

Bo Pelini Firing Outrage  
(Non-disparagement Clauses in College Coaching Contracts)  
by Martin J. Greenberg

I. INTRODUCTION – PELINI COACHING HISTORY

Mark Anthony “Bo” Pelini (“Pellini”) grew up in Youngstown, Ohio and played safety for the Ohio State Buckeyes.<sup>1</sup> Pelini served as the University of Nebraska’s (“Nebraska”) football team’s Defensive Coordinator in 2003, as well as Interim Head Coach.<sup>2</sup> In 2004, he became the Co-Defensive Coordinator at the University of Oklahoma, and from 2005-2007 he was the Defensive Coordinator for Louisiana State University.<sup>3</sup> Pelini was hired as the Nebraska Cornhuskers 28<sup>th</sup> Head Coach on December 2, 2007.<sup>4</sup>

During his term at Nebraska, Pelini had a 67-27 win-loss record in his seven years as Head Coach, “winning at least nine games in every season” including a 9-3 record in his final season.<sup>5</sup> Although an impressive record, Pelini never lead Nebraska to a conference championship and had a 7-17 win-loss record against ranked teams.<sup>6</sup>

Pelini was fired by Nebraska on November 30, 2014 and was then hired as Head Football Coach by Youngstown State University (“Youngstown”) shortly thereafter on December 16, 2014.<sup>7</sup>

II. CONTRACT - TERMINATION

Pelini originally entered into an employment contract with Nebraska on March 9, 2009.<sup>8</sup>

---

<sup>1</sup> *Bo Pelini*, WIKIPEDIA, [http://en.m.wikipedia.org/wiki/Bo\\_Pelini](http://en.m.wikipedia.org/wiki/Bo_Pelini) (last visited Dec. 31, 2014).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Jon Nyatawa, *Bo Pelini Officially Named Youngstown State Coach*, Omaha (Dec. 17, 2014), [http://www.omaha.com/huskers/bo-pelini-officially-named-youngstown-state-coach/article\\_23926af4-8570-11e4-9072-1f9377a76b09.html?mode=jqm](http://www.omaha.com/huskers/bo-pelini-officially-named-youngstown-state-coach/article_23926af4-8570-11e4-9072-1f9377a76b09.html?mode=jqm).

<sup>8</sup> Employment Agreement between The University of Nebraska-Lincoln and Mark “Bo” Pelini (Mar. 9, 2009).

On April 6, 2011, Pelini's contract with Nebraska was extended for the period beginning March 1, 2011 to February 29, 2016 at midnight.<sup>9</sup> In March of 2014, Pelini's contract was further extended to February 28, 2019.<sup>10</sup>

At the time of Pelini's firing, liquidated damages were payable to him pursuant to the not for cause termination provision in his contract:

Section 14. Termination of Employment for Reasons Other than for Cause; Liquidated Damages; Mitigation of Damages.

(a) The position of Head Football Coach is unique and requires special talents and skills. As such, it is the only position for which Coach is being employed, and the University shall not have the right to re-assign Coach to any other position. The parties agree that the University shall, at any time, have the right to terminate Coach's employment hereunder for reasons other than for cause upon giving Coach reasonable written or verbal notice of termination, as such reasonableness may be determined by the University in its discretion and exercise of good faith. Notwithstanding any Contract provision which might be interpreted to the contrary or unless otherwise specifically agreed to in writing, Coach's employment relationship with the University as Head Football Coach shall terminate upon delivery of the notice of termination or as otherwise set forth in the notice of termination. In the event of such termination, the parties further agree that the damages incurred by Coach would be uncertain and not susceptible to exact computation. Accordingly, it is understood and agreed that any and all claims which may arise in Coach's favor against the University and its Board members, employees and agents by reason of such termination shall be strictly and solely limited to an amount of liquidated damages to be determined by multiplying the number of full months remaining in the Term immediately prior to the termination (such period of time to be referred to herein as the "LD Term") by the amount of \$150,000.00. Except as otherwise set forth in this section below with respect to mitigation, the liquidated damages shall be paid in equal monthly installments over the course of the LD Term. In case of Coach's death, the University's obligations under this section 14 shall cease effective on the last day of the month in which Coach dies. The obligations of the University under this subsection shall survive termination of this Contract.

(b) Coach hereby acknowledges and agrees to accept the duty to mitigate the liquidated damages described in this section, as well as any other damages Coach may sustain upon termination of this Contract, whether such termination be one

---

<sup>9</sup> Employment Agreement between the Univ. of Nebraska-Lincoln and Mark "Bo" Pelini (Apr. 6, 2011) [hereinafter Nebraska Agreement]; Mitch Sherman, *Bo Pelini Agrees to One-Year Extension*, ESPN (Mar. 7, 2014), [http://espn.go.com/college-football/story/\\_/id/10569588/nebraska-cornhuskers-bo-pelini-agree-one-year-extension](http://espn.go.com/college-football/story/_/id/10569588/nebraska-cornhuskers-bo-pelini-agree-one-year-extension).

<sup>10</sup> Sherman, *supra* note 9.

for cause or without cause. More specifically, within a reasonably brief period following termination, Coach shall use his or her best efforts to seek and secure substantially comparable employment including the customary and reasonable terms and conditions of compensation at the new employment, without structuring or timing compensation to avoid mitigation. If Coach obtains other employment during the LD Term and such employment does not guaranty Coach cash compensation of more than \$1,800,000.00 per year, then all University obligations to Coach for payments under this section 14 shall cease upon payment of a lump sum to Coach from the University, or other party designated by the University, or other party designated by the University, computed as follows: the present value of a stream of payments over the remaining LD Term in an amount equal to the difference between \$150,000.00 and Coach's monthly prorated amount of his annual gross cash salary guarantee at the new employments, discounted at the 3-year Treasury Constant Maturity Rate. [For purposes of illustration, assume Coach secures employment following a termination without cause. Upon the commencement of his new employment, fifteen months remain in the LD Term. Coach's new employment guarantees that he receives cash salary of \$600,000.00 a year (i.e. a monthly salary of \$50,000.00). The University's obligations under this section would be fulfilled upon payment to Coach of a lump sum equal to the present value of a stream of fifteen monthly payments of \$100,000.00 (\$150,000.00 less \$50,000.00), discounted at the rate stated above.]

(c) The parties have bargained for and agreed to the forgoing liquidated damages provisions, giving consideration to the fact that Coach will lose certain benefits, supplemental compensation or outside compensation related to employment as Head Football Coach, which damages are extremely difficult to determine with certainty. The parties agree that payment to Coach of the liquidated damages provided in subsections (a) and/or (b) of this section shall constitute adequate and reasonable compensation to Coach for the damages and injury suffered by Coach as a result of the termination of this Contract by University. Upon payment of such liquidated damages to Coach, Coach does hereby waive and release the University, its Board members, administrators, employees and agents, from any and all claims of any nature whatsoever, which may arise by reason of such termination, including, but not limited to any benefits of employment or other income which may accrue to Coach by reason of Coach's position as Head Football Coach.

(d) Should the University, based upon advice of legal counsel or for any other reason the University in its discretion deems is appropriate, determines that the payments provided for in this section are to be paid from resources other than resources of the State of Nebraska, then the University promises that it will secure funds from non-public funds for the satisfaction of the obligation described in this section.<sup>11</sup>

---

<sup>11</sup> Nebraska Agreement, *supra* note 9.

