

IN THE OHIO COURT OF CLAIMS  
COLUMBUS, OHIO

JAMES M. FLEMING,

PLAINTIFF,

V.

KENT STATE UNIVERSITY,

DEFENDANT.

**ORIGINAL**

) CASE NO. 2011-09365

) JUDGE JOSEPH T. CLARK

) PLAINTIFF'S REPLY  
) DEFENDANT'S POST-  
) TRIAL BRIEF

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

**1. Under the terms of the Contract, KSU may not unilaterally reassign Mr. Fleming.**

Defendant Kent State University contends that since Mr. Fleming's coaching contract did not contain a provision that precluded reassignment, the University had the unilateral right to reassign him. The University relies upon parole evidence, other coaching contracts, to construct an argument that only "distinguished" coached may be granted written prohibitions against reassignment. This position is simply untenable. The contract is clear and unambiguous; it does not afford the University the unilateral, or any, right to reassign Mr. Fleming. See, Plaintiff's Exhibit C (a copy of the executed contract.) Further, there are no University policies or procedures which permit such an extra-contractual remedy for the KSU when an employee and KSU are subject to the terms of an employment contract. T at 49, 70, 103.

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. The Contract is silent as to reassignment. T at 18-19, 39, 49, 58, 102-103. Courts have an obligation to give plain language its ordinary meaning and to refrain from revising the

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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. KSU asks this Court to reform the terms of the Contract to include, by the absence of language, a right to reassign. However, KSU legal counsel drafted the contract. T at 18. Modifications to the terms and conditions of Mr. Fleming's contract were required to be in writing, signed by the parties. See, Plaintiff's Exhibit C, at ¶13. The parties never entered into any modification of the terms or conditions of the Contract.

**2. Mr. Fleming did not accept an offer of reassignment.**

Contrary to the argument of KSU, Mr. Fleming did not refuse to accept any reassignment, he considered, but refused to accept the offer of reassignment to the position of the Assistant to the Athletic Director. T at 71- 74, 80-81, 98.107.

Defendants contend that Mr. Fleming refused to accept "any reassignment." The rights and remedies of the parties with regard to the terms and conditions of the position Mr. Fleming was offered by the University and which he accepted, is memorialized in the Contract. Mr. Fleming could have accepted the offer of reassignment to a different position, but there was no means for KSU to unilaterally reassign him to a position. Both parties had to abide by the terms of the Contract. With no reassignment clause in the Contract, the University was limited to offering Mr. Fleming a position, and Mr. Fleming was not required to accept such an offer.

KSU cites *Garland v. Cleveland State University*, 2009-Ohio-2383, at ¶¶19, 21 for the proposition that a reassignment, under the terms of a coaching contract, is not a termination. In *Garland* the contract contained a reassignment clause. *Id.*, at 18. *Garland* is inapposite. In *Garland* this Court held that Coach Garland "acted precipitously and without due consideration of the terms of his contract with CSU" when he refused to accept a reassignment to a new position which was contractually permitted. *Id.*, at ¶22. Here, there was no reassignment clause.

Mr. Fleming was notified that he had no coaching position at the time he was offered a new position. He did not accept the offer. He did not act precipitously; he acted within the terms of the Contract. Here, the offer of reassignment is additional evidence that KSU terminated the Contract.

**3. Mr. Fleming did not abandon his position; KSU had already terminated his position at the time it attempted to unilaterally reassign him to non-coaching position.**

KSU informed Mr. Fleming that he would not have a coaching position under the new head coach. T at 69. He was informed in writing that his contractual coaching position was terminated and he was offered a newly created non-coaching position. T at 80-81, 105; Plaintiff's Exhibit D. The offered position was outside the scope/job description set forth in the Contract. T at 104-105, 109. At this point, KSU initiated a breach/termination of the Contract and attempted to unilaterally reform the terms. T at 80-81; see, Plaintiff's Exhibit C, at ¶6.

Mr. Fleming did not jump to any conclusions about his status at KSU; he was informed that he would not be performing the coaching duties he was contractually obligated to perform. There is but one conclusion that can be reached: KSU decided to terminate his contract. After his contract was terminated, there was no position to abandon, and no other position from which to be terminated. KSU concocted a means to circumvent the terms of the Contract. It created a position and by extra-contractual means attempted to reassign Mr. Fleming to the position, which he refused to accept. KSU furthered its scheme by first instructing Mr. Fleming that if he did not report for duty, KSU would deem his failure to report as a resignation. See. Plaintiff's Exhibit D. When Mr. Fleming refused to accept the offer and report to work in the new offered position, KSU terminated him for insubordination. See Plaintiff's Exhibits E, F.

