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)

Plaintiff's Trial Brief
on the
Whistleblower Law

I. Pennsylvania's Whistleblower Law provides protection from adverse actions in addition to termination of employment. 43 P.S. §1423(a) provides:

> "No employer may discharge, threaten or **otherwise discriminate or retaliate** against an employee regarding the employee's compensation, **terms**, **conditions**, **location** or **privileges of employment** because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste." (emphasis added).

43 P.S. §1423(b) contains an identical prohibition "because the employee is requested by an appropriate authority to participate in an investigation, hearing or inquiry held by an appropriate authority or in a court action."

For example, in O'Rourke v. Commonwealth, 778 A.2d 1194 (Pa. 2001), our Supreme Court found that assigning the Plaintiff less desirable work was prohibited by the Whistleblower Law. Thus, the Whistleblower Law provides protection of terms, conditions, location and/or privileges of employment, as well as from discharge.

II. The Whistleblower Law can be violated even if there is no retaliatory motive on the part of the employer.

43 P.S. §1424(c) provides a defense to a whistleblower claim if "the defendant proves by a preponderance of the evidence that the action by the employer occurred for **separate and legitimate reasons**, which are not merely pretextual." (emphasis added).

The primary question presented in O'Rouke was "whether an adverse personnel action taken against an employee of a public body as a direct result of his filing a good faith report of wrongdoing or waste violates the Whistleblower Law, although the employer did not harbor a retaliatory motive." 778 A.2d at 1196. To resolve this issue, the Supreme Court interpreted the meaning of "separate and legitimate reasons, which are not merely pretextual". In O'Rourke, the plaintiff had submitted a report of wrongdoing in the culinary department at SCI Dallas. As a consequence of that complaint, the department removed the plaintiff from kitchen duties and from the acting supervisor's list (which resulted in lost opportunities to perform duties for extra compensation and for opportunities for promotion), but "such measures were not motivated by a desire to exact retribution, but were carried out to reduce the heightened potential for conflict in the culinary department following O'Rourke's April 16, 1996 report and the ensuing investigation . . .". 778 A.2d at 1198.

Even though there was no retaliatory, vengeful motivation, nevertheless the Supreme Court held that such action was not separate from

the report of wrongdoing which Mr. O'Rouke filed. Thus, the Supreme Court held that

> "adopting an interpretation of the phrase 'separate and legitimate' wherein the word 'separate' is addressed solely to the subjective motivation of the employer would fail to effectuate the legislative intent underlying the Whistleblower Law and run contrary to the precept that remedial statutes are to be liberally construed to affect their objects."

778 A.2d at 1203. The Supreme Court went on to hold that

> "to 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."

778 A.2d at 1204.

Because O'Rourke would not have been removed from the more desirable work positions had he not filed his report of wrongdoing, the Supreme Court held that the plaintiff was entitled to a judgment. 778 A.2d at 1205.

III. Whistleblower damages include front pay and compensation for mental suffering, anguish, humiliation and reputation damage.

43 P.S. §1425 provides that:

> "A court, in rendering a judgment in an action brought under this act, 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 may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees[1] and

[1] July 2, 2014, this subsection was amended to provide that "a court **shall** also award the complainant the costs of litigation, including reasonable attorney fees and witness fees, **if the complainant prevails in the civil action.**" (bold indicates amendment).

> witness fees, if the court determines that the award is appropriate." (emphasis added).

From the clear wording of the initial sentence in Section 1425, a remedy is not limited to just the payment of back wages, but also can include, as the court considers appropriate, "actual damages or any combination of these remedies."

Generally:

> "[M]onetary damages fall into three basic categories: compensatory, or actual, damages, which include pecuniary losses, as well as compensation for physical and mental suffering; nominal damages, which are a trivial amount awarded for the infraction of a legal right, where the extent of the loss is not shown, or where the right is one not dependent upon the loss or damage; and punitive damages, which are awarded to punish or deter especially egregious conduct."

Sites v. Nationstar Mortgage LLC, 646 F.Supp. 2d 699, 713 (M.D. Pa. 2009) (internal quotations and citations omitted).

In a case interpreting the Whistleblower Law, Rankin v. City of Philadelphia, 963 F.Supp. 463 (E.D. Pa. 1997), the court noted that the legislature "chose to use the phrase 'actual damages', which generally connotes compensatory damages." 963 F.Supp. at 478. (Accord, Palazzolo v. Damsker, Bucks County, et al., 2011 WL2601536 (E.D. Pa. 2011) - that the General Assembly "used the phrase 'actual damages' which, as the Rankin decision points out, generally denotes compensatory damages.) "Actual" damages are synonymous with compensatory damages. Weider v. Hoffman, et al., 238 F.Supp. 437, 445, (M.D. Pa. 1965).

In a Whistleblower Case decided last week, Senior Commonwealth Court Judge Freedman concluded in an unreported decision, "that 'actual damages' must include compensation for the mental anguish, humiliation, and reputation damages that Bailets suffered as a result of the termination of his employment." (Slip Opinion, p. 22, Bailets v. PA Turnpike Commission) (attached hereto). In Bailets, Judge Freedman also awarded prospective wage loss as an element of actual damages.

Accordingly, under the Whistleblower Law, the court may award back and front pay, damages for mental anguish, humiliation, and suffering, as well as costs of litigation, including reasonable counsel fees.