Following his firing, Pelini was immediately hired by Youngstown on December 16, 2014 as Youngstown's Head Football Coach.<sup>12</sup> On or about May 1, 2015, Pelini executed an Employment Agreement with Youngstown effective as of December 17, 2014.<sup>13</sup> The contract is for a four year term commencing December 17, 2014 and ending on February 28, 2019.<sup>14</sup> Paragraph 4.1 (Annual Base Salary) of the contract indicates that Pelini will be paid \$213,894.00 "payable in bi-monthly installments in accordance with normal university payroll procedures."<sup>15</sup> "[Pelini] may receive increases in base salary to be effective on July 1 of each year of the agreement, beginning on July 1, 2015."<sup>16</sup> Pelini and Youngstown executed an Addendum to the Employment Agreement on May 4, 2015 that eliminated Paragraph 4.3 of the Agreement.<sup>17</sup> The Addendum further states that

[t]he parties agree that the University will not pay to [Pelini] the marketing Compensation of \$50,000 annually during the entire term of the Agreement. [Pelini] will, however, perform the duties set forth in Section 4.3, including, but not limited to, television and radio shows, speeches and other appearances as reasonably requested by the University. Coach will receive no additional compensation for performing the above listed marketing activities.<sup>18</sup>

Pelini's new contract obviously is much less than what he earned in his final year at Nebraska, i.e. a base salary of \$3.07 million per year at Nebraska. Pelini's salary is about the same as Youngstown's previous coach, Eric Wolford (who arrived at Youngstown without head coaching or even coordinator experience), who was also making \$213,894.00, along with \$50,000 in marketing compensation for television and radio shows, speaking engagements, and

---

<sup>12</sup> Adam Rittenberg, *Past Pelini Rant Fuels School's Ire*, ESPN (Dec. 18, 2014), [http://espn.go.com/college-football/story/\\_/id/12042211/bo-pelini-takes-parting-shot-nebraska-cornhuskers-leadership](http://espn.go.com/college-football/story/_/id/12042211/bo-pelini-takes-parting-shot-nebraska-cornhuskers-leadership).

<sup>13</sup> *Id.*

<sup>14</sup> Employment Agreement between Youngstown St. Univ. and Mark "Bo" Pelini (May 1, 2015).

<sup>15</sup> *Id.* at 6, para. 4.1.

<sup>16</sup> *Id.*

<sup>17</sup> Addendum to Employment Agreement of Mark "Bo" Pelini (May 4, 2015).

<sup>18</sup> *Id.* at § 2.

sponsorships in his final year.<sup>20</sup> Pelini's Youngstown salary will help reduce the obligation of Nebraska pursuant to its termination without cause provision.<sup>21</sup>

### III. FIRING - TIRADE

On December 2, 2014, following Pelini's dismissal from Nebraska and two days after his final victory over the University of Iowa, Pelini called a meeting of his players at Lincoln North Star High School to give his farewell address.<sup>22</sup> What follows is a transcript of Pelini's diatribe, which includes several vulgar swipes at Athletic Director Shawn Eichorst ("Eichorst") and the Nebraska program:

Appreciate you guys coming out here and, you know, obviously the last couple days here for me have been, you know, kind of crazy. Just kind of giving you guys a heads up.

It wasn't a surprise to me. It really wasn't. I didn't really have any relationship with the AD. The guy — you guys saw him (Sunday) — the guy's a total p----. I mean, he is. He's a total c---

And since I've been here — he's been here for about two years — I've probably had a conversation with the guy a couple times. You saw him. He's never been in the locker room.

At the end of the day, he was never going to support us. And he didn't support us. You saw it. He was never going to come out in the paper and support (us). And fellas, I gotta tell you, at the end of the day, in the last, you know, when you are in my position, you guys know what it's like, you guys go through it and I go through it about 50 times over. The scrutiny, the taking shots at you, and everything else — when you aren't getting support from your boss, it can be stressful. It was stressful on me, it was stressful on my family.

And Kaz is here, I said to Kaz at one point, I said, man, this is killing me. I said, I don't want to die doing this job. And I meant it. I was like, I don't want to have a heart attack doing this job.

---

<sup>20</sup> Sam McKewon, *Reports: Bo Pelini Signs Contract at Youngstown State*, Big Red Today Sports (May 5, 2015, 12:53 P.M.), [http://www.omaha.com/huskers/blogs/reports-bo-pelini-signs-contract-at-youngstown-state/article\\_aed20122-f34f-11e4-ad31-6369692511e5.html](http://www.omaha.com/huskers/blogs/reports-bo-pelini-signs-contract-at-youngstown-state/article_aed20122-f34f-11e4-ad31-6369692511e5.html).

<sup>21</sup> Nebraska Agreement, *supra* note 9, at 7, at § 14(b).

<sup>22</sup> Brian Christopherson, *Pelini's Final Meeting with Players Included Profane Shots at Eichorst*, LINCOLN JOURNAL STAR (Dec. 17, 2014), [http://journalstar.com/sports/huskers/football/pelini-s-final-meeting-with-players-included-profane-shots-at/article\\_97320c71-c7ed-517e-be01-81f0f47fa93f.html](http://journalstar.com/sports/huskers/football/pelini-s-final-meeting-with-players-included-profane-shots-at/article_97320c71-c7ed-517e-be01-81f0f47fa93f.html).

About a week ago, about 10 days ago, I said, I went to a couple of the members of the board, who — and I don't even really know what those guys do — and I said "Hey, you know what, if this guy ain't gonna do his job, and if he doesn't have the balls to go out there and support me, support these kids, support this program, then do me a favor and get rid of me."

And I don't really know where that went, as far as between whether that got relayed to them or not, but at the end of the day, we won that game, and I could see it in the athletic director's face, I could see it the other guy's face — Kaz will tell you — they were pissed. They didn't want us to win that game. The Iowa game. And that's weird. That's strange. But it is what it is.

But at the end of the day, what I wanted to make sure, if there was gonna be a change, that I would have time to get on my feet. They gotta pay me. They gotta pay our assistants over the next — they have time to get jobs.

But at the end of the day, fellas, if they weren't gonna support us. ... And I said what I said to him and I'll tell you what I told him. When I went in there and he said, "We are gonna make a change," and I said, "All right." I said, "You are gonna honor my contract?" He said, "Yeah." I said, "You are gonna honor my assistant coaches' contracts?" He said, "Yeah." And I said, "Well, I think it's the best for both of us. Because if you aren't gonna support us, then it's probably best for everybody involved that we part ways."

And that's how I felt. And then I told him, I said, "Hey, listen."

And he goes, "Well, I disagree that I haven't supported you."

And I said, "Hey bud, you can't support somebody underneath a f----- rock." I said, "To do your job at this level, at a place like this, you gotta be a grown a-- f--- man to lead something." I said, "You can't lead anything under a f----- rock." I said, "You don't spend any time with us. Our players don't even know who you are." And I said, "That isn't leadership."

And he said, "Well, I appreciate your advice."

And I said, "I suggest you take it, but see you later." And that's how it went down. At the end of the day, the guy ain't changing. I knew that when I took the job.

You know, when they forced coach Osborne out — and that's what happened, he got forced out — when he got forced out, I knew what was right around the corner. Or what could have been around the corner. But I wasn't sure. But I'll put it to you this way. It didn't surprise me how it played out. Like I said, at the end of the day, you gotta have, you gotta be, it's hard enough to get to build something, but you gotta have everybody going in one direction. And it wasn't. Everybody wasn't going in the right direction.

I think there were agendas and those go all the way over to the chancellor's office. Between the AD and the chancellor. And if they want their own guy in there, go ahead, good luck to ya. But what I'm concerned about is you guys. That's all I care about.

I want you guys all to know that I've been through this before, you know. I'll be fine. Between you guys, I don't know what I'm gonna do. I might just stay right here and leave my kids in school here. I already have a couple job offers. I don't know what I'm going to do. Not really sure what I want to do yet. I'm in no hurry to make decisions.

My biggest concern is, as far you guys are concerned, is my wife and kids and to make sure they are happy. I'm sure all you guys are going through, "Hey, what am I gonna do?" I've been there as a player. I was young when it happened with me. It was after my redshirt freshman year at Ohio State, there was a coaching change. And I stayed, but a lot of guys left. And it works out both ways.

