[Cite as *O'Brien v. Ohio State Univ.*, 2005-Ohio-3335.]

IN THE COURT OF CLAIMS OF OHIO
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JAMES J. O'BRIEN	:	
Plaintiff	:	CASE NO. 2004-10230 Judge Joseph T. Clark
v.	:	DECISION
THE OHIO STATE UNIVERSITY	:	
Defendant	:	

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{¶ 1} On February 16, 2005, plaintiff filed a motion for summary judgment pursuant to Civ.R. 56(A). On April 1, 2005, defendant filed a cross-motion for summary judgment pursuant to Civ.R. 56(B) and a memorandum in opposition to plaintiff's motion for summary judgment. On April 18, 2005, plaintiff filed a memorandum in opposition to defendant's motion for summary judgment. The case is now before the court for a non-oral hearing on the motions for summary judgment. Civ.R. 56(C) and L.C.C.R. 4.

{¶ 2} Civ.R. 56(C) states, in part, as follows:

{¶ 3} "*** Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion

and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. ***" See, also, *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 4} In April 1997 plaintiff was hired by defendant as defendant's men's basketball coach. In October 1999 the parties renegotiated the terms of plaintiff's employment and executed a new written agreement. Under the new agreement plaintiff's duties were set forth in relevant part as follows:

{¶ 5} "4.0 Coach's Specific Duties and Responsibilities

{¶ 6} "4.1 In consideration of the compensation specified in this agreement, Coach shall:

{¶ 7} "***

{¶ 8} "(d) Know, recognize and comply with all applicable laws, policies, rules and regulations of Ohio State, the Big 10 Conference and the NCAA; supervise and take appropriate steps to ensure that Coach's assistant coaches, any other employees for whom Coach is administratively responsible and the members of the Team know, recognize and comply with all such laws, policies, rules and regulations; and immediately report to the Director and to the Department of Athletics Compliance Office if Coach has reasonable cause to believe that any person or entity, including without limitation, representatives of Ohio State's athletic interests, has violated or is likely to violate any such laws, policies, rules or regulations. Coach shall cooperate fully with the Department's Compliance Office at all times."

{¶ 9} Plaintiff was terminated from his position as defendant's men's basketball coach on or about June 8, 2004. In his affidavit, plaintiff described the events that led to his termination:

{¶ 10} "***.

{¶ 11} "6. In December of 1998, I loaned money to Alex Radojevic's mother, a disabled woman who lived in Serbia and had recently lost her husband.

{¶ 12} "7. I loaned this money to Alex Radojevic's mother after Alex Radojevic had already signed a letter of intent to play basketball at the University and after I had been notified that he was under contract to play professional basketball with a European team.

{¶ 13} "8. The University learned of my loan to Alex Radojevic's mother on April 24, 2004 when I disclosed the information to Athletic Director Andy Geiger.

{¶ 14} "9. More than six weeks after learning of the loan, the University terminated me."

{¶ 15} Although plaintiff denies that his conduct, as described above, constitutes a breach of his duties under paragraph 4.1(d) of the employment agreement, for purposes of plaintiff's motion the court will assume this fact. In plaintiff's motion for summary judgment, plaintiff argues that even if he breached the agreement by violating NCAA rules, his relatively minor failure of performance did not give defendant sufficient cause to immediately terminate his employment without pay.

{¶ 16} The question whether plaintiff was terminated for cause, as that term is defined in the agreement, is at the heart of this dispute. Defendant is obligated to pay plaintiff a significant portion of his remaining salary if plaintiff were terminated other than for cause. Conversely, if plaintiff were terminated for cause, defendant would be under no obligation to pay plaintiff any further compensation.

{¶ 17} The employment agreement contains the following provisions regarding termination:

{¶ 18} "5.0 Termination

{¶ 19} "5.1 Terminations for Cause — Ohio State may terminate this agreement at any time *for cause*, which, for the purposes of this agreement, shall be limited to the occurrence of one or more of the following:

{¶ 20} "(a) a material breach of this agreement by Coach, which Coach fails to remedy to OSU's reasonable satisfaction, within a reasonable time period, not to exceed thirty (30) days, after receipt of a written notice from Ohio state [sic] specifying the act(s), conduct or omission(s) constituting such breach;

{¶ 21} "(b) a violation by Coach (or a violation by a men's basketball program staff member about which Coach knew or should have known and did not report to appropriate Ohio State personnel) of applicable law, policy, rule or regulation of the NCAA or the Big Ten Conference which leads to a 'major' infraction investigation by the NCAA or the Big Ten Conference and which results in a finding by the NCAA or the Big Ten Conference of lack of institutional control over the men's basketball program or which results in Ohio State being sanctioned by the NCAA or the Big Ten Conference in one or more of the following ways:

{¶ 22} "(i) a reduction in the number of scholarships permitted to be allocated;

{¶ 23} "(ii) a limitation on recruiting activities or reduction in the number of evaluation days;

{¶ 24} "(iii) a reduction in the number of expense-paid, official recruiting visits;

{¶ 25} "(iv) placement of the men's basketball program or Ohio State on probation;

{¶ 26} "(v) being banned from NCAA post-season play for at least one season;

{¶ 27} "(vi) being banned from regional or national television coverage for at least one basketball season with a consequent loss by Ohio State of television revenues for at least one basketball season; or

{¶ 28} "(c) any criminal conduct by Coach that constitutes moral turpitude or any other improper conduct that, in Ohio State's reasonable judgment, reflects adversely on Ohio State or its athletic programs."