Respectfully submitted,

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ralph M. Bailets, Petitioner v. Pennsylvania Turnpike Commission, Anthony Q. Maun, (Director of Accounting), and Nikolaus H. Grieshaber, (Chief Financial Officer), Respondents	No. 265 M.D. 2009

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: October 6, 2016

This opinion is written in support of this court's June 29, 2016, order entering a verdict in favor of Ralph M. Bailets and against the Pennsylvania Turnpike Commission (Commission) in response to the complaint filed by Bailets, seeking relief under the Whistleblower Law (Law),[1] 43 P.S. §§1421-1428. We concluded that Bailets met his burden of proving that he was discharged from the Commission in retaliation for reporting instances of wrongdoing and waste to Commission employees Anthony Q. Maun and Nikolaus H. Grieshaber.[2]

[1] Act of December 12, 1986, P.L. 1559.

[2] On May 6, 2016, the parties filed a stipulation of discontinuance as to Maun and Grieshaber.

Section 3(a) of the Law, 43 P.S. §1423(a), provides that an employer may not discharge a public employee for making a good faith report of wrongdoing or waste.[3] Section 4 of the "Law provides a civil cause of action to employees" of a public body for violations of the Law. *Evans v. Thomas Jefferson University*, 81 A.3d 1062, 1064 (Pa. Cmwlth. 2013). To prove a *prima facie* case of reprisal, an employee must show by a preponderance of the evidence, that prior to the alleged retaliation, he made a good faith report of wrongdoing or waste. *O'Rourke v. Department of Corrections*, 778 A.2d 1194, 1200 (Pa. 2001). Here, the evidence establishes that Bailets has met his initial burden.

Based on the testimony and evidence presented during four days of non-jury trial, this court finds the following facts. Bailets worked for the Commission from 1998 to November 20, 2008. (Ex. 3.) For the majority of this time, Bailets held the position of manager of financial reporting and systems, which required him to ensure that financial reports were produced in a timely and accurate fashion. (N.T., 5/23/16, at 53.) His duties included reviewing certain requests for proposals (RFP). (*Id.* at 63.) In addition to his regular job, Bailets had also performed the duties of the acting assistant secretary treasurer. (*Id.* at 154-56.) The Commission issued an RFP seeking bids for the creation of a computerized financial reporting system. The Commission awarded Ciber, Inc. (Ciber) the initial contract (first contract) for $3.4 million.

[3] Section 2 of the Law defines "waste" as "conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from Commonwealth" sources. 43 P.S. §1422. It defines "wrongdoing" as a "violation which is not of a merely technical or minimal nature of a Federal or State statute or regulation . . . or of a code of conduct or ethics designed to protect the interest of the public or the employer." *Id.*

Subsequently, the Commission issued an RFP seeking bids for a contract to implement the computerized financial reporting system (second contract). Bailets assisted Maun in evaluating the proposals. (N.T., 5/25/16, at 548.) In December 2004, Bailets informed his supervisor, Maun, the Commission's director of accounting, that it would be improper to permit Ciber to bid on the second contract because Ciber had been awarded the first contract and, therefore, had an unfair advantage because it had possession and access to documents that other bidders would not. (N.T., 5/23/16, at 197-98; N.T., 5/25/16, at 543, 547.) Maun told Bailets not to make waves with respect to Ciber and that his job could be in jeopardy as a result.[4] (N.T., 5/23/16, at 66, 191; N.T., 5/24/16, at 222.) Nevertheless, Maun told Bailets that he would talk to then Chief Financial Officer (CFO) Blair Fishburn[5] about Bailets' concern to "get his thoughts and direction." (N.T., 5/25/16, at 547; N.T., 5/23/16, at 210.) Thereafter, Maun raised the matter with CFO Fishburn. (N.T. 5/25/16, at 547.) Maun also told Bailets that he would make the group evaluating the proposals aware of Bailets' concerns. (N.T., 5/23/16, at 211.) The evaluation group included, among others, Fishburn, Maun, and Grieshaber.[6] Their evaluation report of the bidders for the second contract questioned whether Ciber's previous relationship with the Commission created a conflict of interest or provided Ciber an unfair advantage. (Ex. 119 at 7.)

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[4] Maun did not deny making the statements; instead, he testified that he did not recall making them. (N.T., 5/25/16, at 626-29.)

[5] Fishburn was the Commission's CFO until June 2008, when he was replaced by Grieshaber. (N.T., 5/23/16, at 210; N.T., 5/26/16, at 822.)

[6] At that time, Grieshaber was the director of treasury management.

In February 2006, the Commission awarded Ciber the second contract for $58.3 million.[7] (Ex. 61.) Bailets was directed to learn how to configure the new system, how the new system worked, and how to maintain the system after the Ciber consultants were gone. (N.T., 5/23/16, at 15.) This would be accomplished through knowledge transfer[8] from Ciber's consultants to Bailets. (*Id.*)

Throughout the implementation of the new system, there was high consultant turnover and excessive absenteeism, which caused rework and delays. (*Id.* at 16.) Ciber did not have the proper consultants on-site, and knowledge transfer was not occurring. (*Id.*) Bailets regularly informed Maun of Ciber's deficiencies verbally, at project team meetings, and via emails. (*Id.* at 17; N.T., 5/25/16, at 556.) Whenever Bailets raised issues about Ciber, Maun "would move the issues forward," routinely raising them to the CFO, other management officials, and Ciber officials. (N.T., 5/25/16, at 559-60.)

On March 1, 2007, Bailets sent Maun an email asking him to make management aware that, because of Ciber's shortcomings, the finance team was behind schedule and that knowledge transfer from Ciber to Bailets' team was not forthcoming. (Exs. 9, 19.) Maun responded, thanking Bailets for the update and telling Bailets that he has been keeping CFO Fishburn in the loop. (*Id.*) In a follow-

[7] In its lawsuit against Ciber filed in 2012, the Commission acknowledged that it entered this contract knowing that Ciber had presented "the highest offer by far." (Ex. 36EE, ¶226.)

