

ORIGINAL

**IN THE OHIO COURT OF CLAIMS
COLUMBUS, OHIO**

JAMES M. FLEMING,

PLAINTIFF,

V.

KENT STATE UNIVERSITY,

DEFENDANT.

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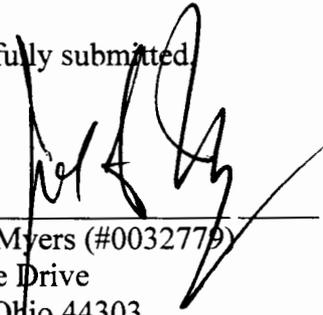
CASE NO. 2011-09365

JUDGE PATRICK M. MCGRATH

PLAINTIFF'S NOTICE OF APPEAL

Now comes Plaintiff, James M. Fleming, by and through undersigned counsel and hereby appeals the October 4, 2013 final appealable order, and the October 29, 2012 order on the liability phase, of the Court of Claims in the above captioned matter. (Attached hereto are the October 4, 2013 decision judgment entry on the damages phase of this matter and the October 29, 2012 decision and judgment entry on the damages phase of this matter.)

Respectfully submitted,



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ON COMPUTER

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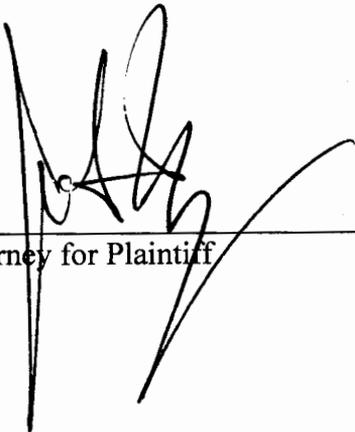
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Notice of Appeal was served this 1st day of

John Knutti

~~October~~, 2013 by regular US mail upon:

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Ohio Attorney General's Office
Court of Claims Defense Section
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Attorneys for Defendant



Attorney for Plaintiff



Court of Claims of Ohio

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JAMES M. FLEMING

Plaintiff

v.

KENT STATE UNIVERSITY

Defendant

Case No. 2011-09365

Judge Patrick M. McGrath

DECISION

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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 2012.¹ 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

¹Figures obtained from plaintiff's W-2s attached to his brief.



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JAMES M. FLEMING

Plaintiff

v.

KENT STATE UNIVERSITY

Defendant

Case No. 2011-09365

Judge Joseph T. Clark

DECISION

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Plaintiff brought this action against defendant, Kent State University (KSU), alleging that KSU committed a breach of his employment contract by reassigning him from his coaching position to an administrative position in February 2011.¹ The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.²

Plaintiff testified that he has been a college football coach for 27 years at ten different institutions. In March 2010, at the request of former KSU head football coach, Doug Martin, plaintiff joined the coaching staff as an assistant coach. Martin was terminated as KSU's head football coach in November 2010, and Darrell Hazell was subsequently hired as his replacement. Plaintiff testified that on January 21, 2011, Executive Associate Athletic Director, Thomas Kleinlein, informed him that he would not be retained as an assistant coach. At that same time, plaintiff was informed that effective February 14, 2011, he was being reassigned to a non-coaching position as an assistant to the Athletic Director within the Athletic Department. (Plaintiff's Exhibit D.) Plaintiff, however, did not report for work. Plaintiff testified that at this same time, KSU cancelled his courtesy vehicle.

¹At trial, plaintiff voluntarily dismissed his claims of defamation and false light, pursuing only his claim of breach of contract.

²Plaintiff's July 17, 2012 "unopposed motion to extend post-trial briefing schedule" is GRANTED instantan.

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On February 18, 2011, Director of Athletics, Joel Nielsen, informed plaintiff that failure to report for work by February 21, 2011, would subject him to discipline, which could include termination of his employment. (Plaintiff's Exhibit E.) Plaintiff did not return to work and his employment was terminated on March 10, 2011. Plaintiff received pay through that date.

