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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA
CIVIL ACTION – LAW

Michael J. McQueary,

Plaintiff,

vs.

The Pennsylvania State University,

Defendant.

) Docket No. 2012-1804

) Type of Case:
) Whistleblower

) _____ Medical Professional Liability
) Action (check if applicable)

) Type of Pleading:
) Preliminary Objections

) Filed on Behalf of:
) Defendant, The Pennsylvania State
) University

) Counsel of Record for this Party:
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FILED FOR RECORD
2013 JUN 15 A 8:32

DEBRA C. IMMEL
PROTHONOTARY
CENTRE COUNTY, PA

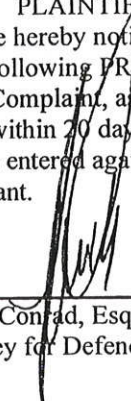
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Attorneys for Defendant,
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To: PLAINTIFF

You are hereby notified to file a written response to the following PRELIMINARY OBJECTIONS to the Complaint, as may be required by Pa. R.C.P. 1029, within 20 days after service, or a judgment may be entered against you and in favor of the defendant.


Nancy Conrad, Esquire
Attorney for Defendant

MICHAEL J. MCQUEARY,

Plaintiff,

v.

THE PENNSYLVANIA STATE
UNIVERSITY,

Defendant.

: IN THE COURT OF COMMON
: PLEAS OF CENTRE COUNTY
:
:
: CIVIL ACTION NO. 2012-1804

PRELIMINARY OBJECTIONS OF DEFENDANT,
THE PENNSYLVANIA STATE UNIVERSITY, TO PLAINTIFF'S
COMPLAINT

Defendant, The Pennsylvania State University ("Penn State"), by and through its counsel, White and Williams LLP, hereby preliminarily objects to Plaintiff's Complaint pursuant to Pennsylvania Rule of Civil Procedure 1028, and avers as follows:

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I. SUMMARY OF KEY FACTS

1. Plaintiff, Michael J. McQueary (hereinafter "Plaintiff"), commenced this action on or about May 8, 2012, by filing a Praecipe to Issue Writ of Summons against Penn State.

2. On October 2, 2012, Plaintiff filed a three-count Complaint alleging Whistleblower (Count I), Defamation (Count II), and Misrepresentation (Count III) claims against Penn State (hereinafter "Complaint"). See Plaintiff's Complaint, attached hereto as Exhibit "A."¹

3. Key factual events alleged in the Complaint include: Plaintiff witnessing alleged child sexual misconduct by former Penn State Assistant Football Coach and Defensive Coordinator, Gerald A. Sandusky ("Sandusky") on February 9, 2001, in the showers of a Penn State locker room; Plaintiff's subsequent reporting of the incident to former Penn State Head Football Coach, Joseph Vincent Paterno ("Paterno"); and, the alleged response to the incident by certain former Penn State officials, including President Graham B. Spanier ("Spanier"), Senior Vice President Gary Schultz ("Schultz"), and Director of Intercollegiate Athletics Timothy Curley ("Curley"). See id., ¶¶ 10, 12, 15-16, 19.

¹ Plaintiff's counsel agreed to extend the deadline for Penn State to file an Answer or otherwise plead to the Complaint until January 15, 2013.

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4. According to the Complaint, following Plaintiff's reporting of the child sexual misconduct incident to Paterno, Curley and Schultz met with Plaintiff and allegedly misrepresented that "appropriate action would be taken" with regard to the report to induce Plaintiff not to report the incident to a law enforcement agency. See id., ¶¶ 60, 61.

5. According to the Complaint, in November 2010, Plaintiff subsequently provided information to investigators from the Pennsylvania Attorney General's Office regarding what he had witnessed on February 9, 2001. Id., ¶ 22.

6. In December 2010, Plaintiff testified before a Statewide Investigating Grand Jury regarding the 2001 incident. Id., ¶ 23.

7. According to the Complaint, on November 5 and 7, 2011, following issuance of a Grand Jury Presentment providing that Curley and Schultz made false statements during an official investigation, Spanier allegedly made verbal and written statements regarding his support for Curley and Schultz. Id., ¶¶ 28, 29.

8. On November 13, 2011, Plaintiff was informed by Penn State that he was being placed on paid administrative leave. Id., ¶¶ 33; 36-37.

9. According to the Complaint, on or about July 5, 2012, Plaintiff received notice that he was no longer employed by the University. Id., ¶¶ 43-44.

10. According to the Complaint, Penn State placed Plaintiff on administrative leave, did not renew his employment contract and otherwise discriminated against him because of his cooperation with investigators for the Pennsylvania Attorney General's Office, his provision of truthful testimony to the Statewide Investigating Grand Jury, and his truthful testimony at the criminal preliminary hearings for Curley and Schultz. Id., ¶ 46.

II. PRELIMINARY OBJECTION IN THE NATURE OF A DEMURRER TO DISMISS THE DEFAMATION CLAIM (COUNT II) OF THE COMPLAINT FOR LEGAL INSUFFICIENCY.

11. Penn State incorporates by reference all preceding Paragraphs as though the same were set forth at length herein.

12. Pa. R. Civ. P. 1028(a)(4) provides that any party to a pleading may file preliminary objections for "legal insufficiency of a pleading (demurrer)."

13. The Complaint fails to set forth a viable defamation claim because the verbal and written statements that form the basis of the claim are not defamatory as a matter of law.

14. Under Pennsylvania law, in order to establish a claim for defamation, a plaintiff has the burden of establishing the following:

1. The defamatory character of the communication;
2. Its publication by the defendant;
3. Its application to the plaintiff;
4. The understanding by the recipient of its defamatory meaning;

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5. The understanding by the recipient of it as intended to be applied to the plaintiff;
6. Special harm resulting to the plaintiff from its publication; and,
7. Abuse of a conditionally privileged occasion.

42 Pa. C.S. § 8343(a).

15. The burden is on the complaining party to establish that the publication being challenged is defamatory. See id.; see also Thomas Merton Center v. Rockwell International Corporation, 442 A.2d 213, 215 (Pa. 1981).

16. Whether a statement is capable of defamatory meaning is a question of law to be decided by the court. Baker v. Lafayette College, 532 A.2d 399, 402 (Pa. 1987).

17. A statement is deemed to be defamatory if it tends “to blacken a person’s reputation or expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession.” Id. (quoting Corabi v. Curtis Publishing Company, 273 A.2d 899, 904 (Pa. 1971)).

18. “The test to be applied in evaluating any statement is ‘the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate.’” Id. (quoting Corabi, at 907).

19. It is not enough that the alleged victim of a statement be embarrassed or annoyed, he must have suffered the kind of harm which has grievously fractured

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his standing in the community of a respectable society. Scott-Taylor, Inc. v. Stokes, 229 A.2d 733, 734 (Pa. 1967).

20. “[L]ibelous words may be divided into two classes: those which are libelous *per se*, that is, words which on their face and without the aid of extrinsic proof are recognized as injurious; and those which are libelous *per quod*, that is, words which are actionable in the consequence of extrinsic facts showing circumstances under which they were said or the damages resulting to the libeled party therefrom.” Duh v. The Bethlehem’s Globe Publishing Company, 48 Pa. D.&C.2d 274, 276 (Northampton County Cm. Pleas Ct. 1969).

