

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

MICHAEL J. McQUEARY,

Plaintiff

vs.

THE PENNSYLVANIA STATE
UNIVERSITY,

Defendant

No. 2012-1804

Type of Case: Whistleblower

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CENTRE COUNTY, PA

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

OPINION

Issue

Should these proceedings be stayed pending the outcome of the criminal cases against Graham B. Spanier, Gary C. Schultz and Timothy M. Curley?

The Pennsylvania State University (hereinafter "Penn State") again¹ asserts that this matter should be stayed because of the unavailability of **Gary C. Schultz and Timothy M. Curley.** Penn State asserts that its ability to respond to the Complaint is hampered by the aforementioned criminal defendants' invocation of their Fifth Amendment rights and that it would be at a disadvantage in framing a response to the Complaint and formulating its defense. Finally, Penn State asserts that the interests of not only itself, but the criminal defendants, the Court and public, would be served by a stay.

¹ See Motion filed on May 31, 2016. A similar request was denied on December 19, 2012.

Background

I previously addressed and denied a similar motion. I provide an updated chronology to bring the reader current with what has happened in the intervening years and how that bears on my decision as to this motion.

Updated Chronology of Events

I incorporate herein by reference thereto the chronology of events set forth in my December 19, 2012, Opinion. I **add** the following:

1. The case of Commonwealth of Pennsylvania vs. Gerald A. Sandusky was appealed to the Pennsylvania Superior Court which entered an Order denying the appeal. See, 338 MDA 2013, Pa. Superior Court, October 2, 2013.
2. The Pennsylvania Supreme Court denied allocatur.
3. Gerald Sandusky filed a Post-Conviction Hearing Act petition on April 2, 2015, which is currently pending.
4. Messrs. Curley and Schultz have pending criminal charges in the Court of Common Pleas of Dauphin County. No trial date has been set.
5. Messrs. Curley and Schultz appeared for depositions in this case and upon advice of counsel invoked their federal and state constitutional privileges against testifying.
6. I found that Messrs. Curley and Schultz properly invoked their right against self-incrimination.
7. It appears from news accounts that Penn State has amicably

resolved all known claims of Mr. Sandusky's **victims**.

8. Plaintiff is expected to be a witness in the Curley and Schultz criminal trials.

Discussion

Both parties agree that *In Re Adelpia Communications Securities Litigation*, 2003 WL 22358819 (E.D. Pa. 2003) and *Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers, Inc., et al*, 87 F.R.D. 53, (E.D. Pa. 1980) set forth the factors to be considered in deciding this motion, to wit:

Broadly stated, in terms of the problems presented by this Litigation, the principal factors are five-fold: (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

Golden Quality, 87 F.R.D. at 56.

I also note that the testimony of Messrs. Curley and Schultz is relevant to the defense of Count III, alleging misrepresentation. Their testimony is NOT relevant as to Counts I and II. As to Count I, the Whistleblower Law, 43 P.S. §1421, *et seq.*, Plaintiff is required to establish that he reported wrongdoing to his superiors. Penn State cannot reasonably dispute this given that a criminal jury convicted Mr. Sandusky of the conduct Plaintiff says he reported (counts 8-11 at docket number CP-14-CR-2011-2422) and did so pursuant to the highest evidentiary standard, proof beyond a reasonable doubt. Of course,

Plaintiff must still establish that he was terminated for having done so. As to Count II, Mr. Spanier approved the press release, a seemingly undisputed fact. Whether it is defamatory remains to be seen. Mr. Spanier has **not** invoked his right to refuse to testify as to the press release.

Against this background, I address the Golden Quality factors.

1. Issue Overlap Between Civil and Criminal Cases

A. Whistleblower Count

My Chronology of Events notes that:

- 1) Mr. Curley was placed on administrative leave on November 6, 2011;
- 2) Mr. Schultz retired on November 6, 2011;
- 3) Plaintiff was placed on administrative leave on November 13, 2011; and
- 4) Plaintiff's employment was terminated on July 5, 2012.

Clearly someone other than Messrs. Curley and Schultz made the decision to terminate Plaintiff given that the termination occurred more than six (6) months after they left Penn State's employ.

B. Defamation Count

Penn State has not asserted that Mr. Spanier is unavailable to testify. There is no dispute that he authorized publication of the message. Whether it is capable of a defamatory meaning is up to the fact finder.

C. Misrepresentation Count

Penn State is disadvantaged here where what Messrs. Curley and Schultz said to Plaintiff is clearly at issue. Given their pending criminal charges, they are unavailable to Penn State as witnesses.

Discussion

The only prejudice to Penn State in mounting its defense is the unavailability of Messrs. Curley and Schultz to testify as to Count III, Misrepresentation. In his misrepresentation count, Plaintiff avers that Messrs. Curley and Schultz stated they “would see the matter was properly investigated and appropriate action taken.” While Messrs. Curley and Schultz can possibly deny the statements attributed to them, the objective circumstantial evidence is that no such action was taken by them. Certainly, Penn State as the possessor of its own records has had adequate time to search them to determine what, if any, action they took in order to refute Plaintiff’s claim.

The use of juror questions on the verdict slip will enable the court to assess and address the impact of Messrs. Curley and Schultz’s unavailability on any verdict rendered on the misrepresentation count and take appropriate action, if required.