[8] Bailets defined "knowledge transfer" as the act of "imparting the knowledge on a technical resource to understanding how it works and how to fix it when it does not work. (N.T., 5/23/16, at 68.) He further explained that the "tracking of the deliverable of knowledge transfer was supposed to be measured and marked with . . . a capability transfer form," which was a plan for each Commission employee so that they would know "what skills they were to be obtaining, and it would measure them . . . on a quarterly basis how they were [progressing] in assimilating those skills." (*Id.* at 77.)

up email on March 2, 2007, Bailets told Maun "One more thing . . . not only should Blair [Fishburn] and senior management be aware that [Commission] resources are not part of the problem, we are solving the problem that was created by our $60M vendor [Ciber]." (*Id.*)

On March 6, 2007, Bailets sent an email to Maun stating that Ciber needed to get the right people on site, and that the Ciber team had been understaffed for months and was working in areas in which they had little expertise. (Ex. 11.) Bailets sought assurance that "[Ciber] will be delivering what was promised." (*Id.*) On March 8, 2007, Bailets sent Maun a follow-up email, explaining that he encountered problems due to the lack of configuration in the module and that "lack of Ciber resources was the problem." (Ex. 12.) Bailets reiterated that knowledge transfer was not occurring effectively and efficiently. (*Id.*)

On March 16, 2007, Bailets sent Maun an email stating that his own work was on hold pending configuration from a Ciber consultant. (Ex. 13.) Bailets asked, ""When will some knowledge transfer occur?' We are all learning on our own over 90% of the time." (*Id.*) On March 19, 2007, Bailets sent Maun an email stating that Ciber consultants were absent and he did not know if, or when, they would come to work that week. (*Id.*) On March 22, 2007, Bailets sent Maun an email suggesting that an upcoming status meeting should include a discussion about requesting a formal plan regarding when and how Ciber will effect the knowledge transfer. (Ex. 72.) In another email to Maun on March 22, 2007, Bailets complained about Ciber's lack of preparation on a business review demonstration. (Ex. 14; N.T., 5/23/16, at 73.) On May 4, 2007, Bailets sent Maun an email voicing his concern about Ciber's

lack of a plan for knowledge transfer and noting that Ciber consultants were nonresponsive when questioned about knowledge transfer. (Ex. 16.)

On June 29, 2007, Bailets sent Maun an email reporting his observations after a team meeting. (Ex. 8.) Bailets stated that knowledge transfer "remains a hit or miss deliverable," (*id.*) meaning that Ciber had no plan regarding how the knowledge transfer was to occur. (N.T., 5/23/16, at 71.) Bailets again complained about Ciber's staffing inadequacies, including absenteeism, vacant positions, and consultants unable to perform their jobs.[9] (Ex. 8)

On July 27, 2007, Bailets sent Maun an email stating, "I don't want to be the one *blowing the whistle* on this but . . . ." (Ex. 20 (emphasis added).) Bailets testified that he said that he did not want to be the one blowing the whistle because "Mr. Maun had already indicated on many, many occasions that I shouldn't be messing with Ciber and I shouldn't be bringing up problems." (N.T., 5/23/16, at 76.) In the email, Bailets then informed Maun that testing had been performed by two Ciber consultants and that best practices required that testing be performed by at least one client source to avoid a conflict of interest. (*Id.*) Maun responded that he discussed the issue with Randy Mellinger[10] "*but I didn't give you up.*" (*Id.*) (emphasis added.) Maun acknowledged that Bailets' concern was a "big deal" and that the general rule was to always have a Commission employee present. (N.T.,

[9] Bailets testified that he reported Ciber's waste and wrongdoing because he had a fiduciary duty to do so to ensure that the Commission was getting what it had paid for from Ciber. (N.T., 5/23/16, at 191.) Additionally, Bailets explained that he did not want to appear complicit in Ciber's wrongdoing by his silence. (*Id.*)

[10] Mellinger was a manager of the internal audit department. (N.T., 5/25/16, at 644.)

5/25/16, at 630, 644); yet, Maun did not follow up on the issue when he did not get a response from Mellinger. (*Id.* at 645.)

On October 3, 2007, Bailets sent Maun an email stating that knowledge transfer from Ciber was still not forthcoming, and that "in the future if a costly maintenance contract is required from a third party vendor it will not be due to the ineffectiveness of assigned [Commission] resources. It will be due to the lack of consultant performance in delivering any meaningful knowledge transfer." (Ex. 17.)

On June 13, 2008, Dennis Miller, Ciber's vice-president, sent an email to George Hatalowich, the Commission's Chief Operating Officer (COO), stating: "For my own selfish reasons I want Tony [Maun] to know that I am speaking for you and Joe [Brimmeier][11] when it comes to his project." Miller explained that, since the computer system had been implemented in the finance department on March 3, 2008, "you and the Commissioners have not seen a single financial report . . . I am actively being proactive to head-off any complaints by commissioners that might question why in the world a '58 million dollar system can't produce reports in a timely manner.' Of course I know they have not asked me for them, I am thinking farther ahead then [sic] my nose, obviously a foreign concept to Tony [Maun]." (Ex. 32.) Miller further stated "I fully realize we are in a delicate position with Nik [Grieshaber] just taking over and we cannot afford to push Tony [Maun] out of the organization." (*Id.*)

[11] Brimmeier was the Commission's Chief Executive Officer (CEO). (N.T., 5/26/16, at 764.)

On August 1, 2008, pursuant to a March 2008 RFP, the Commission entered into a $19.7 million contract with Ciber for knowledge transfer (third contract). (Ex. 36NN.) Ten months earlier, Bailets had warned Maun of the inevitability of a third contract due to Ciber's lack of "performance in delivering any meaningful knowledge transfer." (Ex. 17.)

