

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

MICHAEL J. McQUEARY,

Plaintiff,

v.

THE PENNSYLVANIA STATE
UNIVERSITY,

Defendant.

Attorneys for Plaintiff:

Attorney for Defendant:

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No. 2012-1804

Case Type: Whistleblower

Elliott A. Strokoff, Esquire
William T. Fleming, Esquire
Nancy Conrad, Esquire

DEBRA C. IMMEL
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CENTRE COUNTY, PA
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GAVIN, S.J.

BACKGROUND

On the evening of February 9, 2001, Michael McQueary witnessed Jerry Sandusky engaged in inappropriate sexual activity with a young boy in the Lasch athletic facility. Gerald Sandusky was a retired Penn State football coach who had unlimited access to its athletic facilities. He had been the architect of its nationally renowned defense and was a well-known and popular person in the Penn State and State College communities. Mr. McQueary, after consultation with his father and a trusted family friend, Dr. Jonathan Dranov, reported what he saw to his immediate supervisor, Coach Joseph Paterno the next morning. Thereafter, he met with Coach Paterno's supervisor, Timothy Curley, the Athletic Director of Penn State, and Gary Schultz and repeated what he had told Coach Paterno. Mr. Schultz reported the incident to his supervisor, Dr. Graham Spanier, President of the Pennsylvania State University.

Tom Harmon, the Pennsylvania State University Police Director, was not informed of what Mr. McQueary had observed and reported to Messrs. Paterno, Curley, and Schultz. Both Mr. Harmon and Mr. Curley were aware of a similar incident in 1998, which Mr. Harmon vigorously investigated. Mr. Schultz did inquire of Mr. Harmon whether any record of the 1998 Sandusky incident existed and was advised by an e-mail dated February 12, 2001, “the incident is documented in our imaged archives.” *See* Exhibit P-8.

Mr. Schultz consulted with Penn State’s then counsel, Mr. Courtney, regarding what Mr. McQueary had reported. Attorney Courtney advised him that:

it would be the smart thing, the prudent thing, to have this reported to the Department of Public Welfare.

Findings of Fact #24.

Messrs. Curley, Schultz, and Spanier consulted among themselves as how best to deal with the situation Mr. McQueary reported, opting for the “humanitarian” approach while recognizing the danger if that approach failed, i.e., **“we then become vulnerable for not having reported it.”** (*See* Exhibit P-10) (emphasis added).

Ten years later, the “humanitarian” approach having failed, their fears were realized when the Investigating Grand Jury’s Presentment was released and the public outcry and backlash erupted that not only adversely impacted them, but also the reputation of the University. Within days of the release of the Presentment,¹ the Board of Trustees removed Coach Paterno and President Spanier from their positions. A new school President and athletic director were appointed. As these events were unfolding, the media scrutiny and public outcry continued. *See* Exhibits D-68, 69, 72 and 76.

¹ The Presentment was inadvertently released on November 4, 2011 and taken down. It was officially released on November 5, 2011.

Mr. McQueary was summoned to a meeting on Sunday, November 13, 2011, where the acting Athletic Director, Mr. Sherburne, read a “script” (Exhibit P-47) that had been prepared by Penn State’s General Counsel, Cynthia Baldwin, Esquire which placed him on administrative leave with pay and stated, “your future status has not been determined.” He was also informed, pursuant to the “script”, that “all athletic facilities associated with the Penn State Football program” were off limits to him. He was not permitted access to his office following the reading of the “script” and was required to turn in his keys, cell phone, and vehicle which all assistant coaches had use of. In December of 2011, he was required to clean out his office in the Lasch Building in the presence of individuals designated by Penn State.

On July 12, 2012, he learned through a press conference given by President Rodney Erickson that he was no longer employed by Penn State.

Mr. McQueary timely filed suit pursuant to Pennsylvania’s Whistleblower Law, 43 P.S. §1421 *et seq.* asserting he was wrongfully discharged by Penn State for his role in providing testimony to the investigating Grand Jury which charged Messrs. Sandusky, Curley and Schultz with having committed various criminal offenses. Penn State asserts that Mr. McQueary was an at will employee whose employment was not renewed and that its decision in that regard was legitimate pursuant to 43 P.S. §1424(c).

The parties agreed the issues involving Mr. McQueary’s Whistleblower claim and his defamation and misrepresentation claims were so intertwined that they be tried together.

All claims were tried before a jury from October 17-27, 2016. The parties were afforded the opportunity to submit briefs and did so.

FINDINGS OF FACT²

The following Findings of Fact are from the Notes of Testimony of Monday, October 17, 2016, morning session.

Jonelle Harter Eshbach, Esquire testified:

1. At all times material to this matter she was an attorney in the Office of the Attorney General of Pennsylvania, (hereinafter "OAG"). P. 71.
2. She was assigned to handle the investigation into what is commonly referred to as The Jerry Sandusky case, (hereinafter "Sandusky Matter"). P. 72.
3. In the course of presenting the "Sandusky Matter" to the Investigating Grand Jury, she became aware that Michael McQueary might have information related to the investigation. P. 74.
4. Messrs. Curley and Schultz were advised by the supervising judge, Judge Feudale, that they could discuss their grand jury testimony. P. 79.
5. Her belief was that:

Mike McQueary was one of the best, if not the best, civilian and by that I mean non-law enforcement witness I ever had. He was rock solid in his testimony as to what he had seen. He was very articulate. His memory was excellent. I was delighted to have him as part of my case.

N.T. P. 79, l. 23-P. 80, l. 3.

6. She concluded,

...[T]hat Mr. McQueary had done everything he needed to do, that he had not broken any rules or broken any laws.

P. 80, ll. 15-17.

² If a witness is quoted verbatim the page and line designation will be cited. Otherwise, only the page(s) supporting the finding will be cited.

7. Exhibit P-35 is the criminal complaint for Tim Curley. Attached to the complaint is the

Grand Jury Presentment which reads, in pertinent part, at page 12:

The grand jury finds that Tim Curley made a materially false statement under oath in an official proceeding on January 12, 2011 when he testified before the 30th statewide investigating grand jury relating to the 2002 incident, that he was not told by the graduate assistant that Sandusky was engaged in sexual conduct or anal sex with a boy in the Lasch Building showers.

8. Exhibit P-36 is the criminal complaint against Gary Schultz, which contains language similar to Exhibit P-35.

9. Both Messrs. Curley and Schultz were charged with perjury and failure to report (suspected child abuse) based on Mr. McQueary's testimony. P. 84 and 85.

10. Mr. McQueary will be the principal Commonwealth witness in the Curley and Schultz criminal cases.

11. She regarded President Spanier's statement, Exhibit P-35, as:

...[D]irectly saying that our investigation was false and wrong and that Mr. Curley and Mr. Schultz would be exonerated. That, in turn, meant that everything in our grand jury presentment was false basically.

P. 87, ll. 5-9.

12. She advised Mr. McQueary not to make any public statements. P. 90

13. She had no concerns for Mr. McQueary's personal security. P. 90

The following Findings of Fact are from the Notes of Testimony of Monday, October 17, 2016, afternoon session.

Fran Ganter testified:

14. He is retired from Penn State where he was employed as a football coach. P. 5.

15. He was an associate athletic director for football from 2003-2012 and reported to Tim Curley. P. 6.

16. One of his duties as an associate athletic director was to evaluate the football coaches. P. 11.

17. Exhibits P-15, 16, 17, 18, 21, 23, and 28 are his evaluations of Mr. McQueary's performance as a football coach.

18. Mr. McQueary's performance evaluations were consistently the highest or second highest that could be given.

Wendell Courtney, Esquire, testified:

19. His law firm, McQuaide Blasko, was the outside general counsel for Penn State. P. 59.

20. He was the primary counsel for Penn State from 1995-2010. P. 59.

21. He interacted with Gary Schultz. P. 59.

22. Exhibit P-6 is his billing record for February 11, 2001.

23. Mr. Schultz informed him that:

- A. It was a telephone call that I received from Mr. Schultz. I don't know if I was at home or at the office. He called me to ask for my assistance and he indicated that the University had received a report from an unnamed graduate assistant regarding Jerry Sandusky and young boy unnamed being in the Lasch Building on campus engaging in horseplay in the shower area and that made the graduate assistant feel uncomfortable.

P. 66, ll. 3-11.

24. He advised Mr. Schultz that,

...[I]t would be the smart thing, the prudent thing, to have this reported to the Department of Public Welfare.

P. 67, ll. 8-10.

Lisa Powers testified:

25. She has been a Penn State employee since 1991. P. 86.

26. She has been the Director of News and Media relations for Penn State since 2007. P. 86.

27. On October 28, 2011, she attended a meeting with President Spanier, Mr. Mahon (her direct supervisor), Cynthia Baldwin, Esquire (General Counsel for Penn State), and Mr. Steve Garban (Chairman of the Board of Trustees). Pp. 91-92.

28. Dr. Spanier stated,

A. He said that we had to prepare for something, that two senior leaders were going to be charged with crimes, and that he had a statement that he had written out that he would like us to review.

P. 95, ll. 8-12.

29. Mr. Mahon after looking at Dr. Spanier's version,

...[I]ndicated that he felt like there was something missing from the statement, that he felt like there was nothing about the victim or alleged victims, and that that should be added.

P. 96, l. 24-P. 97, l. 2.

30. Dr. Spanier then added the first paragraph to Exhibit P-30. P. 97.

31. She questioned Dr. Spanier as to his use of the term "unconditional support," to which he replied,

A. He said to me if I was doing my job and doing it correctly and had done nothing wrong would I not want him to support me as his supervisor.

P. 99, ll. 10-13.

32. President Spanier's statement was published on the Penn State news site, Penn State Live, at the direction of Bill Mahon. Pp. 106-07.

33. The attorneys for Messrs. Curley and Schultz participated in the drafting of Dr. Spanier's statement. *See* Exhibits P-31 and 32.

34. Exhibit P-39 is an addendum to Dr. Spanier's statement which includes statements from the attorneys for Curley and Schultz. P. 108.

35. As a result of The Patriot News article regarding Penn State officials appearing before the Grand Jury Bill Mahon met with Dr. Spanier and Cynthia Baldwin, Esquire about what this might mean for Coach Paterno and the athletic department. Mr. Mahon advised her that he was told, "the less we knew the better." Pp. 130, 131, and 132, ll. 11-1.2

36. Lisa Powers stated,

Q. And what happened following those two events (the removal of Paterno and Spanier)?

A. There was a riot in downtown State College following the removal of Joe Paterno. **I was going to say I don't think that the removal of those two were enough.** I think that the general public was very, very angry and wanted to know who was responsible.

P. 141, ll. 18-25 (emphasis added).

37. Once Mr. McQueary was identified as the graduate assistant, Penn State began to receive calls stating he should not remain at Penn State and should not be a coach. P. 142.

