

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

BARRY J. FENCHAK,)
Plaintiff,)

v.)

No. 2024-CV-1843-CI

THE PENNSYLVANIA STATE)
UNIVERSITY BOARD OF TRUSTEES,)
and MATTHEW SCHUYLER IN HIS)
OFFICIAL CAPACITY AS CHAIRMAN)
Defendants.)

Attorney for Plaintiff:

Justin J. Boehret, Esq.
Terry L. Mutchler, Esq.
Erika L. Silverbreit, Esq.

Attorney for Defendants:

Scott E. Diamond, Esq.
Joe H. Tucker, Jr., Esq.

OPINION AND ORDER

Marshall, J.

Presently before the Court is the Emergency Motion for Preliminary Injunction, filed by Barry J. Fenchak (“Plaintiff”) on September 23, 2024. In deciding Plaintiff’s motion, this Court considered, among other things, (i) the aforementioned Motion, (ii) Plaintiff’s Brief in Support thereof, filed on October 2, 2024, (iii) the Brief in Opposition to Plaintiff’s Emergency Motion for Preliminary Injunction, filed by Pennsylvania State University (“PSU” and, together with the other individually named defendants, the “Defendants”) on October 7, 2024, and (iv) Defendants’ Response in Opposition to Plaintiff’s Emergency Motion for Preliminary Injunction, filed October 7, 2024. An evidentiary hearing on the Motion was held on October 8, 2024. Upon consideration of the filings and arguments of the parties, as well as the testimony presented at the October 8, 2024 hearing, the Court finds as follows:

BACKGROUND

Plaintiff is one of 36 voting members of the Board of Trustees of the Pennsylvania State University. Plaintiff is one of nine Trustees elected by alumni of PSU, and Plaintiff assumed his position as a Trustee on or about July 1, 2022. The Board of Trustees is responsible for the governance and welfare of PSU and all the interests pertaining thereto. In the exercise of its responsibilities, the Board of Trustees delegates day-to-day management and control of PSU to the university President, with certain reserved powers as set forth in the PSU's bylaws. *See* Role of the Board of Trustees in University Governance, <https://trustees.psu.edu/purpose>.

On July 16, 2024, Plaintiff filed a *pro se* Complaint for Declaratory and Injunctive Relief (the "Complaint"), asking this Court to declare that Defendants have failed to provide information necessary for Plaintiff to exercise his role as Trustee pursuant to 15 Pa. C.S. §5512(a)¹. In that Complaint, Plaintiff also asked this Court to compel Defendants to provide the requested information and to permanently enjoin Defendants from committing further violations of 15 Pa. C.S. §5512(a) and to permanently enjoin Defendants from "committing further retaliatory acts against Plaintiff, including but not limited to removal from the Board." *See* Complaint, July 16, 2024. On August 27, 2024, Plaintiff filed a counseled Amended Complaint raising essentially the same arguments and prayers for relief as the original Complaint.

¹ § 5512. **Informational rights of a director.**

(a) **General rule.**--To the extent reasonably related to the performance of the duties of the director, including those arising from service as a member of a committee of the board of directors, a director of a nonprofit corporation is entitled:

- (1) in person or by any attorney or other agent, at any reasonable time, to inspect and copy corporate books, records and documents and, in addition, to inspect, and receive information regarding, the assets, liabilities and operations of the corporation and any subsidiaries of the corporation incorporated or otherwise organized or created under the laws of this Commonwealth that are controlled directly or indirectly by the corporation; and
- (2) to demand that the corporation exercise whatever rights it may have to obtain information regarding any other subsidiaries of the corporation.

15 Pa. C.S. §5512(a).

Since joining the Board in 2022, Plaintiff has made repeated requests for financial information related to the administrative fees that PSU pays investment managers to oversee PSU's endowment, estimated by Plaintiff to be valued at approximately \$4.5 billion. Specifically, Plaintiff alleges that, per PSU's IRS Forms 990 for the years 2008-2018, PSU paid industry-standard administrative fees on its endowment of about 0.75%², on average. Thereafter, in the 2018-2019 fiscal year, Plaintiff alleges that the administrative fees that were paid for the management of the endowment jumped to 2.49% -- well above industry-standard. From the 2018-2019 fiscal year to the present, the administrative fee paid was 2.23% (2019-2020), 1.95% (2020-2021), 1.86% (2021-2022) and 1.86% (2022-2023) – still well above what PSU was paying prior to the 2018-2019 year. *See* Complaint, Ex. A-1.