KSU also appears to argue if KSU had breached the Contract, reassignment could never constitute a constructive discharge. In support of its argument KSU cites *Crawley v State of Ohio, Dept. of Transportation*, Case No. C-2-02-1069, 2006 U.S. Dist. LEXIS 80919 at 56-57 (S.D. Ohio). In *Crawley* the aggrieved employee was employed at will, she was not employed under the terms of an employment contract. *Crawley* had not been terminated; rather she resigned due to certain conditions she had to endure in the workplace and claimed she had been constructively terminated. *Id.*, at ¶6. The court held that an employee may not jump to conclusions and assume every conflict with an employer evidences intent by the employer to terminate. *Id.*, at ¶25.

*Crawley* does not apply to the instant action as it was determined within the employment at will context – there was no employment contract. KSU informed Mr. Fleming he would not have a coaching position under the new head coach. This constituted a no cause termination of the Contract. Mr. Fleming had no position to abandon or from which he could claim he was constructively discharged. Mr. Fleming could not avail himself of the doctrine of constructive discharge as a remedy; his remedy is for breach of the Contract.

#### **4. The early termination clause in not liquidated damages clause.**

Paragraph 9 of the Contract provides:

“ . . . 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 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. These are mutually agreed upon costs for early termination of the Contract. The only testimony in the record that addresses the force and effect of this clause is from the Athletic Director, Laing Kennedy, who signed the Contract. T at 22-23. According to Mr. Kennedy, KSU has paid coaches under this term where coaches were terminated, not for cause, but due to a coaching change. T at 23. This is exactly what happened in the instant case.

Mr. Fleming was not terminated for cause, but due to a coaching change. He is entitled to recover under ¶6 of the Contract.

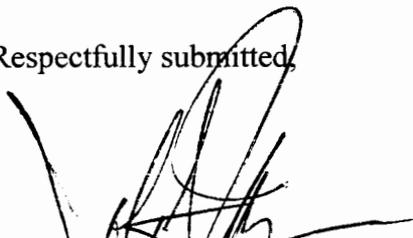
Should the Court consider the force and effect of this clause during the liability phase, Mr. Fleming argues as follows. The parties to the Contract agreed on the early termination costs. Each had the right to terminate the Contract prior to the expiration of the agreed term, and each negotiated the terms of the Contract and agreed to the early termination cost. In *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27 (Ohio 1984), at syllabus, the Ohio Supreme Court held:

Where the parties have agreed on the amount of damages, ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof. (*Jones v. Stevens*, 112 Ohio St. 43, 146 N.E. 894 (1925), paragraph two of the syllabus, followed.)

Paragraph 6 is simply a means to measure and define the damages KSU would be subject to pay Mr. Fleming if it made a decision to terminate the Contract without just cause and should not be considered liquidated damages.

There was no testimony taken on this issue at trial, other than that of Mr. Kennedy. Further, KSU did not raise the limitation of damages as a defense in its answer. The nature and extent of the damages Mr. Fleming is entitled to recover are the subject of the damages phase of this matter, and are not ripe for consideration by the Court.

Respectfully submitted,



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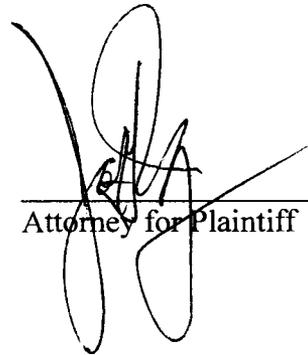
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Plaintiff's Reply to Defendant's Post-trial Brief was served this 30<sup>th</sup> day of July, 2012 by regular US mail upon:

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July 30, 2012

Mark H. Reed  
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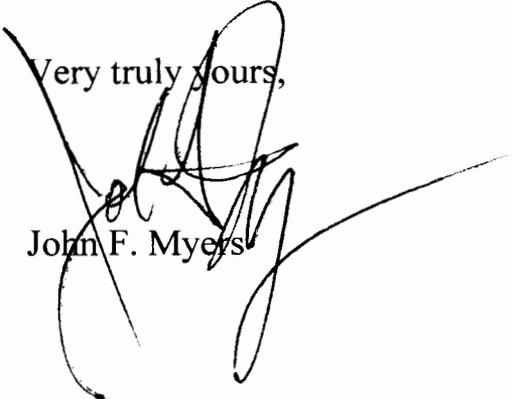
Re: James Fleming v. Kent State University; Case No. 2011-09365

Dear Sir:

Enclosed for filing please find Plaintiff's Reply to Defendant's Post-trial Brief.

Thank you for your prompt attention to this matter.

Very truly yours,



John F. Myers

Enclosures

cc: Randall W. Knutti, Esq.  
Christopher P. Conomy, Esq.