

IN THE OHIO COURT OF CLAIMS
COLUMBUS, OHIO

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JAMES M. FLEMING)	CASE NO. 2011-09365
PLAINTIFF,)	JUDGE JOSEPH T. CLARK
)	
V.)	PLAINTIFF'S PROPOSED
)	FINDINGS OF FACT AND
KENT STATE UNIVERSITY,)	CONCLUSIONS OF LAW
)	
DEFENDANT.)	
)	

Now comes Plaintiff, by and through undersigned counsel, and hereby proposes the following findings of fact and conclusions of law.

I. PROPOSED FINDINGS OF FACT

1. In March 2010, after a period of negotiations, Plaintiff James Fleming (“Mr. Fleming”) and Kent State University (“KSU”) entered into an employment contract wherein the parties agreed Mr. Fleming would serve as an assistant coach reporting to the defensive coordinator of the Kent State Football team (“Contract”). See Transcript (“T”) at 18-19, 26-29, 39, 47-48, 52, 55-62; Plaintiff’s Exhibit C (a copy of the executed contract.) The contract was drafted by KSU legal counsel. T at 18.
2. The Contract provided that that Mr. Fleming would serve solely in a coaching position for a period of twenty eight months (from the date of signing, March 2010 through June 2012). T at 21-22; 39-40, 45-47, 60, 75.
3. The Contract at ¶6 provides that:

“ . . . if this party terminates this Agreement prior to June 12, 2012 except for cause as defined in Rule 3342-09(D)(2) of the Administrative Code as contained

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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 base salary due for the remaining term. If Fleming is the initiator, he shall pay the University in accordance with the declining scale below.”

See Plaintiff’s Exhibit C. If the University initiates the termination, it is obligated to pay Fleming the balance due under the Contract. Id.; see also T at 22-23.

4. The Contract at ¶4 provides that: “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. Mr. Fleming relied upon the terms of the Contract and performed in accordance with the terms of the Contract. T at 62-63, 68. KSU produced no evidence to the contrary. In fact KSU produced no evidence that Mr. Fleming breached the terms of the Contract.
6. The Contract does not contain a clause that affords the University the option, or right, to reassign Mr. Fleming to a non-coaching position. T at 18-19, 39, 49, 58, 102-103.
7. The University does not have a written policy or procedure that permits the University to reassign an employee who is employed under the terms of a written contract to be reassigned to a position not set forth in the contract, such as a coach being reassigned to an administrative position. T at 49, 70, 103.
8. In the Fall of 2010 the current head football coach left KSU. T at 68. Mr. Fleming continued to perform his duties under the terms of the Contract. T at 68. A new coach was hired. T at 68. On or about December 18, 2010, Mr. Fleming met with the new football coach.. T at 68-69, 75.

9. The decision not to retain Mr. Fleming as a coach was made by the new head football coach in early January 2011. T at 100. Prior to January 21, 2011 Tom Kleinlein (Executive Associate Athletic Director) informed Mr. Fleming there would be no coaching position available for him at the University. T at 69.
10. Under the terms of the Contract, the decision not to retain Mr. Fleming as a coach constituted a termination initiated by the University. T at 80-81. See Plaintiff's Exhibit C at ¶6.
- 11.
12. The University decided to *offer* Mr. Fleming a position as the Assistant to the Athletic Director. T at 107.
13. By correspondence dated January 11, 2011 KSU, through Mr. Kleinlein, informed Mr. Fleming that due to new leadership in the football program the Athletic Department was reassigning him to a new position. T at 63, 67-68, 80-81; Plaintiff's Exhibit D. Mr. Kleinlein further related that if Mr. Fleming did not accept the new assignment, the University would consider his decision a resignation. Plaintiff's Exhibit D. Under the terms of the Contract, a resignation would have constituted a termination initiated by Mr. Fleming, subjecting him to the agreed early termination costs under the terms of the Contract. See Exhibit C at ¶6.
14. By correspondence dated February 18, 2011¹, Joel Nielsen, Director of Athletics, demanded that Mr. Fleming accept the offered position of Assistant to the Athletic Director and report to work on February 21, 2011; if he did not report to work, the

¹ The February 18, 2011 correspondence memorializes failed negotiations between KSU's attorney and Mr. Fleming's attorney to address the reassignment of Mr. Fleming. See Plaintiff's Exhibit E.

