IN THE SUPREME COURT OF MISSOURI

Supreme Court No. SC89925

MISSOURI MILITARY ACADEMY,
Appellant/Cross-Respondent,
vs.
MICHAEL KEVENEY,
Respondent/Cross-Appellant.

Transferred from the Missouri Court of Appeals, Eastern District
Court of Appeals No. ED90595

On Appeal from the Circuit Court of Audrain County
12th Judicial Circuit, State of Missouri
Honorable Keith Sutherland
Case No. 04AU-CV00024

THE SUBSTITUTE BRIEF OF APPELLANT/CROSS-RESPONDENT MISSOURI MILITARY ACADEMY

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JURISDICTIONAL STATEMENT

This appeal stems from the Audrain County Circuit Court's denial of Appellant Missouri Military Academy's (the "Academy") Motion for Directed Verdict at the Close of All the Evidence, and Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for New Trial. The trial court denied the Academy's post-trial motions following a jury verdict for Plaintiff Michael Keveney ("Keveney" or "Plaintiff") in the amount of $13,300. Jurisdiction was proper in the Missouri Court of Appeals, as this matter does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. Mo. Const. Art. V, § 3. The appeal from the judgment entered by the Audrain County Circuit Court was properly within the jurisdiction of the Missouri Court of Appeals, Eastern District, pursuant to Missouri Revised Statutes § 477.050. The Court of Appeals affirmed the judgment in favor of the Plaintiff. The Missouri Supreme Court granted Cross-Appellant Keveney's application for transfer, pursuant to Missouri Supreme Court Rule 83.04.

STATEMENT OF FACTS

I. Introduction

Plaintiff was employed by the Missouri Military Academy (the "Academy") as a teacher beginning in August of 2002. (Trial Transcript 178 (hereafter "Tr. ___")). Plaintiff was employed pursuant to two one-year written employment contracts – one for the 2002-2003 academic year, and a second written contract for the 2003-2004 academic year. (Tr. 178, 194-195; Trial Exhibits 1 and 5 (hereafter "Tr. Ex. __")). The contracts contained provisions requiring Plaintiff to adhere to codes of conduct relating to faculty at the Academy. (Tr. Exs. 1 and 5). The contracts also provided that Plaintiff's employment could be terminated for cause. Plaintiff's employment was terminated for cause on October 29, 2003.

Plaintiff was terminated on October 29, 2003, following three verbal outbursts that day directed at his supervisors – two outbursts directed at the President of the Academy ("President Kelly" or "Col. Kelly"), and a third outburst directed at Commandant of the Academy, Ltc. Jim Medley ("Cmdt. Medley"). Plaintiff admits he yelled at both of his superiors in the presence or earshot of students. (Tr. 246-250, 252-256). Plaintiff also admits he was disrespectful toward the two most senior officers at the Academy that day. (Tr. 249, 254). Plaintiff also admits that he could have chosen to be respectful, but that he blew up and lost control. (Tr. 253, 256).

Plaintiff's admitted misconduct on October 29, 2003, was not the first such incident during Plaintiff's employment at the Academy. Plaintiff admits that in March of 2003 he lost his temper and acted inappropriately toward President Kelly during a conversation about a school play. (Tr. 225-227, 238-240). Plaintiff admitted that in March of 2003, President Kelly told Plaintiff that he feared Plaintiff was going to physically strike him during Plaintiff's unprofessional outburst. (Tr. 238-240).

As a result of the March misconduct, President Kelly told Plaintiff there would be a zero tolerance policy concerning further outbursts by Plaintiff at the Academy. (Tr. 227-229). Plaintiff admits that he was aware of the zero tolerance policy and, importantly, that the "no more outbursts" rule was incorporated into his written contract agreement for the 2003-2004 academic year. (Tr. 236, 268-270).

Plaintiff's misconduct on October 29, 2003, constituted a material breach of the terms of his written employment agreement and warranted termination of that agreement as a matter of law.

II. The Parties

Plaintiff Michael Keveney attended the Kemper Military School in Missouri for high school. (Tr. 175). After receiving a bachelor's degree at the University of Tulsa, Plaintiff taught at a school in Oklahoma for a year and a half, and then returned to the Kemper Military School to teach. (Tr. 176-177). Plaintiff taught at

Kemper for only one semester before the school closed. (Tr. 177). Plaintiff was then hired by the Academy on June 19, 2002, to teach drama and English for the 2002-2003 academic year. (Tr. 178-179; Tr. Ex. 1).

The Missouri Military Academy is a private boarding school for boys located in Mexico, Missouri. (Tr. 309). The Academy has been in existence since 1889. (Tr. 309). The Academy has approximately 230 students from the United States and around the world, including Latin America and Asia. (Tr. 307). The school has a middle school and a high school, with approximately two-thirds of the students attending the high school. (Tr. 307).

