

IN THE COURT OF CLAIMS OF OHIO  
COLUMBUS, OHIO

JAMES M. FLEMING  
465 PINEHURST DRIVE  
FAIRLAWN, OHIO 44333

Plaintiff

vs.

KENT STATE UNIVERSITY  
P.O. BOX 5190  
KENT, OHIO 44242-3281

Defendant.

CASE NO.

2011-09365

JUDGE

JUDGE CLARK B. WEAVER SR.

COMPLAINT

**ORIGINAL**

FILED  
COURT OF CLAIMS  
OF OHIO  
2011 JUL 11 PM 2:31

Comes now Plaintiff, James M. Fleming, by and through undersigned counsel and for his several causes of action against Defendant Kent State University states as follows:

1. Plaintiff, James M. Fleming, is a resident of the State of Ohio and at all times relevant hereto, and currently, resides at 465 Pinehurst Drive, Fairlawn, Ohio 44333. Mr. Fleming has served as a collegiate football coach of distinction in varied capacities and for many different colleges and universities in the United States without cease since 1985.
2. Defendant Kent State University ("KSU") was created in accordance with R.C. §§3341.01, et seq., is an instrumentality of the State of Ohio and at all times relevant hereto, and currently is a State University operating in Portage County, Ohio.
3. Prior to March 1 2010, Mr. Fleming and KSU entered into negotiations regarding the terms and conditions of contract wherein Mr. Fleming would serve as a coach for the KSU football team.

ON COMPUTER

4. After those negotiations, on or about March 1 2010, the parties reached an agreement which was expressed in a contract of employment (the "Contract"), a true copy of which is attached hereto as Exhibit A.
5. Material terms, *inter alia*, contained in the Contract were that Mr. Fleming would serve solely in his position as a coach at an agreed rate of minimum subject to several possible increases approved by the Board of Trustees of KSU, for a period of twenty-eight months, to terminate on June 30, 2012.
6. Mr. Fleming relied on the negotiated terms of the Contract and based upon the agreed written terms of the Contract decided to forgo other employment opportunities
7. Upon information and belief the Contract was confirmed by the Board of Trustees of Kent State University.
8. At all times relevant hereto, Mr. Fleming performed his duties in accordance with the terms of the Contract in a manner consistent with the standards of the coaching profession and in compliance with all applicable rules and regulations. At no time has Mr. Fleming been in breach of the contract or any of its provisions, express or implied.
9. Paragraph 13 of the Contract specifically provides that:

This is the entire Contract between the parties and no other terms exist or shall be enforceable except as agreed in writing, and executed, by the parties hereto. The terms of this Agreement may be amended upon the mutual agreement of the parties.
10. At no time after the date the Contract was executed did Mr. Fleming and KSU amend the terms of the Contract, nor did either party indicate a desire, or initiate negotiations, to seek an amendment to the terms of the Contract.
11. Following its 2010 football season, KSU terminated the head football coach and hired a replacement.

12. On or about January 2, 2011, KSU terminated Mr. Fleming from his position as a football coach.
13. Paragraph 6 of the Contract mandates that, as the “initiator” of the termination, KSU “shall pay the balance of the then in effect base salary due for the remaining term.”
14. On or about March 10, 2011, KSU ceased making payments of any further compensation to Mr. Fleming owed on the Contract.
15. KSU has also not paid the remaining balance in base salary due as required.
16. On or about January 21, 2011 KSU notified Mr. Fleming that he was being reassigned to a position as an Assistant to the Athletic Director.
17. The Contract does not contain any provision that permits KSU to reassign Mr. Fleming to another position at Kent State University, nor did KSU possess any other right under KSU policies and procedures, to assign or reassign Mr. Fleming to another position at KSU.
18. KSU intentionally and maliciously initiated an extra-contractual means to reassign Mr. Fleming in order to avoid payment of sums due Mr. Fleming under the terms of the Contract upon the no-fault termination by KSU.
19. On January 21, 2011, KSU demanded that Mr. Fleming report to work at KSU and to begin work as an Assistant to the Athletic Director and that failure to appear for this new position would be considered an act of insubordination subjecting him to discipline up to and including termination for insubordination.
20. KSU’s demand did not originate from any right it possessed in the Contract.
21. Mr. Fleming never agreed to be employed by KSU in any other capacity other than that set forth in writing in the Contract.

