

THE DEFENSE OF SOVEREIGN IMMUNITY: MIKE LEACH AND TEXAS TECH

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Introduction

Mike Leach ("Leach") became Texas Tech University's (TTU) 14th head football coach in 2000 replacing "Spike" Dikes.¹ When Leach arrived at TTU, the program was on probation and the graduation rate was below average.²

During his time at TTU, Leach had a winning record of 84-43, making an appearance at at a bowl game each year.³ In 2008, he won a slew of awards including the George Munger Award, the Woody Hayes Trophy, Big 12 Coach of the Year, and the FieldTurf/Howie Long Coach of the year.⁴ Additionally, the Red Raiders were the Big 12 South Division Champions in 2008. When Leach left, he was the all-time winningest winningest coach in postseason play at TTU.⁵ Leach led TTU to ten straight bowl games and the highest graduation rate for football players from a public institution in the country.⁶

Leach served until December 28, 2009 when he was suspended indefinitely and then fired two days later.⁷ Ruffin McNeill, TTU's defensive coordinator, was named as the interim head coach and led the team during the Alamo Bowl.⁸ Tommy Tuberville is currently the coach at TTU.

Leach became the head football coach of Washington State University on November 30, 2011, and commenced his career at Washington State starting with the 2012

¹ *List of Texas Tech Red Raiders head football coaches*, Wikipedia, http://en.wikipedia.org/wiki/List_of_Texas_Tech_Red_Raiders_head_football_coaches (last visited March 1, 2012).

² *Leach Fired Short of Tech's Bowl Game*, ESPN (Dec. 30, 2009), <http://sports.espn.go.com/ncf/bowls09/news/story?id=4781981>.

³ *Mike Leach*, Wikipedia, http://en.wikipedia.org/wiki/Mike_Leach_%28coach%29 (last visited March 20, 2012).

⁴ *Id.*

⁵ *Id.*

⁶ *Leach Fired Short of Tech's Bowl Game*, *supra* note 2.

⁷ *Mike Leach*, *supra* note 3.

⁸ *Id.*

season. He has a five-year rollover contract which makes him the 4th highest paid coach in the PAC 12.⁹

The Texas Tech Agreement

Leach renewed his contract (the "Agreement") with TTU on February 19, 2009, which superseded his previous employment contract.¹⁰ The Agreement was for a term of five years beginning January 1, 2009 and ending on December 31, 2013.¹¹ In addition to his annual base salary of \$300,000¹², the Agreement included a guarantee of outside athleticly related income of \$1,600,000 for 2009, and even higher amounts for the remaining four years.¹³ The Agreement also guaranteed bonuses for bowl game bids, coaching awards and team accomplishments.¹⁴ Most significantly, Leach was entitled to a contract completion bonus of \$800,000 if he was the head football coach as of December 31, 2009¹⁵ (which ultimately was one day after he was fired). In total, the five-year package was worth approximately \$12.7 million dollars.¹⁶

The Agreement specified that if Leach was fired "for cause," TTU's sole obligation to Leach was to pay his base salary until the effective date of termination.¹⁷ "Cause" is defined as: Coach's violation of any material provision of the agreement (specifically Article IV), provided that if the violation is capable of being cured, University shall allow coach ten business days to cure such violation, provided, however, that if such violation can reasonably be cured, but cannot be cured within ten business days, Coach shall have a reasonable period of time to cure such violation."¹⁸ If Leach was fired by TTU without cause, the Agreement entitled him to liquidated damages in the amount of \$400,000 for each year remaining in the term of the Agreement. This means that if Leach was fired without cause, as he believes he was, he would be entitled to \$1.6 million in liquidated damages for years 2010-2013. Additionally, Leach would be entitled to any supplemental compensation under section III.C.4 of the the Agreement.¹⁹ Supplemental compensation under this section includes:²⁰

⁹ *Id.*

¹⁰ EMPLOYMENT CONTRACT BETWEEN TEXAS TECH UNIVERSITY AND MIKE LEACH (2009), (Hereinafter Leach Contract).

¹¹ *Id.* § I.

¹² *Id.* § III.A.

¹³ *Id.* § III.C.3.

¹⁴ *Id.* § III.C.4.

¹⁵ *Id.* § III.C.5.

¹⁶ *Leach Fired Short of Tech's Bowl Game*, *supra* note 2.

¹⁷ Leach Contract, *supra* note 10 § IV.A

¹⁸ *Id.* § V.A.

¹⁹ Leach Contract, *supra* note 10.