The Academy is fully accredited by the North Central Association of Colleges and Schools ("NCA"), the same accrediting agency for the University of Missouri. (Tr. 304). The Academy is also accredited by the Independent Schools Association, which has even tougher accreditation standards than the NCA. (Tr. 305).

The Academy maintains a Junior Reserve Officer Training Corps ("JROTC") that all high school students participate in. (Tr. 305). The JROTC program is controlled and governed by the Cadet Command of the United States Department of the Army. (Tr. 305-306).

The motto of the Academy is "Look like a soldier, act like a gentleman, and study like a scholar." (Tr. 303). The mission statement of the Academy is to

prepare young men for college and life by cultivating good citizenship, manners and respect for different races and creeds. (Tr. 306-307). Students attend classes and perform other school duties in the Academy's uniform. (Tr. 303-304).

Teachers, like Plaintiff, are also required to be in uniform while performing teaching duties. (Tr. 312). The faculty manual provides that teachers "deal with parents, cadets, co-workers and members of the public cheerfully and with respect." (Tr. 314; Tr. Ex. B). The rules of conduct contained in the faculty manual are incorporated into the written employment agreements of teachers like Plaintiff. (Tr. 315; Tr. Exs. 1 and 5).

Ron Kelly came to the Academy in 1969 as a biology teacher and has served the Academy continuously since that time. (Tr. 298). He thereafter served as the Director of Admissions, Executive Officer, Superintendent, and then President. (Tr. 298). Col. Kelly supervised all division heads of the Academy, including the Director of Studies, the Commandant/Executive Officer, the Commandant of the Middle School, the Principal of the Middle School, and various business officers. (Tr. 300).

As President of the Academy, Kelly was responsible for hiring teachers and entering into written employment contracts with teachers on behalf of the Academy. (Tr. 311). President Kelly ultimately made the decision to hire Plaintiff as a teacher. (Tr. 311).

Commandant Jim Medley has been employed by the Academy since 1995. (Tr. 374). Before joining the Academy, Cmdt. Medley served in the United States Air Force for twenty-seven and a half years. (Tr. 374-375). In October 2003, Cmdt. Medley was the second in command at the Academy under Col. Kelly and served as the Academy's Executive Officer (Tr. 375-376). As Commandant, Medley was responsible for all aspects of the lives of high school cadets outside of the classroom, including residential life, student welfare and student discipline. (Tr. 376).

James Berlin served as the Academy's Chaplain in 2003. (Tr. 388-389). Chaplain Berlin is also the pastor at a Methodist Church in Chillicothe, Missouri. (Tr. 388). Chaplain Berlin was present at the Academy on October 29, 2003, when Plaintiff blew up in President Kelly's office and yelled at President Kelly. (Tr. 390-391).

III. Chronology of Key Events

Plaintiff's Misconduct and Warnings in March of 2003

Plaintiff testified that on March 11, 2003 – during his first year of employment at the Academy – Plaintiff met with President Ron Kelly to discuss a school play. (Tr. 240). During the interaction, Plaintiff and President Kelly also discussed Plaintiff's future at the Academy. Plaintiff admitted during his testimony at trial that he became angry during the meeting:

Q. [By Mr. Cooper] I'd like to go back first to March of 2003. March of 2003 is when you had a conversation with the president, Colonel Kelly, about the possibility of your returning to work the following year.

A. [By Plaintiff] Yes, sir.

Q. And during that conversation you don't dispute that you became very angry and raised your voice; true?

A. After I was told to write my letter of resignation I did become angry.

Q. I remember hearing you say that but I'm just trying to establish so that we can kind compartmentalize what you're admitting actually happened. You admit that during that March of 2003 conversation you became angry enough that you were essentially yelling at the president of the Missouri Military Academy?

A. I don't know if I raised my voice or yelling. Can you refresh my memory from the deposition?

Q. Well, I just want to hear what your testimony is this afternoon.

A. I raised my voice, yes.

(Tr. 225-226).

Plaintiff admitted at trial that during his interaction with President Kelly on March 11, 2003, Plaintiff was disrespectful to the President of the Academy:

> Q. . . . Again I'm just trying to establish during the conversation in March do you think that you were disrespectful?
>
> A. Yes, sir.

(Tr. 226).

Plaintiff also admitted at trial that on the next day (March 12, 2003), Plaintiff again met with President Kelly. (Tr. 227). Plaintiff admitted that during the March 12 meeting, President Kelly told Plaintiff that he feared that Plaintiff was going to strike him:

> Q. . . Do you remember Colonel Kelly telling you the next day that he was concerned he thought you might hit him?
>
> A. Yes, sir.
>
> . . .
>
> Q. Now, now we're in the area, Mike, beyond even disrespect, you would agree, we're talking about highly inappropriate behavior from one employee to another employee of the company; true?
>
> A. True, but that was his perspective.

(Tr. 238-239).