At the end of the day, when you make those kinds of decisions, you gotta go with what's in your heart. There is no right or wrong choice in that stuff. But understand, you aren't going to have a bigger ally than myself and the other coaches. If you guys need any help with anything, all you gotta do is ask, and I promise you, I'm there for you. I mean, I will do everything I possibly can to help you, no matter what. You'll get through this; it's difficult and it sucks.

You know, I don't have a lot of confidence in what their plan is. I don't even know if they have a plan right now, which, to me, is scary. If it's true what he said — someone told me, that it "crystallized" for him on Saturday night — which tells me he doesn't really have a plan, which to me, is a little bit unnerving. But I don't know how you do anything in this world without a plan.

But as far as you guys are concerned, you guys are gonna be fine, you guys gotta stick together in this deal. That's the key. You ain't gonna change what's going on on the third floor (of the athletic department). It doesn't mean it can affect you guys. There's a lot of talent in this room. There's a lot of great kids in this room.

And you know, if you choose to stick it out, you stick it out. If you choose not to, you don't have to. You are free to do whatever the heck you want to do. And that's about all I can say. Like I said, I'm more concerned about you guys than I am anything else. Because it's always been a weakness of mine, but I get close to my guys. I care about you guys. I really do. I'm hard on you, the same way I'm hard on my own kid, but I love you guys. I really do. I recruited most of you guys to come here. And I told you I'd look after you, and I can tell you this, I did everything I possibly could. I gave you guys every ounce I could give you. I promise you. That's how I operate and I said I'll do it until someone told me not to.

And someone told me not to coach here anymore, but I'm still here for you guys. And that doesn't mean over the next month or next year — I don't care if it's 10 years down the road, fellas. If you guys ever need anything from me, you pick up the phone and call me. I've been hearing from guys from LSU, to guys I've coached in the NFL, to guys I've coached three and four years ago. Like I said, I am here for you guys. You need advice? Ask me. Whatever you guys want. Whatever I can do for you, do not hesitate to ask, OK? I'm here, I'm available and I look at you guys like I do my own kids. I really do. I'll be here to help you and do whatever I can for you.

I don't know how long this will all take. (Eichorst) probably tried to fill you guys in. I heard the meeting didn't go real well for the man, which doesn't surprise me, because how does it go well when he doesn't even know you guys?

And that was the crazy thing. To be honest with you fellas, he knows nothing about — and I've always said — he knew nothing about me. I don't know him. He doesn't know me. He has no idea. He has no idea what is important to me, what I represent, how we run our program. He had no idea.

He's a policy guy, a lawyer who sits behind a desk and pushes a pen all day. And you guys know as well I do, that isn't how you lead anybody. So hopefully he brings someone in here that is strong, that has some leadership skills. I'm sure they'll do that.

My advice is, fellas, is, it'll be different, but if you choose to stay here, you give the new guy a chance. Because I went through that, fellas. I went from an old-school coach in Earle Bruce when I was at Ohio State to somebody who came in, and he was totally different. Totally different. It was a big-time adjustment. Whoever it is will probably come in here and talk bad about what we've done, or sit there and say, "We gotta upgrade this, we gotta upgrade that." But at the end of the day, fellas, you'll be able to control your own destiny by what you put on film and how hard you work. That's what you have to remember.

Don't get caught up in all the BS, all the stuff the press says and doesn't say around here. At the end of the day, you take care of you. You take care of each other. And usually when you have that attitude, things work out. OK?

Have they even told you guys what bowl you are gonna go to? Next Sunday? You guys have earned a good bowl game, fellas. I mean, it'll be a good bowl. Play your ass off. Make me proud. That's all I ask. It'll probably be — I heard the Outback Bowl down in Tampa or maybe even in San Diego against SC. So you're going to play someone good.

I know it's difficult, fellas, and it's no fun. But any questions I can answer for you guys?



(No questions)

That's kind of the long and short of what's been going on. Let me tell you, you go back a year, fellas, when I said what I said after the Iowa game? I was trying to press — I wanted to find out then where they stood. And unfortunately all I found out then was that they were p----- and they were gonna do what was politically right, or what they thought was the politically right thing to do.

But at the end of the day, I wanted to find where they stood — because I felt a lack, I didn't get any — it's weird when you don't have any relationship with who you supposedly call your bosses, and you never see them, ever. So, at the end of the day, all I did was kind of bunker in and worry about you guys and worry about coaching. But it wasn't a good situation for me, professionally. It wasn't. I don't know whether you guys could see, but it became very stressful. And it's hard enough.

So for some ways for me personally ... there's some things that have actually been a relief for me. But, at the same time, what I worry about is you guys and my family.

Myself, Kaz, all the coaches, we'll be fine. We'll be fine. Those guys can coach and they're all going to end up with jobs and everything else. Unfortunately, what people who aren't part of this thing don't understand is how it affects you guys. Just read the article? How many have mentioned you guys? Not many. I haven't read any of them — because I'd be dumber for probably having read them and I can't afford to get any dumber than I already am — but I guarantee that not many of them have mentioned, "Hey, how does this affect these guys?" I've sat in your seat, guys, and I understand how hard it is.

I say thank you to you guys, for what you did for me, and the effort you put in. Like I said, I love you guys. I really do. Understand I will do whatever it takes to help you. And do not be afraid and do not hesitate to call on me if there is something I can do for you. So that's about all I can say. Anybody got any questions?

(A question is asked about whether Eichorst met with Pelini one year ago and talked core values.)

He never said, "You gotta do that, you gotta do that." Let me tell you about core values. And fellas, this all stays here. But, a guy like him, who has no integrity, he doesn't even understand what a core value is. He hasn't understood it from the day he got here. I saw it when I first met with the guy. To have core values means you have to be about something, you have to represent something that is important to you. He's a f----- lawyer who makes policies. That's all he's done since he's been here: Hire people and make policies to cover his own ass. So when he walked into

that room to talk to you — and I wasn't there, I don't even know what he said — I can promise you from my dealings with the guy that he just sat out there and threw out words that really meant nothing, that didn't really pertain to the situation. He thought about all these things and "this is what I'm going to say and this is how I'm going to say it," but they probably didn't even relate to what he was saying. Because that is who he is. That's all I ever got from him. Whenever I would have conversations with the guy, his eyes would always be moving back and forth. He can't look you really in the eye. He never sat down and said, "Hey, you gotta do this, you gotta do that," or "Hey, you gotta win this many, you gotta do this."

You know, at the end of the day, people can say a lot about what we did. We won a lot of football games since I've been here. You guys represent this place phenomenally, in the classroom, in the community. What you should have said is, "What are those core values you're talking about?"

(Players said, almost in unison, "He didn't have an answer.")

Because he didn't have an answer, guys. He doesn't even — I told you — guys like that don't know what is important to them. You have to represent something.

One thing about me, you guys knew when you dealt with me, you pretty much knew what my core values were, right? And you knew it was important to me. It was the same with our coaches. I couldn't tell you what his core values were. Just because you can put some words up on the building, what does that mean? It doesn't mean anything. Some of it means something. Some of it is a f----- farce if you don't live it. I like to follow what people do, not what they say. Give me a break.

But, no, there was no such meeting, ever. I gotta tell you guys — my relationship with the guy over the last — (since) spring until now I saw him probably seven or eight times for about 20 minutes over a six-month period. So, you know. Like I said, he would not know what my core values were because he never really took the time to understand it. And, to be honest with you, I didn't really give a f--- if he knew what my core values were or not. I don't give a s--- what that guy thinks. Because I have no respect for him. Right, wrong or indifferent, that's how I am.