22. KSU's demand constituted an offer to renegotiate the terms of the Contract.
23. Mr. Fleming rejected the offer.
24. KSU and Mr. Fleming never agreed to any amendment to the Contract wherein Mr. Fleming would serve as an Assistant to the Athletic Director.
25. Even though Mr. Fleming had been previously terminated by KSU when it removed him from his position as football coach, by correspondence dated February 18, 2011, KSU informed Mr. Fleming that if he did not report to work on February 21, 2011 he would be terminated from employment as Assistant to the Athletic Director for insubordination for failure to report to work.
26. By correspondence dated March 7, 2011 KSU terminated Mr. Fleming from the Assistant to the Athletic Director, a position he never held, and in the process falsely and maliciously accused him of engaging in an act of insubordination.
27. KSU knew or should have known that such a false and malicious accusation could and would cause Mr. Fleming harm in procuring subsequent employment.
28. Upon information belief KSU by and through its employees and agents have caused the basis of the false and malicious termination of Mr. Fleming to be published in the community and within college football community in which Mr. Fleming has been employed for his entire career.

**Count I (Breach of Contract)**

29. All relevant, material and pertinent foregoing averments are reiterated.
30. By reason of the foregoing allegations KSU breached the terms of the Contract.

31. As a direct result of KSU's breaches of Contract, Mr. Fleming has been damaged in indeterminate amounts under the terms of the Contract which will be proven at the trial of this matter.

**Count II (Defamation)**

32. All relevant, material and pertinent foregoing averments are reiterated.

33. At all times relevant hereto KSU caused the publication of false and malicious allegations that Mr. Fleming engaged in insubordinate acts which statements, accusation and/ or characterizations were knowingly false and made maliciously and without privilege; and KSU knew, or could have ascertained, with the exercise of reasonable care, that the publications were not true.

34. By reason of KSU's publication and republications, Mr. Fleming has been injured in his reputation and has suffered great pain, emotional distress and mental anguish.

**Count III ( "False Light" )**

35. All relevant, material and pertinent foregoing averments are reiterated.

36. The actions and omissions of KSU placed Mr. Fleming before the public in a false light that would be highly offensive to a reasonable person.

37. KSU knew and/or could have, with the exercise of reasonable care, ascertained the falsity of its claims, accusations and insinuations made about Mr. Fleming.

38. KSU acted in reckless disregard as to the falsity of its acts and omissions and/or knew or knew or should have known that Mr. Fleming would be placed in a false and damaging light.

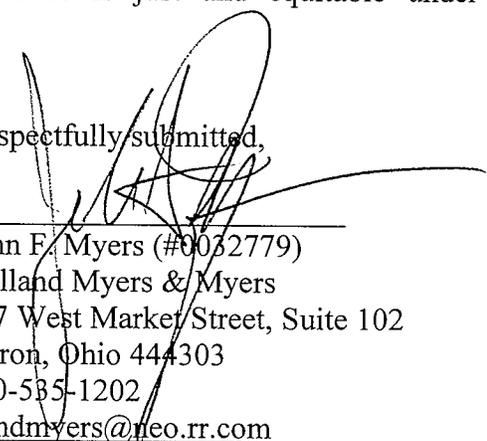
39. KSU's knew or should have know that its acts and/or omissions would cause Mr. Fleming great pain and emotional anguish, and damage him in indeterminate sums to be proven at trial.

40. By reason of KSU's acts and ommission, Mr. Fleming has been placed in a false light before the public and has suffered great pain, emotional distress and mental anguish.