Plaintiff admitted that he was explicitly warned on March 12, 2003, by President Kelly that any future outbursts would not be tolerated:

> Q. You had a conversation with President Kelly during which he said Mike, words to this effect, Mike I'm going to give you another chance; right?
>
> A. Yes, sir.
>
> Q. But there was an important stipulation that was part of that chance that you got and that was no more outbursts, right?
>
> A. He said he wouldn't tolerate any more outbursts, yes, sir.
>
> Q. Wouldn't tolerate. You remember those exact words. He wouldn't tolerate any further outbursts; correct?
>
> A. Yes.
>
> Q. Just so that we're all clear in this room, then as of, I would have been March 12th, around that time frame you think?
>
> A. Yes.
>
> Q. Okay. As of March 12th, 2003, before you entered into your contract for your second year?
>
> A. Yes, sir.

Q. You had a conversation with the president of the Missouri Military Academy during which you were told you're given another chance but only so long as there are no more outbursts; right?

A. Yes. He said he would tolerate no more outbursts, yes.

Q. Would you consider what he told you when he said he wouldn't tolerate any more outbursts a warning?

A. Yes, sir.

Q. And you knew that when he said no further outbursts would be tolerated that if you had more outbursts it could result in your termination?

A. Possibly, yes, sir.

(Tr. 227-228).

Plaintiff admitted that he was told in March of 2003 that there would be a "no more outbursts" policy because from Col. Kelly's perspective Plaintiff's behavior was so extreme:

Q. And that's why you were told no further outbursts; right?

A. Because Colonel Kelly was afraid - -

Q. Because your behavior was so extreme on March 11th, 2003, that it warranted a no more policy?

A. According to what you're saying, yes, from Colonel Kelly's perspective.

(Tr. 239-240).

Plaintiff also admitted at trial that he was warned by Richard Ray, the Dean of Faculty, in March of 2003, shortly after Col. Kelly warned Plaintiff, that he needed to be "professional," "respectful" and to have no further outbursts. (Tr. 233).

Plaintiff understood as of March of 2003 that he was required to be "respectful," "professional," and "courteous" at all times with his superior officers. (Tr. 229).

Plaintiff was warned again in June of 2003

Plaintiff admitted at trial that he met again with President Kelly on June 5, 2003, prior to signing the employment contract for the 2003 – 2004 school year. (Tr. 237). Plaintiff testified that he was again advised on June 5, 2003, that another outburst would not be tolerated:

Q: And if I recall correctly from your testimony and your deposition you admit, sir, that during that June 5 conversation before you executed this contract you were reminded that further outbursts would not be tolerated and that if you had any it could include – it could – you could have discipline up to and including termination?

A. Yes, sir.

(Tr. 237).

The "no more outbursts" rule and Plaintiff's 2003-2004 contract

The following language was contained in the 2003 – 2004 contract between Plaintiff and the Academy:

> The Faculty Member shall perform all duties and services of a Faculty Member faithfully and satisfactorily at the time and place, and for the duration prescribed by M.M.A. The Faculty Member shall comply with and enforce all rules, regulations and policies promulgated by M.M.A. and /or recorded in the *Faculty, Cadet* and *Parent Handbooks*. All such rules, regulations and policies are incorporated herein by reference and are made a part of this Agreement as though fully set forth. . . . A breach of any of the foregoing will be cause for termination of this agreement by M.M.A.

(Tr. Ex. 5, para. 5).

Plaintiff also admitted that paragraph 6 of the contract provides:

> 6. **TERMINATION**: Without limitation by section 5, this Agreement may be terminated by M.M.A. for cause. If for any reason, the services of the Faculty

> Member do not extend throughout the period of this Agreement, his/her salary shall terminate on the date he/she cease to perform his/her duties.

(Tr. Ex. 5, para. 6).

Plaintiff admitted at trial that President Kelly's "no more outbursts" requirement for Plaintiff was a "rule, regulation, and policy" of the Academy that had been incorporated into the employment contract:

> Q. You had read this agreement before you executed it on June 5; true?
>
> A. Yes.
>
> Q. And you understood that your duties included following all the rules, regulations and requirements, policies of the institution as given to you by your superiors like Colonel Kelly; true?
>
> A. Yes, sir.
>
> Q. And that included avoiding further outbursts, inappropriate disrespectful behavior; right?
>
> A. Yes, sir.
>
> Q. Okay. Now, a breach of any of the foregoing will be cause for termination of this agreement. So cause is defined in the agreement as

breach of any of your duties in paragraph 5; correct? You understood that?

A. Yes, sir.

(Tr. 236).

Plaintiff also admitted that the conduct requirements contained in the faculty handbook were incorporated into his employment contract:

Q. But most importantly you agree that part of your contractual obligations in 2003 and 2004 was to conduct yourself always in front of the students by giving a good example of your - - in terms of your conduct, your manners and your uniform?

A. Yes, sir.

(Tr. 242).

