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## ARTICLES

# COACHES' CONTRACTS: TERMINATING A COACH WITHOUT CAUSE AND THE OBLIGATION TO MITIGATE DAMAGES

MARTIN J. GREENBERG\* & DJENANE PAUL\*\*

### I. INTRODUCTION

A divorce in college athletics can be expensive. Sometimes the relationship between a university and its coach just does not work out, and the university ends it. However, when terminating a coach without cause, a university may also incur enormous fiscal obligations to pay for the coach's remaining contract years. Nowadays, a coach can depart from his or her former institution with over a million dollar payday still pending due to careless contract drafting.

Recently, the University of Illinois at Urbana-Champaign went through a very expensive divorce in college athletics. By the end of the 2011–2012 football and basketball seasons, the university experienced the early termination of Ron Zook, Bruce Weber, and Jolette Law—the head coaches of its football, men's basketball, and women's basketball teams, respectively.<sup>1</sup> The timing of the terminations created tremendous financial liability in the university's budget and on its books due to the continued obligation to pay each of these coaches their expected contractual salary—a total of \$7.1 million.<sup>2</sup> After termination, the university owed \$2.6 million to Ron Zook for

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1. Chad Thornburg, *Coaching Buyouts Cost DIA \$7.1 Million in Remaining Salaries*, THE DAILY ILLINI (Oct. 28, 2012), [http://www.dailyillini.com/salary\\_guide/article\\_046c0816-2180-11e2-a41b-001a4bcf6878.html](http://www.dailyillini.com/salary_guide/article_046c0816-2180-11e2-a41b-001a4bcf6878.html).

2. *Id.*

the 2 years remaining on his contract, \$3.9 million to Bruce Weber for his final 3 years, and \$620,000 to Jollette Law for her last 2 contract years.<sup>3</sup> In addition to these generous paydays, each of these coaches found employment relatively quickly: Ron Zook is sitting in a broadcast booth for CBS, Bruce Weber traded in his orange ties for purple as he now strolls the sidelines as Kansas State's head men's basketball coach, and Jollette Law serves as an assistant basketball coach for the University of Tennessee Lady Volunteers.<sup>4</sup> However, had the university drafted careful mitigation of damages clauses into these contracts, it could have avoided its costly financial burden.

On the other hand, in the Southeastern Conference (SEC), universities are not typically financially burdened by the simultaneous firing of high profile coaches; rather, they suffer from a win at all costs mentality in football. An SEC team has won the last seven national championships in college football, and the conference will likely continue to succeed with its teams boasting eleven of the top twenty-five recruiting classes for 2013.<sup>5</sup> To achieve this continued level of success, universities in the SEC spend exorbitant amounts of money to attract the top college football coaches.<sup>6</sup> However, according to some, "[t]he latest symbol of the college football arms race is not the coaches' salaries themselves but rather the money that university officials are spending to buy out those huge contracts when a coach falters."<sup>7</sup> Within the last two years, five SEC teams terminated their coaches with years remaining on their contracts and, consequently, these institutions owe almost \$27 million in buyouts.<sup>8</sup>

Because the stakes are high, an understanding of the legal and monetary implications of an early firing is essential to not only a coach's representative but to university counsel as well. This Article will provide practical insights into how an institution may prepare to protect itself through careful contract drafting from incurring the costs associated with the early termination of its highly paid athletics coaches. Section II first surveys numerous collegiate

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3. *Id.*

4. *Id.*

5. Dan Wolken, *FACT: The SEC Rules College Football . . . so Notre Dame, What're You Gonna Do About It?*, USA TODAY, Nov. 30, 2012, at 1A; Clark Spencer, *SEC Team BCS Title for Seventh Consecutive Season*, THE MIAMI HERALD (Jan. 8, 2013), <http://www.miamiherald.com/2013/01/08/3172217/sec-teams-bcs-title-for-seventh.html>.

6. Wolken, *supra* note 5 ("According to USA Today Sports' most recent annual analysis, SEC schools account for nine of the [twenty] largest athletic budgets in the country and seven of the [twenty] highest-paid coaches.").

7. Jeré Longman, *Firing a Coach, at a Price, with Little Evidence the Move Pays off*, N.Y. TIMES, Nov. 29, 2012, at A1.

8. Dan Wolken, *In SEC, Money Follows Coaches out Door*, USA TODAY, Nov. 26, 2012, at 1C.

coaching contracts to identify the various terms that termination without cause provisions may include. Section III then offers some best practices that institutions should follow when drafting termination without cause provisions. Next, Section IV explains the legal principles behind the affirmative duty to mitigate damages in the employment law context. Section V applies these general principles to drafting effective mitigation of damages provisions in college coaching contracts. Section VI then explores the practical difficulties in dealing with such provisions based on personal experiences. Lessons learned from these experiences are incorporated into Section VII, which suggests several best practices with regard to mitigation of damages that should be taken into consideration when drafting coaching contracts. Finally, Section VIII concludes with some final thoughts as to the importance of careful drafting in collegiate athletics.

## II. TERMINATION WITHOUT CAUSE

In the world of college coaching, the contractual concept of mitigation of damages has found its way into coaches' contracts under what is normally called "termination without cause."<sup>9</sup> In most contracts the university has the right at any time to terminate the coach's contract without cause or reason and for the university's own convenience prior to its normal expiration. Termination without cause is best defined as a premature termination of a contract prior to the end term date, and it normally involves payment of compensation to the coach who was prematurely terminated.<sup>10</sup>

Termination without cause usually involves a failure by the coach to win, lagging ticket sales, dwindling attendance, unhappiness among big money donors, loss of interest in the program, inability to compete in a conference or against a rival opponent, changes in administration (e.g., the athletic director or the president), or any other cause not listed in the termination for cause contractual provision.<sup>11</sup>

In order to understand the mitigation of damages concept, one must first analyze what might be included in a termination without cause provision in a college coaching contract. In evaluating what is included in a termination without cause provision, it is important to review a cross section of those provisions as contained in current coaching contracts as well as some contracts of coaches that either recently retired, resigned, or were terminated.

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9. Martin J. Greenberg, *Termination of College Coaching Contracts: When Does Adequate Cause to Terminate Exist and Who Determines Its Existence?*, 17 MARQ. SPORTS L. REV. 197, 205 (2006).

10. *Id.* at 205–07.

11. *Id.* at 205.

A termination without cause provision will contain some of the following elements: written notice of termination, payment format, payments constitute liquidated damages, waiver and release of liability, no continuation of benefits, withholding, interest, reassignment, death or disability, no liability for collateral benefits, records returns, no obligation to mitigate, limitation on amount, and resignation considered termination without cause.

1. Written Notice of Termination. In order to terminate a coach prior to the end term of a contract that includes a termination without cause provision, the university is required to give oral or written notice of its intent to terminate and the date upon which the termination becomes effective. Several examples follow:

- SABAN - University of Alabama: “Termination by the University without cause shall be effectuated by delivering to the Employee written notice of the University’s intent to terminate this Contract without cause, which notice shall be effective upon the earlier of the date for termination specified in the notice or fourteen (14) days after receipt of such notice by the Employee.”<sup>12</sup>
- CALIPARI - University of Kentucky: “Termination by the University without Cause shall be effectuated by delivering written notice not less than thirty days prior to the effective date of said termination. Termination shall be effective upon the date specified in the notice.”<sup>13</sup>
- MILES - Louisiana State University (LSU): “The UNIVERSITY shall have the right to terminate this Agreement without cause at any time by giving COACH thirty (30) days prior written notice.”<sup>14</sup>
- PELINI - University of Nebraska: “The parties agree that the University shall, at any time, have the right to terminate Coach’s employment hereunder for reasons other than for cause upon giving Coach reasonable written or verbal notice of termination, as such reasonableness may be determined by the University in its discretion and exercise of good faith.”<sup>15</sup>

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12. Amendment to Coaching Contract between Nick L. Saban and Univ. of Ala. ¶ 5.01(d) (Jan. 4, 2007) (on file with author) [hereinafter Saban Contract].

13. Coaching Contract between John Vincent Calipari and Univ. of Ky. ¶ 7(b) (Mar. 31, 2009) (on file with author) [hereinafter Calipari Contract].

14. Amendment to Coaching Contract between Les Miles and La. State Univ. ¶ 13(A) (Dec. 7, 2007) (on file with author) [hereinafter 2007 Miles Amendment].

15. Coaching Contract between Mark “Bo” Pelini and Univ. of Neb.-Lincoln ¶ 14(a) (Mar. 1, 2009) (on file with author) [hereinafter Pelini Contract].

2. **Payment Amount and Format.** A termination without cause provision will specify the amount the coach is to receive and the timing of the payments to be received. Some examples follow:

- CREAN - Indiana University: “[T]he University’s sole obligation to the employee shall be to continue to pay the Employee an amount representing the lesser of his then-current base annual salary . . . for the remainder of the Agreement, or Three Million Dollars (\$3,000,000). [I]rrespective of the total sum to be paid, this amount will be payable in monthly installments . . . .”<sup>16</sup>
- MILLER - University of Arizona: “University shall pay to Coach . . . an amount equal to one-half of the sum of his then-current annual Program Salary . . . and Related Compensation . . . for the remainder of the Contract Year in which such termination occurred plus (i) \$4.8 million if the termination occurred in the first Contract Year, (ii) \$4.0 million if the termination occurred in the second Contract Year; (iii) \$3.2 million if the termination occurred in the third Contract Year, or (iv) \$1.6 million if the termination occurred in the [f]ourth Contract Year.

In the event of such termination after the fourth Contract Year, University shall pay to Coach . . . an amount equal to one-half of the sum of his then-current annual Program Salary . . . and Related Compensation . . . per year, multiplied by the number of full and fractional years remaining on the Term.”<sup>17</sup>

- SABAN - University of Alabama: “[T]he University shall pay, and Employee agrees to accept . . . an amount equal to the sum of annual base salary and talent fees for each month remaining on the term of the Contract calculated from the first full month immediately following the effective date of termination without cause . . . . The [amount] shall be paid to Employee over a period of time equal to twice the number of full months remaining on the Contract term (the “Payment Period”) in monthly installments commencing on the last day of the month immediately following the month in which the termination date occurs and continuing on the last day of each succeeding month thereafter during the Payment Period.”<sup>18</sup>

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16. Coaching Contract between Thomas Crean and Ind. Univ. ¶ 6.02(f) (Aug. 11, 2008) (on file with author) [hereinafter Crean Contract].

17. Coaching Contract between Sean E. Miller and Univ. of Ariz. ¶ 18 (June 22, 2009) (on file with author) [hereinafter Miller Contract].

18. Saban Contract, *supra* note 12, ¶ 5.01(e).

- SELF - University of Kansas: “[University] shall pay Head Coach as liquidated damages, the remaining amount owed to Head Coach [for salary and professional services] for the balance of the contract period as well as all payments as provided for under the terms of . . . the Retention Agreement . . . .”<sup>19</sup>
- MONTGOMERY - University of California: “UNIVERSITY shall pay to Coach as liquidated damages, in lieu of any and all other legal remedies or equitable relief, the following sum(s):
  - 100% of the salary and talent fee for the remainder of the twelve month period in which the termination without cause occurs; and
  - 100% of the next remaining year’s base salary and talent fee; and
  - 75% of the next remaining year’s base salary and talent fee; and
  - 50% of the next remaining year’s base salary and talent fee; and
  - 25% of the base salary and talent fee for each of the next remaining contract years.”<sup>20</sup>
- RYAN - University of Wisconsin: “University shall pay to Coach . . . an amount equal to Coach’s then current Contracted Salary, as defined in paragraph III. B. of this Agreement, for the period of four (4) years from the effective date of the termination or for the remainder of the Term, including any extension thereof, whichever amount is less. University’s obligation shall be paid on a monthly basis, prorated over the balance of the Term of this Agreement. In the alternative and within University’s sole discretion, University may pay to Coach a lump sum equal to the total monthly payments otherwise due hereunder, discounted to an equivalent net present value using the short-term Applicable Federal Rate under Internal Revenue Code §1274(d), annual compounding, as of the end of the month immediately preceding the date of termination.”<sup>21</sup>
- STOOPS - University of Oklahoma: “The parties to this Contract

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19. Coaching Contract between Bill Self and Univ. of Kan. ¶ 12 (Apr. 1, 2006) (on file with author) [hereinafter Self Contract].

20. Coaching Contract between Michael Montgomery and Univ. of Cal. ¶ 12 (Apr. 5, 2008) (on file with author) [hereinafter 2008 Montgomery Contract].

21. Amendment to Coaching Contract between William F. Ryan Jr. & Univ. of Wis.-Madison ¶ V(A)(3) (July 1, 2003) (on file with author) [hereinafter Ryan Contract].

agree that in the event of a termination without cause under Paragraph V.A. of this Contract the damages incurred by Coach would be uncertain and not susceptible to exact computation. Accordingly, in the event of a termination without cause under Paragraph V.A., the University will pay Coach Three Million Dollars (\$3,000,000) per year remaining under the term as set forth in Paragraph II.A. Such amount would be paid in annual installments each year commencing within 30 days of termination. Such annual amount shall be prorated for any termination prior to the end of a contract year. By agreeing to this Contract, Coach agrees that this amount will constitute full settlement of any and all claims that Coach might otherwise assert against the University and any of its agents or employees. If Coach asserts any claim against the University in violation of this Paragraph V.B., the University is released from any and all obligations to make payments to Coach under this Paragraph V.B. from the date the claim is asserted to any entity, including the press, any agency, or a court.”<sup>22</sup>

3. Payments Constitute Liquidated Damages. Drafters of employment contracts often include provisions that will specify the damages for a breach. “A provision in a written employment agreement that stipulates the amount of money to be recovered if the employee is discharged, is known as a liquidated damage clause.”<sup>23</sup> “Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach. . . .”<sup>24</sup>

Liquidated damage clauses present several contractual advantages. First, they establish some predictability involving costs so that parties can balance the cost of anticipated performance against the cost of a breach.<sup>25</sup> In this way liquidated damages serve as a source of limited insurance for both parties. Another contractual advantage of liquidated damage clauses is that the parties each have the opportunity to settle on a sum that is mutually agreeable rather than leaving that decision up to the courts or arbitrators.<sup>26</sup>

There is a presumption in favor of the validity of liquidated damage

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22. Coaching Contract between Robert Anthony Stoops and Univ. of Okla. ¶ V(B) (Jan. 1, 2009) (on file with author).