If I was gonna deal with you guys, I was gonna do the best job I could and whatever happens happens. I have been in this profession a long time and I have seen some crazy s---. I saw a Super Bowl coach — I was gone by then — get fired. I was with Pete Carroll in New England when we had won the division two out of three years and he got let go. I was here in 2003 when they did this to Frank. I've been around the block long enough to know that at some point there was probably going to be — that it wasn't going to work out, because we are different people. I'm not somebody who is going to sit there and get along to get

along when I don't believe in something that's going on. I am going to speak my mind, and that probably bothered him and bothered the chancellor.

What you guys saw in that meeting – I am sure you guys walked out of there, and you're all smart guys who have been around — and I'm sure and your gut told you certain things. Trust your gut, because your gut's right. I could have — not knowing how it was going to go — when he told me he would meet with you guys at 8 o'clock, I think he said "I'm going to meet the players later on today," and my first thought was: "Well, that ain't going to go real well." Because I knew he wouldn't handle it the right way. I heard he brought security with him? (Laughing) C'mon man. I mean, s---, fellas, look who he circles himself with. Look at his team of people. C'mon, man. I'd rather f----- work at McDonald's than work with some of those guys. Not that there's anything bad about working at McDonald's.

I am not going to walk in here and toe the company line. I wanted to bring you in and tell you what went down. And the way it was going down and where my mindset was. Let me tell you, fellas, this is for real. If it wasn't for you guys and the coaches and their families, I would have resigned a year ago. Because there was some things that were going on that were making me miserable. And all the money in the world ain't f----- worth that. And that's the truth.

I told those guys — and Kaz knows — there were too many people, you guys included, that were counting on me, that would have upset the apple cart. My kids were happy here. I said I could suck it up. When I was in coaching — doing the X's and O's and game planning and all those types of things, fellas? I forget about all this stuff. But there were times when I wasn't doing that, When I had to deal with all the other b-----, let me tell you — there were a lot of nights I would go and sit down on the bed, and sit there and think, "What the f--- am I doing? Is this worth it?" Because I felt like it was taking years off my life. Really. The stress, it was hard. It got hard. It really did. You guys obviously don't see that part of things, but it's difficult when you don't feel you have any support and nobody's behind you.

Because, at the end of the day, I truly believe this, and I constantly talk about it, I felt at times, and you guys tell me if I am wrong, but I thought the last couple of years, and I think this has been going for a number of years, because of the environment that's here. I think because, as the year goes on, it gets harder and harder and header on you guys. Because I think you guys feel that. Am I right or wrong? It's a b---- here. It's hard enough when you have the negativity that comes from the media and the negativity from a lot of former players and this talk show and that talk show. You win and it ain't good enough. It's not good enough, how you won. There is a lot of things that go on there, and if you don't have a grown man standing in front of the thing saying, "Hey, I'm behind it," getting everybody, rallying them — I can do it all I want, but they're b----- at me, too. If they don't get somebody to rally this whole thing together, it's hard.

And I saw it on you guys. I saw it. It was never more evident than the Wisconsin game. I thought you guys were more mentally beat in that game than we got physically beat. It's a culmination of the negativity. And I understand, you guys are human. That's why I was constantly talking you guys about it. Last game, you guys just said, "F--- it, let's go play." Despite all the injuries we dealt with, you guys at least played free. And that's my advice to you guys that come back.

You can't let this place eat you up, because if you let it, it'll eat you up. Because I've been at LSU, I've been at Oklahoma, I've been to these other places and it ain't quite — the scrutiny, the negativity, it ain't like that everywhere. But it is what it is. But you gotta be strong as hell and deal with it. You have to. Because it's real, I know its out there. I've seen it. Am I right or wrong?

(Players: You're right.)

You gotta fight that, fellas, you just gotta go play and enjoy this thing because at the end of the day, it's not a job. This ought to be the best time of your life. Anybody who has in their mind — if any of you guys have on your mind, "Hey, should I go or should I stay?" or "Do I want to go or do I want to stay?" At the end of the day, what you gotta sit there and think is, "This is how many years I got left. These ought to be the best years of my life." And if I don't think it's going to be that way in this place, then you shouldn't stay. But if you feel like, "Hey, this is the place for me. This is place where I'm going to enjoy my career," then this is where you should stay. That's what it should come down to because, fellas, it's going to be over before you know it. It just is. It goes fast. You guys who are seniors, you guys would say, you guys know, it goes quick. And you want to make sure you're able to enjoy it. OK?

But I'm gonna be around. I'm gonna be in town. Like I said, if anybody needs anything. If anybody's tried to call me or text me, I haven't even — it's been crazy over the last couple days. It's starting to settle down, but just call me or text me if you need me and I'll be through all this stuff. It should settle down in the next day or so and I'll get to you quick as I can. You guys who are seniors, anybody who has questions about the draft or what you guys are getting ready to do and that stuff, just let me know and I'll be there to help you, give you advice, help you with whatever you guys need. OK? Appreciate you fellas, OK? Appreciate you guys coming out. Love you, OK? Thanks, fellas. Appreciate it.<sup>23</sup>

#### IV. NEBRASKA'S RESPONSE

Eichorst, in response to Pelini's outburst, stated that:

---

<sup>23</sup> Big Red Today, *Bo Pelini Transcript: I'd Rather Work at McDonald's, former Husker Coach Says*, OMAHA.COM (Dec. 17, 2014), [http://m.omaha.com/huskers/bo-pelini-transcript-i-d-rather-work-at-mcdonald-s/article\\_4f3583d6-8637-11e4-b708-3fa46a3a8147.html?mode=jqm](http://m.omaha.com/huskers/bo-pelini-transcript-i-d-rather-work-at-mcdonald-s/article_4f3583d6-8637-11e4-b708-3fa46a3a8147.html?mode=jqm).

*The University of Nebraska is in receipt of what appears to be a transcript of remarks delivered by former football coach Bo Pelini. These remarks to student-athletes were allegedly made during a non-official team meeting at a local high school, held two days after his termination. At this time, the University cannot authenticate the transcript nor do we have an audio version of the remarks.*

*If these comments were, indeed, spoken by Mr. Pelini, we are extremely disappointed, but it only reaffirms the decision that he should no longer be a leader of young men at Nebraska. His habitual use of inappropriate language, and his personal and professional attacks on administrators, are antithetical to the values of our university. His behavior is consistent with a pattern of unprofessional, disrespectful behavior directed by Mr. Pelini toward the passionate fans of Nebraska, employees of the university and, most concerning, our student-athletes. This behavior is not tolerated at the University of Nebraska and, among many other concerns, played a role in his dismissal.*

*Any assertions that the campus or athletics administration was not supportive of our student-athletes and our football program are flat-out false and are contradicted by the facts.*

*We are grateful that the new leadership in our football program is aligned with our values and will establish that you can be successful at Nebraska and that you can do it with integrity and class.<sup>24</sup>*

Youngstown Athletic Director Ron Strollo released a statement relative to the tirade that says, “Coach Pelini's remarks as reported are inappropriate and unfortunate. We have discussed the report with Coach. We are confident that Coach will conduct himself accordingly moving forward. We will not be commenting any further on this issue.”<sup>25</sup>

After news broke regarding Pelini’s firing, many current and former Huskers players coached by Pelini posted their reactions on Twitter:

Husker cornerback Josh Mitchell (@J\_Mitch05) tweeted: “Smh terrible decision just awful smh 9 wins gets you fired? Thank you coach Bo for everything u did for me & this team over ur tenure”

---

<sup>24</sup> Kate Howard, *Nebraska Response: ‘We Are Extremely Disappointed’ in Bo Pelini*, Big Red Today (Dec. 17, 2014, 4:45 P.M.), [http://www.omaha.com/huskers/nebraska-response-we-are-extremely-disappointed-in-bo-pelini/article\\_5d5c574e-863e-11e4-9be7-2f722ac224f2.html](http://www.omaha.com/huskers/nebraska-response-we-are-extremely-disappointed-in-bo-pelini/article_5d5c574e-863e-11e4-9be7-2f722ac224f2.html).

