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

Elliott A. Strokoff, Esquire and William T. Fleming, Esquire, Attorneys for Plaintiff
Nancy Conrad, Esquire, Attorney for Defendant

OPINION

My Order of November 30, 2016 directed plaintiff to file, "**a** detailed statement of counsel fees" (emphasis added) within fifteen business days of my order being filed. On December 14, 2016, plaintiff filed its eight page "Petition for Costs of Litigation" and separate statements for "Deposition Costs" and "Costs Advanced." Plaintiff also filed the affidavit of Attorney Strokoff which stated the total hours spent on all McQueary matters[1] and what those hours translated into in dollars, i.e., $497,881.00. Unfortunately, the billing records were not the precise statement I or defendant envisioned they would be. The statement ultimately provided was likewise not as detailed as it might have been if counsel's services were being provided on a "pay as you go" basis.[2] I surmise his lack of detail was due to the decision to convert his representation from the "pay as you go" model to a

[1] A partial listing of those matters would include health coverage; severance pay; misrepresentation, defamation and whistleblower claims; tracking related matters, etc.
[2] I take judicial notice that most general practice firms operate on a "pay as you go" basis, meaning that as work is done, counsel expects to be paid. Attorney Strokoff testified that his was a "pay as you go" firm.

"contingent fee"[3] one. *See* Exh P. 103 which was admitted during the hearing held on February 28, 2017.[4]

On January 11, 2017, defendant filed a twenty-one page response to plaintiff's petition for counsel fees. Defendant initially objected that plaintiff's failure to submit "**a** detailed statement" (emphasis added) prevented defendant from being able to challenge what was submitted "as unreasonable" and why "the charge was inappropriate." Defendant also objected to a "contingency fee type multiplier." Defendant then proceeded to answer plaintiff's petition and filed New Matter to the petition.

There was a time when an attorney who received what they believed to be an inadequate response would call the other side, note the inadequacy and allow a reasonable time for it to be cured. Not in this case! In defendant's pleading of January 11, 2017, setting forth its objections, etc. to plaintiff's petition for costs of litigation, it asserted that the failure to provide "**a** detailed statement" was fatal and that plaintiff's request for fees should be denied with prejudice, a result I viewed as draconian. My reaction upon reviewing defendant's pleading[5] was to IMMEDIATELY e-mail the parties and to direct plaintiff's counsel to file his "contemporaneous time sheets." Defendant's response to my e-mail was to file an Objection to my *sua sponte* "grant of additional time to file the contemporaneous time sheets" which defendant viewed as, "additional evidence of this court's bias in favor of plaintiff, and against defendant." My directive evidenced no bias. Rather, it was a common sense resolution of a matter counsel should have resolved themselves.

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[3] I take judicial notice that this type fee arrangement is prevalent among firms that limit their practice to specific areas e.g., auto accidents, construction accidents, products liability, class action, etc. Counsel who specialize do so in the belief that the upside verdict potential of some cases more than compensates for the low or non-favorable verdicts obtained in other cases.

[4] This hearing was held in Chester County by agreement of the parties and the court.

[5] I did not see it until the afternoon of January 18, 2017.

On February 1, 2017, plaintiff filed its response to defendant's objection (to the *sua sponte* action of the court) noting in paragraph nine that counsel had reached out on the afternoon of January 18, 2017 to defendant offering to provide the records that I directed be provided at 5:08 p.m. on January 18.

On February 8, 2017, defendant filed its response to plaintiff's fee request.

An evidentiary hearing was held on February 28, 2017. The parties were given the opportunity to brief the matter and have done so.

FINDINGS OF FACT[6]

Michael J. McQueary testified that:

1. His father signed the initial engagement letter, Exh. P 101 and paid a retainer.[7]
2. Exh. P 102 are bills received from Mr. Strokoff's office for time spent working on his case up to July 31, 2012.
3. Based on the statements, Exh. P 102, and the fact that he had no income with which to pay similar bills going forward a contingent fee agreement was discussed and entered into. *See* Exh. P 103.
4. Subsequent to entering into Exh. P 103, he did not receive any further monthly statements.
5. Experts were employed to testify on his behalf and he paid[8] them the sums set forth in Exhs. P 106 and 107.