Bailets not only reported Ciber's wrongdoing to Maun, he also made Grieshaber aware of the problems with Ciber. Bailets testified that, before Grieshaber became CFO in June of 2008, they discussed Ciber on a weekly basis. (N.T., 5/23/16, at 81.) Bailets reported the conflict of interest issue to Grieshaber in approximately January 2005. (N.T., 5/24/16, at 220.) At that time, Grieshaber was the director of treasury management and Bailets' co-worker. (N.T., 5/23/16, at 80, 186; N.T., 5/25/16, at 671-72.) During those conversations, Grieshaber told Bailets to tread lightly (N.T., 5/23/16, at 81-82) and that when he, Grieshaber, complained about Ciber, Grieshaber had been rebuked. (*Id.* at 82.)

In June 2008, Grieshaber replaced Fishburn as CFO. (N.T., 5/25/16, at 682). After Grieshaber became CFO, Bailets continued to complain about Ciber's performance to his immediate supervisor, Maun, who now reported directly to Grieshaber. Bailets testified that, after Grieshaber became CFO, their previously friendly relationship changed. (*Id.* at 52.) Grieshaber's attitude and demeanor towards Bailets changed; he stopped engaging in conversations with Bailets. (*Id.* at 120.)

On June 17, 2008, CFO Grieshaber sent an email to COO Hatalowich, stating that "[w]hile I have a lot of misgivings about Ralph Bailets I think he may be helpful for Purchasing on a temporary basis *as long as we keep a short leash on him.*" (Ex. 137 (emphasis added).) Two days later, Hatalowich forwarded Grieshaber's email to Ciber's vice president Miller, who later that same day responded that he supported the moves that Grieshaber described, i.e., moving Bailets to the purchasing department. (Ex. 137.)

On or about July 2, 2008, Grieshaber moved Bailets to the purchasing department. (Ex. 84; N.T., 5/25/16, at 684.) Grieshaber made the decision to move Bailets without input from Maun, Bailets' immediate supervisor. (N.T., 5/25/16, at 575, 634.) However, he did have input from COO Hatalowich and Ciber's vice president Miller. (Ex. 137.)

Additionally, on or about July 11, 2008, without prior notice or explanation to Bailets, CFO Grieshaber removed Bailets from his position as acting assistant secretary treasurer, which he had held for 10 years, without additional compensation. (Ex. 33.) However, the position, which involved preparation for, and participation at, Commission meetings, had given Bailets some status within the organization, and his service in the position was reflected on his performance evaluations. (N.T., 5/23/16, at 156.) Again, Grieshaber made this decision without consulting Maun, Bailets' immediate supervisor, but with the concurrence of COO Hatalowich and CEO Brimmeier. (*Id.* at 153-57; N.T. 5/25/16 at 692.)

In early November 2008, CEO Brimmeier announced, in response to the "economic realities of 2008," a voluntary departure program providing incentives to staff interested in leaving their employment and asked each department head to reduce operating expenses. (Ex. 129.) In an email to employees on November 14, 2008, Brimmeier stated that he hoped that the program, along with other cost-saving measures,[12] would eliminate or minimize the need for an involuntary reduction in force. He chastised employees for "gossiping and spreading rumors," adding that management was considering constructive ideas of how the Commission could save money. (*Id.*)

On November 20, 2008, a member of the human resources department handed Bailets a letter, informing him that his position as manager of financial reporting and systems was "being eliminated due to budgetary reasons." (Ex. 35.) Bailets was then escorted out of the building with his belongings in a box, in a manner similar to the way the Commission dealt with employees who had been terminated for theft or violent behavior. (N.T., 5/23/16, at 190; N.T., 5/26/16, at 836, 874.)

The Commission's decision to terminate Bailets' employment was based on CFO Grieshaber's recommendation. (N.T., 5/26/16, at 823.) Of the 15 employees that the Commission terminated, Grieshaber personally recommended two. (N.T., 5/25/16, at 638, 732.) At that time, Grieshaber oversaw six different departments, comprising 75 employees. (*Id.* at 672-73, 727.) Yet, the only two employees he

[12] Bailets had previously raised the following two additional financial concerns to Maun: (1) the excessive number of Commission investment fund managers and (2) the E-Z pass commercial volume discount program that small companies were taking advantage of, by bundling together to obtain the 20% discount and then reselling the passes for a profit. (N.T., 5/23/16, at 175-80.)

recommended for termination were Bailets and another employee who also reported to Maun. (*Id.* at 583, 614.)

Although Maun was director of the department and Bailets' immediate supervisor, Grieshaber decided to fire Bailets without consulting Maun. (*Id.* at 583, 614.) The failure to consult Maun was particularly disturbing because CEO Brimmeier testified that he had asked the director of each department to make a list of their employees that were subject to layoff. (N.T., 5/26/16, at 821.) He told the department directors to base their decisions on "information and input from their staff members." (*Id.* at 822.) He explained that the department directors were to obtain input from their staff "where we could make cuts." (*Id.* at 824.) Despite the fact that Maun was the department director in Bailets' department, Brimmeier instructed Grieshaber to make the decision for Maun's department. (*Id.* at 823.)

Before informing Maun that Bailets would be fired, Grieshaber, however, told CEO Brimmeier and COO Hatalowich. (N.T., 5/25/16, at 698, 733.) In deciding to fire Bailets, Grieshaber failed to consider Bailets' recent outstanding performance evaluation ending June 30, 2008, given by Maun and reviewed by Grieshaber. (*Id.* at 730, 743.) Commissioner Pasqual Deon stated that the Commission simply ratified the termination without asking any questions.[13] (N.T., 5/24/16, at 465.) Grieshaber's termination of Bailets occurred just five months after Grieshaber told COO Hatalowich that Bailets needed to be kept on a short leash.