As a result of this increase in endowment administration fees, following his election to the Board, on or around June 2022, Plaintiff requested “access to the specific data and items that totaled to the aggregated figures listed on the IRS Form 990s administrative fees paid reported by Penn State.” *See* Amended Complaint, ¶57. Plaintiff was denied access to this information and, despite repeated requests for the information, Plaintiff has still not received it. Plaintiff avers that he requires this information “to vote in accordance with his fiduciary duties in his role as Trustee of the \$5 billion endowment” and that it is ultimately the Board of Trustees that “maintains ultimate oversight of the University's investment assets.” Plaintiff notes that the endowment is the largest financial asset of PSU, and he argues that, as Trustee, he is entitled to review the requested information. *See generally* Amended Complaint, ¶1-12.

Additionally, on April 29, 2024, May 4, 2024 and May 6, 2024, Plaintiff requested information related to a potential 10-year contract between PSU and a vendor called Elevate.

² In all cases, administrative expenses are given as a percentage of Investment Fund Value.

Elevate was purportedly engaged with the goal of “generating a game day engagement, ticketing, and premium seating and experiences strategy reflective of the passionate Nittany Lion fanbase’s priorities, preferences, and needs...” See “Elevate and Penn State Athletics Announces Landmark Partnership for Ticketing Sales and Experiences”, Aug. 8, 2024, <https://gopsusports.com/news/2024/08/8/elevate-partnership>. The Plaintiff, one of the Trustees entrusted to oversee the operation of PSU as a whole, claims he is unable to provide this Court with any information regarding the Elevate contract because – despite being initially promised the information – he was repeatedly denied access to the details of the contract. On information and belief, Plaintiff testified that the contract with Elevate has been signed, the contract has a 10-year term and is worth approximately \$1 billion, and it is related to the \$700 million renovation to PSU’s football stadium. Plaintiff avers that, because this contract was touted as a “means to ensure the future economic stability of the athletics department,” he should have been given access to information regarding the contract so that he could faithfully vote in accordance with his fiduciary duties as Trustee. Instead, Defendants denied Plaintiff’s requests for information regarding the Elevate contract, writing to Plaintiff in an August 20, 2024 email from Board Chairman Schuyler and Trustee Kleppinger that the agreement with Elevate contains “commercially sensitive information” that Trustee Fenchak, an alumni-elected Trustee who was being asked to vote on the matter, will not get access to because “the University is not able to share due to legal obligations it has to Elevate.” See *generally* Amended Complaint, ¶¶84-108.

Although the Court heard background testimony from Plaintiff regarding the claims in the underlying lawsuit, that is not the matter immediately before the Court. On July 19, 2024, three days after Plaintiff filed this underlying lawsuit related to the aforementioned information requests, Plaintiff attended a Board of Trustees meeting at PSU’s Altoona campus. Following that meeting,

while making conversation with three members of the IT team that provided support for the Board, Plaintiff made a comment, in the context of a more expansive conversation, to the effect that his wife says that he cannot wear baseball hats because it makes him look like “a penis with a hat on.” Plaintiff made the remark because the Trustees were just provided with gift bags from the Altoona campus that included a Penn State baseball hat. Plaintiff explained at the hearing, but not in the conversation in Altoona, that his remark was an approximate quote from the 1992 PG-rated movie *A League of Their Own*, in which Tom Hank’s character told a baseball umpire “you look like a penis with that little ball cap on.”

Defendants launched an investigation on the basis of this July 19, 2024 interaction between Plaintiff and those members of the IT team, who were employees of PSU. Defendants, through the Trustee Removal process outlined in the PSU bylaws,³ have now recommended that Plaintiff be removed from the Board for violating the Trustee Code of Conduct as a result of the July 19, 2024 incident. There is a special meeting of the Board of Trustees scheduled for October 10, 2024, at which the Board will vote on whether Plaintiff violated his fiduciary duty as Trustee such that he should be removed from the Board. Plaintiff brought the instant Motion for Preliminary Injunction in response thereto and has asked this Court to enter a preliminary injunction enjoining the Defendants from removing Plaintiff from the Board.

