

ORIGINAL

IN THE COURT OF CLAIMS OF OHIO

JAMES M. FLEMING,

Plaintiff,

-vs-

KENT STATE UNIVERSITY,

Defendant.

**Case No. 2011-09365
(Judge Patrick M. McGrath)**

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

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I. Overview

James Fleming was an assistant football coach. He was assigned to work with defensive linebackers and he reported to another assistant coach—the defensive coordinator—who in turn reported to the head coach. Tr. at 27-28. When Kent State attempted to assign Mr. Fleming different duties, he engaged his brother, a New York lawyer, to represent him. And his brother told Kent State that he would not perform any different duties and that he considered himself “terminated.” Defendant’s Ex. G. In other words, Mr. Fleming abandoned his job. Had he remained at Kent State through his contract’s expiration date, he would have received a total of \$107,250 from 2011 through June 30, 2012.¹ Instead, Mr. Fleming found his way to the University of Central Florida, and he received a total of \$119,730 during that same period.²

¹ Mr. Fleming would have received his full \$71,500 annual salary for 2011 plus half of that salary for the first six months of 2012, for a total of \$107,250.

² Mr. Fleming received \$14,982 from Kent State in 2011, \$5833 from the University of Central Florida in 2011 and half of his \$197,829 annual UCF salary (\$98,865) for the first six months of 2012, for a total of \$119,730. All figures are taken from Mr. Fleming’s W-2 forms, which he has attached to his brief.

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The issue now is about mitigation. Plaintiffs who win wrongful termination cases are entitled under black-letter law to their salary for the remainder of their contract's term, but they are required to mitigate their losses. Mr. Fleming has no loss; he earned more by leaving Kent State than he would have earned if he had stayed. But now he hopes to convince the Court that he can recover windfall damages from Kent State with no setoff of his UCF earnings.

II. Judge Clark's Hearing and Decision, and the Issue that Remains

The liability hearing opened with Judge Clark's pronouncement that Kent State had breached Mr. Fleming's employment contract by attempting to change his job duties:

Judge Clark: So the only [issue] left is the breach of contract. . . . I've read your pretrial statements and looked over this cause of action based on the pleadings here, and I guess I'm a little surprised why the case is not settled at this point. . . . ***I did read through the contract, and just by looking at it, . . . it appears to me that Kent State didn't have any authority to change Mr. Fleming's job. . . .***

Tr. at 5-6. It is not clear why Judge Clark thinks Kent State had no authority to reassign an assistant-to-an-assistant coach to a new position as an assistant to an athletics director. In the liability decision, he wrote that coaches could "anticipate reassignment within the coaching staff" but "could not reasonably anticipate reassignment to a non-coaching position in the Athletic Department." Liability Decision at 5. And he wrote that Kent State's effort to reassign Mr. Fleming was ***was so unthinkable that Mr. Fleming had every right to abandon his job as a result.*** *Id.* at 7.

All of this is troubling. After all, changing an employee's job duties cannot possibly breach a contract *that contains no job duties at all*. And the notion that assistant coaches and assistant athletics directors have entirely different skills will surely come as news to athletics directors, whose ranks are swollen with former coaches. But those issues will be sorted out on appeal. What is before the Court now is an issue Judge Clark left unresolved: was the contract's provision calling for Mr. Fleming to receive the balance of his salary for the remainder of the contract's term a valid liquidated damages clause or an unlawful penalty? If it is a valid liquidated damages clause, Mr. Fleming is entitled to all of that money, with no setoff for his much-higher earnings at UCF. On the other hand, if it is an unlawful penalty, Mr. Fleming—like every other plaintiff whose earnings rose after termination— is entitled to nothing at all.

III. Is it Hard to Measure Damages when a Low-level Employee is Fired?

There is only one paragraph in Mr. Fleming's damages brief that actually matters. It is the first full paragraph on page 6, and it is remarkable for how little it actually says. Mr. Fleming argues in that paragraph that at the time of his contract the damages he would sustain if he were wrongfully terminated "would be uncertain as to amount and difficult of proof." The language comes from *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St. 3d 27, 29 (1984), which deems every purported liquidated damages clause unlawful unless damages would have been hard to measure when a contract was signed.

Sometimes damages really are hard to measure when a contract is signed. Head coaches of top-notch teams, for example, often have “collateral business opportunities” from “third-party sources,” and the “value of those opportunities would be difficult to predict.” *O’Brien v. The Ohio State University*, 2006-Ohio-4346 (Ct. of Claims) at ¶31. In addition, those coaches often have “numerous incentive clauses that affect both the amount of [their] compensation and the duration of [their] employment.” *Id.* But Mr. Fleming was no head coach. He was just an assistant to another assistant coach. And all he was entitled to was a salary and the use of a car. See Contract at ¶¶2, 4. Under ordinary common law, the measure of damages if he were wrongfully terminated was quite simple. He would be entitled to exactly what he would have earned during the rest of the contract’s term, but he would be obligated to mitigate his damages. See, e.g., *Cooper v. The American Postal Workers Union*, Case No. 85AP-404, 1986 Ohio App. LEXIS 5953 at *10 (10th Dist.) (“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.”).

So just what does Mr. Fleming say in that one paragraph—the most important paragraph in his brief—about how hard it would have been to measure his damages when he signed his contract? Well, first he says he wanted to keep his job if the head coach were fired and a new head coach were hired. But that has nothing to do with measuring damages. Next he says that

he wanted financial security. But so does everyone else, and his desire for financial security does not make his damages hard to measure. Then he says that the contract's 28-month term "provided [him] that security." But that argument does not support his contention that damages were hard to measure; in fact, it is at odds with the contention that damages were hard to measure. As *Cooper* makes clear, the measure of damages for an employee with a 28-month contract who is wrongfully terminated is the remainder of the employee's salary minus any salary the employee earns elsewhere. And finally he says that the "early termination left him with no employment and a need to search for a new position." But that likewise does not make his damages hard to measure. And it is more than just a bit disingenuous. Recall that Mr. Fleming *was terminated only because he refused to come to work at a job that paid \$71,500 a year*. People who fear the loss of "financial security" rarely, as a general rule, quit their jobs without having another job lined up. So does Mr. Fleming have anything else to say about how hard it was to measure what his damages would be? No. He has nothing else to say.

IV. Conclusion

Kent State has argued since the beginning of this case that Mr. Fleming's contract contains an unenforceable penalty—not a lawful liquidated damages clause. It has pointed out over and over that ordinary salaried employees like him cannot demonstrate that their actual damages would have been "uncertain as to amount and difficult of proof." That is what *Samson Sales* demanded that Mr. Fleming demonstrate, and he has failed to do so.

Respectfully submitted,

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