

Earl Holmes vs. FAMU: How a Contract Term can be Cut Short by University Rules and Regulations

By Martin J. Greenberg

I. Introduction

Earl Holmes (“Holmes”) was the linebacker for Florida A&M University (“FAMU”) football team from 1992-1995.¹ In the fourth round of the 1996 NFL Draft, Holmes (126th overall) was drafted by the Pittsburg Steelers.² Over his 10-year professional football career, he not only played for the Steelers, but also the Cleveland Browns and the Detroit Lions.³ In July of 2005, Holmes was inducted into the FAMU Hall of Fame.⁴ Then in 2009, Holmes returned to FAMU as a part of Joe Taylor’s coaching staff, eventually becoming the Defensive Coordinator in 2012.⁵ On January 11, 2013, he was officially named Head Football Coach.⁶

Holmes was terminated from his head football coaching position on October 28, 2014.⁷ His coaching career at FAMU garnered him 6 wins and 16 losses.⁸ Former Florida State Senator Al Lawson “called athletic director Kellen Winslow, Sr. ‘disrespectful’ and said removing Holmes during the week of homecoming was ‘wrong.’”⁹ Lawson went on to say that “[t]here’s no one – not even in high school – that would interrupt homecoming. A competent athletic director would have called someone in ... he wouldn’t have sent a letter.”¹⁰

¹ *Florida A&M Football Bio: Earl Holmes*, FLORIDA A&M ATHLETICS, <http://www.famuathletics.com/ViewArticle.dbml?ATCLID=205235978> (last visited July 31, 2017).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Early Holmes*, REVOLVY., <https://www.revolvvy.com/main/index.php?s=Earl%20Holmes> (last visited July 31, 2017).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Jordan Culver & Doug Blackburn, Update: Al Lawson blasts FAMU for firing Earl Holmes, TALLAHASSEE DEMOCRAT, Oct. 28, 2014, <http://www.tallahassee.com/story/sports/college/famu/2014/10/28/holmes-this-isnt-the-famu-i-grew-up-in/18076019/>.

¹⁰ *Id.*

FAMU is a public institution that was founded in 1887.¹¹ It has an undergraduate enrollment in excess of 8,900 on an urban Tallahassee, Florida campus of approximately 419 acres.¹² FAMU is the only historically black institution in the State University System of Florida,¹³ and is a member of the NCAA Division I Mid-Eastern Athletic Conference.¹⁴

II. Holmes Contracts

After Holmes was named the head coach in January of 2013 he entered into two agreements with FAMU in February of that same year, including a Head Football Coach Employment Agreement and a Head Football Coach's Show Agreement.¹⁵ The employment agreement, relative to "Terms," indicated as follows:

2.1 This appointment shall commence on January 11, 2013 and end on January 10, 2017, without further notice to Coach, and is subject to the rules, regulations, policies and procedures of the Florida Board of Governors and the University as now or hereafter promulgated and the conditions stated herein.

2.2 This Agreement is renewable solely upon an offer from University and acceptance by Coach, both of which must be in writing and signed by the parties. This employment in no way grants Coach a claim to tenure in employment, or any years of employment attributable to tenure within the University.¹⁶

Paragraph 5.0 of Holmes' Employment Agreement deals with "Non-Reappointment, Separation, Termination, Other Discipline" and states:

5.1 Non-reappointment, separation or termination of this Agreement by University may occur pursuant to the terms of this Agreement and University regulations as now existing or hereafter promulgated.

5.2 The University shall also have the right to terminate this at any time prior to its expiration, upon written notice to Coach, upon the following grounds:

¹¹ *Florida A&M University*, U.S. NEWS HIGHER EDUCATION, Nov. 11, 2014, <http://colleges.usnews.rankingsandreviews.com/famu-1480>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Employment Agreement Between Florida A&M University and Earl Holmes (Feb. 7, 2013).

¹⁶ *Id.*

- (a) Deliberate and serious violations of duties as set forth in this Agreement or the refusal or unwillingness to perform such duties.
- (b) A violation of any term or condition of this Agreement not remedied after thirty (30) days' written notice to Coach from the Athletics Director.
- (c) Engaging in conduct which is unlawful; conduct which constitutes moral turpitude as defined by state or federal statutes or as adjudicated by a court of competent jurisdiction or administrative tribunal; conduct in violation of any federal or state law, rule, regulation, policy or procedure; conduct in violation of any rule, regulation, policy or procedure of the MEAC, NCAA, University of Florida Board of Governors; or conduct seriously prejudicial to the best interests of the University or its Sports Team.
- (d) Failure to supervise the assistant coaches and football other coaching staff in a manner to prevent the NCAA or MEAC violations.
- (e) Significant or repetitive violations or major violations of any by-law, rule, regulation, policy or procedure of the MEAC or NCAA, which may adversely affect the University's Sports Team or could result in the University being placed on probation or punished in any manner by the MEAC or NCAA.
- (f) Prolonged absence, i.e. at least three (3) consecutive days, from the University without consent of the Athletics Director or the President.

5.3 In the event of any such termination for cause, the Coach's salary and other benefits, as set forth above, shall terminate as provided in such written notice, and the University thereafter shall not be liable to Coach for any damages, unless Coach is otherwise entitled thereto under applicable state or federal law.

5.4 Notwithstanding any other provision of this Agreement, the Agreement shall terminate automatically if:

- (a) Coach dies;
- (b) Coach becomes totally or permanently disabled; or
- (c) The parties mutually agree in writing.

