

IN THE COURT OF CLAIMS OF OHIO

JAMES M. FLEMING,

Plaintiff,

-vs-

KENT STATE UNIVERSITY,

Defendant.

**Case No. 2011-09365
(Judge Joseph T. Clark)**

**Kent State University's
Post-Trial Brief**

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I. Overview

James Fleming says that Kent State University terminated his employment contract and triggered a liquidated damages provision when it attempted to reassign him from his position as an assistant football coach to a position as an assistant to the Athletics Director.¹ Mr. Fleming cannot prevail on that claim, though, for three reasons. First, his contract was not terminated. The University merely attempted to modify his duties, which are not described in the contract at all, and Mr. Fleming abandoned his position in response. Second, even if the University's attempt to change duties that are not set forth in Mr. Fleming's contract could constitute a breach of that contract, Mr. Fleming had no right to abandon his position because the proposed change in duties did not amount to a constructive discharge. And, third, the liquidated damages clause Mr. Fleming seeks to enforce against the University is an unlawful penalty.

¹ Mr. Fleming dismissed all claims other than his contract claim at trial. See Tr. at 5.

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II. Coaching Contracts at the University

Laing Kennedy, the University's former Athletics Director, has negotiated numerous coaching contracts, most of which do not prohibit reassignment but a few of which do. Robert Lindsay, for example, was employed as Head Women's Basketball Coach for seven years under two different contracts that did not prohibit his reassignment. See 1996 Lindsay Contract (Defendant's Ex. A at KSU000123) and 1998 Lindsay Contract (Defendant's Ex. A at KSU000117). But Mr. Lindsay's next two contracts, in 2003 and 2009, expressly prohibited reassignment. See 2003 Lindsay Contract (Defendant's Ex. B at KSU000112) and 2009 Lindsay Contract (Defendant's Ex. B at KSU000108). His 2009 contract contains this language:

It is understood and agreed that this Contract is for **ROBERT LINDSAY'S** assignment and performance as the Head Women's Basketball Coach. While the supplemental duties contained in paragraph 6 may be amended from time to time by mutual agreement, reassignment to any other position at the **UNIVERSITY** which does not include the title and functions of a Division I head Women's basketball coach shall be a breach of this Contract by the **UNIVERSITY** the same as if **ROBERT LINDSAY** were terminated without cause.

See Defendant's Ex. B at KSU000111, ¶15 (emphasis sic.).

Mr. Lindsay asked for and received this express prohibition against reassignment only after proving himself for years. As Mr. Kennedy put it, by 2003 Mr. Lindsay was "a very distinguished head coach who [was] head coach in [the] program for many years and in fact [was] the winningest coach in the Mid-American Conference [in] any sport." See Tr. at 36. Mr. Fleming, on the other hand, never asked for a prohibition against reassignment, and Mr.

Kennedy—who knew that “distinguished” coaches could be granted prohibitions against reassignment—never offered him one. *Id.* at 40. And it is highly unlikely that Mr. Fleming would have warranted a prohibition against reassignment. After all, even Doug Martin, the head football coach to whom Mr. Fleming’s supervisor reported, did not have a prohibition against reassignment. See Defendant’s Ex. A at KSU000136.

III. Mr. Fleming’s Refusal to Accept any Reassignment

The University notified Mr. Fleming of his reassignment on January 21, 2011. See Defendant’s Ex. D at KSU000008. And Mr. Fleming promptly engaged his brother, William Fleming—an attorney practicing in New York—to stop the reassignment. In an exchange of emails with James Watson, a University attorney, he made it clear that Mr. Fleming would never accept any reassignment from the position he mistakenly believed to be “Football, Defensive Coordinator.” See, e.g., Defendant’s Ex. G, February 14, 2011 email from William Fleming to Mr. Watson at 2.² Having made no progress with Mr. Fleming’s brother, the University notified Mr. Fleming on February 18, 2011 that he was expected to report to work on February 21, 2011 and that his failure to do so “would be an act of insubordination for which [he] would be disciplined up to and including termination.” See Defendant’s Ex. D at KSU000009. On his brother’s advice, Mr. Fleming refused to report to work or

² Though Mr. Fleming’s contract identified him as “Football, Defensive Coordinator,” Mr. Fleming never performed the duties of a defensive coordinator. Instead, he was assigned to assist the Defensive Coordinator. See Kennedy Testimony, Tr. at 27-28.

to communicate with the University at all, and he was ultimately terminated on March 7, 2011 for abandoning his job. *Id.* at KSU000010.

IV. Mr. Fleming's had no right to abandon his job because the University did not breach his contract and, even if it had, changing his duties could never constitute a constructive discharge.

Mr. Fleming's contract identified him as "Football, Defensive Coordinator," but everyone agrees he never performed the duties of a defensive coordinator. See Plaintiff's Ex. c at 1; see also Kennedy Testimony, Tr. at 27-28. The contract contains no description of job duties whatsoever. *Id.* at 28. And there is no dispute that the University had the right to change Mr. Fleming's job duties. Mr. Kennedy, for example, recognized that Mr. Fleming started as a defensive linebackers' coach, though his contract mentions no such position. *Id.* And Mr. Kennedy acknowledges that Mr. Fleming could have been reassigned to other duties as a defensive assistant or even as an offensive assistant. *Id.* at 44-45. The issue in this case is whether Mr. Fleming had the right to abandon his job when the University attempted to reassign him to non-coaching duties.