21. Stated otherwise, Pennsylvania courts generally recognize that a claim for defamation may exist where the words utilized themselves are not defamatory in nature, however, the context in which these statements are issued creates a defamatory implication, *i.e.* defamation by innuendo. See id. See also Bogash v. Elkins, 176 A.2d 677, 679 (Pa. 1962).

22. Of particular importance, in Sarkees v. Warner-West Corp., 37 A.2d 544, 546 (Pa. 1944), the Pennsylvania Supreme Court limited the concept of defamation by innuendo as follows:

The purpose of an innuendo, as is well understood, is to define the defamatory meaning which the plaintiff attaches to the words; to show how they come to have that meaning and how they relate to the plaintiff[.] But it cannot be used to introduce new matter, or to enlarge the natural meaning of the words, and thereby give to the

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language a construction which it will not bear[.] It is the duty of the court in all cases to determine whether the language used in the objectionable article could fairly and reasonably be construed to have the meaning imputed in the innuendo. If the words are not susceptible of the meaning ascribed to them by the plaintiff and do not sustain the innuendo, the case should not be sent to a jury. . . . [Consequently,] [i]f the publication complained of is not in fact libelous, it cannot be made so by an innuendo which puts an unfair and forced construction on the interpretation of the publication.

Id., at 546.

23. An innuendo must be warranted, justified, and supported by the communication. See Thomas Merton Center, at 216; see also Livingston v. Murray, 612 A.2d 443, 449 (Pa. Super. 1992); Cassell v. Mount Joy Mennonite Church, 1998 WL 1112617 (Lancaster County Cm. Pleas Ct. 1998).

24. Plaintiff supports his defamation claim with alleged November 5 and 7, 2011, statements by Spanier concerning Curley and Schultz. See Exhibit "A," ¶¶ 50-51, 53-54.

25. According to the Complaint, on November 5, 2011, Spanier issued the following written statement on *Penn State Live*:

The allegations about a former coach [(referring to Sandusky)] are troubling, and it is appropriate that they be investigated thoroughly. Protecting children requires the utmost vigilance.

With regard to the other presentments, I wish to say that Tim Curley and Gary Schultz have my unconditional support. I have known and worked daily with Tim and

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Gary for more than 16 years. I have complete confidence in how they have handled the allegations about a former University employee.

Tim Curley and Gary Schultz operate at the highest levels of honesty, integrity and compassion. I am confident the record will show that these charges are groundless and that they conducted themselves professionally and appropriately.

See id., at Exhibit “B.”

26. According to the Complaint, on November 7, 2011, Spanier reiterated his affirmation of the honesty and integrity of Curley and Schultz within verbal statements made to staff members of the intercollegiate athletics department. Id., ¶ 29.

27. Spanier’s statements are not *per se* defamatory because they do not expressly reference or relate to Plaintiff in any way . See Duh, at 276-77.

28. Spanier’s statements also do not defame Plaintiff by innuendo.

29. To arrive at an innuendo suggested by Plaintiff — *i.e.*, that Plaintiff lied and committed perjury— a reader must take the statements concerning Curley and Schultz out of context and ascribe a meaning which contravenes the ordinary meaning and usage of the words set forth in the statements. See Sarkees, at 369 (“If the publication complained of is not in fact libelous, it cannot be made so by an innuendo which puts an unfair and forced construction on the interpretation of the publication”); Livingston.

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30. Because Plaintiff's claimed innuendo can only be obtained by means of a tortured and unreasonable construction, the statements are not defamatory.

WHEREFORE, The Pennsylvania State University respectfully requests that this Honorable Court sustain its Preliminary Objection in the Nature of a Demurrer and dismiss Count II of the Complaint with prejudice.

III. PRELIMINARY OBJECTION IN THE NATURE OF A DEMURRER TO DISMISS THE MISREPRESENTATION CLAIM (COUNT III) OF THE COMPLAINT FOR LEGAL INSUFFICIENCY.

A. The Misrepresentation Claim Fails As a Matter Of Law Because a Mere Breach of a "Future Promise" is Not Sufficient to Support a Misrepresentation Claim.

31. Penn State incorporates by reference all preceding Paragraphs as though the same were set forth at length herein.

32. Mere breaches of a promise to do something in the future cannot serve as sufficient support for a misrepresentation claim. See Huddleston v. Infertility Center of America, Inc., 700 A.2d 453, 462 (Pa. Super. 1997); New Hope Books, Inc. v. Data Vision Prologix, Inc., 2003 WL 21672991 (Cm. Pleas Ct. 2003).

33. According to the Complaint, Curley and Schultz "intentionally misrepresented to [] Plaintiff that they thought this was a serious matter, that they would see that it was properly investigated, and that appropriate action would be taken." See Exhibit "A," at ¶ 60 (emphasis added).

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34. Plaintiff supports his misrepresentation claim with Curley's and Schultz's alleged failures to fulfill a future promise. See id.

35. Even if accepted as true, Curley's and Schultz's alleged unfulfilled future promises cannot serve as sufficient support for Plaintiff's misrepresentation claim as a matter of law. See Huddleston; New Hope Books.

36. Under these circumstances, the misrepresentation claim fails and should be dismissed with prejudice. See Pa. R.C.P. 1028(a)(4).

WHEREFORE, The Pennsylvania State University respectfully requests that this Honorable Court sustain its Preliminary Objection in the Nature of a Demurrer and dismiss Count III of the Complaint with prejudice.

B. The Misrepresentation Claim Should be Dismissed with Prejudice Because Curley's and Schultz's Statements Are Too Remote to Plaintiff's Alleged Harm.

37. Penn State incorporates by reference all preceding Paragraphs as though the same were set forth at length herein.

38. As discussed below, the Complaint does not aver sufficient facts to identify whether Plaintiff asserts an intentional or negligent misrepresentation claim. See infra, at 20-25.

39. The required elements to establish an intentional misrepresentation claim are:

- (1) a representation;
- (2) which is material to the transaction at hand;
- (3) made falsely, with knowledge of

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its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

See infra, at 20-25 (quoting Cruz v. Roberts, 2005 WL 1349615 (Lancaster County Cm. Pleas Ct. 2005) (emphasis added)).

40. Similarly, the required elements to establish a negligent misrepresentation claim are:

(1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter [sic] ought to have known of its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation.

Id.

41. Proximate cause is an essential element of both intentional misrepresentation and negligent misrepresentation claims. Allegheny General Hospital v. Philip Morris, Inc., 228 F.3d 429, 445 (3d Cir. 2000).

42. Proximate cause must “be determined by the judge and it must be established before the question of actual cause is put to the jury.” Brown v. Philadelphia College of Osteopathic Medicine, 760 A.2d 863 (Pa. Super. 2000).

43. “Proximate cause is designed not only to allow recovery for damages incurred because of another’s act, but also to define such limits on recovery as are

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economically and socially desirable.” Bonnacci v Save Our Unborn Lives, Inc., 11 Pa. D.&C.3d 259, 262 (Philadelphia County Cm. Pleas Ct. 1979).

44. Proximate cause does not exist where the causal chain of events resulting in the plaintiff’s injury is so remote as to appear highly extraordinary that the conduct could have brought about the harm. Commerce Bank v. First Union National Bank, 911 A.2d 133, 141 (Pa. Super. 2006).