5.5 If Coach is found in violation of MEAC or NCAA regulations, while employed by the University or during prior employment at another NCAA member Institution, the Coach shall be subject to disciplinary or corrective action by the University as set forth in the provisions of the NCAA enforcement procedures. In addition, Coach may be suspended for a period of time, without pay, or the Coach's employment may be terminated if the Coach is found to have been involved in significant or repetitive violations of the NCAA, MEAC or University rules, procedures or regulations.

5.6 This Employment Contract is subject to the U.S. and Florida Constitutions and laws as constitutionally permissible, and the regulations, policies and

procedures of the Florida Board of Governors and FAMU, as now existing or hereafter promulgated.¹⁷

It should be noted that Holmes' Head Football Coach Employment Agreement does not have a provision for termination without cause.

On or about October 28, 2014, Holmes received a letter from Dr. Elmira Magnum, President of the FAMU, which, in essence, notified him of his non-reappointment and employment separation. Said letter read as follows:

Pursuant to paragraph 5.1 of your Employment Agreement and Florida A&M University Board of Trustees (FAMU) Regulations 10.105 and 10.106, you are hereby notified that your employment will end at the close of business on Tuesday, January 20, 2015. Further, you are placed on Administrative Leave with Pay, effective immediately for the remaining sixty (60) days notification period. As set forth in FAMU's Regulations, there is no appeal process for this employment action. In addition, you are to refrain from reporting to work or visiting the area(s) related to your current work-assignment unless otherwise notified by this Office.

Please arrange to return all University equipment or property, which you may have in your possession or control, to Mr. Kellen Winslow, Director for Intercollegiate Athletics by close of business on the date you receive this notice. University equipment or property shall include any and all keys, cellular phone(s), iPads, laptop computers, electronic devices, computer passwords, flash drives, data files, both hardcopy and computer records. Further, you are to return to Mr. Winslow any and all University equipment or property that you may have at home or in locations external to the main campus. Arrangements will be made to return to you any personal property remaining in your work area, as appropriate. Also, to the extent that you have a courtesy vehicle on loan from a dealership, please ensure the vehicle is returned as appropriate.

Should you obtain employment external to the University prior to January 20, 2015, your ending date of employment with FAMU shall be adjusted accordingly. (See FAMU Regulation 10.110). You should contact the Office of Human Resources, Benefits and Leave Sections, regarding your insurance conversion options, any leave payments for which you are due, and to finalize the exit interview process.

Pursuant to Section 112.3145(1)(b) and (c), Florida Statutes, you may also be required to file a final Financial Disclosure Form with the Florida Commission on Ethics within sixty (60) days after leaving employment. Failure to timely file this form may result in a fine not to exceed \$1,500. A copy of the form and mailing

¹⁷ Employment Agreement, *supra* 15, at para. 5.

instruction are available from the website of the Florida Commission on Ethics at www.ethics.state.fl.us.

On behalf of the University, I wish you the very best in your future endeavors.¹⁸

III. Holmes' Lawsuit

In January of 2015 Holmes commenced suit against FAMU, and the complaint indicated as follows:

Plaintiff, EARL HOLMES ("Mr. Holmes"), by and through his undersigned counsel, sues Defendant, FLORIDA A&M UNIVERSITY ("FAMU"), by and through the Board of Trustees for Florida A&M University (the "Board"), for damages from breach of contract, breach of good faith and fair dealing, fraud in the inducement and negligent misrepresentation:

PARTIES, JURISDICTION & VENUE

1. This is a Complaint for breach of contract, breach of good faith and fair dealing, fraud in the inducement and negligent misrepresentation related to FAMU's improper termination of Mr. Holmes' employment as FAMU's head football coach and seeking recovery of Mr. Holmes' unpaid wages and other damages stemming therefrom.
2. Mr. Holmes is an individual residing in Leon County, Florida and is *sui juris*.
3. FAMU is a public educational institution organized and existing under the laws of the State of Florida, with its main offices located in Tallahassee, Leon County, Florida.
4. Upon information and belief, the Board is the governing body of FAMU.
5. This Court has jurisdiction because the matter in controversy exceeds the sum or value of \$15,000.00, exclusive of interest and costs.
6. Venue is appropriate in this circuit because FAMU is subject to personal jurisdiction of this Court. Additionally, the parties executed and entered into the underlying contracts in Leon County, Florida and Mr. Holmes performed under the contract in Leon County, Florida. Furthermore, all wages and other benefits due and owing to Mr. Holmes under the contracts at issue were due to be paid in Leon County, Florida.

¹⁸ Letter from Dr. Elmira Magnum, President of FAMU, to Earl Holmes (Oct. 28, 2014) (on file with author).

BACKGROUND FACTS

7. From approximately 1992 to 1995, Mr. Holmes attended FAMU as a student and was also a member of the FAMU football team as a linebacker and in July 2005, Mr. Holmes was inducted into the FAMU Hall of Fame.

8. In 2009, after a successful career in the National Football League, Mr. Holmes returned to FAMU to serve on the coaching staff of the FAMU football team.

9. Later, in or around November 2012, Mr. Holmes was named as the Interim Head Coach of the FAMU football team. In December 2012, Mr. Holmes submitted his application for the position of FAMU's Head Football Coach.