And the answer is a resounding no. "An employee has an obligation not to jump to conclusions and assume that every conflict with an employer evidences a hidden intent by the employer to terminate the employment relationship." *Simpson v. Ohio Reformatory for Women*, 2003-Ohio-988 at ¶25 (10th Dist.). An employer's reassignment of job duties justifies an employee's job abandonment only where the new duties are "so difficult or unpleasant that

a reasonable person in the employee's shoes would have felt compelled to resign.”

It is true that an employer's re-assignment of an employee can, under certain circumstances, rise to the level of a constructive discharge constituting an adverse action. . . . In order to demonstrate a constructive discharge due to reassignment, however, the proffered employment options must have been “so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.” . . . **An employee's “subjective impressions as to the desirability of one position over another [are] insufficient to render an employer's action materially adverse.”**

Crawley v. State of Ohio, Dep't of Transportation, Case No. C-2-02-1069, 2006 U.S. Dist. LEXIS 80919 at *56-*57 (S.D. Ohio) (citations omitted) (emphasis added).

The job duties the University asked Mr. Fleming to perform were entirely consistent with his experience and qualifications and were not “so difficult or unpleasant that a reasonable person in [his] shoes would have felt compelled to resign.” But Mr. Fleming is in no position to argue the point because he and his brother made it abundantly clear that he would never accept any changes to his duties at all. As this Court has already noted, the emails Mr. Fleming's brother wrote to the University say that Mr. Fleming is “not going to accept any position.” See Tr. at 90, discussing emails collected in Defendant's Ex. G.

V. The liquidated damages clause on which Mr. Fleming relies does not apply because Mr. Fleming was not terminated.

Mr. Fleming has staked his case on a liquidated damages clause that applies only when “a party terminates [the] Agreement.” See Plaintiff's Ex. c at

¶6. And a reassignment is not a termination. In fact, this Court has said so in another case involving the attempted reassignment of a coach:

Defendant contends that plaintiff was not terminated from CSU's employ in March 2006 and that he continued to receive his salary and benefits accordingly. Defendant maintains that it exercised its contractual discretion to reassign plaintiff and that after such action was taken by CSU, plaintiff declined to accept reassignment. **Even after CSU presented plaintiff with both a notice of reassignment and a job description, plaintiff refused to accept the position and refused to return to work.**

* * *

[T]he court finds that . . . plaintiff did not [prove] that he had been fired or that his termination was imminent. There was no evidence presented that plaintiff had been removed from the premises or that his access either to CSU or to his office had been restricted. Indeed, plaintiff was allowed to complete his travel plans to the Final Four Competition the very next day, at the expense of CSU. Moreover, plaintiff continued to receive his salary and benefits. **All of this convinces the court that plaintiff was not fired but that his position and title had been merely changed by CSU. . . .**

Garland v. Cleveland State University, 2009-Ohio-2838 at ¶¶19, 21 (Ct. of Claims) (emphasis added). A reassignment is not a termination, and, if Mr. Fleming had wanted the liquidated damages clause to apply to reassignments—as Mr. Lindsay did—he could have negotiated that point. But he failed to do so, and his liquidated clause does not apply in this case.

VI. The liquidated damages clause Mr. Fleming seeks to apply against the University is an unlawful penalty.

The liquidated damages clause in Mr. Fleming's contract purports to apply when either party terminates the contract. Liquidated damages

provisions are permitted only when actual damages are “uncertain as to amount and difficult of proof.” *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 29 (1984). When salaried assistant coaches terminate their contracts early, damages to their programs are likely to include lost games, lost ticket sales and lost recruiting opportunities among other things. And those damages are both uncertain and difficult to prove. But when universities terminate assistant coaches early, the damages are both certain and easy to prove. “The measure of damages recoverable by an employee for discharge in a breach of employment contract action is the amount of wages the employee would have received but, for the discharge, less the amount the employee earned or could have earned with reasonable efforts to secure other employment.” *Cooper v. The American Postal Workers Union*, Case No. 85AP-404, 1986 Ohio App. LEXIS 5953 at *10 (10th Dist.).

Judges and juries routinely calculate damages in wrongful discharge cases, and they do it with certainty and without difficulty. As a result, though it is clear that the liquidated damages provision in Mr. Fleming’s contract is valid against him, it is equally clear that that provision is not valid against the University.

VII. Conclusion

Mr. Fleming sued the University for terminating his contract even though the University did not terminate his contract. The University merely attempted to change his duties, as it had done before when it assigned him to assist the defensive coordinator even though his contract stated that he was the defensive

coordinator. If Mr. Fleming had objected to any of his new duties, he could easily have negotiated the terms of the reassignment with the University, particularly since he had already engaged his attorney brother to represent him. But Mr. Fleming had no interest in negotiating. He was interested only in cashing in on a liquidated damages provision that did not even apply to him; and he abandoned his job. In short, Mr. Fleming has no case.

Respectfully submitted,

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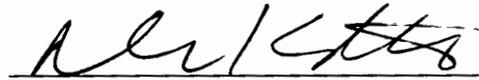
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Certificate of Service

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