Plaintiff's inappropriate outbursts on October 29, 2003 and his dismissal

Plaintiff testified that on October 29, 2003, he entered President Kelly's office along with Cadet Aaron Berta. (Tr. 246-247). When he entered President Kelly's office, both President Kelly and Chaplain James Berlin were already in the office in a meeting. (Tr. 246-247).

Plaintiff admitted that he was "agitated" when he was in President Kelly's office the first time on October 29. (Tr. 248). Plaintiff admits that his "face was

red" and he was standing at all times. (Tr. 248). Plaintiff admits that within the first few minutes of entering President Kelly's office he said words to the effect "that if I were this kid's parents I'd sue the Missouri Military Academy." (Tr. 247). Plaintiff admits that his conduct was inappropriate:

> Q. Do you think that threatening a lawsuit or suggesting a lawsuit over something in front of a student is an appropriate way to conduct yourself in front of that student as a teacher at the Missouri Military Academy?
>
> A. Put that way, no, sir.
>
> Q. And this conversation about the lawsuit happened right off the bat; didn't it, when you walked into the room?
>
> A. Yes, sir. . .

(Tr. 249-250). Plaintiff admits that despite his inappropriate conduct, Col. Kelly did not act unprofessionally at any time:

> Q. Now, despite the fact that you were agitated, red faced and standing over him you would agree with me, sir, that Colonel Kelly didn't raise his voice at any time during that first meeting with you; did he?
>
> A. No, sir.

Q. He didn't act unprofessionally at any time during that meeting with you; did [he]?

A. No, sir.

(Tr. 250).

Plaintiff admitted that after his inappropriate conduct in front of Cadet Berta, Chaplain Berlin and President Kelly, Plaintiff then went to Commandant Jim Medley's office. (Tr. 252-253). Plaintiff admitted that his conduct with Commandant Medley was disrespectful:

Q. Again, you had Aaron Burta, the student, with you; correct?

A. Yes, sir.

Q. And if I'm not mistaken the first words out of your mouth to your superior officer were, "What the hell is going on in the barracks"; correct?

A. Yes, sir.

Q. Okay. Like I asked before, when you came to this point in your communications with Lieutenant Colonel Medley you had a choice; correct?

A. Yes, sir.

Q. You could [have] chosen to be respectful and raise it in a professional way or you could choose to use words what the hell is going on in the barracks; right?

A. Yes, sir.

Q. And you agree that saying what the hell is going on in the barracks is not a respectful way to address any co-employee, let alone a superior officer at the academy; true?

A. Yes, sir.

(Tr. 252-253). Plaintiff admitted that he was yelling at Commandant Medley – possibly so loud that students and other personnel could hear him outside of Commandant Medley's office. (Tr. 254-255).

After yelling and cursing at Commandant Medley, Plaintiff left the Commandant's office and returned to President Kelly's office. (Tr. 255-256). Plaintiff admits that he "blew up" at President Kelly during their second meeting:

Q. Okay. So you admit that during the second conversation with Kelly you again lost control and you blew up?

A. After I was asked to write my letter of resignation, yes, and I did blow up.

(Tr. 256).

Plaintiff admitted that a military academy is a unique employment setting in the sense that employees wear uniforms, have particular orders they are required to follow and have a chain of command they are required to respect. (Tr. 258). Plaintiff testified that respect for superiors is essential to the mission of a military school:

> Q. And the esprit de corps, chain of command, respect for your superiors is essential at a military school; isn't it?
>
> A. It's essential in the military as well, yes.
>
> Q. Both at a military school?
>
> A. And in the military.
>
> Q. And in the military?
>
> A. Yes, sir.
>
> Q. And if that esprit de corps, that respect, that character, that respect for your superiors, professionalism, civility, all of that breaks down that can materially impact the ability of that military school to do its mission.
>
> A. Yes, sir.

(Tr. 258-259).

Plaintiff admitted that the motto of the Academy is "Look like a soldier, act like a gentleman and study like a scholar." (Tr. 224). Plaintiff agreed during his

testimony that acting like a gentleman is essential to the mission and core of the Missouri Military Academy. (Tr. 224). He also conceded that raising his voice at a superior officer, saying that his superior had "pissed off" students and parents, stating he would "have the jobs" of his superiors, and yelling at the Commandant and President of the Academy was not acting like a gentleman. (Tr. 224-225).

Chaplain James Berlin testified that he was present in President Kelly's office on October 29, 2003, when Plaintiff entered the office with Cadet Berta. (Tr. 390-391). Chaplain Berlin agreed that Plaintiff was yelling at President Kelly in front of Berta. (Tr. 391). Chaplain Berlin had never seen an employee of the Academy yell at President Kelly before that day. (Tr. 391). In fact, he had never seen any employee yell at his supervisor in that way in any of his prior work experiences. (Tr. 391). Chaplain Berlin believed that Plaintiff acted inappropriately, unprofessionally, and discourteously when yelling at President Kelly. (Tr. 391-392).