The following Findings of Fact are from the Notes of Testimony on Tuesday, October 18, 2016, morning session.

William Mahon testified that:

38. Penn State Live was the central Penn State website for information about Penn State. P. 9.

39. He felt adding the comments of the attorneys for Curley and Schultz to President Spanier's statement was "odd" and had never been done before, but that Dr. Spanier's instructions should be followed. P. 21.

40. The initial draft of the Spanier statement, Exhibit P-30, was prepared on October 28, 2011, prior to the Grand Jury Presentment's release. P. 27.

41. After the Presentment was made public on November 5, 2011, and the Spanier statement was posted on Penn State Live, his office,

...[W]as ordered not to say anything, not to put out a statement, not to Tweet, not to respond to any press inquiries, and **that was an order of the Board of Trustees.**

P. 45, ll. 9-12 (emphasis added).

The following Findings of Fact are from the Notes of Testimony on Tuesday, October 18, 2016, afternoon session.

Cynthia Baldwin, Esquire, testified:

42. She served as Vice-President and General Counsel of Penn State from February 15, 2010 to July 31, 2012. P. 10.

43. I take judicial notice that she was a member of the Board of Trustees from 1995-2010 and chair from 2004-2007.

44. On May 12, 2011, she presented a report to the Board of Trustees regarding the OAG investigation into the "Sandusky Matter". She informed the Trustees that Messrs. Spanier, Paterno, Curley, and Schultz had appeared before the investigating Grand Jury and had been asked about the 2002³ incident and the 1998 incident.

She advised the Board that the University did not appear to be a focus of the investigation. *See* Exhibit P-43.

³ The date in her affidavit, Exhibit P-53, is wrong.

45. Dr. Spanier instructed her to forward Exhibit P-31 to Caroline Roberto, Esquire, Mr. Curley's attorney. P. 37.

46. She had not read the Grand Jury's Presentment prior to the publication of Dr. Spanier's statement. P-48.

47. She drafted Exhibit P-47, "the script". Pp. 50, 116.

48. After being read Exhibit P-47, Mr. McQueary stated,

...[H]e did not do anything wrong and he really wanted to coach for the University.

P. 123, ll. 11-12.

49. To her, an employee in, "good standing is they are actively employed." P. 127, ll. 1-2.

Mark Sherburne testified:

50. From July 2008 to 2012, he was Associate Athletic Director for Administration. P. 145.

51. On November 6, 2011, Dr. Spanier advised him that he would be named the acting athletic director. P. 150.

52. On Thursday morning, November 10, 2011, acting head coach Tom Bradley held a press conference and said Mr. McQueary would coach in the Nebraska game (on Saturday the 12th). P. 157.

53. His opinion of Mr. McQueary was the following:

A. I thought Mike was a great coach. He was very organized. He was very on top of the things that I think he was asked to do in terms of coaching. He seemed to get along with the staff. He seemed to get along well with the student athletes. So I thought Mike was a good coach.

P. 158, ll. 14-20

54. Attorney Baldwin approached him on November 10th:

Q. And what did she say about Mike McQueary's status.

- A. She just wanted to let me know that, you know, the decision had been made and Mike was not going to be coaching in the game on Saturday and that his status was to be determined and she told me to please make sure I communicated to Mike and Tom that decision and that's what I planned to do.

P. 160, l. 18-P. 161, l. 1.

55. He had no input into the decision regarding Mr. McQueary's status as:

...[I]t was my opinion that any decisions that were being made during the period of time that we are referring to as it related to anybody involved in the matters related to Sandusky or anybody who may have been implicated, including Mike – **that those decisions were being made by the board or those who communicated directly with the board.**

P. 161, ll. 7-14 (emphasis added).

56. On November 11th Attorney Baldwin stopped at his office and:

- A. She met with me and she said, Mark, we are going to need to reach out to Mike and try get ahold of him, **that we need to let him know that his employment status would be changing**, and that we would need to meet as soon as possible, and I said I am not sure that Mike is available to meet. And she said can you please try to reach him by phone and she said to me that she was going to begin to construct information about administrative leave and that we would eventually be inclined to discuss that and she explained that typically when a meeting like that occurs it would be myself, Cynthia Baldwin, our human resource representative, Mike and that we would need to have that meeting as soon as we could, and so I reached out to Mike.

P. 171, ll. 4-19 (emphasis added).

57. He had no input into the preparation of Exhibit P-47. P. 173.

58. He was directed by Attorney Baldwin to read it to Mr. McQueary, which he did. P. 174.

59. Neither Athletic Director Dr. Joyner or Coach O'Brien asked him any questions about Mr. McQueary. P. 177.

The following Findings of Fact are from the Notes of Testimony of Wednesday, October 19, 2016, morning session.

60. Regarding decisions about Mr. McQueary's employment status:

A. That it was apparent to me that no decisions were being made as it related to anybody related to the Sandusky matters, whether it be those implicated Mike, anybody, other than the board and those who had conversation with the board.

Q. And would that include Dr. Rod Erickson, who by this time had been appointed interim president?

A. Yes.

P. 20, ll. 10-17.

Joseph Doncsecz testified:

61. He has been employed at Penn State since 1994 and is currently Associate Vice President of Finance and Controller. P. 71.

62. Penn State receives general appropriations from the Commonwealth of Pennsylvania that average between \$275-285 million. P. 76.

63. Mr. McQueary did not receive the January 1, 2012 pay increase all other Penn State employees received:

Q. And why didn't he get that pay increase?

A. The question in play was he was on leave at that time and he had been put on leave with pay. I think it was a gray area that we didn't have good direction on for folks in that situation.

Q. And who made the decision with respect to he shouldn't get that modest pay increase?

A. I do not recall specifically who gave me. **Again, I would have been informed by a combination of the athletic director's office and office of general counsel.**

P. 83, l. 20-P. 84, l. 5 (emphasis added).

64. Dr. Joyner determined that Mr. McQueary would not receive the bonus for the Ticket City Bowl. P. 84.

65. Penn State has twenty-four (24) campuses and approximately seventeen thousand (17,000) full-time faculty. P. 100.

Anthony Sassano testified:

66. He is a special agent for the OAG. P. 110.

67. In 2009 he was assigned to the “Sandusky Matter”. P. 111.

68. Mr. McQueary was, in his opinion, the linchpin in the Sandusky case. Pp. 113-14.

69. Mr. McQueary will be the main witness in the criminal trials involving Mr. Curley and Mr. Schultz. Pp. 114-15.

70. Mr. Curley and Mr. Schultz did not file any reports (of suspected child abuse) regarding the 2001 incident with Centre County Youth Services, the Department of Public Welfare, or any police agency. Pp. 116-117.

The following Findings of Fact are from the Notes of Testimony, Wednesday, October 19, 2016, afternoon session.

Erikka Runkle testified that:

71. She has been employed by Penn State since 2008. P. 8.

72. She was initially employed as the Human Resources manager in the Athletic Department. P. 8.

73. No one accessed Mr. McQueary’s personnel file from November 3-15, 2011. Pp. 25-26.

74. Attorney Baldwin advised her Mr. McQueary would be placed on administrative leave. Ms. Runkle had no input into that decision. Pp. 29-30.

75. She did not recall anyone being placed on administrative leave with pay during her career before Mr. McQueary was. P. 38.

76. At the time Mr. McQueary was placed on administrative leave with pay, there was no policy in existence covering said leave. P. 88.

77. Penn State employees could not ask to be placed on administrative leave with pay. P. 89.

Dr. Jonathan Dranov testified:

78. He is a physician with a practice in State College. P. 99.

79. He has known Mr. McQueary since his birth in 1974. P. 100.

80. He had a professional relationship with Mr. McQueary's father. Pp. 100-01.

81. He was requested to come to the McQueary home on the evening of February 9, 2001 by Mr. McQueary's father. Pp. 102-03.

82. He observed Mr. McQueary being visibly shaken and described the interaction as follows:

- A. Apparently Mike had brought some sneakers or something else that he wanted to put in his locker in the football program. He was a graduate assistant and he went into the locker room. I imagine this was about an hour before and when he went in and was heading toward his locker he said he heard sounds and I asked him what kind of sounds and he said there were sexual sounds. I asked him what he saw and he said nothing. They were sounds. So I tried to focus on that with him to see exactly what his interpretation of the sounds were and he just said they were sexual sounds. When I asked him again what he saw he could not or did not tell me that he had seen anything specific. Then he went on to say that a boy had looked around. I assume it was looked around from corner of shower or wall in the shower but he looked around. I asked Mike if the boy cried for help, if he looked upset, and he said no and then he said an arm came around the boy and pulled him back in. He went to his locker. He slammed the locker door, closed the locker door, and when he turned around the man came

walking out of the shower and it was - - he said to me it was Jerry Sandusky.

P. 104, l. 6 to P. 105, l. 5

83. His understanding as to who had to be notified of what Mr. McQueary saw was as follows:

- A. The topic turned to what do you do and apparently one of the reasons John wanted me to come over is who do you report this to at Penn State and **it was my understanding at Penn State that if you are witnessed to some kind of event, whatever it may be that is upsetting you report it to your supervisor and I told him he had to report it to his supervisor.** I think he had already come to that conclusion but I told him that I think his dad told him that his supervisor was Joseph Paterno.

P. 105, l. 21-P. 106, l. 9 (emphasis added).

84. At some point after February 9, 2001, he and John McQueary met with Mr. Schultz for business reasons. At the conclusion of the meeting, the following exchange took place:

- A. After the business part John then went onto – or he brought it up in terms of exactly what happened or where the University was in the process of investigating or follow up on Mike’s report.
- Q. And do you remember Gary Schultz’s response?
- A. Yes. The first thing he said that – the word he used I found a little bit confusing. He said there were rumors of similar incidents or a similar incident that occurred in the past and then went on to describe an incident that occurred in the late 1990’s when there was an apparent rumor – although I think it may have been an allegation because it had apparently been followed up by at least Children and Youth Services, apparently the Department of Public Welfare was involved, two police force were involved, the University and State College, the DA’s had been involved. So clearly it must have been an allegation but it was investigated and they said there was nothing that had come of it. The implication also – and he went on to say that they were looking into the incident that Mike reported in a similar

fashion, that the administration was taking it seriously, that I believe at that time the 1990's incident had been discussed with the Second Mile Board. I think he implied at that time that same thing had happened this year that they talked to the board. Someone from Penn State talked to Jerry Sandusky and called him in but beyond that I can't recall that there were any other authorities or anything that had been notified.