23. PAUL H. TOBIAS, 2 LITIGATING WRONGFUL DISCHARGE CLAIMS § 8:4 (2012).

24. RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981).

25. *What Are “Liquidated Damages”?*, ROTTENSTEIN LAW GROUP LLP, <http://www.rotlaw.com/legal-library/what-are-liquidated-damages/> (last visited Apr. 13, 2013).

26. *See id.*



provisions.<sup>27</sup> Thus, the burden is on the party opposing its validity to demonstrate that it is invalid and unenforceable.<sup>28</sup>

The Restatement (Second) of Contracts states that the liquidated damages clause is enforceable “only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.”<sup>29</sup> Further, it has been found that if the sum to be paid to the discharged employee is paid in accordance with the time in which the employment contract is expected to run, the liquidated damages provision for payment will be readily upheld.<sup>30</sup>

The case of *Vanderbilt University v. DiNardo* dealt with a liquidated damage clause in the event that DiNardo terminated his contract or resigned his coaching duties before the expiration of the contract.<sup>31</sup> Vanderbilt brought an action to collect liquidated damages under a buyout provision.<sup>32</sup> DiNardo claimed that the liquidated damages portion of the contract was an unenforceable penalty under Tennessee law and that the liquidated damage provision was a “thinly disguised, overly broad non-compete provision,” unenforceable under Tennessee law.<sup>33</sup>

Although this case involved a liquidated damage clause when a coach decided to terminate his contract early, the Sixth Circuit, using the same standard as the district court, disagreed with DiNardo’s contentions:

Contracting parties may agree to the payment of liquidated damages in the event of a breach. The term “liquidated damages” refers to an amount determined by the parties to be just compensation for damages should a breach occur. Courts will not enforce such a provision, however, if the stipulated amount constitutes a penalty. A penalty is designed to coerce performance by punishing default. In Tennessee, a provision will be considered one for liquidated damages, rather than a penalty, if it is reasonable in relation to the anticipated damages for breach, measured prospectively at the time the contract was entered into, and not grossly disproportionate to the actual damages. When these conditions are met,

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27. *NPS, LLC v. Minihane*, 886 N.E.2d 670, 673 (Mass. 2008).

28. *Id.*

29. RESTATEMENT (SECOND) OF CONTRACTS § 356(1).

30. *See Anderson v. Cactus Heights Country Club*, 125 N.W.2d 491, 493–94 (S.D. 1963).

31. *Vanderbilt Univ. v. DiNardo*, 174 F.3d 751, 753 (6th Cir. 1999).

32. *Id.*

33. *Id.* at 755.

particularly the first, the parties probably intended the provision to be for liquidated damages. However, any doubt as to the character of the contract provision will be resolved in favor of finding it a penalty.<sup>34</sup>

The district court concluded that a “formula based on DiNardo’s salary to calculate liquidated damages was reasonable ‘given the nature of the unquantifiable damages in the case’” and that “parties to a contract may include consequential damages and even damages not usually awarded by law in a liquidated damage provision provided that they were contemplated by the parties.”<sup>35</sup> The district court further explained that

The potential damage to [Vanderbilt] extends far beyond the cost of merely hiring a new head football coach. It is this uncertain potentiality that the parties sought to address by providing for a sum certain to apply towards anticipated expenses and losses. It is impossible to estimate how the loss of a head football coach will affect alumni relations, public support, football ticket sales, contributions, etc. . . . As such, to require a precise formula for calculating damages resulting from the breach of contract by a college head football coach would be tantamount to barring the parties from stipulating to liquidated damages evidence in advance.<sup>36</sup>

The Sixth Circuit agreed with the district court and concluded that the stipulated damage amount was reasonable in relation to the amount of damage that could be expected to result from the breach.<sup>37</sup> The court also found that the parties understood that Vanderbilt would suffer damage should DiNardo prematurely terminate his contract, and that these actual damages would be difficult to measure.<sup>38</sup>

As a general rule, if a court upholds a liquidated damages provision, the injured party may not seek compensatory damages.<sup>39</sup> However, “[u]nless a contract provides that liquidated damages are to be the exclusive remedy for a breach, a liquidated damages provision does not preclude other relief to the non-breaching party, if the actual damages are caused by an event not

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34. *Id.* (internal citations omitted).

35. *Id.* at 755–56 (quoting *Vanderbilt Univ. v. DiNardo*, 974 F. Supp. 638, 642 (M.D. Tenn. 1997)).

36. *Vanderbilt*, 974 F. Supp. at 642.

37. *Vanderbilt*, 174 F.3d at 757

38. *Id.*

39. *See Harris v. Conrad*, No. 7251, 1984 WL 21876, at \*4 (Del. Ch. Sept. 18, 1984).

contemplated by the parties in the liquidated damages clause.”<sup>40</sup>

In order for a plaintiff to establish a breach of contract action for the recovery of liquidated damages, two requirements must be met.<sup>41</sup> First, the amount that was agreed upon by the parties must be a reasonable estimation of compensatory damages in the event of a breach; second, the damages for a contractual breach must have been difficult to determine at the time the contract was formed.<sup>42</sup> If the two requirements are met, the plaintiff is entitled to receive liquidated damages even if no actual money or pecuniary damages were suffered.<sup>43</sup> If a court finds that the sum that was stipulated is not rationally related to the measure of damages that the injured party may have sustained as a result of a breach, a liquidated damages provision will be deemed a penalty and subsequently struck down for violating public policy.<sup>44</sup>

The coach and university will stipulate that the payments received for termination without cause are agreed upon payments that constitute liquidated damages, are not a penalty, were bargained for at arm’s length between the parties, and were reasonable. Several examples include:

- WILLIAMS - University of North Carolina at Chapel Hill: “The parties have bargained for this liquidated damages provision, giving consideration to the following: (a) this is an agreement for personal services; and (b) the parties recognize that a termination of this Agreement by UNIVERSITY prior to its natural expiration could cause COACH to lose benefits, compensation, and/or outside compensation relating to his employment at UNIVERSITY, which damages are difficult to determine with certainty. Therefore, the parties have agreed upon this liquidated damages provision.”<sup>45</sup>

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40. *Draper v. Westwood Dev. Partners*, No. CIV. A. 4428–MG, 2010 WL 2432896, at \*3 (Del. Ch. June 3, 2010; revised June 16, 2010) (citation omitted).

41. *See JKC Holding Co. v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 467–68 (4th Cir. 2001) (holding that the liquidated damages clause was enforceable because the damages were difficult to ascertain at the time the agreement was entered into and the amount agreed upon was “not plainly disproportionate to the injury”).

42. *See Guthy-Renker Corp. v. Bernstein*, 39 F. App’x 584, 586 (9th Cir. 2002) (noting that under California law “[a] liquidated damages clause will be . . . unenforceable . . . ‘if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach.’”) (quoting *Ridgley v. Topa Thrift & Loan Ass’n*, 953 P.2d 484, 488 (Cal. 1998)).

43. *See id.*

44. *See S.H. Deliveries, Inc. v. TriState Courier & Carriage, Inc.*, No. 96C-02-086-WTQ, 1997 WL 817883, at \*2 (Del. Super. Ct. May 21, 1997) (citing 22 AM. JUR. 2D *Damages* § 683 (1965)); *Meyer Ventures, Inc. v. Barnak*, No. 11502, 1990 WL 172648, at \*5 (Del. Ch. Nov. 2, 1990).

45. Amendment to Coaching Contract between Roy A. Williams and Univ. of N.C. at Chapel

- SABAN - University of Alabama: “The parties have bargained for and agreed to the foregoing liquidated damages provision, giving consideration to the fact that termination of this Contract by the University without cause prior to its expiration may cause the Employee to lose certain benefits and incentives, supplemental compensation, or other athletically-related compensation associated with Employee’s employment at the University, which damages are extremely difficult to determine with certainty or fairly or adequately. The parties further agree that the payment of such Liquidated Damages by the University and acceptance thereof by the Employee shall constitute adequate and reasonable compensation to the Employee for the damages and injuries suffered by the Employee because of such termination by the University. The foregoing shall not be, nor be construed to be, a penalty.”<sup>46</sup>
- KELLY - University of Oregon (contract terminated by coach): “The parties have bargained for and agreed to the foregoing liquidated damages provisions giving consideration to the fact that termination of this Agreement or any extension thereof by University without cause prior to such agreement’s expiration date may precipitate or lead to Kelly losing certain salary, benefits, compensation or other economic advantages or income related to his employment at the University, which damages are extremely difficult to determine fairly, adequately, or with certainty. The parties further agree that the payment of such liquidated damages by University and acceptance thereof by Kelly shall constitute sufficient, adequate and reasonable compensation to Kelly for any loss, damages or injury suffered by Kelly related to such termination by University. The foregoing shall not be, nor be construed to be, a penalty. The provisions of this Section 6.02 shall be without prejudice to any other right (excluding unemployment compensation) Kelly may have under applicable law.”<sup>47</sup>

4. Waiver and Release of Liability. Upon the conclusion of the payment of the amount agreed to as liquidated damages, the coach will release the university from any and all further damages. Several examples include:

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Hill ¶ XI (Oct. 31, 2011) (on file with author).

46. Saban Contract, *supra* note 12, ¶ 5.01(e).

47. Coaching Contract between Charles “Chip” Kelly and Univ. of Or. ¶ 6.02(b) (Sept. 27, 2010) (on file with author) [hereinafter Kelly Contract].

- SABAN - University of Alabama: “University shall have no liability whatsoever to Employee, nor shall Employee be entitled to receive, and Employee hereby waives any claim that Employee or Employee’s personal representatives may have against the University or the University’s trustees, officers, employees, or agents, for any direct or consequential damages . . . .”<sup>48</sup>
- PELINI - University of Nebraska: “Upon payment of such liquidated damages to Coach, Coach does hereby waive and release the University, its Board members, administrators, employees and agents, from any and all claims of any nature whatsoever, which may arise by reason of such termination, including, but not limited to any benefits of employment or other income which may accrue to Coach by reason of Coach’s position as Head Football Coach.”<sup>49</sup>
- CREAN - Indiana University: “The Employee agrees that as a condition of receiving any post termination compensation under Section 6.02:1, except for earned but unpaid compensation to the date of termination and any legally protected rights the Employee has under any employee benefit plan, the Employee must execute a comprehensive release in the form determined from time to time by the University in its sole discretion[.] Generally, the release will require the University, the Employee (and his estate), administrators, successors, heirs, distributees, devisees, legatees and assigns to release and forever discharge the University and its trustees, officers,[] directors, agents, attorney, successors and assigns from any and all claims, suits and/or causes of action that grow out of or are in any way related to[] the Employee’s employment with the University. This release may include but shall not be limited to any claim that the University violated the Age Discrimination in Employment Act; the Older Worker’s Benefit Protection Act; the Americans with Disabilities Act; Title VTI of the Civil Rights Act of 1965 (as amended); the Family and Medical Leave Act; any state, federal law or local ordinance prohibiting discrimination, harassment or retaliation in employment; any claim for wrongful discharge in violation of public policy, claims of promissory estoppel or detrimental reliance, defamation, intentional infliction of emotional distress; breach of contract; the public policy of any state; or any federal,

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48. Saban Contract, *supra* note 12, ¶ 5.01(f).

49. Pelini Contract, *supra* note 15, ¶ 14(c).

state or local law relating to any matter contemplated by this Agreement[.] Upon termination of employment with the University, the Employee will be presented with a release and, if the Employee fails to execute the release, the Employee agrees to forfeit any payment from the University. The Employee acknowledges that he is an experienced person knowledgeable about the claims that might arise in the course of employment with the University and knowingly agrees that the payments upon termination provided for in this Agreement are satisfactory consideration for the release of all possible claims described in the release.”<sup>50</sup>

- HOWLAND - University of California, Los Angeles (UCLA) (terminated): “Coach’s right to payment under this Paragraph 12 is subject to the express understanding that Coach shall bring no claim or lawsuit of any kind against University or its employees or agents which arises out of or is in any way related to termination of his employment under this Paragraph 12, or his employment (except any claim for worker’s compensation or enforcement of Coach’s right to payment under this Paragraph 12), regardless of when such termination may take place. In the event that Coach brings such a claim or lawsuit, all obligations of University under this Paragraph 12 shall cease, and Coach shall repay, forthwith and in full, any and all post-termination payments received by him from University under this Paragraph 12[.]”<sup>51</sup>
- DONOVAN - University of Florida: “Coach . . . hereby waives any claim . . . for consequential damages allegedly sustained by reason of any alleged economic loss, including, without limitation, loss of collateral income, loss of earning capacity, loss of business opportunity, loss of perquisites, loss of speech, camp or other outside activity fees, or expectation income, or damages allegedly sustained by or by reason of alleged humiliation or defamation resulting from the fact of termination or suspension, the public announcement thereof or the release by Association, University or Coach of information or documents required to be released by law. Coach acknowledges that in the event of termination of this Agreement for cause, without cause or otherwise, or suspension hereunder, he shall have no right to occupy the position of head

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50. Crean Contract, *supra* note 16, ¶ 6.02(H).