DISCUSSION

A preliminary injunction is a temporary remedy that is granted until the parties' dispute can be fully resolved. *Cutler v. Chapman*, 289 A.3d 139 (Pa. Commw. Ct. 2023). The basic purpose of a preliminary injunction is to preserve the status quo as it exists or previously existed pending

³ PSU amended its bylaws on July 30, 2024, approximately 11 days after the incident at issue. PSU, in formulating its recommendation for removal, assessed Plaintiff’s conduct under the standard for removal in effect on the date of the conduct, but has used the purportedly more robust process contained in the amended bylaws that became effective on July 30, 2024 in affecting his removal.

final resolution of the underlying controversy between the parties. *Fischer v. Department of Public Welfare*, 497 Pa. 267, 439 A.2d 1172 (1982). A preliminary injunction has been described as an extraordinary remedy that, accordingly, is to be granted only in the most compelling cases where the plaintiff has established a clear right to the relief requested and the wrong to be remedied is manifest. *Ambrogi v. Reber*, 2007 PA Super 278, 932 A.3d 969 (Pa. Super. 2007).

To obtain a preliminary injunction, a petitioner must establish that: (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages; (2) greater injury will occur from refusing to grant the injunction than from granting it; (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct; (4) the petitioner is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and (6) the public interest will not be harmed if the injunction is granted. *Shepherd v. Pittsburgh Glass Works, LLC*, 25 A.3d 1233, 1241 (Pa. Super. 2011). The Court now considers whether the Plaintiff has met his burden in establishing the need for a preliminary injunction.

i. Injunction is Necessary to Prevent Immediate and Irreparable Harm

In order to be granted a preliminary injunction, Plaintiff must demonstrate that the requested injunction is necessary to prevent an immediate and irreparable harm. The Court believes that Plaintiff has met his burden on this element. The Plaintiff has demonstrated that, if the October 10, 2024 meeting on Plaintiff's removal is allowed to continue, Plaintiff will almost assuredly be removed from the Board of Trustees. Indeed, the Governance Committee of the Board of Trustees has already made the recommendation to the Chair and Vice Chair of the Board that Plaintiff be removed. Upon his removal, Plaintiff will be divested of the position to which he was duly elected by alumni of PSU, and Plaintiff's ability to challenge his termination will be severely

weakened. Granting the injunction will serve to shield Plaintiff from the immediate and irreparable harm that will be caused by his removal from the Board, and will allow the parties more time to fully litigate the issues involved in this matter.

While this Court takes allegations of sexual harassment seriously, the Court cannot ignore the additional background existing between the parties as discussed herein, including the fact that Plaintiff filed this underlying lawsuit just three days before the alleged incident at the Altoona campus. Although Plaintiff's remark was thoughtlessly made, as Plaintiff himself concedes, and was undoubtedly made worse by Plaintiff's position as a Trustee vis-à-vis the IT staff member, the Court must note that the comment was only a small part of a longer, 5-minute conversation with the IT team. The offending remark was an approximate quote from a popular 1992 movie with which the person to whom the comment was directed (known to the Court only as "Person A") was apparently not familiar. The Court did not hear direct testimony from Person A, and instead only heard testimony from Person's A work supervisor (known to the Court only as "Person B") and testimony from Amber Grove, the head of Ethics and Compliance at PSU, who conducted PSU's investigation into the matter. While this Court does not condone Plaintiff's behavior, particularly coming from a person in a position of power such as Plaintiff toward a person of lesser power like Person A, the Court must consider this additional context as part of Plaintiff's broader argument that he is being retaliated against. With that context, the fact that the July 19, 2024 incident will form the basis for (according to Plaintiff) the first ever removal of a Trustee from the Board is more suspect. As such, this Court is of the belief that granting this injunction will prevent immediate and irreparable harm to Plaintiff in that, if it is not granted, he will be removed from his position on the Board and will be unable to effectively defend his claims related to July 19, 2024 and prosecute the underlying lawsuit in this case.

