

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

OPINION

ISSUE

**Should these proceedings be stayed in whole or in part 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") asserts that this matter should be stayed because there are overlapping factual and legal issues arising out of the criminal prosecutions of Graham B. Spanier, Gary C. Schultz, and Timothy M. Curley which should be resolved first. Penn State further asserts that its ability to respond to the complaint may be hampered by the aforementioned criminal defendants' invocation of their 5<sup>th</sup> Amendment rights and that it would be at a disadvantage in framing a response to the complaint and formulating a defense. Finally, Penn State asserts that the interests of not only itself, but the criminal defendants, the abuse victims, the court and the public would be served by a stay.

Background

In order to analyze the issue presented, it is necessary to view this case in the overall context of the investigation into and the litigation resulting from the sexual abuse committed by

Gerald A. Sandusky, hereinafter ("Sandusky"), on Penn State's premises dating back to at least 1998.

I have read the "Freeh Report"<sup>1</sup> and reviewed the criminal complaints filed against Athletic Director Timothy M. Curley,<sup>2</sup> (hereinafter "Curley"), Senior Vice President-Finance and Business, Gary C. Schultz,<sup>3</sup> (hereinafter "Schultz"), and President of Penn State, Graham B. Spanier,<sup>4</sup> (hereinafter "Spanier"). The Rule 119 Affidavit attached to the complaints incorporates as Exhibit "A" the Report of the Thirty-Third Statewide Investigating Grand Jury. These documents, the Freeh Report, the Rule 119 Affidavits and the Grand Jury Report, provide the time line within which this case can be viewed.

#### Chronology of Events

1. A report was made that Sandusky showered with an eleven (11) year old on May 3, 1998 and that both were naked.<sup>5</sup>
2. Michael J. McQueary, (hereinafter "McQueary"), was a Graduate Assistant Coach on the Penn State football team during the period 2000-2003.
3. On the evening of February 9, 2001, McQueary observed Sandusky and a young boy in the shower at Lasch Building, part of the Penn State athletic complex. Both were naked.

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<sup>1</sup> "Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky" by Freeh Sporkin & Sullivan, LLP, July 12, 2012. I note that Penn State has publicly embraced this report. See, Remarks of Chairman Karen Peetz at Penn State Board of Trustees regular meeting, September 12, 2012, *available at*: <http://progress.psu.edu/resource-library/story/board-of-trustees-chairman-karen-peetz-delivers-remarks>.

<sup>2</sup> See Court of Common Pleas, Dauphin County, No. CP-22-CR-5165-2011 and No. CP-22-MD-1385-2012.

<sup>3</sup> See Court of Common Pleas, Dauphin County, No. CP-22-CR-5164-2011 and No. CP-22-MD-1386-2012.

<sup>4</sup> See Court of Common Pleas, Dauphin County, No. CP-22-MD-1387-2012.

<sup>5</sup> As this incident is not relevant to my analysis, I do not discuss the response of Curly, Schultz and Spanier to it.

McQueary believed inappropriate sexual conduct was occurring and made his presence known prompting Sandusky to separate from the boy.

4. On the morning of February 10, 2001, McQueary visited Joseph V. Paterno, (hereinafter "Paterno"), at his home and reported what he saw.
5. Paterno was Penn State's head football coach and Sandusky had been his long time assistant defensive coordinator.
6. Paterno reported McQueary's observations to Curley and Schultz on February 11, 2001.
7. On February 12, 2001, Curley and Schultz met with Spanier.
8. Sometime before February 19, 2001, McQueary met with Curley and Schultz and told them what he had observed.
9. While Curley and Schultz told McQueary they would get back to him about what he had seen, they did not.
10. On or about March 1, 2004, McQueary was hired as an assistant football coach by Penn State.
11. On or about January 7, 2010, the Pennsylvania Attorney General's Office (hereinafter "AG"), served subpoenas on Penn State for the personnel records of Sandusky and correspondence pertaining to him.
12. On December 14, 2010, McQueary appeared before the Grand Jury and testified that he had discussed his observations of February 9, 2001, with Curley and Schultz.
13. On January 12, 2011, Curley, Schultz and Paterno testified before a Grand Jury.
14. On March 22, 2011, Spanier was interviewed by law enforcement authorities.