P. 111, l. 4-P. 112, l. 12.

Dr. David Joyner's deposition was read into the record. He testified:

85. He is a graduate of Penn State Medical School. P. 122.

86. He had been a member of the Board of Trustees at Penn State since 2000. P. 126

87. He became acting athletic director on November 17, 2011. P. 127.

88. It was his decision not to renew Mr. McQueary's contract. P. 165.

89. His reasons for ending Mr. McQueary's employment were:

A. There was no work for him to do, number one and his term was expiring.

Q. In the whole University there was no work for him to do?

A. Well, one of the things that we're very careful about is that individuals – we don't just pass on work to people to keep them working, so – and we're very careful about that and there was no work in our department or anywhere for Mr. McQueary to do based on his previous employment.

Q. Okay. Now who made that determination that there was no work for him to do?

A. I did.

Q. And you made that determination after reviewing his personnel file?

A. No, sir. There were no jobs available or posted and he would have had the opportunity to do whatever he wanted as an individual would in the community and – but there was not a position that I was looking for someone.

P. 170, l. 10-P. 171, l. 8.

The following Findings of Fact are from the Notes of Testimony, Thursday, October 20, 2016, morning session.

Thomas Harmon testified:

90. He was employed by Penn State from 1972-2005 and was the Director of University Police when he retired. P. 5.

91. He reported to Mr. Schultz. P. 6.

92. Exhibit P-3 is an email chain that he received from Mr. Schultz. P. 10.

93. Exhibit P-3 relates to the "Sandusky Matter" of 1998. P. 11.

94. He advised Mr. Schultz of the investigation:

Because this involved an individual who was a high profile figure at the University.

P. 15, ll. 2-3 (emphasis added).

95. The report regarding Mr. Sandusky's conduct was not placed in the police log available to the public. P. 16.

96. The report was maintained by the University Police, but it was not accessible to the public. P. 16.

97. The District Attorney decided not to prosecute Mr. Sandusky due to a lack of evidence. P. 19.

98. Mr. Schultz was aware of all the investigative steps taken and that the incident was a shower incident. Pp. 20-23.

99. His office was not informed of the February 2001 incident involving Mr. Sandusky. Pp. 30-31.

100. If he had been informed of the February 2001 incident he would have contacted the District Attorney. P. 31.

Dr. Graham Spanier testified:

101. He was initially at Penn State from 1973 to 1982. He returned to Penn State on September 1, 1995 as President and held that position until November 9, 2011. Pp. 35-36.

102. Exhibit P-5 is an email from Mr. Schultz to Mr. Curley which was copied to him. He does not remember receiving it in 1998. P. 39.

103. He had no recollection of the 1998 Sandusky investigation. P. 40

104. Exhibit P-10 is an email exchange between Mr. Curley, Mr. Schultz, and Mr. Spanier, regarding the 2001 "Sandusky Matter". P. 45.

105. Mr. Curley subsequently reported to him that he had spoken to Mr. Sandusky and The Second Mile organization and that the matter was closed. Pp. 69-70.

106. He authored the first draft of Exhibit P-30 and approved the final draft. P. 78

107. Penn State obtained attorneys for Messrs. Curley and Schultz. P. 83.

108. He directed Attorney Baldwin to share Exhibit P-30 with counsel for Messrs. Curley and Schultz. P. 83.

109. He directed that Exhibit P-38 be published:

...[A]nd I said to them, (the senior executives of the University), I handed out the statement at that three o'clock meeting, and I said, "This is the statement that I'm about to release." And I said, "I want all of you to know that if you do your jobs and always make decisions that are in the best interest of the University and you operate with complete honesty and integrity and always try to do the right thing, if you were falsely accused of a crime I would issue the same kind of statement for you. I will do that for you. And you need to know that you have my support for always doing the right thing. And that is why I'm supporting Tim and Gary." Everybody in the room worked with them for years

and had exactly the same sentiment I had. And the chair of the Board who opened the meeting said, "I support this statement. It is exactly what I would say.

P. 88, l. 20-P. 89, l. 11.

110. He believes:

...[A]nd the most visible part of the University, for better or worse, is intercollegiate athletics. So, you know intercollegiate athletics was two percent of my budget **but about 75 percent of the visibility.**

P. 91, ll. 12-16 (emphasis added).

The following Findings of Fact are from the Notes of Testimony, Thursday, October 20, 2016, afternoon session.

Dr. Spanier testified:

111. He had no security concerns for Mr. McQueary. Pp. 6-7.

112. Mr. Curley was placed on paid administrative leave on November 6, 2011. P. 7.

113. No restrictions were placed on Mr. Curley's access to the campus. P. 8.

114. In 2011 there were six hundred thousand (600,000) Penn State alumni. P. 8.

115. On Monday, November 7, 2011, he met with the athletic coaches to reassure them that they should feel free to reach out to Mr. Curley to "give him personal support" and that Mr. Curley "had agreed to go on administrative leave." P. 11.

116. He learned Mr. McQueary was the graduate assistant referenced in the Grand Jury Presentment "through a news story" on Monday, November 7, 2011. P. 34.

John McQueary testified:

117. He is Plaintiff's father. P. 45.

118. On the evening of February 9, 2001, his son called to say what he had witnessed between Sandusky and the boy. P. 49.

119. He and Dr. Dranov told his son to report the incident to his supervisor, Coach Paterno. P. 58.

120. Mr. McQueary told him that he did report the matter to Coach Paterno. P. 59

121. At a later point in time, he spoke to Mr. Schultz:

...I said Gary, this is big. This is huge. That's the word I used. Huge. I said what's next and this is when Mr. Schultz told me - - he said John, we have heard - - and the word he used was noise. We have heard noise about this before prior to this about the same coach and so on and he says every time we have come up empty. He said we have nothing to sink our teeth into. Quote. That's a quote. I said well this time there is something to sink your teeth into. My son saw what he saw. He said John, I am going to look into it. I am going to get this looked into. I believe that's about where that conversation ended. . .

P. 62, ll. 11-24.

The deposition of **Earnest J. Wilson, III** was read into the record:

122. He is the head football coach at Elizabeth City State University. P. 74

123. He has been coaching football since 1992. P. 74.

124. He knew Mr. McQueary at Penn State when he was a graduate assistant. P. 76-79

125. He wanted to hire Mr. McQueary:

A. Oh, that was a definite. I wanted him to be an assistant for me. We were trying to work things out not only with salary but also just getting him here. I alerted my administration because I said, guys, University, look now we are going to come with, University, some controversy, but, University, I knew that he was a person that had stepped forward and I felt like he deserved a chance.

P. 78, l. 25-P. 79, l. 10.

126. His athletic director's reaction to his request to hire Mr. McQueary was as follows:

...And as I - - And I didn't really know our president too well but I talked to the athletic director and he stewed on it and finally in the end after so many weeks and I thought everything was okay he came to me and said that it was not. It would not be good to have my first head coaching job and the president to have her first job and to have - - they felt like they - - University, he was a controversial person.

P. 79, l. 22-P. 80, l. 9.

127. He has coached at fifteen (15) schools. P. 89.

The deposition of **Thomas M. Bradley** was read into the record:

128. He is the defensive coordinator at UCLA. P. 105.

129. He was employed at Penn State from 1979 to 2012. He was named acting head coach after Coach Paterno was fired. P. 107.

130. He knew Mr. McQueary from when he became a graduate assistant through his progression to full time coach. Pp. 109-111.

131. In 2011, Mr. McQueary coached the wide receivers and was also in charge of signaling in plays during the game. P. 112.

132. He wanted Mr. McQueary to coach in the Nebraska game. P. 114.

133. He was told Mr. McQueary would not be coaching the Nebraska game. P. 115.

134. Practice during the week following the Grand Jury Presentment proceeded the same as always and he was not aware of additional security measures. P. 118.

135. He thought Mr. McQueary was a good football coach. P. 122.

136. In 2004 or 2005, he asked Mr. McQueary about what he had seen and done and he:

...[S]aid I turned it into Joe, and Curley and Schultz.

P. 135, ll. 12-13.

137. No one informed him of threats against Mr. McQueary. P. 147

The following Findings of Fact are from the Notes of Testimony of Friday, October 21, 2016, morning session.

Answers to Request for Admissions were read into the record. *See* Exhibit P-88, #5, 10, 11, 12, 13.

Joan Coble testified:

138. She was Gary Schultz's Administrative Assistant for fourteen (14) years. P. 9.

139. She was aware of the existence of a file on Mr. Sandusky and was told not to look at it. P. 10.

140. She said Exhibits P-1, P-2, P-7, and P-9 were in Mr. Schultz's handwriting. These exhibits are his notes regarding the 1998 incident. Pp. 11-15.

Steve Garban testified:

141. He served as a trustee of Penn State from 1998-2012. P. 20.

142. He reviewed Exhibit P-30 on October 28, 2011. P. 21.

143. He concurred in and supported Exhibit P-30 (in his role) as Chairman of the Board of Trustees. P. 22.

144. He had not read the Grand Jury Presentment at the time the statement was put on Penn State Live. P. 23.

Michael J. McQueary testified:

145. His birth date is October 10, 1974. P. 37.

146. He moved to the State College area in October 1981 and has lived there ever since, except for a brief time in 1998. P. 38.

147. He played football for Penn State and graduated in 1997. P. 39.

148. On the evening of February 9, 2001 he witnessed the following:

A. I opened the first door of the locker room and heard some slapping noises, and the shower was running. The next door was propped open by a wedge down in the carpet. And my locker, as you entered that door, is the first door almost directly on your right. Already knew someone else was in there. And turned to my locker and opened it up and glanced over my right shoulder into the mirror. And in that mirror, saw a reflection of Jerry and a boy under the faucet with Jerry directly behind him, his arms wrapped around him in a severely inappropriate position.

Q. All right.

A. Continue?

Q. Yep.

A. Not really believing what I thought maybe I had seen, stepped slightly to my right so I could look into the locker directly - - not into the locker, but into the shower directly, and saw the same exact thing. And put the sneakers in my locker, terrified, slammed the locker shut, and began to walk to the door, saw Jerry and the boy looking right at me, separated, shoulder to shoulder, and walked out of the locker room.

Q. Now, you knew who Jerry Sandusky was?

A. Yes. Jerry Sandusky was almost iconic. I grew up in State College, he was the foundation of Penn State defense and Linebacker U in the 1986 national championship team. I played ball and grew up with his sons, John and Jeff, at State College High, they were on my football team. Jeff was a junior and John was a sophomore when I was a senior. Knew Mrs. Sandusky. He was - - I mean, no one matched Joe's - - no one matched Joe in terms of reputation or reverence but certainly Jerry Sandusky was this, and I'll use a word that we heard yesterday, this boy scout Second Mile founder who was a saint and was an unbelievable iconic football coach.