²⁰ *Id.*

Achievement	Supplemental Compensation
Football team attains a graduation success rate of 65% as defined by the NCAA	\$25,000
Wins or ties for Big 12 South Championship	\$25,000
Advances to the Big 12 Championship Game	\$25,000
Wins the Big 12 Championship Game	\$25,000
Participates in a BCS bowl	\$75,000
Participates in Holiday of Cotton Bowl	\$50,000
Participates in any other Bowl	\$25,000
Wins National Championship	\$250,000
If coach attains any of the following Big 12 Coach of the Year awards: a. Associated Press Big 12 Coach of the Year b. Big 12 Coach of the Year as selected by Big 12 Coaches	One-time payment of \$25,000
If coach attains any of the following National Coach of the Year awards: a. Associated Press National Coach of the Year b. Munger National Coach of the Year c. Woody Hayes National Coach of the Year d. Bear Bryant National Coach of the Year e. Walter Camp National Coach of the Year f. AFCA National Coach of the Year g. Liberty Mutual National Coach of the Year	One-time payment of \$25,000
Final Associated Press or USA today Poll Raking #11-25	\$25,000
Final Associated Press or USA Today Poll Ranking #1-10	\$50,000
5 regular season conference wins*	\$25,000
6 regular season conference wins*	\$50,000
7 regular season conference wins*	\$75,000
8 regular season conference wins*	\$100,000

*Coach receives the greater of the accomplishments

Closet Controversy

It is no secret that negotiations between TTU and Leach were heated during the drafting of the Agreement, and Leach is convinced that his firing was in the works since since the Agreement was signed.²¹ However, a situation arose that potentially gave TTU "cause" to fire Leach.

Leach does not dispute that on December 17 and 19 2009, Adam James ("Adam"), son of ESPN analyst and former NFL player Craig James ("Craig"), was told to stand in a

²¹ LEACH v. TEXAS TECH UNIV., 2011 TX S. Ct. Briefs 164 (March 7, 2011), (Hereinafter Leach Brief).

dark place during practice after being diagnosed with a concussion.²² A source close to the Craig family claimed that Adam was confined to an electrical closet that had a guard posted outside of it.²³ While in the “closet,” Adam communicated with his father via text message.²⁴ Some of that conversation was as follows:²⁵

Adam: Hey, you’re going to like this

Adam: Leach thinks it’s impossible for me to have a concussion and that I’m just being a pussy

Adam: So for punishment he had me locked in a pitch black shed for the whole practice

Adam: And they won’t let me out

Adam: And if they catch me even so much as leaning against the wall they’re going to kick me off the team

Craig: Can you call me?

Adam: No, just text

Craig: Call me when you can and think about what you will allow me to do

After receiving the text messages from Adam, Craig contacted the then Chairman of the the Texas Board of Regents, Larry Anders (“Anders”).²⁶ When asked about the call from Craig in Anders deposition, he stated:

We were in the wedding, and there was a message that I needed to talk to Craig; it was a matter of life and death. And he left his cell phone number. I returned his call and said: Craig, the Board of Regents does not hire or fire the football coach. And he said that Leach used extremely extremely profane language to humiliate and demean my son and that he he had been shut in an electrical closet. He wanted an apology and he wanted Leach fired.²⁷

²² LEACH v. TEXAS TECH UNIV., 2011 TX S. Ct. Briefs 164 (Nov. 3, 2011), (Hereinafter TTU Brief).

²³ *Leach Fired Short of Tech’s Bowl Game*, *supra* note 2.

²⁴ Brooks, *Son’s Allowance Bought Craig James’ Conscience*, SPORTSbyBROOKS (February 9, 2012), http://sportsbybrooks.com/tag/Guy_Bailey.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

Craig also called the Chancellor of TTU, Kent Hance ("Hance") and stated that he wanted an apology and that he wanted Leach fired.²⁸

The day after the closet incident, an investigator for TTU, Charlotte Bingham ("Bingham") interviewed Adam and carried out an investigation into the matter.²⁹ On December 23, 2009, Bingham sent her findings to Hance, Anders, Regent Jerry Turner ("Turner") and Athletic Director Gerald Myers ("Myers"), which reported that Leach did not require Adam to stand in an electrical closet and Adam told her that he went into the electrical closet and stayed there for approximately five minutes.³⁰ Bingham also reported that Adam remained in the media room for around an hour and a half with trainers checking on him every fifteen to twenty minutes.³¹ Additionally, Bingham reported that in her interview with Craig, he threatened litigation against TTU and insisted that it would be a "can of worms" and "would not be pretty" for the university.³²

In addition to his threatening comments to Bingham, Craig also sent an email to Hance that can be seen as nothing short of blackmail. The email refers to a video Adam recorded on his phone when he was allegedly locked in the electrical closet. The email states in part:

Bottom line: Tech is absolutely exposed as a university with each hour that passes. The team, the staff, and increasingly others at the school know that a substantial charge has been made, and we understand it has been verified by your own investigative team.

Kent, I ask you and the board members this: Have each of you seen the shed and electrical closet Adam was confined to? I'd recommend each of you visit the Places...walk in them and turn the lights off. NOW, imagine standing there for three hours in cold without being able to sit down or lean against [sic].