45. Proximate cause “requires a showing of more th[an] a ‘but for’ causation in fact; it requires that the conduct in issue also be a ‘substantial factor’ in bringing about the harm.” Id.

46. With respect to the substantial factor analysis, the following should be considered:

the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it; whether the conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; and lapse of time.

Id.

47. Plaintiff avers that by relying on Curley’s and Schultz’s February 2001 statements, he has been “labeled and branded as being part of a cover-up . . .” and “has suffered distress, anxiety, humiliation and embarrassment.” See Exhibit “A,” ¶ 63.

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48. Accepting the averments within the Complaint as true, no facts establish a causal connection between the alleged 2001 statements by Curley and Schultz and harm allegedly sustained by Plaintiff over a decade later. See generally, Exhibit "A."²

49. The statements by Curley and Schultz are too remote in time to Plaintiff's alleged harm and do not establish a "substantial factor" of bringing about Plaintiff's alleged harm as a matter of law.³

50. Under these circumstances, the misrepresentation claim fails as a matter of law and should be dismissed with prejudice.

WHEREFORE, The Pennsylvania State University respectfully requests that this Honorable Court sustain its Preliminary Objection in the Nature of a Demurrer and dismiss Count III of the Complaint with prejudice.

² In Paragraph 60 of the Complaint, Plaintiff mistakenly avers that he met with Curley and Schultz in February 2011. Compare Exhibit "A," ¶¶ 15-19 with Exhibit "A," ¶ 60.

³ The Complaint fails to identify when Plaintiff actually learned that Curley and Schultz made alleged misrepresentations during the February 2001 meeting, and, therefore, the Complaint fails to provide any facts to support tolling the applicable two year statute of limitations. See Exhibit "A," ¶ 62. Penn State recognizes that an affirmative statute of limitations defense is properly raised in new matter and not by preliminary objection.

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IV. PRELIMINARY OBJECTION TO ALL COUNTS FOR INSUFFICIENT SPECIFICITY OF PLEADING.

51. Penn State incorporates by reference all preceding Paragraphs as though the same were set forth at length herein.

52. Plaintiff failed to plead with specificity as required by Pa. R. Civ. P. 1019(a), 1028(a)(2), and 1028(a)(3).

53. Rule 1028(a)(2) provides for preliminary objections for failure of a pleading to conform to law or rule of the court. Pa. R. Civ. P. 1028(a)(2).

54. Rule 1019(a) provides that “[t]he material facts upon which a cause of action or defense is based shall be stated in a concise and summary form.” Pa. R.C.P. 1019(a).

55. Rule 1028(a)(3) provides for preliminary objections raising insufficient specificity of pleading. Pa. R.C.P. 1028(a)(3).

56. Pennsylvania is a fact pleading state. Smith v. Brown, 423 A.2d 743, 745 (Pa. 1980).

57. “Under the Pennsylvania system of fact pleading, the pleader must define the issues; every act or performance essential to that end must be set forth in the complaint.” Santiago v. Pennsylvania National Mutual Casualty Insurance Co., 613 A.2d 1235, 1238 (Pa. Super. 1992).

58. As the Superior Court has stated, Rule 1019 requires that “the complaint not only apprise the defendant of the claim being asserted, but it must

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also summarize the essential facts to support the claim.” Krajsa v. Keypunch, Inc., 622 A.2d 355, 357 (Pa. Super. 1993).

59. “A purpose behind the rules of pleading is to enable parties to ascertain, by utilizing their own professional discretion, the claims and defenses that are asserted in the case.” Id.

60. Fact pleading requires that the complaint must apprise the defendant of the nature and extent of the plaintiff’s claims so that the defendant has notice of what the plaintiff intends to prove at trial and may prepare to meet such proof with his own evidence. Id.

61. The Complaint is lacking in specificity with regard to the Whistleblower, Defamation, and Misrepresentation claims.

A. The Whistleblower Claim (Count I) Fails For Lack of Specificity Or, In The Alternative, a Claim For Wrongful Discharge Fails for Legal Insufficiency.

1. The Whistleblower Claim Fails for Lack of Specificity.

62. Penn State incorporates by reference all preceding Paragraphs as though the same were set forth at length herein.

63. In “Count I” (Whistleblower) Plaintiff alleges that Penn State treated him in a discriminatory fashion and terminated his employment because he cooperated with investigators for the Pennsylvania Attorney General, he provided testimony to the Statewide Investigating Grand Jury, he testified at the Preliminary

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Hearing for Curley and Schultz, and further because he is expected to be a key prosecution witness at the criminal trials of Curley and Schultz. See Exhibit "A," ¶ 46.

64. The Complaint does not specifically reference the Pennsylvania Whistleblower Law or otherwise indicate whether Plaintiff asserts a claim under this Law. See generally, Exhibit "A."

65. The Pennsylvania Whistleblower Law provides:

No employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

42 P.S. § 1423(a).

66. The Pennsylvania Whistleblower Law further provides that:

No employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee is requested by an appropriate authority to participate in an investigation, hearing or inquiry held by an appropriate authority or in a court action.

Id., § 1423(b).

67. Concomitantly, Pennsylvania law recognizes a common law cause of action for wrongful discharge when an employer discharges an at-will employee in

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violation of a clear mandate of public policy. See Hunger v. Grand Central Sanitation, 670 A.2d 173, 175 (Pa. Super. 1996) (citing Geary v. United States Steel Corporation, 317 A.2d 174 (Pa. 1974)).

68. If an at-will employee is discharged for performing a function that he is required to perform by law, an action for wrongful discharge on public policy grounds may be allowed. See id.

69. Plaintiff alleges that Penn State ended his employment because he cooperated with investigators for the Pennsylvania Attorney General, provided truthful testimony to the Statewide Investigating Grand Jury, and testified truthfully at the Preliminary Hearing for Curley and Schultz.

70. While the Complaint avers certain acts related to the investigation of the Pennsylvania Attorney General and Grand Jury proceedings, the Complaint does not specifically reference a wrongful discharge claim or a clear mandate of public policy.

71. Based upon the factual allegations set forth in the Complaint, it is unclear whether Plaintiff is asserting a claim under the Pennsylvania Whistleblower Law or common law wrongful discharge claim. See generally, Exhibit "A."

72. Under these circumstances, the Complaint neither apprises Penn State of the nature and extent of the claim to allow Penn State to prepare its defense nor

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provides Penn State sufficient notice of what Plaintiff intends to prove at trial. See Krajsa.

WHEREFORE, The Pennsylvania State University respectfully requests that this Honorable Court sustain its Preliminary Objection to Count I of the Complaint for insufficient pleading.

2. **To the extent the Complaint asserts a common law wrongful discharge claim, the claim fails for legal insufficiency.**

73. Penn State incorporates by reference all preceding Paragraphs as though the same were set forth at length herein.

74. The Complaint attaches a document which reflects that Penn State employed Plaintiff as a “fixed term contract” employee, with a term to expire on June 30, 2012. See Exhibit “A,” at Exhibit “C.”

75. Wrongful discharge actions do not extend “to employees who are otherwise protected by contract or statute.” Phillips v. Babcock & Wilcox, 503 A.2d 36, 38 (Pa. Super. 1986).