P. 47, l. 4-P. 48, l. 17.

149. He was told by his father and Dr. Dranov to report the matter to Coach Paterno, which he did the next morning. Coach Paterno said he would tell some people. Pp. 50-52.
150. Approximately ten (10) days later, he met with Messrs. Curley and Schultz. P. 54
151. He told them what he had seen, and they responded, "...we will look into it, it's serious and we will follow up." P. 55, ll. 2-3.
152. Approximately ten (10) days later. Mr. Curley called and told him the incident had been reported to the Second Mile and that Sandusky was no longer permitted to bring children to the athletic facilities. P. 55.
153. In 2010, he met with investigators from the OAG. P. 58.
154. He testified before the Grand Jury about what he told Messrs. Curley and Schultz. P. 64.
155. His reaction to the Spanier statement was as follows:
- A. Because I knew what it was saying. I mean, I knew what it was portraying, that if they did nothing wrong or if the charges brought against them were going to be proven groundless and they weren't perjuring themselves, they had said opposite of what I had said, and that's why they were charged. That calls me a liar.
- P. 82, ll. 4-10.
156. In his opinion, practices during the Monday through Thursday morning period after the Grand Jury Presentment was released, had been normal. P. 82.
157. Acting Athletic Director Sherburne told him on Thursday that, "the University doesn't want you to coach in the stadium." P. 94, ll. 2-3.
158. He left town as directed, on Friday. P. 99.
159. Mr. Sherburne told him, on the Friday before Dr. Erickson's announcement, that he would be placed on administrative leave. P. 101.

160. Exhibit P-47 is the “script” Mr. Sherburne read to him regarding being placed on administrative leave. P. 102

161. After Mr. Sherburne read the “script,” he indicated he wanted to coach and had done nothing wrong. P. 104.

162. He was not permitted to retrieve anything from his office. P. 104.

163. He learned he was no longer employed during a press conference held by Dr. Erickson. P. 111.

The following Findings of Fact are from the Notes of Testimony, Friday, October 21, 2016, afternoon session.

Mr. McQueary testified:

164. Joe Paterno was his direct supervisor. P. 6.

165. Exhibit P-20 is his severance contract. P. 6.

166. He was never the subject of any disciplinary action while a Penn State employee. P. 7.

167. In addition to base pay, he received pay for coaching at summer football camps for high school students. P. 8.

168. His goal was to be a head coach. P. 11.

169. Exhibit P-56 lists job openings at Penn State during the relevant time frames. P. 20.

170. Exhibit P-59, dated July 13, 2012, informed him that his health coverage was terminated. P. 20.

171. Exhibit P-64 is the check for the proceeds of his retirement account. P. 22.

172. Exhibit P-71 is his resume through 2011. P. 32.

173. He attempted to find other employment:

A. Oh, I tried to find or tried to think about whatever skills I may possess that carried over into other careers. For instance, as one example, and I've tried to explore medical device sales. They hire a lot of ex-athletes. They hire extremely competitive people, high energy, great interpersonal skills, people who are able to communicate, people who work hard. So I investigated and tried to explore that field and tried to catch on with a medical device sales job. I was a health policy administration major, had been around the medical field a lot of my life through my father, and I thought it would be a good fit.

Q. Any other career choices did you explore?

A. Yes, HR/recruiting. I have tried to explore that. Obviously, the direct area would be - - and while it's not the same, it's similar, the recruiting coordinator role I had at Penn State and recruiting kids out of college to go to work for companies.

I investigated a career in golf, obviously not playing golf, although I wish, but a golf professional or a teacher. There's others. I can't think of them.

P. 33, l. 2-P. 34, l. 3.

174. Exhibit P-79 contains the documents pertaining to his efforts to find employment.

P. 36.

175. He sought employment in a local Rite Aid drugstore in August 2016, and did not get the position. P. 49.

176. Credibility is important in obtaining a coaching position. P. 54 and 55.

177. He had the skills necessary to fill the positions referenced in Exhibit P-56 at Penn State 530, 540, and 552. Pp. 56-57.

178. His reaction to being placed on administrative leave was as follows:

- A. Yeah. Again, you know, right now, right now, as we sit here today, there is a kid in some locker room or some church having the same thing happen to him, and someone may know about it, and that person is scared to speak up, and to do it to someone, to treat someone that way, who does speak up, and I'm not sitting here saying I handled it exactly perfectly. I have said this before. I will point a finger at myself before I point it at anyone else. I'm a man, and I can take responsibility, but you don't treat someone like that who tries to stop something, maybe not perfectly, but tries to do the right thing in these awful acts, so that's how I feel about it. You don't do that to someone. You stand up and you say, "Hey, listen. This guy tried to do the right thing. He came to us with it," and you don't throw him because he's, quote, unquote, "threatened." You don't throw him somewhere like he's the guy who committed the acts, you know. It's not right.

P. 65, ll. 16-P. 66, l. 15.

179. His reaction to not being able to find employment was as follows:

- A. Again, I'm biased, obviously, to myself. 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 - - I mean, that's humiliating. That's humbling. I'm biased. I know it. I get it. That's not fair. It wasn't me who did it. All right. It wasn't.

P. 66, l. 16-P. 67, l. 11.

The following Findings of Fact are from the Notes of Testimony, Monday, October 24, 2016, morning session.

Mr. McQueary testified:

180. Defendant's Exhibits 68, 69, 72, and 76 are news articles questioning Mr. McQueary's failure to act and/or why Penn State is allowing Mr. McQueary to stay as a coach. Pp. 8-12.

181. Defendant's Exhibit D-42 contains excerpts from Dr. Erickson's press conference wherein he stated Mr. McQueary would not be coaching in the Nebraska game. He also stated:

A. Erickson said that McQueary's leave is indefinite and paid subject to further determination. Asked if McQueary would be fired **Erickson said there are complexities to that issue that I am not prepared to go into at this point.** Asked about the status of Athletic Director Tim Curley and Erickson said that is an ongoing topic of discussion. We will get to that next week.

P. 28, ll. 6-14 (emphasis added).

182. No police official personally spoke to him regarding threats and/or providing security for him or his family. P. 31.

183. He was not frightened by the threatening messages that were being sent regarding him. P. 33.

184. Pursuant to his understanding of how bowl bonuses were paid, he should have received a bonus for the Ticket City Bowl. P. 56 and Pp. 88-90.

185. He withdrew his funds from TIAA-CREF because:

A. Well, yeah, because you get heavily taxed and heavily penalized. So in order to get what I thought I might need to sustain ourselves, no word from the

University, no paychecks, no nothing for almost three months, you get scared. I mean, you get really scared.

P. 57, l. 22-P. 58, l. 2.

Dr. Rodney Erickson testified that:

186. He was President of Penn State from November 9, 2011 to May 11, 2014. P. 110.

187. He became interim president the night of November 9, 2011. P. 117.

188. He made the decision that Mr. McQueary would not coach at the Nebraska game.
P. 118.

189. He did not consult with interim Coach Bradley before deciding that Mr. McQueary would not coach. P. 118.

190. He never talked to Coach Bradley regarding Mr. McQueary's status. P. 124.

191. General Counsel Baldwin was the liaison to the athletic department at this time.
P. 124.

192. He does not recall discussing any alternatives to administrative leave for Mr. McQueary with General Counsel Baldwin. Pp. 124-25.

193. He suggested to incoming head coach Bill O'Brien that:

...[H]e might want to retain one or two existing coaches in order to provide some continuity, and, yes, I did suggest Vanderlinden and Johnson.

P. 127, ll. 19-22.

194. As to other jobs at the University that Mr. McQueary could have performed, he stated:

A. I don't get into job hunting at that level.

Q. Did Athletic Director Joyner tell you there were no other positions for Mr. McQueary?

A. He stated there were no openings in the athletic department.

P. 130, l. 21-P. 131, l. 1.

195. Prior to the Sandusky scandal he was unaware of any plans in 2011 for Coach Paterno to step down. Pp. 136-37.

196. He had no involvement in drafting Exhibit P-47, the Sherburne "script." P. 143.

197. General Counsel Baldwin advised him to have Mr. Sherburne place Mr. McQueary on administrative leave. P. 144.

The following Findings of Fact are from the Notes of Testimony of Monday, October 24, 2016, afternoon session.

Dr. Erickson testified:

198. He decided Mr. McQueary would not coach due to the threats made against him.
P. 26.

199. As to Mr. McQueary's fixed term employment contract ending, he stated:

Q. Dr. Erickson, were you aware that Mr. McQueary's fixed term appointment ended on June 30, 2012?

A. I was, yes.

Q. And how were you aware of that?

A. Ms. Baldwin told me that it was a fixed term appointment in early January.

Q. And did you consult with anyone in athletics about whether his fixed term appointment, he would receive a new appointment?

A. No, I didn't.

- Q. Did Dr. Joyner at any time consult with you about whether Mr. McQueary would be reappointed?
- A. I believe some time in the - - in the spring, perhaps about the April timeframe, Dr. Joyner indicated that there weren't any openings in athletics.
- Q. And did Dr. Joyner state to you on that basis then there would be - - Mr. McQueary's contract would end.
- A. Well, we both were aware that it was a fixed term contract ending on June 30, 2012.
- Q. And did you concur with Dr. Joyner's decision that the appointment would end and that there would be no new appointment?
- A. Well, he indicated there was no opening in athletics.
- Q. And on that basis, you agreed with that decision?
- A. Yes.

P. 45, l. 17-P. 46, l. 21.

John C. Parry, IV testified:

200. He is the Athletic Director at Cleveland State University. P. 54.
201. He has been an athletic director for thirty (33) years. P. 55.
202. He has participated in the search for a head football coach. P. 62.
203. He has hired head football coaches both internally and from the outside. P. 64.
204. Exhibit P-80 is his report. P. 77.
205. He described the usual process to hire a coach as follows:
- A. The usual process, in my experience, is when a school either loses their head coach or decides to fire or replace their head coach, that they appoint an interim coach, particularly if it's still during - - late in the season. And even if it's not, they'll appoint an interim because somebody has to kind of hold

the program together, hold the recruits together, hold the players together.

There's then discussion among the assistant coaches to essentially ask if any of them are interested in being the head coach. And they're either encouraged to apply or they could be discouraged, but they're told they have a perfect right to apply.

The process, again, if the University's decided to conduct a full search, they're going to advertise, they're going to make the word that it's an open position. The alternative would be to say we have a logical successor and we're going to promote from within. So if the determination is to run a full search, then internal candidates may or may not choose to be a candidate.

At the end of the search process, it's common practice to inform the head coach to interview all the assistants if it's not one of them that's hired, so that it's the expectation that the new head coach could at the very least interview all the assistants.

And all the studies I've read, all the experiences myself, there's usually one or two assistants that are retained for the purposes of continuity of understanding the players, understanding the contents with the potential recruits, understand how the University works, how to get things purchased, how do you buy supplies, how do you arrange for meals. So oftentimes, one or two assistant coaches are retained for that purpose.

