

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA

ROBERT WEISENBACH, an Individual;)	CIVIL DIVISION
)	
Plaintiff,)	Case No. 10819-21
)	
v.)	
)	
PROJECT VERITAS, a foreign entity;)	
JAMES O'KEEFE III, an Individual, and)	
RICHARD ALEXANDER HOPKINS, an)	
Individual,)	
)	
Defendants.)	
)	

DEFENDANT RICHARD ALEXANDER HOPKINS'S REPLY BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS TO THE FIRST AMENDED COMPLAINT

Defendant Richard Alexander Hopkins (“Hopkins” or “Defendant”), by and through undersigned counsel, Bochetto & Lentz, P.C., respectfully submits this Reply Brief in Support of his Preliminary Objections to the First Amended Complaint of Plaintiff Robert Weisenbach (“Postmaster” or “Plaintiff”).

INTRODUCTION

The Postmaster’s allegations of actual malice are completely refuted and disproven by his own Amended Complaint. The actual malice alleged by the Postmaster is fabricated by ignoring and distorting facts. The Postmaster should not be permitted to continue with this action when his allegations of actual malice are completely negated by his own exhibits and citations.

The Postmaster cherry-picks quotes from the USPS Office of Inspector General interview to support his position that actual malice can be sufficiently alleged. It can’t. When the exhibits and citations to the Amended Complaint are reviewed, it is apparent that the Postmaster’s

allegations of actual malice are the result of misrepresentation.¹ The Postmaster argues that Hopkins fabricated his accounts, entertained serious doubts as to the truth of his publication, intentionally avoided the truth, and had a financial motive. The exhibits and citations of the Amended Complaint say otherwise. By way of limited example, and expanded upon below, the Postal Service Office of Inspector General *validated* Hopkins' concerns and decision to report to Project Veritas, told Hopkins that what he reported is cause for concern,² admitted that his interpretation of what he overheard is a "very logical assumption" given the preceding events, and assured him that the investigation will continue.³ Hopkins made it clear that his accounts were not fabricated, he has no financial motivation and the reason for his reporting was based on the totality of the circumstances.⁴

The Postmaster neglects the context in which Hopkins made the disputed remarks and the instructions Hopkins received to make his interpretation and subsequent reporting of the

¹ See *Baravordeh v. Borough Council of Prospect Park*, 699 A.2d 789, 791 (Pa. Commw. Ct. 1997) (citing *Jenkins v. County of Schuylkill*, 441 Pa. Superior Ct. 642, 658 A.2d 380 (1995), *petition for allowance of appeal denied*, 542 Pa. 647, 666 A.2d 1056 (1995)) ("**a court is not bound to accept as true any averments in a complaint which are in conflict with exhibits attached to it.**").

² The OIG agreed that what Hopkins was asked to do with respect to the collecting of ballots after Election Day is cause for concern. Specifically, the OIG investigator stated: "but what I understand and what actually makes me question what's going on in this building is he actually was having ballots collected. . . . Is that true?" Hopkins replied: "Yes. He was having us collect the ballots up till the sixth. That was one of the things in that safety meeting before we left. So, we were collecting the fourth, the fifth and the sixth." (Am. Compl. ¶ 95 fn. 25 (citing Project Veritas, *Raw Audio: USPS Whistleblower Richard Hopkins Full Coercive Interrogation By Federal Agents* at 34:10-34:29, YouTube (Nov. 11, 2020), <https://www.youtube.com/watch?v=QkNkQ2nDQfc>)). As further cited herein, Hopkins refers to this citation as "Am. Compl. ¶ 95 fn. 25."

³ The OIG investigators acknowledged that Hopkins' "choice, which is also valid, was to go outside the postal service" to report what he heard to Project Veritas. Upon walking the OIG investigators through the timeline of events, the OIG stated: "And from that, your very logical assumption was they're talking about backdating postmarks." The OIG investigators further stated to Hopkins: "The other thing I want to do is I want to validate your concerns. And I do that for a specific reason too, because I want people to know that you were working off of a sense of duty and obligation, not out of any sort of retribution or vengeance or, or, [sic] try to just trying to cause trouble. . . . You heard something and you were very honest with me when you said, this is what I believed that meant. . . . And I want you to know [the investigation will] continue. . . ." Am. Compl. ¶ 95 fn. 25, at 30:29-30:41; 1:06:43-1:06:50; 1:58:40-1:58:50; 2:00:1-2:01:33.