This story will become public at some point and you can count on the fact that some television cameras will show this picture.³³

Events Leading up to Termination According to TTU

According to TTU, Adam's family filed a complaint on December 19, 2009.³⁴ TTU launched an investigation of Leach's conduct, and interviewed him on December 21,

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ TTU Brief, *supra* note 22.

2009. On December 26, 2009, Myers and TTU President Guy Bailey ("Bailey") met with Leach.³⁵ They provided Leach with a letter dated December 23, 2009 pertaining to the proper treatment of injured student athletes and asked Leach to sign it.³⁶

Dear Coach Leach,

As you know, we have been conducting an inquiry into allegations by a student athlete that your treatment of him, subsequent to his being diagnosed with a mild concussion, may have been injurious to his health and served no medical and/or educational purposes. Texas Tech takes these allegations very seriously. In addition to being unacceptable, if proven, these allegations constitute a breach of your employment contract.

So that we can carry out an inquiry that takes into account the safety of our student athletes and in addition, that is fair to the students, yourself, and the university, we have determined that you must abide by the following guidelines from this day forward:

1. All practices and other team meetings will be monitored by the athletic director or his representative. (Crossed out with the initials GB beside it.)
2. Any player claiming an injury will be examined by a physician and cleared in writing prior to practicing or playing. Decisions regarding whether an injury warrants suspension from practice and/or play will be determined by a physician without pressure from you or your staff.
3. You must recognize that the players you are working with are student athletes and that you have an obligation to treat them with respect and further to conduct yourself in a manner consistent with your position as an instructor of students.
4. You must at all times assure the fair and responsible treatment of student athletes in relation to their health, welfare, and discipline, and if you are not doing so, you must immediately cease any actions not in compliance with this provision of your contract.
5. There will be no retaliation against any student who has suffered an injury.

³⁵ *Id.*

³⁶ *Texas Tech letter provided to Mike Leach*, The Atlanta Journal-Constitution (Dec. 30, 2009), <http://www.ajc.com/sports/texas-tech-letter-provided-262512.html>

Again, these allegations are serious, and should they be substantiated will result in disciplinary action ranging from public or private reprimand, monetary fines or adjustments in compensation, adjustments in the term of this contract, up to termination.

Sincerely,

Guy Bailey
President

Leach refused to sign the letter claiming that his contract did not require him to do so and because it suggested that he had done something wrong.³⁷ Additionally, Bailey asked Leach to provide the James family with a statement about what happened with Adam.³⁸ Leach never did.³⁹

After the meeting, Bailey and Myers met with Ted Liggett ("Liggett") one of Leach's attorneys, and emphasized how important it was for Leach to cooperate.⁴⁰ Liggett said he would get a reply to them by December 28, 2009.⁴¹ Hearing nothing back from Leach by December 28, 2009, Myers and Bailey decided to suspend Leach.⁴² The suspension letter dated December 28, 2009 read⁴³:

Dear Coach Leach:

We recently received a complaint from a player and his parents regarding your treatment of him after an injury, and we have undertaken an investigation of that complaint. We consider this a serious matter. Until the investigation is complete, you are suspended from all duties as Head Football Coach effective immediately.

Sincerely,
Gerald Myers
Athletic Director

Guy Bailey
President

³⁷ TTU Brief, *supra* note 22.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Mike Leach's Motion for Temporary Restraining Order and Temporary Injunction (Dec. 29, 2009), available at <http://lubbockonline.com/pdfs/leach122909.pdf>

After his suspension, Leach's representatives sent letters to the media that were critical of Adam and how TTU handled the Craig family's complaint.⁴⁴ Also, one of Leach's attorneys gave interviews to the media that were also critical of TTU and the way TTU handled the Craig complaint.⁴⁵

Leach filed a lawsuit for injunctive relief on the December 29, 2009 that would allow him to coach the Alamo Bowl game.⁴⁶ A letter of termination dated December 30, 2009, was prepared by Bailey and delivered to Leach on the December 30, 2009.⁴⁷ The letter was signed by Bailey and simply read:

Dear Coach Leach,

This letter shall serve as formal notice to you that, pursuant to Article V of your employment Contract, you are terminated with cause effective immediately, for breach of the provisions of Article IV in that contract.⁴⁸

Article IV of the Agreement states:

In the performance of his duties, Coach shall be directly responsible to and under the supervision of the Director of Intercollegiate Athletics. Without limitation of the foregoing, Coach, in the performance of his duties, shall conduct himself at all times in a manner consistent with his position as an instructor of students. The parties agree that, although this agreement is sports related, the primary purpose of the University and this agreement is educative. Thus, the educative purposes of the University shall have priority in the various provisions of this Agreement. Coach will follow all applicable University policies and procedures. Coach shall not, either directly or indirectly, breach or countenance to the breach by any player or coach subject to his control or supervision of any of the rules and standards of the Big 12 Conference, the NCAA, youth, youth, collegiate, and master's amateur athletics as well as other associations or agencies to which the University adheres. In this connection, Coach agrees to devote his entire time, labor, effort and attention, in good faith, to conduct and perform the duties commensurate with the position as Head Football Coach, bearing in mind that University recognizes and accepts that Coach has the ability to engage in reasonable Outside Income producing activities as defined in Article III.C.3. Coach shall assure the fair and responsible treatment of

⁴⁴ TTU Brief, *supra* note 22.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Leach Termination Letter Released*, KCBD.com (Dec. 20, 2009), <http://www.kcbd.com/Global/story.asp?S=11749138>

student-athletes in relation to their health, welfare and discipline. Breach of such rules and standards, whether willful or through negligence, negligence, may be subject to disciplinary action and penalties ranging from termination, public or private reprimand to monetary fines or adjustments in compensation or adjustments in the term of this contract as determined by the President following consultation and review with the the Director of Intercollegiate Athletics. The provision of this Article IV shall be without prejudice to any right the University may have under Article V of this Agreement.⁴⁹

TTU's official statement read "In a defiant act of insubordination, Coach Leach continually refused to cooperate in a meaningful way to help resolve the complaint filed by Craig. He also refused to obey a suspension order and instead sued Texas Tech University."⁵⁰

TTU claimed that Leach's termination was "for cause" because Article IV of the Agreement required Leach to "assure the fair and responsible treatment of student-athletes in relation to their health, welfare, and discipline."⁵¹

Events Leading up to Termination According to Leach

Leach claims that the day after the Agreement was signed, Turner advised Hance that they should fire Leach on November 30, 2009 to avoid paying the \$800,000 contract completion bonus he would be due if he were still the coach on December 31, 2009.⁵² According to Leach, TTU needed an excuse to fire him, and that excuse came in December 2009.⁵³

Leach contends that throughout the 2009 season, Craig was adamant about getting his son Adam more playing time.⁵⁴ When Craig's efforts failed, he decided to file a complaint about alleged physical mistreatment of Adam, and TTU found the excuse it had been looking for.⁵⁵ Accordingly, Hance, who had no authority to investigate complaints such as the one alleged, took control of the "investigation."⁵⁶ Hance appointed Bingham to make a report. Bingham's report recommended that Leach should not be terminated; however, Hance was dissatisfied, and insisted that Bingham make her report more critical of Leach.⁵⁷

⁴⁹ Leach Contract, *supra* note 10.

⁵⁰ *Leach Fired Short of Tech's Bowl Game*, *supra* note 2.

⁵¹ TTU Brief, *supra* note 22.

⁵² Leach Brief, *supra* note 21.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

On December 26, 2009, TTU presented Leach with what he felt was a confession letter which, by signing, would suggest that Leach acknowledged his guilt.⁵⁸ Since Leach refused to sign, Bailey recommended that he be reprimanded.⁵⁹ In response, two regents, including Turner, went beyond the scope of their authority when they demanded that the reprimand letter not be sent, and that the incident would be used to to “their advantage” in firing Leach.⁶⁰

On December 28, 2009, Leach arrived in San Antonio to prepare for the Alamo Bowl. Myers called him and said that he was suspended through January 2, 2010.⁶¹ This was supposedly to allow TTU time to complete an investigation that Leach claimed was already complete, and just long enough to prevent Leach from coaching the Alamo Bowl and from collecting the \$800,000 contract completion bonus that would otherwise otherwise be due to him on December 31, 2009.⁶²

Leach did not hesitate to throw the challenge flag on that call, and sought a temporary temporary restraining order against TTU. When he refused to drop the order, TTU fired him “for cause.”⁶³ This was done so that TTU could avoid paying \$1.6 million in liquidated damages due to Leach under the Agreement.⁶⁴ After word of Leach’s termination got out, former Regent Windy Sitton (“Sitton”) who had been privy to the contract negotiations between Leach and TTU, emailed Turner saying “Jerry, I know this firing has been in the works since the Chancellor and the AD were outmaneuvered by Leach.”⁶⁵

According to Leach, TTU breached several provisions of the Agreement.⁶⁶ TTU fired Leach for filing a suit, his dismissal without notice violated the ten-day notice and cure provision, and the termination for cause was not justified and therefore violated Leach’s rights under the Agreement.⁶⁷

The Truth Shall Set you Free?