<sup>25</sup> *Youngstown State AD Says Pelini Remarks ‘Inappropriate,’* Lincoln Journal Star (Dec. 19, 2014), [http://journalstar.com/sports/huskers/football/youngstown-state-ad-says-pelini-remarks-inappropriate/article\\_375a0e5d-1e12-5c3c-b116-67e49c191362.html](http://journalstar.com/sports/huskers/football/youngstown-state-ad-says-pelini-remarks-inappropriate/article_375a0e5d-1e12-5c3c-b116-67e49c191362.html).

Husker quarterback Tommy Armstrong (@Tommy\_Gun4) said on Twitter "Biggest mistake you ever made.... Bo was the best coach I've ever had and I'll always appreciate the things you taught me."

Former Husker running back and current Cincinnati Bengal Rex Burkhead (@RBrex2022) tweeted "Words can't explain how much all the players appreciate what you did for us. Love you Coach Bo and thanks for everything."

Former Husker turned New York Giant Prince Amukamara (@PrinceAmukamara) Said he "Will always be thankful for Coach Pelini! Really helped mold me into the player I am today. Can't thank him enough!"

Former Husker turned CFL offensive tackle Jermarcus Hardrick (@Yoshi\_Hardrick) Said "They fired @BoPelini terrible decision @Huskers"

Former Husker longsnapper P.J. Mangieri (@PJ\_Mangieri) said "140 characters isn't enough to describe my feelings/emotion toward Coach Bo as a man and the decision the University has made this morning."<sup>26</sup>

The Pelini tirade is not the first profanity-laced rant to reach the public. Pelini was reprimanded by Chancellor Harvey Perlman for sideline meltdowns during the loss to Texas A&M University in 2010.<sup>27</sup> In September 2013, Deadspin.com published an audio tape of Pelini just before the start of his postgame radio interview with Greg Sharpe following Nebraska's comeback win over Ohio State on October 8, 2011 criticizing Nebraska fans and media:

It took everything in my power to not say, 'F--- you, fans. F--- all of you.' F--- 'em. Our crowd. What a bunch of f---g fair-weather f---g – they can all kiss my a-- out the f---g door. 'Cause the day is f---g coming now. We'll see what they can do when I'm f---g gone. I'm so f---g pissed off.<sup>28</sup>

---

<sup>26</sup> Brent Yarina, *Twitter: Nebraska Players, Past and Present, React to Bo Pelini's Firing*, BTN (Nov. 30, 2014), <http://btn.com/2014/11/30/twitter-reaction-to-nebraska-firing-football-coach-bo-pelini/>.

<sup>27</sup> Dom Cosentino, *Bo Pelini on Nebraska Fans: "Fuck You, Fans. Fuck All of You."*, DEADSPIN (Sept. 16, 2013), <http://deadspin.com/bo-pelini-on-nebraska-fans-fuck-you-fans-fuck-all-o-1327398903>.

<sup>28</sup> *Id.*

At the time of his firing by Nebraska, Pelini was due a \$7.65 million buyout.<sup>30</sup> There is no non-disparagement clause in Pelini’s Nebraska contract that would affect his severance.<sup>31</sup> In December of 2014, Nebraska hired Mike Riley, former Head Coach of Oregon State University, who was 93-80 in fourteen years at Oregon State.<sup>32</sup> Riley received a five year contract for \$2.7 million per year.<sup>33</sup> “He[ wi]ll receive automatic \$100,000.00 increases in each year of [the] contract that runs through February 28, 2020.”<sup>34</sup> Riley’s contract also does not contain a non-disparagement provision.<sup>35</sup>

#### IV. NON-DISPARAGEMENT CLAUSES IN COACHES CONTRACT

Generally, “a non-disparagement clause restricts an individual from taking any action that negatively impacts an organization, its reputation, products, services, management or employees.”<sup>36</sup> Non-disparagement clauses are typically found in almost all “settlement agreements and about a quarter of executive employment agreements.”<sup>37</sup>

The word disparage means “to speak of or treat slightly; depreciate; belittle” or “to bring reproach or discredit upon; lower the estimation of.”<sup>38</sup> The word disparagement means “the act of disparaging; something that derogates or casts in a bad light, as a remark or censorious essay.”<sup>39</sup>

An example of a non-disparagement clause follows:

---

<sup>30</sup> Ben Doody, *Bo Pelini Buyout: Nebraska Owes Fired Coach \$7.7 Million*, Heavy.com (Nov. 30, 2014), <http://heavy.com/sports/2014/11/bo-pelini-contract-salary-buyout-record-nebraska-coach/>.

<sup>31</sup> See generally Nebraska Agreement, *supra* note 9.

<sup>32</sup> *Mike Riley Takes Helm at Nebraska*, ESPN (Dec. 6, 2014), [http://espn.go.com/college-football/story/\\_/id/11983123/nebraska-cornhuskers-coach-mike-riley-takes-helm-lincoln](http://espn.go.com/college-football/story/_/id/11983123/nebraska-cornhuskers-coach-mike-riley-takes-helm-lincoln).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Employment Agreement between University of Nebraska-Lincoln and Mike Riley (2014).

<sup>36</sup> *Non-Disparagement*, CONTRACT STANDARDS, <http://www.contractstandards.com/clauses/non-disparagement> (last visited Mar. 23, 2016).

<sup>37</sup> *Id.*

<sup>38</sup> *Disparage*, DICTIONARY.COM, <http://www.dictionary.com/browse/disparage?s=t> (last visited Mar. 23, 2016).

<sup>39</sup> *Disparagement*, DICTIONARY.COM, <http://www.dictionary.com/browse/disparagement?s=t> (last visited Mar. 23, 2016).

The Employee agrees that, during the term of this Contract, and for a period of five years after termination of this Contract, he/she will not, directly or indirectly, in any capacity or manner, make, express, transmit speak, write, verbalize or otherwise communicate in any way (or cause, further, assist, solicit, encourage, support or participate in any of the foregoing), any remark, comment, message, information, declaration, communication or other statement of any kind, whether verbal, in writing, electronically transferred or otherwise, that might reasonably be construed to be derogatory, false, or critical of, or discredit, or negative toward, the Company or any of its directors, officers, Affiliates, subsidiaries, employees, agents or representatives (collectively, the "Company Representatives"), or that reveals, discloses, incorporates, is based upon, discusses, includes or otherwise involves any confidential or proprietary information of the Company or its subsidiaries or Affiliates, or to malign, harm, disparage, defame or damage the reputation or good name of the Company, its business or any of the Company Representatives.

Disparaging remarks, comments, or statements for purposes of this Contract are those that impugn the character, honesty, integrity, morality, or business acumen or abilities in connection with any aspect of the operation of business of the covered individual or entity.

Nothing herein shall prevent Employee from making any truthful or honest statement in connection with any legal proceeding or investigation by the Company or any governmental authority.

In the event that Employee breaches any component of this non-disparagement clause at any time during the Contract or the period after termination, Employee agrees and acknowledges that it would be impractical or extremely difficult to ascertain the amount of actual damage to the Company. For this reason, Employee agrees that any violation of the non-disparagement provision of this Contract shall result in the imposition of liquidated damages and not as a penalty in the amount of \$\_\_\_\_\_.00 for each occurrence to be paid by Employee to the Company within five (5) days of each occurrence and which represents reasonable compensation for the loss incurred by the Company because of the breach.

The parties agree and acknowledge that this non-disparagement provision is a material term of this Contract, the absence of which will result in the Company refusing to enter into the agreement.<sup>42</sup>

---

<sup>42</sup> This information is based on the legal experience and knowledge of Martin J. Greenberg.