⁴ (Am. Compl. ¶ 95 fn. 25, at 45:08-45:20; 46:45-47:04; 46:37-46:46; 56:30-56:48; 57:08-57:55; 1:00:10-1:00:25; 1:10:00-1:11:09.)

Postmaster's conversation "very logical," as the USPS OIG observed.⁵ When the exhibits and citations are considered, the Amended Complaint is stripped of any semblance of actual malice.⁶

Second, the Postmaster's proposition that he "has no freestanding obligation to plead that Defendant Hopkins acted outside the scope of []his employment" is wrong as a matter of law.⁷ The Postmaster does not dispute that he fails to plead Defendant Hopkins acted outside the scope of his employment with the United States Postal Service. Instead, the Postmaster argues that because he did not explicitly bring a claim under the Federal Torts Claim Act, he is implicitly suing Hopkins for conduct outside the scope of his employment.⁸ The law does not support the Postmaster's position. To sufficiently plead a defamation-based claim against a federal employee in their individual capacity for conduct that occurred while on-duty, relating to his employment, and for the benefit of the employer, a plaintiff must plead that the conduct falls outside the scope of his employment and allege facts to support it. The Postmaster has not done that.

⁵ See Am. Compl. ¶ 95 fn. 25, at 1:06:43-1:06:50 ("And from that, your very logical assumption was they're talking about backdating postmarks.").

⁶ See *Weiley v. Albert Einstein Med. Ctr.*, 51 A.3d 202, 208 (Pa. Super. Ct. 2012) (quoting *Brosovic v. Nationwide Mutual Insurance Co.*, 841 A.2d 1071, 1073 (Pa. Super. Ct. 2004)) ("In determining whether the trial court properly sustained preliminary objections, the appellate court must examine the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred.").

⁷ (Pl.'s Resp. to Prelim. Objs. ¶¶ 21, 51.)

⁸ (Pl.'s Opp. Br. Prelim. Objs. at pgs. 17-23.)

ARGUMENT

I. THE POSTMASTER FAILS TO PLEAD A VIABLE CLAIM FOR DEFAMATION

A. THE POSTMASTER’S ALLEGATIONS OF ACTUAL MALICE ARE DISPROVEN BY THE ATTACHMENTS AND LINKS TO THE AMENDED COMPLAINT.

The Postmaster cannot establish actual malice because his claims are directly refuted by the exhibits and citations to the Amended Complaint. It is critically important for this Honorable Court to recognize the context in which the statements – which are now the subject of this lawsuit – were made and the severe degree to which the Postmaster distorts the facts. This Court should not accept as true the averments the Postmaster sets forth that are in conflict with the exhibits and citations attached to the Amended Complaint. *See Baravordeh v. Borough Council of Prospect Park*, 699 A.2d 789, 791 (Pa. Commw. Ct. 1997) (citations omitted) (“**a court is not bound to accept as true any averments in a complaint which are in conflict with exhibits attached to it.**”) (Emphasis added.)

Hopkins, as averred in his November 6, 2020 affidavit, was under the impression, “as [he] understand[s] Pennsylvania law, [that] ballots must be postmarked by 8:00 p.m. on Election Day, November 3, 2020[.]” (Am. Compl. ¶¶ 83-84.) On November 5, 2020, *two days after Election Day*, Hopkins was instructed by a superior, Stephanie Hetrick, to continue to collect all mail-in ballots. (*See id.*) (“Weisenbach and his assistant had ordered my co-workers and I to continue picking up ballots after November 3 despite the requirement that ballots be mailed by then.”). Hopkins found this instruction to be totally improper and indicative of unlawful conduct.⁹ Specifically, Hopkins recounted to the USPS OIG investigators as follows:

⁹ *See* Am. Compl. ¶ 95 fn. 25, at 40:50-41:03; 46:45-47:04 (Hopkins: “Legally, there is a legal manner in this. And if we’re picking up ballots, somebody has got a question. Why is nobody like, why are we doing this now? . . . I felt like

OIG: So, on the fifth Stephanie comes by your bay and what does she say?

