



IN THE COURT OF COMMON PLEAS OF  
CENTRE COUNTY, PENNSYLVANIA

MICHAEL J. MCQUEARY,  
Plaintiff

Docket No. 2012-1804

v.

THE PENNSYLVANIA STATE  
UNIVERSITY,  
Defendant

(Judge Gavin)

**Plaintiff's Brief in Support of  
Award of Contingency Attorney's Fee**

Plaintiff has a Contingency Fee Agreement; dated August 16, 2012, with his attorneys providing for the payment of 33 1/3% of net recovery of a "settlement, verdict or otherwise achieved, more than six (6) months after the date of this Agreement." Plaintiff's Petition for Costs of Litigation seeks an award of costs, to include attorneys fees of one-third of the amount awarded by the Court, \$4,974,048,<sup>1</sup> under the Whistleblower Law.

43 P.S. §1425, at the time this action was commenced, provided in pertinent part as follows:

"A court **may** also award the Complainant all or a portion of the costs of litigation, including **reasonable attorney fees** and witness fees, if the court determines that the award is **appropriate.**" (emphasis added).

<sup>1</sup> In the Court's Order of November 30, 2016, the Defendant was ordered to certify the average bonus paid to PSU assistant football coaches for the Ticket City Bowl. On December 15, 2016, Defendant certified that average bonus was \$15,000. Therefore, an outstanding issue is whether \$15,000 is to be added to the economic loss section of the Whistleblower Law award.

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Clearly, 43 P.S. §1425<sup>2</sup> vests a great deal of discretion in the court. First, the court may, but need not, award all or a portion of the costs of litigation. Further, the attorneys fees which a court may award must be “reasonable”. And finally, the court’s decision as to whether or not to award all or a portion of the costs of litigation, including reasonable attorneys fees, rests on a court determination “that the award is appropriate”.

Thus, the court should make a determination that attorney fees are reasonable and further that an award of such attorney fees is appropriate.

In Defendant’s Objections, Answer and New Matter to Plaintiff’s Petition for Costs of Litigation, filed January 11, 2017, and Defendant’s “Continuing Objections” filed on or about February 8, 2017, Defendant maintains that a contingency fee may not be awarded under the Whistleblower Act, but that the only attorney fees that may be awarded are attorney fees calculated under the lodestar methodology.

First, to be sure, there is no precedent that the lodestar methodology is the only one that may be utilized under the Pennsylvania Whistleblower Law.

Defendant relies chiefly on the case of Krebs v. United Refining Company of Pennsylvania, 893 A.2d 776 (2006), a case concerning awarding attorney fees under the Storage Tank and Spill Prevention Act (“STSPA”). 35 P.S. §6021.1305. That statute provided that:

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<sup>2</sup> By the Act of July 2, 2014, PL 824, No. 87, the final sentence of 43 P.S. §1425 was amended to read “A court shall also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the complainant prevails in a civil action.”

“The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate . . . .”

35 P.S. §6021.1305(f).

In Krebs, the Plaintiffs were awarded \$37,000 for loss of enjoyment and use of their land, discomfort and annoyance. 893 A.2d at 781. Plaintiff filed a motion for attorneys’ fees of \$275,378 and costs of \$13,345.79, (Id.), more than 10 times the amount awarded by the jury. The Defendant argued that any attorney fees awarded should be limited to the percentage in the contingency fee agreement. The Krebs court did note that Superior Court precedent has

“held that, as a **general rule**, the method of determining reasonable attorneys’ fees under fee-shifting provisions in Pennsylvania is the lodestar approach, whereby the lodestar figure may be adjusted, in the discretion of the trial court; in light of the degree of success, the potential public benefit achieved, and the potential inadequacy of the private fee arrangement.”

[citation omitted] 893 A.2d at 790. (emphasis added).

Thus, Krebs refers to a “general rule”, (based on non-Whistleblower Law precedent) but, the court provided specific guidance to determine the amount of attorney fees to be awarded. Krebs, began with the acknowledgment that the STSPA “is a remedial statute and, as such, requires that any ambiguous language contained therein be construed ‘liberally’ in order to effectuate the legislative intent”. 893 A.2d at 787. When construing the

ambiguous provision of the STSPA concerning attorneys' fees, the Krebs Court held that

“the construction of that provision must be given ‘teeth to realize the goals of the General Assembly.’”

893 A.2d at 787 (citation omitted). So too, the Whistleblower Law is “chiefly a remedial measure” (O’Rourke v. Commonwealth, 778 A.2d 1194, 1202 (Pa. 2001), which also should be construed liberally to effectuate legislative intent. So too should the Whistleblower’s Law’s attorney fee provision be construed to be “given teeth” to realize the goals of the General Assembly.

The Krebs Court then went on to set forth a non-exhaustive list of 8 principles to be applied in determining reasonable and appropriate attorney fees.

The third principle set forth in Krebs was that:

“a determination of the appropriateness of an award of attorneys’ fees under Section 1305(f) should **not be based** on the **general standards** applicable to all litigation, **but** should be based, under the **circumstances** of the **particular case**, on whether an award of fees and costs would promote the purposes of the STSPA.”

893 A.2d at 791. (emphasis added).

The eighth principle set forth in Krebs was that

“a **contingency agreement** may be viewed as a **factor** in the trial court’s **determination** of the *amount* of attorneys’ fees awarded under 1305(f), but it **cannot serve** as an **artificial ceiling** based on the percentage agreed upon between attorney and client.”

893 A.2d at 791. (italics in original) (bold face added).

In Signora v. Liberty Travel, Inc., 886 A.2d 284 (Pa. Super 2001) dealing with the Minimum Wage Act, the plaintiffs were awarded \$413,571.09. 886 A.2d at 289. The trial court, using the lodestar methodology, applied a contingency multiplier of 1.5, producing an attorney fee of \$864,067, 886 A.2d at 292, more than double the amount of overtime pay with interest awarded in the case. The Signora court held that “the prevailing party’s **degree of success is the critical consideration** in determining an appropriate fee award. (citation omitted). (886 A.2d at 293) (emphasis added).

### **Conclusion**

Thus, there is no precedent barring an award of the amount set forth in a contingent fee agreement under the Whistleblower Law.

Interpreting the Whistleblower Law liberally certainly supports a contingency fee award, especially under the circumstances of this particular case.<sup>3</sup> As Krebs held, “a contingency agreement may be viewed as a factor in the trial court’s determination of the *amount* of attorneys fees awarded . . .” 893 A.2d at 791. (italics in original). The degree of success in the Whistleblower Count, which Signora held is “the critical consideration in

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<sup>3</sup> Among those circumstances are “lengthy and unending defense challenges . . .” (Signora v. Liberty Travel Inc., 886 A.2d at 293).

determining an appropriate fee award,” 893 A.2d at 791, supports an award of the amount of one-third the contingency fee.

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