So at that point, there's a new staff in place. It's assumed that every assistant would get an interview, but not every assistant will get a job.

P. 89, l. 2-P. 90, l. 17.

206. The role of an athletic director in hiring assistant coaches as follows:

- A. The athletic director, again, in my experience, does not hire the assistant coaches but would reserve the right to veto a choice. It's very hard to tell somebody you have to work with so and so, but if a

head coach were about to hire an assistant who you felt would be problematic for any number of reasons, he would reserve the right to veto that hire.

P. 90, l. 21-Pt. 91, l.3.

207. His opinion as to Mr. McQueary's future prior to November 1, 2011 was as follows:

- A. Based on the bio in the Penn State, at that time, called media guide, based on his performance evaluations from the prior six years, three of which were exceptional, three of which were exceeds expectations, which is all high on the performance chart, it appeared that it would make one think that Mike had done very well, he's been well compensated. They have promoted him all the way back from when he was a grad assistant.

And I can't tell you how hard it is to be a graduate assistant in school and then get kept. Every year there's two or three graduate assistants who are working 80 hours a week and want a full-time job. And for Mike McQueary to be at Penn State as a grad assistant and get hired on as full-time is really quite an accomplishment. Because every year there's a handful of grad assistants at every program in the country trying to get hired full-time. So Mike was - - could be viewed as someone rising, someone who's had success, he's in the top 25 program, he's coaching the wide receivers, he's the special teams coach, works with the kickers, and is the recruiting coordinator.

And my belief, he could coach quarterbacks, wide receivers, tight ends, special teams, some combination and/or be a recruiting coordinator. Or more recently, now teams hire what's called a quality control coach for offense, and quality control coach for defense, and Mike could fit that role, which means he's self-scouting, he's looking at our own offense saying what are our tendencies, every time we're on right hash mark, we're running wide, and we need to change that up. So there's a quality control position.

So I think Mike could have done any number of those positions based on, again, the reading, the performance reviews, and what he had done at Penn State.

P. 94, l. 7-P. 95, l. 19.

208. His opinion was that in five to seven (5-7) years, Mr. McQueary would have been a candidate for offensive coordinator or head coach at a Division I football program. P. 95-96.

209. Penn State's actions harmed Mr. McQueary as follows:

A. I base it that they sent a message by putting him on administrative leave, by supporting others, by not allowing him to coach, by not having the new coach interview him, they sent a message to every other school in the country that Mike McQueary did something wrong, that he lied, that he was disloyal, he had no integrity. What did he do wrong? And given that climate, no one was going to hire him to be a football coach.

P. 98, ll. 11-19.

210. The Spanier statement to the athletic department employees of support for Curley and Schultz with no mention of support for Mr. McQueary:

...[S]ent a message to the whole athletic department that Mike is not to be supported.

P. 99, ll. 19-21.

211. An athletic director's reaction to Penn State's actions would be:

A. Well, again, within a reasonable degree of certainty, if I was sitting as an athletic director and head coach came in and said I want to hire Mike McQueary, ever since November 5th, 2011, I would veto it. I think - - because of the unknown. I don't know what happened. I don't know, what did Mike do that put him on persona non grata? What did he do?

And no one's ever answered that question. Mike may answer the question, but no one has said why, other than the safety, which makes sense for the first weekend.

P. 100, l. 17-P. 101, l. 2.

212. His opinion is that Penn State's actions irreparably harmed Mr. McQueary's football coaching career. P. 101.

213. An outside coach is brought in when:

A. Again, I can't put myself in Athletic Director Curley's mind and the Board of Trustees and the president, normally it's usual, if a program is successful, you look to promote from within. If the program is losing, not winning, you try to run a search. You don't want to say to the current players if they're successful, why would you change the system? So again, if they're winning, probably a good chance the internal candidate gets elevated.

P. 143, ll. 2-10.

The following Findings of Fact are from the Notes of Testimony of Tuesday, October 25, 2016, morning session.

214. Exhibit P-80 is the expert report of Mr. Parry.

James Stavros testified:

215. He is a forensic accountant. P. 4.

216. Exhibit P-81 is his report and sets forth his damage calculations. P. 11.

217. He did a pre-and-post November 2011 incident analysis of what Mr. McQueary was capable of doing. P. 14.

218. He calculated Mr. McQueary's work life to be to age 62.76 years for the reasons set forth at pages 17 and 18.

219. He determined Mr. McQueary's post-incident earning capacity in the manner set forth at pages 19 and 20.

220. Mr. McQueary paid an additional \$61,871.00 in Federal income tax in 2012 due to cashing out his TIAA-CREF retirement plan. P. 41.

221. Each of his damage calculations assumed Mr. McQueary would continue to coach. P. 48.

222. It was stipulated that if Messrs. Curley and Schultz were called as witnesses by either party, they would invoke their 5th Amendment right against self-incrimination. P. 57.

Kirk Diehl testified:

223. He is a Penn State graduate and current Penn State employee. P. 77.

224. He has held various positions in the athletic department continuously since 1992. P. 78-79.

225. He has known Mr. McQueary since 1993. P. 80.

226. He had a close working relationship with Mr. McQueary. P. 88.

227. The "lunch bunch," group included himself, Brad Caldwell, Tom Venturino (Director of Football Operations) and Mr. McQueary. P. 90.

228. He was not aware of any threats against Mr. McQueary. P. 107.

229. He was told:

A. No. The only thing we were told was to be careful, that he had filed a lawsuit against the University, **and it was in your best interest not to talk about the lawsuit.**

P. 115, ll. 1-4 (emphasis added).

The following Findings of Fact are from the Notes of Testimony of Tuesday, October 25, 2016, afternoon session.

Kirk Diehl testified:

230. He thought Mr. McQueary was a great coach who one day could be a head coach.

P. 7.

231. He has not had lunch with Mr. McQueary since he was placed on administrative leave. P. 17.

232. He did not see Mr. McQueary at Mr. Caldwell's retirement dinner to which all "lettermen" were invited. Mr. McQueary is a "lettermen." P. 17-19

James Bradley Caldwell testified that:

233. He has known Mr. McQueary since 1992. P. 32.

234. He was present when Dr. Spanier addressed the intercollegiate athletic staff and recalled him saying:

...[E]verything's going to be okay. You know, Mr. Curley and Gary are good men. We're going to get through this.

P. 40, ll. 1-3.

235. He was present when Mr. McQueary and others were discussing what to do about a rules violation and Mr. McQueary said,

...[W]ell, I saw something too that changed my life forever."

P. 42, ll. 14-15.

236. Mr. McQueary did not provide any details, and:

...[Y]ou know, and I thank him for that to this day."

P. 43, ll. 2-3.

237. He was unaware of any threats made and on Thursday, November 10, Mr. McQueary was there getting ready for the (Nebraska) game. P. 44

238. He believed Mr. McQueary to be a good coach as he had great knowledge of the game, was a very hard worker, (who) was good with the players and was a good recruiter. P. 60.

239. His explanation as to why he was glad Mr. McQueary did not tell him (what he had witnessed),

Just because of the - - pretty much because what this poor man has gone through, you know, I just feel so bad for him.

P. 62, ll. 7-9.

240. His reaction when he learned that Mr. McQueary was the graduate assistant:

A. I just felt like - - you know, I just thought the pain and what he saw, it must have just been so hard for him. I don't know, I just felt like he - - I put myself in his shoes and if I, you know, would have seen that I just feel like I would have- - you know, I respected Jerry and we grew up in this town, he was as legendary as Joe. And I - - you know, I just think it would have been even devastating for him to see that. And it just crushed me, just another reason to feel terrible for him, that he had to deal with that sight.

P. 63, ll. 15-25.

241. Before October 2011, he was not aware of any plan to change coaches, that Mr. McQueary's job was in jeopardy or, that when Coach Paterno retired an outside coach would be brought in. Pp. 76-78.

242. He was aware that Mr. McQueary "with someone from the University" was cleaning out his office in December of 2011. P. 78.

Stephen Shelow testified:

243. In November of 2011 he was the assistant vice-president for police and public safety at Penn State. P. 89.

244. Exhibit D-44 contains the only threat against Mr. McQueary that he was personally aware of. P. 96.

The following Findings of Fact are from the Notes of Testimony, Wednesday, October 26, 2016, morning session:

Peter Roussel testified that:

245. He was a student assistant on the University of Mississippi football team where he learned the value of networking. Pp. 6-7.

246. He held football positions at four different schools after graduation. Pp. 8-11.

247. He owned a website called, "footballscoop.com" that listed job openings, etc. P. 12.

248. He founded "coachingsearch.com" which reported on positions, salary, etc. P. 13.

249. He currently is an agent for coaches. P. 17.

250. He explained how coaches hire assistant coaches as follows:

A. Yeah. I mean, that is correct. Obviously you have nine - - you can hire nine coaches and there are coaches around the country that decide to keep one guy, maybe two guys, for different reasons but by and large when you get a head coaching job you want to bring your own guys. There is a reason there was a coaching change. **Usually it's because the team had not been winning and so it's time to get new blood in the program**, get new coaches who inspire players differently, who have a different level of expertise, who do things different from a philosophical standpoint.

P. 24, ll. 6-18 (emphasis added).

251. The criteria for selecting an assistant coach is as follows:

- A. Well I think a proven track record as a recruiter is a very important component. A track record of developing players, especially if you have got a resume of all conference guys on a consistent basis or all Americans, who guys who were high picks in the NFL draft that you coached for three or four years and that's one of the reason why they became a first, or second, or third round draft choice because he was very well coached. Expertise - - just your overall expertise at the position that you are coaching and, you know, on that side of the ball. So, for example, if you are a running back coach you will have a great expertise of offensive football, how to coach offense, and then I would say - - I mean, maybe the most important would be fit. You know, how does - - that's a common phrase in - -

P. 26, l. 18-Pt. 27, l. 9.

252. His impression of Mr. McQueary as a coach was as follows:

- A. Well, number one, coach had been at Penn State his entire career. Started as a graduate assistant and then transitioned into the full-time role and it's very rare in college football that you work for the same head coach for more than a decade. There are - - as we talked about earlier there is 27 on average head coach's changes a year since 2010. I mean, this year there will be another 20 something at least. Last year I think it was 31 if I am not mistaken. And so he had been at the same place the entire time and then just knowing the profession - - I didn't even have to look it up but Penn State - - they had very, very, very little staff turnover. Coach Paterno wasn't a guy who fired a lot of coaches. Personally I can't - - and maybe he fired a coach or two. I can't remember one but they also didn't have guy that left Penn State for other jobs. So it just stands out that Mike McQueary was at Penn State his entire career. From a resume standpoint, you know, coached some good players, was a recruiting coordinator, but nothing just jumps out at you like, oh, my - - wow. That would be my evaluation.