Hopkins: Make sure to collect all the ballots you find on the street. Every vote counts. Very specific on that part. . . .

OIG: On the fifth she said?

Hopkins: Yes. . . . She would run around saying make sure you get them ballots. That was like a big deal, she was running around.

(Am. Compl. ¶ 95 fn. 25, at 37:11-37:43.)

Already disturbed by the instruction to continue to collect mail-in ballots after Election Day, Hopkins then overheard an aggressive conversation between the Postmaster and his supervisor Darrell Locke. (Am. Compl. ¶¶ 44, 82, 84.); (*see also* Am. Compl. ¶ 95 fn. 25, at 1:35:26-1:35:32) (“Because it wasn’t a friendly conversation they were having either. That’s one of the reasons why, . . .”). From that conversation, Hopkins recounted that the Postmaster was upset about the improper dating of ballots. (*Id.* at ¶¶ 44-46, 59.) Hopkins has been resolute that he recalls hearing something along the lines of the Postmaster and his supervisor “say[ing] one of the[mail-in ballots] was marked the fourth and the rest the third.” (Am. Compl. ¶ 96.)

Hopkins further explained that it was not *just* overhearing the conversation between the Postmaster and his supervisor that led him to make his reports. Rather, it was the context and accompanying circumstances that led him to report because Hopkins was directed to collect mail-in ballots after Election Day and the same day he received this instruction, he witnessed an aggressive conversation between the Postmaster and his supervisor relating to the postmarking of ballots. (*See* Am. Compl. ¶ 95 fn. 25, at 37:56-38:02) (“You bring them in, you give them to the supervisor. He puts them in a special thing, they take it to the county.”); (Am. Compl. ¶ 95 fn. 25,

the truth needed to get out, that’s all. I wanted this investigation to happen, that’s why I even came out the first time I wanted to be anonymous. I didn’t want to come out”).

at 1:35:26-1:35:32.); (Am. Compl. ¶ 95 fn. 25, at 1:09:24-1:09:27) (OIG: “You know you heard the word ‘Postmarked’?” Hopkins: “Yes”).

After Hopkins communicated to the USPS OIG the timeline of events, his concerns, what he was instructed to do, and what he overheard, the USPS OIG validated his reporting and also expressed concern about the circumstances.

OIG: but what I understand and what actually makes me question what’s going on in this building is he actually was having ballots collected.

Hopkins: Yes.

OIG: Is that true?

Hopkins: Yes. He was having us collect the ballots up till the sixth. That was one of the things in that safety meeting before we left. So, we were collecting the fourth, the fifth and the sixth.

(Am. Compl. ¶ 95 fn. 25, at 34:10-34:29.)

Hopkins further explained to the USPS OIG:

Hopkins: **I mean added with what, how they were treating these ballots. I was picking up these ballots with what I had heard and I got assumption based on take it – putting two and two together.**

Hopkins: I felt like the truth needed to get out, that’s all. I wanted this investigation to happen, that’s why I even came out the first time I wanted to be anonymous. I didn’t want to come out . . .

OIG: But, if what you assumed was true . . . Your pride in this country can’t let you not act. Is that also fair?

Hopkins: Yes.

(Am. Compl. ¶ 95 fn. 25, at 45:08-45:20; 46:45-47:04.) (Emphasis added.)