ii. Greater Injury Will Occur from Refusing to Grant the Injunction

For many of the same reasons as were listed above, this Court concludes that Plaintiff has met his burden on this element. Refusing to grant the injunction will result in Plaintiff's removal from the Board, and will allow the Defendants' alleged retaliatory behavior to go unchecked. Further, Plaintiff raises important claims in his underlying lawsuit that may be foreclosed once he is removed from the Board. On the other hand, the only harm that may result from not granting the injunction is that Person A may not feel vindicated in her complaint – yet. The Court is not suggesting that Plaintiff should not face repercussions for his actions on July 19, 2024, and the Court notes that steps have already been taken to reduce the chance of harm coming from Plaintiff's remaining on the Board, such as Plaintiff being required to attend Board meetings remotely via Zoom, rather than in person. This Court was not presented with evidence from which it can conclude that Plaintiff presently poses a meaningful risk to anybody, and denying the injunction will result in greater injury – permanent removal from the Board – to Plaintiff. Granting the injunction does not cause any meaningful injury to Defendants.

iii. The Injunction Will Restore the Parties to the Status Quo as it Existed Before the Alleged Wrongful Conduct

Plaintiff must establish that granting his injunction will restore the parties to the status quo as it existed prior to the alleged wrongful conduct. The parties disagree about the appropriate way to frame this element – Plaintiff argues that his permanent removal from the Board is the final and ultimate retaliatory act by Defendants, such that granting the injunction will restore the status quo as it existed prior to Defendants' invocation of removal proceedings. Defendants argue that, by granting the injunction, Plaintiff will not face consequences for his inappropriate interaction with Person A. The Court begins by noting that Plaintiff has already faced consequences for his inappropriate interaction with Person A; namely, Plaintiff is now required to attend Board

meetings via Zoom rather than in person, and Plaintiff has had his “social privileges” as Trustee revoked. Further, this Court is not suggesting that Plaintiff should not be sanctioned for his behavior on July 19, 2024, and the Court finds Defendants characterization that it will be “render[ed] ineffectual in its attempts to adjudicate its own Bylaws and determine whether a Trustee as breached his fiduciary duty” to be unconvincing. In granting this injunction, Defendants are not barred from adjudicating its bylaws and holding Trustees accountable. Rather, Defendants are barred from adjudicating their bylaws in a way that, at least at a prima facie level, is a retaliatory, pretextual termination of a Trustee. Granting this injunction will maintain the status quo in that Plaintiff will not be removed from the Board and will be permitted an opportunity to present the merits of this lawsuit – filed just three days before the Altoona incident – as well as the merits of his defense of the July 19, 2024 incident.

iv. Plaintiff is Likely To Prevail On The Merits

In addition to the foregoing background, Plaintiff has testified to and provided uncontradicted evidence of a broad pattern of retaliatory behavior that he has faced at the hands of Defendants since he joined the Board in July 2022. Since joining the Board, Plaintiff has made repeated requests for information that he has the right to request and likely has the right to receive as a Trustee pursuant to 15 Pa. C.S. §5512⁴ and the Pennsylvania Supreme Court in *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A. 100 (Pa. 1912) (“[t]he right of a director to inspect the books of the corporation, like that of a stockholder, exists at common law; but the right of the former is unqualified, while the latter, to a certain extent, is a qualified right. The reason is that the duties of a director require him to be familiar with the affairs of the company in order that he may have sufficient information to enable him to join intelligently in the management of the concern.”).

⁴ *Supra.*

Rather than provide Plaintiff with the information that he has requested, Defendants repeatedly denied the requests and sought an opportunity like the July 19, 2024 interaction that would provide the basis to remove the Plaintiff and permanently end his probing inquiries into the health of the endowment and other university business for which he has a responsibility. Additionally, the courts of this Commonwealth have routinely ruled against defendants, and awarded attorney's fees, for the wrongful evasion of the mandates of 15 Pa. C.S. §5512. *See In re Nonprofit Corporation Trustees to Compel Inspection of Corporate Information*, 157 A.3d 995 (Pa. Commw. 2017). This Court concludes that Plaintiff has made an adequate showing that he is likely to prevail on the merits of his underlying lawsuit.

