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

GRAHAM B. SPANIER, Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	Docket No. 2012-2065 **PRELIMINARY OBJECTIONS** Filed on behalf of: Defendant Counsel of record for this party: Michael M. Mustokoff (PA 15674) Daniel R. Walworth (PA 204968) Duane Morris LLP 30 South 17th Street Philadelphia, PA 19103-4196 Telephone: +1 215 979 1000 Fax: +1 215 979 1020

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Attorneys for Defendant,
The Pennsylvania State University

NOTICE TO PLEAD

TO: Plaintiff, Graham B. Spanier: You are hereby notified to file a written response to the enclosed Preliminary Objections of Defendant The Pennsylvania State University to Plaintiff's Complaint within twenty (20) days from service hereof or a judgment may be entered against you.

Attorneys for Defendant,
The Pennsylvania State University

GRAHAM B. SPANIER,	:	
Plaintiff,	:	IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
v.	:	PENNSYLVANIA
THE PENNSYLVANIA STATE UNIVERSITY,	:	CIVIL ACTION NO. 2012-2065
Defendant.	:	

PRELIMINARY OBJECTIONS OF DEFENDANT THE PENNSYLVANIA STATE UNIVERSITY TO PLAINTIFF GRAHAM B. SPANIER'S COMPLAINT

Defendant, The Pennsylvania State University (the "University"), by and through its undersigned counsel Duane Morris LLP, hereby submits these Preliminary Objections to the Complaint of Plaintiff Graham B. Spanier ("Spanier"), and in support thereof avers as follows:

1. The University respectfully requests that this Honorable Court dismiss Spanier's Complaint in its entirety. A true and correct copy of the Complaint, including exhibits, is attached to the Preliminary Objections as Exhibit A.

2. Spanier's claims for replevin and for an "amicable action" of mandamus to obtain e-mails, allegedly located on the University's servers, are without legal merit.

3. As set forth in detail below, the University objects preliminarily to the Complaint on the following three grounds:

4. First, the University asks this Court to dismiss Counts One and Two of the Complaint, with prejudice, because Spanier has failed to exhaust his statutory remedy under 65 P.S. § 67.101 *et seq.* (the "Right to Know Law").

5. Spanier's request for the subject e-mails is, at its core, an attack on the directive by the Office of Attorney General (the "Attorney General") not to disclose the e-mails it has obtained in the course of an investigation.

6. Spanier's request, and its attendant challenge to the Attorney General's directive is properly directed toward the Attorney General—not the University.

7. The Right to Know Law sets forth an explicit statutory scheme governing the rights, restrictions and obligations for the request of these materials

from the Attorney General, and for challenges to any determination by the Attorney General that such materials should not be disclosed.

8. Second, the University asks this Court to dismiss Count One of the Complaint, with prejudice, for failure to state a claim for replevin upon which relief can be granted, because e-mails allegedly located on University Servers are the property of the University and not the property of Spanier.

9. Third, the University asks that this Court dismiss Count Two of the Complaint, with prejudice, for failure to state a claim for an "amicable action" mandamus upon which relief can be granted.

10. Spanier cannot colorably contend that the University has a legal obligation to refuse to cooperate with the Attorney General's request not to disclose information potentially related to an ongoing investigation.

11. Moreover, the University's statement that it would provide Spanier with the requested e-mails, but for the University's cooperation with the Attorney General's request, does not constitute an "amicable action" for mandamus, or otherwise permit Spanier to treat the University as a proxy for the Attorney General in challenging the Attorney General's direction not to provide the subject e-mails.

STATEMENT OF THE FACTS

12. Spanier alleges that he resigned as president of the University, a position he had held for over sixteen years, on November 9, 2011, to "allow the Board of Trustees to have a free hand in investigating certain allegations relating to former University coach Jerry Sandusky." Compl. ¶¶ 5, 6.[1]

13. As part of that investigation, Spanier alleges that he answered questions before the investigating grand jury and the Attorney General. *Id.* ¶¶ 7-8.

14. Spanier also alleges that the University has engaged Freeh Group International Solutions, LLC (the "Freeh Group") to investigate matters arising out of the Sandusky allegations. *Id.* ¶ 12.

15. Subsequent to his contacts with the grand jury and the Attorney General, Spanier alleges that "at least some e-mails that pre-dated 2004 . . . ha[ve] been retrieved." *Id.* ¶ 14.

16. Spanier alleges that "these [e-mails] have been produced to the Attorney General of Pennsylvania, the U.S. Attorney for the Middle District, and to the Louis Freeh Group's attorneys/investigators." Compl. Exhibit A.

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[1] Notwithstanding that the University must accept all of Spanier's allegations as true for purposes of these Preliminary Objections only, the University notes that Spanier did not "resign," but rather, was terminated without cause.

17. Spanier alleges that, at the request of the Attorney General, the University has not made the alleged e-mails available to him. Compl. ¶ 19; *see also* Compl. Exhibit C (the University has "received an explicit instruction from the Deputy Attorney General not to share the requested information for fear of compromising the Commonwealth's ongoing investigation").[2]

18. According to Spanier's allegations, he seeks disclosure of these e-mails to assist him in an interview with the Freeh Group. *Id.* ¶¶ 14, 17-18.

19. Spanier further alleges that he has declined such an interview because "[t]he University felt constrained to abide by a request of the Pennsylvania Attorney General to not produce these documents to us, even though they have been shared with [the Freeh Group], the U.S. Attorney in the Middle District, the

[2] The University notes that, in light of recent media reports citing to the purported content of the subject e-mails, reportedly provided by "law enforcement sources," the Attorney General may no longer have an interest in preventing the disclosure of these e-mails. *See* http://video.today.msnbc.msn.com/today/47762669#47762669 (last accessed June 11, 2012), a copy of the published transcript of which is attached hereto as Exhibit B. Unless and until the University receives contrary instruction, however, it maintains that its prevailing interest is in cooperating with the Attorney General's request. Moreover, publicly reported comments by attorneys for Messrs. Schultz and Curley indicating Spanier's participation in critical discussions involving the handling of the 2001 incident highlight Spanier's need to see those documents. *See Gary Schultz, Tim Curley Attorneys Respond to Graham Spanier Report*, CENTRE DAILY TIMES, http://www.centredaily.com/2012/06/11/3225006/schultz-curley-attorneys-respond.html (last accessed June 12, 2012), attached hereto as Exhibit C.

Pennsylvania Attorney General and others within the University community." Compl. Exhibit B.

20. On May 25, 2012, Spanier initiated suit upon the filing of a Complaint against the University.

PRELIMINARY OBJECTION TO ALL CAUSES OF ACTION
PA.R.C.P. 1028(A)(7)
FAILURE TO EXERCISE OR EXHAUST A STATUTORY REMEDY

21. Pennsylvania Rule of Civil Procedure 1028(a)(7) permits a party to object preliminarily to any pleading when a party fails to exercise or exhaust a statutory remedy. Pa.R.C.P. 1028(a)(7).

22. Spanier has not alleged that he has undertaken any effort to pursue his rights and remedies under Pennsylvania's Right to Know Law, 65 P.S. § 67.101 *et seq.*, and therefore, his Complaint must be dismissed in its entirety.

23. The Right to Know Law sets forth an explicit statutory scheme that contemplates requests directed to the Attorney General for documents gathered in the course of an investigation, provides for express statutory exceptions permitting the Attorney General to refuse to provide such materials, and prescribes appellate remedies for any challenge to such a refusal.

24. The Right to Know Law does *not* permit an individual to circumvent those procedures by filing a civil action against an entity that has provided its property, in this case e-mails, to the Attorney General in the first instance.

25. The gravamen of Spanier's Complaint is that the Attorney General is in possession of certain e-mails—e-mails to which Spanier seeks access—*and that Spanier disagrees with the Attorney General's determination that the e-mails should not be shared.*

26. Spanier's disagreement with that determination by the Attorney General is not properly directed at the University.

27. The Right to Know Law unambiguously governs the rights and remedies for requests for documents in the Attorney General's possession (and permits the Attorney General to deny such requests) obtained in the course of a criminal investigation—*and challenges to denials of such requests*.

28. That statutory procedure, directed at the Attorney General, must be utilized in this instance. End runs are out of bounds.

29. Requests for e-mails in the possession of the Attorney General and challenges to the Attorney General's refusal to permit their disclosure fall within the scope of the Right to Know Law. *See id.* § 67.305.

30. Under the Right to Know Law, Commonwealth agencies "shall provide public records in accordance with this act." *Id.* § 67.301; *see also id.* § 67.102 (defining the Pennsylvania Office of Attorney General as a Commonwealth agency under the Right to Know Law).

31. In accordance with the Right to Know Law, several statutorily enumerated exemptions permit or require the Attorney General to decline to disclose records. *See id.* §§ 67.305(a)(1); 67.708(16) (iv) (exempting from disclosure "[a] record of an agency relating to or resulting in a criminal investigation" when that record "includes information made confidential by law or court order," such as in a grand jury investigation); *see also* Pa.R.Crim.P. 320 (requiring secrecy of testimony before the investigating grand jury); 65 P.S. § 67.708(16)(vi)(A) (exempting records from disclosure related to a criminal investigation that "[r]eveal the institution, progress or result of a criminal investigation").

32. We believe these provisions provide the rationale for the Attorney General's request that the subject e-mails not be provided to Spanier. *See* Compl. Exhibit C ("[w]e have received an explicit instruction from the Deputy Attorney General not to share the requested information for fear of compromising the Commonwealth's ongoing investigation").

33. If Spanier's displeasure with the Attorney General's claim of secrecy is to be remedied, that remedy lies with the Attorney General. It is accomplished with the review and appellate prescriptions provided for by the Right to Know Law. *See* 65 P.S. §§ 67.1101–67.1102 (providing for appeal of the agency determination); *id.* §§ 67.1301–67.1310 (providing for judicial review of the disclosure determination).

34. Although the University does not contend that the Right to Know Law prohibits all efforts to obtain information from other than the Attorney General in all circumstances through informal requests (as Spanier has already unsuccessfully done in this case), the Right to Know Law *does* set forth the formal legal process and mechanism for making such requests, and *for challenging any refusal based upon the Attorney General's assertions of investigative secrecy.*

35. Spanier has not alleged that he has made any request upon the Attorney General for the subject e-mails, or invoked the clear procedures set forth in the Right to Know Law for challenging the Attorney General's position.

36. Instead, Spanier seeks to evade the Right to Know Law's process for *directly* challenging an assertion by the Attorney General that investigative records must not be disclosed to protect the secrecy and integrity of an investigation.

37. By circumventing the procedures for such challenges set forth in the Right to Know Law, Spanier has not only failed to exercise or exhaust those statutory remedies, but seeks to place the University in the untenable position of defending the Attorney General's decisions concerning investigative secrecy.

38. The University cannot, and should not, be forced to mediate disagreements about the scope of that secrecy between the Attorney General and Spanier.

39. Spanier has a statutory vehicle for both attempting to obtain the subject e-mails from the Attorney General, and challenging any dictate by the Attorney General that the e-mails cannot be shared. Spanier must avail himself of *those* procedures and not employ novel causes of action for replevin and mandamus against the University, lacking legal authority. Spanier has not done so.

WHEREFORE, Defendant The Pennsylvania State University respectfully requests that this Court enter an Order sustaining its preliminary objections and dismissing the Complaint against it with prejudice, and granting such further relief as the Court deems proper.

PRELIMINARY OBJECTION TO COUNT ONE (REPLEVIN)
PA.R.C.P. 1028(A)(4)
LEGAL INSUFFICIENCY OF A PLEADING (DEMURRER)

40. Count One of the Complaint should be dismissed because Spanier fails to state a claim for replevin.

41. An action for replevin does not lie because the subject e-mails are the property of the University and not of Spanier.

42. While the Court must accept as true all well-pleaded facts, the Court is not free to accept as true unwarranted inferences from facts, conclusions of law, argumentative allegations, or opinions. *See Hyam v. Upper Montgomery Joint Auth.*, 160 A.2d 539, 541 (Pa. 1960).

43. Spanier fails to state a claim for replevin because he has not sufficiently alleged (and cannot allege) his right of possession to the subject e-mails. *See Robinson v. Tool-O-Matic, Inc.*, 216 Pa. Super. 258, 263 A.2d 914 (Pa. Super. 1970) (action dismissed where plaintiff failed to allege possessory interest).

44. Replevin is a civil action to enforce the claim of an owner of property for its delivery to him or her by one who wrongfully detains it. 4 Goodrich Amram 2d § 1071:1.

45. To state a claim for replevin, Spanier must have a general or special property right in the items taken or detained, and must show title and a right of immediate possession. *See Int'l Elec. Co. v. N.S.T. Metal Prod. Co.*, 370 Pa. 213, 88 A.2d 40 (Pa. 1952).

46. As a matter of law, Spanier has no such ownership or right of possession over e-mails on the University's servers.

47. As a defense to a claim in a replevin action, the defendant may "of course, show his or her own right of possession." 42-1 Pa. L. Ency. Courts § 7.