P. 32, l. 7-P. 33, l. 5.

253. In 2011, there were approximately one hundred and twenty (120) Division 1 teams. P. 40.

254. His explanation as to why Mr. McQueary has not found a coaching position was as follows:

A. Well I think coach had a very limited network because he had worked at Penn State for his entire career and I think it was significantly to his detriment that coaches didn't branch off from this staff. Sometimes it's good for you to have some of your colleagues get fired because then they go get other jobs and now you have contacts at other places that are in a position to help you. Sometimes it's good for guys on your staff to get promotions, to go make more money or have a better job title at other places because you have got - - now you have got a lifeline at other places. Guys who you have worked with that are going to be able to speak up for you - - they are all over the country, and you look at coach's timeline both of those hindered him, no doubt, and when you look at his resume - - good resume? Yeah. Good resume. Did they have a good team certain years? Yeah. They had a good team but nothing is like, wow, you have got to hire Mike McQueary, like he is available, and so when you combine all of those, yeah, I think that he was definitely hindered.

P. 46, l. 19-P. 47, l. 1-16.

Samuel Kursh testified:

255. He has a doctorate in business from George Washington University. P. 61

256. He does forensic economic studies. P. 63.

257. Exhibit D-111 is his report. P 67.

258. In employment cases he looks at what a person's "career path" is. P. 70

259. An important fact in his analysis is as follows:

- A. So on average head football coach in an FBS level is expected to stay about 6.4 years and I think that's an important number in our analysis because it helps to define - - given what we know about the industry and what we know about jobs in the industry it helps define how long a typical assistant coach or a staff member would be there as well.

P. 72, l. 20-P. 73, l. 2.

260. He used these sums for his calculations as follows:

The two numbers we picked \$70,432 - - that's the average income of a college graduate in the United States between 35 and 39. \$72,605 and that's cross the United States. And in doing this case I thought that was probably not the right number to use here.

So I looked at what we call the area wage survey. Now it's called the area occupational employment and wage estimates for State College. So right for this specific area. A lower level supervisor makes \$41,715. So in doing my A minus B calculations I used the \$41,715 because I thought that was about the lowest income that ought to be considered as potential B or potential offset.

P. 74, l. 7-21.

261. He calculated damages over the 6.4 year tenure of head coaches as anything beyond that would be speculative. P. 75.

262. In the post-Paterno era he placed Mr. McQueary as follows:

- A. Scenario two is that Mr. McQueary was able to get a job but at a smaller football program. However, still an FBS program because the data I have is on FBS and so I assume that he would make - - he was making 140 which put him in the 65th percentile of assistant coaches. 65th percentile simply means if there is 100 of them there would be 64 below him and 35 above him. He is in 65. I looked at salary - - wages and salaries that came from the NCAS football assistant coaches salary data for 2012 and I

looked at people making in the bottom two deciles from zero to 20. So go back to the 100 people I just talked about he was 65th at one of the most successful major college programs in the country and I said well where is he going to end up and I felt that a conservative way to look at it was that he would be in the bottom 20 percent of FBS programs because they would be smaller programs, the ones not paying as much, and using the average of people in that he should have made in that situation about \$77,000 a year of \$76,957.

P. 77, l. 21-Pt. 78, l. 17.

263. Had Mr. McQueary been able to get a job at a similar paying school, his economic loss would be \$98,000/year. P. 80.

264. Mr. Stavros's loss calculation over twenty (20) years is speculative. P. 81.

265. His opinion is that because Mr. McQueary did not have a network, his coaching career was over when he lost his Penn State position. P. 90.

The following Findings of Fact are from the Notes of Testimony of Wednesday, October 26, 2016, afternoon session.

Mr. Bill Mahon testified:

266. His office was monitoring media reports during November. P. 5.

267. Exhibit D-76 contains media articles relating to what Mr. McQueary saw between Mr. Sandusky and the child in the shower. P. 14.

Penn State presented the deposition of William J. O'Brien:

268. He is the head coach of the Houston Texans. P. 5.

269. He has been a coach for twenty-five (25) years. P. 6.

270. He has coached for five (5) colleges and two (2) professional teams. Pp. 7-9.

271. As Penn State coach he had complete discretion to hire his staff. P. 11.

272. He would not have hired Mr. McQueary. P. 16.
273. Mr. McQueary's name was not on the list of personnel to be interviewed. P. 21.
274. His interview of existing coaches were "courtesy interviews", i.e., meaningless as he did not intend to retain them. P. 28.

Penn State Presented the Deposition of Matt Rhule:

275. He graduated from Penn State and played on its football team. P. 11.
276. He has coached at five (5) different colleges. P. 14.
277. He is currently head football coach at Temple University. P. 18.

DISCUSSION

Pennsylvania's Whistleblower Law (43 P.S. §1424(b)) requires that (1) the employee performed services for wages under a contract of hire for a public body, and (2) the employee must show by a preponderance of the evidence that prior to the alleged reprisal, the employee reported an instance of wrongdoing to the employer or appropriate authority. If the employee meets his burden, then the burden of proof shifts to the employer to prove by the preponderance of the evidence that the action it took occurred for separate and legitimate reasons which are not merely pretextual. 43 P.S. §1424(c).

For purposes of this discussion I accept as credible the facts set forth in my Findings of Fact.

Penn State, at all times material hereto, was a "public body"⁴ as it is funded in part by the Commonwealth of Pennsylvania. *See* Findings of Fact #62.

Mr. McQueary, at all times material hereto, was an employee⁵ as he performed services for wages under a contract of hire for a "public body." *See* Exhibit P-14.

⁴ 43 P.S. §1422

⁵ 43 P.S. §1422

Coach Paterno was an “employer”⁶ who supervised Mr. McQueary. *See* Exhibit P-18.

Dr. Spanier, Mr. Curley and Mr. Schultz were employers in that they were superiors of Coach Paterno and/or agents of a public body.

The observation Mr. McQueary made of the interaction between Mr. Sandusky and the boy constitutes “wrongdoing”⁷ as the conduct was a violation of the penal code of Pennsylvania. *See* Findings of Fact #148.

Mr. McQueary’s report of the conduct he observed to Coach Paterno, Mr. Curley and Mr. Schultz was a “good faith report”⁸ as that term is defined in the Statute.

Mr. McQueary was requested by the OAG to testify before the 30th Statewide Investigating Grand Jury looking into the conduct of Mr. Sandusky. *See* Findings of Fact #5.

Mr. McQueary’s employment contract was not renewed by Penn State after the Presentment was made public.

Accordingly, Mr. McQueary met his burden of proof, shifting the burden to Penn State to show that it had “separate and legitimate reasons”, for not renewing his contract which were not pretextual.

Penn State in defense asserts that:

1. Mr. McQueary’s contract expired and that new Head Football Coach O’Brien did not have a place on his coaching staff for him, and/or
2. Dr. Joyner decided not to renew Mr. McQueary’s contract as there was no other work for him. (*See* Findings of Fact #89).

⁶ 43 P.S. §1422

⁷ 43 P.S. §1422

⁸ 43 P.S. §1422

Penn State asserts either/both of these decisions were based on legitimate non-pretextual grounds and that Mr. McQueary was therefore properly not retained.

Justice, now Chief Justice, Saylor's opinion in O'Rourke v. Commonwealth of Pa., Dept. of Corrections, 778 A.2d 1194 (Pa. 2001) is a virtual roadmap as to how to analyze a Whistleblower case. The fact that it is eerily similar factually is a coincidence.

O'Rourke was a food service instructor at SCI-Dallas who reported a theft ring involving inmates in the culinary department. These inmates were stealing food and trading it to other inmates for cigarettes. Following an investigation, O'Rourke experienced a hostile work environment, was ostracized by culinary staff, and subjected to harassment by the inmates. As a result of these actions, he was reassigned to a less desirable job that limited his ability to earn extra pay and to gain experience necessary for promotion. O'Rourke asserted these actions were taken to chastise him for revealing the theft and mismanagement in the culinary department. SCI-Dallas contended that O'Rourke was removed from his prior duties to "reduce the heightened potential for conflict in the culinary department."

Penn State's asserted defenses must be analyzed in the context of its conduct both pre and post Grand Jury Presentment as this is a case where actions speak louder than words.

Mr. McQueary reported what was arguably criminal conduct to Coach Paterno, his supervisor. He then met with Messrs. Curley and Schultz and repeated what he told Coach Paterno. When Mr. McQueary came to the attention of the OAG, he fully cooperated. His cooperation led, in part, to criminal charges against Messrs. Sandusky, Curley, and Schultz.

When the charges became public, threats were made which raised safety concerns. To this point, one can substitute the name McQueary for O'Rourke. The response of Penn State mirrors that of the Department of Corrections, i.e. his job duties were changed, he was banned

from his usual work place, benefits associated with his position were taken away, and his prospects for advancement destroyed.

The Presentment was officially released on Saturday, November 5, 2011. That afternoon Dr. Spanier had Exhibit P-38 published on Penn State Live. In Exhibit P-38, Dr. Spanier expressed his support for Messrs. Curley and Schultz. It was published with the full support of the then Chairman of the Board of Trustees, Mr. Garban. No mention of support was made for the graduate assistant who had come forward to report the inappropriate conduct. This was the beginning of the disparate treatment accorded Mr. McQueary by Penn State.

On Monday, November 7, 2011, Dr. Spanier first met with all available head coaches and then with all available members of the athletic department where he expressed his support for Mr. Curley. He encouraged members of the athletic department to reach out and give Mr. Curley support. *See Findings of Fact #115.* At the time of his remarks to the coaches and athletic staff the identity of the graduate assistant, Mike McQueary, was known. *See Exhibit P-91 and Findings of Fact #116.* No expression of support was made for him, nor any suggestion that they reach out to him. This was a continuation of the disparate treatment accorded Mr. McQueary. The unmistakable conclusion to be drawn from his failure to mention Mr. McQueary is that he was not being supported by the University and that members of the athletic department should not support him either. *See Findings of Fact #210.* This subtle message clearly was heard as Messrs. Diehl and Caldwell (witnesses called by Penn State) who previously had lunch with Mr. McQueary several days per week over an approximately nine (9) year period, never again had lunch with him and never reached out to support him. *See Findings of Fact # 232.* This subtle message was again reinforced months later when attorneys for Penn State called members of the athletic department including Coach O'Brien, together after Mr. McQueary filed suit and

advised them, “it was in your best interest not to talk about the lawsuit.” *See* Findings of Fact #229. This conduct by Penn State’s attorneys verges on a violation of Rule of Professional Conduct, 3.4.

Dr. Spanier also informed them that Mr. Curley had agreed to go on administrative leave. He named Mr. Sherburne acting Athletic Director.