Attorney Strokoff testified that:

6. When he was first contacted by Mr. McQueary's father (Exh. P 102, entry of 11/13/2011) he had no idea of the scope of the case.

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[6] All findings are from my bench notes of February 28 as the notes of testimony have not been transcribed.
[7] This case thus began on a "pay as you go" basis.
[8] Some payments were made on his behalf by his father. He has since reimbursed his father.

7. He interacted with Attorney Fleming as Attorney Fleming was the initial attorney the McQuearys spoke with.
8. He determined that he and Attorney Fleming would both represent Mr. McQueary.
9. He quickly recognized that there were multiple causes of action, some of which required his immediate attention due to approaching filing deadlines.
10. He initially focused on health insurance coverage, severance payments, and the whistleblower claim.
11. He was aware that Mr. McQueary was unsuccessful in finding employment and that an hourly fee arrangement payable monthly, the "pay as you go" method, was not going to be viable given what he perceived to be defendant's response to his efforts to amicably resolve matters. He therefore decided to continue his representation on a contingency fee basis.
12. His firm takes very few cases on a contingent fee basis.
13. Time records are maintained in all cases, even in contingent fee cases, so that a post outcome determination can be made as to whether such type cases should thereafter be taken on the same basis.
14. Exh. P 108 is the contemporaneous time record maintained in this matter.
15. The client does not receive monthly statements in matters handled pursuant to Finding of Fact 11.
16. Exh. A of defense Exh. 201 is the same exhibit as Exh. P 102.
17. Pages 14-52 of defense Exh. 201 are the same pages contained in Exh. P 108.

18. He agreed that the color coding system shown on Exh. D 201 is appropriate to use when reviewing his Exh. P 108.

19. He agreed that the "blue" items which carry the designation "vague" did so properly as he could not now state what they applied to based on the notation[9] shown.

Attorney Fleming testified that:

20. He has been a sole practitioner for the last fifteen years.

21. As a sole practitioner, he does not send itemized bills.

22. His billing rate is $275.00 per hour.

23. Exh. P 109 is his itemized statement of services rendered.

24. Exh. P 109 was prepared, in part, based on Exhs. P 102 and 108.

25. He agreed that the color coding and its meaning shown on Exh. D 201 were appropriate to use in reviewing Exh. P 109.

DISCUSSION

Plaintiff requests "reasonable attorney fees" pursuant to 43 P.S. §1425. The statute as originally written (1986) read:

> The court, in rendering a judgment in an action brought under this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages or any combination of these remedies. A court **may** also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, **if the court determines that the award is appropriate**. (emphasis added).

[9] Had plaintiff been on a "pay as you go" basis, the notations would have been more precise in allocating the time between the various matters being handled and the work done.

Unfortunately, the legislature provided no guidance as to how to determine "reasonable attorney fees."

In 2014, the legislature amended §1425 so that it now reads:

> A court, in rendering a judgment in an action brought under this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages or any combination of these remedies. A court **shall** also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, **if the complainant prevails in the civil action**. (emphasis added).

Again, the legislature failed to provide guidance as to how to determine "reasonable attorney fees." Significantly, it eliminated the discretion of the court to award such fees and mandated their award where plaintiff prevails.

Not surprisingly, the parties disagree on how to calculate "reasonable attorney fees." Defendant asserts that I should look to the reasonable number of hours expended pursuing the whistleblower claim and multiply them by the applicable billing rate,[10] i.e., the "lodestar" approach. Defendant in its initial response to plaintiff's counsel's submission of their "contemporaneous time sheets" suggested that the reasonable fee was $202,619.50.[11] *See*, Defendant's Continuing Objections etc. filed on February 8, 2017, p. 13 (c). After Attorneys Strokoff and Fleming testified as to various entries on Exhs. 102, 108 and 109, I had the impression that defendant tacitly agreed that their original number was subject to an upward revision if I were to grant attorney fees.

Plaintiff asserts that only a contingent fee award is appropriate as he could not have funded the litigation "out of pocket" as his pockets were empty due to his wrongful

[10] Defendant did not challenge the hourly billing rates of plaintiff's attorneys.
[11] Despite this acknowledgement, defendant did not and does not concede that I should award counsel fees.

termination and resultant inability to find any employment, let alone comparable employment.

I decide this issue pursuant to the 1986 statute.