76. “[T]he tort of wrongful discharge is available only when the employment relationship is at-will.” Ross v. Montour Railroad Co., 516 A.2d 29, 32 (Pa. Super. 1986).

77. To the extent the Complaint asserts a wrongful discharge claim, the claim fails because the Complaint does not specifically reference a clear mandate of public policy. See supra, ¶¶ 67, 70.

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78. Moreover, a wrongful discharge claim fails because a document attached to the Complaint reveals that Penn State employed Plaintiff as a “fixed term contract” employee. See supra, ¶ 74.

79. Based on the foregoing, to the extent Plaintiff asserts a wrongful discharge claim, the claim fails as a matter of law and should be dismissed with prejudice. See Pa. R. Civ. P. 1028(a)(4).

WHEREFORE, The Pennsylvania State University respectfully requests that this Honorable Court sustain its Preliminary Objection in the Nature of a Demurrer to Count I to the extent a wrongful discharge claim is asserted against Penn State with prejudice.

B. The Defamation Claim (Count II) Alternatively Fails For Lack of Specificity.

80. Penn State incorporates by reference all preceding Paragraphs as though the same were set forth at length herein.

81. Even if a legally viable defamation claim is asserted within the Complaint, see supra, ¶¶ 11-28, this claim alternatively fails for lack of specificity.

82. The Complaint does not allege a *per se* defamation claim. See supra, ¶¶ 20, 28.

83. Instead, the Complaint alleges that Spanier’s written and verbal statements concerning Curley and Schultz “clearly suggest that the Plaintiff was lying in his reports and testimonies that he had reported the sexual misconduct he

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had witnessed on February 9, 2001, to Athletics Director Curley and Senior Vice President Schultz.” See Exhibit “A,” ¶ 50; see also id., ¶ 51.

84. When a plaintiff asserts a defamation by innuendo cause of action, a plaintiff must adequately plead an explanation as to define the defamatory meaning which plaintiff attaches to the words, show how the words have come to have that meaning, and how the words relate to the plaintiff. See Duh, at 277; see also Mumma v. Pomeroy’s Inc., 38 Pa. D.&C.2d 594, 598 (Dauphin County Cm. Pleas Ct. 1965) (“[t]he purpose of an innuendo is to define the defamatory meaning which plaintiff attaches to the words in the publication to show how they come to have that meaning and how they relate to plaintiff”).

85. Plaintiff baldy alleges in Paragraphs 50 and 51 of the Complaint that Spanier’s November 5 and 7, 2011, oral and written statements “clearly suggest that the Plaintiff had lied to law enforcement officials and committed perjury to the Statewide Investigating Grand Jury when he stated and testified that he had reported the sexual misconduct he had witnessed on February 9, 2001” Exhibit “A,” ¶ 51.

86. The Complaint fails to identify any material facts to support a position that Spanier’s alleged statements infer or in any way suggest that Plaintiff “lied to law enforcement officials and committed perjury to the Statewide Investigating

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Grand Jury when he stated and testified that he had reported the sexual misconduct he had witnessed on February 9, 2001.” Id.

87. To this end, the Complaint merely alleges that the Statewide Investigating Grand Jury found that Curley and Schultz made “materially false statement[s] to the Grand Jury concerning the Plaintiff’s report of sexual misconduct to them.” Id., ¶ 26.

88. General allegations regarding Curley’s and Schultz’s alleged false statements to a Statewide Investigative Grand Jury, in and of themselves, do not sufficiently support Plaintiff’s claim that Spanier’s statements “clearly suggest” that Plaintiff committed perjury.

89. Indeed, the Complaint provides absolutely no explanation as to the content of the alleged false statements provided by Curley and Schultz to the Statewide Investigative Grand Jury or how these alleged comments relate in any way to the information provided to the Grand Jury by Plaintiff. See generally, Exhibit “A.”

90. The Complaint also provides no explanation as to the nexus between Spanier’s statements relating to Curley and Schultz and the harm allegedly suffered by Plaintiff. See generally, id.

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91. Under these circumstances, Penn State cannot adequately prepare its defenses because the Defamation Claim is not pled with sufficient specificity and the claim should be dismissed.

WHEREFORE, The Pennsylvania State University respectfully requests that this Honorable Court sustain its Preliminary Objection to Count II of the Complaint for insufficient pleading.

C. The Misrepresentation Claim (Count III) Alternatively Fails For Lack of Specificity.

92. Penn State incorporates by reference all preceding Paragraphs as though the same were set forth at length herein.

93. As previously discussed, Pennsylvania law recognizes both negligent and intentional misrepresentation causes of action.

94. The elements necessary to establish negligent misrepresentation are:

(1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter [sic] ought to have known of its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation.

Cruz v. Roberts, 2005 WL 1349615 (Lancaster County Cm. Pleas Ct. 2005).

95. Similarly, intentional misrepresentation has six elements, including:

(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on

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it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

Id.

96. “[N]egligent misrepresentation differs from intentional misrepresentation in that to commit the former, the speaker need not know his or her words are untrue, but must have failed to make reasonable investigation of the truth of those words.” Gibbs v. Ernst, 647 A.2d 889 (Pa. 1994).

97. The Complaint alleges that Curley and Schultz “intentionally misrepresented to the Plaintiff that they thought this was a serious matter, that they would see that it was properly investigated and that appropriate action would be taken.” See Exhibit “A,” ¶ 60.

98. The Complaint further alleges that Curley and Schultz “intended that their misrepresentation induce the Plaintiff not to report the matter to any other law enforcement authority.” Id., ¶ 61.

99. Based upon the factual allegations, it appears that Plaintiff is asserting a claim for intentional misrepresentation; however, it remains unclear whether Plaintiff is alternatively asserting a claim for negligent misrepresentation based upon the factual allegations contained in the Complaint. See generally, Exhibit “A.”

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100. Under these circumstances, the Complaint does not apprise Penn State of the nature and extent of the claims so that Penn State can adequately prepare its defenses or have notice of what Plaintiff intends to prove at trial.

101. In any event, the Complaint does not aver sufficient facts to support either an intentional misrepresentation claim or a negligent misrepresentation claim. See Exhibit "A," at ¶¶ 60-64. See also supra, ¶¶ 37-49.

102. Based on all of the foregoing reasons, Plaintiff fails to aver sufficient facts to support his misrepresentation claim and the claim should be dismissed with prejudice.

WHEREFORE, The Pennsylvania State University respectfully requests that this Honorable Court sustain its Preliminary Objection to Count III of the Complaint for insufficient pleading.

V. PRELIMINARY OBJECTION TO PUNITIVE DAMAGES

103. Penn State incorporates by reference all preceding Paragraphs as though the same were set forth at length herein.

104. Plaintiff seeks punitive damages under Counts II and III of the Complaint.

105. Under Pennsylvania law, punitive damages may not be assessed against a defendant whose conduct constitutes ordinary negligence, such as

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inadvertence, mistake and errors of judgment. See Smith v. Brown, 423 A.2d 743, 745 (Pa. Super. 1980).

106. Punitive damages may only be awarded for conduct that is outrageous because of the defendant's evil motive or because of his reckless indifference to the rights of others. Id.

