



IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA

MICHAEL J. MCQUEARY,
Plaintiff

v.

THE PENNSYLVANIA STATE
UNIVERSITY,
Defendant

Docket No. 2012-1804

(Judge Gavin)

DEBRA C. IMMEL
PROTHONOTARY
CENTRE COUNTY, PA

2017 FEB -1 AM 9:41

FILED FOR RECORD

**Plaintiff's Answer to Defendant's Objection
to the Court's *Sua Sponte* Granting to
Plaintiff of Additional Time to Submit
Contemporaneous Timesheets**

The Plaintiff, Michael J. McQueary, by his attorneys Strokoff & Cowden, P.C. and William T. Fleming, hereby answers Defendant's Objection to the Court's *Sua Sponte* Granting to Plaintiff of Additional Time to Submit Contemporaneous Time Sheets:

1. On December 14, 2016, the Plaintiff filed a Petition for Costs of Litigation (Petition for Costs).

2. Plaintiff's Petition for Costs seeks an award of \$1,658,016 as reasonable attorney's fees, one-third of the amount awarded in the Whistleblower Order of November 30, 2016, which one-third amount was agreed to by Contingent Fee Agreement between the Plaintiff and counsel dated August 16, 2012.

3. The Petition for Costs does not seek the payment of legal fees to be based on the lodestar methodology.

4. There is no binding precedent in Pennsylvania that the determination of a reasonable fee under the Whistleblower Law must be on the basis of the lodestar methodology.

5. In support of Plaintiff's request for an award of counsel fees equal to one-third of the amount awarded under the Whistleblower Law, Plaintiff's Petition for Costs outlined the vigorous and time consuming, if not dilatory, defense mounted by PSU in this litigation. Paragraphs 29 and 30 of the Petition set forth the actual amount of professional time spent in representing the Plaintiff in this matter, and was averred to support the reasonableness of the contingency fee, not to serve as a factor in a lodestar calculation.

6. On or about January 11, 2017, Defendant filed its Objections, Answer and New Matter to Plaintiff's Petition for Costs of Litigation, (Defendant's Objections to Costs), although because the Defendant's Objections and Costs was sent by regular mail, Plaintiff's counsel Strokoff did not have an opportunity to read these Objections until January 16, 2017.

7. Within Defendant's Objections to Costs, the Defendant provides no authority that reasonable attorney's fees under the Whistleblower Law must be determined by the lodestar methodology. In paragraph 3 of Defendant's Objections to Costs, the Defendant alleges that in the case of Zenak v. Police Athletic League of Philadelphia, 132 A.3d 541 (Pa. Super 2016): "The Superior Court sanctioned this method – which used the lodestar – to calculate a reasonable attorney fee under 43 Pa.C.S. Section 1425." However, there is nothing in the Zenak decision which mentions the lodestar methodology, much less approves the methodology for Whistleblower Law purposes. Indeed, the Commonwealth Court in Zenak never reached the issue

of an award of attorney's fees, having remanded the case in the trial court because the Whistleblower action in that case was tried before a jury.

8. Defendant's Objections to Costs cites authority that attorney's fees under other, different, and inapposite, statutes may be decided using the lodestar methodology. One of the cases cited in Defendant's Objections to Costs, Signora v. Liberty Travel, Inc., 886 A.2d 284 (Pa. Super 2005), held that a trial court could award attorney's fees **in excess of** an amount agreed to in a **contingency fee agreement**. In the instant case, the Plaintiff is not asking for an award of counsel fees in excess of the contingency fee agreed upon amount.

9. By letter from Plaintiff's Counsel Strokoff to Defense Counsel Conrad, emailed on January 18, 2017, at 1:43 p.m., Plaintiff's counsel offered to provide Defense Counsel with contemporaneous records of the professional time spent in this matter, as well as other documents pertaining to some other matters raised in Defendant's Objections to Costs. Accordingly, Plaintiff's counsel had already undertaken to provide Defense Counsel with documentation Defendant claimed it needed in Defendant's Objections more than 3 hours before the Court's email of 5:08 p.m. on January 18, 2017.

10. Plaintiff submits that had Plaintiff's Counsel not offered to provide time records (and other documents) to the Defendant, and had the Court not sent its email of January 18, 2017, then the Defendant would have complained that it didn't have these time records in advance of the (to be scheduled) hearing on Plaintiff's Petition for Costs.

11. On January 10, 2017, the Court sent an email to Defense Counsel to make sure that Defendant would be filing a timely objection to Plaintiff's Petition for Costs, if it had any. Plaintiff's Counsel did not object to that case management communication, much less that it was as an abuse of discretion, error of law or bias in favor of PSU.

12. Even if the Petition for Costs sought attorney's fee award to be determined by the lodestar methodology, and it did not, the Court's case management email of January 18, 2017, at 5:08 p.m. would not represent an abuse of discretion or error of law.

WHEREFORE, Defendant's Objection to the Court's Sua Sponte Granting to Plaintiff of Additional Time to Submit Contemporaneous Time Sheets is without merit.

Respectfully submitted,

STROKOFF & COWDEN, P.C.

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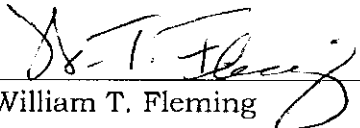
CERTIFICATE OF SERVICE

I, the undersigned, certify that I have this day served a true and correct copy of the foregoing by first-class mail, postage prepaid, and email, on the following person(s):

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Dated: 2/1/17

By: 
William T. Fleming