If a coaching contract has a non-disparagement clause it will either be found in the termination for cause provision, as a standalone provision, or as part of a settlement or release agreement.<sup>43</sup>

A. As a part of a termination provision:

1. University of Cincinnati and Tommy Tuberville, December 9, 2012

7. Termination. (A) For Cause by University (vii.) Public comments by, or the intentional release of statements by, Coach which disparage the University regarding the Program or the University's football team, other athletic programs or personnel of the University, including statements made by or positions taken by the University's President, Director of Athletics, or member of the University's Board of Trustees, provided that as to the first occurrence of any such conduct for which the University alleges cause under this subparagraph (vii), Coach may eliminate said cause by issuing a public retraction of any such comments or statements along with a mutually agreed upon public apology.<sup>44</sup>

2. Kansas Athletics, Inc. and Bill Self, April 1, 2008

13. Termination for Cause. (C).(v.) [s]tatements concerning KU, its personnel, programs, policies and/or departments that cause damage to KU's reputation.<sup>45</sup>

B. As a standalone provision in the contract:

1. Oakland University and Beckie S. Francis, July 1, 2009

12. TERMINATION f. Non-disparagement In the event the Head Basketball Coach's employment is terminated by the University with or without cause, or by the Head Basketball Coach's disability, resignation or retirements, the Head Basketball Coach and the Athletics Director will refrain from any public or private conduct, language or actions that might directly or indirectly undermine or disparage the Head Basketball Coach, the Athletics Director, the University or University's Board of Trustees or its individual members, or University officers, employees, agents or volunteers in any manner whatsoever including without limitation conduct, language or actions that would reflect negatively on the reputation or image of the Head Basketball Coach or the University.<sup>46</sup>

---

<sup>43</sup> *Id.*

<sup>44</sup> Employment Agreement between the Univ. of Cincinnati and Tommy Tuberville (Dec. 9, 2012).

<sup>45</sup> Employment Agreement between the Univ. of Kansas and Bill Self (Apr. 1, 2008).

<sup>46</sup> Employment Agreement between Oakland Univ. and Beckie S. Francis (July 1, 2009).

2. Colorado State University and Mike Bobo, December 23, 2014

6. TERMINATION

e. Non-Disparagement; Non-Interference. In the event that either party terminates this Agreement without cause under the provisions set forth in Section 6.c or Section 6.d, the University and Bobo agree not to make or disseminate any public statement that disparages the other, or which reflects negatively upon, either Bobo or the University, including its board members, officers, staff and employees. Similarly, in the event that either party terminates this Agreement without cause under the provisions set forth in Section 6.c or Section 6.d, Bobo acknowledges that his continuing contract and communication with individuals, particularly important University donors and supporters, with whom Bobo interacted with during the Term as part of his duties, may interfere with and harm the University's interests, and Bob agrees not to contact or communicate with any such individuals, as identified by the President, in any way that would harm or interfere with University business. The Parties' non-disparagement and non-interference obligations set forth herein shall survive any termination of this Agreement. In addition, Bobo and the University further agree that compliance with this non-disparagement and non-interference obligations are a condition of any Best Interest Flexibility Amount and/or Liquidated Damages payments, and upon Bobo's failure to comply with either his non-disparagement or non-interference obligation, then the University's obligation to pay any Best Interest Flexibility Amount shall cease immediately and permanently. To the extent the University has already made any Best Interest Flexibility payments under Section 6.c to Bobo at the time Bobo violates his non-disparagement or non-interference obligations, the University shall be entitled to seek a reimbursement of such payments that were made by the University to Bobo prior to any such violation by Bobo. Similarly, if the University fails to comply with its non-disparagement obligation, then Bobo's obligation to pay Liquidated Damages to the University pursuant to Section 6.f. at the time the University violates its non-disparagement obligation, Bobo shall be entitled to seek a reimbursement of the Liquidated Damages provided to the University prior to such violation by the University.<sup>47</sup>

C. There is a third area in coaching representation where non-disparagement clauses are utilized and that is when there is a dispute and the university and coach enter into some form of separation or settlement agreement and release. Some examples follow:

1. Confidential Settlement Agreement and Release by and between The University of Kansas and Mark Mangino, December 2009.

---

<sup>47</sup> Employment Agreement between Colorado State Univ. and Mike Bobo (Dec. 23, 2014)

6. The Parties further agree that they will not disparage one another, the officials or employees or agents of the Parties, upon matter related to Mangino's employment at the University.<sup>48</sup>

2. Separation Agreement and Release by and between The University of Tennessee and Charlie Baggett, December 2011.

11.(a) Coach Baggett agrees that he will not make or issue public statements or take any action that disparages the University or any of the Released Parties. Nothing contained in this Agreement shall be construed to limit or influence Coach Baggett's testimony in connection with any NCAA or legal proceeding.<sup>49</sup>

3. Settlement Agreement and Release by and between the University of Kentucky, the University of Kentucky Athletic Association, Inc., and Billy Clyde Gillispie, October 2009.

8. Non-Disparagement: Gillispie agrees that he will not in any way disparage the University, UKAA, Dr. Lee Todd (President of both entities), all individuals reporting directly to Dr. Todd, the University of Kentucky Athletics Director, and he will not make or solicit any comments, statements, or remarks or the like, whether public or in private, or assist others in doing so, that may be considered derogatory or detrimental to the good name and reputation of the University, UKAA, or individuals in the aforementioned positions. University and UKAA agree that Dr. Lee Todd (President of both entities), all individuals reports directly to Dr. Todd, the University of Kentucky Athletics Director, the Senior Associate Athletics Directs, and Deputy Athletics Director will not in any way disparage or make or solicit any comments, statements, or remarks or the like, whether public or in private, or assist others in doing so, that may be considered derogatory or detrimental to the good name and reputation of Gillispie; provided, however, in the event testimony or written response to questions is compelled by lawful subpoena or other judicial or administrative process, including proceedings, investigating, or charging alleged violations of NCAA or SEC bylaws, rules or regulations arising from the 2007-08 and 2008-09 seasons when Gillispie was UK basketball coach so require, the University, its Athletics Directors, Compliance Officers, and employees shall not be prohibited from defending such infractions or charges or truthfully discussing any role or knowledge they believe Gillispie may have had in any alleged events or infractions, and Gillispie shall similarly be entitled to defend himself and

---

<sup>48</sup> Confidential Settlement Agreement and Release between the Univ. of Kansas and Mark Mangino (Dec. 11, 2009).

<sup>49</sup> Separation Agreement and Release between the Univ. of Tennessee and Charlie Baggett (Dec. 2, 2011).

speaking truthfully about the role or knowledge of other University employees in any alleged events or infractions, without breach of this provision.<sup>50</sup>

4. Confidential Settlement Agreement and Release of All Claims by and between West Virginia University and William L. Stewart, June 2011.

3. The University and Stewart agree that neither will engage in any conduct or communications that disparage the other or any agents, employees, or representatives of the other.<sup>51</sup>

## V. PRACTICAL APPLICATION

Currently, non-disparagement clauses are not readily utilized in college coaching contracts. There are issues that typically arise in the drafting and implementation of a non-disparagement clause:

### 1. What Does it Mean to Disparage?

Before someone may collect damages as a result of a breach of a non-disparagement clause, the offended party must prove that the actions of the individual were disparaging.<sup>52</sup> Disparaging is sometimes defined as to “malign, harm, discredit, defame, damage the reputation or good name, impugn the character, honesty, morality or business acumen of a person or company, or making derogatory or false statements.”<sup>53</sup> All of these words present challenges as to the meaning under the circumstance in which they are used and, thus, have given courts difficulty in concluding what really is a disparaging remark.

In *Caputo v. City of Haverhill*, the plaintiff was relieved of her duties as high school track

---

<sup>50</sup> Confidential Settlement Agreement and Release between the Univ. of Kentucky and Billy Clyde Gillispie (Oct. 13, 2009).

<sup>51</sup> Settlement Agreement and Release of All Claims between West Virginia Univ. and William L. Stewart (Sept. 10, 2008).