It is abundantly clear that Hopkins was not acting with actual malice, but rather “putting two and two together” based on the directions he received that mandated he continue to collect mail-in ballots after Election Day (which he believed to be illegal) combined with what he

overheard being discussed during a tense conversation between the Postmaster and the supervisor Darrell Locke.¹⁰

Near the conclusion of the interview, the USPS OIG explicitly validated Hopkins' concerns and informed him that the investigation would not stop with him. Specifically, the USPS OIG stated:

OIG: The other thing I want to do is *I want to validate your concerns*. And I do that for a specific reason too, because I want people to know that you were working off of a sense of duty and obligation, not out of any sort of retribution or vengeance or, or, [sic] try to just trying to cause trouble. . . . You heard something and you were very honest with me when you said, this is what I believed that meant. . . . And I want you to know [the investigation will] continue. Just not with you.

(Am. Compl. ¶ 95 fn. 25, at 1:58:40-1:58:50; 2:00:14-2:01:33.) (Emphasis added.)

¹⁰ During the interview, Hopkins stated multiple times that his reporting was not done maliciously and only done for the purpose of upholding the law. By way of limited example:

Hopkins: I don't care who wins. If Biden wins, I'm going to laugh. I don't care. I just want it done properly. Legally, there is a legal manner in this. And if we're picking up ballots [after Election Day], somebody has got a question. Why is nobody like, why are we doing this now?

(Am. Compl. ¶ 95 fn. 25, at 40:50-41:03.)

OIG: What would you say, I'm making – just so you know, I'm making this up. This is, this is not reality right now. I'm making this up. This is a hypothetical. . . . What would you say if it came out that Rob did not say that. He used those words, but he was actually saying something else.

Hopkins: I would feel fucking horrible.

(*Id.* at 47:10- 47:30.)

Hopkins: I didn't want to come out. I wanted to be, I just wanted the words to get out there. So you guys would show up and that'd be it.

(*Id.* at 57:55-58:04.)

Hopkins: Do you ever feel like you were doing the right thing and then you've kind of regret it anyways?

(*Id.* at 1:51:46-1:51:50.)

Then, when the *Washington Post*, among other news outlets, began reporting Hopkins recanted his account of the events, he denied it, because he did not recant.¹¹ It is apparent from the USPS OIG interview itself that Hopkins maintained his overall conclusion that the totality of the circumstances evidenced unlawful behavior. (*See generally* Am. Compl. ¶ 95 fn. 25.)

Upon the conclusion of the interview, Hopkins was informed that the investigation would continue. Hopkins, in fact, did not learn of the results of the investigation until around February 3, 2021 when it was published. (*See* Am. Compl. ¶ 149) (“The OIG investigation began November 6, 2020, and ended November 16, 2020. The Report of Investigation was prepared and eventually circulated on or about February 3, 2021.”). Throughout the USPS OIG interview, Hopkins’ accounts were lent credence by the Investigator and Hopkins remained steadfast on the overall conclusion that the direction he received to collect mail-in ballots after Election Day and the portion of the Postmaster’s conversation he overheard were indicative of unlawful conduct. (Am. Compl. ¶ 95 fn. 25, at 1:58:40-1:58:50; 2:00:14-2:01:33.)¹²

Hopkins never entertained serious doubt as to the *truth* of his statements. Hopkins explained that, in light of being instructed to collect mail-in ballots after Election Day and overhearing a conversation between the Postmaster and his supervisor regarding the dating of ballots post-Election Day, he reached the conclusion that unlawful behavior was afoot.¹³ As *Norton* provides, “serious doubt as to the *truth* of his publication” must be pled with supporting facts for actual malice to be sufficiently alleged. *Norton v. Glenn*, 860 A.2d 48, 55 (Pa. 2004)

¹¹ At 1:10:00-1:11:09, the USPS OIG recaps a portion of the timeline of the events and Hopkins maintains that based on what he heard and experienced, when taken together, evidences the unlawful behavior he reported to Project Veritas. (Am. Compl. ¶ 95 fn. 25.)

¹² *Id.*

¹³ (Am. Compl. ¶ 95 fn. 25, at 45:08-45:20; 1:06:43-1:06:50); (*see also* Am. Compl. ¶ 95 fn. 25.)

(quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)) (Emphasis added.) Hopkins repeatedly averred that his overall account is accurate given the context and attendant circumstances.¹⁴ *See* Am. Compl. ¶ 95 fn. 25, at 45:08-45:20 (“I mean added with what, how they were treating these ballots. I was picking up these ballots with what I had heard and I got assumption based on take it – putting two and two together.”).

The Postmaster’s allegations that Hopkins avoided the truth and had a financial motive for his reporting are demonstrably false. First, the Postmaster misquotes the OIG interview to assert Hopkins avoided the truth. The Postmaster avers that Hopkins “walked away” after he overheard the Postmaster’s conversation. (Pl.’s Opp. Br. Prelim. Objs. at pgs. 26-27.) However, at 23:53, 24:33, 28:45, and 39:13 during the USPS OIG interview, it is apparent that Hopkins states that the Postmaster and the supervisor “walked away,” not Hopkins.¹⁵ Following this encounter, Hopkins ran into his colleague Zonya with whom he confided and asked for advice as to what he should do. (Am. Compl. ¶ 95 fn. 25, at 1:00:52-1:01:25). Zonya advised him to report what he heard. *Id.*

USPS OIG: After you heard the conversation, you were done casing. Did you go out?

Hopkins: Yeah, I pulled my, I pulled down and I went out. I talked to, I think I talked to Zonya first and I was like, holy shit – . . . And I told her what I heard. And I was like, I don’t know the fuck to do. It’s freaking me out so – she sent me a different person to contact, but I was already thinking project veritas because I’d heard about them. I knew this was the kind of thing they looked into.

Id.

¹⁴ At 1:10:00-1:11:09, the USPS OIG recaps a portion of the timeline of the events and Hopkins maintains that based on what he heard and experienced, when taken together, evidences the unlawful behavior he reported to Project Veritas. (Am. Compl. ¶ 95 fn. 25.)

¹⁵ At 39:13-39:26, the subtitle is improperly transcribed because it incorrectly states that Hopkins stated: “I walked away.” As the audio provides, Hopkins clearly states that it was the Postmaster and the supervisor that walked away, not Hopkins. This recitation of the facts is further confirmed at 23:53-23:55, 24:33-24:36, and 28:42-28:45. *See* Am. Compl. ¶ 95 fn. 25, at 23:53, 24:33, 28:45, and 39:13. At 28:42-28:45, Hopkins explicitly states: “They walk away.” (*Id.*)

Hopkins did not avoid the truth. Hopkins confided in a fellow mail carrier who advised him to report what he heard to an outside news organization. *Id.* Also, it was the Postmaster that walked away after he noticed Hopkins, not the reverse.¹⁶ (*See* Am. Compl. ¶ 95 fn. 25, at 24:28-24:35) (“I saw the two of them and then they, Rob actually looked directly at me and then **they walked away.**”) (Emphasis added.) Moreover, actual malice is not satisfied by a mere failure to investigate. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332, 94 S.Ct. 2997, 3003, 41 L.Ed.2d 789 (1974) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968)) (“[M]ere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the publisher must act with a ‘high degree of awareness of . . . probable falsity.’”).

The USPS OIG interview makes clear that Hopkins’ creation of a GoFundMe was not made to profit. Instead, it was a precautionary measure in case Hopkins lost his job. Specifically, Hopkins stated:

Hopkins: I felt like the truth needed to get out, that’s all. I wanted this investigation to happen, that’s why I even came out the first time I wanted to be anonymous. I didn’t want to come out . . .

(Am. Compl. ¶ 95 fn. 25, at 46:37-46:46.)

Hopkins: And I’m like, I’ve even asked . . . like, what the hell do I do with this money if I don’t lose my job? I was like, I mean, I don’t know how to give it back.

(*Id.* at 56:30-56:48.)

Hopkins: the only reason I even set up that GoFundMe is because James O’Keefe said, okay, if you’re going to come out, because at that point I was like, I guess I have to come out because I’ve noticed weird things with my work at that point. . . . I didn’t want to come out. I wanted to be, I just wanted the words to get out there. So you guys would show up and that’d be it.