107. When seeking punitive damages, a plaintiff is obligated to plead facts amounting to outrageous conduct — *i.e.* reckless indifference to the interests of others or wanton misconduct on the part of the defendant — in order to support such a claim. Id.

108. Reckless indifference to the rights of others, sometimes referred to as “wanton misconduct,” has been defined to mean that “the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.” Gaul v. Consolidated Rail Corporation, 556 A.2d 892 (Pa. Super. 1989). See also Lewis v. Miller, 543 A.2d 590, 592 (Pa. Super. 1988) (noting that wanton misconduct, as required for imposition of punitive damages, requires a state of mind in which the tortfeasor realizes the danger to the plaintiff and disregards it to such a degree that “there is at least a willingness to inflict injury, a conscious indifference to the perpetration of the wrong.”).

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109. While recklessness may be averred generally, this standard does not dispense with Rule 1019's requirement that material facts constituting the alleged conduct must also be pleaded. Kercsmar v. Pen Argyle Areas School District, 1 Pa. D. & C.3d 1, 4 (Pa. Com. Pl. 1976) (striking all allegations of "willful and wanton" conduct because, although permissibly pleaded generally, no material facts were pleaded supporting the allegations) (citing Ammlung v. City of Chester, 302 A.2d 491 (Pa. Super. 1973)).

110. Plaintiff's request for punitive damages under Count II of the Complaint is based on an allegation that President Spanier acted with actual malice and/or reckless disregard for the truth when he published a written statement on *Penn State Live* to assist in the exoneration of Curley and Schultz and to make Plaintiff a "scapegoat." See Exhibit "A," at ¶ 53.

111. Plaintiff's allegations under Count III of the Complaint make no reference to actual malice or reckless disregard to the rights of others in support of his request for punitive damages. See id., ¶¶ 60-64.

112. The above allegations do not amount to the type of outrageous conduct that is required to support a punitive damages claim.

113. Plaintiff's Complaint is devoid of sufficient facts to support a claim that Spanier or Penn State acted with evil motive or in reckless indifference to the rights of others.

COPY

114. Plaintiff's Complaint is also devoid of sufficient facts to support a claim that Curley or Schultz acted with evil motive or in reckless indifference to the rights of others at the time they met with Plaintiff in 2001.

115. Plaintiff cannot, as a matter of law, sustain a cause of action against Penn State for punitive damages.

116. Accordingly, the claim for punitive damages should be dismissed and any and all claims and/or allegations of recklessness, wanton and outrageous conduct, and reckless indifference to the rights of Plaintiff should be stricken.

WHEREFORE, The Pennsylvania State University respectfully requests that this Honorable Court sustain its Preliminary Objection and dismiss Plaintiff's demand for punitive damages with prejudice.

Respectfully submitted,

WHITE AND WILLIAMS LLP

By: _____

Nancy Conrad, Esq.
Attorney I.D. PA 56157
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
610.782.4909/ Fax 610.782.4935
conradn@whiteandwilliams.com
Attorneys for Defendant,
The Pennsylvania State University

Dated: January 14, 2013

EXHIBIT “A”

Elliot A. Strokoff, Esq.
Strokoff & Cowden, PC
132 State Street
Harrisburg, PA 17101
(717)233-5353
eas@strokoffandcowden.com

MICHAEL J. MCQUEARY,
Plaintiff

v.

THE PENNSYLVANIA STATE
UNIVERSITY,
Defendant

IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA

DOCKET NO. 2012-1804

CIVIL ACTION - LAW

JURY TRIAL DEMANDED

COMPLAINT

1. The Plaintiff, Michael J. McQueary, is an adult individual and, at all times relevant to this Complaint, was a resident of State College, Centre County, Pennsylvania.

2. The Defendant, The Pennsylvania State University (hereafter PSU), was incorporated for educational purposes by the Act of February 22,

1855, PL 46, and has its principal administrative office located at 201 Old Main, University Park, Centre County, Pennsylvania 16802.

3. Defendant PSU, at all times relevant to this Complaint, received millions of dollars annually from the Commonwealth of Pennsylvania for use in funding its operations.

4. From February 2000 through February 2003, the Plaintiff was a Graduate Assistant Coach for the Defendant's intercollegiate football team.

5. In February 2001, Plaintiff's supervisor was Head Football Coach Joseph V. Paterno.

6. In February 2001, Head Football Coach Paterno's supervisor was the PSU Director of Intercollegiate Athletics, Tim Curley (hereafter Athletics Director Curley).

7. In February 2001, Athletics Director Curley's supervisor was PSU's Senior Vice President, Finance and Business, Gary Schultz (hereafter Senior Vice President Schultz).

8. In February 2001, the Defendant's University Police provided all law enforcement and security services to the Defendant's University Park Campus located in State College, Pennsylvania, with the same powers as police of municipalities, including the power and duty to prevent crime, investigate criminal acts, apprehend, arrest, and charge criminal offenders.

9. In February of 2001, the Director of the University Police, Thomas Harman, was supervised by, and reported to, the Defendant's Senior Vice President Schultz.

10. At approximately 9:00 p.m. on February 9, 2001, the Plaintiff witnessed an adult male, formerly employed by the Defendant as an Assistant Football Coach and Defensive Coordinator, engaging in highly inappropriate and illegal sexual conduct with a boy who appeared to be about ten to twelve years old in the Support Staff Locker Room showers in the Lasch Football Building located on the Defendant's University Park Campus.

11. At no time prior to February 9, 2001, had the Defendant University, or any of its employees or agents, provided the Plaintiff with any instruction, guidance or training as to the jurisdictions of the Defendant's University Police and/or the police of the Borough of State College, and/or the Pennsylvania State Police, with respect to criminal acts occurring on the University Park Campus, nor had the Defendant provided the Plaintiff with any instruction, guidance or training with respect to reporting sexual misconduct under the federal Clery Act.

12. At about 8:00 a.m. February 10, 2001, Plaintiff personally reported what he had witnessed the night before, as described in paragraph 10 above, to his supervisor, Head Football Coach Paterno. Coach Paterno told the Plaintiff that he had done the right thing in reporting this to him, that this was

very disturbing, that he would tell some people about what the Plaintiff had witnessed and that he would get back to the Plaintiff.

13. Based upon information and belief, Plaintiff avers that by February 11, 2001, Head Coach Paterno reported what the Plaintiff had witnessed to Athletics Director Curley.

14. A few days after February 10, 2001, Head Football Coach Paterno told the Plaintiff that he had reported what Plaintiff had witnessed on February 9, 2001, to Athletics Director Curley and at that time Head Football Coach Paterno reiterated that the Plaintiff had done the right thing in reporting what he had witnessed to him.

15. About 9 or 10 days after making his report to Head Coach Paterno, at the direction of Athletics Director Curley, the Plaintiff met with Athletics Director Curley and Senior Vice President Schultz in a conference room in the Bryce Jordan Center and told them about the aforementioned highly inappropriate sexual misconduct that he had witnessed the night of February 9, 2001.

16. Senior Vice President Schultz and Athletics Director Curley thanked the Plaintiff for providing them with this information, told the Plaintiff that they thought this was a serious matter, that they would see that it was properly investigated and that appropriate action be taken.

17. The Plaintiff believed and relied upon Athletics Director Curley's and Senior Vice President Schultz's statements that they would see

that the incident was properly investigated and that appropriate action be taken.