15. Curley, Schultz and Spanier were questioned as to what they knew about the incident reported by McQueary and when they knew about it.
16. On November 4, 2011, criminal charges were filed against Sandusky in Centre County and against Curley and Schultz in Dauphin County.
17. On November 5, 2011, Spanier caused to be published on Penn State's official news site his statement of support for Curley and Schultz. See Exhibit "B" to McQueary's complaint.
18. On November 6, 2011, the Board of Trustees of Penn State placed Curley on administrative leave and announced that Schultz had retired.
19. On November 9, 2011, the Board of Trustees of Penn State removed Spanier as President and Paterno as head football coach of Penn State.
20. On November 13, 2011, McQueary was placed on administrative leave.
21. Sandusky was convicted of multiple sexual offenses on June 22, 2012. One of those convictions related to the incident McQueary had reported to Curley and Schultz. McQueary was a witness at Sandusky's trial.
22. The suit Doe B. v. The Second Mile, Gerald Sandusky and The Pennsylvania State University, was filed in the Court of Common Pleas of Philadelphia County on June 28, 2012 at Case No. 03727 June Term, 2012.
23. On July 5, 2012, McQueary's employment with Penn State was terminated.
24. The suit, Doe C. v. The Pennsylvania State University was filed in the Court of Common Pleas of Philadelphia County on July 31, 2012 at Case No. 120704291.

25. The suit, Doe A. v. The Second Mile, Gerald Sandusky and The Penn State University, was filed in the Court of Common Pleas of Philadelphia County on November 30, 2011 at Case No. 111102968.
26. The suit, C. Miller v. The Second Mile, Gerald Sandusky and The Penn State University was filed in the Court of Common Pleas of Philadelphia County on December 22, 2011 at Case No. 02933 December Term, 2011.
27. McQueary's suit against Penn State was filed on October 2, 2012.
28. Additional criminal charges were filed against Curley and Schultz on November 1, 2012.
29. Spanier was indicted on November 1, 2012.
30. As of December 5, 2012, the preliminary hearings on the new charges filed against Curley and Schultz and the charges filed against Spanier were indefinitely continued.
31. Curley and Schultz's trial date of January 7, 2013, has also been indefinitely continued.
32. McQueary is expected to be a witness in the pending criminal cases.

### Discussion

Counsel for the parties agree that the factors to be considered in weighing whether a stay should be granted are set forth in, In Re Adelphia Communications Securities Litigation,

2003 WL 22358819 (E.D.Pa.) at \*3, to wit:

- (1) The extent to which the issues in the civil and criminal cases overlap;
- (2) the status of the criminal proceedings, including whether any defendants have been indicted;
- (3) the plaintiff's interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay;
- (4) the burden on the defendants;
- (5) the interests of the court;
- and (6) the public interest.

and Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers, Inc., et al., 87 F.R.D. 53

at 56, 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.

Preliminarily, I note that several of the cases cited by Penn State involve situations where one or more of the defendants in the criminal proceedings were also defendants in the civil litigation. Further, the conduct at issue was an element common to both cases. As such, defendants had legitimate self-incrimination concerns. Also, a criminal conviction necessarily lessened the burden of discovery and proof on the civil plaintiffs, such that delaying the civil case was appropriate. Those factors do not exist here.

#### **1. Issue Overlap Between Civil and Criminal Cases**

The AG in the criminal cases will be focused on the time period up to March 22, 2011, and what the defendants knew of and when they knew of Sandusky's improper sexual conduct. Penn State has no role in prosecuting the criminal charges, nor is it defending the defendants. Thus, the criminal cases impose no burden on Penn State. As the Freeh Report makes clear, Penn State has already made the information it has pertaining to Sandusky regarding THIS

INCIDENT available to the AG.<sup>6</sup> Its employees with knowledge of the events concerning Sandusky's conduct regarding this incident have already been interviewed.

Penn State is the defendant in this case and may well want to call one or more of the criminal defendants as witnesses. If called, the criminal defendants have no 5<sup>th</sup> Amendment right to refuse to testify, nor need they fear that information gathered in this case can be used against them in the criminal proceedings. The focus in the criminal proceedings is what defendants knew about Sandusky's improper conduct on the date they appeared before the Grand Jury or met with investigators, not the reason why McQueary was let go. As to the defamation count, the sole issue is whether the Spanier statement in support of Curley and Schultz defamed McQueary. Whether the criminal defendants were truthful in their testimony regarding what they knew about the incident McQueary observed and reported is factually and legally distinct from McQueary's whistleblower and defamation claims.

Simply put, while there may be overlapping witnesses, there are no overlapping issues in the criminal and civil cases.

This factor does not support the grant of a stay.