51. Coaching Contract between Ben Howland and Univ. of Cal., L.A. ¶ 12(d) (June 1, 2008) (on file with author) [hereinafter Howland Contract].

basketball Coach and that his sole remedies are provided herein and shall not extend to injunctive relief. Coach further acknowledges that he has no expectation of the granting of tenure by University.”<sup>52</sup>

- CHIZIK - Auburn University (terminated): “Coach acknowledges that in the event of termination of this Agreement he shall have no right to occupy the position of Head Football Coach and that his sole remedies are provided herein and shall not extend to injunctive relief. Coach acknowledges that he has no expectation of tenure. Coach acknowledges that as part of this Agreement, he forfeits all rights he might have to file a grievance under University policy related in any way to his termination, and University acknowledges that it will not assert in subsequent proceedings that Coach’s forfeiture of these rights results in his failure to exhaust any administrative remedies.”<sup>53</sup>

5. Continuation of Benefits. A termination without cause provision makes clear that the only amounts that the coach is entitled to receive are those amounts specifically enumerated as liquidated damages. University benefits, with some exception, normally will cease upon the payment of liquidation of damages.<sup>54</sup> Some examples follow:

- HOWLAND - UCLA (terminated): “Coach understands and agrees that any payments made to him as a result of a Termination Without Cause shall not entitle him to the continuation of University employee benefits, including, without limitation, the accruing of additional UCRS service credit, except as such benefits are required by law for former employees, such as COBRA, or such benefits as shall have vested as of the date of such termination.”<sup>55</sup>
- SABAN - University of Alabama: “Employee will be entitled to continue such life or health insurance benefits at Employee’s own expense as required or permitted by law . . . .”<sup>56</sup>
- CALIPARI - University of Kentucky: “Coach will be entitled to continue such benefits at Coach’s own expense as required or

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52. Amendment to Coaching Contract between William J. Donovan and Univ. of Fla. ¶ 14(E) (Apr. 16, 2003) (on file with author).

53. Coaching Contract between Gene Chizik and Auburn Univ. ¶ 20 (Dec. 15, 2008) (on file with author) [hereinafter Chizik Contract].

54. Saban Contract, *supra* note 12, ¶ 5.01(d).

55. Howland Contract, *supra* note 51, ¶ 12(e).

56. Saban Contract, *supra* note 12, ¶ 5.01(d).

permitted by law, but Coach will not otherwise be entitled to any employment or other benefit described herein. Health insurance however shall continue in full force and effect at University's expense for ninety (90) days after date of termination or until Coach is employed, whichever occurs first."<sup>57</sup>

- ERICKSON - Arizona State University (terminated): "All fringe benefits furnished by the University will terminate on the date of termination of this Contract."<sup>58</sup>
- RYAN - University of Wisconsin: "In either event, Coach will be entitled to continue his health insurance plan at his own expense for up to thirty-four (34) months from the effective date of termination, but will not be entitled to any other employee benefits, except as otherwise provided herein or required by applicable law. As permitted by Wisconsin law, Coach may secure a conversion policy for his UW group term life insurance."<sup>59</sup>

6. Withholding. A termination without cause provision may require the university to continue to withhold state and federal taxes or other deductions from the coach's paycheck in just the same way as though the coach was still employed. Several examples follow:

- CREAN - Indiana University: "[T]his amount will be payable in monthly installments with appropriate withholding and deductions for taxes and other matters required by law."<sup>60</sup>
- MILLER - University of Arizona: "The payment by the University under this section will be subject to such withholdings as may be required by applicable state and federal laws as determined by the University."<sup>61</sup>
- FISHER - Florida State University: "[T]he University shall pay Coach . . . , less required deductions and applicable withholdings for federal, state, and local taxes . . . ."<sup>62</sup>

7. Interest. While most contracts are silent in this regard, a contract may specify that no interest will be paid on the accruing liquidated damage

57. Calipari Contract, *supra* note 13, ¶ 7(b).

58. Coaching Contract between Dennis Erickson and Ariz. State Univ. ¶ 15 (June 11, 2007) (on file with author).

59. Ryan Contract, *supra* note 21, ¶ V(A)(3).

60. Crean Contract, *supra* note 16, ¶ 6.02(f).

61. Miller Contract, *supra* note 17, ¶ 18.

62. Coaching Contract between John J. Fisher, Jr. and Fla. State Univ. ¶ III(A) (Jan. 5, 2010) (on file with author).



obligations. Specifically, the contract between the University of Oregon and Chip Kelly indicated that the university's obligation shall not accrue interest so long as the payments are not in arrears or in default.<sup>63</sup>

8. Reassignment. In some coaches' contracts, the termination without cause provision will specify that the university does not have the right to reassign the coach to any other position in the event of a termination without cause. Several examples follow:

- PELINI - University of Nebraska: "The position of Head Football Coach is unique and requires special talents and skills. As such, it is the only position for which Coach is being employed, and the University shall not have the right to re-assign Coach to any other position [in the event that it terminates his contract for reasons other than for cause]."<sup>64</sup>
- RHOADS - Iowa State University: "University agrees that it does not have the power to reassign Rhoads to another position without his prior written consent."<sup>65</sup>
- MCCAFFERY - University of Iowa: "In such event, Coach will not be reassigned to any other position within the Department of Athletics."<sup>66</sup>
- ROBINSON - Oregon State University: "University waives its rights to reassign COACH as provided in OAR 580-021-0318."<sup>67</sup>
- WALKER - New Mexico State University (contract terminated by coach): "Head Football Coach agrees that Athletics Director may, at any time and with reasonable evidence of misconduct without cause or the necessity of any hearing, reassign Head Football Coach to other positions with different duties than those as Head Football Coach of University's football program, without reduction in Head Football Coach's wages and benefits specified in Section 3 only. Benefits set forth in Section 4, if any, shall terminate effective upon reassignment unless otherwise agreed upon by the parties. Prior to any reassignment, there shall be a meeting between the Head Football Coach and the President of the

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63. Kelly Contract, *supra* note 47, ¶ 6.02(b).

64. Pelini Contract, *supra* note 15, ¶ 14(a).

65. Coaching Contract between Paul Rhoads and Iowa State Univ. ¶ V(10), (Dec. 20, 2008) (on file with author).

66. Coaching Contract between Francis John McCaffery and Univ. of Iowa ¶ 10 (Mar. 29, 2010) (on file with author) [hereinafter McCaffery Contract].

67. Coaching Contract between Craig Robinson and Or. State Univ. ¶ 16 (Apr. 6, 2008) (on file with author) [hereinafter Robinson Contract].

University to discuss the matter. After such meeting the President and Athletics Director shall confer and determine whether a reassignment shall occur. In the event the decision is made to reassign Head Football Coach, then the Head Football Coach shall have the right to accept such reassignment or terminate this Agreement. Should Head Football Coach decide to terminate this Agreement, he shall be entitled to receive payment of fifty percent (50%) of the value of his salary for the remaining term of the Agreement.”<sup>68</sup>

9. Death or Disability. Some termination without cause provisions address the issue as to what happens with respect to liquidated damages payments in the event that a coach dies or becomes disabled during the period of payment of liquidated damages and the continued duty and obligation to mitigate. Some examples follow:

- PELINI - University of Nebraska: “In case of Coach’s death, the University’s obligations under this section 14 shall cease effective on the last day of the month in which Coach dies.”<sup>69</sup>
- LONDON - University of Virginia: “No payment shall be payable following the Coach’s death or during a period of any incarceration or other condition precluding the Coach from actively seeking to mitigate as above provided.”<sup>70</sup>
- RYAN - University of Wisconsin: “If University terminates this Agreement without cause pursuant to Article V., Section A.2.(b), University shall pay to Coach, or to Coach’s estate or designated beneficiary should Coach die after termination but during the payment period, as liquidated damages . . . .”<sup>71</sup>

10. No Liability for Collateral Benefits. Oftentimes, a termination without cause provision will indicate that the amounts stated as liquidated damages are the only amounts that the coach will receive. As a result, the coach will receive no other collateral benefits as provided in the contract. Several examples follow:

- SABAN - University of Alabama: “University shall have no liability whatsoever to Employee, nor shall Employee be entitled to receive, and Employee hereby waives any claim that Employee

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68. Coaching Contract between DeWayne Walker and N.M. State Univ. ¶ 14 (Jan. 1, 2009) (on file with author).

69. Pelini Contract, *supra* note 15, ¶ 14(a).

70. Coaching Contract between Mike London and Univ. of Va. ¶ 7.3(2) (Dec 8, 2009) (on file with author) [hereinafter London Contract].

71. Ryan Contract, *supra* note 21, ¶ V(A)(3).

or Employee's personal representatives may have against the University or the University's trustees, officers, employees, or agents, for any direct or consequential damages by reason of any alleged economic loss, including, but without limitation, loss of collateral income, talent fees, earning capacity, business opportunities, incentive and supplemental income, benefits, or perquisites, including those described in Sections 4.02 and 4.03 hereof, or Commercial Activities income or fees or by reason of alleged humiliation or defamation resulting from the fact of termination or suspension, the public announcement thereof, or the University's release of information or documents required by law. Employee acknowledges that in the event of the termination of this Contract for cause, without cause, or otherwise, Employee shall have no right to occupy the position of head football coach and Employee's sole remedies are provided for herein and shall not extend to injunctive relief."<sup>72</sup>

- CREAN - Indiana University: "In addition, in no case shall the University be liable to the Employee for the loss of any collateral business opportunities or any other benefits, perquisites or income resulting from activities such as but not limited to camps, clinics, media appearances, radio, television, Internet, marketing and promotional services, apparel or shoe [sic] contracts, basketball or equipment agreements, consulting relationships or from[] other sources that might produce promotional or outside income[.]"<sup>73</sup>
- KELLY - University of Oregon (contract terminated by coach): "In no case shall University or the State of Oregon be liable for the loss of any collateral business opportunities or any other benefits (including unemployment compensation), or perquisites or income resulting from activities such as but not limited to, camps, clinics, media appearances, broadcast talent fees, consulting relationships or from any other (inside-the-University or outside-the-University) sources that may ensue as a result of University's termination of this Agreement without cause."<sup>74</sup>
- HOKE - University of Michigan: "In no case shall the University be liable for the loss of any base salary, additional compensation, bonus payments, deferred compensation, collateral business opportunities or any other benefits, perquisites or income resulting

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72. Saban Contract, *supra* note 12, ¶ 5.01(f).

73. Crean Contract, *supra* note 16, ¶ 6.02(I).

74. Kelly Contract, *supra* note 47, ¶ 6.02(b).

from activities such as, but not limited to, camps, clinics, media appearances, television or radio shows, apparel or shoe contracts, consulting relationships or from any other sources that may ensue as a result of the University's termination without cause of Head Coach's employment under this Agreement."<sup>75</sup>

- GOTTFRIED - North Carolina State University (NC State): "In the event NC STATE exercises its right to terminate the Agreement without Cause, NC STATE shall not be obligated to pay COACH any other compensation described in the Agreement (except as detailed to the contrary herein) or be responsible for consequential damages, including, but not limited to any loss of business opportunities or loss of other income, benefits, or perquisites from any sources, that might occur as a result of such termination."<sup>76</sup>

11. Records Return. With this provision, the coach, upon termination without cause, is contractually required to return certain records and information to the university within a designated time period. Some examples follow:

- MEYER - Ohio State University: "All materials or articles of information, including, without limitation, personnel records, recruiting records, Team information, films, statistics or any other material or data, furnished to Coach by Ohio State or developed by Coach on behalf of Ohio State or at Ohio State's direction or for Ohio State's use or otherwise in connection with Coach's employment hereunder are and shall remain the sole property of Ohio State. Within seventy-two (72) hours of the expiration of the term of this agreement or its earlier termination as provided herein, Coach shall immediately cause any such materials in his possession or control, including, but not limited to, all Ohio State building/facility keys, Ohio State issued credit cards, telephones and computers (including all other Ohio State issued technological devices) to be delivered to Ohio State."<sup>77</sup>
- PELINI - University of Nebraska: "All documents, files, records, materials (in any format, including electronically stored

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75. Coaching Contract between Brady Hoke and Univ. of Mich. ¶ 4.01(d) (Mar. 28, 2011) (on file with author) [hereinafter Hoke Contract].

76. Coaching Contract between Mark Gottfried and N.C. State Univ. ¶ XIII(A) (Apr. 21, 2011) (on file with author) [hereinafter Gottfried Contract].

77. Coaching Contract between Urban F. Meyer and Ohio State Univ. ¶ 5.4 (Nov. 28, 2011) (on file with author) [hereinafter Meyer Contract].

information), equipment or other property, including without limitation, personnel records, recruiting records, team information, athletic equipment, films, statistics, keys, credit cards, laptop computers, software programs, electronic communication devices, and any other material, data or property, furnished to Coach by the University or developed or acquired by Coach on behalf of the University or at the expense of the University or using University resources or otherwise in connection with Coach's employment by the University are and shall remain the sole property of the University. Within ten (10) days of termination or separation of Coach's University employment, for any reason, Coach shall cause any such materials in Coach's possession or control to be delivered to the University. The foregoing provisions of this section shall not apply to personal notes, personal playbooks, memorabilia, diaries and similar personal records of Coach, which Coach is entitled to retain."<sup>78</sup>

- FERENTZ - University of Iowa: "All materials or articles of information including, without limitation, personnel records, recruiting records, team information, films, statistics or any other material furnished to the Coach by the University or developed by the Coach on behalf of the University or at the University's direction or for the University's use or otherwise in connection with the Coach's employment hereunder are and shall remain the property of the University. In the event of the Coach's termination as provided herein, the Coach shall immediately cause any such materials to be delivered to the University."<sup>79</sup>

12. No Obligation to Mitigate. Some contracts, upon the acceptance of amounts stated as liquidated damages, indicate that the coach has absolutely no further obligation to mitigate. Some examples follow:

- MILLER - University of Arizona: "The amount of liquidated damages bargained for in this Contract shall not be reduced if Coach retains other employment."<sup>80</sup>
- WHITTINGHAM - University of Utah: "Coach Whittingham shall have no obligation to mitigate damages if this Agreement is terminated by the University without cause."<sup>81</sup>

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78. Pelini Contract, *supra* note 15, ¶ 11.