48. Courts have routinely found that employee e-mail located in an entity's proprietary e-mail accounts is "owned" by the entity. *See, e.g., Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 100-01 (E.D. Pa. 1996) ("[u]nlike urinalysis and personal property searches, we do not find a reasonable expectation of privacy in

e-mail communications voluntarily made by an employee to his supervisor over the company e-mail system notwithstanding any assurances that such communications would not be intercepted by management"); Kevin W. Chapman, *I Spy Something Read! Employee Monitoring of Personal Employee Webmail Accounts*, 5 N.C. J.L. & TECH. 121, 132 (2003); *see also McLaren v. Microsoft Corp.*, No. 05-97-00824-CV, 1999 Tex. App. LEXIS 4103, at *11 (Tex. App. May 29, 1999), attached hereto as Exhibit D; *Kelleher v. City of Reading*, No. 01-3386, 2002 U.S. Dist. LEXIS 9408, at *24-25 (E.D. Pa. May 29, 2002), attached hereto as Exhibit E.

49. Spanier's own allegations establish that he does not have an ownership interest in the e-mails because they are located "on the University's servers," and were "generated and received while acting in his official capacity as president of the University . . . ." Compl. ¶¶ 22-23.

50. Curiously, Spanier appears to contend that any e-mail, of which he was the author or a recipient during his time at the University is his property in perpetuity (wherever those e-mails might be found).

51. Because these e-mails were received and generated by Spanier in the course of his employment as the University's president and allegedly reside on the University's servers, however, these e-mails are the University's property and not subject to an action in replevin by Spanier.

WHEREFORE, Defendant The Pennsylvania State University respectfully requests that this Court enter an Order sustaining its preliminary objections and dismissing Count One against it for failing to state a claim upon which relief can be granted, and granting such further relief as the Court deems proper.

PRELIMINARY OBJECTION TO COUNT TWO (MANDAMUS)
PA.R.C.P. 1028(A)(4)
LEGAL INSUFFICIENCY OF A PLEADING (DEMURRER)

52. Count Two of the Complaint should be dismissed because Spanier fails to state a claim for mandamus.

53. Spanier cannot credibly contend that the University has a mandatory duty *to refuse to cooperate* with the Attorney General's directive not to provide Spanier with the subject e-mails and that *mandatory non-compliance* with that directive is a ministerial, non-discretionary act.

54. To the extent, however, that Spanier is attempting to use the University as a proxy for the Attorney General in order to challenge to the Attorney General's directive, Spanier must raise that with the Attorney General directly.

55. Mandamus is an extraordinary legal remedy by which a court of competent jurisdiction compels a public official, municipality, or private corporation to perform a mandatory duty or ministerial act where the petitioner has a legal right to enforce the performance of that act, the defendant has a corresponding duty to

perform the act, and there is no other adequate or appropriate remedy. *Logan v. Horn*, 692 A.2d 1157 (Pa. Cmwlth. 1997).

56. Spanier's effort to enlist this Court in directing the University to disregard the Attorney General's request that the e-mails not be shared falls far short of establishing a right to this extraordinary remedy.

57. Mandamus lies to compel the performance of a ministerial act or mandatory duty, and is not available when the duty to be enforced is discretionary. *Hotel Casey Co. v. Ross,* 343 Pa. 573, 23 A.2d 737 (Pa. 1942).

58. A ministerial act is one which the defendant is *required* to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his or her own judgment or opinion concerning the propriety or impropriety of the act to be performed. *M.B. Invs. v. McMahon*, 903 A.2d 642 (Pa. Cmwlth. 2006); *see also J.E. Brenneman Co. v. Schramm,* 456 F. Supp. 269 (E.D. Pa. 1978) (defining an act as "ministerial," for purposes of mandamus, only "when its performance is positively commanded and so plainly prescribed as to be free from doubt").

59. Spanier cannot credibly contend that the University *has a legal obligation to refuse to cooperate* with the Attorney General's request, and that cooperation requires the University *not* to provide Spanier with the e-mails. *See* Compl. Exhibit C (stating that the University has "received an explicit instruction

from the Deputy Attorney General not to share the requested information for fear of compromising the Commonwealth's ongoing investigation").

60. Implicitly conceding that the University has no such obligation, Spanier instead alleges that the University amicably agreed to file this mandamus action under Pennsylvania Rule of Civil Procedure 1093(2) because "the University [has taken] the position that it would willingly turn over [the relevant e-mails] if it were not for the direction of the Pennsylvania Attorney General." Compl. ¶ 25.

61. President Spanier alleges that the University "taking the position . . . has in effect agreed to an amicable action of mandamus." *Id.*

62. An amicable action for mandamus is not sufficiently plead, however, if there is no written agreement for an action in the record. *Cooke v. Greenville*, 2 Pa. Commw. 417, 419-20, 278 A.2d 182 (Pa. Cmwlth. 1971).

63. Here, the University has not agreed to an amicable mandamus action.

64. Spanier's contention is built on an unsupported inference—an unsupported inference that the University's willingness to share information with him, but for its prevailing interest in complying (or obligation to comply) with the Attorney General's request, amounts to an agreement to enlist the judiciary to challenge that request.

65. The law precludes such reliance on unfound inferences, and no such agreement exists.

66. The University has neither agreed to challenge its own cooperation with the Attorney General, nor agreed to stand in the Attorney General's shoes in defending the directive not to disclose the subject e-mails.

67. In lieu of an action in mandamus directed toward the University, Spanier has other—more appropriate—legal remedies to address his disagreement with the Attorney General's directive.

68. Mandamus does not supersede legal remedies, and cannot be invoked by a party who has another adequate remedy at law. 16-3 Pa. L. Ency. Courts § 503.

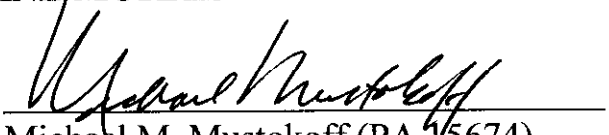
69. For the reasons described above, Spanier possesses an adequate remedy at law to attempt to obtain the alleged e-mails from the Attorney General directly, and to challenge any determination that Spanier cannot obtain the e-mails.

70. In contrast, no basis exists for permitting Spanier to use the extraordinary writ of mandamus in order to interpose the University between the Attorney General and himself in order to avoid addressing this matter with Attorney General.

WHEREFORE, Defendant The Pennsylvania State University respectfully requests that this Court enter an Order sustaining its preliminary objections and dismissing Count Two against it for failing to state a claim upon which relief can be granted, and granting such further relief as the Court deems proper.

Respectfully submitted,

DUANE MORRIS LLP

By: 

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Attorneys for Defendant,
The Pennsylvania State University

Dated: June 14, 2012

CERTIFICATE OF SERVICE

I, Michael M. Mustokoff, certify that a true and correct copy of the foregoing Preliminary Objections of Defendant The Pennsylvania State University to Plaintiff's Complaint, supporting exhibits, and Memorandum of Law has been served, by regular first class mail, postage prepaid, on the 14th day of June, 2012 upon the following:

Peter F. Vaira, Esq.
John E. Riley, Esq.
Vaira & Riley
1600 Market Street, Suite 2650
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Telephone: +1 215 751 2700
Fax: +1 215 751 9420

Attorneys for Plaintiff, Graham B. Spanier

Michael M. Mustokoff, Esq.

Exhibit A

VAIRA & RILEY

A PROFESSIONAL CORPORATION

1600 Market Street, Suite 2650
Philadelphia, PA 19103

Telephone (215) 751-2700
Facsimile (215) 751-9420
E-mail j.riley@vairariley.com
Website vairariley.com

John E. Riley

May 25, 2012

VIA EMAIL

Frank T. Guadagnino, Esquire
Reed Smith
225 Fifth Avenue
Pittsburgh, PA 15222

Re: ***Spanier v. Penn State University***

Dear Frank:

As a courtesy, attached please find a Complaint which is being filed this afternoon in Centre County seeking the production of relevant documents we need to prepare Dr. Spanier for any interview by the Freeh Group. We reluctantly took this course of action because of our frustration of being placed in the unusual predicament of eagerly wishing to assist the University by participating with the Freeh Group investigation but consistently being denied by the University, pursuant to a directive of the Pennsylvania Attorney General, access to the material and relevant documents necessary to have him properly prepare for that process. We know you understand our position but, with the increased passage of time without any movement, we felt constrained to seek this legal action to obtain the documents we need to prepare the client.

Sincerely,

John E. Riley

JER/tb
Attachment

c: Linda L. Kelly, Esquire - Attorney General of Pennsylvania
(*via facsimile, w/attachment*)

Exhibit A

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

GRAHAM B. SPANIER Plaintiff, v. PENNSYLVANIA STATE UNIVERSITY, Defendant.	)	Docket No. **COMPLAINT** Filed on behalf of: Plaintiff Counsel of record for this party: Peter F. Vaira (PA Id. No.17042) John E. Riley (PA Id. No. 22504) Vaira & Riley 1600 Market Street, Suite 2650 Philadelphia, PA 19103 215-751-2700 215-751-9420 (facsimile)

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

GRAHAM B. SPANIER	)	Docket No.
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
PENNSYLVANIA STATE UNIVERSITY,	)	
	)	
	)	
Defendant.	)	

NOTICE TO DEFEND

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE TO FIND OUT WHERE YOU CAN GET LEGAL HELP:

CENTRE COUNTY LAWYERS REFERRAL SERVICE
C/O CENTRE COUNTY
PENNSYLVANIA BAR ASSOCIATION
P.O. BOX 186
HARRISBURG, PA 17108
TELEPHONE: 800-692-7375

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

GRAHAM B. SPANIER	)	Docket No.
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
PENNSYLVANIA STATE UNIVERSITY,	)	
	)	
	)	
Defendant.	)	

COMPLAINT IN EQUITY

The Parties

1. Plaintiff Graham B. Spanier (hereinafter "Dr. Spanier") is an individual residing in Centre County in the Commonwealth of Pennsylvania.

2. Defendant Pennsylvania State University (hereinafter "Penn State") is a corporation duly organized and existing under the laws of Pennsylvania with a

principal place of business located at 201 Old Main, University Park, Centre County, Pennsylvania.

Jurisdiction and Venue

3. Venue is proper in Centre County pursuant to Pennsylvania Rules of Civil Procedure 1006, 1072, 1092 and 2179, inasmuch as defendant is located and regularly conducts business in Centre County, Pennsylvania, the cause of action arose in Centre County, Pennsylvania and a transaction or occurrence took place in Centre County, Pennsylvania out of which the cause of action arose.

4. The Defendant is subject to personal jurisdiction in Pennsylvania as it has significant contacts with and regularly conducts and transacts business in Pennsylvania.

Background

5. Dr. Spanier was president of Penn State between September 1, 1995 and November 9, 2011.

6. On November 9, 2011, Dr. Spanier offered his resignation to the Board of Trustees of Penn State, so as to allow the Board of Trustees to have a free hand in investigating certain allegations of sexual misconduct relating to former Penn State coach Jerry Sandusky. The Trustees accepted Dr. Spanier's offer, and he resigned under the "termination without cause" provision of his contract. Dr. Spanier continues as a professor at Penn State to this date.

7. Previously, on March 22, 2011, Dr. Spanier had met with representatives of the Pennsylvania Attorney General and answered questions about Mr. Sandusky and Penn State.

8. Following that interview, on April 13, 2011, Dr. Spanier voluntarily and without subpoena appeared before the investigating grand jury in Harrisburg, Pennsylvania, and answered many questions under oath as to his recollection of reports from roughly a decade or more in the past, including one in which it had previously been alleged that Mr. Sandusky had showered with a youth while on the Penn State campus.

9. Dr. Spanier had reviewed no documents before testifying before the investigating grand jury. He had been informed that no emails or other communications from the relevant time period could be obtained for his review, inasmuch as a new email system installed in 2004 at Penn State had eliminated email records prior to 2004.

10. In that grand jury appearance, Dr. Spanier was accompanied by Penn State counsel, whom he believed was representing his interests in the proceedings. However, that counsel later (in 2012) took the position that she, in fact, was representing only the interests of Penn State.

11. Dr. Spanier answered the questions put to him in the grand jury to the best of his recollection and belief.

12. Since that date, defendant Penn State has engaged the Freeh Group International Solutions to investigate and report on many matters relating to and arising out of the Sandusky allegations.

13. Dr. Spanier has at all times desired to speak with the Freeh firm and assist the investigation.

14. In recent months, Dr. Spanier learned that at least some emails that pre-dated 2004 were indeed retrievable and had been retrieved. The one condition that Dr. Spanier and his counsel have placed upon any such interview or interviews with the Freeh firm is that Penn State provide him with access to communications in the University's possession, which he received or generated or had knowledge of during the period 1998-2004.

15. It was and is his belief that access to these emails would refresh his recollection significantly and allow him to assist the University fully in its investigation.

16. It is estimated that as president of Penn State, Dr. Spanier received more than 25,000 emails per year on average. During the 1998-2004 time frame, Dr. Spanier would have received more than 2,000 emails per month.

