

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO: 09-CI-0887

FILED
MAY 28 2009
FRANKLIN CIRCUIT COURT
SALLY JUMP, CLERK

UNIVERSITY OF KENTUCKY

PETITIONER

vs.

**PETITION AND COMPLAINT
FOR DECLARATORY JUDGMENT**

BILLY C. GILLISPIE
SERVE: 619 Burr Oak
Nicholasville, KY 40356

RESPONDENT

* * * * *

The Petitioner, University of Kentucky, by counsel, respectfully petitions this Court for a declaration of rights concerning an actual controversy with the Respondent, Billy C. Gillispie, and for its Petition and Complaint states the following:

1. The University of Kentucky ("UK") is a land grant university and part of the state system of public institutions of higher education of the Commonwealth under KRS Chapter 164.100, et seq., with the power to sue and be sued in this Court of Justice.

2. The Respondent, Billy C. Gillispie ("Gillispie") is and has been at all relevant times a resident of Jessamine County, Kentucky, and until March 27, 2009, Gillispie was the head men's basketball coach at UK.

3. This Court has jurisdiction and venue concerning any and all disputes arising from contracts or alleged contracts to which UK is a party, under KRS 45A.245(1).

4. This action seeks a declaration of rights to resolve an actual controversy between the parties, involving matters of law and an alleged contract, which KRS 418.040 and 418.045 authorize this Court to adjudicate by summary motion practice in order to make a binding declaration of rights, along with any other relief the Court deems just and proper.

5. On or about April 6, 2007, UK, acting through its Vice President and Director of Athletics, Mitch Barnhart, and Gillispie executed a certain Memorandum of Understanding Offer (“MOU”) in Lexington, Kentucky, a true copy of which MOU is attached and incorporated by reference as Exhibit A.

6. UK terminated its employment relationship with Gillispie on March 27, 2009.

7. An actual and justifiable controversy has arisen between the parties as to whether the MOU constitutes a long-term contract of employment, and specifically, with respect to Gillispie’s claim, asserted by letter from his counsel on March 27, 2009, that he was dismissed without “cause” and is therefore entitled to payment of \$6,000,000.00 from UK pursuant to his interpretation of the MOU.

8. UK asserts that the MOU was expressly intended by the parties to be only a letter of intent or agreement to agree, and does not constitute either a fully-integrated writing or a final expression of the parties’ entire agreement. The MOU specifically stated that it was to “be expanded and incorporated into an employment contract with University of Kentucky for execution at the earliest possible date.” Among other express conditions, the MOU stated that “a termination for cause provision mutually agreed upon by the parties,” was to be negotiated and included in the long-term employment contract, which was material to the determination of when and if UK might be required to pay Gillispie \$1.5 million per year (not to exceed 48 months) if terminated without cause before the end of his employment contract. Further, the MOU repeated at its conclusion, “while these terms are contingent upon our executing an employment contract...I trust that every reasonable effort will be made to mutually conclude that process within sixty calendar days of your start date.” Thus, there were material terms remaining to be

negotiated and agreed upon between UK and Gillispie after the MOU, without which terms and conditions precedent, there would be no long-term employment contract between the parties.

9. During the next 21 months, UK proposed at least six (6) offers of written employment contracts to Gillispie through his counsel, each of which was rejected by letter or counteroffer. Each time, counsel for Gillispie deleted or changed material terms contained in UK's latest offer, and added new and different terms not contained in the MOU or UK's last offer, making complete counteroffers on or about the following dates: (a) June 21, 2007, (b) July 23, 2007, (c) September 26, 2007, (d) April 3, 2008, and (e) February 17, 2009. In fact, the parties broke off negotiations in the Fall of 2007, and it was at the request of Gillispie by letter dated April 3, 2008 that negotiations were reopened to again attempt to agree on "the final terms".

10. The last such rejection/counteroffer by Gillispie was communicated by letter from his counsel dated February 17, 2009, received by UK on February 20, 2009. True copies of said letter and counteroffer are attached and incorporated by reference as collective Exhibit B. Among other things, Gillispie's February 17th counteroffer continued to reject and eliminate a number of UK's proposed grounds for termination for "cause," which included "(x) Failure to follow written Athletic Department or other University policies and procedures" and "(xii) Acts of misconduct including, but not limited to conviction of a felony...". (See pp. 15-16 of Exhibit B).