Mr. Mahon, Vice President of University Relations, was ordered (after the statement by Dr. Spanier was published on November 5),

. . . not to say anything, not to put out a statement, not to tweet, not to respond to any press inquiries, and **that was an order of the Board of Trustees.**”

Findings of Fact #41 (emphasis added).

The Board of Trustees met on Wednesday evening, November 9, 2011 and took the following actions:

1. They fired Coach Paterno,
2. they fired Dr. Spanier, and
3. they appointed Dr. Erickson interim President.

Dr. Erickson decided that Mr. McQueary would not coach in the Nebraska game. He did so without seeking the input of Coach Bradley or Mr. Sherburne.

General Counsel Baldwin advised Dr. Erickson to have Mr. McQueary placed on administrative leave. Accordingly, Mr. McQueary was directed to attend a meeting on Sunday, November 13, 2011 with Attorney Baldwin, acting Athletic Director Sherburne, and Human Resources representative Runkle. Attorney Baldwin had prepared Exhibit P-47 which she instructed Mr. Sherburne to read word for word to Mr. McQueary. He read:

- 1) **You were placed on administrative leave with pay on Thursday, November 11, 2011 by acting Athletic Director Mark Sherburne.**

This statement finds no support in the record. In fact, the record contradicts the statement. See Findings of Fact #54 and 56. The fact Mr. McQueary was *placed* on administrative leave, as opposed to being given the option to do so as in Mr. Curley's case, is further evidence of the disparate treatment of Mr. McQueary by Penn State.

- 2) **Your future status has not been determined.**

This statement is contradicted by what occurred at the conclusion of the meeting when Mr. McQueary was told that he could not go to his office to retrieve his personal effects and that "all athletic facilities associated with the Penn State Football Program" were off limits. These directives constitute a *de facto* termination of his employment by Penn State. The fact that Mr. McQueary was barred from his work place but Mr. Curley, who was also on paid administrative leave was not is further evidence of the disparate treatment given to Mr. McQueary by Penn State.

- 3) **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.**

A person who is told to do no work on behalf of his employer would implicitly understand this directive to be the *de facto* equivalent of being told they are no longer working for the employer and that they have implicitly been fired.

In fact, General Counsel Baldwin testified that an employee in "good standing is one who is actively employed." See Findings of Fact #49. My American Heritage Dictionary, 2d College Edition defines:

Work: n: physical or mental effort or activity directed toward the production or accomplishment of something.

Employ: verb: to put to use or service; to provide with gainful work.

Employee: n: a person who works for another in return for financial compensation.

These definitions support the conclusion that Mr. McQueary was *de facto* terminated on November 13, 2011 by Penn State's General Counsel, who acted with the consent of Dr. Erickson. *See Findings of Fact #197.*

Dr. Erickson in his press conference announcing Mr. McQueary would not coach in the Nebraska game acknowledged that there were "complexities" regarding Mr. McQueary's indefinite leave that he was not prepared to discuss. *See Exhibit P-46*

Mr. McQueary was required to clean out his office and belongings from the Lasch building in December 2011 in the presence of designated Penn State personnel. This is further evidence of his *de facto* termination.

In January a new head coach was hired. Penn State provided the list of coaches to be interviewed. *See Findings of Fact #273.* Mr. McQueary was not on that list which is further evidence of his *de facto* termination and disparate treatment.

There were inquiries regarding Mr. McQueary's employment status in June of 2012. *See Exhibit P-55, and earlier; see Findings of Fact #199.*

Dr. Joyner never looked at Mr. McQueary's personnel file and did not speak to him before deciding not to renew his contract as he determined there was no work for him. (Findings of Fact #89).

The objective evidence compels the conclusion that Dr. Joyner who had no experience as an athletic director is not a credible witness and that his reasons for not renewing Mr. McQueary's contract are pretextual. The objective evidence is that Fran Ganter who had more

than thirty (30) years coaching experience and who served as associate athletic director for nine (9) years (*See Findings of Fact #15*) gave Mr. McQueary the highest possible performance rating on May 24, 2011. *See Exhibit P-28*. There were open positions in the athletic department (*See Exhibit P-56*) which Mr. McQueary was qualified to perform. Dr. Joyner simply chose to ignore the facts to arrive at his desired outcome. Thus, his reasons for not renewing Mr. McQueary's contract were not based on separate and legitimate reasons, but were pretextual.

I find Coach O'Brien credible when he said he would not have hired Mr. McQueary even if he had interviewed him as he already had a person for Mr. McQueary's position, Mr. Stan Hixson.

However, Coach O'Brien's decision has to be viewed in the context of how he came to be in the position of selecting coaches for Penn State in the first instance.

On November 3, 2011, Penn State's football team had a record of eight (8) wins and one (1) loss. No one from equipment manager, Penn State witness Caldwell, (*See Findings of Fact #241*) through Dr. Erickson, (*See Findings of Fact #195*) believed Coach Paterno had any plans to step down or that the University had any thought of replacing him. In fact, Penn State's expert on coaching changes, Peter Roussel testified that:

. . . [T]here is a reason there was a coaching change. **Usually it's because the team has not been winning and so it's time to get new blood. . .**

Excerpt from Findings of Fact #250 (emphasis added).

On November 4, there was no need for "new blood." However, on November 5, "blood" was needed and people had to go to satisfy the public outcry. Ms. Powers best expressed that sentiment when she said,

I was going to say I don't think that the removal of those two (Paterno and Spanier) were enough.

Excerpt from Findings of Fact #36.

I agree with both experts, Mr. Roussel and Mr. Parry, that when a firing occurs mid-season an interim coach is installed. Penn State did that with Coach Bradley who had been at Penn State for thirty-three (33) years. Penn State chose not to retain its loyal coach of thirty-three (33) years as head coach and instead brought in an outsider who happened to have a full complement of coaches in mind. Consistent with what both experts testified, the associate coaches were let go with the exception of those Dr. Erickson wanted retained, another example of the disparate treatment accorded to Mr. McQueary.

But for the Grand Jury Presentment, no Penn State coach would have lost their job and Coach O'Brien would not have been hired. Accordingly, Coach O'Brien's decision not to interview or hire Mr. McQueary does not constitute a separate and legitimate reason for the termination of Mr. McQueary.

THE NEXUS BETWEEN THE REPORTING AND RETALIATION

When Mr. McQueary initially reported what he saw to Messrs. Paterno, Curley, and Schultz, he suffered no disparate treatment or adverse employment consequences. When the Board of Trustees were informed of the Grand Jury investigation in May, 2011, by General Counsel Baldwin, no adverse employment actions were taken against Mr. McQueary even though Penn State could have elected not to renew his contract on July 1, 2011. Neither was he subjected to any disparate treatment.

Only when the "Sandusky Matter" became public was Mr. McQueary subjected to disparate treatment and adverse employment consequences.

The Whistleblower law requires the claimant to come forward with “some evidence” of a connection between the report and retaliation. Golashevsky v. Department of Environmental Protection, 720 A.2d 757, 759 (1988). Here, the evidence of the connection is overwhelming.

The O’Rourke court concluded that,

[T]o successfully rebut a prima facie case of reprisal – the employer must prove that it would have taken the same adverse employment action absent the employee’s good faith report of wrongdoing.

O’Rourke, 778 A.2d at 1204. The objective evidence is that Mr. McQueary would not have been removed from his coaching position but for his involvement in the “Sandusky Matter” *once it became public knowledge*. Thus, Penn State failed to meet its burden of proof.

Based on the foregoing Findings of Fact and Discussion, I make the following:

CONCLUSIONS OF LAW

1. Penn State is a public body subject to the Whistleblower Law.
2. Mr. McQueary was an employee of Penn State performing services for wages.
3. Mr. McQueary, in the course of his employment, observed wrongdoing in a facility owned by Penn State.
4. Mr. McQueary reported what he had seen in good faith to his immediate supervisor.
5. Mr. McQueary reported what he had seen in good faith to Messrs. Curley and Schultz.
6. Mr. McQueary testified before the investigating Grand Jury at the request of the OAG.
7. As of November 4, 2011, Penn State had no cause grounds to terminate him.
8. Penn State engaged in retaliatory conduct against Mr. McQueary subsequent to the release of the Presentment on November 5, 2011.

9. Penn State treated Mr. McQueary disparately in relation to its treatment of Mr. Curley and all other Penn State employees.⁹
10. Penn State *de facto* terminated Mr. McQueary on November 13, 2011, when it precluded him from accessing his office and personal effects and by informing him that he was to do no work for Penn State and/or when it had him remove his personal effects etc., from his office in December, 2011 under the supervision of Penn State personnel.
11. Dr. Joyner's assertion that he did not renew his contract for lack of available work is not credible.
12. Mr. McQueary met his burden of proof under the Whistleblower Law.
13. Penn State's stated reasons for not renewing his contract are not separate and legitimate reasons within the meaning of the Whistleblower Law.
14. Penn State's stated reasons for not renewing his contract are pretextual.
15. Penn State did not meet its burden of proof.
16. Mr. McQueary was terminated in retaliation for his having reported what he saw and for cooperating with the OAG.
17. Mr. McQueary is entitled to the damages permitted pursuant to the Whistleblower law.

Based on the foregoing, I now address the issue of damages.

DAMAGES

Section 5 of the Whistleblower Law provides that:

[a] court...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,

⁹ If Mr. McQueary was in fact an employee and not *de facto* fired as of November 13, 2011, he should have received the pay increase all Penn State employees received on January 1, 2012. *See* Findings of Fact #63.

including reasonable attorney fees and witness fees, if the complainant prevails in the civil action.

43 P.S. §1425 (emphasis added)

First, I will address Mr. McQueary's economic damages.

THE ECONOMIC EXPERTS

Plaintiff called James Stavros as his economic expert. Exhibit P-81 sets forth his calculations of economic loss.

Penn State called Samuel Kursh as its economic expert. Exhibit D-111 sets forth his calculations of economic loss.

I find both experts to be equally qualified. However, I find Mr. Kursh's analysis to be flawed and not supported by the objective evidence.

THE KURSH APPROACH

Mr. Kursh looks at what he refers to as a person's career path. Findings of Fact #258. He determined that since Mr. McQueary did not have a network outside of Penn State, his coaching career was essentially over when he lost his Penn State position. *See* Findings of Fact #265. He also determined that an "average head football coach" holds his position for 6.4 years and that therefore an associate coach would have a similar tenure. *See* Findings of Fact #259. He believes that any calculation based on more than 6.4 years would be speculative. *See* Findings of Fact #261.