WHEREFORE, Plaintiff demands relief as follows:

- (a) As to Count I, a judgment in an indeterminate sum, together with pre-judgment interest, costs, attorney's fees and such other relief as this Court deems equitable and just;
- (b) As to Counts II and III a judgment in an indeterminate sum, including compensatory, damages together with pre-judgment interest, costs, attorney's fees and such other relief as this Court deems equitable and just.
- (c) Judgment for pre-judgment interest on any and all damage awards, plus costs; and
- (d) Such other and further relief and redress as is just and equitable under the circumstances.

Respectfully submitted,



---

John F. Myers (#0032779)  
Holland Myers & Myers  
697 West Market Street, Suite 102  
Akron, Ohio 444303  
330-535-1202  
[hllndmyers@neo.rr.com](mailto:hllndmyers@neo.rr.com)

Attorney for Plaintiff

**EMPLOYMENT CONTRACT  
BETWEEN  
JAMES FLEMING  
FOOTBALL, DEFENSE  
AND  
KENT STATE UNIVERSITY, KENT, OHIO**

This Contract entered into this \_\_\_\_ day of March, 2010, by and between Kent State University and James Fleming.

WHEREAS, Kent State University agrees that James Fleming (hereinafter referred to as "Fleming") shall be employed by Kent State University as its Football, Defensive Coordinator; and

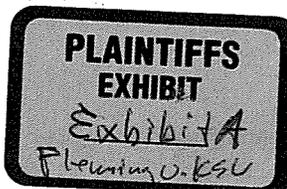
WHEREAS, the parties to this Contract desire to establish terms of employment not contained in the standard university employment Contract,

NOW, THEREFORE, in consideration of the above, the parties agree as follows:

1. The term of this Contract shall be for an initial period of **twenty-eight (28) months**, to terminate on June 30, 2012.
2. The initial salary beginning **March \_\_\_\_, 2010** will be **\$71,500**. Fleming's salary will consist of a cash salary and a deferred salary. Those amounts will be calculated as 90% cash salary and 10% deferred salary. In future years, the deferred salary will be the percentage of the "employee" contribution amount established by OPERS and the cash salary will be the balance. As earned, the deferred salary amount will be contributed by the university to the Ohio Public Employees Retirement System/State Teachers' Retirement System or Alternative Retirement Plan for deposit into Fleming's account.
3. Thereafter, beginning in **2011**, on or about June 1 of each year, the salary will be reviewed by the Director of Intercollegiate Athletics. The Director shall recommend a salary to the President, consistent with the guidelines established by the Board of Trustees for the particular fiscal year. If salary increases were approved by the Board for the fiscal year as "across the board" or "cost of living" increases, Fleming's salary shall increase by not less than that amount. Increases for merit may be recommended at the discretion of the Director, based upon Fleming's performance, consistent with the Board guidelines. Any increases will be effective on the same date as the fiscal year salary adjustments are effective for non-faculty University employees.

In addition to the salary listed above should the football team achieve the following accomplishments, Fleming shall receive a one-time bonus of the listed amount, subject to all appropriate deductions:

Division Champion	\$2,500
Each Division 1A Win per Season over 6 Wins	\$2,500
MAC Coach of the Year	\$2,500
Conference Champion	\$5,000
Bowl Appearance	\$6,000
15,000 in Actual Average Yearly Attendance (Not corporate-negotiated sales)	\$2,500
Each 1,000 increase in actual Average Yearly Attendance over 15,000 (Not corporate-negotiated sales)	\$1,250
Annual Team GPA of 2.5	\$500
Each .05 Increase in Team GPA from Previous 12 Months	\$500
GSR (Graduation Success Rate) of 80%	\$2,500
Each Percentage Point of Increase in Graduation Rate over 86%	\$500
APR (Academic Progress Rate of 1000)	\$500