After the dust from the media storm settled, the truth about the famed electrical closet closet came out. Despite the text messages sent between Adam and Craig and the threatening phone calls and emails, the truth about what really happened that day came out in March 2010 through depositions of various key players. Adam’s deposition deposition is most telling, and portrays quite a different picture of the events- a picture

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

picture that supports Leach's claim that he was fired without cause. The pertinent questions and answers of the deposition are as follows⁶⁸:

Q. You're sitting in a shed and you text your father, "hey, you're going to like this, Leach thinks it's impossible for me to have a concussion. And I'm just being a pussy."

Q. You thought it was funny?

A. Well, we have the same sense of humor and we thought it was funny so I said "you're going to like this." At the time, yes, sir.

Q. Did Leach tell you "I don't believe you have a concussion?"

A. No, sir, he didn't.

Q. Did the trainer, Mr. Pincock, tell you that Coach Leach didn't think you have concussion?

A. I don't necessarily know. I guess maybe it was an assumption or...

Q. It was an assumption made by you that Coach Leach didn't believe you had a concussion?

A. Yes, sir.

Q. Let's go back and look at your text messages to your father. "So for punishment he had me locked in a pitch black shed for the whole practice."

Q. Will you agree with me that you were not physically locked by a key or a door lock?

A. The garage door was not locked.

Q. Coach Leach didn't tell you to get inside that electrical closet, did he?

A. Not personally, no.

⁶⁸ Brooks, *supra* note 24.

Q. You weren't locked in an electrical closet for three hours, were you?

A. No.

Q. Did Coach Leach tell you that if you were sitting down or leaning on the wall that you would be kicked off the team?

A. He did not tell me.

Q. But in fact, you didn't remain standing the whole time and you weren't punished?

A. No, sir.

Craig also changed his tune during his deposition and indicated that he knew the text messages from his son were less than truthful. He also said that he knew this at time he sent the threatening email to Hance.

Q. When you wrote this email of 12/26 you did not believe Adam had been confined to the electrical closet for a total of three hours, fair?

A. Yes.

Despite Leach's arguments that he was fired without cause, TTU refused to pay Leach his contract completion bonus or liquidated damages, and Leach filed suit. According to Texas Law, TTU is a state entity and is therefore protected from lawsuits by sovereign immunity and the ability of third parties to collect for breach of contract.

Procedural History

Following his termination from TTU, Leach filed suit in the 99th District Court of Lubbock Lubbock County ("District Court") against TTU, Hance, Turner, Anders, Craig, Bailey, Myers and Bingham.⁶⁹ Leach cited eight causes of action including 1) violation of the Texas Whistleblower Act, 2) breach of contract - wrongful termination, 3) violation of the Takings Clause of the Texas Constitution without due course of law, 4) fraud in the inducement, 5) negligent misrepresentation, 6) defamation, 7) tortious interference, interference, and 8) conspiracy to defraud, tortiously interfere, defame, violate the Texas Whistleblower Act, and plaintiff's constitutional rights. The District Court

⁶⁹ TTU Brief, *supra* note 22.

dismissed all claims against TTU except the claim for breach of contract.⁷⁰ The District District Court held that by entering into a contract for services with Leach, TTU waived its right to sovereign immunity.⁷¹

Although the District Court held that Leach could sue TTU for breach of contract, the Court of Appeals for the Seventh District of Texas (Appellate Court) reversed.⁷² In Texas, the law of sovereign immunity insulates state entities from both liability and suit.⁷³ In Texas, the waiver of sovereign immunity is the exception rather than the rule, as indicated by statute:

In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language. In a statute, the use of "person," as defined by Section 311.005 to include governmental entities, entities, does not indicate legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction. Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental governmental entity.⁷⁴

This means that "one cannot sue for payment, nor compel payment from the State without Legislative consent."⁷⁵ So, although a state entity such as TTU must perform its duties under a contract, and is responsible for its failure to do so, it still cannot be sued for damages without its permission, even if TTU fails to perform.⁷⁶ In Texas, unless the legislature carves out a sovereign immunity exception for a particular state body, that body cannot be sued.

The Appellate Court first discussed Leach's argument that TTU waived immunity by statute § 109.001(c) of the Texas Education Code.⁷⁷ Through this statute, TTU enacted specific operating procedures allowing an employee, such as Leach, to take his his grievances out of the administrative process and into court.⁷⁸ Leach argued that

⁷⁰ Mike Leach's Fourth Amended Petition, Cause No. 2009-550,359, *available at* <http://multimedia.lubbockonline.com/pdfs/Leach/draft4.pdf>.

⁷¹ *Id.*

⁷² TTU Brief, *supra* note 22.

⁷³ *Id.* at 392.

⁷⁴ TEX. GOV'T CODE § 311.034 (2012).

⁷⁵ *Leach*, 335 S.W.3d at 392.