## **2. Status of Criminal Proceedings**

It is my understanding that as of December 5, 2012, all pending criminal matters have been indefinitely continued. While defendants may well not want to be deposed, etc. in this

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<sup>6</sup> "The Special Investigative Counsel performed the forensic analysis and review of this raw data independent of the University staff. From this review and analysis, the Special Investigative Counsel discovered the most important documents in this investigation – emails among former President Graham B. Spanier, former Senior Vice President-Finance and Business Gary C. Schultz and Athletic Director Timothy M. Curley from 1998 and 2001 – relating to Sandusky's crimes. The Special Investigative Counsel immediately provided these documents to law enforcement when they were discovered." Freeh Report at 11.

matter, their interests can and will be protected by the court pending resolution of their criminal cases.

I note, as did the Freeh Report,<sup>7</sup> that if a similar contemporaneous electronic record exists as to their discussions<sup>8</sup> or those of any other Penn State official involved in the decision to terminate McQueary, as exists concerning Sandusky, there may be no need to call them as witnesses. The written word is as powerful as the spoken word in proving one's case.

This factor does not support the grant of a stay.

### **3. Burden on Defendants**

As I have already made clear, the criminal defendants have no burden imposed on them in this case other than the burden placed on any non-party witness.

I note from both the Freeh Report and the Second Grand Jury Report that Penn State's Information Technology Department contains a specialized unit denominated the "SOS" unit, which is "trained and dedicated to assembling responsive electronically stored data in response to litigation needs or other legal process<sup>9</sup>." This unit was able to retrieve more than 3.5 million pieces of electronic data and documents spanning twelve (12) plus years when requested to do so by the Freeh investigators. As the Grand Jury also noted, Penn State "has in place a well defined historical practice and procedure for responding to subpoenas, "at page 23. In this day

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<sup>7</sup> "Moreover, the extensive contemporaneous documentation that the Special Investigative Counsel collected provided important insights, EVEN INTO THE ACTIONS OF THOSE WHO DECLINED TO BE INTERVIEWED." (emphasis added) Freeh Report at 12.

<sup>8</sup> I do not imply that such a record exists or that any one of the defendants participated in or made the decision to terminate McQueary's employment.

<sup>9</sup> Second Grand Jury Report, p. 23, available at: [http://www.attorneygeneral.gov/uploadedFiles/Press/spanier-schultz-curley\\_presentation-11-1-12.pdf](http://www.attorneygeneral.gov/uploadedFiles/Press/spanier-schultz-curley_presentation-11-1-12.pdf).

of electronic discovery and in light of Penn State's specialized expertise in this area, I see no meaningful burden placed on Penn State to search its files for relevant information regarding why McQueary was let go. Indeed, an electronic search may eliminate the need for the in person examination of individuals, only to discover they have no relevant information.

While hundreds of persons had to be interviewed and thousands of documents reviewed to determine the full scope of Sandusky's improper conduct spanning many years and involving multiple victims, who knew of it and when, no such far-reaching inquiry is needed here. One or more persons likely made the decision to end McQueary's employment. Once that person is identified and deposed, McQueary's Whistleblower action can be resolved. Identifying the decision maker now, as opposed to after the conclusion of the criminal trials, imposes no burden whatsoever on Penn State. In fact, it may lessen the burden on Penn State as it will avoid unnecessary discovery, expense, etc.

If the decision maker turns out to be one or more of the defendants, the court can control the method and timing of discovery addressed to them so as not to interfere with their criminal trial preparation. If it is someone else, then the issue of their participation in this case is moot.

Penn State infers that other current or former employees may decline to cooperate for self-incrimination reasons if the defendants do not testify. As I believe they are not at risk of incriminating themselves, this argument is unpersuasive. The suggestion that these same unidentified witnesses may not want to testify without prior or contemporaneous testimony from the defendants defies logic and experience. A person with relevant testimony must provide it absent a legal basis for refusing to do so. Until such a basis is asserted, I am unprepared to

assume that Penn State employees with relevant information will decline to provide it. The experience of the Sandusky case does not support this suggestion.

Penn State also believes that its access to McQueary may be limited by the AG. I know of no authority by which the AG can prevent a willing witness from testifying. McQueary's counsel has indicated that he will make McQueary available to Penn State when requested. Should the AG object, the issue can be dealt with then.

This factor does not favor the grant of a stay.

#### **4. The Interests of the Court**

Sandusky's conduct has resulted in ongoing litigation in three counties.