17. Plaintiff's counsel has nevertheless asked to review only those communications that may be relevant to the Freeh Group investigation, and it has

never been suggested by the university that delivery of such communications would be at all difficult.

18. On several occasions, Dr. Spanier's counsel has requested that Penn State turn over the materials now demanded, so as to allow Dr. Spanier to become sufficiently prepared to assist Mr. Freeh's firm's investigation. Copies of Dr. Spanier's counsel's letters are attached hereto as Exhibits A and B.

19. The response by counsel on behalf of Penn State was that, although Penn State would itself be willing to transmit the material, Penn State is refusing to make the material available to Dr. Spanier at the direction and request of the Attorney General of the Commonwealth of Pennsylvania. The decision to refuse access to the material was made, on information and belief, by Penn State's general counsel acting under the supervision of the Board of Trustees. A copy of Penn State's counsel's response is attached as Exhibit C.

20. The Attorney General of the Commonwealth of Pennsylvania has no legal right to insist that Penn State comply with this request, and Penn State does not take the position that it is under any legal compulsion not to make Dr. Spanier's own email correspondence available to him.

Count One: Replevin

21. The allegations contained in paragraph 1 through 20 are incorporated herein by reference.

22. Dr. Spanier has a property interest of incalculable value in the body of email correspondence he generated and received while acting in his official capacity as president of Penn State between 1998 and 2004.

23. The emails are in Penn State's possession on Penn State's servers, and Penn State has refused to allow Dr. Spanier to access them.

WHEREFORE, the plaintiff Graham Spanier hereby demands that this Court enter an Order in the nature of Replevin directing defendant Pennsylvania State University to give plaintiff a copy of any email correspondence relevant to the Freeh Group investigation that it has in its possession and that plaintiff generated or received between the years 1998 and 2004; and to grant such other and further relief as this Court shall deem just and proper.

Count Two: Mandamus

24. The allegations contained in paragraph 1 through 23 are incorporated herein by reference.

25. Penn State, by taking the position that it would willingly turn over Dr. Spanier's email record to him if it were not for the direction of the Pennsylvania Attorney General, has in effect agreed to an amicable action of mandamus under Pennsylvania Rule of Civil Procedure 1093(2).

26. Unless Penn State turns over the email record, Dr. Spanier will be deprived of the ability to give the Freeh firm his most accurate recollections.

27. Dr. Spanier has no other adequate remedy at law.

WHEREFORE, the plaintiff Graham Spanier hereby demands that this Court enter an Order of Mandamus directing defendant to give plaintiff a copy of any email correspondence relevant to the Freeh Group investigation that it has in its possession and that plaintiff generated or received between the years 1998 and 2004; and to grant such other and further relief as this Court shall deem just and proper.

Peter F. Vaira (PA Id. No. 17042)
John E. Riley (PA Id. No. 22504)
Vaira & Riley
1600 Market Street, Suite 2650
Philadelphia, PA 19103
215-751-2700
215- 751-9420 (facsimile)

EXHIBIT A

VAIRA & RILEY

A PROFESSIONAL CORPORATION

1600 Market Street, Suite 2650
Philadelphia, PA 19103

Telephone (215) 751-2700
Facsimile (215) 751-9420
E-mail j.riley@vairariley.com
Website vairariley.com

John E. Riley

April 18, 2012

VIA EMAIL

Frank T. Guadagnino, Esquire
Reed Smith
225 Fifth Avenue
Pittsburgh, PA 15222

Dear Frank:

As you know we represent Dr. Graham Spanier. We have been working with Mike Mustokoff at Duane Morris to obtain certain of Dr. Spanier's documents during his tenure as President of PSU in order to properly prepare and represent Dr. Spanier's interests.

Dr. Spanier has been contacted by representatives of the Louis Freeh group which is conducting an extensive review of Penn State's operations over the past 15 years. Dr. Spanier was the University President for the past 16 years. He will surely be asked numerous questions about the operations, practices, and personnel of the university during that period of time. We are aware that there are Dr. Spanier's emails from before 2004 in the University's possession (prior to 2004). We were waiting to receive them from Mike Mustokoff. Late last week, Mike Mustokoff told us that he received instructions forbidding him to provide us those documents.

We called yesterday to speak with you about the matter but only got through to voicemail. Hopefully, this instruction to Mike Mustokoff can be reversed. It is clearly not in the University's interests to withhold documents from Dr. Spanier and, thereby, prevent him from being properly prepared. This is especially so when dealing with events which may have occurred over 10 years ago and, in Dr. Spanier's case, well over 10,000 emails ago and thousands of meetings ago.

Conversely, we see no countervailing benefit to PSU from withholding the documents. We understand that these documents have been produced to the Attorney General of Pennsylvania, the U.S. Attorney for the Middle District, and to the Louis Freeh Group's attorneys/investigators. Obviously, there is no privilege that attaches to these documents if they have been shared so thoroughly and freely with others.

EXHIBIT A

These documents are essential for our client's proper preparation. They should have been obtained by competent counsel and reviewed with Dr. Spanier even prior to his grand jury appearance last April. To intentionally withhold them from him at this stage is simply not well founded in legal practice or common sense. It smacks of game playing and would constitute fundamental unfairness and prejudice to Dr. Spanier.

Dr. Spanier has always strived to legitimately place the University's best interest as a top priority. Our access to these documents should be consistent with the best interests of the University. There certainly can be no downside to providing him documents to which he was privy during his tenure as University President.

Kindly contact us at your earliest convenience so we may discuss this issue. We believe that these documents should properly be provided to us without significant delay.

Sincerely,

John E. Riley

Peter F. Vaira

Timothy K. Lewis
Schnader Harrison Segal & Lewis LLP
The Victor Building
750 9th Street, NW, Suite 550
Washington, DC 20001-4534

JER/slc

EXHIBIT B

VAIRA & RILEY

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Peter F. Vaira*
*also admitted in Illinois and District of Columbia

April 25, 2012

VIA EMAIL

Louis J. Freeh, Esquire
Freeh Group International Solutions
3711 Kennett Pike, Suite 130
Wilmington, DE 19807-2156

Dear Judge Freeh:

We represent Dr. Spanier who, as you know, was the President of Penn State University from 1995 to November, 2011. We have been in contact with Greg Paw about scheduling an interview for Dr. Spanier in connection with the investigation your firm is conducting at Penn State University. Dr. Spanier has been eagerly awaiting the opportunity to be interviewed. As we have advised Greg Paw, we need to have access to documents relevant to Dr. Spanier's 16 years tenure as University President to permit him to be properly prepared and refresh his recollection of events occurring up to 16-17 years ago.

We have been working for some time over the past six to eight weeks with Mike Mustokoff and Dan Walworth of Duane Morris, the firm designated to handle document issues for PSU. As we had advised Greg Paw on more than one occasion, we seemed to be making strides to obtain the documents necessary to prepare Dr. Spanier for an interview. However, recently we have been notified of an obstacle which prevents us from obtaining documents and, thereby, prevents us from proceeding to an interview with you and your representatives. We had been advised a few weeks ago by Mike Mustokoff that PSU was in possession of certain documents, namely, emails prior to 2004 going back to 1998, which we would be able to obtain from him in due course when he received them. After two or three contacts with Mike's office about possible production of those documents in a short time period, last week Mike Mustokoff told us he was instructed he was forbidden to turnover those documents to us.

We attempted to overcome this instruction by raising this issue with Frank Guadagnino, the attorney from Reed Smith charged with representing the PSU on a multitude of issues and the attorney to whom Mike Mustokoff directed us to seek recourse. We sent a letter dated April 18, 2012, a copy of which is attached hereto, to Frank to reconsider the position by PSU and allow us the necessary documents to permit us to properly prepare Dr. Spanier for, *inter alia*, an

EXHIBIT B

interview with you. Unfortunately, on April 20, 2012, we received a responsive letter (a copy of which is attached hereto) from Frank which advised us the University felt constrained to abide by a request of the Pennsylvania Attorney General to not produce these documents to us, even though they have been shared with your firm, the U.S. Attorney in the Middle District, the Pennsylvania Attorney General and others within the University community.

As frustrated as we feel with the University's position, we wish to advise that we simply cannot agree to an interview without the necessary documents we know are in existence and which are essential to properly prepare our client. We know you share with us a substantial background in law enforcement and in white collar matters. We are confident that you will readily agree that we cannot have our client submit to an interview without having access to relevant documents. We cannot repeat the episode from last year in which our client was permitted to be interviewed by the Attorney General's office and, later, appear in front of a grand jury with absolutely no preparation, including no review of any relevant documents.

We are also addressing this issue with you in the hopes that you, in your position of independently reviewing matters occurring during Dr. Spanier's tenure as President for the University, may be able to influence the University to change its position with respect to permitting us access to documents. We all know there is no legal authority for a prosecutor to forbid the sharing of documents such as these. Conversely, there is a minimal (we believe zero) risk that providing us access to these documents could realistically "compromise" an investigation.[1] We, on behalf of our client and his sincere interest in being interviewed as part of your investigation, request any assistance you may be able to provide to have the requisite documents necessary for our preparation to be released to us.

Any assistance or guidance you and your firm may be able to provide would be greatly appreciated. Unfortunately, the most recent decision by the University to forbid us access to relevant documents has a very unfortunate impact on our client's ability to be interviewed until such decision is reversed and we can gain access to the documents.

---

[1] On the issue of "compromising an investigation", certainly we cannot destroy or alter the documents. Further, it would not be in our interest to further disseminate them to anyone else and, if necessary, we would be willing to enter into a confidentiality agreement to that effect.

We would welcome the opportunity to meet and discuss this issue further with you if you feel any progress can be made to enable us to obtain documents. You may contact us at any time.

Sincerely,

Peter F. Vaira

John E. Riley

JER/tb
Enclosures

cc: Gregory A. Paw, Esquire (*w/enc*)

EXHIBIT C

Frank T. Guadagnino
Direct Phone: +1 412 288 3236
Email: fguadagnino@reedsmith.com

Reed Smith LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222-2716
+1 412 288 3131
Fax +1 412 288 3063
reedsmith.com

April 20, 2012

Peter F. Vaira, Esquire
Vaira and Riley, P.C.
Suite 2650
1600 Market Street
Philadelphia PA 19103

Dear Peter:

I have read your letter several times, considered it carefully and discussed it with Mike. After careful consideration, we cannot allow you to see the documents which you have requested.

Please understand the difficult position in which we find ourselves. We have received an explicit instruction from the Deputy Attorney General not to share the requested information for fear of compromising the Commonwealth's ongoing investigation.

Given that instruction and the sensitivity of the University's position, we see ourselves as having no choice but to accede to the Deputy Attorney General's instruction.

At page 2 of your letter, you imply that the documents that you have requested should have been provided to Dr. Spanier prior to his Grand Jury appearance last April. We can assure you that those same documents were only discovered within the last several weeks and were, therefore, unavailable at that time.

We regret that we cannot be more helpful to Dr. Spanier at this time.

Very truly yours,

Frank T. Guadagnino

FTG:ac

EXHIBIT C

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VERIFICATION

I verify that the statements made in the within Complaint are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S.A. §4904, relating to unsworn falsification to authorities.

Date: 5/24/12

Graham Spanier

Exhibit B

Ex-Penn State officials may face more charges

As Jerry Sandusky's sex abuse trial begins, authorities are reviewing emails and documents as they reportedly consider bringing more charges against former Penn State officials for allegedly concealing what they knew about his conduct. NBC's Michael Isikoff reports.

>> held at the child sex abuse trial of penn state football coach jerry sandusky . nbc 's national correspondent michael isikoff at the courthouse this morning. michael, good morning.

>> reporter: good morning, ann. jerry sandusky goes on trial today charged with repeatedly molesting young boys . law enforcement officials telling nbc news pennsylvania prosecutors are weighing bringing more charges in this case against former top penn state officials for allegedly concealing what they knew about his conduct. as sandusky goes to court, law enforcement sources tell nbc news investigators obtained new evidence in this case. internal e-mails and documents they say show former president graham spanier and others discussed whether they needed to tell authorities about a 2001 allegation involving a late night encounter between a naked sandusky and a young boy in the penn state shower room. the sources say

Exhibit B

documents show penn state even did legal research on the issue. but in one e-mail exchange two sources say spanier and former vice president gary schultz agreed it would bc, quote, humane to sandusky not to inform social services and the incident never got reported.

>> depending on precisely what's in the e-mails and documents, this could spell more legal trouble for other university officials.

>> reporter: sandusky who denies all charges is facing 52 counts of child sex abuse . eight of his alleged victims are slated to testify. among them, a young man known as victim six who first told penn state in 1998 when he was 11 years old that sandusky had bear hugged him in the penn state shower room. dr. chambers, the boy's psychologist, submitted this report to penn state police at the time concluding sandusky 's behavior fit that of a likely pedophile's pattern.

>> i immediately thought this may well be a child molester .

>> reporter: but a second psychologist reached a different conclusion and no charges were filed. then graduate assistant mike mcqueary had originally testified to a grand jury he saw sandusky in the shower with a young boy in mar 2002 . a new e-mail says spanier , schultz and former director discussed what mcqueary saw and whether to report it more than a year earlier.