18. Athletics Director Curley and Senior Vice President Schultz requested the aforementioned meeting and conducted the aforementioned meeting within the scope of their employment by Defendant.

19. Plaintiff believes and therefore avers, that neither Athletics Director Curley nor Senior Vice President Schultz reported what the Plaintiff had reported to them to the Defendant's University Police, or to the State College Police, or the Pennsylvania State Police or to the Centre County Children and Youth Services.

20. Beginning about March 1, 2004, the Plaintiff became a full-time Assistant Coach for the football team of Pennsylvania State University.

21. As an inducement to retain the Plaintiff as an Assistant Football Coach, on or about December 17, 2008, Athletics Director Curley provided the Plaintiff with a letter memorializing a severance commitment, a true and correct copy of which is attached hereto as Exhibit A hereto. Plaintiff believes and therefore avers that on or about December 17, 2008, the Defendant's other Assistant Football Coaches received similar severance commitments as an inducement to retain their services.

22. In November 2010, the Plaintiff provided information to investigators from the Pennsylvania Attorney General's Office and the Pennsylvania State Police about what he had witnessed as is described in ¶10

above and that he had, about 10 days thereafter, told Athletics Director Curley and Senior Vice President Schultz what he had witnessed.

23. On December 14, 2010, the Plaintiff testified in Harrisburg, Pennsylvania, before a Statewide Investigating Grand Jury about what he had witnessed in the Lasch Football Building Support Staff Shower Room as described in ¶10 above. Also, included in the Plaintiff's Grand Jury testimony was that he had reported the incident to Athletics Director Curley and Senior Vice President Schultz.

24. The Plaintiff's base salary for the 2011-2012 year was \$140,400, plus discretionary and/or bowl bonus, and fringe benefits, including paid family health insurance coverage, pension contribution, a motor vehicle and a cell phone.

25. As of November 4, 2011, the present value of the Plaintiff's reasonably anticipated future earnings over the course of the next 25 years in the profession of football coaching was at least \$4,000,000.

26. On or about November 4, 2011, the Statewide Investigating Grand Jury issued a Presentment finding, among other things, that Athletics Director Curley and Senior Vice President Schultz each made a materially false statement to the Grand Jury concerning the Plaintiff's report of sexual misconduct to them.

27. Pursuant to the Grand Jury Presentment, both Athletics Director Curley and Senior Vice President Schultz were charged with violations of the Pennsylvania Crimes Code.

28. On Saturday, November 5, 2011, Defendant's President Spanier, acting within the scope of his employment, issued a statement, published on Penn State Live, the Defendant University's official news service, a true and correct copy of which is attached hereto as Exhibit B.

29. On Monday, November 7, 2011, Defendant's President Spanier, acting within the scope of his employment, reiterated his unconditional support for Athletics Director Curley and Senior Vice President Schultz to a meeting of numerous staff of the Defendant's intercollegiate athletic department held at the Mount Nittany Lounge at Beaver Stadium, reiterating his affirmation of the honesty and integrity of Athletics Director Curley and Senior Vice President Schultz and stating that the charges against them were groundless.

30. Even though the Plaintiff was quite ready, willing and able to do so, on Thursday afternoon, November 10, 2011, Acting Head Coach Tom Bradley told the Plaintiff that the Defendant's Administration was prohibiting the Plaintiff from coaching in any capacity in the upcoming football game that Saturday.

31. On Thursday evening, November 10, 2011, Acting Athletics Director Sherburne told the Plaintiff that the Defendant's Administration was

directing that the Plaintiff leave the State College, Pennsylvania area for the weekend.

32. By telephone call from Acting Athletics Director Mark Sherburne on Friday, November 11, 2011, at approximately 1:30 p.m., Mr. Sherburne told the Plaintiff, who had left the state pursuant to the directive of the evening before, that he was going to be placed on paid administrative leave and that Plaintiff would be advised as to what that meant in a meeting to be scheduled for Sunday, November 13, 2011.

33. On November 13, 2011, shortly after 7:00 p.m., the Plaintiff attended a meeting in the Athletics Director's office in the Bryce Jordan Center with Acting Athletics Director Sherburne, Human Resources Manager Erika Runkle, and the University's General Counsel, Cynthia Baldwin. At that meeting, Acting Athletics Director Sherburne read to the Plaintiff the statement attached hereto as Exhibit C, and then handed Exhibit C to the Plaintiff.

34. In response to Acting Athletics Director Sherburne's reading of the statement to him, the Plaintiff replied that he was ready, willing, able and desirous of coaching at Penn State and that he did not feel he was "negligent in any way with my job responsibilities." University General Counsel Baldwin replied that "No one is accusing you of being negligent at all."

COUNT 1 - (Whistleblower)

35. Paragraphs 1-34 above incorporated by reference herein as if fully set forth.

36. As the result of being placed on paid administrative leave, from November 13, 2011, the Plaintiff was barred from performing any football coaching duties, including coaching in preparation for, and in, the Ticket City Bowl, and deprived of receiving the bonus paid to Assistant Coaches therefore.

37. As the result of being placed on paid administrative leave on November 13, 2011, Plaintiff was required to immediately turn in, and ceased to have the benefit of, his University provided motor vehicle, a benefit fairly valued at \$425 per month.

38. It is believed and therefore averred that the Plaintiff was the only Assistant Football Coach employed by the Defendant at the time of Joseph V. Paterno's departure as Head Football Coach who was not invited to be interviewed for employment as an Assistant Coaching position by Defendant University's incoming new Head Football Coach, Bill O'Brien.

39. The Plaintiff, based upon knowledge and belief, was the only Penn State employee to whom the University has not offered to reimburse counsel fees incurred as a result of legal process related to the Pennsylvania Attorney General's criminal investigations and/or testifying before of the Statewide Investigating Grand Jury. Based upon information and belief, the Plaintiff avers that the Defendant is paying the legal fees incurred by Athletics

Director Curley and Senior Vice President Schultz in defending the criminal charges against them. The Plaintiff has incurred substantial and ongoing counsel fees incurred as a result of legal process relative to the Pennsylvania Attorney General's criminal investigations and testifying before the Statewide Investigating Grand Jury.

40. Plaintiff believes, and therefore avers, that all the other Assistant Football Coaches whose employment has been terminated by the University as a consequence of the decision of the new Head Football Coach not to continue their employment began receiving their severance payments by July 31, 2012. The Defendant University refused to honor its commitment to pay severance to the Plaintiff as set forth in Exhibit A hereto until September 17, 2012.

41. As a result of the Defendant's refusal to honor its commitment to pay severance to the Plaintiff until September 17, 2012, the Plaintiff was financially constrained in August 2012 to take an early withdrawal of his TIAA-CREF Retirement Account, at a substantial, but as of yet undeterminable, tax cost and penalty.

42. Based upon information and belief, all of the other Assistant Football Coaches who were not retained by new Head Football Coach O'Brien, received notices on or before July 31, 2012 of their COBRA rights to continue health insurance to be paid for by the University. Despite repeated demands

therefore, Plaintiff, however, did not receive any notice of his COBRA rights until September 15, 2012.