[13] The parties stipulated that, if called to testify, Commissioner Deon would testify as stated above and that the Commissioners had no involvement in selecting the chosen employees. (N.T. 5/24/16, at 465.)

When Grieshaber became CFO in June of 2008, he focused on incrementally decreasing Bailets' influence in the Commission – first transferring Bailets to the purchasing department, then removing his assistant secretary/treasurer duties and finally firing him. The above evidence amply supports this court's determination that Bailets reported wrongdoing and waste to the Commission before his termination.

Two subsequent developments that are part of the record leave no doubt that the matters that Bailets complained of to the Commission constituted wrongdoing and waste. First, a report prepared by Phoenix Business, Inc. (Phoenix Report)[14] found that it "is highly unusual" for an organization to select the firm that developed the RFP for software to implement the project in a subsequent contract because of the possibility of an unfair advantage. (Ex. 136, at 4.) The Phoenix Report concluded that the $58.3 million cost of the second contract with Ciber for implementation was "extremely high" and that the contract should have cost only $10 to $15 million. (*Id.*) That report found that the implementation program "faced numerous issues including high consultant turnover, poor project management, insufficient guidance to the [Commission] and lack of appropriate skill and knowledge from the implementation consulting staff." (*Id.*) Those were the same concerns Bailets had repeatedly raised before he was fired.

Second, four years after Bailets' termination, the Commission acknowledged that waste had occurred with respect to Ciber, when it filed a lawsuit

[14] The Commission received the final Phoenix Report in February of 2014; however, the Commission received a draft of the report at the end of 2013. (N.T., 5/24/16, at 473.)

against Ciber and Ciber's vice president Miller on August 31, 2012, seeking $45 million for, *inter alia*, breach of contract and violations of the Commonwealth Procurement Code,[15] 62 Pa. C.S. §§101-4509. (Ex. 36EE, at ¶5.) The amended complaint alleged that no knowledge transfer occurred in the second contract, that consultant turnover and absenteeism were high, that consultants were not qualified, and that systems were not delivered. (*Id.* at Count IV.) Those allegations mirror the complaints Bailets regularly and continuously made to Maun from 2004 to November 2008. They involve a substantial misuse or loss of Commonwealth funds or resources and raise serious ethical concerns.

Although the Commission conceded waste and wrongdoing with respect to the Ciber contracts, the Commission argued that Bailets did not establish a causal connection between his reports of waste and wrongdoing and his termination. Our Supreme Court has stated that, under the Law, a claimant "must come forward with some evidence of a connection between the report of wrongdoing and the alleged retaliatory acts." *O'Rourke*, 778 A.2d at 1200.

Bailets credibly testified that, whenever he voiced his concerns about Ciber's performance to Maun, Maun consistently told him "you're stepping on a hornet's nest here . . .; you're making waves" and "Mr. Miller is very powerful with respect to his relationships with Mr. Hatalowich and Mr. Mesaric."[16] (N/T., 5/23/16,

[15] Act of May 15, 1998, P.L. 358.

[16] Jeffrey Mesaric was the head of the Commission's information technology department. (N.T., 5/26/16, at 810.) Bailets also raised his concerns about Ciber directly to Mesaric during meetings. (N.T., 5/23/16, at 111.) The Commission has acknowledged that Ciber's vice-president had a "personal relationship" with Mesaric. (Ex. 36EE, ¶223.) *See also* (N.T., 5/23/16, at 107.) The Commission has acknowledged that Ciber's vice president was criminally charged for his
(Footnote continued on next page...)

at 80.) Maun warned Bailets on at least 15 occasions that Miller was powerful in his relationship with Hatalowich and that Bailets "needed to be careful." (*Id.*) Bailets testified that his oral complaints to Maun continued until the week of his termination. (*Id.* at 28.) Grieshaber also told Bailets to tread lightly with Ciber. (*Id.* at 82-82.) The evidence shows that Bailets was warned time and again by Maun and at least once by Grieshaber to tread lightly and not make waves regarding Ciber.

The Commission nonetheless argues that Bailets has failed to show the required causal connection because Bailets was offered a position in another department and Bailets' complaints in 2004 were too remote from his termination in 2008. We disagree.

First, we consider the Commission's claim that Maun and Grieshaber did not retaliate against Bailets for his reports of wrongdoing and, in fact, offered Bailets a position in another department. However, the testimony of Maun and Grieshaber belied that argument. A specific job was never offered, no salary was discussed, and both Maun and Grieshaber admitted that Bailets was not informed that he would be terminated if he did not accept the "nebulous, conceptual" position. (N.T., 5/26/16, at 918; N.T., 5/25/16, at 703, 750.)

Next, we consider the Commission's claim that Bailets' complaints in 2004 were too remote from his termination in 2008. Although Bailets' complaints

(continued...)

conduct on this contract but that he "entered into the ARD Program (all charges, including restricted activities seeking improper influence, bid rigging and theft, to be withdrawn upon successful completion of the program)." (Ex. 36EE, ¶229.)

about Ciber began in 2004, they did not end in 2004. Bailets, verbally and through email communication, reported the waste and wrongdoing associated with the Ciber contracts regularly and continuously from 2004 until his termination in November 2008.

Bailets has produced evidence of a connection between his reports of waste and wrongdoing and his termination. Under the Law, the burden then shifted to the Commission to rebut Bailets' charges pursuant to section 4(c) of the Law, which states that an employer may defend by proving that its action against the employee "occurred for separate and legitimate reasons, which are not merely pretextual." 43 P.S. §1424(c). To 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. Thus, in this case, the Commission bears the burden of proving that it would have fired Bailets even absent his reports of waste and wrongdoing. The Commission has failed to meet that burden.