¹⁶ *Id.*

(*Id.* at 57:08-57:55.)

Hopkins: And I've heard people say that on there [that money was a motivating factor]. And I'm like, I had no idea this would even happen.

(*Id.* at 1:00:10-1:00:25.) It is abundantly clear that Hopkins intended to remain anonymous and there was no intent to profit from his whistleblowing. *Id.*

When the Amended Complaint is analyzed in its entirety, and the totality of the circumstances detailed therein are considered, it is abundantly clear that actual malice is not sufficiently pled because the very exhibits and citations to the Amended Complaint disprove any semblance of actual malice.¹⁷ The exhibits and citations also demonstrate that the Postmaster is grossly distorting facts to make it appear as if actual malice can be alleged. This lawsuit is an example of clear and unmistakable retaliation against Hopkins for his whistleblowing. This case should be promptly dismissed because actual malice cannot be properly pled in light of the transcript of Hopkin's OIG interview, which the Postmaster attached to the Amended Complaint to prove actual malice, actually refuting the existence of actual malice.¹⁸

Accordingly, Hopkins respectfully requests this Honorable Court sustain his preliminary objection because the Postmaster fails to sufficiently plead actual malice.

B. THE POSTMASTER DOES NOT PLEAD HOPKINS' CONDUCT FALLS OUTSIDE THE SCOPE OF HIS EMPLOYMENT.

The Postmaster argues, he "has no freestanding obligation to plead that Defendant Hopkins acted outside the scope of []his employment." (Pl.'s Resp. to Prelim. Objs. ¶¶ 21, 51.); (Pl.'s Opp. Br. Prelim. Objs. at pg. 22.) That is wrong as a matter of law. The Postmaster contends that "the

¹⁷ See *Baravordeh*, 699 A.2d at 791 (citations omitted) ("a court is not bound to accept as true any averments in a complaint which are in conflict with exhibits attached to it.").

¹⁸ *Id.*

face of the Amended Complaint makes clear that Hopkins was not acting within the scope of his employment.” (*Id.*) It does not. Often a party levels a defamation claim directly against a government employee without regard for the state or federal immunity provisions. In those instances, if the complaint does not adequately plead that the defendant’s conduct falls outside the scope of his employment and supports those allegations with facts, the complaint may naturally fall within the ambit of sovereign immunity. That occurs in this instance.

In *Brown v. Wetzel*, the plaintiff contended that the court erred by dismissing his fraud claim against state employees in their individual capacities. 179 A.3d 1161 (Pa. Commw. Ct. 2018). The plaintiff “maintain[ed] that because [certain government employees] violated the Ethics Code, they were not acting within the scope of their employment.” *Id.* at 1167. The Commonwealth Court held:

Whether [certain Commonwealth employees] violated the Ethics Code is not dispositive of whether sovereign immunity applies. “[S]ince [Inmates’] cause of action emanates from intentional tort claims and [defendants are] Commonwealth employee[s], the only question to be resolved to determine if immunity attaches is whether [they were] acting within the scope of [their] duties” when they completed their grievance and grievance appeal responses. *La Frankie*, 618 A.2d at 1149. **Because [plaintiff] did not allege that [the Commonwealth employees] were acting outside the scope of their employment, the trial court properly sustained the preliminary objection to [plaintiff’s] fraud claim based on sovereign immunity.**

Id. at 1167. (Emphasis added.)

In *Robins v. Ward*, albeit a persuasive opinion, the plaintiff “repeatedly refers to Defendants as employees of the Delaware County Department of Public Welfare, a Commonwealth agency, and nowhere in his pleadings does he allege that Defendants were acting outside the scope of their employment.” 1789 C.D. 2017, 2018 WL 3862778, at *4 (Pa. Commw. Ct. Aug. 15, 2018). The Commonwealth Court ultimately found that “the trial court properly

concluded that Defendants, both of whom were Commonwealth employees, were immune from suit . . .” and dismissal of the complaint was appropriate. *Id.*¹⁹

The same logic applies in defamation actions where a complaint alleges conduct that sounds in the Federal Torts Claim Act (“FTCA”). *See generally Sharpless v. Summers*, CIV. A. 00-3260, 2001 WL 118960, at *4 (E.D. Pa. Feb. 9, 2001), *aff’d sub nom. Sharpless v. O’Neill*, 281 F.3d 224 (3d Cir. 2002) (“Because the Complaint fails to allege that any of the defendants were acting outside the scope of their employment, the Court determines that plaintiff’s defamation and libel claims are not cognizable . . .”).