⁷⁶ *See id.*

⁷⁷ *Id.* at 394

⁷⁸ *Id.*

this meant that TTU consented to be sued; however, the Appellate Court disagreed.⁷⁹ The Appellate Court stated that the Code did not speak to waiving immunity.⁸⁰

The Appellate Court next explained why it did not agree with Leach's Whistleblower argument.⁸¹ The Whistleblower Act forbids a state entity from taking action against an employee who in good faith reports a violation of the law by that entity.⁸² The Appellate Court said that the legislature did not intend to include situations like Leach's in the Whistleblower Act.⁸³ A complaint for breach of contract and constitutional deprivation rising out of that termination does not qualify as a report.⁸⁴

Finally, the Appellate Court addressed Leach's constitutional claims. The claims are the the "purported taking without compensation of Leach's property and his termination without due process."⁸⁵ Leach argued that TTU violated the takings clause of the Texas Texas Constitution as well as due process. The Appellate Court held that the Texas takings clause did not apply to contractual disputes; however, the Appellate Court did find that Leach may have been denied due course of law.⁸⁶ Leach had property rights in continued employment for a term of years and in his compensation.⁸⁷

The Appellate Court's ruling allows Leach to take his case back to the District Court to determine whether his due-process rights were violated when he was fired by TTU; however, this ruling only allowed Leach to seek equitable, rather than monetary relief.⁸⁸ relief.⁸⁸

While one attorney for TTU stated that the ruling was a "great victory," an attorney for Leach summed it up best when he said "the doctrine permits a Texas state institution to deny a person's written contractual rights and steal his hard-earned labor labor while paying nothing."⁸⁹

On November 28, 2011, Leach sent a settlement proposal to TTU officials as well as the the Attorney General of Texas, Greg Abbot and Texas Governor, Rick Perry.⁹⁰ In the

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 395.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 397.

⁸⁵ *Id.* at 398.

⁸⁶ *Id.* at 398-399.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Appellate Court Deals Major Blow to Leach in Case v Tech*, LubbockOnline (Jan. 22, 2011), <http://lubbockonline.com/filed-online/2011-01-21/appellate-court-gives-tech-sovereign-immunity#.UC0yu6MeV3s>.

⁹⁰ Settlement Proposal Letter from Mike Leach to Kent Hance et al. (Nov. 28, 2011), *available at* <http://www.myfoxlubbock.com/news/local/story/Lubbock-mike-leach-texas-tech-responsen-griggs/2v-S77ebe0-C53YrgR4sXw.cspX>.

settlement letter, Leach stated that he only wanted the money he was owed under his contract: his guaranteed income from 2009, his 10-year bonus and his incentive bonuses for games won, ranking, etc.⁹¹ Leach specifically pointed out that had the school abided by the contract and given him ten days' notice prior to his termination, he would have been employed on January 9, 2010, and therefore eligible for his 10-year bonus.⁹² Leach wrote that he was not seeking any monetary damages, and that he only wanted what was due him under the contract.⁹³ He wrote that it was in the best interest of all involved including the alumni, students and fans, to settle and move on.⁹⁴

Attorney Dicky Grigg ("Grigg") for TTU rejected Leach's settlement proposal on December 27, 2011.⁹⁵ In the December 27, 2011 rejection letter, Grigg described how Leach repeatedly abused a student athlete with a brain concussion.⁹⁶ He went on to state that Leach, not TTU, was the one who breached the contract by mistreating student athletes and refusing to cooperate with the University to ensure it would not happen again.⁹⁷ The letter also stated that Leach did receive his incentive bonuses, unlike Leach claimed in his settlement offer.⁹⁸ Grigg also pointed out that it was curious timing for Leach to be "demanding" millions of dollars after the Court of Appeals sided with TTU and rejected Leach's monetary claims.⁹⁹ Grigg also stated that that the Texas Supreme Court would be expected to do the same.¹⁰⁰

With his proposed settlement rejected, Leach was determined to have the sovereign immunity doctrine reviewed at the highest level in Texas, the Texas Supreme Court. However, the Court rejected Leach's appeal in February of 2012 without comment.¹⁰¹ However, Leach may still seek a ruling by the lower court that TTU erred in firing him by denying him due process.

Leach has sought permission to sue the State from the Texas House of Representatives. State Representative Craig Eiland of Galveston introduced House Concurrent Resolution 101 to the Texas House of Representatives. The proposed legislation recognizes that the legislature of the State of Texas is the only proper entity

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Settlement Rejection Letter from Dicky Grigg to Ted Liggett (Dec. 27, 2011), *available at* <http://www.myfoxlubbock.com/news/local/story/Lubbock-mike-leach-texas-tech-responsen-griggs/2v-S77ebe0-C53YrgR4sXw.csp>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Mike Leach's appeal on lawsuit denied*, ESPN (Feb. 17, 2012), http://espn.go.com/college-football/story/_/id/7585199/mike-leach-texas-supreme-court-denies-appeal-wrongful-termination-suit-vs-texas-tech.

entity to waive sovereign immunity, that TTU is protected by sovereign immunity, and if the legislation is passed, former TTU coach Mike Leach would have permission to sue TTU. The legislation, however, has not passed.