My initial focus is on the second sentence of §1425 and the language "if the court determines that the award is appropriate." I have found that plaintiff was terminated for his role in bringing to light the criminal conduct of Mr. Sandusky. Exposing such conduct is to be encouraged as the Commonwealth has an interest in protecting children and prosecuting wrongdoers. The definition of wrongdoing (43 P.S. §1422) reads in pertinent part, "a violation of . . . a State Statute ...designed to protect the interest of the public . . ." The fact that one who reports such conduct would suffer loss of employment for having done so is contrary to the interests of the Commonwealth in protecting children. Accordingly, I find the award of counsel fees to be appropriate as they advance a legitimate state interest of encouraging individuals to step forward and report such conduct.

The parties both cite Krebs v. United Refining Company of Pennsylvania, 893 A.2d 776 (Pa.Super. 2006), to support their position as to how I should compute the "reasonable fee" in the present case. They also cite Signora v. Liberty Travel, Inc., 886 A.2d 284 (Pa.Super. 2005). Both opinions were authored by Judge, later Justice McCafferty. Both opinions direct me to first look at the purpose of the statute in determining the appropriate fee. Here, the Whistleblower Law was enacted to protect public employees who report violations of the law and/or who participate in investigations or court proceedings into the reported activity from being discharged. *See*, e.g., Jakomas v. McFalls, 229 F.Supp.2d 412 (W.D. Pa. 2002). The General Assembly also intended to ensure that (state) employees were

not discouraged from reporting violations of the law. *See*, e.g., O'Rourke v. Commonwealth of Pennsylvania, Dep't of Corrections, 778 A.2d 1194 (Pa. 2001).

We regrettably live in an age where children are not safe from sexual predators anywhere, not at home, in school, in religious, organized or recreational settings-- nor do sexual predators fit any one mold. They can be a family member, neighbor, religious leader or distinguished citizen. As children are often confused and/or conflicted about sexual improprieties directed at them by persons they trust and whether they should report such conduct and to whom to report the conduct, it is imperative that third parties who become aware of such activities report them to the proper authorities without fear of retribution. Certainly, the General Assembly can be presumed to have had the reporting of sexual improprieties and the protection of those who do so in mind in enacting the Whistleblower Law as there are few more compelling state interests than the protection of children. It therefore follows that the General Assembly would want those who report such activity to be made whole for any lost income they sustain as a result of reporting such activity.

Krebs, *supra*, looked at cases where counsel fees had been awarded pursuant to federal and state "fee shifting" statutes and noted that there is a strong presumption that the lodestar method represents a reasonable fee. However, Krebs did not hold that a contingent fee agreement was precluded as a means of determining the reasonable fee.

Judge McCaffery listed the principles to be considered in determining what constitutes a reasonable fee. I have done so and address each:

1. **Does the statute in question authorize an award of attorney fees?**

   It does.

2. **Does the statute in question authorize an award of attorney fees in "appropriate circumstances?"**

   It does.

3. **Will the award of attorney fees promote the purposes of the statute?**

   Yes, for the reasons I will state.

4. **What are the purposes of the statute?**

   To protect employees who report wrongdoing.

5. **Will the award of counsel fees attract competent counsel to vigorously enforce the statute?**

I find that Attorneys Strokoff and Fleming would not have continued to represent plaintiff absent the contingent fee agreement. It is obvious from the results obtained that they are competent counsel. They vigorously represented their client at every stage of the proceedings, doing so against very formidable opposing counsel who were equally vigorous in representing their client.

6. **The degree of success.**

   Plaintiff has been made whole economically.

Plaintiff's testimony before the Grand Jury compelled defendant to change how it handles sexual complaints, a desirable outcome and something the General Assembly had in mind in enacting the Whistleblower Law.

7. **The method of determining reasonable attorneys' fees under Section 1305(f) is the lodestar approach, whereby the lodestar figure may be adjusted, in the discretion of the trial court, in light of the degree of success, the potential public benefit achieved, and the potential inadequacy of the private fee arrangement.**

Judge McCaffery noted the similarity in the fee shifting language of the Storage Tank Statute, to that of the Clean Streams Law and the Surface Mining Conservation and Reclamation Act, both of which had adopted the lodestar approach and concluded that, "the fee shifting provisions of these three statutes should be interpreted in a consistent manner." Krebs, 893 A.2d at 791. I do not read this language as mandating that the lodestar approach is controlling in a whistleblower case.