43. It is believed and therefore averred, that every other Assistant Football Coach who was employed by the Defendant in 2011 and who was not retained by new Head Football Coach O'Brien was notified that he would not be retained by the University no later than January 31, 2012.

44. The Plaintiff received no notice that his employment was terminated until he heard during a televised news conference on July 5, 2012, then Defendant's President Ericson stating that the Plaintiff was no longer employed by the University.

45. By barring the Plaintiff from all facilities associated with Penn State football program as part of being placed on administrative leave, the Plaintiff was ostracized and isolated from a community of individuals, colleagues and friends and a program which had been an integral part of his life for approximately 20 years

46. Plaintiff avers that he was treated in a discriminatory fashion as set forth above, and that his employment was terminated by the Defendant because of his aforementioned cooperation with investigators for the Pennsylvania Attorney General, his provision of truthful testimony to the Statewide Investigating Grand Jury, his truthful testimony at the criminal preliminary hearings for Athletics Director Curley and Senior Vice President Schultz and further because Plaintiff is expected to be a key prosecution

witness at the criminal trials of the Athletics Director Curley and Senior Vice President Schultz.

47. The Plaintiff's aforementioned reports to Head Football Coach Paterno, Athletics Director Curley, Senior Vice President Schultz, the investigators from the Pennsylvania State Police and Attorney General's Office, the Plaintiff's testimony to the Statewide Investigating Grand Jury, and at the Preliminary Hearing on the criminal charges against Athletics Director Curley and Senior Vice President Schultz on December 16, 2011, were truthful, and made without malice or consideration of personal benefit.

48. The aforementioned discriminatory treatment by the University since November 5, 2011 has caused the Plaintiff much distress, anxiety and embarrassment.

WHEREFORE, the Plaintiff demands judgment against the Defendant, Pennsylvania State University liquidated damages consisting of the sum of: (1) the bowl bonus Plaintiff would have received had he not been placed on administrative leave; plus (2) \$4,250 representing the fair rental value of his employer provider vehicle for the period November 13, 2011 through September 30, 2012; plus (3) reimbursement of legal fees he incurred and/or paid for legal counsel in connection with the legal process of the criminal investigations and prosecutions; plus (4) back pay and benefits through the date of trial; and plus (5) the amount of tax and penalty Plaintiff will have to pay on account of the early withdrawal of his TIAA-CREF

Retirement Account; prejudgment interest on the foregoing; plus an order for reinstatement, or in lieu thereof front pay, plus general damages as compensation for Plaintiff's distress, anxiety and embarrassment, plus costs of litigation, including reasonable counsel fees.

COUNT II – (Defamation)

49. Paragraphs 1-48 above are incorporated by reference herein as if fully set forth.

50. The written statement released by the University President Spanier on November 4, 2011, as set forth in Exhibit C to the Complaint, and the verbal statement made by University President Spanier to the Athletic Department staff meeting on November 7, 2011, clearly suggest that the Plaintiff was lying in his reports and testimonies that he had reported the sexual misconduct he had witnessed on February 9, 2001 to Athletics Director Curley and Senior Vice President Schultz.

51. The written statement released by the University President Spanier on November 4, 2011, as set forth in Exhibit C to the Complaint, and the verbal statement made by University President Spanier to the Athletic Department staff meeting on November 7, 2011, clearly suggest that the Plaintiff had lied to law enforcement officials and committed perjury to the Statewide Investigating Grand Jury when he stated and testified that he had

reported the sexual misconduct he had witnessed on February 9, 2011 to Athletics Director Curley and Senior Vice President Schultz.

52. Exhibit C to this Complaint was widely reported in the mainstream print, television and radio media, and was viewed by innumerable people on the internet.

53. Exhibit C was published by President Spanier with actual malice and/or with reckless disregard for the truth in an outrageous effort to provide full and public support of the University to two criminal defendants in an effort to assist in their exoneration (regardless of their guilt or innocence) in the belief that their exoneration would help to preserve the reputation of the Defendant, to isolate the Plaintiff and to make the Plaintiff the scapegoat in this matter.

54. To this date, the Defendant University has not retracted, withdrawn or apologized for President Spanier's statement as set forth in Exhibit C. On the contrary, the Defendant's continued financial support for Athletics Director Curley and Senior Vice President Schultz and its maltreatment toward the Plaintiff reinforces the perception that the Plaintiff had lied and committed perjury.

55. President Spanier's statements have irreparably harmed the Plaintiff's reputation for honesty and integrity, and have irreparably harmed the Plaintiff's ability to earn a living, especially in his chosen profession of coaching football.

56. The publication and innumerable republications of President Spanier's statement as set forth in Exhibit C, have subjected the Plaintiff to public scorn and vilification.

57. The President's statements to the members of the Athletic Department staff on November 7, 2011, as aforementioned, have caused certain members of the Athletic Department staff to distance themselves from the Plaintiff and/or cease to communicate or socially interact with him.

58. President Spanier's written and verbal statements as aforementioned have caused the Plaintiff distress, anguish, humiliation and embarrassment.

WHEREFORE, Plaintiff demands judgment against the Defendant Pennsylvania State University for \$4,000,000, or such greater amount as may be proven at trial, for lost future earnings, plus general damages to be determined at trial for distress, anguish, humiliation and embarrassment, plus punitive damages, costs of suit, and such other relief deemed appropriate by the Court.

COUNT III (Misrepresentation)

59. Paragraphs 1-58 above are incorporated by reference herein as if fully set forth.

60. Plaintiff believes, and therefore avers, that during the meeting in February 2011 Athletics Director Curley and Senior Vice President

Schultz intentionally misrepresented to the Plaintiff that they thought this was a serious matter, that they would see that it was properly investigated and that appropriate action would be taken. On the contrary, Athletics Director Curley and Senior Vice President Schultz, unbeknownst to the Plaintiff, had decided to pursue a course of action that would avoid an investigation by any law enforcement investigator or other trained investigator and try to keep Plaintiff's report, and the underlying incident, a secret in an effort to preserve the reputation of the Defendant University.

61. Plaintiff believes, and therefore avers, that Athletics Director Curley and Senior Vice President Schultz intended that their misrepresentation induce the Plaintiff not to report the matter to any other law enforcement authority.

62. The Plaintiff relied upon Athletics Director Curley's and Senior Vice President Schultz's misrepresentation and did not report the incident to any other law enforcement authority until he was approached in November of 2010 by investigators from the Pennsylvania Attorney General and Pennsylvania State Police.

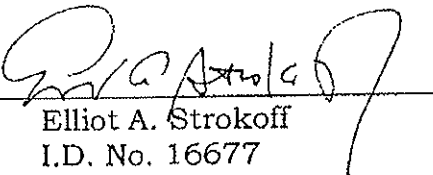
63. As a proximate cause of his reliance on the aforementioned misrepresentation of Athletics Director Curley and Senior Vice President Schultz, the Plaintiff has been labeled and branded as being part of a cover-up, which has caused irreparable harm to his ability to earn a living, especially in his chosen profession of coaching football.

64. As a proximate cause of Athletics Director Curley's and Senior Vice President Schultz's misrepresentation and Plaintiff's reliance thereon, Plaintiff has suffered distress, anxiety, humiliation and embarrassment.

