



# Court of Claims of Ohio

The Ohio Judicial Center  
65 South Front Street, Third Floor  
Columbus, OH 43215  
614.387.9800 or 1.800.824.8263  
www.cco.state.oh.us

JAMES M. FLEMING

Plaintiff

v.

KENT STATE UNIVERSITY

Defendant

Case No. 2011-09365

Judge Patrick M. McGrath

DECISION

FILED CLAIMS  
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Plaintiff brings this action for breach of contract against defendant. The issues of liability and damages were bifurcated. Following a trial on the issue of liability, the court found that defendant breached the parties' contract by reassigning plaintiff from a coaching position with the football team to a non-coaching position in defendant's Athletic Department. The court further found that such a reassignment amounted to a constructive discharge. In lieu of a trial on the issue of damages, the parties agreed to file briefs on the issue of damages. Plaintiff filed his brief on July 12, 2013. Defendant filed its brief on July 26, 2013, and plaintiff filed a reply on August 2, 2013.

Plaintiff argues that the amount of monetary damage to which he is entitled to recover as a result of the breach by defendant has been stipulated by the parties in paragraph six of the employment contract. According to plaintiff, the determination of his damages is a simple calculation resulting in an award of \$97,619.91. Defendant argues that the liquidated damages clause is an unenforceable penalty clause and that plaintiff suffered no damage inasmuch as he received a larger salary in his subsequent employment.

The March 2010 employment contract provides in relevant part:

"WHEREAS, Kent State University agrees that [plaintiff] 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;

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"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. \* \* \***

" \* \* \*

"6. Subject to [plaintiff'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 [defendant] is the initiator, it shall pay the balance of the then in effect base salary due for the remaining term." Defendant terminated plaintiff's employment on March 10, 2011.

It is well established that parties are free to enter into contracts that contain provisions which apportion damages in the event of default. *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27 (1984). Contracting parties may specify in advance those damages that are to be paid in the event of a breach "as long as the provision does not disregard the principle of compensation." *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376 (1993), citing 3 Restatement of the Law 2d, Contracts (1981), 157, Section 356, Comment a. Such damages are typically referred to as liquidated damages. In certain circumstances, however, freedom of contract may be limited for public policy reasons where stipulated damages constitute a penalty. *Id.*

The test developed in Ohio to judge a stipulated damages provision was set forth in *Samson Sales, supra*, as follows: "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

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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.” *Id.* at paragraph one of the syllabus, citing *Jones v. Stevens*, 112 Ohio St. 43 (1925) paragraph two of the syllabus. Whether a stipulated damages provision constitutes enforceable liquidated damages or an unenforceable penalty is a question of law for the court. *Lake Ridge Academy, supra*, at 380.

Defendant argues that plaintiff’s damages are not uncertain as to amount and are not difficult of proof. The court finds that in this case, the damages plaintiff would incur as a result of defendant’s breach of contract are certain in amount and easy to prove. Pursuant to the parties’ agreement, plaintiff was entitled to an annual base salary of \$71,500. The contract term was for a period of 28 months, terminating on June 30, 2012. At the time of termination, plaintiff had 16 months remaining on the contract. Additionally, plaintiff was eligible for several bonuses should the football team achieve various accomplishments both academic and athletic. Each accomplishment is tied to a specific dollar amount in the parties’ agreement. Furthermore, “[a] valid liquidated damages clause contemplates the nonbreaching party’s inability to identify and mitigate its damages.” *Id.* at 385. There is no question that plaintiff easily identified his damages as a result of defendant’s breach. Thus, the court cannot conclude that plaintiff’s damages were uncertain as to amount and difficult of proof. Therefore, the court concludes that the parties’ stipulated damages clause is an unenforceable penalty clause.

In the absence of a valid liquidated damages clause, the usual remedy in a breach of contract case for wrongful discharge is to pay the injured party any wages due under the contract from the date of discharge until the contract term expires. *Worrell v. Multipress, Inc.*, 45 Ohio St.3d 241 (1989). That amount is to be reduced by any wages the employee earned in subsequent employment. *Aldahan v. Tansky Sales Inc.*, 10th Dist. No. 99AP-651, 2000 Ohio App. LEXIS 2675. The party seeking to recover such compensation is required to mitigate damages. *Id.*

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Attached to plaintiff's brief are responses to interrogatories and document production requests as well as plaintiff's pay stubs and W-2s from 2010, 2011, and 2012. Although the documents have not been properly authenticated, both parties rely upon the documents to determine plaintiff's damages.

At the time of termination, plaintiff had 16 months remaining on his contract with defendant. Defendant paid plaintiff a monthly salary of \$5,958.33 (\$71,500 / 12 months). Additionally, plaintiff did not present the court with any evidence that he would have received any of the bonuses under his contract if his employment had not been terminated. Therefore, plaintiff would have received \$95,333.33 (\$5,958.33 X 16 months) had he remained employed with defendant for the remaining 16 months of his contract term.

There is no dispute that subsequent to plaintiff's employment with defendant, at the end of 2011, plaintiff obtained employment in a similar position at the University of Central Florida (UCF). Additionally, there is no dispute that UCF paid plaintiff \$5,833.33 in 2011 and \$193,604.40 in 2012.<sup>1</sup> Accordingly, UCF paid plaintiff \$102,635.53 (\$193,604.40 / 2 + \$5,833.33) during the same 16 month period of plaintiff's remaining contract term with defendant. Indeed, plaintiff received more money from UCF than he would have received from defendant during the 16 month period remaining on his contract. Accordingly, the court finds that plaintiff mitigated his damages. Therefore, the court finds that plaintiff has failed to prove that he was damaged by defendant's breach of contract.

Judgment shall be rendered for plaintiff in the amount of \$25, representing the filing fee paid by plaintiff.



PATRICK M. MCGRATH  
Judge

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<sup>1</sup>Figures obtained from plaintiff's W-2s attached to his brief.



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Judge Patrick M. McGrath

JUDGMENT ENTRY

FILED  
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OF OHIO  
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The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiff in the amount of \$25, representing the filing fee paid by plaintiff. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH  
Judge

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