University would consider it an act of insubordination and Fleming he would be disciplined up to and including termination. T at 103; Plaintiff's Exhibit E. This was Neilsen's attempt to reassign Mr. Fleming, under his authority as Director of Athletics. T at 103-104. There was no contractual means to reassign Mr. Fleming, nor did any University policy or procedure permitting such a reassignment. Further the discipline was a new threat, as the January 21, 2011 informed Mr. Fleming that a decision not to accept the new assignment would be considered a resignation. Neither the January 21, 2011 nor the February 18, 2011 makes reference to the Contract.

15. Mr. Neilsen did not attempt to reassign Mr. Fleming to a coaching position, but to new job responsibilities outside the job description set forth in the Contract. T at 104-105, 109. The Administrative Assistant to the Athletic Director position was created for Mr. Fleming after his coaching position was terminated by the University. T at 105. No person held the position prior to it being offered to Mr. Fleming, and no one held the position after Mr. Fleming refused to accept the offer to reassign him. T at 105.
16. The February 18, 2011 correspondence makes no reference to the Contract, but did provide that Mr. Fleming would continue to receive the same salary and health and welfare benefits. Plaintiff's Exhibit E.
17. On February 17, 2011, the University cancelled Mr. Fleming's bi-monthly salary deduction which covered the insurance and personal use of the leased/courtesy vehicle he had been provided under the terms of the Contract. T at 113-115. Mr. Fleming was informed he had to turn in his vehicle to facilitate the new football staff. T at 76.
18. Mr. Fleming considered the University's offer of reassignment to the Assistant to the Athletic Director position and asked for a written job description. T at 71.

19. Mr. Fleming determined that offered position was different than the type of work he contracted to perform and decided not to accept the offer. T at 72- 74, 80-81, 98. Negotiations ensued between attorneys for KSU and Mr. Fleming, but the parties were not able to reach an agreement on the offer of reassignment. T at 92-98; Plaintiff's Exhibit E.
20. Mr. Fleming did not return to the University on February 21, 2011, as demanded by the University in its correspondence of February 18, 2011 as he did not want to accept the offer of reassignment. T at 74.
21. On March 7, 2011 the University informed Mr. Fleming he would be terminated from the position of Assistant to the Athletic Director effective March 10, 2011 as it was determined that his failure to report to work as demanded constituted insubordination. T at 75; Plaintiff's Exhibit F. Mr. Fleming was terminated from a position he never accepted and never held. T at 74.
22. 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.
23. After the date the Contract was executed, Mr. Fleming and KSU never agreed to amend the terms of the Contract. T at 73. Mr. Fleming was never provided a written addendum to the Contract setting forth any proposed modifications to the terms of the Contract. T at 83. There was no mutual agreement between the parties that Mr. Fleming would be reassigned to a non-coaching position, that his vehicle would be returned to KSU or that KSU would not be liable for damages under ¶6 of the Contract.

24. The University never paid the balance due Mr. Fleming under the terms of the Contract. T at 79; Plaintiff's Exhibit C at ¶6.

II. PROPOSED CONCLUSIONS OF LAW

A court must interpret a contract so as to carry out the intent of the parties. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 361, 678 N.E.2d 519. The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement. *Shifrin v. Forest City Ent., Inc.* (1992), 64 Ohio St.3d 635, 638, 597 N.E.2d 499. Courts have an obligation to give plain language its ordinary meaning and to refrain from revising the parties' contract. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246, 7 O.O.3d 403, 374 N.E.2d 146, and paragraph two of the syllabus. Accordingly, interpretation of clear and unambiguous contract terms is a matter of law, and our standard of review is de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684.