WHEREFORE, Plaintiff demands judgment against the Defendant Pennsylvania State University for \$4,000,000, or such greater amount as may be proven at trial for lost future earnings, general damages to be determined at trial for distress, anguish, humiliation and embarrassment, plus punitive damages, costs of suit, and such other relief deemed appropriate by the Court.

Respectfully submitted,

STROKOFF & COWDEN, P.C.

By: 
Elliot A. Strokoff
I.D. No. 16677
132 State Street
Harrisburg, PA 17101
(717) 233-5353

Date: October 1, 2012



Timothy M. Curley
Director of Athletics

The Pennsylvania State University
101T Bryce Jordan Center
University Park, PA 16802-7101

(814) 865-1086
Fax: (814) 863-7955

December 17, 2008

Personal and Confidential

Mike McQueary
208 Lasch Building
University Park, PA 16802

Dear Mr. McQueary:

I am pleased to confirm the University's commitment regarding the following terms for your continued employment as Assistant Football Coach.

1. You will continue to perform such duties as may be assigned to you by the Head Football Coach, Joseph V. Paterno.
2. If you are employed as Assistant Football Coach at the time of Joseph V. Paterno's departure as Head Coach, and in the event you are terminated by the University, other than for cause, and as a consequence of the decision of the new head coach to not continue your employment as Assistant Football Coach, you will be entitled to the following severance benefits:
 - a. The University will continue paying your salary for a period of eighteen (18) months, or until you secure another football coaching position elsewhere at a salary equal to, or greater than, your University salary at the time of termination; provided however, in the event your new salary in another football coaching position is less than your University salary at the time of termination, you will be paid the difference between your former University salary and your salary in the new coaching position for a period not to exceed eighteen (18) months from the date of termination of your University employment.
 - b. You will be entitled to continue using the dealer car and cell phones assigned to you for a period of three (3) months following the date of termination of your University employment.
 - c. You shall have such rights to health insurance for you and your family at the time of termination as are provided by COBRA coverage and University policy. In the event you elect COBRA coverage, University

EXHIBIT

A

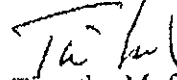
shall pay all COBRA premiums for a period not to exceed eighteen (18) months from the date of termination of your University employment.

3. All of the terms of this commitment are completely confidential except for (a) disclosure required by law or in connection with legal proceedings between the parties, or (b) disclosure by you to members of your immediate family or to your attorneys, accountants or tax advisors.

I am delighted to be able to make this commitment in recognition of your outstanding service as Assistant Football Coach.

Please let me know if you have any questions.

Sincerely,



Timothy M. Curley
Director of Intercollegiate Athletics

Enclosure



Statement from President Spanier

Statement from President Spanier

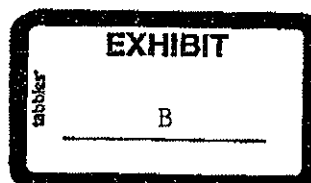
Saturday, November 5, 2011

The allegations about a former coach are troubling, and it is appropriate that they be investigated thoroughly. Protecting children requires the utmost vigilance.

With regard to the other presentments, I wish to say that Tim Curley and Gary Schultz have my unconditional support. I have known and worked daily with Tim and Gary for more than 16 years. I have complete confidence in how they have handled the allegations about a former University employee.

Tim Curley and Gary Schultz operate at the highest levels of honesty, integrity and compassion. I am confident the record will show that these charges are groundless and that they conducted themselves professionally and appropriately.

Graham Spanier

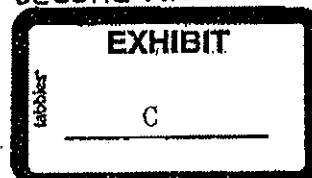


You were placed on administrative leave with pay on Thursday, November 11, 2011 by Acting Athletic Director Mark Sherburne. Your future status has not been determined. During the term of administrative leave you will receive your full current pay and benefits. You are to do no work on behalf of The Pennsylvania State University and any matters for which you are contacted concerning the position from which you are on administrative leave must be referred to Tom Bradley. The following facilities are off limit: all athletic facilities associated with the Penn State Football Program.

Your fixed term contract is scheduled to end on June 30, 2012 and it has not been determined whether there will be a new contract at this time. A media announcement concerning the above described action was made by President Rodney Erickson on November 11, 2011 at 4:00 p.m..

Arrangements for return of personal items from an office, a locker, etc., may be made through Erikka Runkle, Human Resources Manager, by the close of business on Monday, November 14, 2011.

Arrangements for return of University items, for example, keys, equipment, security badge, second factor authentication token,



purchasing card, and cell phone may be made through Errika Runkle, Human Resources Manager, by the close of business on Monday, November 14, 2011. You may keep your I.D. card and parking permit pursuant to conditions established under University policy.

Arrangements for the return of the dealer vehicle that you have pursuant to your employment with the University may be made through Janet Bosco, Intercollegiate Athletics, by the close of business on Monday, November 14, 2011. You may also discuss the employee assistance program with your Human Resources Manager.

IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA

MICHAEL J. MCQUEARY,
Plaintiff

v.

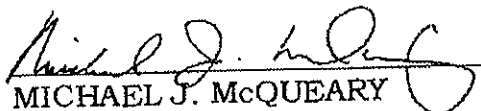
THE PENNSYLVANIA STATE
UNIVERSITY,
Defendant

DOCKET NO. 2012-1804

JURY TRIAL DEMANDED

VERIFICATION

I, **Michael J. McQueary**, certify that the statements made in the foregoing Complaint are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.


MICHAEL J. MCQUEARY

DATE: 11/1/12

MICHEL J. MCQUEARY
Plaintiff

vs.

**THE PENNSYLVANIA STATE
UNIVERSITY,**
Defendant

: IN THE COURT OF COMMON PLEAS
: CENTRE COUNTY, PENNSYLVANIA
:
: NO.
:
: CIVIL ACTION
:
:

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have this day served a true and correct copy of the foregoing Complaint by first-class mail, postage prepaid, on the following person(s):

Nancy Conrad, Esq.
White and Williams LLP
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034

Dated: 10/1/2012

By: 

Elliot A. Strokoff

COPY

WHITE AND WILLIAMS LLP
Nancy Conrad, Esq.
Identification No. 56157
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
610.782.4909
conradn@whiteandwilliams.com

Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY,	:	IN THE COURT OF COMMON
	:	PLEAS OF CENTRE COUNTY
Plaintiff,	:	
v.	:	
	:	CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE	:	
UNIVERSITY,	:	
	:	
Defendant.	:	

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 14th day of January, 2013, a true and correct copy of the foregoing PRELIMINARY OBJECTIONS, PROPOSED ORDER, and SCHEDULING REQUEST was served upon the following persons via first class, United States mail, postage prepaid:

Elliot A. Strokoff, Esquire
Strokoff & Cowden, PC
132 State Street
Harrisburg, PA 17101
Attorney for Plaintiff

and

COPY

William T. Fleming, Esquire
Fleming Law Offices
204 East Calder Way, Suite 304
State College, PA 16801
Local Counsel for Plaintiff

WHITE AND WILLIAMS LLP

By: _____

Nancy Conrad, Esq.
Attorney I.D. PA 56157
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
610.782.4909/ Fax 610.782.4935
conradn@whiteandwilliams.com
Attorneys for Defendant,
The Pennsylvania State University