79. Coaching Contract between Kirk J. Ferentz and Univ. of Iowa ¶ 12 (Feb. 1, 2010) (on file with author).

80. Miller Contract, *supra* note 17, ¶ 18.

81. Coaching Contract between Kyle Whittingham and Univ. of Utah ¶ 8(B) (Dec. 29, 2008)

- MCCAFFERY - University of Iowa: “Accordingly, the parties agree to this liquidated damage provision, and the parties agree that Coach shall have no duty to mitigate such damages.”<sup>82</sup>
- HUGGINS - University of West Virginia: “Coach shall have no duty to mitigate, nor shall University have any right of offset.”<sup>83</sup>
- PEARL - University of Tennessee (terminated): “If the University terminates this Agreement pursuant to the terms of this Article XV(D), the buy-out payments made to Coach Pearl shall not be subject to mitigation and shall not terminate or be reduced should Coach Pearl obtain other employment. Coach Pearl shall not be obligated to obtain other employment.”<sup>84</sup>

In some contracts, the termination without cause provision will contain a lump sum buyout, and therefore not require any stipulation that the coach will mitigate damages. Some examples follow:

- MEYER - Ohio State University:  

<u>“Date of Notice of Termination:”</u>	<u>Buy-Out Amount*</u>
At any time after contract execution but on or before January 31, 2014	\$15,375,127
Between February 1, 2014 - January 31, 2015	\$11,931,731
Between February 1, 2015 - January 31, 2016	\$8,683,244
Between February 1, 2016 - January 31, 2017	\$5,618,634
Between February 1, 2017 - January 31, 2018	\$2,727,492

Such payment shall be made in a lump sum on the sixtieth (60th) day after the effective date of termination.”<sup>85</sup>

- JONES - University of Cincinnati (contract terminated by coach): “The University reserves the right to terminate this Agreement without cause at any time prior to its expiration by giving Coach thirty (30) days written notice. In the event the University terminates this Agreement without cause, it agrees to pay to Coach, as liquidated damages in full satisfaction of its obligation to Coach under this Agreement, the following:

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(on file with author).

82. McCaffery Contract, *supra* note 66, ¶ 10.

83. Coaching Contract between Robert E. Huggins and W. Va. Univ. ¶ V(D)(1) (May 1, 2008) (on file with author).

84. Coaching Contract between Bruce Pearl and Univ. of Tenn. art. XV(D) (Oct. 13, 2005) (on file with author).

85. Meyer Contract, *supra* note 77, ¶ 5.2.

<u>Date of Termination</u>	<u>Liquidated Damages</u>
Before January 31, 2011	\$2,500,000
Before January 31, 2012	\$2,000,000
Before January 31, 2013	\$1,750,000
Before January 31, 2014	\$1,500,000
After January 31, 2014	\$1,000,000

The appropriate payment will be made within thirty (30) days of termination.”<sup>86</sup>

- SELF – University of Kansas: “In the event that Head Coach’s employment is terminated without cause, [University] shall pay Head Coach as liquidated damages, the remaining amount owed to Head Coach under Sections 3 (Salary) and Section 8 (Professional Services) for the balance of the contract period as well as all payments as provided for under the terms of Section 4 of the Retention Agreement dated April 1, 2008 . . . and should be due and payable within sixty (60) days following Head Coach’s termination.”<sup>87</sup>

13. Limitation on Amount. Some termination without cause provisions will limit the amount of liquidated damages the university is required to pay. Some examples follow:

- O’LEARY - University of Central Florida: “The Association’s liability for total payments made to Coach and George O’Leary Enterprises, Inc. pursuant to Paragraphs 9.2 (A) and (B) above shall be limited to a maximum cumulative amount of Five Million Dollars, (\$5,000,000), paid as liquidated damages for termination of this Agreement by the Association without cause. In addition, no more than \$1M[illion] shall be paid to Coach in any single year after the year of termination.”<sup>88</sup>
- MILES - LSU: “Upon termination of COACH’S employment without cause during the term or extended term of this Agreement, the amount of liquidated damages due COACH shall not exceed Eighteen Million Seven Hundred Fifty Thousand Dollars (\$18,750,000).”<sup>89</sup>

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86. Coaching Contract between Lyle “Butch” Jones and Univ. of Cincinnati ¶ 5(b) (Dec. 16, 2009) (on file with author).

87. Self Contract, *supra* note 19, ¶ 12.

88. Coaching Contract between George J. O’Leary and Univ. of Cent. Fla. ¶ 9.2(C) (July 1, 2006) (on file with author) [hereinafter O’Leary Contract].

89. Amendment to Coaching Contract between Les Miles and La. State Univ. ¶ 13(A) (Mar. 14, 2008) (on file with author).

14. Resignation Considered Termination Without Cause. A negotiated resignation in some instances will be considered a termination without cause:

- STOOPS - University of Arizona (terminated): “[A]t any time when no grounds exist for termination for cause under Paragraph 17, ‘termination without cause’ shall include a nominal resignation made under circumstances when the Coach has been explicitly notified by the Director of Athletics or the President of the University that he would be terminated if he did not resign; and such a nominal resignation shall not be considered to be termination by the Coach under Paragraph 19 [Termination by Coach] but shall be considered termination by University without cause and shall be subject to this paragraph 18.”<sup>90</sup>

Depending on which terms are included and how they are written, termination without cause provisions may work for or against either a coach or university. As such, it is necessary to determine the parties’ needs and expectations to draft the most effective contract.

### III. TERMINATION WITHOUT CAUSE: BEST PRACTICES

In reviewing numerous coaches’ contracts, it is apparent what a well-drafted termination without cause provision must contain in order to adequately answer some of the issues that are necessary to its interpretation and implementation. These provisions include:

1. Written Notice. The university should give written notice of the university’s intent to terminate the contract without cause and the effective date of the termination.

2. Payment Amount and Format. The provision should contain with specificity the amount and the format in which the coach is to be paid by the university along with the time frame that such payment should be made. The provision should also specify the maximum amount the university will pay as liquidated damages.

3. Liquidated Damages. The university and coach must stipulate that the amount of liquidated damages was bargained for, agreed to, and does not constitute a penalty. The contract should also stipulate that the amount constitutes reasonable and adequate compensation for the damages suffered by the coach by virtue of said termination without cause.

4. Release. Upon the payment of the contracted amount, the coach should release, either as part of the contract or by virtue of a separate agreement, the

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90. Coaching Contract between Michael Stoops and Univ. of Ariz. ¶ 18 (Dec. 1, 2003) (on file with author).



university from any further liability or responsibility.

5. Benefits. The contract should clearly specify which, if any, benefits provided for by either the university or by the contract continue or cease as a result of the termination without cause.

6. Withholding. The provision should specify whether the university will continue to withhold state and federal taxes or other deductions much in the same way as though the coach was still being paid as if he was an employee.

7. Interest upon Default. The contract provisions should specify what occurs in the event that the university fails or breaches its obligation. This provision may include the payment of a specified amount of interest on accruing obligations, the installment obligations becoming accelerated in the event of default or breach, and the payment of attorney fees by the university in the event of a collection action or a lawsuit.

8. Reassignment. The provision should state that the university has no right to reassign the coach to another position in the event it determines to terminate the coach without cause.

9. Death or Disability. The contract provision should state with specificity what occurs in the event the coach either dies or becomes disabled during the period of payment of liquidated damages and cannot fulfill his obligation to mitigate damages.

10. Collateral Benefits. The provision should specifically indicate that liquidated damages are the only damages that the coach will be paid under the termination without cause provision and that any and all collateral benefits such as incentives, supplemental income, perquisites, and the like cease to accrue or be paid upon termination.

11. Records Return. The provision will require the coach to return any and all documents, files, records, and materials, whether in paper or electronic format, to the university upon the occurrence of a termination without cause.

12. Resignation. Sometimes the coach and university will negotiate a resignation as being the public perception of a termination without cause. The contract should indicate that substance over form will dictate and that the termination without cause provision will prevail in the event of a resignation.

13. Obligation to Mitigate. The provision may require a lump sum payment as liquidated damages. If the provision provides for such, it should indicate that, as a result, the coach has no obligation to mitigate. The coach may also receive installment payments, and mitigation may not be required; in this case, and a statement of no obligation should be clearly stated.

When a coach without a contractual obligation to mitigate damages is terminated before the expiration of his or her contract, the university may be left with an enormous financial burden. In these instances, the university may

consider looking to common law mitigation of damages principles for a solution to its financial woes.

#### IV. LEGAL PRINCIPLES FOR MITIGATION OF DAMAGES IN EMPLOYMENT CASES

Aside from the high salaries and national prestige of high-profile collegiate coaches, they are just employees governed by employment law principles. Thus, an exploration of mitigation of damages principles within the employment context will help a university understand how to further protect itself contractually.

##### *A. Definition and Purpose*

The doctrine of mitigation of damages, which has been recognized by every jurisdiction, requires the plaintiff, after an injury or breach of contract, to make reasonable efforts to alleviate the effects of the injury or breach.<sup>91</sup> More specifically, a plaintiff may not recover certain avoidable damages when he fails to take reasonable actions after an injury occurred.<sup>92</sup> The plaintiff is not required to make extraordinary efforts, which may cause an unreasonable burden, to ensure no damages are ultimately suffered.<sup>93</sup> Efforts that are undertaken by the non-breaching party to mitigate damages do not need to be successful as long as they are reasonable.<sup>94</sup>

The purpose of the doctrine of mitigation of damages is to avoid economic and physical waste and to avoid further harm by making it incumbent upon the injured party to take affirmative steps to reduce, avoid, or mitigate his loss.<sup>95</sup> The affirmative obligation to mitigate is a condition precedent to receiving agreed upon damages.<sup>96</sup>

##### *B. Reasonable Good Faith Efforts*

In regard to a breach of an employment contract, an employee who can establish the fact that he suffered a compensable injury as a result of being terminated must take reasonable steps to mitigate damages by making reasonable efforts to obtain and maintain comparable employment.<sup>97</sup>

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91. See RESTATEMENT (SECOND) OF CONTRACTS § 350(1) (1981).

92. *Id.* § 350(1) cmt. b.

93. *Id.*

94. *Id.*

95. *Id.* § 350 cmt. a.

96. See *id.* § 350 cmt. b.

97. *Wilson v. Union Pac. R.R.*, 56 F.3d 1226, 1232 (10th Cir. 1995).

There are several factors that may be considered in attempting to determine if an employee has demonstrated a good faith effort to obtain comparable employment:

- Did the employee create documentation of all job search activity, including records of résumés sent, advertisements responded to, phone logs, mail logs, and employment events attended?<sup>98</sup>
- Did the employee document all expenses of the job search, which can be elements in the recovery?<sup>99</sup>
- Did the employee demonstrate the reasonableness of the scope of the search?<sup>100</sup>
- Did the employee expand the types of employment considered as time passed?<sup>101</sup>
- Did the employee consult with employment services and counselors?<sup>102</sup>
- Did the employee discuss job opportunities with friends and acquaintances?<sup>103</sup>
- How much time did the employee devote to the task of finding comparable employment?<sup>104</sup>
- What was the availability of comparable positions in the relevant job market?<sup>105</sup>
- Did the employee pursue all known comparable employment opportunities in the relevant job market?<sup>106</sup>
- How many job applications were submitted by the employee?<sup>107</sup>
- A decision by the employee to become self-employed.<sup>108</sup> However, self-employment must be a “reasonable alternative to finding other comparable employment.”<sup>109</sup>

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98. See *Bannister v. Bemis Co.*, 556 F.3d 882, 886–87 (8th Cir. 2009).

99. See Michael B. Kelly, *Living Without the Avoidable Consequences Doctrine in Contract Remedies*, 33 SAN DIEGO L. REV. 175, 183 (1996).

100. See *Pacesetter Corp. v. Barrickman*, 885 S.W.2d 256, 263 (Tex. App. 1994).

101. See *Hayes v. Yale-New Haven Hosp.*, 844 A.2d 258, 285 (Conn. Super. Ct. 2001).

102. See *Labriola v. Pollard Grp., Inc.*, 100 P.3d 791, 797 (Wash. 2004).

103. See *Trainor v. Hei Hospitality, LLC*, 699 F.3d 19, 30 (1st Cir. 2012).

104. See *Hayes*, 844 A.2d at 285.

105. See *Hertz Equip. Rental Corp. v. Barousse*, 365 S.W.3d 46, 59 (Tex. App. 2011).

106. See *Booker v. Taylor Milk Co.*, 64 F.3d 860, 864 (3d Cir. 1995).

107. See *Kiely v. Heartland Rehab. Servs.*, 360 F. Supp. 2d 851, 858 (E.D. Mich. 2005).

108. See *Smith v. Great Am. Rests., Inc.*, 969 F.2d 430, 438 (7th Cir. 1992).

109. See *id.*

- A decision by the employee to attend school.<sup>110</sup>

Idleness will not satisfy the duty to mitigate damages.<sup>111</sup> Accordingly, “the reasonableness of the effort [undertaken by the plaintiff] to find substantially equivalent employment should be evaluated in light of the individual’s background and experience and the relevant job market.”<sup>112</sup> Currently, employment law does not have a specified duration of time for which an employee must conduct a job search in order for it to be considered “reasonably diligent.”<sup>113</sup> However, for the purposes of adequately mitigating damages, the plaintiff should “continue a vigorous search, even if it means reapplying to employers for jobs that may have opened in the interim following initial applications, and to document the search with care.”<sup>114</sup>

### C. Comparable Employment

An individual has the right to select his own line of work, profession, or calling and will not be required to seek employment outside of the scope of his chosen field in order to mitigate damages that may be sustained as a result of a termination of his employment contract.<sup>115</sup> A terminated employee has a duty to mitigate damages by accepting employment that is found to be similar to the employment that was expected by his contract.<sup>116</sup> “However, a plaintiff’s duty to mitigate his damages is not met by using reasonable diligence to obtain *any* employment; the employment must be substantially equivalent employment.”<sup>117</sup>

The employee within this context is not required to mitigate damages by accepting employment that is found to be within the same general field of work that was previously held by the employee but that is outside of his

110. See *Dailey v. Societe Generale*, 108 F.3d 451, 457 (2d Cir. 1997).

111. See *In re Davidson*, 978 A.2d 1, 5 (Vt. 2009).

112. *Id.* at 5 (quoting *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985)).