Here, the Postmaster is suing a former mail carrier for statements made about conduct he observed while on-duty, relating to the distribution, collection and marking of mail, and for the benefit of his employer, the United States Postal Service. (Am. Compl. ¶¶ 31-45); (Am. Compl., Ex. 27, 36); (*see also* Prelim. Objs. at pgs. 10-17) As previously detailed in the preliminary objections, most, if not all, of the statements made by Hopkins are explicitly permitted by the U.S. Postal Service’s Employee and Labor Relations Manual, occurred with Hopkins’ apparent or actual authority, and/or were deemed “valid” by the USPS OIG. (*Id.*); (Am. Compl. ¶ 95 fn. 25, at 30:29-30:37.)

In rebuttal, the Postmaster argues that Hopkins’ failure to report to “appropriate authorities” is an “inconvenient fact” that Hopkins “sidestep[s]” which indicates his conduct falls outside the scope of his employment. (Pl.’s Br. Opp. Prelim. Objs. at pgs. 23-24.) Hopkins does not sidestep anything. The Postmaster ignores the Pennsylvania case law cited by Hopkins which provides that “an act, although forbidden, or done in a forbidden manner, may be within the scope of

¹⁹ *Brown* and *Robins* are cited not because Hopkins is a Commonwealth employee but rather for the notion that the Postmaster must sufficiently plead in his Amended Complaint to avoid sovereign immunity barring his claim at this stage of the proceeding.

employment.” *Mazur v. Cuthbert*, 186 A.3d 490, 499-500 (Pa. Commw. Ct. 2018) (citing *Kull v. Guisse*, 81 A.3d 148, 158 (Pa. Commw. Ct. 2013); *see* Restatement (Second) of Agency § 247 (“A master is subject to liability for defamatory statements made by a servant acting within the scope of his employment, or, as to those hearing or reading the statement, within his apparent authority.”)). It was within Hopkins’ actual – or at the very least apparent – authority to report unlawful conduct, whether internally within the United Postal Service or outside to a new organization.²⁰

Comment e of the Restatement (Second) of Agency § 247 further provides:

It may be found to be within the scope of employment of a person . . . to accuse another of wrongful conduct or to report to others the supposed wrongful conduct of [another] employee or other person. A servant having a duty to make such reports either to his employer or to others . . . may subject his employer to liability for his untruthful statements constituting defamation because made in excess of a privilege to speak, if he speaks in connection with his employment and with a purpose to serve it.

Restatement (Second) of Agency § 247 cmt. e.; *Brumfield v. Sanders*, 232 F.3d 376, 381 (3d Cir. 2000).²¹

There is no question that Hopkins has a duty to report conduct he believes evidences unlawful behavior and, even if those statements are “made in excess of a privilege to speak, if he speaks in connection with his employment and with a purpose to serve it[.]” it may fall within the scope of his employment. *Id.* As provided for by Section 666.18 of the Manual, U.S. Postal employees are provided protections for reporting what they “believe[] evidences . . . [a] violation of any law, rule, or regulation[.]” (*See* Prelim. Objs. Br. at pgs. 11-13.) During the USPS OIG

²⁰ *See* Section 666.18 of the Manual (“No one may take or fail to take a personnel action, or threaten to do so, with respect to any employee or applicant for employment because the employee or application discloses information that he or she believes evidence: . . . A violation of any law, rule, rule or regulation”).