Here, the Commission argued that, because of an unprecedented decline in turnpike revenue, it fired Bailets and 14 other employees for budgetary reasons. This court was not persuaded for the following reasons.

First, there was no budget crisis necessitating the employee layoffs. Theodore Rusenko, the current manager of accounting and financial reporting, was supervisor of the Commission's budget department in 2008. (N.T., 5/24/16, at 400, 406, 415.) He testified that there was no budget crisis. (*Id.* at 401, 445-46, 456.)

The Commission makes much of the fact that the Commission's expenses more than doubled between 2007 and 2008. However, Rusenko credibly testified that the increase was the result of Act 44[17], which took effect in 2008 and required the Commission to pay $750 million per year to the Pennsylvania Department of Transportation for turnpike maintenance. (*Id.* at 441, 453, 459.) However, the Act 44 payments were met by the Commission borrowing that money, as well as by a 25 percent system-wide toll increase in January 2009.[18] (*Id.* at 433, 445.) Moreover, from June 1, 2007 to May 31, 2008, there were 4 million more vehicles travelling the turnpike. (*Id.* at 437.) Additionally, the Commission's traffic and revenue consultant's projections in 2008 did not find any looming budget crisis. (*Id.* at 447, 449.) Significantly, Rusenko concluded that the elimination of 15 jobs would not have any impact on the budget. (*Id.* at 461.)

Second, events that occurred after Bailets' termination lend support to the conclusion that the Commission's purported reason for terminating Bailets' employment was pretextual. Despite the Commission's claim that it terminated Bailets and 14 other employees for budgetary reasons, on December 5, 2008, 15 days after the terminations, certain employees in the finance department were reclassified and received pay raises. (Ex. 139.)

Moreover, after the Commission terminated Bailets, Bailets sent a letter to the director of the human resources department, asking how the Commission

[17] Act of July 18, 2007, P.L. 169, No. 44, 75 Pa. C.S. §8901.

[18] In November of 2008, before Bailets was terminated, it was well known at the Commission that there would be a toll increase in January 2009.

would consider the laid off workers for rehire for future vacancies. (N.T., 5/23/16, at 166, 169.) The director responded, by sending Bailets an employment application. (*Id.* at 169.) Although the Commission hired four new employees in the six month period after it fired Bailets (Ex. 41; N.T., 5/26/16, at 858, 869) and hired a manager of treasury operations (N.T., 5/26/16, at 862), the Commission failed to consider Bailets for any of the vacancies. In July 2009, Bailets applied for the job of manager of finance which had become vacant due to the incumbent's retirement, as well as a strategic manager position, but received no response. (*Id.* at 170-71.)

In October 2008, when Grieshaber and CEO Brimmeier were purportedly trying to reduce operating expenses to avoid employee layoffs, Brimmeier ordered Patricia Raskauskas, who was manager of workers' compensation claims for the Commission, to meet with and hire an outside person for a position in her department. Raskauskas had previously told Brimmeier and Grieshaber that her department did not need to fill that position and that she did not have anything for that person to do. (N.T., 5/24/16, 370-71, 373.) When she told Grieshaber again that it was not necessary to fill that position because she did not have anything for the person to do, Grieshaber instructed her "to find something for her to do." (*Id.* at 373.) On December 1, 2008, just 11 days after Bailets was fired, that person was hired.[19] (Ex. 41; N.T., 5/24/16, at 375.) Moreover, Raskauskas testified that, in order to make a position for Brimmeier's candidate, it was necessary to promote and increase the salary of an employee who had been performing poorly in his position. (N.T., 5/24/16, at 376.)

[19] During the time she was employed, she told Raskauskas that she did not have enough work to do. (N.T., 5/24/16, at 374.) She resigned approximately 15 months later, telling Raskauskas that she was bored with the job. (*Id.*)

Another example occurred in Maun's department. Sharon Jones, a former employee of the Commission who worked in Maun's department, testified about a vacancy for a credit and collections supervisor that she had initiated. (*Id.* at 392, 394.) She explained that the usual procedures for interviewing and hiring candidates were not followed for that vacancy, but instead that Maun and Grieshaber directed her to hire a particular outside candidate who did not have skills relevant to the position. On May 8, 2009, that candidate was hired and then terminated less than six months later due to poor performance. (Ex. 41; N.T., 5/24/16, at 392-93.)

Third, Bailets had consistently received high ratings on his performance evaluations. (Ex. 3.) In his most recent performance evaluation for the period July 1, 2007, to June 30, 2008, Bailets received two outstanding ratings and five commendable ratings. Maun signed that evaluation, and Grieshaber concurred in it as reviewer, just three months before Bailets' termination. (*Id.*) CEO Brimmeier had made it clear to Grieshaber that the less effective, less productive employees "should be looked at first" to be laid off. (N.T., 5/26/16, at 778.) Firing Bailets for purported budget reasons, without first considering his performance, was inconsistent with COO Hatalowich's email to employees, promising to do "our best to make sure that this process is fair and impartial." (Ex. 129.)

Based on the above evidence that Bailets had specifically been warned not to complain about Ciber, that Bailets' most recent evaluation ranked his performance as outstanding and commendable, that new employees were hired and other employees given pay raises shortly after Bailets' termination, and that Bailets

was not considered for subsequent job openings, this court concludes that the Commission did not meet its burden of proving that it had separate and legitimate reasons for Bailets' termination that were not merely pretextual.

Finally, this court must decide the issue of damages. Section 5 of the 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, including reasonable attorney fees and witness fees, if the complainant prevails in the civil action.