113. See 7 EMPLOYMENT COORDINATOR § 72:45 (2013).

114. 2 EMPLOYMENT DISCRIMINATION COORDINATOR § 62:72 (2013).

115. See *Mason Cnty. Bd. of Educ. v. State Superintendent of Sch.*, 295 S.E.2d 719, 723–26 (W. Va. 1982).

116. *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791, 815 (W. Va. 2009) (“Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.”) (quoting *Mason Cnty. Bd. of Educ.*, 295 S.E.2d at 719–20) (emphasis omitted).

117. *Finch v. Hercules Inc.*, 941 F. Supp. 1395, 1421 (D. Del. 1996) (citing *Booker v. Taylor Milk Co.*, 64 F.3d 860, 866 (3d Cir. 1995)).

specialized area.<sup>118</sup> Therefore, an employee is not required to accept employment that is not “substantially equivalent” to the employee’s prior employment.<sup>119</sup> A plaintiff, in mitigating his damages, will not be required to accept a new position that is “less favorable” in its contractual terms than his prior employment.<sup>120</sup> However, a discharged employee may have a duty to accept a paying job that is lower than the compensation that he received from his previous employment after an extended but otherwise unsuccessful search for a job.<sup>121</sup>

Two jobs are comparable or substantially similar if they are of the same nature and if the pay, benefits, and working conditions are substantially similar.<sup>122</sup> Generally, an employee will not be required to travel any distance in order to obtain new employment, although distance is one of the factors that is considered in evaluating the reasonable diligent efforts that were used by the employee.<sup>123</sup> In following that same rationale, several courts have found that discharged employees are not obligated to accept lesser employment, nor are they required to relocate to a new community.<sup>124</sup> Although this may be the general rule, this finding may be difficult in its application to coaching contracts. In order for a discharged coach to find employment that will be deemed “comparable” to mitigate his damages, he may be required to relocate to a different community and conference or even to a different state.

The duty that is placed upon a plaintiff to mitigate damages by obtaining comparable employment does not require the plaintiff to accept a position that will cause personal embarrassment or great hardship.<sup>125</sup>

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118. *Walmsley v. Brady*, 793 F. Supp. 393, 395 (D.R.I. 1992) (finding that the plaintiff, who was a trained surgical veterinarian, was not required to alter her professional career path by practicing veterinary medicine without performing an extensive amount of surgeries or by serving as an administrative veterinarian in order to mitigate damages).

119. *Vaughn v. Sabine Cnty.*, 104 F. App’x 980, 984 (5th Cir. 2004).

120. *Mallek v. City of San Benito*, 121 F.3d 993, 997 (5th Cir. 1997). In this case, a plaintiff’s duty to mitigate damages for a breach of an employment contract did “not include the duty to accept a new and different bargain with terms less favorable than those to which he had previously agreed.” *Id.*

121. *Meyer v. United Air Lines, Inc.*, 950 F. Supp. 874, 876–77 (N.D. Ill. 1997). In this case, the plaintiff failed to mitigate damages when she accepted a part-time position at one half of her former pay without conducting a search for a full-time job. *Id.*

122. *Cal. Sch. Emps. Ass’n v. Pers. Comm’n*, 106 Cal. Rptr. 283, 288–89 (Ct. App. 1973).

123. RESTATEMENT (SECOND) OF AGENCY § 455 cmt. d (1958); *Hadra v. Herman Blum Consulting Eng’rs*, 632 F.2d 1242, 1246 (5th Cir. 1980); *Salem Cmty. Sch. Corp. v. Richman*, 406 N.E.2d 269, 275 (Ind. Ct. App. 1980) (quoting *Seco Chems., Inc. v. Stewart*, 349 N.E.2d 733, 740–41 (Ind. Ct. App. 1976)).

124. *See, e.g., Moore v. Univ. of Notre Dame*, 22 F. Supp. 2d 896, 907 (N.D. Ind. 1998).

125. *Dep’t of Transp. & Pub. Facilities v. Miller*, 145 P.3d 521, 532 (Alaska 2006).

*D. Offset*

The amount of damages a terminated employee may be awarded is offset by any income received from actual post-termination employment or by the amount of income that would have been received if the employee had satisfied his obligation to mitigate damages.<sup>126</sup> An employee must use reasonable diligence to mitigate damages, and any amount that may have been earned through such efforts is offset against the damages caused by the breach.<sup>127</sup> The measure of said damages is based on “the contract price for the unexpired term less what the employee has earned, or by reasonable diligence in mitigation of damages could have earned, in other employment since the discharge.”<sup>128</sup> A discharged employee’s recovery of damages will “place the [employee] in the same economic position the [employee] would have attained if the contract had been performed.”<sup>129</sup> The duty of “mitigation places no greater burden on a non-breaching party than to make a reasonable effort to minimize loss, and a party who tries to do so, but fails, will recover the total damages owed in each case.”<sup>130</sup> Therefore, an employee who contracted for damages or has bargained for liquidated damages will receive those damages minus any monies that are earned from comparable employment or, in the alternative, monies that the employee could have earned if the employee had used reasonable diligence to obtain comparable employment after the discharge. In agreeing to a liquidated damages provision, the parties bargain in order to prevent a claim that will permit the other party to be unjustly enriched if the liquidated damages provision is enforced without offsetting the benefits received by the non-breaching party.<sup>131</sup>

*E. Burden of Proof*

The concept of a “burden of proof” is referred to as establishing by a

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126. RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b (1981).

127. *Murphy v. Gulf Consol. Int’l, Inc.*, 666 S.W.2d 383, 383 (Tex. App. 1984).

128. *Dep’t of Natural Res. v. Evans*, 493 N.E.2d 1295, 1302 (Ind. Ct. App. 1986); *Dunkin’ Donuts of Am., Inc. v. Minerva, Inc.*, 956 F.2d 1566, 1582 n. 47 (11th Cir. 1992) (“The measure of damages recoverable by an employee wrongfully discharged before the expiration of an employment contract is the wages he would have earned under the contract less what he did in fact earn or in the exercise of proper diligence might have earned in another employment.”) (quoting *Nat’l Med. Care, Inc. v. Zigelbaum*, 468 N.E.2d 868, 876 (Mass. App. Ct. 1984)).

129. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 14.4 (4th ed. 1998).

130. Lisa A. Fortin, Note, *Why There Should Be a Duty to Mitigate Liquidated Damages Clauses*, 38 *HOFSTRA L. REV.* 285, 292 (2009).

131. *Vrgora v. L.A. Unified Sch. Dist.*, 200 Cal. Rptr. 130, 135–36 (Ct. App. 1984).

preponderance of the evidence what the truth of the basic proposition is,<sup>132</sup> i.e., “the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.”<sup>133</sup> The defendant employer therefore has the burden of production and the burden of persuasion in proving a plaintiff’s failure to mitigate.<sup>134</sup>

An employee’s failure to mitigate damages appropriately may be found if an employee has not made a reasonable, diligent effort to find comparable employment.<sup>135</sup> The burden of proof is placed upon the employer to show that the employee, through the use of reasonable diligence, obtained or could have obtained employment that is similar to the employee’s abilities.<sup>136</sup> The employer is required to prove not only that the employee did not exercise reasonable efforts in his attempt to obtain employment, but the employer must also prove that suitable work was available.<sup>137</sup> The rationale for placing the burden on the employer is that the “basic principles of equity and fairness mandate that the burden of proof must remain on the employer because the employer’s illegal discharge of the employee precipitated the search for another job.”<sup>138</sup> Although the burden is placed on the employer to prove that the employee failed to mitigate damages, the employee should nonetheless be prepared to produce evidence that will demonstrate a good faith effort on the part of the employee to find suitable alternative employment.<sup>139</sup> In consideration of whether the plaintiff mitigated damages, the courts ask whether the employee acted in a “reasonable manner consistent with what an ordinarily prudent person would do in similar circumstances.”<sup>140</sup>

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132. 29 AM. JUR. 2D *Evidence* §§ 171–73 (2008).

133. *Transammonia Export Corp. v. Conserv, Inc.*, 554 F.2d 719, 723 (5th Cir. 1977) (quoting FLA. STAT. § 671.1-201(8) (1976)).

134. *Marks v. Prattco, Inc.*, 633 F.2d 1122, 1125 (5th Cir. 1981).

135. *Johnson v. Spencer Press of Maine, Inc.*, 249 F. Supp. 2d 5, 7 (D. Me. 2003) (finding that an employee failed to exercise reasonable diligence in mitigating damages).

136. *See Sellers v. Delgado Coll.*, 902 F.2d 1189, 1194–95 (5th Cir. 1990).

137. *Delliponti v. DeAngelis*, 681 A.2d 1261, 1265 (Pa. 1996) (observing that in a breach of employment contract case, the burden is on the employer to show that loss could have been avoided; the employer may do so “by proving that other substantially equivalent positions were available . . . and that [the employee] failed to use reasonable diligence in attempting to secure those positions.”) (quoting *In re Edge*, 606 A.2d 1243, 1247 (Pa. Commw. Ct. 1992)); *Lee v. Scotia Prince Cruises Ltd.*, 828 A.2d 210, 216 (Me. 2003) (finding that “[a] plaintiff has a duty to use reasonable efforts to mitigate his or her damages, but because mitigation is an affirmative defense, the burden is on the defendant to show that the plaintiff failed to take reasonable steps to mitigate damages”).

138. *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985).

139. *Id.*

140. *Shelton v. Clements*, 834 So. 2d 775, 783 (Ala. Civ. App. 2002) (quoting *Carnival Cruise Lines v. Goodin*, 535 So. 2d 98, 103 (Ala. 1988)). A party is barred from recovering for losses that were due to his failure to act reasonably. *Id.* at 783.

In order to submit a failure to mitigate damages claim to the jury, the employer must

[I]ntroduce substantial evidence that (1) there was something the plaintiff could have done to mitigate his loss, (2) requiring the plaintiff to do so was reasonable under the circumstances, (3) the plaintiff acted unreasonably in failing to undertake the mitigating activity, and (4) a causal connection exists between the plaintiff's failure to mitigate and the damages claimed.<sup>141</sup>

The employer must prove ““that, based on undisputed facts in the record, during the time in question there were substantially equivalent jobs available, which the plaintiff could have obtained, and that the plaintiff failed to use reasonable diligence in seeking one.””<sup>142</sup> Specifically, the employer must prove the earnings that the discharged employee actually earned or may have earned from alternative employment through the use of reasonable diligence during the remainder of the contract term.<sup>143</sup>

#### *F. Failure to Mitigate*

Courts have held that the failure to mitigate damages on the part of the plaintiff is an affirmative defense that must be either asserted or it will be waived on the part of the defendant.<sup>144</sup> The defendant then carries the burden of raising the mitigation issue in its pleadings.<sup>145</sup> A defendant's failure to raise mitigation may cause the defense to be considered waived.<sup>146</sup> An obligation is also placed on the defendant to sufficiently plead the defense, which will in turn put the plaintiff on notice of the defense.<sup>147</sup>

By considering the legal principles mentioned above when drafting

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141. Vasconez v. Mills, 651 N.W.2d 48, 53–54 (Iowa 2002) (citing Greenwood v. Mitchell, 621 N.W.2d 200, 205 (Iowa 2001)) (holding that a defendant asserting a failure to mitigate damages claim on the part of the plaintiff holds the burden of proving the elements of the defense).

142. Hughes v. Mayoral, 721 F. Supp. 2d 947, 967 (D. Haw. 2010) (quoting Odima v. Westin Tuscon Hotel, 53 F.3d 1484, 1497 (9th Cir. 1995)).

143. Juvenile Diabetes Research Found. v. Rievman, 370 So. 2d 33, 34 (Fla. Dist. Ct. App. 1979); see generally Bornstein v. Neuman, 459 N.Y.S.2d 462 (App. Div. 1983).

144. Sayre v. Musicland Grp., Inc., 850 F.2d 350, 354 (8th Cir. 1988).

145. See *id.*

146. See FED. R. CIV. P. 8(c) (requiring a party to plead affirmative defenses); Modern Leasing, Inc. v. Falcon Mfg. of Cal., Inc., 888 F.2d 59, 62–63 (8th Cir. 1989) (denying the defense's post-trial motion to amend pleadings to include a mitigation defense because the mitigation issue was not raised during trial); Morgenstern v. Cnty. of Nassau, No. CV 04–58(ARL), 2009 WL 5103158, at \*1 (E.D.N.Y. Dec. 15, 2009) (holding that a defendant's failure to plead mitigation would mean that the defense was waived).

147. City of Miami Beach v. Carner, 579 So. 2d 248, 255 (Fla. Dist. Ct. App. 1991).



contractual provisions, attorneys should be able to effectively protect their clients' financial interests.

#### V. MITIGATION OF DAMAGES

A well-drafted mitigation of damages clause in the context of a college coach's contract will contain the following elements:

1. An affirmative obligation to mitigate;
2. A requirement that reasonable and diligent efforts be used to obtain comparable employment;
3. A definition of what constitutes comparable employment;
4. The meaning of compensation;
5. An offset provision including the university's continued liability for any differential if amounts are offset;
6. A reporting function;
7. Notice of employment; and
8. Prospective rather than retroactive application.