>> at a minimum it suggests they took mcqueary much more seriously than they led the grand jury to believe.

>> lawyers for spanier , who was fired last september, did not return calls seeking comment. said, "the information confirms conscientiously considered mike mcqueary 's reports of observing inappropriate conduct, reported it to the university president graham spanier and deliberated about how to responsibly deal with the conduct. legal sources say discovery of the e-mails show whatever happens in the sandusky trial, the investigation as to whether there's a cover-up by penn state officials is very active and going strong.

>> more to come on this. michael isikoff , thank you very

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Exhibit C

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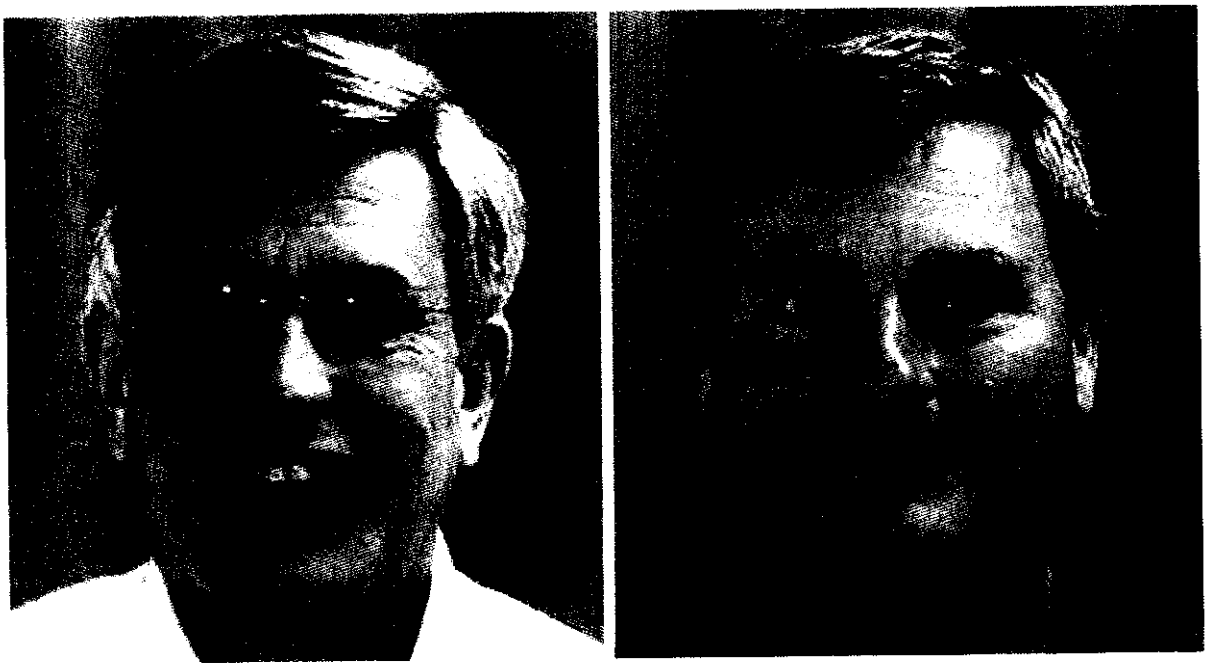
Gary Schultz, Tim Curley attorneys respond to Graham Spanier report

Published: June 11, 2012 Updated 12 hours ago



Tim Curley, left, and Gary Schultz face their preliminary hearings on perjury and failure-to-report-abuse charges Friday in Harrisburg.

CDT

By Cliff White cwhite@centredaily.com — State College - Centre Daily Times

Bellefonte — Attorneys for former Penn State officials Gary Schultz and Tim Curley acknowledged Monday that high-level discussions took place between their clients and ex-President Graham Spanier concerning allegations of child sex abuse against former assistant football coach Jerry Sandusky.

The statement followed an NBC News report Monday that cited sources involved in the Sandusky investigation who said "major new evidence" could mean Spanier may face charges.

The development hit as Sandusky's trial was beginning at the Centre County Courthouse.
Schultz and Curley have been charged with perjury related to statements made to a grand jury and failure to report child abuse.

The evidence includes emails exchanged by Spanier, Schultz and Curley in 2001 when, NBC reported, Spanier and Schultz de cided it would be "humane" to Sandusky to not involve legal authorities.

Exhibit C

That decision followed claims by then-graduate as sistant coach Mike Mc Queary that he saw Sandusky in a shower with a young boy on campus.

Spanier has sued Penn State in an attempt to get copies of those emails, saying seeing them would better enable him to respond to the university's investigation by former FBI chief Louis Freeh concerning Penn State's handling of the Sandusky allegations.

Caroline Roberto, the attorney for Curley, and Tom Farrell, who represents Schultz, released a joint statement in which they acknowledge their clients discussed with Spanier allegations of inappropriate conduct by Sandusky.

"The information confirms that as they testified at the grand jury, Tim Curley and Gary Schultz conscientiously considered Mike Mc Queary's reports of observing inappropriate conduct, reported it to the University President Graham Spanier, and deliberated about how to responsibly deal with the conduct and handle the situation properly," the statement said.

Also in response to the Spanier report, Penn State spokesman David La Torre released the following statement:

"In the course of former FBI Director Louis Freeh's independent investigation, emails were discovered and immediately turned over to the State Attorney General. In deference to the legal process, the University cannot comment further on specifics of the ongoing legal case as it unfolds.

"We continue to work with the State Attorney General, the U.S. Attorney and Judge Freeh in their investigations into this matter. We will continue to cooperate fully with all legal processes to determine what happened and ensure personal accountability."

Cliff White can be reached at 235-3928. Follow him on Twitter @CliffWhiteNews

Back to Top
< Previous Story

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Bellefonte Cruise 'will go on' this weekend despite Jerry Sandusky trial

Exhibit D

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As of: Jun 05, 2012

BILL MCLAREN, JR., Appellant v. MICROSOFT CORPORATION, Appellee

No. 05-97-00824-CV

COURT OF APPEALS OF TEXAS, FIFTH DISTRICT, DALLAS

1999 Tex. App. LEXIS 4103

May 28, 1999, Opinion Filed

NOTICE: [*1] PURSUANT TO THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

PRIOR HISTORY: On Appeal from the 116th Judicial District Court. Dallas County, Texas. Trial Court Cause No. 97-00095-F.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff appealed a judgment from 116th Judicial District Court, Dallas County (Texas), which dismissed his case against defendant, his former employer. Plaintiff sued for invasion of privacy based on defendant's review and dissemination of electronic mail stored in a "personal folders" application on plaintiff's office computer. Defendant's special exception was granted, and the action was dismissed when plaintiff failed to replead his claims.

OVERVIEW: Judgment that dismissed plaintiff's action against defendant, his former employer, was affirmed. Plaintiff sought damages for invasion of privacy based on defendant's review and dissemination of electronic mail stored in "personal folders" on plaintiff's office computer. The trial court granted a special exception, and plaintiff refused to replead. Plaintiff argued that the special exception was an impermissible speaking demurrer that relied on facts outside the complaint and contended that he had stated a valid claim. The appellate court held that the special exception did not rise to the level of a speaking demurrer where the challenged allegations were not in the exception but in a memorandum in support and where there was no indication that the trial court relied on the allegations in reaching its decision. Plaintiff did not allege facts that would establish a reasonable expectation of privacy in the e-mail messages where they were not personal property but were merely part of the office environment. In any case, defendant's action would not be considered invasion of privacy where its need to prevent inappropriate use of its e-mail system would outweigh any privacy interest.

OUTCOME: Dismissal of invasion of privacy suit was affirmed. The action was based on review and dissemination by defendant, plaintiff's former employer, of electronic mail stored in "personal folders" on plaintiff's office computer. It was dismissed after a special exception was granted and plaintiff did not replead. The special exception was not a speaking demurrer, and plaintiff did not allege facts that established a reasonable expectation of privacy.

CORE TERMS: special exception, e-mail, message, locker, folders, cause of action, invasion of privacy, password, stored, intrusion, speaking, demurrer, replead, manifested, amend, lock, electronic mail, workstation,

Exhibit D

offensive, invasion, breaking, storage, privacy interest, personal belongings, facts giving rise, sexual harassment, expectation of privacy, private affairs, reasonable expectation of privacy, unjustified

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > General Overview

[HN1]A special exception may serve several functions including: (1) questioning the sufficiency in law of the plaintiff's alleged claim; (2) presenting dilatory matters shown on the face of the pleading; and (3) indicating formal defects in the allegations. Regardless which function the special exception serves, however, it must address only matters shown on the face of the pleadings. A special exception that uses facts not appearing in the petition to challenge the plaintiff's right to recover is known as a "speaking demurrer." Speaking demurrers are not permitted in Texas. The proper course for a defendant that relies on facts outside the petition to demonstrate the plaintiff's inability to recover is to pursue relief through a motion for summary judgment or similar action.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > General Overview
Civil Procedure > Appeals > Dismissals of Appeals > General Overview

[HN2]When a trial court sustains a defendant's special exceptions, it must give the plaintiff an opportunity to amend the pleading. The plaintiff then has two options: either amend the pleading to cure the defect or refuse to amend. If the plaintiff refuses to amend, the court may dismiss the case and the plaintiff may test the ruling on appeal.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN3]When reviewing a trial court's dismissal of a cause of action on special exceptions, an appellate court must accept as true all of the factual allegations set out in the challenged pleading. This standard, however, does not apply to the plaintiff's assertions of law. The legal conclusions of the trial court as to whether the plaintiff's petition adequately pleads facts giving rise to a cause of action are subject to a de novo review in the appellate court.

Torts > Intentional Torts > Defamation
Torts > Intentional Torts > Invasion of Privacy > Intrusion > General Overview
Torts > Intentional Torts > Invasion of Privacy > Public Disclosure of Private Facts > General Overview

[HN4]Texas recognizes four distinct torts, any of which constitutes an invasion of privacy: (1) intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Torts > Intentional Torts > Invasion of Privacy > Intrusion > General Overview

[HN5]There are two elements to a cause of action for intrusion upon a plaintiff's seclusion or into his or her private affairs: (1) an intentional intrusion, physically or otherwise, upon another's solitude, seclusion, or private affairs or concerns, which (2) would be highly offensive to a reasonable person. When assessing the offensive nature of the invasion, courts further require the intrusion to be unreasonable, unjustified, or unwarranted. This type of invasion of privacy is generally associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying.

JUDGES: Before Justices Morris, Whittington, and Roach. Opinion By Justice Roach.

OPINION BY: JOHN R. ROACH

OPINION

OPINION

Opinion By Justice Roach

In this case, appellant Bill McLaren, Jr. asks us to recognize a cause of action for invasion of privacy based on his employer's review and dissemination of electronic mail stored in a "personal folders" application on McLaren's office computer. We conclude that McLaren's petition failed to allege facts sufficient to state a cause of

action for invasion of privacy. We affirm the trial court's judgment.

FACTUAL BACKGROUND

McLaren was an employee of Microsoft Corporation. In December 1996, Microsoft suspended McLaren's employment pending an investigation into accusations of sexual harassment and "inventory questions." McLaren requested access to his electronic mail to disprove the allegations against him. According to McLaren, he was told he could access his e-mail only by requesting it [*2] through company officials and telling them the location of a particular message. By memorandum, McLaren requested that no one tamper with his Microsoft office workstation or his e-mail. McLaren's employment was terminated on December 11, 1996.

Following the termination of his employment, McLaren filed suit against the company alleging as his sole cause of action a claim for invasion of privacy. In support of his claim, McLaren alleged that, on information and belief, Microsoft had invaded his privacy by "breaking into" some or all of the personal folders maintained on his office computer and releasing the contents of the folders to third parties. According to McLaren, the personal folders were part of a computer application created by Microsoft in which e-mail messages could be stored. Access to the e-mail system was obtained through a network password. Access to personal folders could be additionally restricted by a "personal store" password created by the individual user. McLaren created and used a personal store password to restrict access to his personal folders.

McLaren concedes in his petition that it was possible for Microsoft to "decrypt" his personal store password. McLaren [*3] alleges, however, that "by allowing [him] to have a personal store password for his personal folders, [McLaren] manifested and [Microsoft] recognized an expectation that the personal folders would be free from intrusion and interference." McLaren characterizes Microsoft's decrypting or otherwise "breaking in" to his personal folders as an intentional, unjustified, and unlawful invasion of privacy.

In response to McLaren's petition, Microsoft filed a special exception, original answer, and affirmative defenses. Microsoft specially excepted to "all Petition allegations that purport to state a cause of action for tortious invasion of privacy arising out of Defendant's alleged 'breaking into' and 'publication of' information contained within electronic-mail folders that were part of an electronic mail system owned and administered by Defendant and made available for Plaintiff's use only in connection with his employment by Defendant." Microsoft contended that " the common law of Texas does not recognize any right of privacy in the contents of electronic mail systems and storage that are provided to employees by the employer as part of the employment relationship." In addition to [*4] the special exception, Microsoft filed a supporting memorandum setting forth arguments and authorities for granting the special exception. Based on its contention that McLaren's allegations did not give rise to a cause of action, Microsoft requested that McLaren be required to replead and, if he refused, that his claims be dismissed.