10. From December 2012, to January 2013, FAMU and its agents, including, but not limited to members of the Board, and FAMU Athletic Director Derek Horne, actively recruited Mr. Holmes for the position of FAMU's new Head Football Coach.

11. During this time, Mr. Horne and other agents of FAMU, including members of the Board, represented to Mr. Holmes that he would be receiving a four-year contract.

12. On January 11, 2013, FAMU named Mr. Holmes as its new Head Football Coach.

13. Thereafter, on or about February 7, 2013, Mr. Holmes, FAMU Interim President Larry Robinson, and FAMU Athletic Director Derek Horne, each executed the FAMU Head Football Coach Employment Agreement (the "Agreement"). A true and correct copy of the Agreement is attached as Exhibit "A."

14. The Agreement provided Mr. Holmes a four (4) year employment term commencing on January 11, 2013 and ending on January 10, 2017. *See* Exh. A at ¶ 2.1.

15. In conjunction with the Agreement and Mr. Holmes' position as the FAMU head Football Coach, in or around February 2014, Mr. Holmes, FAMU Interim President Larry Robinson and FAMU Interim Athletic Director Michael L. Smith each executed the Florida A&M University Board of Trustees Head Football Coach's Show Agreement (the "Show Agreement"). A true and correct copy of the Show Agreement is attached as Exhibit "B."

16. On October 28, 2014, Elmira Mangum, President of FAMU, sent correspondence to Mr. Holmes stating that "Pursuant to paragraph 5.1 of [the Agreement] and Florida A&M University Board of Trustees (FAMU) Regulations 10.105 and 10.106, you are hereby notified that your employment will end at the

close of business on Tuesday, January 20, 2015.” A true and correct copy of this October 28, 2014 correspondence is attached as Exhibit “C.”

17. Mr. Holmes has retained the undersigned counsel to represent him in this action and has agreed to pay his counsel their reasonable attorneys’ fees and costs.

18. All conditions precedent to the filing of this action have occurred, have been performed or have been waived.

COUNT I – BREACH OF CONTRACT

19. Mr. Holmes reincorporates and realleges Paragraphs One (1) through Eighteen (18) as if fully set forth herein.

20. This is an action for breach of the Agreement seeking damages exceeding \$15,000.00, exclusive of costs, interest and attorneys’ fees.

21. On or about February 7, 2013, Mr. Holmes entered into the Agreement with FAMU to become FAMU’s Head Football Coach. *See* Exh. A.

22. Pursuant to the express language of the Agreement, the Agreement had a term commencing on January 11, 2013 and ending on January 10, 2017. *See* Exh. A at ¶ 2.1.

23. On October 28, 2014, FAMU, by and through its agent and member of the Board, terminated Mr. Holmes’ employment as FAMU’s Head Football Coach as of Tuesday, January 20, 2015 and attempted to terminate the Agreement. *See* Exh. C.

24. FAMU’s October 28, 2014 correspondence and subsequent actions constitute an unequivocal breach of the Agreement by FAMU.

25. As a result of FAMU’s breach of the Agreement, Mr. Holmes has been damaged, including, but not limited to: actual damages, including the balance of his salary under the Agreement and other benefits stemming therefrom, consequential damages, costs and interest.

26. Furthermore, Mr. Holmes is entitled to be reimbursed for his attorneys’ fees and costs from FAMU pursuant to Section 448.08, *Florida Statutes*.

WHEREFORE, Plaintiff, EARL HOLMES, respectfully requests this Honorable Court enter final judgment against Defendant, FLORIDA A&M UNIVERSITY, by and through the Board of Trustees for Florida A&M University, and award Mr. Holmes damages, including the balance of his salary under the Agreement and other benefits stemming therefrom, all direct and indirect

consequential damages, in addition to costs, attorneys' fees pursuant to Section 448.08, *Florida Statutes*, interest and any such further relief as this Court deems just and appropriate.

COUNT II – BREACH OF GOOD FAITH & FAIR DEALING

27. Mr. Holmes reincorporates and realleges Paragraphs One (1) through Eighteen (18) [sic] as if fully set forth herein.

28. This is an action for breach of the duty and covenant of good faith and fair dealing, seeking damages exceeding \$15,000.00, exclusive of costs, interest and attorneys' fees.

29. As a result of the contractual relationship between FAMU and Mr. Holmes, FAMU owed Mr. Holmes a duty of good faith and fair dealing in the performance and enforcement of the Agreement and the employment relationship between the parties.

30. This implied duty and covenant of good faith and fair dealing requires FAMU to refrain from taking any action which interferes with, injures or otherwise deprives Mr. Holmes of the rights or benefits he is entitled to receive under the Agreement.

31. FAMU, through conscious and deliberate acts, failed or refused to perform its obligations and responsibilities under the Agreement, which unfairly frustrates the purpose of the Agreement and disappoints Mr. Holmes' expectations under the Agreement.

32. FAMU's actions, including improperly terminating the employment of Mr. Holmes, constitute a breach of the implied covenant of good faith and fair dealing, which wholly deprives Mr. Holmes of the rights and benefits he is entitled to under the Agreement.

33. FAMU committed these acts willfully, recklessly and with the express intent to result in an unjust benefit to FAMU and to the detriment and damage of Mr. Holmes.

34. As a result of FAMU's breach of the covenant of good faith and fair dealing, Mr. Holmes has been damaged in the form of lost benefits, lost wages and other damages that Mr. Holmes would have otherwise received under the Agreement.