1. Affirmative Obligation to Mitigate. An affirmative obligation to mitigate is a basic tenet of contract law and requires, unless otherwise stated, the coach to reduce damages owed from the terminating university by undertaking acts of mitigation. Some examples follow:

- KELLY - University of Oregon: "Kelly agrees to mitigate University's obligations to pay liquidated damages . . . ." <sup>148</sup>
- MURPHY - Eastern Michigan University: "The Employee is required to mitigate the University's obligations under [this] section . . . ." <sup>149</sup>
- CLAWSON - Bowling Green State University: "The University's obligation to any amount under Section 5.2.2 (a) shall be subject to Coach Clawson's duty to mitigate his damages." <sup>150</sup>
- MONTGOMERY - University of California: "Coach agrees to mitigate UNIVERSITY's obligations to pay damages that may be sustained by virtue of termination . . . ." <sup>151</sup>
- GOTTFRIED - NC State University: "COACH acknowledges his obligation to minimize the payments due to him under section

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148. Kelly Contract, *supra* note 47, ¶ 6.02(c).

149. Coaching Contract between Robert L. Murphy and E. Mich. Univ. ¶ 7.2.4 (Apr. 25, 2011) (on file with author).

150. Coaching Contract between Dave Clawson and Bowling Green State Univ. ¶ 5.2.3(a) (Dec. 11, 2008) (on file with author).

151. 2008 Montgomery Contract, *supra* note 20, ¶ 12.

XIII(A) . . . .”<sup>152</sup>

- CALIPARI - University of Kentucky: “Notwithstanding any other provisions contained in this Agreement, Coach agrees to reasonably mitigate the University’s obligation to pay liquidated damages under this Agreement . . . .”<sup>153</sup>

2. A Reasonable and Diligent Effort. A mitigation of damages provision will require a reasonable and diligent effort to obtain employment. Some examples follow:

- CREAN - Indiana University: “The Employee is required to use his reasonable best efforts to mitigate . . . .”<sup>154</sup>
- LONDON - University of Virginia: “Coach agrees to make reasonable ongoing efforts in seeking employment commensurate with his experience, in good faith . . . .”<sup>155</sup>
- ROBINSON - Oregon State University: “COACH agrees to mitigate . . . by making reasonable and diligent efforts to obtain employment.”<sup>156</sup>
- MILES - LSU: “COACH has the good faith duty and obligation to seek to obtain similar or related employment . . . .”<sup>157</sup>
- PELINI - University of Nebraska: “Coach shall use his . . . best efforts to seek and secure substantially comparable employment including the customary and reasonable terms and conditions of compensation at the new employment, without structuring or timing compensation to avoid mitigation.”<sup>158</sup>
- CALIPARI - University of Kentucky: “Coach agrees . . . to make reasonable and diligent efforts to obtain employment as soon as possible after termination of this Agreement by the University.”<sup>159</sup>

3. Comparable Employment. A mitigation of damages provision will provide for the coach to seek on a good faith basis “comparable employment.” Some examples follow:

- PELINI- University of Nebraska: “Coach shall use his . . . best efforts to seek and secure substantially comparable

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152. Gottfried Contract, *supra* note 76, ¶ XIII(B).

153. Calipari Contract, *supra* note 13, ¶ 7(b).

154. Crean Contract, *supra* note 16, ¶ 6.02(G).

155. London Contract, *supra* note 70, ¶ 7.3

156. Robinson Contract, *supra* note 67, ¶ 19(b).

157. 2007 Miles Amendment, *supra* note 14, ¶ 13(A).

158. Pelini Contract, *supra* note 15, ¶ 14(b).

159. Calipari Contract, *supra* note 13, ¶ 7(b).

employment . . . ”<sup>160</sup>

- KELLY - University of Oregon: “Kelly agrees to mitigate . . . by making reasonable, good faith, and diligent efforts to obtain comparable employment as soon as reasonably possible after termination of this Agreement.”<sup>161</sup>

A legal dispute involving the duty to mitigate damages in a coach’s employment contract is found in *Moore v. University of Notre Dame*.<sup>162</sup> In this case, the plaintiff, Joseph R. Moore, was the offensive line football coach for the University of Notre Dame from 1988 to 1996.<sup>163</sup> Under his instruction, the team’s offensive line was “ranked among the top ten in the country.”<sup>164</sup> In December of 1996, Notre Dame terminated Moore’s employment.<sup>165</sup> Moore alleged that head football coach Robert Davie told Moore that he “was fired because he was ‘too old’ and would not be able to continue to coach for another full five-year period.”<sup>166</sup> Notre Dame claimed that the reason behind Moore’s termination was that he no longer measured up to the standards that were set in the program, and Notre Dame further claimed that Moore made inappropriate and intimidating comments to his players.<sup>167</sup>

Notre Dame argued that Moore was not entitled to front pay because he failed to take reasonable efforts to mitigate his damages.<sup>168</sup> Judge Allen Sharp’s decision in this case addressed Moore’s duty to mitigate damages. Judge Sharp stated:

Notre Dame finally argues that Moore is not entitled to front pay because he failed to undertake reasonable efforts to mitigate his damages. This Court disagrees. Generally, an ADEA plaintiff satisfies the mitigation of damages requirement that he use “reasonable diligence in attempting to secure employment” by demonstrating his commitment to seeking active employment and by remaining ready, willing and able to work. However, a plaintiffs [sic] duty to mitigate his damages is not met by using reasonable diligence to obtain

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160. Pelini Contract, *supra* note 15, ¶ 14(b).

161. Kelly Contract, *supra* note 47, ¶ 6.02(c).

162. *See generally* 22 F. Supp. 2d 896 (N.D. Ind. 1998).

163. *Moore v. Univ. of Notre Dame*, 968 F. Supp. 1330, 1332 (N.D. Ind. 1997).

164. *Id.*; *see also* *Coach Who Tackled Age Discrimination Dies*, USA TODAY (July 6, 2003), [http://usatoday30.usatoday.com/sports/college/football/2003-07-06-moore-obit\\_x.htm](http://usatoday30.usatoday.com/sports/college/football/2003-07-06-moore-obit_x.htm).

165. *Moore*, 968 F. Supp. at 1332.

166. *Id.*

167. *See Moore*, 22 F. Supp. 2d at 905–06.

168. *Id.* at 906.

any employment, rather the employment must be comparable employment. The Seventh Circuit has defined “comparable work” as a position that affords “virtually identical promotional opportunities, compensation, job responsibilities, working conditions and status” as the previous position. The goal of mitigation is to prevent the plaintiff from remaining idle and doing nothing. Furthermore, an employee is not required to go to heroic lengths in attempting to mitigate his damages, but only to take reasonable steps to do so. Furthermore, a claimant has no obligation to accept lesser employment . . . or relocate to a new community.<sup>169</sup>

Judge Sharp further found:

When evaluating the reasonableness and duration of a job search a court may consider the plaintiff’s background and individual characteristics. Moreover, it is the defendant’s burden to prove that a plaintiff has failed to discharge his duty. In the present case, Notre Dame has not met this burden. Moore sought and obtained employment shortly after his discharge. He currently works at three different jobs. The fact that he did not accept a position at Cornell does not indicate a failure to mitigate. That position offered a \$40,000 salary, significantly less than Moore’s former salary, and involved a tenuous situation where the head coach was seeking other employment. Nor does the fact that Moore did not apply for certain positions mentioned by defendant indicate a failure to mitigate. Moore is presently sixty-six years old. The options available to him are not as great as those available to someone younger. Moore has demonstrated his willingness to work, but, the chances of finding “comparable work” as defined by the Seventh Circuit are slim. It is this Court’s opinion that Moore used reasonable diligence in attempting to obtain employment.<sup>170</sup>

4. Definition of Comparable Employment. In some mitigation of damages provisions, comparable employment will actually be specifically defined. Some examples follow:

- SABAN - University of Alabama: “[E]mployment as a head or assistant coach or as an administrator either at a college or

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169. *Id.* at 906–07 (internal citations omitted).

170. *Id.* at 907 (internal citations omitted).

university or with a professional sports organization (collectively referred to hereafter as a ‘Coaching Position’)[.]”<sup>171</sup>

- LONDON - University of Virginia: “Such payments shall be reduced by earnings or other payments the Coach may subsequently receive, or earn and defer receipt of, from athletically-related employment or consulting. Such employment or consulting includes but is not limited to any head coach or assistant coaching or other athletic position with, or consulting or other services of any kind provided to, any school, college, university, professional or semi-professional athletic team or any athletic conference, organization, league or association, or from any sports-related position or services provided to any sports-related entity, including without limitation any media entity.”<sup>172</sup>
- CALHOUN - University of Connecticut (Retired): “Any such payment shall be reduced, however, by an amount equal to the compensation (to include salary and value of fringe benefits) the Coach actually earns in any basketball-related position from the date of termination to the end of this Agreement.”<sup>173</sup>
- KELLY - University of Oregon: “Comparable employment includes employment as a coach (not necessarily as a head coach) at a university that competes on the NCAA Division 1-A (Football Bowl Subdivision) or 1-AA (Football Championship Subdivision) level or equivalent, or with a professional team.”<sup>174</sup>
- O’LEARY - University of Central Florida: “Any sums payable pursuant to paragraph 9.2 shall be reduced by any amounts earned by Coach or George O’Leary Enterprises, Inc. during the remaining term of the agreement in connection with Coach’s employment as a coach of any college or professional football team.”<sup>175</sup>
- O’BRIEN - North Carolina State University (terminated): “If the COACH obtains new employment, NC STATE’s financial obligations under the liquidated damages provision shall be to pay COACH the difference between what COACH would have received as Head Football Coach at NC STATE for the term of

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171. Saban Contract, *supra* note 12, ¶ 5.01(h).

172. London Contract, *supra* note 70, ¶ 7.3.

173. Coaching Contract between James A. Calhoun and Univ. of Conn. ¶ 10.2 (July 1, 2009) (on file with author).

174. Kelly Contract, *supra* note 47, ¶ 6.02(c).

175. O’Leary Contract, *supra* note 88, ¶ 9.2(E).

this Agreement and the salary in the new job.”<sup>176</sup> (There is no definition of new employment).

- HOWLAND - UCLA (terminated): “[P]ayments made to Coach . . . shall be reduced by any cash payments or other form of consideration Coach, and/or any person or entity acting on Coach’s behalf, receives from other sources, including University, for services performed by Coach, including without limitation, promotional, endorsement, coaching, or consultative services during the period of time Coach would have been employed by University if University had not so terminated this 2008 HC Agreement.”<sup>177</sup>
- CREAN - Indiana University: “[T]he Employee agrees that the following employment or services opportunities shall constitute a comparable position or opportunity for purposes of this provision; media commentator with a national or regional network, broadcast station or cable company, professional basketball assistant or head coach, head men’s basketball coach at a Division I college or university . . . .”<sup>178</sup>
- MARSHALL - Wichita State University: “[B]y obtaining comparable employment at a similar rate of compensation or other opportunities within the scope of his expertise to provide personal services for remuneration.”<sup>179</sup>
- PINKEL - University of Missouri: “[T]hat any amounts received by the Employee from other employment for services or obtained as a consultant or rendered as a head or assistant football coach or as an administrator or executive in a collegiate athletic department or professional sports organization before the end of the term of this Agreement, shall be offset against the amount set forth herein to be paid by the University as liquidated damages.”<sup>180</sup>
- RICHT - University of Georgia: “[T]he parties understand and agree that the Association’s liability, if any, for payments provided under this paragraph 15 shall be reduced by any and all

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176. Coaching Contract between Thomas Patrick O’Brien, Jr. and N.C. State Univ. ¶ X(B) (Dec. 8, 2006) (on file with author).

177. Howland Contract, *supra* note 51, ¶ 12(b).

178. Crean Contract, *supra* note 16, ¶ 6.02(G).

179. Coaching Contract between Gregg Marshall and Wichita State Univ. ¶ 8.3 (Apr. 16, 2011) (on file with author).

180. Coaching Contract between Gary R. Pinkel and Univ. of Mo. ¶ 12 (Jan. 1, 2009) (on file with author).

compensation attributable to Richt's coaching or providing athletic administration services for any sports team (whether as a head coach, assistant coach, athletic director or assistant athletic director, or consultant); to Richt's fundraising, talent evaluation or consulting services to any sports team or athletics programs; or to any Radio, TV, magazine, newspaper, movie, or other media outlet appearance or commentary made by Richt after the date of termination through the end of the Term. The Association's right to offset payment pursuant to this subparagraph shall not include sums earned by Richt through passive investment or activities not related to the foregoing."<sup>181</sup>

- TRESSEL - Ohio State University (contract terminated by coach): "Coach is required to mitigate Ohio State's obligations under this Section 5.2 by making reasonable and diligent efforts (under the circumstances and opportunities then prevailing) to obtain a comparable employment position (for example, media commentator, professional head or assistant football coach, NCAA Division I head football coach) as soon as practicable following such termination[.]"<sup>182</sup>
- HOKE - University of Michigan: "[T]o obtain other football related employment (such as a head or assistant coach of a professional football team, head men's football coach of an NCAA Division I team, or media commentator) . . . ."<sup>183</sup>
- GOTTFRIED - NC State University: "If the COACH obtains new employment as a collegiate or professional basketball coach . . . ."<sup>184</sup>

5. Meaning of Compensation. In some mitigation of damages provisions, the meaning of compensation is specifically defined:

- BRILES - Currently the Baylor University coach, but the contract provision was taken from his prior contract with the University of Houston: "For the purposes of this Section 6.4.5, 'amounts earned by Coach in the new position' shall mean any and all compensation received through Coach's employment, including, but not limited to, base salary, non-salary compensation,

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181. Amendment to Coaching Contract between Mark Richt and Univ. of Ga. ¶ 15(E) (Jan. 1, 2006) (on file with author).