During the second outburst in President Kelly's office on October 29, 2003, President Kelly ordered Plaintiff off campus. (Tr. 331). President Kelly believed that the outbursts in his office violated Plaintiff's contractual obligations, particularly because he had cautioned Plaintiff that future outbursts would not be tolerated. (Tr. 332-333). President Kelly also testified that Plaintiff's raising concerns about bruising on Cadet Berta's arm or reporting hazing to the DFS

played absolutely no role in President Kelly's decision to terminate Plaintiff's employment. (Tr. 334).

IV. Plaintiff's suit, the trial, the verdict, and this appeal

Plaintiff filed a two-count Petition in the Circuit Court of Audrain County on May 12, 2004. (Legal File 08-13 (hereinafter "L.F. ___")). Count I, entitled "Termination in Violation of Public Policy," was dismissed by order dated April 15, 2005. (L.F. 36). Count II, entitled "Breach of Contract," was tried to a jury on July 16 and 17, 2007. On July 16, 2007, the Academy presented its motion for directed verdict at the close of Plaintiff's evidence. (Tr. 291-296). Despite noting that the issue was "somewhat of a close question," the trial court denied the Academy's motion. (Tr. 295).

After the Academy's evidence, and Plaintiff's rebuttal, on July 17, 2007, the Academy presented its motion for directed verdict at the close of the evidence and the Court denied the motion. (Tr. 410-412). On the same day, the jury found in favor of Plaintiff on his claim for breach of contract in the amount of $13,300. (Tr. 441-442). The trial court entered Judgment on the jury verdict on July 18, 2007. (L.F. 55).

On August 10, 2007, the Academy timely filed its post-trial motions including a motion for judgment notwithstanding the verdict. (Supplemental Legal File 1-27 (hereinafter "S.L.F. ___"). The trial court denied the Academy's post-

trial motions on October 24, 2007. (L.F. 63-64). On November 5, 2007, the trial court entered an Amended Judgment, awarding Plaintiff pre-judgment interest. (L.F. 50). The parties thereafter filed notices of appeal and cross-appeal. (L.F. 51-65) and (S.L.F. 50-53). On December 9, 2008, the Missouri Court of Appeals, Eastern District, issued its Order upholding the Circuit Court's decision. On March 31, 2009, this Court accepted transfer of the instant case.

POINTS RELIED ON

I. The Trial Court Erred in Denying the Missouri Military Academy's Motion for Directed Verdict at the Close of All the Evidence and Motion for Judgment Notwithstanding the Verdict Because the Evidence Established That Plaintiff Failed to Perform His Contractual Obligations and Thus Failed to Make a Submissible Case of Breach of the Employment Agreement Between Plaintiff and the Academy.

Begley v. Werremeyer Associates, Inc., 638 S.W.2d 817 (Mo. App. 1982)

Craig v. Thompson, 244 S.W.2d 37 (Mo. Banc 1951)

Forkin v. Container Recovery Corp., 835 S.W. 2d 500 (Mo. App. 1992)

Stokes v. Enmark Collaborative, 634 S.W.2d 571 (Mo. App. 1982)

II. The Trial Court Erred in Denying the Missouri Military Academy's Motion for Directed Verdict at the Close of All the Evidence and Motion for Judgment Notwithstanding the Verdict as the Evidence Established That Plaintiff Engaged in Misconduct That Constituted "Cause" for Termination of the Agreement Under the Terms of the Employment Contract Between Plaintiff and the Academy.

Craig v. Thompson, 244 S.W.2d 37 (Mo. Banc 1951)

Forkin v. Container Recovery Corp., 835 S.W. 2d 500 (Mo. App. 1992)

Superior Gearbox Co. v. Edwards, 869 S.W.2d 239 (Mo. App. 1993)

ARGUMENT

I. The Trial Court Erred in Denying the Missouri Military Academy's Motion for Directed Verdict at the Close of All the Evidence and Motion for Judgment Notwithstanding the Verdict Because the Evidence Established That Plaintiff Failed to Perform His Contractual Obligations and Thus Failed to Make a Submissible Case of Breach of the Employment Agreement Between Plaintiff and the Academy.

A. The Standard of Review

The standard of review of denial of a motion for judgment notwithstanding the verdict is essentially the same as for review of denial of a motion for directed verdict. ***Clevenger v. Oliver Ins. Agency, Inc.***, 237 S.W.3d 588, 590 (Mo. 2007). In ***Clevenger***, this Court held:

> A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence. In determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that

> verdict. This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion. Accordingly, a motion for JNOV is properly granted when the motion identifies at least one element of the plaintiff's case that is not supported by the evidence.

Id. at 590 (internal citations omitted).