35. Furthermore, Mr. Holmes is entitled to be reimbursed for his attorneys' fees and costs from FAMU pursuant to Section 448.08, *Florida Statutes*.

WHEREFORE, Plaintiff, EARL HOLMES, respectfully requests this Honorable Court enter final judgment against Defendant, FLORIDA A&M UNIVERSITY, by and through the Board of Trustees for Florida A&M University, and in his favor and award Mr. Holmes his actual damages, including, but not limited to the balance of his salary under the Agreement and other benefits stemming therefrom, all direct and indirect consequential damages, in addition to costs, attorneys' fees pursuant to Section 448.08, *Florida Statutes*, interest and any such further relief as this Court deems just and appropriate.

COUNT III – FRAUD IN THE INDUCEMENT

36. Mr. Holmes reincorporates and realleges Paragraphs One (1) through Eighteen (18) [sic] as if fully set forth herein.

37. This is an action for fraud in the inducement of the Agreement, seeking damages exceeding \$15,000.00, exclusive of costs, interest and attorneys' fees.

38. FAMU, by and through its agents, including, but not limited to members of the Board and Derek Horne, made or caused to be made, *inter alia*, the following false material misrepresentations, omissions, or misleading statements to Mr. Holmes during the negotiation and execution of the Agreement:

- a. That the Agreement was a "four year contract;"
- b. That the Agreement must be approved by the Board because it was a "multi-year contract;"
- c. that Mr. Holmes could only be terminated for cause under the Agreement before the end of the four-year term; and
- d. that Mr. Holmes would be permitted to recruit for FAMU for at least four years.

39. FAMU also failed to disclose the following material facts to Mr. Holmes:

- a. that FAMU believed it could attempt to rely on certain, obscure regulations to terminate Mr. Holmes' employment with only sixty days of advance notice; and
- b. that FAMU could attempt to terminate Mr. Holmes for convenience.

40. FAMU knew these representations were false, yet intended for Mr. Holmes to rely on each of their misrepresentations and/or omissions to ensure Mr. Holmes would accept and execute the Agreement. To the extent the misrepresentation related to future actions, FAMU had no intention of honoring their representations when they made them.

41. Mr. Holmes justifiably relied on these representations made by

FAMU, by and through its agents, to his detriment when he accepted and executed the Agreement.

42. Mr. Holmes did not know, nor did he have any reason to know, of the falsity of these representations and omissions at the time he accepted and executed the Agreement.

43. As a result of FAMU's fraudulent conduct, Mr. Holmes has been damaged, including, but not limited to: actual damages, including the balance of his salary under the Agreement and other benefits stemming therefrom, consequential damages, costs and interest.

44. Additionally, since FAMU engaged in such fraudulent conduct that was the proximate cause of the damages suffered by Mr. Holmes, Mr. Holmes hereby puts FAMU on notice of his intention to seek punitive damages and conduct discovery to support such a claim.

45. Furthermore, Mr. Holmes is entitled to be reimbursed for his attorneys' fees and costs from FAMU pursuant to Section 448.08, *Florida Statutes*.

WHEREFORE, Plaintiff, EARL HOLMES, respectfully requests this Honorable Court enter final judgment against Defendant, FLORIDA A&M UNIVERSITY, by and through the Board of Trustees for Florida A&M University, and in his favor and award Mr. Holmes his actual damages, including, but not limited to the balance of his salary under the Agreement and other benefits stemming therefrom, all direct and indirect consequential damages, in addition to costs, attorneys' fees pursuant to Section 448.08, *Florida Statutes*, interest and any such further relief as this Court deems just and appropriate.

COUNT IV – NEGLIGENT MISREPRESENTATION

46. Mr. Holmes reincorporates and realleges Paragraphs One (1) through Eighteen (18) [sic] as if fully set forth herein.

47. This is an action for negligent misrepresentation of the Agreement, seeking damages exceeding \$15,000.00, exclusive of costs, interest and attorneys' fees.

48. FAMU, by and through its agents, including, but not limited to members of the Board, and Derek Horne, made or caused to be made, *inter alia*, the following material misrepresentations, omissions, or misleading statements to Mr. Holmes during the negotiation and his execution of the Agreement:

- a. That the Agreement was a "four year contract;"
- b. That the Agreement must be approved by the Board because it was a "multi-year contract;"
- c. that Mr. Holmes could only be terminated for cause under the

- Agreement before the end of the four-year term; and
- d. that Mr. Holmes would be permitted to recruit for FAMU for at least four years.

49. FAMU also failed to disclose the following material facts to Mr. Holmes:

- a. that FAMU believed it could attempt to rely on certain, obscure regulations to terminate Mr. Holmes' employment with only sixty days of advance notice; and
- b. that FAMU could attempt to terminate Mr. Holmes for convenience.

50. FAMU and its agents, including members of the Board, knew or should have known of the falsity of these misrepresentations at the time they were made to Mr. Holmes.

51. Moreover, FAMU intended that each of the misrepresentations listed above would induce Mr. Holmes into executing the Agreement.

52. FAMU did not exercise the necessary reasonable care or competence in obtaining or communicating the information contained in any of these false representations.

53. Mr. Holmes justifiably relied on each of these representations made by FAMU, or its agents, including members of the Board, to his detriment when he executed the Agreement.