²¹ In *Brumfield*, the Court applied Restatement (Second) of Agency § 247 to a dispute among federal employees and deliberately omits the portion of Comment e related to “managing a business.” *Brumfield*, 232 F.3d at 381.

interview, the USPS investigator explicitly stated that Hopkins’ “choice, which is also valid, was to go outside the postal service” to report what he heard to Project Veritas. (Am. Compl. ¶ 95 fn. 25, at 30:29-30:37.) Section 661.2 of the Manual requires all postal employees take an oath to “support and defend the Constitution of the United States.”²² The USPS OIG recognized that Hopkins was “working off of a sense of duty and obligation, not out of any sort of retribution or vengeance or, or, [sic] try to just trying to cause trouble . . . [.]” and, as Hopkins previously explained to the USPS OIG, he is a veteran and takes his oath to uphold the law very seriously.²³ (Am. Compl. ¶ 95 fn. 25, at 1:58:40-1:58:50.)

When taken together, the USPS OIG explicitly stating that Hopkins’ “choice, which is also valid, was to go outside the postal service” to report what he heard to Project Veritas and his

²² See Section 661.2 of the Manual (“Oath of office required for all postal employees (39 U.S.C. 1011)”).

²³ Hopkins reporting was clearly done in an effort to protect the law. During the OIG interview, Hopkins stated, in part:

Hopkins: I don’t care who wins. If Biden wins, I’m going to laugh. I don’t care. I just want it done properly. Legally, there is a legal manner in this. And if we’re picking up ballots [after Election Day], somebody has got a question. Why is nobody like, why are we doing this now?

See Am. Compl. ¶ 95 fn. 25, at 40:50-41:03.

OIG: But, if what you assumed was true . . . Your pride in this country can’t let you not act. Is that also fair?

Hopkins: Yes.

Id. at 46:51-47:04

During the second Project Veritas interview on November 11, 2020, Hopkins stated:

I don’t care who wins this election. I really don’t. I’m going to laugh if we ended up electing [] Biden. I’m going to laugh if we elect Trump. **But the end goal is that it’s a fair and correctly done election. And that’s all I care about.**

(Am. Compl. ¶ 110 fn. 35 (citing Project Veritas, *Marine Veteran & USPS Whistleblower Richard Hopkins Stands By Original Account: I Did Not Recant; Hopkins Describes More Than Three Hours Kept in Room Without Lawyer or Union Rep With Post Office Agents: ‘Grilling the Hell Out of Me...I Just Got Played’* at 6:35-6:52 (Nov. 11, 2020), <https://www.projectveritas.com/news/marine-veteran-and-usps-whistleblower-richard-hopkins-stands-by-original/> (Ex. 17)) (Emphasis added.)

“working off of a sense of duty and obligation” infers that Hopkins’ form of reporting outside the postal service falls within the scope of his employment. *Id.*²⁴ The Amended Complaint does not aver otherwise. (*See generally* Am. Compl.)

The Amended Complaint never explicitly alleges that any of Hopkins’ conduct falls outside the scope of his employment. (*Id.*) Rather, the Postmaster petitions this Court to assume that he intended to allege conduct outside the scope of Hopkins’ employment. (*See generally* Pl.’s Opp. Br. Prelim. Objs. at pgs. 17-24.) Since the Amended Complaint sounds in Federal Torts Claim Act, it should be dismissed failure to state a claim upon which a Commonwealth court has jurisdiction.

II. CONCLUSION

Based on the foregoing, and the previously filed Preliminary Objections, Defendant Richard Alexander Hopkins respectfully requests this Honorable Court to sustain his objections and dismiss the Amended Complaint with prejudice.

Respectfully submitted,

BOCHETTO & LENTZ, P.C.

/s/ David P. Heim

Dated: October 25, 2021

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²⁴ Furthermore, it appears as if USPS OIG effectively ratifies Hopkins’ reporting in that Charles Klein (Postal Inspector) explicitly stated that it was “valid” for Hopkins to report the behavior he believed unlawful “outside the postal service.” Am. Compl. ¶ 95 fn. 25, at 30:29-30:37.