The type of cases Judge McCaffery looked at were those where the financial recovery might be such that a contingent fee would be inadequate and thus counsel would not continue to take such cases especially as the client could not afford the "pay as you go" method. The court's common sense solution was to look at the reasonable hours expended and award compensation on that basis, otherwise matters important to the public might not be presented.

The concerns expressed regarding retaining competent counsel in the type of cases Judge McCafferty cited do not exist in whistleblower type cases. The General Assembly enumerated **with clarity** the damages available:

1) reinstatement of the employee,
2) payment of back wages,
3) full reinstatement of fringe benefits,
4) seniority rights,
5) actual damages.

Counsel can look at his client's work and compensation history to estimate the potential recovery and quickly determine whether or not to take the case. Here, Mr. McQueary was earning in excess of $150,000.00, not including benefits and thus was looking at a

substantial award if successful as items 1 and 4 of damages were not realistically obtainable. Obviously, a contingent fee award under the facts of this case would adequately compensate counsel. Accordingly, in whistleblower type cases, I do not see the need to default to the "lodestar" approach. Thus, the opinion in Krebs is not dispositive of the issue, prompting me to look to the rules of statutory construction.

The phrase "reasonable fees" is not defined in the definitional section of the Whistleblower Law. *See* 43 P.S. §1422. Absent a definition in the statute, statutes are presumed to use words in their popular and plain everyday sense, and the popular meaning of such words must prevail. *See* e.g., Harris-Walsh, Inc. vs. Borough of Dickson City, 216 A.2d 329, 335 (Pa. 1966). Unfortunately, the common usage of the word "reasonable" is not helpful. The words fee, all, or portion are clearly understood. However, they either modify or are modified by "reasonable." My American Heritage Dictionary, Second College Edition, defines:

> reasonable: adj. capable of reasoning; rational; governed by or in accordance with reason or sound thinking; within the bounds of common sense; not excessive or extreme; fair

Black's Law Dictionary, Fifth Edition, defines:

> reasonable: fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view

These definitions do not offer any guidance in determining the meaning of "reasonable fee" within the context of §1425 of the Whistleblower Law. Therefore, I look to the purpose and goals of the General Assembly in enacting the statute.

The Whistleblower Law is a remedial statute and any ambiguous language must be liberally construed to effectuate the purpose of the statute. *See*, e.g., *In Re.* Estate of

Huested, 169 A.2d 57 (Pa. 1961). According to the "Historical and Statutory Notes" at 43 P.S. §1421 this is,

> An act providing protection for employees who report a violation or suspected violation of State, local or Federal law; providing protection for employees who participate in hearings, investigations, legislative inquiries or court actions; and prescribing remedies and penalties.
>
> 1986, Dec. 12, P.L. 1559, No. 169.

I am unable to definitively determine the General Assembly's intent regarding §1425's "reasonable fee" language from the cite note. Therefore, until the General Assembly clarifies the "reasonable fees" language, I must construe it liberally. Support for my doing so can be found in §1922 of the Statutory Construction Act pertaining to presumptions in ascertaining legislative intent. §1922(1) reads:

> That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

§1922(2) reads:

> That the General Assembly intends the entire statute to be effective and certain.

1 Pa.C.S.A. §1922(1), (2).

In order for the statute to be effective, and have individuals put their employment and livelihood at risk, it would be unreasonable to also require them to pay their counsel's fees in bringing the wrongdoing to light. A construction of §1425 that makes the whistleblower whole will put teeth in the statute and will further its goal of encouraging others to expose wrongdoing.

Defendant argues that the "private fee agreement" (the contingent fee agreement) represents a "windfall" to plaintiff as the "pay as you go" arrangement would yield a fee that is a fraction of the contingent fee.

Plaintiff asserts that on the unique facts of this case, the contingent fee agreement represents the "reasonable fee." Further, plaintiff is contractually obligated to pay his attorneys one third of the award he received. *See* Exh. P-103, 4. Mr. McQueary would have been unable to pursue this case if his attorneys had not agreed to do so on a contingent fee basis. The discussion of "lodestar" versus "contingent fee" is the proverbial "red herring." There would be no fee discussion absent the contingent fee agreement as the case would not have been presented.