McLaren responded, arguing that Microsoft's special exception relied on facts outside the pleadings and was, therefore, an impermissible "speaking demurrer." The trial court granted Microsoft's special exception and ordered McLaren to replead his petition to eliminate all statements claiming tortious invasion of privacy in connection with the facts currently alleged in the petition. The court further ordered that, if McLaren failed to replead his claims, the case would be dismissed in its entirety. McLaren did not replead his petition and, on April 10, 1997, the trial court signed an order dismissing the case with prejudice. McLaren brings this appeal challenging the trial court's order of dismissal.

DISCUSSION

In his first point of error, McLaren contends the trial court erred in granting Microsoft's special exception because it sought relief based [*5] on facts outside the petition. [HN1]A special exception may serve several functions including: (1) questioning the sufficiency in law of the plaintiff's alleged claim; (2) presenting dilatory matters shown on the face of the pleading; and (3) indicating formal defects in the allegations. *Brown v. Hawes*, 764 S.W.2d 855, 856 (Tex. App.-Austin 1989, no writ). Regardless which function the special exception serves, however, it must address only matters shown on the face of the pleadings. *Id.* A special exception that uses facts not appearing in the petition to challenge the plaintiff's right to recover is known as a "speaking demurrer." *Ragsdale v. Ragsdale*, 520 S.W.2d 839, 843 (Tex. Civ. App.-Fort Worth 1975, no writ). Speaking demurrers are not permitted in Texas. *Id.* The proper

course for a defendant that relies on facts outside the petition to demonstrate the plaintiff's inability to recover is to pursue relief through a motion for summary judgment or similar action. *Id.*

McLaren argues that Microsoft's special exception rises to the level of a speaking demurrer. In support of this argument, McLaren points to allegations of fact that do not appear in his petition, but [*6] upon which he contends Microsoft relied in seeking to force him to replead. The allegations noted by McLaren are not contained in Microsoft's special exception, but in its memorandum in support of the special exception. The special exception itself states only that McLaren's claim for invasion of privacy is based on Microsoft's alleged access and publication of "information contained within electronic-mail folders that were part of an electronic mail system owned and administered by [Microsoft] and made available for [McLaren's] use only in connection with his employment by Microsoft." After reviewing McLaren's petition, we conclude that the facts stated in Microsoft's special exception accurately reflect the allegations in the petition and are not extrinsic to the pleadings.

To the extent that Microsoft's memorandum in support of its special exception states facts outside the pleadings, there is nothing in our record to indicate that the trial court relied upon or even considered these facts in reaching its decision. Indeed, the trial court's order explicitly states that it "considered *Defendant's Special Exception*, and for good cause shown, the Court has determined that [*7] the *special exception* should be granted." (emphasis added). Because Microsoft's special exception does not assert facts outside the scope of the petition and there is no indication that the trial court relied upon extrinsic facts when granting the special exception, we cannot conclude that the trial court erroneously granted a speaking demurrer. We overrule McLaren's first point of error.

In his second point of error, McLaren contends the trial court erred in sustaining the special exception and dismissing the case because, contrary to the ruling otherwise, his petition alleged facts giving rise to a cause of action for invasion of privacy. [HN2]When the trial court sustains a defendant's special exceptions, it must give the plaintiff an opportunity to amend the pleading. *Friesenhahn v. Ryan,* 960 S.W.2d 656, 658 (Tex. 1998); *Nichols v. Jack Eckerd Corp.,* 908 S.W.2d 5, 7 (Tex. App.-Houston [1st Dist.] 1995, no writ). The plaintiff then has two options: either amend the pleading to cure the defect or refuse to amend. *Nichols,* 908 S.W.2d at 7. If, as in this case, the plaintiff refuses to amend, the court may dismiss the case and the plaintiff may test the ruling on appeal. [*8] *See id.*

[HN3]

When reviewing the trial court's dismissal of a cause of action on special exceptions, we must accept as true all of the factual allegations set out in the challenged pleading. *See id.* This standard, however, does not apply to the plaintiff's assertions of law. The legal conclusions of the trial court as to whether the plaintiff's petition adequately pleads facts giving rise to a cause of action are subject to a *de novo* review in this Court. *See id.*

In the instant case, the trial court apparently reached the conclusion that, accepting as true all of McLaren's factual allegations, his petition did not allege a cause of action for invasion of privacy. It is this legal conclusion that we now review.

[HN4]Texas recognizes four distinct torts, any of which constitutes an invasion of privacy:

(1) Intrusion upon the plaintiff's seclusion or solitude or into his private affairs;

(2) Public disclosure of embarrassing private facts about the plaintiff;

(3) Publicity which places the plaintiff in a false light in the public eye;

(4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

See Industrial Found. of the S. v. Texas [*9] *Indus. Accident Bd.,* 540 S.W.2d 668, 682 (Tex. 1976), *cert. denied,* 430 U.S. 931, 51 L. Ed. 2d 774, 97 S. Ct. 1550 (1977). At issue in this case is whether McLaren's petition states a cause of action under the first recognized tort. [HN5]There are two elements to this cause of action: (1) an intentional intrusion, physically or otherwise, upon another's solitude, seclusion, or private affairs or concerns, which (2) would be highly offensive to a reasonable person. *Valenzuela v. Aquino,* 853 S.W.2d 512, 513 (Tex. 1993). When assessing the offensive nature of the invasion, courts further require the intrusion

to be unreasonable, unjustified, or unwarranted. *Billings v. Atkinson,* 489 S.W.2d 858, 860 (Tex. 1973). This type of invasion of privacy is generally associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying. *Wilhite v. H.E. Butt Co.,* 812 S.W.2d 1, 6 (Tex. App.-Corpus Christi 1991, no writ).

In his petition and on appeal, McLaren contends the fact that the e-mail messages were stored under a private password with Microsoft's consent gave rise to "a legitimate expectation [*10] of privacy in the contents of the files." As support for his position, McLaren relies on *K-Mart Corp. Store No. 7441 v. Trotti,* 677 S.W.2d 632 (Tex. App.-Houston [1st Dist.] 1984), *writ ref'd n.r.e.,* 686 S.W.2d 593 (1985).

In *Trotti,* the court considered the privacy interest of an employee in a locker provided by the employer to store personal effects during work hours. The court began its analysis by recognizing that the locker was the employer's property and, when unlocked, was subject to legitimate, reasonable searches by the employer. The court further reasoned:

This would also be true where the employee used a lock provided by [the employer], because in retaining the lock's combination or master key, it could be inferred that [the employer] manifested an interest both in maintaining control over the locker and in conducting legitimate, reasonable searches."

Trotti, 677 S.W.2d at 637. But, the court concluded, when, as in *Trotti,* an employee buys and uses his own lock on the locker, with the employer's knowledge, the fact finder is justified in concluding that the "employee manifested, and the employer recognized, an expectation that the locker [*11] and its contents would be free from intrusion and interference."

McLaren urges that the locker in *Trotti* is akin to the e-mail messages in this case, "only the technology is different." We disagree. First, the locker in *Trotti* was provided to the employee for the specific purpose of storing *personal* belongings, not work items. In contrast, McLaren's workstation was provided to him by Microsoft so that he could perform the functions of his job. In connection with that purpose and as alleged in McLaren's petition, part of his workstation included a company-owned computer that gave McLaren the ability to send and receive e-mail messages. Thus, contrary to his argument on appeal, the e-mail messages contained on the company computer were not McLaren's personal property, but were merely an inherent part of the office environment.

Further, the nature of a locker and an e-mail storage system are different. The locker in *Trotti* was a discrete, physical place where the employee, separate and apart from other employees, could store her tangible, personal belongings. The storage system for e-mail messages is not so discrete. As asserted by McLaren in his petition, e-mail [*12] was delivered to the server-based "inbox" and was stored there to read. [1] McLaren could leave his e-mail on the server or he could move the message to a different location. According to McLaren, his practice was to store his e-mail messages in "personal folders." Even so, any e-mail messages stored in McLaren's personal folders were first transmitted over the network and were at some point accessible by a third-party. [2] Given these circumstances, we cannot conclude that McLaren, even by creating a personal password, manifested -- and Microsoft recognized -- a reasonable expectation of privacy in the contents of the e-mail messages such that Microsoft was precluded from reviewing the messages.

1 E-mail messages are by definition "stored in a routing computer." *See Bohach v. City of Reno,* 932 F. Supp. 1232, 1234 (D. Nev. 1996). "The central computer routing the messages stores the transmission in unencrypted plain text files, available to the service provider whether that be a third-party common carrier or the employer itself." 932 F. Supp. at 1234-35 n.2.

2 McLaren also cites *Dawson v. State,* 868 S.W.2d 363 (Tex. App.-Dallas 1993, pet. ref'd), which is a criminal case addressing the propriety of a search of a locked locker of a topless dancer. As in *Trotti,* the employer provided the locker. The employee had the only key to the lock. The employer ordered the employee to open the locker and, in the presence of the police, searched a purse inside the locker and found drugs. This Court concluded that the employee's expectation of privacy was reasonable and further concluded that the State had not established otherwise. Any distinction in the instant case with respect to *Trotti* would equally apply to *Dawson.*

[*13] Even if we were to conclude that McLaren alleged facts in his petition which, if found to be true, would establish some reasonable expectation of privacy in the contents of his e-mail messages sent over the company e-mail system, our result would be the same. We would nevertheless conclude that, from the facts alleged in the petition, a reasonable person would not consider Microsoft's interception of these communications to be a highly offensive invasion. As set forth in McLaren's petition, at the time Microsoft accessed his e-mail messages, McLaren was on suspension pending an investigation into accusations of sexual harassment and "inventory questions" and had notified Microsoft that some of the e-mails were relevant to the investigation. Accordingly, the company's interest in preventing inappropriate and unprofessional comments, or even illegal activity, over its e-mail system would outweigh McLaren's claimed privacy interest in those communications. *See Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa. 1996). We overrule the second point of error.

We affirm the trial court's judgment.

JOHN R. ROACH

JUSTICE

Exhibit E

LEXSEE

Caution
As of: Jun 05, 2012

LINDA KELLEHER v. CITY OF READING, ET AL.

Civil Action No. 01-3386

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2002 U.S. Dist. LEXIS 9408

May 29, 2002, Filed

DISPOSITION: Defendant Jeffrey Waltman's Motion for Summary Judgment was granted. All claims against said Defendant are DISMISSED under the doctrine of qualified immunity. Defendants City of Reading, Joseph D. Eppihimer, and Kevin Cramsey's Motion for Summary Judgment was granted. Judgment is ENTERED in favor of said Defendants on all remaining counts.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff former employee sued defendants, a city, a mayor, a mayor's assistant, and a city councilman, alleging First Amendment retaliation and conspiracy claims pursuant to 42 U.S.C.S. § 1983. The employee sued the assistant for invasion of privacy. The councilman moved for summary judgment asserting a qualified immunity defense. The remaining defendants filed a joint motion for summary judgment.

OVERVIEW: The employee alleged that the councilman spoke to the medial and disclosed information relating to her suspension in order to retaliate against her for engaging in conduct that was protected by the First Amendment. The employee alleged that the remaining defendants engaged in a campaign of harassment as a result of certain conduct and speech which they thought she engaged in. The court found that while the councilman spoke to the media in interviews, there was no evidence showing a connection between the employee's alleged constitutionally protected speech and any actions taken by the councilman. Therefore, the employee failed to prove any evidence of an improper motive and his statements were protected under the qualified immunity defense. The employee failed to establish a genuine issue of material fact to sustain her First Amendment retaliation claim because she failed to adduce evidence that she engaged in speech or conduct that was protected by the First Amendment. Furthermore, she failed to establish that the conduct was the substantial motivating factor behind the allegedly retaliatory actions taken by defendants.

OUTCOME: The councilman's motion for summary judgment was granted. The remaining defendants' joint motion for summary judgment was granted.

CORE TERMS: retaliation, e-mail, retaliatory, summary judgment, qualified immunity, deposition, genuine, motive, adduce, issue of material fact, privacy, reasonable expectation of privacy, constitutional rights, publicity, invasion, parking, rumors, protected activity, suspension, intrusion, seclusion, reasonable person, protected speech, public concern, harassment, conspiracy claims, expectation of privacy, verification, admissible, guidelines

LexisNexis(R) Headnotes

Exhibit E

Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Materiality
Civil Procedure > Summary Judgment > Supporting Materials > General Overview
[HN1]Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that a moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is genuine if the evidence is such that a reasonable jury can return a verdict for a non-moving party. A factual dispute is material if it might affect the outcome of the case under governing law.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants
Civil Procedure > Summary Judgment > Evidence
Civil Procedure > Summary Judgment > Opposition > General Overview
[HN2]A party seeking summary judgment always bears the initial responsibility for informing a district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Where a non-moving party bears the burden of proof on a particular issue at trial, the movant's initial burden can be met simply by pointing out to the district court that there is an absence of evidence to support the non-moving party's case. After the moving party meets its initial burden, the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Under Fed. R. Civ. P. 56, the court must view the evidence presented on the motion in the light most favorable to the opposing party. If the opponent exceeds the mere scintilla of evidence threshold and offers a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent.