54. These negligent misrepresentations made by FAMU, by and through its agents, proximately caused the damages suffered by Mr. Holmes.

55. As a result of FAMU's negligent conduct, Mr. Holmes has been damaged, including, but not limited to: actual damages, including the balance of his salary under the Agreement and other benefits stemming therefrom, consequential damages, costs and interest.

56. Furthermore, Mr. Holmes is entitled to be reimbursed for his attorneys' fees and costs from FAMU pursuant to Section 448.08, *Florida Statutes*.

WHEREFORE, Plaintiff, EARL HOLMES, respectfully requests this Honorable Court enter final judgment against Defendant, FLORIDA A&M UNIVERSITY, by and through the Board of Trustees for Florida A&M University, and in his favor and award Mr. Holmes his actual damages, including, but not limited to the balance of his salary under the Agreement and other benefits stemming therefrom, all direct and indirect consequential damages, in addition to costs, attorneys' fees pursuant to Section 448.08, *Florida Statutes*, interest and any such further relief as this Court deems just and appropriate.

COUNT V – BREACH OF CONTRACT

57. Mr. Holmes reincorporates and realleges Paragraphs One (1) through Eighteen (18) [sic] as if fully set forth herein.

58. This is an action for breach of the Show Agreement seeking damages.

59. In or around February 2014, Mr. Holmes entered into the Show Agreement in connection with his position as FAMU's Head Football Coach. *See* Exh. B.

60. Pursuant to the express language of the Show Agreement, FAMU agreed:

To pay [Mr. Holmes] the sum of \$7,000.00 for Services performed during the term/period of performance of this Agreement. Payment will be made in tow equal installments...If the Agreement is cancelled prior to the conclusion of the 2014 Football Season and [Mr. Holmes] has performed partial Services, the payment or refund amount shall be prorated as appropriate in proportion to the remaining football games and any playoff games.

See Exh. B at IV(a).

61. On October 28, 2014, FAMU terminated Mr. Holmes' employment as FAMU's Head Football Coach as of Tuesday, January 20, 2015. *See* Exh. C. However, FAMU never terminated the Show Agreement. *See* Exh. B at II(b).

62. Prior to October 28, 2014, Mr. Holmes performed partial service under the Show Agreement for which FAMU has not paid him for. *See* Exh. B at IV(a).

63. FAMU's failure to pay Mr. Holmes for partial services rendered and FAMU's subsequent actions constitute an unequivocal breach of the Show Agreement by FAMU.

64. As a result of FAMU's breach of the Show Agreement, Mr. Holmes has been damaged, including, but not limited to: actual damages, including the balance of owed to Mr. Holmes under the Show Agreement and other benefits stemming therefrom, consequential damages, attorneys' fees, cost and interest.

65. Furthermore, Mr. Holmes is entitled to be reimbursed for his attorneys' fees and costs from FAMU pursuant to Section 448.08, *Florida Statutes*.

WHEREFORE, Plaintiff, EARL HOLMES, respectfully requests this Honorable Court enter final judgment against Defendant, FLORIDA A&M UNIVERSITY, by and through the Board of Trustees for Florida A&M University, and award Mr. Holmes his damages, including the balance owed under the Show Agreement and other benefits stemming therefrom, all direct and indirect consequential damages, in addition to costs, attorneys' fees pursuant to Section 448.08, *Florida Statutes*, interest and any such further relief as this Court deems just and appropriate.

JURY DEMAND

Mr. Holmes hereby demands a trial by jury on all issues so triable.

Respectfully submitted this 26th day of January, 2015.¹⁹

Holmes is represented by both Broad and Cassell and Jansen and Davis, P.A.²⁰

IV. Commentary on Holmes' Dismissal and Lawsuit

The President's Alumni Advisory Board for Athletics (PAABA) cited the following reasons for Holmes' firing:

"We felt that it was essential that we make a change at this time in order to take the football program in a new direction," the PAABA statement said.

The advisory board cited the dramatic decline in attendance during the past decade, saying turnout has dropped from an average of 18,000 per game at Bragg Memorial Stadium to 7,500 this season. Football ticket sales, the statement noted, are the No. 1 source of revenue for the entire athletics department.

"In the past few weeks, we received an overwhelming amount of feedback from alumni about the football program and the need to make a change soon. The time to make that change was now, especially because we want to position FAMU to be competitive this recruiting season. The earlier the coaching transition starts, the better positioned and the more time a new coach would have to recruit from a large talent pool," PAABA said.²¹

¹⁹ Complaint, Earl Holmes v. Florida A&M University, Case No. 15-CA-190 (Fla. Cir. Ct. filed Jan. 26, 2015).

²⁰ *Id.*

²¹ Jordan Culver & Doug Blackburn, *Update: Mangum Panel Defends Firing of FAMU Coach Holmes*, THE DESERT SUN, Oct. 29, 2014, <http://www.desertsun.com/story/news/local/famu-news/2014/10/29/high-profile-famu-alums-displeased-holmes-fired/18157181/>.