It is not the responsibility or function of this court to rewrite the parties' contract in order to provide for a more equitable result. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 54-55, 544 N.E.2d 920. In the absence of fraud or bad faith, this court will not save one party from an improvident contract when both parties had equal bargaining power. *Ullmann v. May* (1947), 147 Ohio St. 468, 34 O.O. 384, 72 N.E.2d 63, paragraph two of the syllabus.

The Contract is clear and unambiguous. Mr. Fleming and the University entered into the Contract wherein Mr. Fleming agreed to and did perform as an assistant coach. When the head football coach resigned, the new coach determined that the services of Mr. Fleming were no

longer needed. This constituted a University initiated termination under the terms of the Contract – a breach of the Contract. Generally, a breach of contract occurs when a party demonstrates the existence of a binding contract or agreement; the non-breaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the non-breaching party suffered damages as a result of the breach." *Garofalo v. Chicago Title Ins. Co.* (1995), 104 Ohio App.3d 95, 108, 661 N.E.2d 218.

There is no dispute that Mr. Fleming did perform his contractual obligations, but was not retained as a coach under the terms of the Contract. The University committed additional breaches of the Contract: 1) taking possession of the vehicle Mr. Fleming was provided under ¶4 of the Contract; and 2) failing to pay Mr. Fleming the agreed upon early termination cost set forth in ¶6 of the Contract. The early termination cost provision is mutual; if Mr. Fleming had initiated the termination, under ¶6 he would be obligated to pay the University the early termination cost. Mr. Fleming suffered damages as a result of the breaches committed by the University.

Unlike an at-will employment relationship, an employer who is a party to an employment contract of definite term may properly discharge the employee only for "just cause." *Beckman v. Garrett* (1902), 66 Ohio St. 136, 141-142, 64 N.E. 62, 62-63; *Dayton Rubber Mfg. Co. v. Brown* (1927), 116 Ohio St. 373, 374, 156 N.E. 136, 137; *Hosking v. Hollaender Mfg. Co.* (1961), 114 Ohio App. 70, 72, 17 O.O.2d 339, 340, 175 N.E.2d 201, 203.

KSU and Mr. Fleming entered into a contract for a definite term. KSU has not demonstrated that Mr. Fleming engaged in any conduct that would constitute a just cause termination under the terms of the Contract. In order to avoid its contractual obligation to pay Mr. Fleming the agreed upon early termination cost, the University attempted to amend the terms

of the Contract by offering to reassign Mr. Fleming to a non-coaching position. Despite the offer of a new position, separate from the position set forth the Contract, KSU unilaterally informed him, by correspondence dated January 21, 2011, that his new position was effective February 14, 2011.

It is fundamental that the formation of a contract requires an offer, acceptance of the offer, and consideration. *Callander v. Callander*, 10th Dist. No. 07AP-746, 2008-Ohio-2305, 2008 WL 2026431, ¶ 14, citing *Hoyt v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 04AP-941, 2005-Ohio-6367, 2005 WL 3220192, ¶ 40. Absent a contract between the parties, there can be no breach. *Collins v. Flowers*, 9th Dist. No. 04CA008594, 2005-Ohio-3797, 2005 WL 1763615, ¶ 52.