To make a submissible case, a plaintiff must present substantial evidence for every fact essential to liability. ***Kelly v. State Farm Mutual Automobile Insurance Company***, 218 S.W.3d 517, 520 (Mo. App. 2007). Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide the case. ***Id.*** at 520-521**.** The Court also noted "this Court will not . . . supply missing evidence nor grant the plaintiff the benefit of any unreasonable, speculative, or forced inferences." ***Id.*** at 521. Whether evidence in a case is substantial and whether inferences drawn are reasonable are questions of law. ***Kiesel Co. v. J&B Pros., Inc.,*** 241 S.W.3d 868, 871 (Mo. App. 2008).

B. The Elements of a Breach of an Employment Contract Claim

To state a claim for a breach of contract, a plaintiff must allege and prove (1) the existence of a contract and the terms of that agreement; (2) that the plaintiff

performed or tendered performance; (3) that defendant did not perform; and (4) that the defendant's failure to perform caused the plaintiff damage. ***Venable v. Hickerson Phelps Kirtley & Assoc., Inc.***, 903 S.W.2d 659, 664 (Mo. App. 1995). Of critical importance in this case, a plaintiff claiming breach of an employment contract in Missouri has the burden of proving at trial that he substantially performed his contractual obligations up until the time of the alleged breach by the employer. ***Begley v. Werremeyer Associates, Inc.***, 638 S.W.2d 817, 820 (Mo. App. 1982).

The Missouri Supreme Court has held that "[i]t is elementary that a party to a contract cannot claim its benefit where he is the first to violate it." ***Boten v. Brecklein***, 452 S.W.2d 86, 92 (Mo. 1970). Where one party to a contract fails to perform material contractual obligations prior to any alleged failure to pay for the goods or services, the party "first breaching" cannot assert the other is liable for a failure to pay. ***Rexite Casting Co. v. Midwest Mower Corp.,*** 267 S.W.2d 327, 333 (Mo. App. 1954).

The "first breach" rule applies with equal force in the context of employment contracts. ***See, e.g., Stokes v. Enmark Collaborative***, 634 S.W.2d 571, 573 (Mo. App. 1982). In other words, where an employee is the first to materially breach an employment contract, he cannot recover compensation otherwise due under the contract. ***Id.***

The Missouri Supreme Court has made it clear that when there is no dispute as to facts constituting the employee's material breach, then the issue of the effect of the prior breach is one for the court as a matter of law. ***Craig v. Thompson,*** 244 S.W.2d 37, 41 (Mo. banc 1951). In ***Craig***, the Supreme Court reversed a jury verdict for an employee where the undisputed facts indicated that the employee had violated several of the employer's work rules. Much like the Plaintiff here, the employee in ***Craig*** admitted in cross-examination at trial that he had violated various work rules governing his attendance and availability for work. ***Id.***

C. Plaintiff Breached His Employment Contract Prior to Being Terminated on October 29, 2003

Plaintiff admitted at trial that as part of his employment contract, he was required to follow the "no more outbursts" rule given him by President Kelly in March and June of 2003. (Tr. 236-237). It is also undisputed that Plaintiff's duty to refrain from further outbursts was a material contractual obligation – Plaintiff admitted that he knew further outbursts could result in his termination, and that being respectful to other employees and superiors is essential to the mission of the Academy. (Tr. 224, 227-230, 237).

Plaintiff admitted at trial that despite these clear contractual obligations, he engaged in repeated outbursts on October 29, 2003, when he yelled at both President Kelly and Commandant Medley. (Tr. 225-226, 253-255, 256). Plaintiff

admitted that he yelled, “what the hell is going on in the barracks” at Commandant Medley, and that he “blew up” at President Kelly. (Tr. 253-254). Plaintiff’s admitted misconduct clearly constituted material breaches of Plaintiff’s employment contract, and therefore, Plaintiff failed to make a submissible case that he performed his duties under the contract.

The ***Begley*** decision is highly instructive regarding an employee’s burden to prove performance of contractual obligations. There, the employee and employer entered into a two-year employment contract for a salary of $39,000 per year. ***Begley v. Werremeyer Associates, supra***, 638 S.W.2d at 818. The contract provided that the plaintiff/employee was required to faithfully perform his duties during the term of the contract. ***Id.*** If the defendant/employer dismissed plaintiff prior to the expiration of the contract “other than for cause” then the defendant was required to pay plaintiff “an amount equal to the total salary [the plaintiff] would have earned from the date of breach to the date of termination had he been permitted to fully perform the terms of his employment.” ***Id.*** at 819.

At trial, the plaintiff/employee asserted that he performed his contractual obligations. The defendant, on the other hand, asserted that the plaintiff’s work was “not satisfactory or professional.” ***Id.*** Over the defendant/employer’s objection, the trial court submitted the following instruction:

> If you determine that the plaintiff has met his burden of showing by a preponderance of the evidence that he substantially performed his part of the contract, then the defendant has the burden of showing by a preponderance of the evidence that plaintiff's discharge was for good cause under the Employment Agreement.

Id.