However, one of the FAMU Trustees, Torey Alston, indicated that the decision by President Mangum and Athletic Director Kellen Winslow to fire Holmes four days before the annual homecoming game was “culturally incompetent.”²²

Holmes openly expressed his utter disappointment with FAMU and their termination of his contract:

You know at the end of the day it was done...no one explained anything other than ‘we’re moving in a different direction.’...I never really got a chance to sit down with Kellen Winslow...there was no communication...When you’re a head coach you try to...especially with someone coming in late, you try to let that person or people know the 3-5 year plan [on rebuilding the program]...but that never took place. ... To this day, no one has come out and said the truth. ... It was very disrespectful. Again, you put your faith in God and not in man.²³

Many were not only upset with the firing of Holmes, but with the Universities failure to pay out the remainder of his contract. Bill Proctor, Leon County Commissioner, a graduate of FAMU high school, and a political science instructor at FAMU, wrote the following letter to the FAMU Board of Trustees:

Dear Chairman Lawson and BOT Members:

I call upon you as a moral and humanistic request that you expedite a resolution that honors the employment contracts between Florida A&M University and former Coaches Clemon Johnson and Earl Holmes.

Both Earl Holmes and Clemon Johnson graduated from Florida A&M University and FAMU High School. They are revered as two of FAMU’s All-Time greatest players. Clemon Johnson’s jersey hangs in the rafters of the Al Lawson Arena as a tribute to his excellence as a player. Both men are members of FAMU’s Sports Hall of Fame.

For over a year now these two great sons of FAMU have not been paid per the terms of their employment contracts. They were fired unceremoniously and without notice, warning or due process.

²² *Id.*

²³ Jessica Davis, *Former Head Coach Earl Holmes Explains Why He’s Suing FAMU*, NEWS 96.5 WDBO, Jan. 26, 2015, <http://www.news965.com/news/local/former-head-coach-earl-holmes-explains-why-suing-famu/E5pqAph5qzG3WULyL3hNbl/>.

The heartless massacre of their coaching careers at the hands of their own Alma Mata is shameful by any moral, legal or community standard. FAMU, it appears, does not respect the dignity of its own athletic sons and alumni by failing to pay these men on terms that FAMU established in the contract it offered Holmes and Johnson to sign.

What does it say about a university that treats its all time greatest sons with such inhumane and callous indifference? It is unclear to me and a few others why the university has treated Earl and CJ with such contempt and disdain. These coaches did not terminate themselves as employees and they did not abandon their roles as coaches.

Has either Earl or CJ committed an egregious error or heinous act that serves as a legal basis to deny paying them? Thanksgiving and Christmas are upon us again and FAMU still neglects to perform its legal obligations per its own employment contract with its own Hall of Fame sons.

As the holiday season approaches, I call upon you to interject a metric of compassion, moral decency and the Golden Rule in fulfilling the legal financial responsibilities owed to Clemon Johnson and Earl Holmes as former coaches. Treating these two former premier Rattler players with the respect they deserve would be a start to healing deep wounds the Tallahassee community feels in seeing these sons of FAMU and Tallahassee wrongfully treated before and after being fired.

As Christian men and women, I request that you honor sons of God and brothers in Christ to you all. In the name of Jesus the Christ please treat Earl Holmes and Clemon Johnson with the love and respect that Christian men of God and faith deserve.

Feel free to contact me directly if you are not comfortable reaching out to the Lord God for further input. Just call me at (850) 606-5371.

Thank you very much for making the lives, hearts and spirits of Coach Johnson and Holmes feel brighter for the Thanksgiving and Christmas Holidays of 2015. Their families and members of the Tallahassee Community will feel brighter too.

Sincerely yours in Christ,

William C. Proctor, Jr.
Associate Minister
Bethel A.M.E. Church
Tallahassee, Florida²⁴

²⁴ *Proctor asks FAMU Trustees to Pay Out Holmes and Johnson's Contracts*, RATTLER NATION THE BLOG, Nov. 11, 2015, <http://rattlernation.blogspot.com/2015/11/proctor-asks-famu-trustees-to-pay-out.html>.

Noted communitarian, Reverend R.B. Holmes, Jr., stated:

I believe the moral and legal approach is to resolve the lawsuits by reaching an agreement with the coaches. I am not going to address the issue of these men's terminations; however, I believe that dragging this issue out will cost the university much more money. Legal fees and lawyers are not cheap; it is in the best interest of the university and the Board of Trustees to move beyond this quagmire. If we settle these lawsuits, it can create so much needed goodwill and positive spirit in the FAMU family.

Therefore, I am calling upon the Trustees and president to honor these coaches' contracts. Please pay them what they are rightly due and end this impasse sooner than later. These men were raised on FAMU's campus; they are both graduates of FAMU DRS and the university. Coach Holmes and Coach Johnson played professional sports; Coach Holmes football and Coach Johnson basketball. These gentlemen were inducted into the Florida A&M University's Sports Hall of Fame. These coaches are family men, good citizens and contributed to the legacy of FAMU.

Finally, a contract must be honored, that is why people sign contracts and this is why it is now time for FAMU to end this chapter. I hope other leaders will join us in encouraging the university to do the right thing by Coach Holmes and Coach Johnson, pay them the money that both of them truly deserve.²⁵

V. Lawsuit Results

FAMU filed their Partial Answer with Affirmative Defenses on March 20, 2015.²⁶ FAMU essentially denied the allegations as contained in Holmes' Complaint and affirmatively alleged that FAMU's actions with respect to the Plaintiff's employment, and ultimate separation from employment, were at all times fair, made in good faith on legitimate business reasons, in accordance with applicable federal and state laws, and in compliance with the Employment Agreement.²⁷

²⁵ Rev. R.B. Holmes Jr., *Transformation: Pay the Coaches*, CAPITAL OUTLOOK, Nov. 25, 2015, <http://capitaloutlook.com/site/transformation-pay-the-coaches/>.

