



00001QK2G

CCGPRO 201404

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

MICHAEL J. MCQUEARY
Plaintiff

vs.

THE PENNSYLVANIA STATE
UNIVERSITY,
Defendant

: Docket No. 2012-1804
:
: Type of Case: Whistleblower/Defamation/
: Misrepresentation
:
: Type of Pleading: Motion to Compel
: Production of Documents
:
: Filed on Behalf of: Plaintiff
:
: Counsel of Record for this Party:
: Elliot A. Strokovff
: PA I.D. Number: 16677
: W. Tim Fleming
: PA I.D. Number: 39563

DEBRA C. INSEL
PROthonARY
CENTRE COUNTY, PA

2014 DEC -4 PM 12:20

MICHAEL J. MCQUEARY
Plaintiff

vs.

**THE PENNSYLVANIA STATE
UNIVERSITY,**
Defendant

: IN THE COURT OF COMMON PLEAS
: CENTRE COUNTY, PENNSYLVANIA
:
: NO. 2012-1804
:
: CIVIL ACTION
:
: JURY TRIAL DEMANDED

2014 DEC -4 PM 12:20
DEBRA C. JIMMEL
PROTHONOTARY
CENTRE COUNTY, PA

**PLAINTIFF'S MOTION TO COMPEL
DEFENDANT'S PRODUCTION OF DOCUMENTS**

Plaintiff, Michael J. McQueary, by and through his counsel Strokkoff & Cowden, P.C., and Fleming Law Office hereby moves this Court to enter an order pursuant to Pa. R.C.P. 4019(a)(1)(vii) directing Defendant, the Pennsylvania State University, to produce documents requested in Plaintiff's Request for Production of Documents (First Set) in the above-captioned matter. In support of its motion, Plaintiff avers as follows:

1. Plaintiff filed a Complaint in the above captioned matter on October 2, 2012, averring Counts in: (1) Whistleblower; (2) Defamation; and (3) Misrepresentation.
2. The parties have been engaging in discovery and have entered into a Confidentiality Agreement concerning said discovery, Exhibit A filed under seal with this Motion. Pursuant to said Confidentiality Agreement, the Exhibits to this Motion are filed under seal.
3. Plaintiff and Defendant have had a number of disputes concerning said discovery and, despite numerous conferences and communications, including a number of supplemental responses filed by the

Defendant, are at impasse with respect to some of the Defendant's claims to Attorney/Client and Attorney Work Product discovery privileges.

Document Request No. 4

4. Document Request No. 4 in the Plaintiff's Request for Production of Documents (First Set) is as follows:

"Any and all documents relating to the writing and publication of Exhibit B to the Complaint, including all prior drafts thereof, documents transmitting the statement to, or placing the statement on, Penn State Live, and any and all documents recording or compiling the times or instances that the statement from President Spanier 'was accessed, viewed read and/or downloaded, through the present date.'"

5. Defendant has filed a number of responses to Plaintiff's Request for Production of Documents (First Set), the most recent of which is Defendant's Third Supplemental Written Response to Plaintiff's First Request for Production of Documents (hereafter Third Supplemental Response), a true and correct copy of which is Exhibit B filed under seal with this Motion.

6. In its response to Document Request No. 4, the Defendant asserts the Attorney/Client and Work Product privileges for more than a dozen emails from November 1, 2011-November 3, 2011 [PSU000341-000352] between the then General Counsel of the Defendant and the then attorneys for two Penn State employees, regarding the draft of the statement which was published as Exhibit B to the Complaint. See Privilege Log accompanying Defendant's Third Supplemental Response (hereafter Privilege Log), filed under seal.

7. Also in its response to Document Request No. 4, Defendant asserts the Attorney/Client and Work Product privileges for 3 emails on November 5, 2011 between a PSU public information employee and another Penn State employee, because a cc of each email was sent to three individuals, including the then General Counsel of PSU, regarding the draft statement which was published Exhibit B to the Complaint. [PSU000353-000355].