In holding that it was reversible error to submit the aforementioned instruction, the appeals court noted that "at trial plaintiff has the burden of proving substantial performance under the contract up until the time of the alleged breach." ***Id.***

The ***Begley*** decision makes it clear that Plaintiff had the burden to prove at trial that he performed his contractual obligations as a teacher at the Academy up until the time of his dismissal on October 29, 2003. If the undisputed facts reveal that Plaintiff failed to perform as he was contractually required to do, he cannot prevail as a matter of law. ***Id.***

Plaintiff's numerous admissions as to his outbursts directed at his superiors, the requirements of his employment contract, his knowledge that further outbursts could result in termination, and his unprofessional conduct during his interactions with superiors of October 29, 2003, remove this matter from the province of the

jury and place the case squarely within the dictates of ***Craig*** and ***Begley***. Plaintiff's contractual breaches and the materiality of those breaches were admitted by Plaintiff at trial and he is bound by those admissions on appeal.

In ***Forkin v. Container Recovery Corp.***, 835 S.W.2d 500 (Mo. App. 1992), this Court reversed a jury verdict in favor of an employee who claimed that various supervisors tortiously interfered with his business expectancy of continued employment. This Court held that because the plaintiff admitted that he had failed to perform his duties as an employee, he could not claim entitlement to an expectancy in continued employment as a matter of law. ***Id.*** at 504**.** The Court held:

> Plaintiff admitted he did not tell any of the defendants that he had obtained the signature and gave the signed UCC-1 to Stengel rather than the credit department. Plaintiff admitted he let the defendants believe he failed to both obtain the signature and deliver the document to the credit department until he filed his suit, some two years later. Clearly, defendants as officers of CRC and supervisors of plaintiff, had a legal right to discharge plaintiff, an employee at will, for failure to complete an assignment and, thus, breaching his employment contract with CRC. Even if plaintiff had the UCC-1 signed, his evidence is

> that he failed to follow attorney Trieschmann's instructions to return it to Ms. Holland. Plaintiff was employed by CRC and his admitted breach of his assignment ultimately caused CRC to sustain a loss. Plaintiff's own evidence supports the conclusion the discharge was justified.

Id. at 503.

The principle discussed in ***Forkin*** applies with equal force here: ***Plaintiff's own evidence*** supports the conclusion that his discharge was justified. Plaintiff's failure to perform material requirements in his employment agreement constitutes a failure of proof as to an essential element of his breach of contract claim. A trial court should enter judgment notwithstanding the verdict in a breach of an employment contract case where the plaintiff fails to submit substantial proof of any element of his claims. ***Harrell v. Mercy Health Services Corp.***, 229 S.W.3d 614, 619 (Mo. App. 2007) (granting motion for judgment notwithstanding the verdict in breach of employment contract case).

Here, Plaintiff failed to make a submissible case by failing to provide substantial evidence that he performed his contractual obligations up to the time of the termination of his employment by the Academy. The trial court erred in denying the Academy's motion for directed verdict at the close of all the evidence and motion for judgment notwithstanding the verdict.

II. The Trial Court Erred in Denying the Missouri Military Academy's Motion for Directed Verdict at the Close of All the Evidence and Motion for Judgment Notwithstanding the Verdict as the Evidence Established That Plaintiff Engaged in Misconduct That Constituted "Cause" for Termination of the Agreement Under the Terms of the Employment Contract Between Plaintiff and the Academy.

A. The Standard of Review

The standard of review described in Section I.A., *supra*, of this Brief applies to the arguments raised in this section.

B. Plaintiff's Misconduct Constituted "Cause" For Termination As A Matter Of Law

Even assuming Plaintiff's admitted misconduct is not deemed to constitute a failure of proof of Plaintiff's performance of his contractual obligations, the Academy is still entitled to judgment, as a matter of law, because the undisputed facts establish that the Academy had "cause" to terminate Plaintiff's employment on October 29, 2003.

This Court has ruled that an employee's admitted breach of reasonable workplace rules constitutes "cause" as a matter of law. In ***Craig v. Thompson***, ***supra***, this Court wrote:

> In every contract of employment it is implied that the employee will obey the lawful and reasonable rules, orders and instructions of the employer, and disobedience of such known rules justify the employee's discharge.

Craig, 244 S.W.2d at 41. The ***Craig*** Court went on to hold:

> Whether a certain state of facts as to which there is no dispute amounts to a legal justification for discharge, i.e., whether the discharge was or was not wrongful, is a question of law for the court.

Id. In addition, other Missouri courts have held that dismissal for insubordination constitutes "cause" for termination of employment contracts. ***See, e.g., Superior Gearbox Co. v. Edwards***, 869 S.W.2d 239, 244 (Mo. App. 1993).

Where an employee confesses to violating a work rule, it is not a question for the jury as to whether the termination was appropriate:

> …[P]laintiff is not entitled to have a jury pass upon the question of whether his confessed violation of the operating rules of his employer warranted his dismissal, for the jury may not here substitute its opinion for the conclusions of plaintiff's employer upon that question.