²⁶ Partial Answer with Affirmative Defenses, *Earl Holmes v. Florida A&M University*, Case No. 15-CA-190 (Fla. Cir. Ct. filed Mar. 20, 2015).

²⁷ *Id.*

It appears that FAMU's position with respect to Holmes' Contract is that even though the Contract recited under Paragraph 2.0, "Term," that the appointment shall commence on January 11, 2013 and end on January 10, 2017, that the term stated was subject to an override pursuant to and in compliance with FAMU Board of Trustee Regulations.²⁸ In a letter from the Vice President and General Counsel of FAMU to counsel for Coach Holmes, the FAMU attorney stated:

[p]ursuant to Section 1012.80(1)(b), Florida Statutes, "[a]ny person who accepts the privilege extended by the laws of this state of employment at any state university shall, by working at such institution, be deemed to have given his or her consent to the policies of that institution, the policies of the Board of Governors, and the laws of this state." Accordingly, Mr. Earl Holmes has already consented to the applicability of FAMU Board of Trustees Regulations 10.105 and 10.106 in the non-reappointment of his employment as an Administrative and Professional (A&P) employee.

In pertinent part, please note the following:

1. Regulation 10.105(3)(e) provides that "[n]o appointment shall create any right, interest, or expectancy of continued employment. At any time during any appointment, faculty, A&P, and Executive Service employees may be non-renewed upon written notice in compliance with these regulations and consistent with any relevant collective bargaining agreement."

2. Regulation 10.106(3) further states that "[n]otwithstanding the provisions of section 1 herein, an A&P employee may be separated from University employment. An A&P employee shall not have tenure and no expectation of appointment beyond a sixty (60) days' notice."

As an A&P employee who is not a member of any designated collective bargaining unit, Mr. Holmes has been appropriately and lawfully notified of his non-reappointment and separation from employment with the University.²⁹

Kellen B. Winslow, Sr. ("Winslow"), who many believe to be partially responsible for the termination of Holmes, was employed pursuant to an Executive Service Employment Contract with FAMU.³⁰ It is interesting to note that, unlike Holmes' Contract, Winslow's Contract actually

²⁸ See generally, letter from Avery McKnight to Martin Greenberg (Nov. 18, 2014) (on file with author).

²⁹ *Id.*

³⁰ Executive Service Employment Contract between Florida A&M University and Kellen Winslow (Apr. 14, 2014).

indicates that no employee has expectation of employment beyond the 60 days' notice period as provided in the FAMU Regulations.³¹ Winslow's contract in Paragraph 5 stated as follows:

5. Effective Date of Employment in Executive Service: 04/14/2014

As an Employee appointed to the Executive Service within the Administrative and Professional classification and compensation plan, the Employee serves at the will of the President and does not have tenure in this position. Further, the Employee has no expectation of employment beyond 60 days' notice period as provided in the FAMU Regulations 10.105 and 10.106. Therefore, no ending appointment date is shown.³²

It should be noted that Winslow resigned his position at FAMU on approximately December 15, 2014.³³

There is currently another lawsuit pending involving wrongful termination, with the same or similar issues as the Holmes case, filed by Basketball Coach Clemon J. Johnson ("Johnson") against FAMU.³⁴ Johnson filed his lawsuit in the Second Judicial Circuit Court of Florida.³⁵ Johnson, who was also fired by Winslow, signed a four-year contract with FAMU in 2011.³⁶ He was fired in April of 2014, during the third year of that contract, after Johnson led the Rattlers to a 14-18 record in his final season.³⁷ Johnson is claiming the remaining money owed on his four-year contract.³⁸ Many of the same issues from Holmes' lawsuit also arise in this lawsuit, and Johnson is also represented by Tallahassee lawyer Tim Jansen.³⁹

³¹ *Id.*

³² *Id.* at para. 5.

³³ ³³ Iliana Limón Romero, *FAMU Athletic Director Kellen Winslow Resigns, Interim Leader Urges Fans to Support Rattlers*, ORLANDO SENTINEL, Dec. 15, 2014, <http://www.orlandosentinel.com/sports/college/college-gridiron-365/os-famu-athletic-director-kellen-winslow-resigns-20141215-post.html>.

³⁴ Brief for Petitioner, Clemon J. Johnson v. Florida A&M University, No. 2015-CA-001070 (Fla. Cir. Ct. filed on May 11, 2015).

³⁵ *Id.*

³⁶ Employment Agreement between Florida A&M University and Clemon Johnson (May 24, 2011).

³⁷ Jordan Culver, *Former FAMU Basketball Coach Johnson Sues University*, TALLAHASSEE DEMOCRAT, May 14, 2015, <http://www.tallahassee.com/story/sports/college/famu/2015/05/13/former-famu-basketball-coach-johnson-files-civil-lawsuit-against-school/27248101/>.

³⁸ Brief for Petitioner, Clemon J. Johnson, No. 2015-CA-001070.