11. There being no long-term contract of employment, UK gave Gillispie timely notice on March 27, 2009, before the end of his second year of employment, that he would not be the head men's basketball coach for the 2009-2010 season.

12. UK has paid all incentive payments earned by Gillispie for the 2008 - 2009 basketball season in accordance with Attachment A of the MOU.

13. Due to the failure of the parties to agree to a definitive written long-term contract of employment, including, but not limited to, a definition of what kinds of misconduct would be “cause” for termination that would excuse UK from payment of any damages for breach of contract, the MOU is unenforceable in all future aspects. In *Walker v. Keith*, 382 S.W.2d 198, 201 (Ky. 1964), the Court stated, quoting from the Williston on Contracts (3rd ed.), § 45, p. 149:

“...if an essential element is reserved for the future agreement of both parties, the promise gives rise to no legal obligation until such future agreement. Since either party, by the very terms of the agreement, may refuse to agree to anything the other party will agree to, it is impossible for the law to fix any obligation to such a promise.”

Also drawing upon the holding in *Johnson v. Lowery*, 270 S.W.2d 943, 946 (Ky. 1954), the Court in *Walker* concluded:

Courts should not extend their powers to establish contract rights which the parties, with an opportunity to do so, have failed to define. *Id* at 204.

More recently, *Cinelli v. Ward*, 997 S.W.2d 474, 478 (Ky. App. 1998) exhaustively reviewed the above cases and other cases, and determined that Kentucky still takes the “all or nothing” approach, that where “an agreement leaves the resolution of material terms to future negotiations...we view it as simply an agreement to negotiate in good faith, and as such, without legal import.”

14. In addition to Gillispie’s failure or refusal to agree to a definition of good “cause” for termination arising from any misconduct or breach he might commit—the absence of which could expose UK, a public university and state agency of the Commonwealth to large liquidated damages for early termination—there was another material element or term which Gillispie

rejected. UK requested a mitigation provision that if Gillispie were terminated without cause but he obtained a subsequent coaching job in college or professional basketball, the largest measurement or amount of his new compensation package (whether just salary or a combination of income sources like sponsorships, endorsements and camps) would be disclosed to UK and credited against the amount of liquidated damages to be paid, so as not to amount to double compensation and violate public policy. Gillispie consistently disagreed with such a mitigation provision on each date set forth in paragraph 9 above, and his February 17, 2009 counteroffer again struck the mitigation paragraph from UK's last offered contract of employment (*See* p. 14 of Exhibit B).

15. The MOU provided no mechanism to resolve disputes and/or resort to other means to supply missing material terms, hence there is no long-term contract of employment between UK and Gillispie.

16. Gillispie is claiming the right to damages from UK for breach of contract under the MOU, in an amount exceeding the \$4,000 minimum jurisdictional amount of this Court, and asserts that any missing terms or disagreements are not material, but only "supplementary."

17. UK contends that the MOU is not an enforceable long-term contract of employment, and that it owes no damages to Gillispie, having paid him for each basketball season in which he coached.

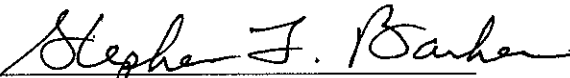
18. The above events are uncontroverted, and the attached documents (Exhibits A & B) are self-authenticating, speak for themselves, and require no parol evidence to explain them. The parties failed to agree. Accordingly, this Court should require a response from Gillispie, including any applicable legal citations, and then issue a declaratory judgment enunciating the

rights and obligations, if any, of the parties, and determining the status and effect, if any, of the MOU.

19. In particular, UK requests the Court to determine that (a) by its express terms, and the subsequent failure of the parties to agree in writing upon a long-term contract of employment, the MOU is unenforceable in all future respects, and (b) due to the failure of agreement between the parties on material terms, such as "cause" for termination and mitigation of damages, UK owes Gillispie nothing as damages for its decision not to continue his employment as head men's basketball coach.

WHEREFORE, the Petitioner, University of Kentucky respectfully asks the Court to enter a declaratory judgment binding upon the parties, providing that the MOU is not an enforceable contract, and that UK does not owe Gillispie any damages for its termination of his employment as head men's basketball coach; providing UK all other relief, legal or equitable, to which it may be entitled; its costs herein expended; and that the Court advance this matter on its docket, under KRS 418.050.

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