8. Emails between and among Defendant's General Counsel and two attorneys representing two of Defendant's employees planning or coordinating public statements are not exempt from discovery because of Attorney/Client or Work Product privileges. Such communications were not between attorney and client made for the purpose of obtaining or providing professional legal advice. Gillard v. AIG Insurance, 15 A.3d 44, 59 (Sup. 2011). Similarly, a "cc" of an email to an in-house counsel is not entitled to Attorney/Client privilege unless the cc was for the express purpose of obtaining legal advice, which does not appear to have been the case. Nor are such emails entitled to the limitation on the discovery of an attorney's work product under Pa.R.C.P. 4003.3.

Document Request No. 11

9. Document Request No. 11 in the Plaintiff's Request for Production of Documents (First Set) is as follows:

"Any and all documents relating to the determination that the Plaintiff would separate or be separated from his employment by the University at the end of June 2012."

10. In its response to Document Request No. 11, the Defendant asserts the Attorney/Client and Work Product privileges to emails on February 13, 2012 between an individual who the PSU engaged as a media consultant (See p. 33, Erickson Deposition, Exhibit C filed under seal with this Motion), who also happens to be an attorney, his non-attorney colleague and various PSU employees and board members concerning Plaintiff's contract. [PSU000407-000409].

11. Also in its response to Document Request No. 11, Defendant asserts Attorney/Client and Work Product privileges for the emails between the non-attorney colleague of the media consultant and various employees of the Defendant. [PSU000409-000415], and a number of other emails because a cc was sent to one or more attorneys for Defendant. [PSU000416-000425].

12. A communication between an individual and a media consultant is not entitled to the protection of Attorney/Client privilege merely because the media consultant may also happen to be an attorney. To properly claim the privilege the communication must be between attorney and client for the purpose of securing or providing professional legal advice (Gillard, supra.), not public relations advice. Nor are communications by and to a non-lawyer colleague of the media consultant concerning media advice entitled to Attorney/Client or Work Product privileges.

WHEREFORE, Plaintiff requests that this Court dismiss the foregoing objections of Defendant to Plaintiff's Request for Production and direct that Defendant provide to the Plaintiff the documents, unredacted, for

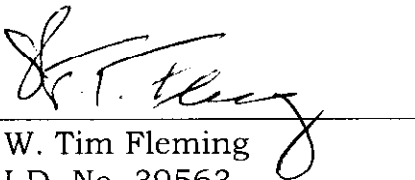
which it claims Attorney/Client and Work Product privileges in response to Plaintiff's 4th and 11th Request for Production of Documents (First Set) within 20 days or suffer appropriate sanctions upon further application to this court.

Respectfully submitted,

By: 

Elliot A. Strokoff
I.D. No. 16677
Strokoff & Cowden, P.C.
132 State Street
Harrisburg, PA 17101
(717) 233-5353

DATE: 12/4/14

By: 

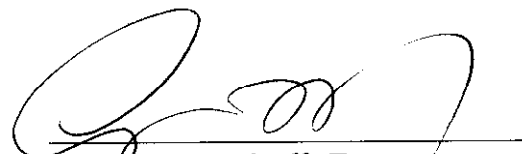
W. Tim Fleming
I.D. No. 39563
Fleming Law Office
204 E. Calder Way, Suite 304
State College, PA 16801
(814) 278-5280

ATTORNEY CERTIFICATION OF GOOD FAITH

The undersigned counsel for Plaintiff hereby certifies and attests that Plaintiff's counsel has communicated with opposing counsel as described in the foregoing motion regarding the specific discovery disputes at issue in an effort to resolve such disputes and, further, that despite counsel's good faith attempts to resolve the disputes, he has been unable to do so.

CERTIFIED TO THE COURT BY:

Dated: 12/3/14



Elliot A. Strokoff, Esq.
Attorney for Plaintiff

MICHAEL J. MCQUEARY : IN THE COURT OF COMMON PLEAS
Plaintiff : CENTRE COUNTY, PENNSYLVANIA
: vs. : NO. 2012-1804
: **THE PENNSYLVANIA STATE** : CIVIL ACTION
UNIVERSITY, :
Defendant : JURY TRIAL DEMANDED

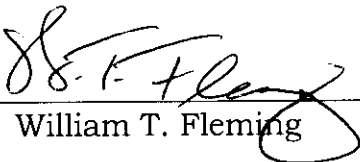
CERTIFICATE OF SERVICE

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

conradn@whiteandwilliams.com

Nancy Conrad, Esq.
White and Williams LLP
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034

Dated: 12/4/14

By: 
William T. Fleming