Civil Rights Law > Immunity From Liability > Local Officials > Customs & Policies
[HN3]Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation. Government officials have qualified immunity from suit under 42 U.S.C.S. § 1983 so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The test is whether reasonable persons in a defendant's position at the relevant time could believe, in light of clearly established law, that his conduct comported with established legal standards. Thus, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. The defendant has the burden of pleading and proving qualified immunity.

Civil Rights Law > Immunity From Liability > Local Officials > Customs & Policies
Governments > Courts > Judicial Precedents
[HN4]When resolving issues of qualified immunity, a district court must first determine whether a plaintiff alleges a deprivation of a constitutional right. If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. If the court determines that a constitutional violation is viable on a favorable view of the parties' submissions, the court must then ask whether the right was clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition. Although a right may be clearly established even if there is no prior precedent that is directly on point, the contours of the right must be sufficiently clear that a reasonable official will understand that what he is doing violates that right. Accordingly, the relevant inquiry in determining whether a right is clearly established is whether it will be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Civil Procedure > Summary Judgment > Opposition > General Overview
Civil Rights Law > Immunity From Liability > Local Officials > Customs & Policies
[HN5]Where a plaintiff alleges an unconstitutional subjective intent, she must proffer particularized evidence of direct or circumstantial facts that support the claim of an improper motive in order to avoid summary judgment on qualified immunity grounds. The standard allows an allegedly offending official sufficient protection against

baseless and unsubstantiated claims, but stops short of insulating an official whose objectively reasonable acts are besmirched by a prohibited unconstitutional motive.

Civil Rights Law > Immunity From Liability > Local Officials > Customs & Policies
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom
[HN6]In the context of a qualified immunity defense, with no evidentiary connection whatsoever between any actions that might have been taken by a defendant and a plaintiff's First Amendment free speech rights, reasonable persons in the defendant's position at the relevant time could have believed, in light of clearly established law, that his conduct comported with established legal standards.

Civil Rights Law > Contractual Relations & Housing > Civil Rights Act of 1866
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > General Overview
Labor & Employment Law > Discrimination > Retaliation > Statutory Application > Reconstruction Statutes (secs. 1981, 1983 & 1985)
[HN7]The First Amendment protects public employees from retaliation by their employer. Under 42 U.S.C.S. § 1983, a public employee may sue to enforce that protection if: (1) she spoke on a matter of public concern; (2) her interest in that field outweighed the government's concern with the effective and efficient fulfillment of its responsibilities to the public; (3) the speech caused the retaliation; and (4) the retaliatory action would not have occurred but for the speech.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom
Labor & Employment Law > Discrimination > Retaliation > General Overview
[HN8]In order to be considered protected speech under the First Amendment, the speech or activity engaged in must address a matter of public concern. Speech addresses a matter of public concern when it relates to any matter of political, social, or other concern to the community. However, regardless of the subject of the alleged speech, a plaintiff must actually engage in the type of conduct protected from retaliation under the First Amendment. A retaliation claim cannot be based on speech or conduct if a defendant erroneously believed that the plaintiff engaged in such speech or conduct.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Public Employees
[HN9]A public employee's speech involves a matter of public concern if it can be fairly considered as relating to any matter of political, social or other concern to the community. In this respect, a district court focuses on the content, form, and context of the activity in question. Speech in a form that is not deemed a matter of public concern in one context does not become a matter of public concern simply because it could be deemed protected in a different context.

Labor & Employment Law > Discrimination > Retaliation > General Overview
[HN10]A plaintiff must show that her protected activity was a substantial or motivating factor in the actions alleged to be retaliatory.

Labor & Employment Law > Discrimination > Retaliation > General Overview
[HN11]Temporal proximity between the protected activity and the allegedly retaliatory action is a factor to consider in retaliation cases.

Civil Rights Law > Section 1983 Actions > Scope
Torts > Procedure > Multiple Defendants > Concerted Action > Civil Conspiracy > General Overview
[HN12]To demonstrate a conspiracy under 42 U.S.C.S. § 1983, a plaintiff must show: (1) there was a single plan, the essential nature and general scope of which was known to each person who is to be held responsible for its consequences; (2) the purpose of the plan was to violate a constitutional right of the plaintiff; (3) an overt act resulted in an actual deprivation of the plaintiff's constitutional rights; and (4) the constitutional violation was the result of an official custom or policy of the municipality.

Torts > Intentional Torts > Invasion of Privacy > Appropriation > General Overview
Torts > Intentional Torts > Invasion of Privacy > Intrusion > General Overview
[HN13]Pennsylvania law provides four theories on which a claim of invasion of privacy can be based: (1) intrusion upon seclusion; (2) appropriation of name and likeness;

(3) publicity given to private life; and (4) publicity placing a person in false light.

Torts > Intentional Torts > Invasion of Privacy > Intrusion > Elements

[HN14]One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person. The invasion may take various forms including: (1) physical intrusion into a place where the plaintiff secludes herself; (2) use of a defendant's senses to oversee or overhear the plaintiff's private affairs; or (3) some other form of investigation into the plaintiff's private concerns. A defendant is subject to liability only when he intrudes into a private place, or otherwise invades a private seclusion that the plaintiff has thrown about her person or affairs. There is no liability unless the interference with the plaintiff's seclusion is both substantial and highly offensive to the ordinary reasonable person.

Torts > Intentional Torts > Invasion of Privacy > Public Disclosure of Private Facts > General Overview

[HN15]One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter published is of a kind that would be highly offensive to a reasonable person, and is not of legitimate concern to the public. To state a cause of action, a plaintiff must prove that a defendant (1) publicized (2) private facts (3) that would be highly offensive to a reasonable person, and (4) are not of legitimate concern to the public. The publicity element requires that the matter be communicated to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. Disclosure of information to only a small number of people is insufficient to constitute publicity.

Torts > Intentional Torts > Invasion of Privacy > Public Disclosure of Private Facts > General Overview

[HN16]In the context of an invasion of privacy claim, to determine if facts are private facts, the line is drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he has no concern. The limitations, in other words, are those of common decency.

COUNSEL: [*1] For LINDA A. KELLEHER, PLAINTIFF: JANA R. BARNETT, WYOMISSING, PA USA.

For CITY OF READING, PENNSYLVANIA, JOSEPH D. EPPIHIMER, KEVIN CRAMSEY, JEFFREY S. WALTMAN, SR., DEFENDANTS: STEVEN K. LUDWIG, FOX, ROTHSCHILD, O'BRIEN & FRANKEL, PHILADELPHIA, PA USA. MAREN REICHERT, FOX ROTHSCHILD O'BRIEN & FRANKEL, LLP, PHILADELPHIA, PA USA.

JUDGES: John R. Padova, J.

OPINION BY: John R. Padova

OPINION

MEMORANDUM

Padova, J.

The instant matter arises on the two separate Motions for Summary Judgment filed by the Defendants. Plaintiff Linda Kelleher, the City Clerk of the City Council of Reading, Pennsylvania, filed this suit against the City of Reading ("City"), Mayor Joseph Eppihimer ("Eppihimer"), the Mayor's assistant Kevin Cramsey ("Cramsey"), and City Councilman Jeffrey Waltman ("Waltman") for a series of allegedly harassing actions taken by the Defendants against her in retaliation for exercising her First Amendment rights to free speech. Plaintiff brings First Amendment retaliation claims and conspiracy claims pursuant to 42 U.S.C. § 1983. She also brings a claim for invasion of privacy against Defendant Cramsey for allegedly publicizing e-mails and [*2] *other purportedly private information relating to her suspension by the City Council. Defendant Waltman filed a Motion for Summary Judgment asserting qualified immunity as well as other bases for dismissal or judgment. The remaining Defendants filed a joint Motion for Summary Judgment asserting a variety of grounds for judgment. For the reasons that follow, the Court grants the Motions as to all claims in favor of all Defendants.*

I. Legal Standard

[HN1]*Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. *Id.*

[HN2]A party seeking summary judgment always bears the initial responsibility for informing the district [*3] court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial *Celotex* burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing [*4] party. *Anderson*, 477 U.S. at 255. "If the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992).

II. Discussion

A. *Qualified Immunity - Claims Against Defendant Waltman*

Defendant Waltman moves for summary judgment on all claims against him on the basis of qualified immunity. [HN3]Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985)). Government officials have qualified immunity from suit under § 1983 so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Sharrar v. Felsing*, 128 F.3d 810, 826 (3d Cir. 1997) [*5] (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)). The test is whether reasonable persons in the defendants' position at the relevant time "could have believed, in light of clearly established law, that their conduct comported with established legal standards." *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 726 (3d Cir. 1989), cert. denied, 493 U.S. 1044, 107 L. Ed. 2d 835, 110 S. Ct. 840 (1990). Thus, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986). The defendant has the burden of pleading and proving qualified immunity. *Harlow*, 457 U.S. at 815.

[HN4]When resolving issues of qualified immunity, a court must first determine whether the plaintiff has alleged a deprivation of a constitutional right. *Saucier*, 121 S. Ct. at 2156; *Torres v. McLaughlin*, 163 F.3d 169, 172 (3d Cir. 1998) (internal citations omitted). If no constitutional right would have been violated were the allegations established, there [*6] is no necessity for further inquiries concerning qualified immunity. *Saucier*, 121 S. Ct. at 2156. If the court determines that a constitutional violation is viable on a favorable view of the parties' submissions, the court must then ask whether the right was clearly established. *Saucier*, 121 S. Ct. at 2156. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition. *Id.* Although a right may be clearly established even if there is no prior precedent that is directly on point, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *See Saucier*, 121 S. Ct. at 2156 (internal quotations omitted); *Eddy v. Virgin Islands Water & Power Auth.*, 256 F.3d 204, No. 99-3849, 2001 WL 770088, at *2 (3d Cir. July 10, 2001). Accordingly, the relevant inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his

conduct was unlawful in the situation he confronted. *Saucier*, 121 S. Ct. at 2156; *Eddy*, 265 F.3d 204, 2001 WL 770088, at *2.

[*7] Plaintiff alleges that Waltman spoke to the media and disclosed information relating to her suspension in order to retaliate against her for engaging in conduct that was protected by the First Amendment. [HN5]Where a plaintiff alleges an unconstitutional subjective intent, she must proffer particularized evidence of direct or circumstantial facts that support the claim of an improper motive in order to avoid summary judgment on qualified immunity grounds. *Keating v. Bucks Cty. Water & Sewer Auth.*, Civil Action No. 99-1584, 2000 U.S. Dist. LEXIS 18690, at *29 (E.D. Pa. Dec. 29, 2000). "The standard allows an allegedly offending official sufficient protection against baseless and unsubstantiated claims, but stops short of insulating an official whose objectively reasonable acts are besmirched by a prohibited unconstitutional motive." *Id.* at 30 (citing *Sheppard v. Beerman*, 94 F.3d 823, 828 (2d Cir. 1996)).

In this case, Plaintiff admits that she has no direct evidence demonstrating that Defendant Waltman disseminated copies of the e-mails to the media, but adduces some circumstantial evidence designed to establish such dissemination. (Pl.'s Resp. [*8] to Def. Waltman's Mot. at 6.) It is undisputed that Defendant Waltman spoke to the media in interviews. (Pl.'s Resp. to Def. Waltman's Mot. Ex. 3 at 6-8.) Plaintiff also presents evidence that Waltman advocated Plaintiff's termination. (Def. Waltman's Ex. A. at 68.)

Absent, however, is any evidence showing any connection between Plaintiff's alleged constitutionally protected speech and any actions taken by this Defendant. [1] In the context of qualified immunity analysis, Plaintiff has failed to provide any evidence of an improper motive by Defendant Waltman for any of the actions taken. Although Plaintiff alleges in her Complaint that the motive was to retaliate for speech in which she engaged, none of the evidence has the tendency to prove such a motive either directly or circumstantially. Plaintiff has likewise adduced no evidence demonstrating that Waltman conspired with the other Defendants for the purpose of retaliating against her for exercising her free speech rights. [HN6]With no evidentiary connection whatsoever between any actions that might have been taken by this Defendant and Plaintiff's First Amendment free speech rights, reasonable persons in the Defendant's position at [*9] the relevant time "could have believed, in light of clearly established law, that [his] conduct comported with established legal standards." *See Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 726 (3d Cir. 1989), cert. denied, 493 U.S. 1044, 107 L. Ed. 2d 835, 110 S. Ct. 840 (1990). Accordingly, Defendant Waltman is entitled to qualified immunity. The Court dismisses all claims against him.

1 Because this part of the qualified immunity inquiry is based on the pleadings rather than evidence in the record, the Court has considered the possible connection between Plaintiff's alleged conduct relating to the Reading Water Authority and the televised debate. As indicated below, infra, Plaintiff has failed to establish that she engaged in the alleged conduct that serves as the basis for the alleged retaliation.