Conversely, Defendants argue that, for this element, Plaintiff must show a likelihood of succeeding on the merits of his *Board removal* (i.e., that Plaintiff will persuade the Trustees not to remove him on October 10, 2024), rather than succeeding on the underlying lawsuit. The Court does not agree with this characterization of the element. Plaintiff brought the instant Motion based on his credible belief that he will be removed from the board on October 10, 2024, so accepting Defendants' argument that the Board vote is the appropriate proceeding for this Court to analyze only serves to thwart Plaintiff's Motion. If Plaintiff expected that he would succeed on the merits of the Board vote, then he never would have filed the instant Motion to prevent his removal. This Court has been presented with credible and, in many instances uncontroverted, evidence that Plaintiff has been subject to ongoing incidents of retaliation by Defendants, so this Court will not deny Plaintiff's request for a preliminary injunction based on Defendants' averments that Plaintiff dispose of this preliminary injunction just because Defendants aver that Plaintiff will not succeed on the October 10, 2024 vote. Furthermore, Defendants' interpretation is inconsistent with precedent established by the appellate courts of this Commonwealth.

v. The Injunction is Reasonably Suited to Abate the Offending Activity

An injunction, although an extraordinary measure, is reasonably suited for the situation at hand. If anything, Plaintiff's prompt removal from Board is the extraordinary measure in this case. If the injunction were not granted, Plaintiff would be removed from the Board and his claims of misconduct by Defendants will become much harder, if not impossible, to prove. On the other hand, Plaintiff has already been barred from social activities as Trustee and Plaintiff is now required to attend Board meetings remotely via Zoom. Further, supportive measures have been implemented that ensure that Person A will not be required to interact with Plaintiff again.

In light of the Plaintiff's allegations of misconduct by Defendants that were caused by Plaintiff's information requests, an injunction is reasonably suited to abate the retaliatory action of removing Plaintiff from the Board. Further, because Defendants have already taken significant steps to separate Plaintiff from other members of the PSU community, this Court is not concerned about future potential harm coming to anyone as a result of Plaintiff's conduct.

vi. The Public Interest Will Not Be Harmed if the Injunction is Granted

Finally, it is clearly in the public interest to grant the preliminary injunction. PSU is a public state-related, state-supported, land-grant research university, whose largest financial asset is its endowment that is valued at over \$4 billion and consists, in significant part, of contributions from the public to PSU. In 2013-2014, the administrative expenses paid for the endowment fund were 0.62%. In 2018-2019, the fee jumped to 2.49% and has remained above 1.8% since. In light of the size of the endowment, the increase in administrative expenses represents millions of dollars paid out annually for the management of the endowment that were not being paid less than a decade ago. Plaintiff, as a Trustee that was voted into the position by alumni of PSU, is entitled to inquire about the administrative fees, to whom they were being paid, and how the cost of those fees impacts the operations of PSU. Granting this injunction serves the public interest by preventing

the potentially retaliatory termination of a Trustee based on that Trustee's inquiries regarding the operation of the public university that he serves. Denying the injunction and allowing Plaintiff's removal would re-cast a shadow over the financial operations of Defendants, to the detriment of every PSU stakeholder except those at the very top of the PSU hierarchy. As stated previously, it appears that Plaintiff is entitled to this information and granting this injunction will prevent the pretextual termination of Plaintiff while these requests are outstanding.

ORDER

AND NOW, this 9th day of October, 2024, Plaintiff's Emergency Motion for Preliminary Injunction is hereby GRANTED. Defendants are hereby ENJOINED from removing Plaintiff from the Board of Trustees by vote. This Preliminary Injunction will remain in effect until the earliest of (i) its dissolution by the Court, (ii) the conclusion of the underlying litigation in this matter, or (iii) the conclusion of all terms for which Plaintiff has been duly elected to the Board.

BY THE COURT:


Brian K. Marshall, Judge