The Texas Supreme Court's refusal to review the Appellate Court's ruling and the precedent created thereby may have huge implications in the world of Texas sports by limiting state actors to exposure to any civil suits or liability for claims.

Sovereign Immunity

The principle of sovereign immunity is an English common law concept used at a time when kings and queens were omnipotent. "The King was chosen by God to rule and as God's chosen divine representative on earth the King does God's will and thus can do no wrong" and therefore could not be sued.¹⁰² The states derive their sovereign immunity laws from the Eleventh Amendment of the United States Constitution: "The Judicial power of the United States shall not be construed to extend to any law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court of Texas has taken this to its ultimate extreme by creating a double shield and reaffirming that as a government institution TTU has sovereign immunity, which means immunity from being sued and from being liable if sued without its own permission.

Many states have abolished sovereign immunity as it applies to contract claims by holding that a state impliedly waives its immunity if it enters into a contract.¹⁰³ In fact, every state, except Texas, can be sued for financial damages resulting from a breach of contract.¹⁰⁴ Thirty-nine states abrogated sovereign immunity as it applies to contract claims, making the ability to sue the state absolute.¹⁰⁵ Had Leach been coaching at a University in one of these states, he would likely have been successful in his lawsuit and awarded the damages he claimed he was owed.

In ten states complainants must "navigate a variety of bureaucratic hurdles" after which complainants may seek monetary damages.¹⁰⁶ Texas stands alone in its complete immunity from suit and liability.¹⁰⁷

¹⁰² Allen Hooser, *Legally Speaking, Texas is King in Sovereign Immunity*, Sports Networker (March 2, 2012), <http://www.sportsnetworker.com/2012/03/02/legally-speaking-texas-is-king-in-sovereign-immunity/>.

¹⁰³ Smith v. State, 222 S.E.2d 412, 419.

¹⁰⁴ *Mike Leach and Sovereign Immunity in Texas*, Sports for Dorks (June 24, 2012), <http://sportsfordorks.squarespace.com/home/2012/6/24/mike-leach-and-sovereign-immunity-in-texas.html>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

For the states that have not completely abolished sovereign immunity as it applies to breach of contract claims, there are four ways to challenge its application including legislative consent, statutory waiver, waiver by execution, and waiver by conduct.¹⁰⁸

Seeking legislative consent is probably the most convenient option in that the legislature is best suited to make policy decisions about the government and controls state funds.¹⁰⁹ Although permission may be burdensome, legislative consent will prevent the state from using sovereign immunity to shield the state from payments owed, as well as preventing the state from breaching contracts with private parties at will.¹¹⁰ In addition to legislative consent, aggrieved parties may not need permission to sue the State because a waiver is provided by state statute.

Permission to sue is not required when a statute waives the state's sovereign immunity protection under certain circumstances. Leach attempted to show there was a statutory waiver when he argued that TTU waived immunity by statute § 109.001(c) of the Texas Education Code. However, in Texas, there must be clear and unambiguous language indicating that sovereign immunity does not apply to the specific situation.¹¹¹ While Leach had the right idea, the court said this was not a statutory waiver.

Waiver by execution is based on the principle that because a state is protected from lawsuits when it enters into a contract with a private party, the contract is therefore illusory and lacks mutuality.¹¹² In essence, then, if a state executes a contract with a private party, the execution of the contract itself is a waiver of immunity. Texas, of course, found a way around waiver by execution. In a Texas case the court held that waiver by execution only waived immunity to suit, not liability; that is, the state could be sued but not held liable.¹¹³

Finally, there is waiver by conduct. There may be circumstances where the state may waive its immunity by conduct other than by simply executing a contract. While analyzing a waiver by conduct claim, a court will look at (1) whether the state entity accepted contract benefits; (2) whether the state has refused to pay for the services; (3) whether a suit for breach of contract has been filed against the state; and (4) whether the private party will suffer substantial loss if a waiver is not granted.¹¹⁴

¹⁰⁸ Peter J. Prigge, *Blowing the Whistle Against State Universities: Challenging the Application of Sovereign Immunity*, 15, Spring 2011 (Selected Topics in Sports Law Seminar, Marquette University Law School).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 15 (citing *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 854).

¹¹¹ *Tex. Gov't Code* § 311.034 (2012).

¹¹² *Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401 (Tex. 1997).

¹¹³ *General Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591 (Tex. 2001).

¹¹⁴ Prigge, *supra* note 108 at 19.

Presently, sovereign immunity has its loopholes in every state except Texas. Even though there was language in one Texas case that left the door open for the Supreme Court to make waiver by conduct a complete waiver¹¹⁵, any hope of that happening was dashed when the Texas Supreme Court refused to hear Leach's case. As it stands, stands, there is no getting around Texas's sovereign immunity laws without the Texas Legislature's permission.