Craig v. Thompson, ***supra***, 244 S.W.2d at 43.

In the present case, Plaintiff admitted at trial that before he entered into the 2003-2004 employment contract, he understood the Academy's work rules included refraining from outbursts directed at President Kelly and other superiors. (Tr. 227-228). At trial, Plaintiff admitted that these requirements formed a part of his contractual obligations. (Tr. 268-270). Plaintiff admitted that outbursts could constitute grounds (i.e., "cause") for his termination. (Tr. 227-228). Nonetheless, he "blew up" at his superiors on three occasions on October 29, 2003, before he was terminated. (Tr. 247-250, 252-256).

The Academy is not aware of a single reported case in the history of Missouri holding that employee misconduct of the kind involved here directed at supervisors on multiple occasions, after being warned not to do so, does not constitute "cause" for termination. It would be a worrisome day, indeed, when employers are required to pay contract damages to employees who admit they engaged in this kind of insubordinate and inappropriate behavior in the workplace. Such a result is even more troubling in the context of a military academy where it is undisputed that observance of decorum and professionalism is integral to its mission of educating students and promoting appropriate behavior.

C. Plaintiff's Claim That He Was Terminated For Complaining About Bruises On A Student's Arm, Or For Stating The Bruises Should Be Reported To The Division Of Family Services, Is Irrelevant.

Throughout this case, Plaintiff has claimed that because Plaintiff raised concerns about Cadet Berta's bruises, and stated that his bruises should be reported to the DFS, Plaintiff was insulated from termination. Plaintiff has argued, in effect, that his misconduct must be forgiven because of his noble purpose in bringing his concerns to President Kelly and Commandant Medley.

Plaintiff's argument is legally and factually without any merit whatsoever. First, as a factual matter, Plaintiff admitted that he could have presented his concerns in a professional and appropriate way. (Tr. 253). However, Plaintiff chose not to. Plaintiff's subjective state of mind and purpose, however noble, do not excuse Plaintiff's misconduct or contractual breaches.

Second, as a legal matter, Plaintiff's effort to excuse his misconduct fails. Where, as here, a plaintiff admits that he has failed to perform agreed upon contractual requirements, the plaintiff may not allege that he is entitled to recover upon the contract. ***See e.g., Craig v. Thompson, supra,*** 244 S.W.2d at 41; ***Forkin v. Container Recovery Corp., supra***, 835 S.W.2d at 503.

Two simple hypotheticals demonstrate this principle. First, suppose Plaintiff decided to express his concerns to President Kelly by assembling the student body and yelling at President Kelly in front of all of the students. No one would doubt that the Academy would have "cause" to terminate Plaintiff's employment. It is no less true that Plaintiff's three outbursts on October 29, 2003, in front of students and other Academy employees, and following his inappropriate conduct in March of 2003, constituted cause for termination, as a matter of law.[1]

Suppose, again for purposes of argument, Plaintiff contracted with the Academy to paint the Academy's buildings white. If Plaintiff painted the Academy buildings red, but did so because he thought it would make the Academy

[1] Obviously, this case is not a First Amendment claim and Plaintiff has no right to claim that his statements were somehow protected. Aside from an absence of state action, there is no right to disrupt the workplace under the Supreme Court's analysis in ***Connick v. Myers,*** 461 U.S. 138 (1983). Moreover, a plaintiff who engages in misconduct cannot claim protection under anti-retaliation statutes. ***See, e.g., Nichols v. Southern Illinois University***, 510 F.3d 772, 785 (7th Cir. 2007) (untrue statements not "protected activity" with respect to anti-retaliation statutes). Regardless, such claims are not relevant to the breach of contract analysis required in this case.

a better place, no one would doubt that Plaintiff had nonetheless breached the contract.

Regardless of Plaintiff's alleged motives on October 29, 2003 (which are irrelevant in a breach of contract action), it cannot be disputed that his outbursts were in direct violation of the Academy's reasonable work place rules. As a result, the Academy was entitled, as a matter of law, to terminate Plaintiff's employment for cause.

CONCLUSION

Because Plaintiff admitted that he violated contractual requirements by engaging in repeated outbursts directed at his supervisors, Plaintiff failed to make a submissible case on his claim of breach of his employment agreement with the Academy. Moreover, Plaintiff's misconduct constituted "cause" as a matter of law for Plaintiff's termination. In all events, the trial court erred in denying the Academy's motions for directed verdict and for judgment notwithstanding the verdict.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that:

(1) This brief contains the information required by Rule 55.03;

(2) This brief complies with the limitations contained in Rule 84.06(b);

(3) There are 7,413 words in this brief;

(4) The electronic mail file containing a copy of this brief filed contemporaneously herewith has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct printed copy of the foregoing, as well as an electronic file copy, were served by first-class U.S. mail, postage pre-paid, this 22nd day of May, 2009 to:

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