B. *First Amendment Retaliation Claim* [2]

2 Count 1 brings a retaliation claim under 42 U.S.C. § 1983 against the City of Reading and each of the individual Defendants in their official capacities. Count 2 brings the same retaliation claim against the Defendants in their individual capacities.

[*10] Plaintiff alleges that the Defendants violated her constitutional rights by retaliating against her for exercising her First Amendment right to free speech. Plaintiff alleges that the Defendants engaged in a campaign of harassment as a result of certain conduct and speech which they thought she engaged in.

[HN7]The First Amendment protects public employees from retaliation by their employer. Under 42 U.S.C. § 1983, a public employee may sue to enforce that protection if: (1) she spoke on a matter of public concern; (2) her interest in that field outweighed the government's concern with the effective and efficient fulfillment of its responsibilities to the public; (3) the speech caused the retaliation; and (4) the retaliatory action would not have occurred but for the speech. *Green v. Philadelphia Housing Auth.*, 105 F.3d 882, 885 (3d Cir. 1997).

The Court determines that Plaintiff has failed to establish a genuine issue of material fact to sustain her claim of First Amendment retaliation. Plaintiff has failed to adduce evidence that she engaged in speech or conduct that is protected by the First Amendment. Furthermore,

even if Plaintiff could [*11] establish that she engaged in such speech or conduct, she has failed to establish that the conduct was the substantial motivating factor behind the allegedly retaliatory actions taken by the Defendants.

1. *Protected Speech*

[HN8]In order to be considered protected speech under the First Amendment, the speech or activity engaged in must address a matter of public concern. *Azzaro v. County of Allegheny*, 110 F.3d 968, 976 (3d Cir. 1997). Speech addresses a matter of public concern when it relates "to any matter of political, social, or other concern to the community." [3] *Id.* at 977. However, regardless of the subject of the alleged speech, a plaintiff must actually engage in the type of conduct protected from retaliation under the First Amendment. *Fogarty v. Boles*, 121 F.3d 886, 887-88 (3d Cir. 1997) (dismissing retaliation claim based on allegation the employer believed plaintiff engaged in the protected conduct where plaintiff denied actually speaking to the press about the matter). A retaliation claim cannot be based on speech or conduct if the defendant erroneously believed that the plaintiff engaged in such speech or conduct. [*12] *Id.*; *Barkoo v. Melby*, 901 F.2d 613, 619 (7th Cir. 1990) ("[Plaintiff] provides no authority for the proposition that her free speech rights are deprived in violation of § 1983 when the speech at issue admittedly never occurred.")

> 3 [HN9]"A public employee's speech involves a matter of public concern if it can 'be fairly considered as relating to any matter of political, social or other concern to the community.'" *Green*, 105 F.3d at 885-86 (quoting *Connick v. Myers*, 461 U.S. 138, 146, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983)). In this respect, we focus on the content, form, and context of the activity in question. *Connick*, 461 U.S. at 147-48; *Watters v. City of Phila.*, 55 F.3d 886, 892 (3d Cir. 1995). Speech in a form that is not deemed a matter of public concern in one context does not become a matter of public concern simply because it could be deemed protected in a different context. *See Connick*, 461 U.S. at 148 n.8.

[*13] Here, Plaintiff alleges that the Defendants retaliated against her because of their perception that she engaged in speech or conduct relating to two public issues: the municipal trash collection referendum and the proposal to abolish the Reading Area Water Authority ("Authority"). She alleges that this speech and conduct was protected by the First Amendment. The primary incident occurred in 1998, and related to Plaintiff's role in organizing and overseeing a televised debate on the trash collection referendum. (Compl. P 22; Defs.' Ex. F ("Kelleher Dep.") at 88, 90-91.) Plaintiff testified in her deposition that her role in the debate was helping to secure a debate representative for each side and establishing rules regarding the format of the debate. (Kelleher Dep. at 88.) Kelleher testified that while she was involved in screening calls to put on the air, she only screened the calls to ensure the remarks related to the debate topic, and not to determine which side the caller intended to support. (*Id.* at 89-90.) She testified that after the debate, she perceived that Eppihimer was upset with her "because of the way the programming went." (*Id.* at 92.) Plaintiff did not appear [*14] on the debate or speak to the Defendants on the issue at that time.

In light of Plaintiff's own testimony regarding the limited nature of her activities in connection with the debate, and her testimony that she did not engage in the specific conduct that purportedly motivated the Defendants to retaliate against her, Plaintiff's showing is insufficient to establish that she engaged in conduct that is protected by the First Amendment. For example, even if Plaintiff could show at trial that Eppihimer became upset with her because he perceived that she barred callers from speaking against the municipal trash collection referendum, Plaintiff's own deposition testimony that she did not engage in such activity means that any actions taken on his part in retaliation for such conduct would be based on a mistaken belief as to what Plaintiff had done. Even if such conduct were protected, [4] the fact that Plaintiff did not actually engage in such conduct means that the televised debate incident cannot be the basis for Plaintiff's First Amendment retaliation claim. [5] *See Barkoo*, 901 F.2d at 619.

> 4 Because the Court determines that the Plaintiff has failed to establish a genuine issue of material fact as to whether she engaged in the purportedly protected activity, it need not consider the legal question of whether such conduct would be protected by the First Amendment.

[*15]

> 5 Plaintiff further testified in her deposition that she spoke on the subject of municipal trash collection when she objectively told Eppihimer the "pros and cons" of adopting such a plan. (Pl.'s Resp. to Defs.' Mot. Ex. 1 ("Kelleher

Verification") P 23.) This speech, however, is not alleged in the Complaint, and therefore is not part of Plaintiff's retaliation claim here. Furthermore, Plaintiff fails to identify the specifics of that speech, such as the time and place at which it took place or the circumstances in which the speech was given. Even had Plaintiff included an allegation that she engaged in such speech, Plaintiff has provided insufficient evidence to establish a genuine issue of material fact concerning whether she engaged in speech that was protected.

Plaintiff's evidence is similarly insufficient concerning the other alleged incident. Plaintiff alleges that in 1997, Eppihimer, then a Councilman, asked her to draft an ordinance to abolish the Authority. (Compl. P 13.) Plaintiff alleges that she researched the issue and learned that abolishing the Authority would, among other things, [*16] place restrictions on the City's sale of water to outlying communities and force the City to assume the Authority's bond debt. (*Id.* P 14.) When Plaintiff informed Eppihimer of these facts, he "began yelling at her, and saying that she was against him and he would have her fired." (*Id.* P 15.) Plaintiff's retaliation claim, with respect to this incident, is based on the Defendant's perception that she was speaking against his position on the abolition of the Authority.

Kelleher testified in her deposition, however, that she made no such recommendation or criticism regarding the merits of Eppihimer's proposal to abolish the Authority. (Kelleher Dep. at 53-54.) Plaintiff admits that she did not have an opinion as to whether the authority should be abolished. (*Id.*) She denies that she did anything other than objectively relay the results of her research to Eppihimer. (*Id.*) Because Plaintiff denies having engaged in the speech that forms the alleged basis of Defendants' alleged retaliatory motive, that speech cannot form the basis of her retaliation claim.

2. *Nexus Between Alleged Retaliation and Speech*

Furthermore, even if Plaintiff could establish that she engaged [*17] in protected speech and conduct, she has failed to establish a connection between that speech and conduct and the allegedly retaliatory conduct by the Defendants. [HN10]A plaintiff must show that her protected activity was a substantial or motivating factor in the actions alleged to be retaliatory. *Anderson v. Davila*, 37 V.I. 496, 125 F.3d 148, 161 (3d Cir. 1997). Even assuming that Plaintiff engaged in protected activity, Plaintiff has failed to meet her burden to show that the protected activity was a substantial or motivating factor in the alleged retaliatory actions.

In this case, Plaintiff alleges that the Defendants engaged in a campaign of harassment that included a host of different retaliatory actions: (a) Plaintiff's one-week suspension; (b) Plaintiff's lock-out from City Hall during her suspension; (c) the retrieval and reading of Plaintiff's e-mails; (d) dissemination of her e-mail messages to the media; (e) dissemination of the ethics complaint to the media; (f) public comments regarding Plaintiff's suspension; (g) refusal to issue Plaintiff a parking permit; (h) refusal to pay Plaintiff additional salary allotted by the City Council; and (i) initiation of [*18] rumors of Plaintiff's extramarital affairs. [6]

6 Because the Court determines that Plaintiff has failed to establish a genuine issue of material fact with respect to there being a retaliatory motive, it is unnecessary to examine in detail the evidence that such retaliation took place at the hands of the Defendants. The Court notes, however, that in several respects, Plaintiff's evidentiary showing is insufficient to establish genuine issues of material fact.

For example, Plaintiff points to no admissible evidence that she was actually locked out of either the building (after hours) or the computer system during the relevant period. Although Plaintiff testified in her deposition that Councilman Waltman ordered her to be locked out of City Hall and the computer system, and that Eppihimer did so, (Kelleher Dep. at 282-88), Plaintiff admits that she had no personal knowledge of Mr. Waltman having told Defendant Eppihimer to lock Plaintiff out of City Hall. (Kelleher Dep. at 288.)

Similarly, Plaintiff provides no admissible evidence that Defendants actually disseminated the e-mails. Plaintiff provides a statement in her Verification that Don Kaiser, a television news reporter, "sent [a copy of] the e-mails and ethics complaint to me after I agreed to trim off the header. I looked at the header before I trimmed it off, and saw that the facsimile had been sent from the Mayor's office, . . ." (Kelleher Verification P 58.) However, this account of events is contradicted by her prior deposition testimony, in

which she indicated that ". . . Kaiser and . . . . Weiler. . . told me they received copies of the complaint. It was faxed. And although they, let's say, trimmed the lead, whatever you call that section at the top, they did tell me that it was from the mayor's office." Plaintiff also testified in her deposition that she never saw any copy of the ethics complaint with any fax identifier on it. (Kelleher Dep. at 238, 324-26). Given the conflict in testimony, it is appropriate to disregard the subsequent verification statement, because on a motion for summary judgment, a court may properly refuse to consider testimony presented in an affidavit when the non-movant's affidavit contradicts, without satisfactory explanation, testimony previously provided in deposition. *See Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 706 (3d Cir. 1988) ("The objectives of summary judgment would be seriously impaired if the district court were not free to disregard the conflicting affidavit.") Furthermore, Plaintiff's statements as to what Kaiser and Weiler told her about the origins of the e-mails (that they came from Eppihimer's office) are inadmissible hearsay.

Moreover, Plaintiff fails to establish that all of the allegedly retaliatory actions were sufficiently serious enough for purposes of the retaliation claim. In a First Amendment retaliation case, the alleged retaliatory action itself does not have to infringe on a federally protected right independent of the First Amendment. *See Perry v. Sindermann*, 408 U.S. 593, 596-98, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972) ("Even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . his interest in freedom of speech."); *see also Rutan v. Republican Party of Illinois*, 497 U.S. 62, 76 n.8, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990).

Nevertheless, while the actions taken do not independently need to violate a constitutional right, not every action of harassment is actionable under § 1983 in a retaliation case. Rather, the actions must be such that they would "deter a person of ordinary firmness" from exercising her First Amendment rights. *Suppan v. Dadonna*, 203 F.3d 228, 235 (3d Cir. 2000). "In the field of constitutional torts de minimis non curat lex. Section 1983 is a tort statute. A tort to be actionable requires injury. It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise . . ." *Suppan*, 203 F.3d at 235 (quoting *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)).

Several of the retaliatory actions likely do not pass the *Suppan* test. For example, Plaintiff alleges that the Defendants monitored and screened her private e-mails, yet she adduces no evidence to demonstrate that such correspondence was confidential. In fact, Plaintiff admits that she signed a statement saying that she received and read a copy of the City's usage guidelines, which specifically reserve the City's right to read and monitor e-mail communications. (Kelleher Dep. at 430-33; Defs.' Ex. T ("Guidelines.") Plaintiff also does not dispute that such monitoring has occurred on other occasions with other employees. (Defs.' Ex. C ("Tangredi Dep.") at 121-24.) Given that Plaintiff was clearly subject to such monitoring, had notice of such monitoring, and that such monitoring had occurred before with another employee, the action seems far less likely to deter a person of ordinary firmness from the exercise of protected activity.

Similarly, Plaintiff alleges that the Defendants denied her a dashboard parking permit. However, notwithstanding her unsubstantiated claim that it "is undisputed that free parking is one of the fringe benefits of fulltime employees of the City of Reading who work in City Hall," (Pl.'s Resp. at 12), Plaintiff adduces no evidence, and there is no evidence in the record, which establishes such an entitlement. Plaintiff, in fact, did not receive a new permit until after the City Council passed an ordinance granting parking passes to the City Council and employees, thus suggesting that she was not entitled to such a permit. (*See* Kelleher Dep. at 418.) Furthermore, Plaintiff's primary grievance is the large number of parking tickets that she

received; yet Plaintiff received tickets for parking in areas where she admits she did not know whether the dashboard permits allowed for the waiver of the parking rules. (*See* Kelleher Dep. at 426-27.) In light of Plaintiff's failure to adduce evidence that she was entitled to such a permit and that such a permit would have prevented all of her parking tickets, it is unlikely that such a denial of the permit would deter a person of ordinary firmness from engaging in protected conduct.