{¶ 29} Under common law, "a 'material breach' is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract." Williston on Contracts Chapter §63:3. Defendant contends that plaintiff's conduct in violating NCAA rules and thereafter failing to immediately report the violation constitutes a "material breach" of the employment agreement and provides defendant with sufficient cause to terminate plaintiff's employment pursuant to paragraph 5.1(a).

{¶ 30} Plaintiff argues that under the terms of his renegotiated contract if the alleged breach is in the nature of an NCAA violation, defendant's right to terminate his position for cause is limited by the very specific provisions of paragraph 5.1(b). Upon review of the plain language of the written employment agreement, the court does not perceive any such limitation upon defendant's right of termination.

{¶ 31} The purpose of contract construction is to give effect to the intention of the parties, and such intent "is presumed to reside in the language they chose to employ in the agreement." *Stoll v. United Magazine Co.*, Franklin App. No. 03AP-752, 2004-Ohio-2523, at ¶7. In construing a written agreement, common words appearing in the written instrument are to be given their plain and

ordinary meaning "unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument." Id. at ¶8 quoting *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph two of the syllabus.

{¶ 32} Plaintiff insists that a construction of the employment agreement that allows defendant to terminate him for cause under 5.1(a) due to an NCAA infraction renders paragraph 5.1(b) meaningless. Plaintiff argues that under the circumstances of this case such a construction would violate a basic tenet of contract interpretation that requires contracts to be read as a whole and interpreted so as to give effect to every provision. See *Farmers' National Bank v. Delaware Insurance Co.* (1911), 83 Ohio St. 309, 337. The court disagrees.

{¶ 33} Under the terms of the renegotiated agreement, it is conceivable that any one or more of the several provisions permitting termination for cause may arise from a single breach of plaintiff's duties under paragraph 4.1(d) of the employment agreement. It would be reasonable to foresee a circumstance where conduct by plaintiff that would be considered a major infraction of NCAA rules may not constitute a material failure of performance, whereas a relatively minor infraction may constitute such nonperformance.

{¶ 34} Simply put, the written employment agreement does not state that the provisions regarding "for cause" termination contained in paragraphs 5.1(a), 5.1(b), and 5.1(c) are mutually exclusive as plaintiff now contends. In the opinion of the court, the employment agreement does not limit defendant's right of termination to the provisions of paragraph 5.1(b) in every instance

where an NCAA rule is involved. To hold otherwise would be to add language to the agreement that does not appear in the document.[1]

{¶ 35} Plaintiff nonetheless urges the court to look beyond the four corners of the written agreement to determine the intention of the parties regarding cause for termination. For example, in plaintiff's affidavit, plaintiff states that the parties renegotiated his agreement as a result of the tremendous success of the basketball program under plaintiff's guidance and that the new contract was intended to be much more favorable to plaintiff in consideration of his past performance. More specifically, plaintiff insists that, unlike his original employment contract which granted defendant "unbridled discretion to determine if plaintiff violated NCAA rules and terminate him based upon its own conclusion," it was the intention of the parties under the renegotiated agreement that a more objective standard be used. Although the court agrees that paragraph 5.1(b) contains an objective standard for determining cause, there is no language in the agreement evidencing the parties' intention that paragraph 5.1(b) be the exclusive remedy for defendant in the case of an NCAA violation.

{¶ 36} Additionally, a court is not required to go beyond the plain language of an agreement to determine the parties' rights and obligations if a contract is clear and unambiguous. *Custom Design Technologies, Inc. v. Galt Alloys, Inc.*, Stark App. No. 2001CA00153, 2002- Ohio-100. "If a contract is clear and unambiguous, then its interpretation is a matter of law and there

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[1]The employment agreement contains the following integration clause:

"11.0 Entire Agreement: Amendments

"This agreement constitutes the entire agreement of employment between the parties and supersedes all prior understandings with respect to the subject of employment. No amendment or modification of this agreement shall be effective unless in writing and signed by both parties. Promotional responsibilities and opportunities will be addressed by separate agreements."

is no issue of fact to be determined." *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322. See, also, *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 66, 1993-Ohio-195; *Latina v. Woodpath Development Co.* (1991), 57 Ohio St.3d 212, 214. Indeed, "the interpretation of a written contract is a question of law, absent patent ambiguity." *P & O Containers, Ltd. v. Jamelco, Inc.* (1994), 94 Ohio App.3d 726, 731. If no ambiguity appears on the face of the instrument, parol evidence cannot be considered in an effort to demonstrate such an ambiguity. *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St.3d 635, 638, 1992-Ohio-28; *Stony's Trucking Co. v. Public Utilities Commission* (1972), 32 Ohio St.2d 139, 142. In other words, parol evidence cannot be used to demonstrate a "latent ambiguity" in a contract. *Shifrin*, supra. See, also, *Charles A. Burton, Inc. v. Durkee* (1952), 158 Ohio St. 313; *Cassilly v. Cassilly* (1897), 57 Ohio St. 582.