182. Coaching Contract between James P. Tressel and Ohio State Univ. ¶ 5.2(a) (Feb. 1, 2006) (on file with author) [hereinafter Tressel Contract].

183. Hoke Contract, *supra* note 75, ¶ 4.01(b).

184. Gottfried Contract, *supra* note 76, ¶ XIII(B).

consulting fees, bonuses, and any other compensation[.]”<sup>185</sup>

- SABAN - University of Alabama: “For purposes of this subsection, ‘gross compensation’ shall mean, without limitation, gross income from base salary or wages, talent fees, or other types of compensation paid to Employee . . . , consulting fees, honoraria, fees received by Employee as an independent contractor, or other income of any kind whatsoever from a Coaching Position.”<sup>186</sup>

6. Offset Provision. In the event the coach receives monies from another employer in his attempt to mitigate damages, there will always be an offset provision against the monies that are owed from the university. Some examples follow:

- HOKE - University of Michigan: “If the Head Coach is employed in a football-related position or receives compensation related thereto (e.g.[,] as a consultant) elsewhere after the University’s termination of this Agreement pursuant to Section 4.01(a), then the University’s obligation to pay the Head Coach as set forth in Section 4.01(a) shall be reduced by Head Coach’s total compensation from all such sources (except not including employee reimbursements, benefits and costs associated with such other position).”<sup>187</sup>
- HEATH - University of South Florida: “Notwithstanding the foregoing, if Coach subsequently obtains employment in another basketball coaching capacity prior to the expiration of the term of the Agreement, then the following shall apply: (i) if Coach’s new base salary is greater than the Base Salary, then the University’s obligations to make payment(s) under this Section shall cease as of the first date of new employment; or (ii) if Coach’s new base salary is less than the Base Salary, then the University shall only be obligated to pay for the difference between the two amounts, less any salary increases paid by the new employer, through the expiration of the term of the Agreement.”<sup>188</sup>
- KELLY - University of Oregon: “Should Kelly obtain such comparable employment, University’s financial obligations under

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185. Coaching Contract between Art Briles and Univ. of Hous. ¶ 6.4.5 (Jan 1, 2004) (on file with author).

186. Saban Contract, *supra* note 12, ¶ 5.01(h).

187. Hoke Contract, *supra* note 75, ¶ 4.01(b).

188. Coaching Contract between Stan Heath and Univ. of S. Fla. ¶ 11(a) (May 24, 2007) (on file with author).



this Agreement, including Section 6.02.b, shall cease so long as Kelly's monthly compensation from such comparable employment, excluding reasonable and usual non-monetary fringe benefits such as health and life insurance, club memberships and use of vehicles, is equal to or greater than University's obligation to pay liquidated damages under Section 6.02.b, prorated on a monthly basis.

If Kelly's monthly compensation, excluding reasonable and usual non-monetary fringe benefits, from such comparable employment is less than University's monthly obligation to pay liquidated damages under Section 6.02.b, the amount of University's obligation to pay liquidated damages shall be reduced by the amount of Kelly's compensation, excluding reasonable and usual non-monetary fringe benefits, from such comparable employment.

If, after diligent efforts to obtain comparable employment as described above, Kelly obtains employment that is not comparable employment, his income from such employment (plus or minus raises and adjustments) shall be off-set against University's obligations under 6.02.b herein."<sup>189</sup>

- CHIZIK - Auburn University (terminated): "In the event Coach obtains other employment after his termination or receives income from any other source (such as for work as an announcer or analyst, consultant, independent contractor, speaking engagement fees, income from writing a book, or appearance fees), the amount earned or received by Coach will be subtracted from the amount Auburn owes Coach under this Paragraph."<sup>190</sup>
- MONTGOMERY - University of California: "Notwithstanding the liquidated damages provision below, it is expressly understood and agreed that any amounts to be paid to Coach pursuant to this Paragraph 12 will be reduced by any amounts received, or to be received at a later date, by Coach from other sources in and for rendition of services by Coach during the period of time in which Coach, pursuant to this Employment Contract, would have been employed by the UNIVERSITY if this Contract had not been terminated by the UNIVERSITY without cause; provided, however, under no circumstances will Coach be required to reimburse the UNIVERSITY for UNIVERSITY compensation

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189. Kelly Contract, *supra* note 47, ¶ 6.02(c).

190. Chizik Contract, *supra* note 53, ¶ 18(b).

previously paid.”<sup>191</sup>

- TRESSEL - Ohio State University (contract terminated by coach): “Notwithstanding any other provisions of this Section 5.2, if Coach is employed elsewhere during the twelve (12) month period post-termination in a comparable employment position (for example, media commentator, professional head or assistant football coach, NCAA Division 1 head football coach), then Ohio State’s obligation to pay Coach Two Million Dollars (\$2,000,000.00) set forth in this Section 5.2 shall be reduced by Coach’s total compensation (from all sources directly related to such comparable position (except not including the employee benefits costs associated with such comparable position)) for the twelve (12) month period post-termination. Ohio State shall pay such amount (which shall not include employee benefits for the period that Coach is employed in such comparable position) in equal quarterly installments for a period not to exceed twelve (12) months after the date of termination, except the installments may not be equal if Coach is employed in such a comparable employment position (thus reducing Ohio State’s obligation) and Ohio State has already paid Coach certain installments pursuant to this Section 5.2 before Coach has accepted such a comparable employment position[.]”<sup>192</sup>

7. Notice of Employment. Mitigation of damages provisions will require the coach to give notice of new employment. A few examples follow:

- SABAN - University of Alabama: “While the University’s obligation to pay Liquidated Damages remains in effect, within fourteen (14) days after accepting any employment in a Coaching Position and within fourteen (14) days after the end of each month thereafter, Employee shall furnish to the University an accounting or report of all gross compensation received by Employee during the immediately preceding month from the Coaching Position. The University shall reduce the amount of the monthly Liquidated Damages payments due and payable to Employee based upon the gross compensation for the immediate previous month as reflected in the Coaching Position gross compensation report. If Employee fails or refuses either to notify the University of Employees employment in a Coaching Position or to furnish the monthly

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191. Coaching Contract between Michael Montgomery and Univ. of Cal. ¶ 12 (Feb. 27, 2009) (on file with author).

192. Tressel Contract, *supra* note 182, ¶ 5.2(b).

Coaching Position gross compensation reports after receiving a formal, written request to do so from the University, then, after giving Employee fourteen (14) days' written notice, the University's obligation to continue paying Liquidated Damages to Employee shall cease."<sup>193</sup>

- GOTTFRIED - NC State University: "COACH shall promptly, upon acceptance of other employment as a collegiate or professional basketball coach, notify the Director of Athletics in writing of such employment and the total compensation to be paid to COACH for the employment during the term of this Agreement (had it naturally expired). In addition, COACH agrees to provide NC STATE with a copy of his W-2 form for each calendar year as long as NC STATE has the obligation to make payments under section XIII."<sup>194</sup>
- CREAN - University of Indiana: "[T]he Employee shall promptly report to the University on a quarterly basis on all compensation received or earned by him (or by any of his affiliates) during the prior three-month and six-month periods. The University may reduce future base [ ]salary continuation payments by any amount that the University is entitled to offset as a consequence of the foregoing provisions and at the conclusion of the base salary continuation period, the Employee shall be obligated to promptly pay to the[ ] University the full amount of any offset and reduction due to mitigation that the University is entitled to that was not fully recouped by the University[ ] through a previous offset and reduction."<sup>195</sup>

8. Prospective Rather than Retroactive Application. Any amount received in mitigation of damages that acts as an offset against the amount being paid contractually by the university shall apply prospectively, not retroactively. So for instance, a coach was terminated without cause and the liquidated damage amount was \$3,600,000, payable in equal monthly installments of \$100,000 per month for 36 months.<sup>196</sup> The coach obtained new employment after the eighteenth month payment. The coach's new package was equal to double what the university was obligated to pay during the liquidated damage period. The excess could not be used to retroactively offset those amounts that had

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193. Saban Contract, *supra* note 12, ¶ 5.01(h).

194. Gottfried Contract, *supra* note 76, ¶ XIII(B).

195. Crean Contract, *supra* note 16, ¶ 6.02(G).

196. The information in this paragraph comes from a confidential case worked on by Author Greenberg.

previously been paid or to require, in the alternative, that the coach reimburse the university for those amounts.

Although these contractual terms seem straightforward and simple in theory, the practical application of mitigation of damages provisions to coaching contracts is slightly more difficult.

#### VI. PRACTICAL EXPERIENCE—DIFFICULTY WITH MITIGATION OF DAMAGES CLAUSES

I served as an expert witness in a case involving the interpretation and implementation of a mitigation of damages clause.<sup>197</sup> The coach was terminated without cause. Thus, the termination triggered the mitigation of damages clause, and it became a disputed issue.

##### *A. The Contractual Provision*

The coach's contract provided with respect to termination without cause and mitigation of damages as follows:

(1) Severance/Liquidated Damages. If, during the term of this Agreement, Coach's employment is terminated by the Team for a reason other than for Cause, the Team shall continue to pay Coach his applicable monthly salary (i.e., as set forth and in accordance with the Section above), for the remainder of the period this Agreement was to have remained in effect. Such salary continuation payments shall be made on a semi-monthly basis on the Team's regular payroll cycle and shall be paid less all applicable taxes, withholdings, payroll deductions. In addition, such salary continuation payments shall be subject to the mitigation and set-off provisions contained in the Section below.

Notwithstanding any of the foregoing, the Team shall incur no obligation to provide severance benefits under this Section if his employment is terminated by disability or by death under the provisions of the Sections above.

(2) Mitigation. Coach agrees to mitigate the Team's obligation to pay liquidated damages under this Section. The Team shall be entitled to off-set and reduce any and all

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197. The "I" in this sentence and the following information regarding the arbitration concerns Author Greenberg. Identifying information about the participants of the arbitration cannot be included due to the confidentiality of the arbitration.

amounts of compensation that may be due to Coach from the Team under this Section against any amounts earned by Coach under contracts with other individuals or entities provided that this right of set-off is limited to a head coaching and/or general manager position with the NBA club or NCAA institution. Notwithstanding the foregoing, it is the specific agreement between Coach and the Team that the operation and implementation of this set-off provision shall never result in Coach's receipt of compensation less than would have been received for the period this Agreement was to have remained in effect.<sup>198</sup>

The agreement was subject to arbitration, which stated as follows:

a. Arbitrable Claims. All disputes between Coach (and his attorneys, successors, and assigns) and the Team (and its affiliates, partners, directors, officers, employees, agents, successors, attorneys, and assigns) of any kind whatsoever, including, without limitation, all disputes relating in any manner to the employment or termination of Coach, and all disputes arising under this Agreement, ("Arbitrable Claims") shall be resolved by arbitration. All persons and entities specified in the preceding sentence (other than the Team and Coach) shall be considered third-party beneficiaries of the rights and obligations created by this Section on Arbitration. Arbitrable Claims shall include, but are not limited to, contract (express or implied) and tort claims of all kinds, as well as all claims based on any federal, state, or local law, statute, or regulation, excepting only claims under applicable workers' compensation law and unemployment insurance claims. Arbitration shall be final and binding upon the parties and shall be the exclusive remedy for all Arbitrable Claims, except that the Parties may seek provisional relief as provided by law. The parties hereby waive any rights they may have to trial by jury in regard to arbitrable claims.

b. Procedure. Arbitration or Arbitrable Claims shall be in accordance with the Employment Dispute Resolution Rules, except as provided otherwise in this Agreement. In any arbitration, the burden of proof shall be allocated as provided in applicable law. Either party may bring an action in court to

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198. Coaching Contract between X and Univ. Y (on file with author).

compel arbitration under this Agreement and to enforce an arbitration award. Otherwise, neither party shall initiate or prosecute any lawsuit or administrative action in any way related to any Arbitrable Claim. All arbitration hearings under this Agreement shall be conducted in . . . . The Federal Arbitration Act shall govern the interpretation and enforcement of this Section.

c. Confidentiality. All proceeds and all documents prepared in connection with any Arbitrable Claim shall be confidential and, unless otherwise required by law, the subject matter thereof shall not be disclosed to any person other than the parties to the proceedings, their counsel, witnesses and experts, the arbitrator, and, if involved, the court and court staff.

d. Continuing Obligations. The rights and obligations of Coach and the Team set forth in this Section on Arbitration shall survive the termination of Coach's employment and the expiration of this Agreement.<sup>199</sup>

#### *B. Team and Coach's Allegations*

The coach was terminated without cause, and approximately twenty-one months passed before he procured new employment. Consequently, the team stopped paying the coach the amounts required under the termination without cause provision. The coach then filed for arbitration seeking the liquidated damages he believed he was entitled to pursuant to the contract. The team defended on the basis that the coach had a statutory common law and contractual obligation to mitigate damages and failed to do so; as a result, this failure relieved the team completely or partially from the obligation to make payment. The team further defended that any amount the coach was entitled to claim must be offset and reduced by those amounts he actually earned or could have earned after his discharge by the team. The team asserted that its obligation was to make payments that were conditioned on the coach's common law, statutory, and contractual mitigation obligations.

The mitigation provision reproduced above indicates that the coach had a clear duty to take steps to minimize any loss by making a reasonable effort to find comparable employment. While the team continued to pay the coach his salary after termination, the coach breached his mitigation obligation during the same period by, among other things, failing to make a reasonable effort to

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199. *See supra* notes 197–98.

seek mitigating employment and by purposely not seeking such employment.

In its counterclaim, the team indicated that, as a result of the coach's breach, it was entitled to retain all amounts withheld from the coach to date in addition to a return of some or all of the monies paid to the coach since his termination.