By permitting recovery of counsel fees, the General Assembly acknowledged that the whistleblower would not be made whole if he/she had to pay counsel fees out of his/her pocket or out of the damages awarded for his/her wrongful termination for reporting conduct the General Assembly wanted reported.

A significant anomaly exists between the facts of this case and the other whistleblower cases I have read. In no other case was the whistleblower still without employment at the time the court was processing his/her claim. Some were proceeding from demoted positions within the same employer organization or while holding new positions elsewhere. None were INVOLUNTARILY UNEMPLOYED at the time their claim was heard. Mr. McQueary went from being a well-respected individual in his community to a pariah, such that five years after the Sandusky matter came to light he is still unemployed. Mr. McQueary's testimony on his employment status is compelling:

> Again, I'm biased, obviously, to myself. I don't think it's fair.
> I don't think it's fair. I don't. I don't. I'm not a perfect person.

> I didn't handle this, quote, unquote, "situation" perfectly, but I did I darn good thing. All right. I testified in that courtroom right there. I stood up and I did it, and I can't get a job. I can't get a job at Rite Aid, working a cash register? You know, I'm not the smartest guy in the world. I have skills. I have abilities. I'm going to speak up. I'm a God darn good football coach. I can coach. I know what it means to be a coach. I learned from the best football coach to ever step on this planet. He was the best football coach ever, and for me to not be able to go to work as a coach or work a cash register or . . .
>
> P. 66, 1. 16-P. 67 l. 7, N.T. October 21, 2016.

Clearly Mr. McQueary lacked the ability to proceed on the "pay as you go" model. As indicated in my Order of November 30, 2016, defendant has NEVER ACKNOWLEDGED that plaintiff followed defendant's protocol in reporting what he saw. This failure, in my view, accounted in no small measure for his inability to find employment. Thus, Penn State arguably put plaintiff in the position where he could not proceed under the "pay as you go" model which Penn State now seeks to invoke to limit his counsel fee award. Given the unique facts of this case, any funds derived from this and the related litigation will likely constitute the funds available to sustain him for the remainder of his life expectancy. The whistleblower award should not be reduced by the payment of counsel fees.

My Order of November 30, 2016 directed defendant to state the average bonus paid to assistant football coaches for the Ticket City Bowl. Defendant responded that it was $15,000.00. But for his wrongful termination, plaintiff would have received <u>at least</u> that sum.[12]

[12] See affidavit of joseph J. Doncesecz filed on December 22, 2016.

CONCLUSIONS OF LAW

1. 43 P.S. §1421, et seq. is a remedial statute.
2. The award of counsel fees on the facts of this case is appropriate.
3. The language "reasonable fee" has no statutory definition, nor does it have a commonly accepted meaning.
4. The purpose of §1425 is to encourage the reporting of wrongdoing or waste.
5. An interpretation of §1425 that would require plaintiff to pay counsel fees from his award would act as a disincentive for others to step forward to report wrongdoing or waste.
6. A contingent fee of one third of the recovery is reasonable.
7. §1425 must be liberally construed.

Based on the foregoing findings of fact, discussion and conclusions of law, I enter my

ORDER

AND NOW, this 30th day of March, 2017, I reaffirm my Order of November 30, 2016, in all respects and

(1) award plaintiff the sum of $15,000.00 as and for his share of the Ticket City Bowl bonus and

(2) award plaintiff the sum of $487.10 for costs and

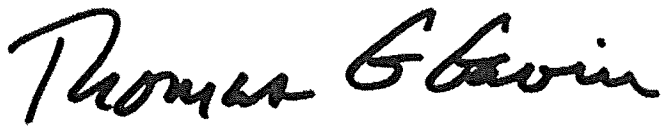
(3) award plaintiff the sum of $6,867.44 for transcripts and

(4) award plaintiff the sum of $26,801.84 for expert witness fees and

(5) award plaintiff $1,663,016.00 [13] as and for reasonable counsel fees.

This is the final Order for purposes of Pa. R.C.P., Rule 227.1.

BY THE COURT:



Thomas G. Gavin, Senior Judge

[13] Original award + $15,000.00 x 1/3