{¶ 37} Given the absence of any language in the written employment agreement evidencing the parties' intentions to treat the several provisions of paragraph 5.1 as mutually exclusive, and given the fact that the language used in the agreement is both clear and unambiguous, the court will not look beyond the four corners of the agreement to determine its meaning.

{¶ 38} That is not to say that the language of the agreement permits defendant to disregard the provisions of 5.1(b) and immediately terminate plaintiff, without compensation, for any perceived violation of NCAA rules. Rather, under the plain language of the agreement, defendant is permitted to do so if the violation also results in a "material breach" of the employment agreement. Otherwise, plaintiff must be paid compensation in accordance with the provisions relating to termination other than for cause.

{¶ 39} In short, the court finds that the plain language of the employment agreement permits defendant to terminate plaintiff's contract for cause under paragraph 5.1(a) even though the alleged breach by plaintiff is in the nature of an NCAA violation. Accordingly, plaintiff is not entitled to judgment as a matter of law and plaintiff's motion for summary judgment shall be denied.

{¶ 40} In defendant's motion for summary judgment, defendant asks the court to find that plaintiff's conduct constitutes a material breach of the employment agreement, as a matter of law. In support of this argument defendant submitted a letter dated June 8, 2004, wherein defendant's athletic director notified plaintiff of defendant's decision to terminate plaintiff's employment. The letter provides, in pertinent part, as follows:

{¶ 41} "In our discussion on April 24, 2004, you admitted that you knew your action was a violation of NCAA rules, and you are correct. ***

{¶ 42} "Section 4.1(d) of your employment agreement requires you to 'know, recognize and comply' with all applicable rules and regulations of the NCAA and to 'immediately report to the Director [of Athletics] and to the Department of Athletics Compliance Office' if you have 'reasonable cause to believe that <u>any</u> person *** has violated *** such laws, policies, rules or regulations.' You have materially breached this important term of your contract.

{¶ 43} "Unfortunately, your admitted wrongdoings leave the University no choice. Pursuant to Section 5.1(a) of your employment agreement, we intend to terminate such agreement *for cause*, effective at 5:00 p.m. today, June 8, 2004."

{¶ 44} Although some of the assertions of fact made in the athletic director's letter are disputed by plaintiff, defendant has clearly taken the position that plaintiff's conduct amounted to a material breach and that plaintiff's termination was for cause.

However, under the language of paragraph 5.1(a) of the employment agreement, materiality is an objective inquiry. Additionally, the determination whether a material breach of an agreement has occurred is generally a question of fact. See *Kersh v. Montgomery Developmental Center* (1987), 35 Ohio App.3d 61; *Software Clearing House v. Intrak, Inc.* (1990), 66 Ohio App.3d 163. It is only where a contract is clear in making a certain event a material breach of that contract, that a court must respect that contractual provision. See *Williston*, supra.

{¶ 45} The employment agreement in this case does not contain a list of specific material events or otherwise define the term "material breach." Thus, the court must look to the common law for guidance.

{¶ 46} In *Kersch*, supra, at 62-63, the Tenth District Court of Appeals adopted the five factors test set forth in the Restatement of the Law 2d, Contracts (1981) 237, Section 241, in determining whether a breach of contract is material. Those five factors are:

{¶ 47} "(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

{¶ 48} "(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

{¶ 49} "(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

{¶ 50} "(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

{¶ 51} "(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing."

{¶ 52} Under the common law test set forth above and in consideration of the evidence thus far submitted, it is clear to the court that the determination whether plaintiff's conduct in this case constitutes a material breach of the employment agreement is a disputed issue of fact. Thus, defendant is not entitled to judgment as a matter of law.

{¶ 53} In conclusion, upon review of the motions for summary judgment and the memoranda filed by the parties, and construing the facts in a light most favorable to the non-moving party, the court finds that genuine issues of material fact exist and that neither party is entitled to judgment as a matter of law. Accordingly, the motions for summary judgment shall be denied.

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Plaintiff	:	CASE NO. 2004-10230 Judge Joseph T. Clark
v.	:	
		JUDGMENT ENTRY
THE OHIO STATE UNIVERSITY	:	
Defendant	:	

: : : : : : : : : : : : : : : : :

A non-oral hearing was conducted in this case upon the parties' motions for summary judgment. For the reasons set forth in the decision filed concurrently herewith, both motions are DENIED.

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JOSEPH T. CLARK
Judge

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