The team alleged that the coach failed to engage in a good faith and diligent effort to mitigate damages. The issues raised with respect to the lack of good faith effort to obtain employment were as follows:

1. The absence of an affirmative marketing plan;
2. A passive and inactive approach versus a proactive approach to obtaining employment;
3. Minimal attempts to market the coach, indicated by the lack of marketing material of a substantive nature on the coach for prospective employers;
4. The coach was not positioned for potential employment openings;
5. The coach retained one of the leading representatives of coaches in the industry, but there was little evidence that that representative was involved in the placement effort at all; rather, a junior associate with little or no experience was heading up the job procurement effort;
6. Inquiries and follow-up from the junior associate indicated a lack of serious effort to place the coach;
7. Communications to prospective employers indicated a lack of a serious interest; for example, only passive inquiries were made to the tune of "If you're interested, call me";
8. There was a lack of follow-through with respect to any inquiries that were made;
9. The agent adopted a strategy that is commonly referred to as "slow play";
10. There was a question as to whether the coach was really interested in working by virtue of several public statements that he was not ready to work;
11. The coach was unwilling to leave a certain geographical area, only wanted to be placed within a certain conference, and did not necessarily want to move from his home in his current location;
12. There was an absence of any kind of paper trail and little evidence of marketing materials, such as books, letters, or emails to potential employers;
13. There was no notebook or diary on the coach's mitigation efforts;
14. The coach's agents had conflict of interests that would have lessened attempts to place the coach; and
15. The agents had other coaches in their client's stable who were interested in the mitigation jobs that were available during the mitigation

period and who were willing to relocate.

The next area of concern in the arbitration was the issue of whether there was the availability of comparable employment. The coach maintained that it would be impossible for him to obtain another professional or collegiate job after the termination and so close to the date of termination. With respect to college jobs that became available, the coach maintained that the positions available were not identical from the standpoint of location, compensation, job responsibility, working conditions, and status. The coach claimed that he was tainted by his lack of success in the National Basketball Association (NBA). The coach also maintained that it was unreasonable to expect him to relocate for a National Collegiate Athletic Association (NCAA) position.

The coach claimed that, although the language in the mitigation clause defined comparable employment as any NCAA institution, it only meant employment that was comparable from a monetary, job status, and location status, not any NCAA job. As such, it was unreasonable to expect the coach to move. Moreover, the available jobs for which he might be considered for were low pay compared to the pay he obtained as a professional coach.

The team, of course, countered that the mitigation clause defining comparability required reasonable steps and good faith to obtain a head coach or general manager position in the NBA or at an NCAA institution. There was no particular definition of an NCAA institution so it could have meant, at the time, any Division I, II, or III institution. The clause did not limit the obligation to obtain such positions in a particular region or a particular school or conference, and it was the accepted norm that replacement jobs were not regional but national in nature. Therefore, it was reasonable to expect the coach to have to travel or relocate for an available position in the coaching industry.

The team claimed that the mitigation clause could have actually included written language that fit the coach's interpretation of the clause and restrictions could have been negotiated into the contract. The team further maintained that there was a litany of NBA coaches who were fired and made it back into the high college ranks thereafter, many of these top coaches around the country were in the same age category as the coach after being fired, and the clause, as drafted, applied to monies payable by the team in the present and future and did not apply to any amounts previously paid.

The team additionally claimed that the coach's agents did not negotiate any of the restrictions related to mitigation in the contract either because they did not have leverage or because they did not feel it was important. The team maintained that the coach's agents could have negotiated restrictions on the type of NCAA institutions, geographic restrictions, or standards for what was comparable compensation that would require a good faith effort.



The word “comparable” was not used in the contract because no restrictions were negotiated or contained in the contract. The contract did not limit or restrict the coach’s obligation to mitigate. The team argued that the coach could refuse to accept any position, but the team must offset the amounts that he could have earned against the amounts payable by the team. The coach’s lawyer argued that only amounts that were actually earned, not the amounts that could have been earned, were to be offset against the amount payable by the team.

The case involved an interpretation of what the mitigation clause meant in the first place, whether the coach made a good faith effort to obtain comparable employment, and what constituted comparable employment.

## VII. CONCLUSION—BEST PRACTICES

Mitigation clauses are important in collegiate coaching contracts because of the high rate of termination without cause and relocation in the coaching industry. No two termination without cause and mitigation of damages clauses are exactly alike. These clauses are individually crafted by a coach’s representatives and university counsel, and there are many variations in the industry as to the contents thereof.

For instance, two big name coaches in the SEC were recently fired, University of Tennessee head football coach Derek Dooley and Auburn University head football coach Gene Chizik.<sup>200</sup>

The University of Tennessee owes Dooley \$5 million in liquidated damages, or approximately \$102,040 per month through December 2016.<sup>201</sup> Moreover, Dooley is not required to mitigate damages.<sup>202</sup> The money is guaranteed, meaning that any future employment he may obtain up to and including December 31, 2016, will not alter what Tennessee is required to pay him.<sup>203</sup>

Under his latest contract amendment, Chizik is owed \$7.5 million, payable in equal monthly installments over the remaining duration of the agreement.<sup>204</sup>

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200. Associated Press, *Firing a Coach Is Often About Balancing Wins and Losses with Dollars and Cents*, FOXNEWS.COM (Nov. 27, 2012), <http://www.foxnews.com/sports/2012/11/27/firing-coach-is-often-about-balancing-wins-and-losses-with-dollars-and-cents/> [hereinafter *Firing a Coach*]; Evan Woodbery, *Buying out Derek Dooley and Staff Could Cost as Much as \$9.3 Million over Four Years*, GO VOLS XTRA (Oct. 23, 2012), <http://www.govolsxtra.com/news/2012/oct/23/buying-out-derek-dooley-and-staff-could-cost-as/>.

201. Woodbery, *supra* note 200.

202. *Id.*

203. *Id.*

204. Chizik Contract, *supra* note 53, ¶18(b); *see also* Woodbery, *supra* note 200.

But Chizik, unlike Dooley, has a mitigation of damages obligation wherein if Chizik

[O]btains other employment after his termination or receives income from any other source (such as for work as an announcer or analyst, consultant, independent contractor, speaking engagement fees, income from writing a book, or appearance fees), the amount earned or received by [Chizik] will be subtracted from the amount Auburn owes [him] . . . .<sup>205</sup>

Chizik “acknowledges that he is required to use reasonable efforts to obtain other employment[,] . . . income[, or both] from third parties, and he is required to provide immediate written notice to the University Athletics Director of such earnings or income . . . .”<sup>206</sup> Obviously, market leverage would result in no obligation to mitigate and an agreed upon lump sum or installment payment as liquidated damages. It is where one is required to mitigate where issues start to arise.

In carefully reviewing the industry standard relative to what constitutes a mitigation of damages clause and experiencing the implementation and interpretation of such a clause first-hand as an expert witness, some conclusions can be reached as to best practices relative to the drafting of mitigation of damages clauses in coaches’ contracts:

1. The contract should clearly state that the coach has an affirmative obligation to mitigate damages; that the right to receive liquidated damages, as specified in the termination without cause clause, is specifically conditioned on meeting and fulfilling that obligation; and that liquidated damages are not guaranteed payments.
2. The obligation to mitigate damages requires a reasonable, diligent, and good faith effort. These words are not easily definable, are words of art, and should have a more substantive definition as to their meaning. For instance, when does the obligation to mitigate commence? Is it immediate or does the coach get some “rest period” after termination? Is the coach, in order to meet the mitigation obligation, required to have some form of marketing plan? Is the coach required to maintain a “book” or time log with respect to prospective job inquiries? Is the coach required to have a list of targets based on job availability? Are written follow-ups required to initial inquiries? A best practice clause will require

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205. Chizik Contract, *supra* note 53, ¶18(b).

206. *Id.*

- specificity and definition as to what constitutes reasonable, diligent, and good faith efforts to mitigate damages.
3. The obligation to mitigate requires a good faith effort to obtain comparable employment. Comparable employment is another term that needs to be specifically defined. Does comparable employment mean identical or similar job status, responsibilities, and compensation? Does comparable employment mean that a head coach who was terminated without cause from an SEC job paying four million dollars a year must take employment as a head coach in the Atlantic Coast Conference at two million dollars a year if available? Does comparable employment mean another coaching job at the same division level or any coaching job at any level in the NCAA? Does comparable employment mean a similar job in a professional status as either a head coach or assistant head coach? Does comparable employment mean an administrative job such as a general manager, athletic director, or front office staff? Does comparable employment mean income from media outlet employment or other sports-related employment, or does comparable employment mean income from any source regardless of the job description? The obligation is to make the coach whole for the liquidated damage amount, and the responsibility to pay any difference is always with the university. Maybe comparable employment ought to define an accepted minimum compensation package that offsets the university's obligation rather than attempting a definition of comparable job status, responsibilities, and compensation.
  4. Because the college coaching market is national in nature, a good faith and reasonable effort to obtain comparable employment includes available coaching jobs on a national basis. That would appear to be the most reasonable and understood meaning within the industry. However, coaches oftentimes are not interested in moving, want to stay within the same or similar conference, want comparable employment to include designated schools, and want to put some form of geographic limitation on movement. All of this must be written into the contract to further define what comparable employment is.
  5. While the intent of mitigation of damages clauses is to make the coach whole during the mitigation period, what offsets liquidated damages also needs to be specifically defined. Does it include salary, benefits, deferred compensation, personal service and talent fees, income from outside sources, perquisites, bonuses, and

other forms of compensation that may constitute the package? Or should the offset be defined as anything that has economic value that is paid by the subsequent employer?

6. Most mitigation of damages clauses have some form of reporting function, which is a certification of the amounts that the coach has received at the new employment to offset the university's responsibility. The reporting function and how one certifies actually what is received to offset liquidated damages must be more specific in detail.
7. Finally, if employment is obtained in contemplation of the obligation to mitigate in a reasonable, diligent, and good faith manner, is the offsetting compensation received by virtue of new employment prospective or retroactive in nature and application?

My experience as an expert witness was telling with respect to the drafting deficiencies in these clauses and how much is left up to guesswork and interpretation.<sup>207</sup> A well-drafted mitigation of damages clause will contemplate the specific items that I encountered as an expert witness and the questions that I have raised in this Section.

#### VIII. SOME FINAL THOUGHTS

Termination and early firing are part of the coaching job landscape. The back end of the contract may be as important as the front end. Therefore, time, thought, and good draftsmanship must be given to termination clauses, especially termination without cause, which are simply means of continued payment. The problems inherent in a mitigation of damages clause are too many to anticipate.

Bill Carr, former athletic director of the University of Florida and University Houston, has stated:

[I]t's best to identify a number to pay for liquidated damages rather than trying to determine coaching related compensation in the dismissed coach's new circumstances. The amount of time and effort required to report and verify becomes prohibitive for both parties.

Today's coaches' compensation is so extreme, it's hard for a university not to insist on some reduction of the buyout total, and that has to be more than just current value calculations. Prospectively, the coach is likely to earn some money from

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207. See *supra* note 197 and accompanying text.

coaching related sources; that amount should be factored in to achieve a fair number for liquidated damages.<sup>208</sup>

Coaches, career, and contract consultant Thom Park has also stated:

Having participated with the coaching profession as an advocate, a business and career advisor for three decades, I have watched the escalation of coaching compensation in this highly insecure and transient vocation. Institutional cost liability for coaches terminated 'not for cause' has led to the use of mitigation language in coaches contracts. The employer's hope here is that the terminated coach will find new employment soon and reduce the former employer's cost in the liquidated damage settlement by offsetting that cost with what is earned in the future. The fact is that similar paying employment circumstances in such a highly competitive arena are seldom found and certainly not quickly, if at all. The terminated coach may also well need time off to simply re-energize and heal psychologically. Given the financial cost of the legal labor over any conflict in the mitigation details, mitigations financial incentive to the coach to avoid a quick reentry to the coaching ranks, and the intrusiveness of the sports news with possible negative institutional public relations, an optimal approach for the school may well be to simply negotiate a damages settlement amount and be done with the process. This number could be paid in a lump sum or installments. When all is calculated, a negotiated settlement amount devoid of any potential mitigated claims is cleaner, simpler, and maybe best for the school.<sup>209</sup>

The better approach to an early terminated coach is simply a negotiated amount as liquidated damages, which is paid either in lump sum or tax structured pursuant to an agreement between the coach and the university without any obligation whatsoever to mitigate or find offsetting employment. The liquidated damages amount should be a number that is negotiated and defined by the present value of those damages that the coach and the university agree are to be paid for early termination. Unless a master draftsman contemplates the many issues that arise with respect to what this

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208. E-mail from William Carr, Carr Sports Assocs., Inc., to Author Greenberg (Oct. 30, 2012) (on file with author).

209. E-mail from Thom Park, Founder and Principal, Thomas Park & Assocs., to Author Greenberg (Dec. 17, 2012) (on file with author).

obligation means, a simple no obligation to mitigate whatsoever is the simplest solution to keep these matters out of the world of arbitration and the courts.

Mike Gundy, Oklahoma State University head football coach, may have negotiated a reduced amount of liquidated damages for and in consideration of a waiver of the obligation to mitigate damages. In his contract, he receives only 75% of his gross base monthly salary and only 75% of the compensation due under his Talent and Personal Services Contract.<sup>210</sup> Said sums are to be payable in full until paid, but there is no obligation on Gundy's part to seek comparable employment as an offset to the amount negotiated as liquidated damages.<sup>211</sup>

Not having an obligation to mitigate is worth something, even if the coach has to take less in the form of liquidated damages as a quid pro quo for having no obligation to mitigate. It is worth the risk of not having the future challenge of a failure to meet the obligation.

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210. Coaching Contract between Michael R. Gundy and Okla. State Univ. ¶ 8(f) (Jan. 1, 2009) (on file with author).

211. *Id.*