In order to recover for breach of contract, plaintiff must prove the existence of a contract, performance by plaintiff, breach by defendant, and damages or loss as a result of the breach. *Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 2003-Ohio-5340 (10th Dist.); *Doner v. Snapp*, 98 Ohio App.3d 597, 600 (2nd Dist.1994).

The relationship between the parties is governed by plaintiff's March 2010 employment contract which provides in relevant part:

"WHEREAS, Kent State University agrees that James Fleming (hereinafter referred to as "Fleming") shall be employed by Kent State University as its Football, Defensive Coordinator³; and

"WHEREAS, the parties to this contract desire to establish terms of employment not contained in the standard university employment Contract;

"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**. * * *

"4. A suitable automobile will be provided for **Fleming's** use consistent with the Athletic Department's Memorandum of agreement regarding automobiles, which is incorporated by reference.

³The parties agree that plaintiff was hired as an assistant defensive coordinator.

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"6. Subject to **Fleming'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 the University is the initiator, it shall pay the balance of the then in effect base salary due for the remaining term.

"8. Except for those terms contained herein to the contrary, all other conditions of this employment are contained in and controlled by any and all University and Administrative Policies and Procedures, as published in the University Policy Register, and as may be added to or amended during the period of employment consistent with **Kent State University's** Constitution and Bylaws.

"13. 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." (Plaintiff's Exhibit C.)

Defendant contends that nothing in the contract prohibits KSU from reassigning plaintiff to a different position within the university and that plaintiff terminated the employment contract by failing to report for work in February 2011. Plaintiff contends that he never would have signed a contract that allowed KSU to reassign him to a non-coaching position within the university.

Contract interpretation is a matter of law for the court. *City of St. Marys v. Auglaize Cty. Bd. of Comms.*, 115 Ohio St.3d 387, 2007-Ohio-5026, ¶ 38. When interpreting a contract, a court's principle objective is to ascertain and give effect to the intent of the parties. *Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987),

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DECISION

paragraph one of the syllabus. In determining the parties' intent, a court must read the contract as a whole and give effect, if possible, to every part of the contract. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361-362.

The parol evidence rule is not a rule of evidence, interpretation or construction, but rather a rule of substantive law which, when applicable, defines the limits of a contract. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, citing *Charles A. Burton, Inc. v. Durkee*, 158 Ohio St. 313, 324 (1952). The rule applies to integrated writings but does not apply to partially integrated writings. *Id*; see also *Miller v. Lindsay-Green, Inc.*, 10th Dist. No. 04AP-848, 2005-Ohio-6366. The rule provides that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might tend to add to, vary, or contradict the writing. *Galmish, supra*, at 26. However, extrinsic evidence becomes admissible to ascertain the intent of the parties when the contract is unclear or ambiguous or when circumstances surrounding the agreement give the plain language special meaning. *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St.3d 635, 638.

"[I]f a term cannot be determined from the four corners of a contract, factual determination of intent or reasonableness may be necessary to supply the missing term." *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.*, 15 Ohio St.3d 321, 322 (1984). In such a situation, as an exception to the parol evidence rule, the parties may introduce extrinsic evidence to supply the missing term. *McGonagle v. Somerset Gas Transmission Co.*, 10th Dist. No. 11AP-156, 2011-Ohio-5768.

The court finds that the parties' agreement is silent on the issue of reassignment within the university and there is clearly no agreement regarding the missing term. "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." Restatement of the Law 2d. Contracts, Section 204 (1981).

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DECISION

Former KSU Athletic Director, Laing Kennedy, testified that as the Athletic Director, he would enter into contracts with coaches of the various sports at the university. Kennedy, a signatory to the parties 2010 contract, stated that assistant coaches typically did not have contracts with the university. Kennedy testified that plaintiff's duties are not written in the contract because they can change within the coaching staff. Kennedy explained that the particular job duties fluctuated within the job title and that a defensive coach may be reassigned to the offensive side; however, Kennedy admitted that he did not reassign coaches to non-coaching positions. Kennedy reviewed several employment contracts of various coaches at KSU and noted that head women's basketball coach, Robert Lindsay, requested an express provision prohibiting reassignment, which was subsequently added to his contract. Kennedy stated that plaintiff did not make such a request.