This factor does not support a stay.

2. Status of Criminal Proceedings

I am advised that a Senior Judge has recently been assigned to oversee the criminal cases. Assuming that they can be fast tracked², they are years from resolution unless there is a not guilty verdict. Were either man to be convicted of any offense, the appeals process would be lengthy and they would continue to be unavailable.

Discussion

Given the history of how the cases against Messrs. Curley and Schultz have progressed, it is reasonable to conclude that they are unlikely to be resolved in the foreseeable future despite the best efforts of all to move them forward expeditiously.

As neither party has a say as to the progress of the criminal cases, this factor is neutral.

3. Burden on Defendants

Penn State has not asserted, nor do I believe they could, that Messrs. Curley and Schultz are relevant to their whistleblower or defamation defense. Accordingly, their only burden is as to the misrepresentation count.

Discussion

I find interesting Mr. Strokoff's answer to this motion, wherein he asserts that Penn State failed to ask its then (2001) counsel, Mr. Courtney, what he recalled of any contact with Mr. Schultz regarding this issue.

² The Sandusky case was fast tracked. He was convicted on June 22, 2012 and FOUR YEARS LATER his case is still ongoing!

Penn State has had almost four years to search its records for relevant information. If Messrs. Curley and Schultz were available to Penn State as witnesses, they could deny meeting with, discussing with, or representing anything to plaintiff. Of course, Penn State's counsel would then have to weigh the wisdom of presenting such testimony in light of the other circumstantial evidence available bearing on what did or did not occur in 2001. Not every known or available witness is called to testify. It might well be that after speaking with Messrs. Curley and Schultz, Penn State would not call them as witnesses. If that were to occur, years would have passed for no reason.

This factor does not support a stay.

4. Interests of the Court

I repeat what I said in December of 2012:

The interests of any one court in awaiting the outcome in another results in no advantage to the court, nor does it serve to conserve any judicial resources. Accordingly, each court should be free to resolve the matter before it as expeditiously as it sees fit ...

when I noted that three courts were involved.

The First Judicial District cases involving the Sandusky victims appear to be resolved AS TO THE VICTIMS. This case and the criminal cases against Curley, Schultz and Spanier remain active.

Discussion

This factor does not support a stay as the criminal cases are on a separate track and I have ruled that Messrs. Curley and Schultz have properly invoked their right not to testify in this matter.

My interest is and has been to promptly resolve this case. This factor does not support a stay.

5. The Public Interest

Interest in the Sandusky and related cases remain high and the sooner the remaining cases can be resolved, the better.

This is a neutral factor.

6. The Interests of Non-Parties

No non-party has an interest in the outcome of these proceedings.

This is a neutral factor.

7. Plaintiff's Interest in Prompt Resolution Versus Prejudice to Plaintiff Caused by Delay

I have been informally³ advised that Plaintiff, despite his best efforts, has been unsuccessful at obtaining a coaching position at **any** level. I question whether this is a reflection on his coaching skills or due to the notoriety surrounding him resulting from his involvement in the Sandusky case. In either event, he has no job. His counsel has also advised both Penn State and me that he has expended the resources available to him, such as pension funds, etc., to meet his expenses. Accordingly, I believe it safe to

³ I use the term to designate a statement not made on the record. Informal discussions with counsel are an accepted means of obtaining relevant information.

assume that he is suffering ongoing economic harm. Economic harm is a recognizable form of prejudice.

Discussion

This is the dispositive factor. Of all the Sandusky related cases, the only open cases are those of Plaintiff and Messrs. Curley, Schultz and Spanier. It is worth noting that while Penn State is properly exercising its legal right to contest Plaintiff's claims, it is simultaneously fully funding the defense of Messrs. Curley and Schultz in their criminal cases that make them unavailable to Penn State to address Plaintiff's claims. The fact that Plaintiff must self-fund this litigation, while Penn State's proposed witnesses can litigate at Penn State's expense means they (Curley and Schultz) will be unavailable until the termination of their criminal cases either by a favorable jury verdict or exhaustion of their appeal rights. I have spoken to the Honorable John A. Boccabella who has been assigned to handle the criminal cases. Based on our conversation, I do not see Messrs. Curley and Schultz being available in this case before the middle of 2017 under the best case scenario. Should that not occur, given the Sandusky precedent, their cases will be working their way through the system for years to come.

I am mindful of what I said in my December 19, 2012 Opinion:

McQueary asserts that pursuant to Article I, Section 11 of the Pennsylvania Constitution, he has the right to the prompt resolution of his case. I have not previously had a plaintiff argue this ground and credit counsel for his novel approach. However, it is unnecessary to remind the court of this right as every court strives to resolve all matters in a timely fashion.

The time has come to resolve this case. Accordingly, I enter my Order.

BY THE COURT:


Thomas G. Gavin S.J.

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ORDER

AND NOW, this 11th day of August, 2016, the Motion to Stay is
hereby **DENIED**.

The Court Administrator of Centre County is directed to attach counsel
for jury selection beginning on **October 10, 2016**, and Trial on **October 17,**
2016.

BY THE COURT:


Thomas G. Gavin S.J.