³⁹ *Id.*

On March 20, 2015, FAMU filed a Motion to Dismiss Holmes' lawsuit which the court ultimately did not grant.⁴⁰

After two years of litigation, on February 8, 2017, FAMU filed a Motion for Summary Judgment.⁴¹

As stated in the Order on Motion for Summary Judgment, the University's position is simple:

The University contends that it did not breach the contract. It contends that while the contract ends by its expressed terms on January 10, 2017, the University retained the right to terminate Coach Holmes (or any Administrative or Professional Employee) before January 10, 2017 upon sixty days written notices pursuant to University Regulations 10.105 and 10.106. Coach Holmes was an A&P Employee of the University. The contract incorporates --- "regulations, policies and procedures of the Florida Board of Governors and FA&MU" but does not specifically reference Regulations 10.105 and 10.106. The University's position is that the contract is clear and unambiguous and therefore not susceptible to modification by parole evidence. The University contends that there are no disputed issues of material fact and that it is entitled to a summary judgment as a matter of law.⁴²

Alternatively, Holmes' position in the Order on Motion for Summary Judgment is as follows:

Coach Holmes argues that he negotiated a binding, guaranteed four-year contract with the University's Athletic Director, Derek Horne. Coach Holmes maintains that the University's rules, regulations, policies and procedures cannot be incorporated into the contract by general reference in their entirety and if specific regulations are to be incorporated they must be specifically identified in the contract. Therefore, Coach Holmes argues that the regulations are not a part of the contract and the contract could not be terminated except for causes and was binding until January 20, 2017. He argues that Regulations 10.05 and 10.06 were not part of the contract because they were not specifically referenced in the contract. Coach Holmes contends that his termination was a breach of the guaranteed four-year contract that he had negotiated.

⁴⁰ Leon County Clerk of Court online case docket.

⁴¹ *Id.*

⁴² ⁴² Order Granting Mo. Summ. J., Earl Holmes v. Florida A&M University, No. 15-CA-190, (Fla. Cir. Ct. May 2, 2017).

Coach Holmes further argues that A.D. Horne fraudulently induced him into signing the contract or alternatively that A.D. Horne fraudulently or negligently misrepresented to him that the regulations of the University did not apply to his contract.⁴³

The Court's conclusions clearly indicated that Coach Holmes was alleging that the Athletic Director either negligently or fraudulently told Coach Holmes that he could not be fired during the four-year term of the contract except for cause.⁴⁴ However,

[R]egulation 10.105 and [R]egulation 10.106 are in writing and are incorporated into and made a part of the contract. These two [R]egulations are clear and unambiguous and are part of the contract just as if they had been quoted verbatim in the contract. Parole evidence of the discussions between Mr. Horne and Coach Holmes cannot vary those expressed terms.⁴⁵

A hearing on the matter was ultimately held on April 13, 2017 before the Honorable James O. Shelfer.⁴⁶ An Order on Motion for Summary Judgment was entered on May 2, 2017 and filed on May 3, 2017 in which the Court held:

Summary Judgment is appropriate if there are no genuine issues of material fact and if the moving party is entitled to a judgment as a matter of law. The interpretation of a contract, if it is unambiguous and not subject to collateral attack is a matter of law to be determined by the Court and not by a jury. The University complied with its Regulations 10.105 and 10.106 in terminating Coach Holmes. In doing so, the University complied with the clear and unambiguous terms of the coaching contract. The University did not violate the terms of this agreement with Coach Holmes when it issued the termination letter on October 28, 2014 effective January 20, 2015. The Plaintiff cannot show a *prima facie* case of breach of contract. Summary Judgment in favor of the Defendant Florida A&M University is appropriate.⁴⁷

This order effectively ended Holmes' Circuit Court case. On June 1, 2017, Holmes filed a Notice of Appeal.⁴⁸

⁴³ *Id.*

⁴⁴ *Id.* at 3.

⁴⁵ *Id.*

⁴⁶ Leon County Clerk of Court online case docket.

⁴⁷ Order Granting Mo. Summ. J., Earl Holmes.

⁴⁸ Leon County Clerk of Court online case docket.

VI. Conclusion

The lesson to be learned from the Holmes' case is that a contract may be impacted by and/or refer to other documents, such as university rules and regulations. These references to other documents may become part of the contract even though they are not reprinted within the contract. In the case of Holmes, his appointment was a four-year term which was subject to the rules, regulations, policies, and procedures of the Florida Board of Governors and the University as now and hereinafter promulgated.⁴⁹ As a result of the reference to University rules, regulations, policies, and procedures, what appeared to be a four-year contract was really a contract that could be terminated with sixty (60) days notice.⁵⁰ As a result, Holmes was not getting what he thought he had bargained for in the form of a four-year contract. Any lawyer who would have represented Holmes, and had not specifically told him that the four-year term was subject to a cut-short by virtue of University rules, regulations, policies, and procedures, would have potentially committed malpractice. If the bargained for term, i.e. – four years, was what was really intended by Holmes and the University, that portion of the contract that referred to University rules, regulations, policies, and procedures, should have been stricken. As for the sixty (60) day notice, Holmes should have included in his contract a written provision that he could only be terminated pursuant to the contract's written terms which were not superseded or negated by any University rules, regulations, policies, or procedures. Making any coaches' contract subject to the rules, regulations, policies, or procedures of the university are a trap for the unwary and must be closely studied and analyzed to make certain that the coach is getting what is written within the four corners of the contract and what the coach thought was bargained for.

⁴⁹ ⁴⁹ Employment Agreement Between Florida A&M University and Earl Holmes (Feb. 7, 2013), at paragraph 5.1.

⁵⁰ ⁵⁰ *Id.*

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