<sup>52</sup> *Non-Disparagement Clause*, My Court Calendar, <https://www.mycourtcalendar.com/legal/disparagement> (last visited Sept. 29, 2015).

<sup>53</sup> *Id.*

coach following a dispute with the high school’s athletic director.<sup>54</sup> After being terminated by the school, Caputo filed suit against the City for violating the employment agreement.<sup>55</sup> The suit was later settled and included a confidentiality clause as well as a non-disparagement clause.<sup>56</sup> Two years later, an email sent by a city official and party to the initial Caputo lawsuit was obtained by a local newspaper; the email referred to the Caputo lawsuit and parts of the email were quoted in the newspaper story days later.<sup>57</sup> Caputo subsequently alleged the athletic director violated the non-disparagement clause that provided that “each party agrees not to make any disparaging or defamatory statements, whether written or verbal, regarding any other party or any of the other parties’ officers, directors, employees, or agents.”<sup>58</sup> The court held that Caputo was not disparaged because “the statement that Caputo ‘did something the former Athletic Director did[ not] like and the[ high school] did . . . not want to re-sign her contract,’ was true” and the email containing the statement “did not speak slightingly of Caputo.”<sup>59</sup> The court subsequently upheld the City’s motion for summary judgment.<sup>60</sup> The holding of Caputo implies that statements that may damage an individual’s reputation are not disparaging if they are truthful.

Other case law implies that statements that are pure opinion are not disparaging. In *Patlovich v. Rudd*, the defendant, alone or in conjunction with others, sent “hundreds of anonymous letters and notes” to various people and entities with whom the plaintiff “had a professional relationship.”<sup>61</sup> The letters “criticized [the plaintiff’s] professional integrity and competence” as a medical professional.<sup>62</sup> The District Court stated that “there is . . . no reason

---

<sup>54</sup> Caputo v. City of Haverhill, 971 N.E.2d 337, 337 (Mass. App. Ct. 2012).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at n.3.

<sup>59</sup> *See id.* at 338.

<sup>60</sup> *See id.* at 340.

<sup>61</sup> *Patlovich v. Rudd*, 949 F. Supp. 585, 589 (N.D. Ill. 1996).

<sup>62</sup> *See id.*

why a statement must be defamatory in order to ‘disparage.’”<sup>63</sup> In making this distinction, the district court stated that “[t]he meaning of ‘disparage’ must be determined by reference to ordinary principles of contract interpretation . . . we see no reason why ‘disparage’ should not be given its ordinary, non-technical meaning: ‘to speak of in a belittling way; to reduce in rank or esteem.’”<sup>64</sup> The District Court used the Webster’s dictionary definition of disparage to determine the normal, ordinary meaning of the term disparage.<sup>65</sup>

In *Eichelkraut v. Camp*, the Georgia Court of Appeals held that non-disparagement clauses must be determined according to the intent of the parties under normal contract construction, and concluded the “clause applied to all derogatory communications, whether [they] are true or not.”<sup>66</sup> Here, because of previous litigation between the parties, the parties executed a settlement agreement that included a non-disparagement clause.<sup>67</sup> The non-disparagement clause stated, “the parties agree that henceforth they shall cease and refrain from making any disparaging or defamatory remarks or comments regarding one another, expressly or by implication, including but not limited to any parties’ personal or business dealings and reputations.”<sup>68</sup> Camp subsequently alleged that Eichelkraut breached the settlement agreement after Eichelkraut sent three letters, which Camp alleged were disparaging.<sup>69</sup> The Court of Appeals noted that “these letters, on their faces, were disparaging.”<sup>70</sup> As noted above, the Court of Appeals looked to the parties’ intent of the non-disparagement clause under normal contract construction, looked to the dictionary definition of disparage, and also looked to whether or not

---

<sup>63</sup> *Id.* at 595.

<sup>64</sup> *Id.*

<sup>65</sup> *See id.*

<sup>66</sup> *See, Eichelkraut v. Camp*, 513 S.E.2d 267, 269 (Ga. App. 1999).

<sup>67</sup> *Id.* at 268.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 269.

the statements needed to be true or not to constitute disparagement.<sup>71</sup>

In *Ohio Education Association v. Lopez*, a recent Ohio court decision held that not all statements made by employees against their former employer, which may seem like disparaging comments, are a breach of the non-disparagement clause.<sup>72</sup> In that case, the Court held that a former employee's admitted remark to a third party that the Executive Director of the employer was a "slimebag" did not materially breach the non-disparagement provision of his severance agreement.<sup>73</sup> Shortly after the employee signed his severance agreement, he left a voice mail message for an outside attorney that represented the employer, referring to the Executive Director as a "slimebag."<sup>74</sup> The message could have been interpreted as saying that the Executive Director had told lies about the former employee, referring to "all this s\_\_\_\_\_ that slimebag said to you."<sup>75</sup> That severance agreement at issue expressly provided: "Employee further agrees not to at any time disparage, defame, or otherwise derogate Employer's Officers, Executive Committee Members, employees or agents."<sup>76</sup> The severance agreement also incorporated a provision of Lopez's previous employment agreement, in which the employee agreed "not [to] . . . make any statement[] . . . that is harmful to or that diminishes in any manner (or that could be reasonably foreseen as such) the relationship between Employer, it[s] members, its employees, and its Subsidiaries."<sup>77</sup>

The Court held that the "slimebag" comment was not a material breach of contract because the term disparage "connote[s] harming a person's reputation or causing one to seem inferior," and "there was no evidence of any harm or detrimental effect to [Defendant]'s

---

<sup>71</sup> *Id.*

<sup>72</sup> *Ohio Educ. Ass'n v. Lopez*, No. 09AP-1165, 2010 WL 4102948 (Ohio App. Oct. 19, 2010).

<sup>73</sup> *Id.* at \*5.

<sup>74</sup> *Id.* at \*1.

<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

<sup>77</sup> *Id.*

reputation because of the message.”<sup>79</sup> The court held that the comment was not disparaging because it was “common slang” and a “trifling figure of speech” of “little consequence.”<sup>80</sup> The Court also noted that the voicemail message was left for a long-time friend, although there was no exception for communications to life-long friends in the non-disparagement agreement.<sup>81</sup> Additionally, the Court stated that the former employee’s dislike of the Executive Director was well known, although the covenant was not limited to disparaging comments not previously known by the listener or reader.<sup>82</sup>

It is important to remember that a proper drafting of a non-disparagement clause should include an exhaustive definition of the word “disparage” to avoid the problems faced by the courts above.<sup>84</sup>

## 2. Damages Are Difficult to Prove.

Damages are difficult to assess, and “the problem with such clauses is that they are difficult to enforce.”<sup>85</sup> For example, “[a] disgruntled former employee may say things about the company that, though critical, do not rise to the level of defamation.”<sup>86</sup> Even if the comments are defamatory, it may be hard for a company to prove that it was actually damaged in a particular dollar amount.<sup>87</sup> Moreover, getting a court to issue “an injunction against a former employee in these circumstances would be both burdensome and expensive.”<sup>88</sup>

---

<sup>79</sup> *See id.* at \*4.

<sup>80</sup> *See id.*

<sup>81</sup> *See id.*

<sup>82</sup> *See id.*

<sup>84</sup> Shep Davidson, *Drafting a Practical and Enforceable Non-Disparagement Provision*, THE IN-HOUSE ADVISOR (Jan. 21, 2014), <http://in-houseadvisor.com/2014/01/21/drafting-a-practical-and-enforceable-non-disparagement-provision/#.VL0llvdX7l>.