Penn State called Mr. Roussel as its expert on coaching changes. He held coaching positions at four (4) different schools (*See* Findings of Fact #246) before deciding to get out of coaching for personal reasons. Penn State witness Coach O'Brien has been a coach for twenty-five (25) years (*See* Findings of Fact #269) and has coached for five (5) colleges and two (2) professional teams. *See* Findings of Fact #270. Coach Wilson has been coaching since 1992 (*See*

Findings of Fact #123) and has coached at fifteen (15) different schools (*See* Findings of Fact #127). Penn State witness, Matt Rhule has coached at five (5) different schools. *See* Findings of Fact #276. None of these men had a cloud hanging over their head as did Mr. McQueary. Coach Bradley who had been at Penn State for thirty-three (33) years (*See* Findings of Fact #129) found employment with UCLA after his contract was not renewed. Of course, he was not directly linked to the “Sandusky Matter” and does not have the cloud over him that Mr. McQueary has. I conclude based on the foregoing that Mr. McQueary’s career in football is over not because of his lack of a network but because of the cloud over his involvement in the “Sandusky Matter.” A cloud created and reinforced by Penn State’s public actions taken against him which made him *persona non grata* in the football world. *See* Findings of Fact #211. But for his involvement in the “Sandusky Matter” his career would easily have been coextensive with that of Coaches Bradley, O’Brien and Wilson. Thus, the fundamental premise of Mr. Kursh’s analysis is flawed and his calculations based on 6.4 years is rejected as contrary to the objective evidence.

THE STAVROS APPROACH

Mr. Stavros assumed that Mr. McQueary would have continued to coach and calculated his work life expectancy to be to age 62.76. *See* Findings of Fact #218. He used that age even though Mr. McQueary expressed the intent to work to age sixty-seven (67) to seventy (70).

The objective evidence suggests that but for his involvement in the “Sandusky Matter” Mr. McQueary would have coached to at least age sixty-two (62). Pre-Presentment he had successfully transitioned from graduate assistant to assistant coach at a perennial top twenty-five (25) football school. He consistently received high performance ratings, coached individuals who had gone onto professional careers and was recruiting coordinator for Penn State. There

was every reason to believe that he would have gone on to be an offensive coordinator or head coach. *See* Findings of Fact #208.

Accordingly, Mr. Stavros calculations through age sixty-two (62), plus are supported by the record and are not speculative.

Mr. Stavros calculated eight (8) different scenarios of wage loss. In my view, scenario #6 is the appropriate calculation as it is based on the salary of wide receiver coaches. While I believe the objective evidence supports the conclusion that Mr. McQueary would have become an offensive coordinator or head coach at a Division 1 football program, he would most certainly have continued as a wide receiver coach at any of the schools Mr. Stavros used in his analysis.

Mr. Stavros also calculated the tax penalties Mr. McQueary incurred when he cashed in his retirement plan when he did not timely receive the severance benefits called for in Exhibit P-20. Given his family responsibilities and the delayed response by Penn State as to whether it would make the payments, his decision was appropriate. The loss he incurred is directly attributable to Penn State and is compensable to him.

Accordingly, I award the sum of three million, nine hundred seventy-four thousand, forty-eight dollars (\$3,974,048.00) as and for past and future lost wages, and for the tax penalty incurred.

I also find that but for his improper termination, he would have received his share of the Ticket City Bowl bonus. Defendant shall, within fifteen (15) days of the filing of this Opinion, certify the average bonus paid to the assistant football coaches for the Ticket City Bowl, which sum I award to him, plus interest, from January 31, 2012.

NON-ECONOMIC DAMAGES

I find persuasive the reasoning of The Honorable Rochelle S. Friedman in Bailets v. Pennsylvania Turnpike Commission, No. 265 MD 2009 (Pa. Cmwlth. Oct. 6. 2016) that non-economic damages are recoverable in a Whistleblower case. While the legislature did not define the term actual damages, our Supreme Court has. In Joseph v. Scranton Times, L.P., 129 A.3d 404, 429 (Pa. 2005), the Supreme Court made clear that “actual damages” include non-economic injuries such as “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.” Such an award furthers the goal that a whistleblower, “be put in no worse a position for having exposed the wrongdoing.” O’Rourke, 778 A.2d at 1202.

Penn State addressed in its brief the issue of a potential double recovery as, “a jury has already awarded these damages [on the defamation and misrepresentation claims].”

On the defamation count, the jury was permitted to award damages for:

FIRST, the actual harm to the plaintiff’s reputation that you find resulted from the defendant’s conduct;

SECOND, the emotional distress, mental anguish, and humiliation that you find the plaintiff suffered as a result of the defendant’s conduct;

THIRD, any other special injuries that you find the plaintiff suffered as a result of the defendant’s act.

As Penn State did not ask that the damages award be broken out by category, I have no way of knowing what category of damages the jury’s award addressed. They may have intended their award to cover all compensable items or just one. It is too late to inquire of the jury as to what category they allocated damages to. As Penn State could have avoided this issue by use of

a simple jury interrogatory, their argument against a potential double recovery is deemed to be waived.

As to the misrepresentation count, my analysis is the same as in the defamation count delineated above.

REPUTATION

“A good reputation is more valuable than money.”

Maxim 108
Publius Syrus

Prior to November 5, 2011, Mr. McQueary was well respected in the community and had a good reputation. I infer this from the lack of any evidence to the contrary and in light of the prominent position he held as one of only nine assistant coaches on the Penn State football team.

Once the presentment was officially released, many persons faulted Mr. McQueary for failing to notify the police. When Mr. McQueary contacted the OAG for support in the form of a positive statement on his behalf it was not forthcoming. In fact, it was suggested that he not respond to the things being said about him (*See Findings of Fact #12*), advice he followed. However, at all times material, Penn State KNEW that he had acted in accordance with its then policy by reporting what he saw to Coach Paterno. Penn State was under no OAG instruction not to respond to the misinformation about what Mr. McQueary did regarding reporting. A reasonable inference arising from Penn State’s failure to correct the misinformation is that if it did so, it would have had to explain why it had not referred the information to its or any other police agency.

A person whose job was to recruit and interact with young men on a very personal basis could hardly be expected to be able to do so when the public perception was that he saw inappropriate conduct and failed to report it to the proper authorities. Having been silenced by

the OAG and Penn State having decided not to set the record straight, Mr. McQueary's reputation clearly has suffered. As I note below, Penn State to this date has failed to acknowledge Mr. McQueary's compliance with its then reporting requirements. Such an acknowledgement would have gone a long way in limiting the harm to his reputation.

Accordingly, an award of damages for loss of reputation is appropriate.

HUMILIATION

The following objective evidence supports Mr. McQueary's claim of humiliation:

1. Dr. Spanier's and Mr. Garban's unconditional support for Messrs. Curley and Schultz as announced on Penn State Live on November 5, 2011 with no mention of support for the graduate assistant who followed the established Penn State procedure in reporting what he saw.
2. Dr. Spanier's convening of all head coaches and athletic staff on November 7, 2011 to announce his support for Mr. Curley and advising them that they should feel free to reach out to him and give him personal support. *See Findings of Fact #115.* No mention of similar support for Mr. McQueary was made. *See also* my comments at P. 47, which are incorporated herein by reference thereto.
3. Dr. Erickson's unilateral decision that Mr. McQueary would not coach in the Nebraska game, a decision publicly announced after Coach Bradley had announced he would coach.
4. The meeting of November 13, 2011 where General Counsel's script, Exhibit P-47, was read to Mr. McQueary under circumstances that made clear nothing he might say would change the "script's" preordained outcome.
5. Being denied the right to go to his office for his personal effects.

6. Being banned from the athletic facilities that had been his home since 1993 when he began his football career at Penn State effectively cutting him off from his expected support network and friends of almost twenty (20) years. This was the equivalent of banishment.
7. Being told to clean out his office in the presence of Penn State personnel, an action that suggests he had done something wrong and was not to be trusted.
8. Being the only assistant coach not placed on the list of persons to be considered by incoming head Coach O'Brien. This act reinforced the message that he was not to be supported.
9. Not being invited to Mr. Caldwell's retirement party when all other "lettermen" were invited.
10. Being rejected for a position at Elizabeth City State University, a non-Division 1 football program and being told the reason was the notoriety attached to him.
11. Being unable to secure a position as a cashier in a Rite-Aid Store in his local community.
12. Being subject to news articles, e-mails, etc. which likened him to Jerry Sandusky and Jerry Sandusky's actions.

The fact that five (5) years post-Presentment, Mr. McQueary could not be employed as a cashier in a local drug store shows, to this writer, the extent to which he has been ostracized in the Penn State community. Certainly this has to be humiliating to one who was the quarterback of the Penn State football team and a respected coach. I could go on to list many more examples but am satisfied that these are sufficient to support an award of damages for humiliation.

On the issue of humiliation, I have also considered that Penn State has never publicly acknowledged that Mr. McQueary acted in accordance with University policy. Such recognition

would have gone a long way toward reducing the opprobrium visited upon him (*See Findings of Fact #125*) and the resulting humiliation he suffered.

Assuming that the jury award of compensatory damages on both the defamation and misrepresentation counts were intended solely to compensate Mr. McQueary for the harm to his reputation and humiliation, I regard those sums as insufficient and not binding on me. Accordingly, I award one million dollars (\$1,000,000.00) for his non-economic damages.

COUNSEL FEES

Plaintiff shall submit to defendant a detailed statement of the counsel fees, witness fees and costs of litigation it incurred and for which it seeks reimbursement. The statement is to be filed not later than fifteen (15) business days after this Opinion is filed. If Penn State asserts a fee, etc., is unreasonable, it shall identify the item and state why the charge is inappropriate. Penn State shall file any such objections within thirty (30) business days of this opinion.

Due to the fact that all counts in the complaint were interrelated, plaintiff shall not be required to allocate expenses by count. All reasonable expenses are deemed to be reimbursable.

If objections are filed, a hearing will be scheduled.

The request to file the fee bill under seal is **DENIED**.

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

MICHAEL J. McQUEARY,

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No. 2012-1804

Plaintiff

vs.

THE PENNSYLVANIA STATE
UNIVERSITY,

Type of Case: Whistleblower

Defendant

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

ORDER

AND NOW, this 30 day of November, 2016, after trial of the above matter, I find in favor of Plaintiff and against Defendant and award Plaintiff the following damages:

1. Past and future economic loss \$ 3,974,048.00
2. Past and future non-economic loss \$ 1,000,000.00
3. Defendant shall, within 15 days of the filing of this Order, certify the average bonus paid to the assistant football coaches for the Ticket City Bowl, which sum I award Plaintiff plus interest from January 31, 2012.
4. Reasonable counsel fees, costs of litigation and witness fees to be determined in accordance with Section 5 of the Whistleblower Law.

The effective date of this Order for purposes of filing any post-trial motions, SHALL BE the date the award of counsel fees, etc. is filed of record.

BY THE COURT:


Thomas G. Gavin S.J.