4. A suitable automobile will be provided for **Fleming's** use consistent with the Athletic Department's Memorandum of agreement regarding automobiles, which is incorporated herein by reference.
5. **Fleming** shall not accrue vacation in accordance with normal University policy, but shall be granted 20 days paid vacation leave upon approval of direct supervisor and the Director of Intercollegiate Athletics.
6. Subject to **Fleming's** continuing compliance with NCAA and University rules and regulations, if this party terminates this Agreement prior to **June 30, 2012** except for cause as defined in Rule 3342-09(D)(2) of the Administrative Code as contained in the University Policy Register, the initiating party shall pay to the other the agreed upon early termination cost. If the University is the initiator, it shall pay the balance of the then in effect base salary due for the remaining term. If **Fleming** is the initiator, he shall pay the University in accordance with the declining scale below. In addition, **Fleming** agrees that he will not seek potential job prospects nor accept a position within the MAC <sup>except for a coordinator or P.D.S. LE R 3/</sup> nor will he seek job prospects with any other program during the term of this agreement. If, however, he is sought for a job prospect outside of the MAC, **Fleming** will not respond to such inquiries without the permission of their direct supervisor and the Director of Intercollegiate Athletics, with such permission not to be unreasonably withheld. Upon receipt of a firm job offer from outside the MAC, **Fleming** hereby grants the University the right to match the salary offer from the perspective employer. If the salary offer is not matched by the University, **Fleming** shall be relieved of the early termination costs outlined herein. Otherwise, **Fleming** or the prospective employer shall pay these costs in accordance with the following declining scale:  
  - During the first year of the contract, 100% of the then annual base salary amount for the remaining term;
  - During the second and partial third year of the contract, 50% of the then annual base salary
7. **Fleming** agrees to abide by all National Collegiate Athletic Association (hereinafter called "NCAA" rules, regulations and requirements), inclusive of but in no way limited to the following:
  - a. As required by NCAA regulations, a coach may be suspended for a period of time, without pay, or the coach's employment may be terminated if the coach is found to be involved in deliberate and serious violations of NCAA regulations.
  - b. **Fleming** shall, on an annual basis, report all athletic-related income from sources other than **Kent State University**, including but not limited to, income from annuities, sports camps, housing benefits, complimentary ticket sales, television and radio programs, endorsements or consultation Contracts with athletic shoe, apparel or equipment manufacturers. Such reporting shall be through the Director of Intercollegiate Athletics to the President. If **Fleming** is found in violation of NCAA regulations, he shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedure.
8. Except for those terms contained herein to the contrary, all other conditions of this employment are contained in and controlled by any and all University and Administrative Policies and Procedures, as published in the University Policy Register, and as may be added to or amended during the period of employment consistent with **Kent State University's** Constitution and Bylaws.
9. Notwithstanding other provisions herein, **Kent State University** may discipline **Fleming** up to and including termination of employment without further obligation if **Fleming** is found to have committed deliberate and serious violations of **Kent State University's** Policies, Athletic Department Policies and Procedures, Mid-American Conference, Policies, NCAA rules and regulations, or committed the acts specified in rule 3342-6-09(D)(2) of the Ohio Administrative Code as contained in the University Policy Register.
10. Compensation will be payable twice monthly at the completion of service. If employment is terminated before the end of the current pay period, payment shall be prorated for the time of actual services. No allowance shall be made for any incomplete month pay period, other than terms specified elsewhere in this Contract.
11. As earned, deferred salary will be contributed by **Kent State University** to the retirement system for **Fleming's** account.

12. This Contract, including the payment of salary, is conditional upon and subject to the continuing availability of funds and confirmation by the Board of Trustees of Kent State University. In this context, availability of funds refers to the overall funding of Kent State University.
13. This is the entire Contract between the parties and no other terms exist or shall be enforceable except as agreed in writing, and executed by the parties hereto. The terms of this Agreement may be amended upon the mutual agreement of the parties.

IN WITNESS WHEREOF, the parties hereto have executed this Contract the date first set forth above.

Deborah Dancy  
Witness

James Fleming  
James FLEMING

Carol Wray  
Witness

KENT STATE UNIVERSITY  
[Signature]  
President

Deborah Dancy  
Witness

Laird E. Kennedy  
Director of Athletics