43 P.S. §1425 (emphasis added).

Here, both sides presented evidence as to Bailets' economic loss because of his discharge. Bailets presented the expert testimony of economist Andrew C. Verzilli, who calculated that Bailets' total economic loss from the date of his termination through March 2016 was between $1.4 and $1.6 million. (Ex. 45; N.T., 5/25/16, at 508, 510.) Verzilli used the normal retirement age of 67 because Bailets intended to work until that age. (N.T., 5/25/16, at 517.) He used 1.4 percent per year wage progressions based on data from the Bureau of Labor Statistics regarding earnings growth for state workers. (*Id.* at 509.) The $1.6 million takes into account a 2% annual productivity growth rate. (*Id.* at 511, 514.)

The Commission presented the expert testimony of forensic economist Chad Staller, who opined that Bailets' economic loss was $944,000. (N.T., 5/26/16,

at 902.) Staller used a retirement age of 60. (*Id.* at 906.) Staller also presumed that Bailets would obtain a comparable paying job by July 2017. (*Id.* at 909.)

This court finds that, although the Commission's employees can retire at 60, Bailets, who has worked since the age of 14, does not intend to retire at age 60 and has every intention to work as long as possible. (N.T., 5/23/16, at 189; N.T., 5/25/16, at 517.) In this regard, we note that Bailets is married and the father of triplets and thus has a personal incentive to work until age 67. (N.T., 5/23/16, at 52-53.) Accordingly, this court accepts a retirement age of 67. Additionally, this court accepts a two percent productivity increase based on the average annual increase in workers' wages.

Finally, this court rejects Staller's opinion that Bailets will find a comparable paying job by July 2017. After finding his present job, Bailets has continued to look for a higher paying position to no avail. (N.T., 5/26/16, at 537.) Verzilli explained that Bailets had not secured a job with pay comparable to what he was earning at the Commission because Bailets' job at the Commission "was specialized and unique." (N.T., 5/25/16, at 516.) Verzilli explained that similar jobs do not exist in the "general private sector." (*Id.*) Verzilli further explained that the economic impact on employees who have been terminated involuntarily "can last 10 to 20 years in terms of never replacing their pre-displacement earnings." (N.T., 5/26/16, at 516.) Thus, for economic damages, this court awards Bailets $1.6 million.

As to non-economic damages, Bailets argues that they are available under the Law, whereas the Commission argues that they are not. We agree with Bailets

that nothing in the Law precludes him from obtaining non-economic damages. Section 5 of the Law specifically states that a complainant is entitled to "actual damages" as the court considers appropriate. The term actual damages is not defined under the Law. However, in *Joseph v. Scranton Time, L.P.*, 129 A.3d 404, 429 (Pa. 2015) (citation omitted), the Pennsylvania Supreme Court made clear that actual damages include not only economic but non-economic injuries such as "'impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.'"[20]

In *O'Rourke,* our Pennsylvania Supreme Court noted that the Law was designed "to 'enhance openness in government . . . by protecting those who inform authorities of wrongdoing.'" 778 A.2d at 1202 (citation omitted.) Chief Justice Saylor cogently explained:

> An employee of a public body is often in the best position to know that illegal or unethical activities are occurring within that body, and thus, to report such activities. This is particularly significant because, if such illegalities are taking place, the employer and/or the individuals who benefit ordinarily have no incentive to reveal them and, additionally, may be adept at concealing them from the outside world. Therefore, the Commonwealth and its citizens benefit substantially when employees aid in the enforcement of legal and ethical codes 'by raising substantiated claims of wrongdoing through protected procedural channels,' which serves the interests of exposing

[20] The Commission argues that, because the Legislature did not specifically define actual damages in the Law, non-economic damages are not recoverable. As an example, the Commission points to section 9(f)(1) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, *as amended*, 43 P.S. §959(f)(1), which includes damages for humiliation and embarrassment. Because our Supreme Court in *Joseph*, 129 A.3d at 429, explained that the term "actual damages" may include compensation for non-economic injury and in *O'Rourke*, 778 A.2d at 1202, emphasized the importance of ensuring that the whistleblower is "put in no worse a position for having exposed the wrongdoing," we disagree.

> and halting the illegalities, and relieves the government of some of the expenses of investigation and litigation. Just as surely, however, an employee who becomes aware of wrongful activities within a public entity will often feel compelled to remain silent about the illicit conduct, lest he be subjected to harassment and other adverse action by his management and co-workers . . . . Accordingly, absent some measure of assurance that the employee will ultimately be put in no worse a position for having exposed the wrongdoing, the Commonwealth largely foregoes the benefit of such "employee reporters."

Id. (citations omitted.)

Based on our Supreme Court's admonition in *O'Rourke*, 778 A.2d at 1202, of the importance of ensuring that the whistleblower is put "in no worse a position for having exposed the wrongdoing," we conclude that "actual damages" must include compensation for the mental anguish, humiliation, and reputation damage that Bailets suffered as a result of the termination of his employment.

Our holding in this respect is in accord with courts of other states with similar, if not identical, whistleblower protection laws. For example, in *Robertson County v. Wymola*, 17 S.W.3d 334, 347 (Tex. Ct. App. 2000) (citations omitted), the Texas Court of Appeals affirmed an award of actual damages for a whistleblower who showed that her mental anguish was more than "'mere worry, anxiety, vexation, embarrassment, or anger.'" The court found that the whistleblower's testimony that the loss of her job was "devastating" and "overwhelming" was sufficient to award damages for mental anguish. *Id.* Like Pennsylvania's Law, "actual damages" in the Texas Whistleblower Protection Law was undefined. *Id.*