With the Supreme Court's refusal to hear the Leach appeal, it appears that Texas sovereign immunity laws, i.e. immunity to suit as well as liability, currently stand without garnering the Texas legislators' permission.

Leach may have likely reached a similar outcome had he been coaching in Wisconsin rather than Texas. Sovereign immunity is codified in Wisconsin's Constitution which states "(t)he legislature shall direct by law in what manner and in what courts suits may be brought against the state."¹¹⁶ In Wisconsin, "it is well recognized that the state waives immunity from suit when it creates an agency as an 'independent going concern;' one with independent proprietary powers and functions and acts separately and independently from the state."¹¹⁷ The agency's powers as well as the statutory authority creating the agency determine whether it is an independent going concern.¹¹⁸

In the leading sovereign immunity case in Wisconsin, the court held that the Board of Regents of the University of Wisconsin System did not have the authority to waive sovereign immunity.¹¹⁹ A public university in Wisconsin is not an "independent going concern" and therefore cannot waive immunity when the university's board cannot collect funds, incur debts or liabilities, or dispose of property without legislative approval.¹²⁰ Assuming the law is upheld, Leach would probably have not been successful in Wisconsin either.

The doctrine of sovereign immunity does not apply in suits for damages against officers officers as individuals.¹²¹ A Wisconsin court has stated that "an officer may be held liable for damages resulting from negligent performance of a ministerial duty."¹²² If Hance, Turner, Anders, Bailey or Myers acted outside their scope of authority by terminating Leach in the manner that occurred therefore invading his personal property property rights, Leach may be successful against them as individual officers.¹²³

¹¹⁵ See generally, *Federal Sign v Texas Southern Un.*, 951 S.W.2d 401 (1997).

¹¹⁶ *Lister v Board of U. Wis. Sys.*, 240 N.W.2d 610, 617 (Wis. 1976).

¹¹⁷ *Prigge*, *supra* note 108 at 9 (citing *Lister*, 240 N.W.2d at 618).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Graney v. Board of Regents of University of Wisconsin System*, 286 N.W.2d 138, 1979 (Wis. Ct. App. 1979).

¹²¹ *Id.* at 144.

¹²² *Id.*

¹²³ See *id.* at 145.

Conclusion

In essence, the Texas sovereign immunity law prevents an aggrieved party from successfully suing the State of Texas without the State's prior permission, or collecting on a lawsuit against the State for a contractual breach. The doctrine of sovereign immunity in Texas is antiquated and needs to be legislatively changed. Leach's attorneys got it right; that is, sovereign immunity in Texas "is nothing more than a university-sanctioned theft of a person's labor and contractual rights."¹²⁴

From a legal perspective, what is left in Leach's case is the ability of Leach's lawyers to seek a ruling that TTU erred in firing him by denying him due process. While no monetary gain would come from such exercise, a trial before a jury could find that Leach was unjustly terminated and that the allegations against him were untrue. His attorneys could also take the case to the United States Supreme Court.

Liggett has indicated that "We believe the doctrine of sovereign immunity has to be overturned. We think it denies due process and a right to trial. It's fundamental constitutional issues at work here. The people are sovereign, not the state."¹²⁵

In representing college coaches for well over 25 years, the issue of sovereign immunity has never come up. The Leach matter has raised another issue in contractual planning and processes for negotiating college coaches' contracts. Lawyers representing coaches need to bone up on the sovereign immunity law of the state in which they are negotiating the contract. An attorney needs to know the impediments to commencing a suit and the procedure if a suit is required for contract breach under a state's doctrine of sovereign immunity.

While Texas is an anomaly, coaches' representatives need to make certain that there is recourse for a coach in the state institution that breaches its contract. The TTU decision should alarm contract lawyers in the sport industry, especially in the state of Texas given the number and size of state-owned athletic programs in the state of Texas, including University of Texas Austin Longhorns, Texas Tech University Red Raiders, Texas A&M University Aggies, University of Houston Cougars, University North Texas Mean Green, and Texas State University Bobcats.

Because of the possibility of breach without recourse, lawyers representing Texas coaches will look more closely at up-front payments in the form of signing bonuses or having the contract front-end loaded, or as part of the contract negotiations, seek

¹²⁴ *Appellate Court Deals Major Blow to Leach in Case v Tech*, *supra* note 89.

¹²⁵ *Texas court limits Mike Leach's lawsuit against Texas Tech*, USATODAY.com, (Feb. 17, 2012), <http://www.usatoday.com/sports/college/football/story/2012-02-17/Court-Appeal-Mike-Leach-Texas-Tech/53131230/1>.

under the current law, permission from the legislature to sue the State in the first instance.