<sup>85</sup> Charles Fleischer, *Enforcing Non-Disparagement Clauses Can Be Difficult to Do*, Gazette.Net (Sept. 9, 2005), [http://ww2.gazette.net/stories/busipra183617\\_31896\\_31896.shtml](http://ww2.gazette.net/stories/busipra183617_31896_31896.shtml).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*



However, one “Baltimore company may have found a way around these problems.”<sup>89</sup> James Harrell worked for a subsidiary of Sysco, Inc. (Sysco) as a truck driver for thirteen years and then filed several claims against the company, including discrimination, whistleblower, and workers’ compensation claims.<sup>90</sup> The parties settled the claims, and Harrell went back to work with the subsidiary and received \$185,000 from the company.<sup>91</sup>

The settlement agreement included a non-disparagement clause, stating that Harrell

would not voluntarily aid or assist any third parties in making or pursuing claims against the company.”<sup>92</sup> According to the settlement agreement, “the non-disparagement clause [is] ‘a substantial and material provision’ of the agreement and . . . if Harrell breached the provision, Sysco could recover whatever it paid him under the agreement, plus any actual damages it could prove.”<sup>93</sup>

After Harrell signed the settlement agreement and received his money, “he wrote a letter on behalf of another Sysco employee, claiming that a white, female supervisor had harassed him and had tried to set him up to be fired because of his race.”<sup>94</sup> In the letter, Harrell told the other employee that “[i]f I can be of any more help let me know.”<sup>95</sup> The employee thereafter filed suit against Sysco, claiming race discrimination, and the employee’s claims were “supported in part by Harrell’s letter.”<sup>96</sup> Immediately after the employee filed suit, Sysco filed suit against Harrell for breach of the settlement agreement and demanded that Harrell return the \$185,000.<sup>97</sup>

The Circuit Court for Howard County found in favor of Sysco, noting that through the email Harrell had, in fact, breached the settlement agreement.<sup>99</sup> In their decision, the Circuit Court noted that while “the refund agreement was intended to be a liquidated damage provision,”

---

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>99</sup> *Id.*

it was, in fact, more like “a penalty, because there was no reasonable connection between the amount and Sysco’s anticipated damages,”<sup>100</sup> and “[a] liquidated damages clause is intended to estimate damages in the event of non-performance or breach of contract.”<sup>101</sup> If the amount of liquidated damages would be disproportionate to the anticipated or actual harm caused, the clause is considered a penalty and would not be enforceable because it would be against public policy.<sup>102</sup> Thus, “the provision was unenforceable and Sysco would have to prove its actual damages.”<sup>103</sup> Sysco was unable to prove the amount of actual damages, which “resulted in an award of only \$1 in nominal damages.”<sup>104</sup>

Upon appeal by Sysco, the decision was reversed by the Maryland Court of Special Appeals, and the Court of Special Appeals stated that “the provision was not a liquidated damages clause at all because Sysco was free to try to prove actual damages over and above the payments it made to Harrell.”<sup>106</sup> The provision was therefore an unliquidated damages clause not subject to the usual rules involving liquidated damages and penalties.”<sup>107</sup> Furthermore, the Court stated that “the clause was reasonable and enforceable and Sysco was entitled to a refund of its \$185,000.”<sup>108</sup>

It is difficult for the injured party to prove actual damages occurred as a result of the allegedly disparaging remarks.<sup>109</sup> Furthermore, it is unclear whether or not liquidated damages would hold up because liquidated damages must in some way approximate the damages

---

<sup>100</sup> *Id.*

<sup>101</sup> J. Frank McKenna & Lisa P. Means, *Liquidated Damages and Penalty Clauses: A Civil Law Versus Common Law Comparison*, THE CRITICAL PATH (Spring 2008), available at <https://www.reedsmith.com/files/Publication/e5e3e826-020f-4c4d-b5b1-ab1a8b50530f/Presentation/PublicationAttachment/085e07b6-e8f9-402c-b980-cc660a4956d2/0804crit.pdf>.

<sup>102</sup> *Id.*

<sup>103</sup> Fleischer, *supra* note 85.

<sup>104</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

incurred.<sup>110</sup> If the damages incurred are indeterminable, it is impossible to determine if the amount of liquidated damages are proportionate to the damage suffered.<sup>111</sup>

### 3. Non-Disparagement Clauses Are Difficult to Monitor.

The concept of the non-disparagement clause creates issues for the party being limited by its terms. A non-disparagement clause is, for all intents and purposes, a gag order that in some way limits free speech. Not only are 1<sup>st</sup> Amendment issues implicated, but also the non-disparagement clause may be voided for violating public policy. While the non-disparagement clause may be invalid, the inclusion of the clause does not necessarily invalidate an entire agreement.

Practically speaking, “no one can monitor effectively an ex-employee’s communications, waiting to pounce on nasty comments made about the employer or its executives and managers.”<sup>112</sup> Additionally, it is unlikely that a former employee who is suspected of making or is likely to make disparaging remarks would refrain from such marks simply because of a non-disparagement clause.<sup>113</sup> Although the provision “may buy silence or deter bad-mouthing in some instances, such an agreement is of dubious value in the case of most day-to-day communications.”<sup>114</sup>

“The public nature of lawsuits to enforce such provisions further undercuts the value of non-disparagement provisions. The very secrecy sought by an employer that requires a non-

---

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Ted Olson, *The Declining Value of Non-Disparagement Provisions in Separation Agreements*, Sherman & Howard (Nov. 3, 2010), <http://shermanhoward.com/publications/thedecliningvalueofnon-disparagementprovisionsinseparationagreements/>.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

disparagement commitment must be broken when that employer sues for the former employee's breach of the covenant."<sup>115</sup>

Social media has also upped the stakes; social media creates the same complex issues for non-disparagement agreements that it does for business issues.<sup>116</sup> "Social media put[s] a potentially large microphone in front of any employee,' Joe Hugg, a partner at Breazeale, Sachse & Wilson says.<sup>117</sup> It's much easier to spread disparaging comments now with social media."<sup>118</sup>

Jay Stovall, a partner at Breazeale, Sachse & Wilson, concurs.

"Social media open up other complications," he says.<sup>119</sup> "If you put a disparaging comment on social media, it can get bounced around forever. It is as if it's being published daily. Social media give the disgruntled employee a much broader forum to communicate negative comments."<sup>121</sup>

Non-disparagement clauses may be best suited for use as a basis for termination for cause. The general public typically understands that a recently fired coach no longer represents the university and may be resentful towards their former employer. Due to the difficulty in approximating damages, the non-disparagement clause would be difficult to enforce following a coach's departure and would be best used as a cause for termination.

To further protect themselves against statements by disgruntled former coaches universities may consider in the future inserting a well-tailored non-disparagement clause into their coaching contracts. The contract must include the definition of "disparage" as well as what actions would be considered as disparaging. While it may be difficult to prove that the disparagement has caused damages, the best option may be a liquidated damages clause. In the

---

<sup>115</sup> *Id.*

<sup>116</sup> *Hush Money – When a Worker Leaves on Bad Terms, is a Non-Disparagement Clause in Order?*, BUSINESS REPORTER (Oct. 14, 2014), <https://www.businessreport.com/article/hush-money-when-a-worker-leaves-on-bad-terms-is-a-non-disparagement-clause-in-order>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>121</sup> *Id.*

end, a university that fails to include a non-disparagement clause in their coaches' contract will be placed in a position to overcome any remarks made by a coach, former or current, who does not feel as though the university is upholding their end of the bargain.

A special thank you to Lori Shaw for her assistance in footnoting and finalizing this article. Lori Shaw is currently a 3L at Marquette University Law School where she is focusing on Intellectual Property and Sports Law. Shaw is also the Managing Editor for the Marquette Intellectual Property Law Review and is a member of the Alternative Dispute Resolution Society and Labor and Employment Law Society at Marquette. Prior to coming to Marquette Law, Shaw double-majored in History and Political Science, with a Psychology minor, at Indiana University in Bloomington, Indiana.

Thank you to Ben Walker, a 3L at Marquette University Law School who assisted in footnoting this article.