[*19] Examining the evidence in the record, however, the Court can identify no admissible evidence that draws a connection between Plaintiff's alleged speech and conduct in 1997 and 1998, and the alleged retaliatory actions that form the "campaign of harassment." [7] None of the deposition testimony or the documentary evidence establishes such a connection. Plaintiff argues that this connection can be inferred from the series of retaliatory actions themselves; however, this kind of circular reasoning simply underscores the fact that there is no genuine issue of material fact with respect to a nexus between the protected conduct and the retaliation. In the absence of some other type of evidence, this inference is not one that can be supported solely by the alleged "retaliatory campaign." This is particularly true in light of Plaintiff's failure even to adduce evidence to support that all of the actions took place.

7 Plaintiff does point to statements that tend to indicate Eppihimer's desire to see Plaintiff terminated as the City Clerk. (Kelleher Dep. at 84.) However, these statements, even if admissible, are insufficiently connected to Plaintiff's speech in 1997 and 1998. Moreover, the statements are an insufficient basis upon which to infer that Defendants engaged in particular activities for the purpose of retaliating against her.

[*20] Moreover, the large gap in time between the allegedly protected speech (in 1997 and 1998) and the alleged retaliatory activities (in 2000 and later) cuts against Plaintiff's position that the Defendants' actions were motivated by a retaliatory motive. [8] [HN11]Temporal proximity between the protected activity and the allegedly retaliatory action is a factor to consider in retaliation cases. See *Grimm v. Borough of Norristown*, No. 01- CV-431, 2002 U.S. Dist. LEXIS 3954, at *83 (E.D. Pa. Mar. 11, 2002) (citing *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279-80 (3d Cir. 2000) (noting that temporal proximity has probative value in retaliation cases, but that other evidence suggesting a causal connection between protected activity and allegedly retaliatory action may be considered)); *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997) (noting that if timing alone could ever be sufficient to establish a causal link, the timing of the alleged retaliatory action must be "unusually suggestive" of retaliatory motive); *see generally Russoli v. Salisbury Twp.*, 126 F. Supp. 2d 821, 855 (E.D. Pa. 2000).

8 The only exception is that the alleged spreading of rumors took place closer in time to Plaintiff's allegedly protected speech. However, Plaintiff has adduced no admissible evidence that either individual Defendant was responsible for spreading any such rumors. Plaintiff states that "I believe that Mr. Eppihimer was responsible for these rumors [of extramarital affairs] because a variety of people told me that they heard that he was spreading the rumors." (Kelleher Verification P 13.) Plaintiff also discusses at length in her deposition the various rumors. (Kelleher Dep. at 58-77.) However, Plaintiff provides no testimony from any of the individuals that allegedly heard Mr. Eppihimer make such statements or otherwise had personal knowledge that he spread the rumors. Plaintiff has likewise provided insufficient evidence upon which to infer that Eppihimer was responsible for starting them. Accordingly, the Court has not considered the rumors as part of Plaintiff's contention that there was a retaliatory motive behind the alleged "campaign of harassment."

[*21] Accordingly, judgment on the retaliation claims is granted in favor of the City of Reading and the individual Defendants in their official and individual capacities.

C. *Conspiracy Claims* [9]

9 Count 3 brings a conspiracy claim under 42 U.S.C. § 1983 against the City of Reading and the individual Defendants in their official capacities. Count 4 brings the same conspiracy claim against the individual Defendants in their individual capacities.

Plaintiff also alleges that the Defendants conspired to

violate her First Amendment rights. [HN12]To demonstrate a conspiracy under § 1983, a plaintiff must show: (1) there was a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences; (2) the purpose of the plan was to violate a constitutional right of the plaintiff; (3) an overt act resulted in an actual deprivation of the plaintiff's constitutional rights; and (4) the constitutional violation was the result of an [*22] official custom or policy of the municipality. *Sieger v. Township of Tinicum*, 1990 U.S. Dist. LEXIS 1243, Civ.A.No. 89-5236, 1990 WL 10349, at *2 (E.D. Pa. Feb. 6, 1990).

As discussed above, Plaintiff has failed to demonstrate the deprivation of a constitutional right, because she has failed to demonstrate retaliation under the First Amendment. Accordingly, her conspiracy claims fail, and Defendants are entitled to judgment on those claims.

D. *Invasion of Privacy Claim*

Plaintiff's final count is a claim for invasion of privacy against Defendant Cramsey in his individual capacity. [HN13]Pennsylvania law provides four theories on which a claim of invasion of privacy can be based: (1) intrusion upon seclusion; (2) appropriation of name and likeness; (3) publicity given to private life; and (4) publicity placing a person in false light. *Smith*, 112 F. Supp. 2d at 434. Plaintiff's claim proceeds on the "intrusion upon seclusion" and "publicity given to private life" theories. For the reasons that follow, the Court determines that Defendant is entitled to judgment on this Count.

The Pennsylvania courts have adopted section 652B of the Restatement (Second) of Torts which provides: [*23]

> [HN14]
>
> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement (Second) of Torts § 652B (1976); *Harris v. Easton Publ'g Co.*, 335 Pa. Super. 141, 483 A.2d 1377, 1383 (Pa. Super. Ct. 1984). The invasion may take various forms including: (a) physical intrusion into a place where the plaintiff has secluded herself; (2) use of the defendant's senses to oversee or overhear the plaintiff's private affairs; or (3) some other form of investigation into plaintiff's private concerns. Restatement (Second) of Torts § 652B cmt. b (1976); *Harris*, 483 A.2d at 1383. Defendant is subject to liability under this section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about her person or affairs. Restatement (Second) of Torts § 652B cmt. c (1976). There is no liability unless the interference with the plaintiff's seclusion is both substantial and highly offensive [*24] to the ordinary reasonable person. *Id.* cmt. d; *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 621 (3d Cir. 1992).

Defendant first contends that Plaintiff had no expectation of privacy with respect to her e-mail communications. Some courts have held that there is no reasonable expectation of privacy in e-mail communications. *See Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa. 1996) ("Unlike urinalysis and personal property searches, we do not find a reasonable expectation of privacy in e-mail communications voluntarily made by an employee to his supervisor over the company e-mail system notwithstanding any assurances that such communications would not be intercepted by management."); *see also Commonwealth v. Proetto*, 2001 PA Super 95, 771 A.2d 823, 827, 830-31 (Pa. Super. Ct. 2001) (rejecting criminal defendant's challenge under the Fourth Amendment that e-mail evidence used against him at trial was improper). *Smyth* and *Proetto* do not necessarily foreclose the possibility that an employee might have a reasonable expectation of privacy in certain e-mail communications, depending upon the circumstances of the communication [*25] and the configuration of the e-mail system. *See, e.g., McLaren v. Microsoft Corp.*, No. 05-97-00824- CV, 1999 Tex. App. LEXIS 4103, at *10-12 (Tex. Ct. App. May 28, 1999) (examining the configuration of the company e-mail system to determine if there was an expectation of privacy).

In this case, however, the uncontroverted evidence demonstrates that Plaintiff did not have a reasonable

expectation of privacy with respect to her e-mail. The City's Guidelines regarding the expectation of privacy of e-mail messages, which are uncontroverted, explicitly informed employees that there was no such expectation of privacy:

> Messages that are created, sent, or received using the City's e-mail system are the property of the City of Reading. The City reserves the right to access and disclose the contents of all messages created, sent, or received using the e-mail system. The E-mail system is strictly for official City of Reading messaging.

(Defs.' Ex. T ("Guidelines")). Plaintiff signed an acknowledgment that she had received and read the Guidelines on September 16, 1999. (*Id.*; Kelleher Dep. at 431-33.) Although Plaintiff contends that other employees [*26] were not subject to such review, she adduces no evidence to support her allegations, and, in fact, Defendant presents evidence, again uncontroverted, of at least one other instance in which an employee had his e-mail communications monitored and reviewed. (Defs.' Ex. C ("Tangredi Dep.") at 131-32.) It is clear from the undisputed evidence in the record that there is no genuine issue of material fact, and that the Plaintiff clearly lacked a reasonable expectation of privacy with respect to her e-mail communications on the City of Reading's e-mail system. *See Smyth*, 914 F. Supp. at 101.

Aside from the e-mail communications, Plaintiff alleges that Defendant "disseminated information about the executive session in which it was decided to suspend her without pay for one week; and/or disseminated information about the Ethics Complaint which had been lodged against her." (Compl. P 109.) Whether these allegations are sufficient to support the intrusion upon seclusion claim depends on whether Plaintiff had a reasonable expectation of privacy in this information. Plaintiff alleges that the information involved was not part of the public record, and that she therefore had a [*27] reasonable expectation of privacy in this information. [10] However, Plaintiff adduces no evidence to support her contention that she had a reasonable expectation of privacy in this information. Although she testified in her deposition that Mayor Eppihimer had previously said that the reasons that he fired an employee were confidential, such evidence does not tend to demonstrate that her being disciplined by a different body - here, the City Council - is similarly confidential.

> 10 If, for example, this information was deemed to be part of the public record, then there could be no intrusion upon seclusion for publicizing the information. Restatement (Second) of Torts § 652B cmt. c.

Similarly, Plaintiff's privacy claim fails under the publicity of private life theory. Section 652D of the Restatement (Second) of Torts states:

> [HN15]One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter published is of a kind that [*28] (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Restatement (Second) of Torts § 652D; *Harris*, 483 A.2d at 1384. To state a cause of action, the plaintiff must prove that the defendant (1) publicized (2) private facts (3) that would be highly offensive to a reasonable person, and (4) are not of legitimate concern to the public. *Id.* The publicity element requires that the matter be communicated "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Kryeski v. Schott Glass Techs., Inc.*, 426 Pa. Super. 105, 626 A.2d 595, 601 (Pa. Super. Ct. 1993) (quoting Restatement (Second) of Torts § 625E (1976)); *Harris*, 483 A.2d at 1384. Disclosure of information to only a small number of people is insufficient to constitute publicity. *See Kryeski*, 626 A.2d at 602 (disclosure to two people is insufficient); *Harris*, 483 A.2d at 1384 (disclosure to one person is insufficient).

[HN16]To determine if facts are "private facts," the line is drawn "when the publicity ceases [*29] to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency. . . ." Restatement (Second) of Torts § 652D cmt. h.

In this case, Plaintiff adduces no evidence demonstrating that the fact of her suspension by the City

Council constitutes private information, the publication of which would offend standards of decency. Plaintiff has cited no evidence demonstrating that she had any expectation of privacy in this information, which related to her professional conduct in the course of her job as the clerk for the City Council.

Furthermore, even if Plaintiff did adduce evidence establishing that she had a privacy right in the fact of her being suspended by the City Council, or that the fact of her suspension constituted private facts the disclosure of which would represent an intrusion into her private life, she has adduced no evidence that Defendant Cramsey, the only Defendant remaining in this Count, took any action to publicize or distribute [*30] the information. Plaintiff's only evidence is testimony from her deposition that Cramsey spent a great deal of time with Mayor Eppihimer. Such evidence is insufficient to support an inference that proves Plaintiff's position.

For these reasons, the Court grants judgment in favor of Defendant Cramsey as to the invasion of privacy claims.

III. Conclusion

For all of the above reasons, the Court grants Defendant Waltman's Motion for Summary Judgment and Defendants City of Reading, Joseph Eppihimer, and Kevin Cramsey's Motion for Summary Judgment. The claims against Defendant Waltman are dismissed under the doctrine of qualified immunity. Judgment is entered in favor of the remaining Defendants on all of the remaining claims.

An appropriate Order follows.

ORDER

AND NOW, this day of May, 2002, upon consideration of Defendants' Unopposed Motion to File Reply Brief (Doc. No. 26), **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and the Reply Brief is filed herewith. **IT IS FURTHER ORDERED** that:

1. Upon consideration of Plaintiff's Motion to Amend Response to Defendants' Motion for Summary Judgment (Doc. No. 28), and the response [*31] thereto, said Motion is **GRANTED** and the Response is considered **AMENDED** as specified by Plaintiff.

2. Upon consideration of Defendant Jeffrey Waltman's Motion for Summary Judgment (Doc. No. 16), and all responsive and supporting briefing, **IT IS HEREBY ORDERED** that said Motion is **GRANTED**. All claims against said Defendant are **DISMISSED** under the doctrine of qualified immunity.

3. Upon consideration of Defendants City of Reading, Joseph D. Eppihimer, and Kevin Cramsey's Motion for Summary Judgment (Doc. No. 21), and all responsive and supporting briefing, **IT IS HEREBY ORDERED** that said Motion is **GRANTED**. Judgment is **ENTERED** in favor of said Defendants on all remaining counts.

BY THE COURT:

John R. Padova, J.