Likewise, in *Rogers v. City of Fort Worth,* 89 S.W.3d 265, 284 (Tex. Ct. App. 2002), the court affirmed an award of actual damages, including mental anguish, in favor of a whistleblower, where the evidence showed the duration of his mental anguish, established that his daily routine was substantially disrupted, and that he suffered a high degree of mental pain and distress. It also considered that, after his termination, the whistleblower "had considerable difficulty obtaining a job." *Id.* That court also explained that "[w]rongdoing that threatens a person's reputation is sufficient to support an inference that the resulting injury was accompanied by mental anguish." *Id.*

Melchi v. Burns International Security Services, Inc., 597 F. Supp. 575, 585-586 (E.D. Mich. 1984) was cited with approval by our Supreme Court in *O'Rourke*, 778 A.2d at 1202. The court in *Melchi* interpreted the Michigan Whistleblower Protection Law, which permits the award of actual damages in language virtually identical to Pennsylvania's Law. That court considered the whistleblowing claimant's request for damages for emotional distress and humiliation, but declined to award the damages only because it found that the claimant had acted with an improper motive. *Id.* at 585, 586.

Without compensation for harm to his reputation,[21] humiliation, and mental anguish, Bailets would be in a far worse position for having reported the wrongdoing. *See O'Rourke,* 778 A.2d at 1202. In fact, because of all that he has endured since the Commission's termination of his employment, Bailets has

[21] One's reputation is a fundamental right under the Pennsylvania Constitution. *Pennsylvania Bar Association v. Pennsylvania Insurance Department*, 607 A.2d 850, 856 (Pa. Cmwlth. 1992).

questioned whether he should have reported the waste and wrongdoing and whether it was worth putting himself and his family through the loss of his job. (N.T., 5/25/16, at 538.) After struggling for three years to find a suitable job, Bailets was finally offered and accepted a job that paid only approximately two-thirds of his Commission salary. (N.T., 5/23/16, at 174.) After taking that job, he has continued to search, to no avail, for a higher paying job. Adding to his humiliation before his family, friends and community, prior to finding that job, Bailets was forced to take a minimum wage job far below his skill, education and experience level, shuttling cars for an auto dealership, just to get by. (*Id.* at 53, 174.)

In assessing the value of the non-economic damages, this court credits the testimony of Bailets and his wife that he suffered humiliation and mental anguish when he was fired shortly before Thanksgiving and escorted from his office carrying his belongings in a box; when he had to tell his wife of 21 years and his then 13-year-old-triplet daughters that he did not have a job; when he had to tell his father-in-law that he was no longer a provider for his daughter and granddaughters; and when he had to face extended family members, who were doctors, lawyers, engineers, and accountants at Thanksgiving dinner and admit that he no longer had a job. (*Id.* at 190; N.T., 5/25/16, at 535.) Bailets was known to be a worker and provider for his family. (*Id.*) However, after his termination from the Commission, Bailets was known as the guy without a job who could no longer provide for his family. (N.T., 5/23/16, at 190.) Bailets, whose father had died when he was 8 years old and who had worked since the age of 14, suddenly no longer had a job. (*Id.* at 189-90.) Bailets suffered further humiliation when he had to use his unemployment compensation debit card at the local grocery store where people knew him. (*Id.* at

190.) Bailets testified that he "had no end of sleepless nights" worrying about paying bills, medical costs, vehicle repairs, and college expenses for his three daughters, (*id.* at 190-91) and that he was heart-broken when one of his daughters apologized to him for needing a new pair of cleats because her feet had grown. (*Id.* at 194.)

There is no doubt that the Commission's wrongful termination of Bailets had a profound effect on Bailets and caused a major disruption to his life. Therefore, this court concludes that for his non-economic actual damages, which include harm to his reputation, humiliation, and mental anguish, Bailets is entitled to an additional award equal to that of his economic damages, or $1.6 million.

Accordingly, this court awards Bailets a total of $3.2 million.[22]

ROCHELLE S. FRIEDMAN, Senior Judge

[22] We recognize that public policy considerations preclude the imposition of punitive damages against a Commonwealth agency. *See Feingold v. Southeastern Pennsylvania Transportation Authority*, 517 A.2d 1270, 1277 (Pa. 1986). However, punitive damages serve the important purpose of punishing the wrongdoers and deterring future misconduct. *Id.* at 1276. Our Legislature recognized this important purpose in the year 2014, when it amended section 6 of the Law, 43 P.S. §1426, to permit the imposition of a civil fine of not more than $10,000 against a "person who, under color of an employer's authority," violates the Law, as well as possible suspension of that person from public service up to seven years where the intent was to discourage the reporting of criminal activity. Such civil fine is payable to the State Treasurer for deposit into the General Fund. *Id.*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ralph M. Bailets, Petitioner v. Pennsylvania Turnpike Commission, Anthony Q. Maun, (Director of Accounting), and Nikolaus H. Grieshaber, (Chief Financial Officer), Respondents	No. 265 M.D. 2009

ORDER

AND NOW, this 6th day of October, 2016, after a non-jury trial in the above matter, a decision is entered in favor of Ralph M. Bailets and against the Pennsylvania Turnpike Commission in the amount of $3.2 million. The Chief Clerk shall enter judgment accordingly if no post-trial motions are filed within 10 days of the date of this order, as set forth in Pa. R.C.P. No. 227.1.

It is further ordered that within 30 days of the date of this order, Bailets shall file with this court any petition for costs of litigation, including reasonable attorney fees and witness fees, in accordance with section 5 of the Whistleblower Protection Law, Act of December 12, 1986, P.L. 1559, 43 P.S. §1425.

Rochelle S. Friedman

ROCHELLE S. FRIEDMAN, Senior Judge

Certified from the Record

OCT 06 2016

And Order Exit

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)

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have this day served a true and correct copy of the foregoing Plaintiff's Trial Brief on the Whistleblower Law by email on the following person(s):

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Dated: 10/14/16

By: _____
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