The victims suits are being handled by the 1<sup>st</sup> Judicial District, Philadelphia County. Sandusky, his charitable organization, The Second Mile, and Penn State are named defendants. Penn State has publicly stated its interest in resolving these cases in light of Sandusky's conviction. As neither Sandusky nor Second Mile have any direct connection to the McQueary suit, resolution of either the victims' or McQueary suits will not advance or delay resolution of the other.

Similarly, the criminal cases pending in Dauphin County involve DIFFERENT PARTIES, witnesses, elements and burdens of proof. The only common denominator between those cases and the present case is that McQueary and PERHAPS one or more of the defendants will be witnesses. As with the victims' cases, resolution of either the criminal or civil case neither advances nor delays resolution of the other.

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.

This factor does not favor the grant of a stay.

#### **5. The Public Interest**

I believe that if the court insures the parties receive a fair and prompt hearing, the public interest is satisfied.

This factor is neutral regarding a stay.

#### **6. The Interests of Non-Parties**

Judge Pollak in his Golden Quality opinion addressed this factor noting that several of the non-parties to the civil proceedings were facing criminal prosecution. The dilemma for those non-parties was that they were officers of the corporate civil defendant and could be called upon to speak on behalf of the corporate defendant. Seeing a real risk to their 5<sup>th</sup> Amendment right, Judge Pollak deemed this impediment to carry significant weight regarding the requested stay. No such concern exists here. Assuming, arguendo, that Curley, Schultz and/or Spanier individually or collectively terminated McQueary in violation of the Whistleblower Act, that fact is irrelevant to their pending criminal prosecutions.

Whether Spanier defamed McQueary is also irrelevant in his criminal case.

Penn State asserts that the victim-civil plaintiffs may be affected if this case proceeds before the criminal cases conclude. I disagree. Those plaintiffs have not named Curley, Schultz and Spanier as defendants. The Sandusky conviction is clearly admissible against him

and McQueary has already testified in the Sandusky trial as to what he saw, who he told and when. To the extent that the McQueary trial or discovery process readdresses that testimony, no information not already publicly known would be disclosed. Accordingly, the victim-plaintiff involved in the McQueary testimony suffers no harm by allowing this case to proceed. As McQueary has no personal information regarding the other victim-plaintiffs, their cases likewise are not impacted by any testimony in this case.

This factor does not favor the grant of a stay.

**7. Plaintiff's Interest in Prompt Resolution versus prejudice to Plaintiff Caused by Delay**

Penn State asserts that plaintiff should be required to demonstrate, "a particularly unique injury, such as the dissipation of assets or an attempt to gain an unfair advantage from the stay," Adelphia Communications, 2003 WL 22358819 \*4, as opposed to the mere delay in his right to promptly pursue his claim.

Judge Pollak introduced the concept of "potential prejudice" in his Golden Quality Opinion. In discussing this point he noted the overlapping nature of the criminal and civil cases, the fact that both were proceeding in the SAME judicial district and that a result favorable to the government in the criminal case would "obviate much of the expenditure of time and dollars which plaintiffs would otherwise be compelled to invest in their civil suits," Golden Quality at 56. Based on this belief, he found that some delay was acceptable. Here, as I have already noted, the criminal and civil cases do not overlap, and involve different defendants, different elements. The discovery requested differs and the conviction or acquittal of one or more of the defendants

will not advance McQueary's claims. As the basis of Judge Pollak's concerns do not here exist, his "potential prejudice" test is inapplicable.

Penn State asserts that McQueary, if he prevails, may be entitled to interest, etc. and that he is not currently suffering any economic harm as he is receiving his severance pay. I note that Exhibit "A" to his complaint, his employment agreement, calls for eighteen (18) months' severance pay. Those payments will end by January 2014 at the latest. During conference and at oral argument on this Motion, plaintiff's counsel stated that he anticipated discovery, etc. would consume the better part of one (1) year. Penn State did not disagree with his assessment. If this case is stayed, McQueary may well find himself without funds to live on and/or to prosecute his claim which, to me, rises to the level of economic harm.

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. Obviously, as here, there are competing factors to be assessed in determining what constitutes a timely fashion. Many of those factors have already been discussed.

An additional factor that I deem relevant is the publicly stated (through various members of Penn State's Board of Trustees) desire of Penn State to restore its reputation as promptly as possible. Certainly, McQueary should have the same right. Allowing this case to proceed now will afford both parties that opportunity.

This factor does not support the grant of a stay.

Based on the foregoing, I enter my

ORDER

AND NOW, this 19<sup>th</sup> day of December, 2012, the Motion for Stay is **DENIED**.

BY THE COURT:

*Thomas G. Gavin*

THOMAS G. GAVIN

SJ