Current athletic director, Joel Nielsen, asserted that the Athletic Director may reassign a coach to any position within the university so long as it matched the particular coaches background and experience. Nielsen testified that he reassigned plaintiff to a position as an assistant to the Athletic Director. Nielsen explained that he created the position at the time of the reassignment and that it remains unfilled. The duties of the position include fund raising, building security, facility scheduling and maintenance, and marketing and promotion. (Defendant's Exhibit F.) According to Nielsen, plaintiff's bonuses under his contract remained in effect while he served in the newly-created position within the athletic department despite the fact that the bonuses apply to plaintiff's performance as a coach and both the athletic and academic performance of the football team.

Based upon the evidence presented at trial, the court concludes that it is reasonable under the circumstances for plaintiff to anticipate reassignment within the coaching staff but that he could not reasonably anticipate reassignment to a non-coaching position in the Athletic Department. Indeed, the court is persuaded by Kennedy's testimony that reassignment of a coach to a non-coaching position was not the established practice at

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DECISION

KSU during his tenure. Kennedy testified that KSU's expectation was for plaintiff to be a football coach. Moreover, even if the court were to accept Nielsen's testimony regarding reassignment, the court has difficulty believing the duties of the newly-created administrative position match plaintiff's background and experience. Plaintiff has been a coach for 27 years and has never held an administrative position.

Defendant argues, in the alternative, that plaintiff relinquished his employment voluntarily when he refused to accept the reassignment. Plaintiff counters that his reassignment by KSU to an administrative position amounted to a constructive discharge. "The test for determining whether an employee was constructively discharged is whether the employer's actions made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign." *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, paragraph four of the syllabus. "In applying this test, courts seek to determine whether the cumulative effect of the employer's actions would make a reasonable person believe that termination was imminent. They recognize that there is no sound reason to compel an employee to struggle with the inevitable simply to attain the 'discharge' label." *Id.* at 589. Conversely, "[a]n 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*, 10th Dist. No. 02AP-588, 2003-Ohio-988, ¶ 25, citing *Jackson v. Champaign Natl. Bank & Trust Co.*, 10th Dist. No. 00AP-170 (Sept. 26, 2000).

Based upon the evidence presented, the court concludes that plaintiff's reassignment from a coaching position to a non-coaching administrative position within the Athletic Department amounts to a constructive discharge. Indeed, Kennedy testified that he did not reassign coaches to non-coaching positions. Additionally, at the time of plaintiff's reassignment, KSU cancelled his courtesy car that had been provided to him pursuant to the contract. Moreover, as noted above, the duties of the newly-created administrative position do not match plaintiff's 27 years of coaching experience and background. It is clear from the evidence at trial that KSU no longer desired plaintiff's

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DECISION

services as a football coach. Accordingly, the court finds that plaintiff's reassignment amounted to a constructive discharge and that a reasonable person would have felt compelled to resign.

For the foregoing reasons, the court finds that KSU violated the terms of the contract and, accordingly, judgment shall be rendered in favor of plaintiff.⁴

⁴Defendant's argument that the contract's liquidated damages clause is an unenforceable penalty clause shall be addressed during the damages phase of the trial.



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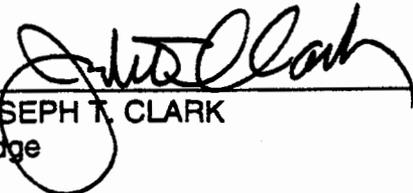
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Judge Joseph T. Clark

JUDGMENT ENTRY

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This case was tried to the court on the issue of liability. 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 on his claim of breach of contract. A case management conference is set for *November 9, 2012, at 9:30 a.m.*, to discuss further proceedings. The court shall initiate the conference via telephone.



JOSEPH T. CLARK
Judge

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