In order to form a valid contract, an offer must be accepted by the offeree. Whether a contractual offer and acceptance have been made is a question of fact. *KeyBank Natl. Assn. v. Mazer Corp.*, 188 Ohio App.3d 278, 2010-Ohio-1508, 935 N.E.2d 428, at ¶36; *Oglebay Norton Co. v. Armco, Inc.* (1990), 52 Ohio St.3d 232, 235, 556 N.E.2d 515. The offeror has the power to limit or specify the power and method of acceptance. *Foster v. Ohio State University* (1987), 41 Ohio App.3d 86, 87-88, 534 N.E.2d 1220, citing 1 Corbin on Contracts (1963) 157-166, Sections 38 and 39. The acceptance of an offer must go to all of the terms of the offer, and may not make material changes to the terms. *Goldfarb v. The Robb Report, Inc.* (1991), 77 Ohio App.3d 362, 369, 602 N.E.2d 329, citing *Karas v. Brogan* (1978), 55 Ohio St.2d 128, 129, 9 O.O.3d 107, 378 N.E.2d 470.

After Mr. Fleming received the offer of reassignment to a non-coaching position, negotiations ensued. When the negotiations broke down, KSU demanded that Mr. Fleming show up to perform the offered position. When he refused to accept the position and did not show up

for work, he was terminated for insubordination. However, since Mr. Fleming never accepted the offer of reassignment, and there was no written agreement modifying the terms of the Contract. At the time KSU terminated Mr. Fleming for insubordination, KSU had already breached the terms of the Contract by removing Mr. Fleming from his coaching duties, for no cause other than the new head coach not wanting to retain Mr. Fleming. The decision not to retain Mr. Fleming effectively terminated the Contract for no cause and obligated KSU to pay out the balance due Mr. Fleming for the remainder of the term of the Contract.

III. CONCLUSION

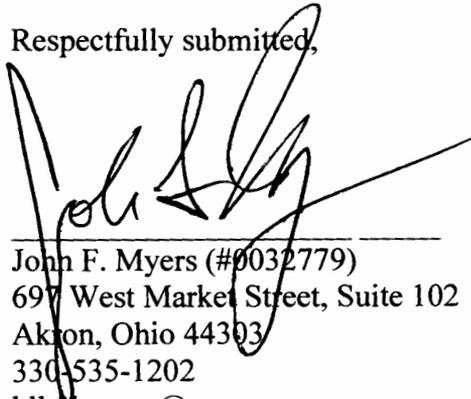
Since Mr. Fleming was employed under the terms of a written employment contract, with a specific duration, he was not an at-will employee and his separation from employment, or termination from employment, is governed by the terms of the Contract. KSU initiated a termination under the terms of the Contract by removing Mr. Fleming from his coaching position. This constituted a breach of contract.

After KSU initiated the termination of Mr. Fleming from his coaching position it offered to reassign Mr. Fleming a new position. Mr. Fleming never accepted the new position. After a period of negotiations, he rejected the offer of reassignment. The University had no contractual authority to unilaterally modify the terms of the Contract. There was no policy or procedure of KSU that permitted the unilateral modification of the Contract.

At the time the University terminated Mr. Fleming on grounds of insubordination, there was no agreement between the parties to modify or otherwise amend the Contract. The so called termination was contrary to the terms of the Contract, and was not in any way a “just cause” termination of the Contract. KSU had already engaged in conduct that constituted a breach of the

Contract which entitled Mr. Fleming to a pay out of the balance due under the terms of the Contract.

Respectfully submitted,



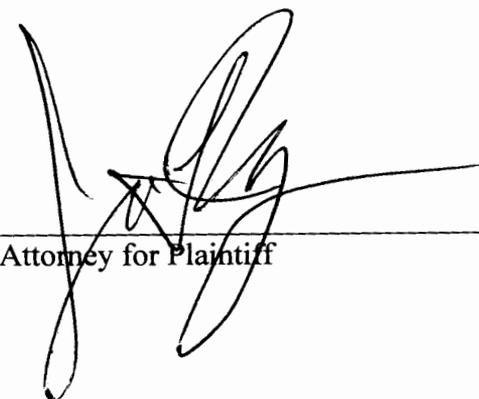
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiff's Proposed Findings of Facts and Conclusions of Law was served this 25th day of July, 2012 by regular US mail upon:

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