

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DR. GERARD NUOVO, :
 :
 : Case No. 2:09-CV-312
 :
 Plaintiff, : JUDGE FROST
 :
 : MAGISTRATE JUDGE ABEL
 v. :
 :
 THE OHIO STATE UNIVERSITY :
 c/o E. Gordon Gee :
 205 Bricker Hall :
 190 North Oval Mall :
 Columbus, Ohio 43210-1357 :
 : THIRD AMENDED
 : COMPLAINT
 and :
 :
 DR. SANFORD BARSKY, :
 The Ohio State Univ. Pathology :
 Dept. :
 129 Hamilton Hall :
 1645 Neil Avenue :
 Columbus, OH 43210 :
 : JURY DEMAND ENDORSED
 and : HEREON
 :
 OSU PATHOLOGY SERVICES LLC :
 c/o Harry Pukay-Martin :
 129 Hamilton Hall :
 1645 Neil Avenue :
 Columbus, OH 43210, :
 :
 and :
 :

OHIO STATE UNIVERSITY :
PHYSICIANS INC. :
c/o Statutory Agent, Timothy :
Nagy, Esq., 21 East State Street, :
Ste 1200 :
Columbus, Ohio 43215 :

and :

E. GORDON GEE :
President of Ohio State University :
80 N. Drexel :
Bexley, Ohio 43209 :

and :

GILBERT CLOYD, ex officio :
Ohio State University Board of Trustees :
210 Bricker Hall :
190 North Oval Mall :
Columbus, Ohio 43210 :

and :

STEVEN GABBE, M.D. :
Chief Executive Officer :
Ohio State Univ. Medical Center :
410 W. 10th Avenue :
Columbus, Ohio 43210 :

and :

CAROLINE WHITACRE, Ph.D. :
Ohio State Univ. Office of Research :
208 Bricker Hall :
190 North Oval Mall :
Columbus, Ohio 43210 :

and :

DR. JOSEPH ALUTTO :
Ohio State University Executive :
Vice President & Provost :
203 Bricker Hall :
190 N. Oval Mall :
Columbus, Ohio 43210 :

and :

DANIEL SEDMAK, M.D. :
Ohio State Univ. Medical Center :
410 W. 10th Avenue :
Columbus, Ohio 43210 :

and :

ROBERT BORNSTEIN, Ph.D. :
Ohio State University College of Medicine :
370 West 9th Avenue :
Columbus, Ohio 43210 :

and :

JOHN DOE and JANE ROE :
Individual, employee and staff person :

and :

JOHN DOE CORPORATION AND/OR :
LIMITED LIABILITY COMPANY :

Defendants. :

NATURE OF CLAIMS

Now Comes Plaintiff Doctor Gerard Nuovo, by and through the undersigned counsel, and for his Complaint states as follows:

1. This action is brought against Defendants Ohio State University (hereinafter "OSU"), Ohio State University Pathology Services LLC (hereinafter "OSUPS"), Ohio State University Physicians Inc. (hereinafter "OSUPI"), Dr. Sanford H. Barsky, Dr. E. Gordon Gee, Dr. Gilbert Cloyd, Dr. Steven Gabbe, Dr. Caroline Whitacre, Dr. Joseph Alutto, Dr. Daniel Sedmak, Dr. Robert Bornstein and John Doe and Jane Roe individuals and entities . The action arises out of the illegal and discriminatory treatment of Plaintiff Doctor Gerard Nuovo based on his race, national origin, ancestry and retaliation in opposition to public policy and from protected activity under Title VII, violation of his U.S. Constitution First Amendment Rights against Retaliation, United States Constitution Due Process Clause, and state common law claims and causes of action.

2. Plaintiff alleges claims against the Defendants to the extent permissible under the U.S. Constitution's Eleventh Amendment and where the U.S. Congress and the Ohio Legislature has permitted specific claims against individuals in their personal and/or official capacity to the extent permissible herein.

JURISDICTION AND VENUE

3. This action is instituted and authorized by 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-et seq., §102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981, the United States Constitution, and 42 U.S.C. § 1983.

4. Plaintiff filed timely administrative complaints with the EEOC.

5. Plaintiff received the Right to Sue letters from the EEOC on March 23rd 2009 and on August 19, 2009.

6. Jurisdiction of this Court to hear and determine the claims is based on 28 U.S.C. § 1331 and § 1343. The Court has supplemental

jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367(a) against individuals and private actor defendants.

7. Venue is proper in this Court as all the acts complained of herein occurred in the State of Ohio, within the jurisdiction of this Court.

PARTIES

Plaintiff

8. At all relevant times, Plaintiff Dr. Nuovo has been employed by The Ohio State University Medical Center from July 1999 to present as tenured faculty member and employed by OSUPS and OSUPI. As an Italian – American race, Dr. Nuovo is in a class of persons protected by Title VII and 42. U.S.C. § 1981 based on his race and national origin and ancestry as an Italian.

9. Plaintiff Nuovo is a licensed physician, who in the course of treating patients, is duty bound to protect the public and patients. This duty is a separate and independent duty that exceeds his employment obligations with OSU and OSUPI and OSUPS. (*See American Medical Association Code of Ethics*, Preamble, the body of ethical statements are “developed primarily for benefit of the patient . . .” and federal and Ohio regulations governing Medicaid coverage.

Defendants

10. Defendant OSU is an employer which employs more than 20 employees qualifying as an employer under Title VII, 42 U.S.C § 2000e(b). At all times material herein, Defendant OSU, a state university, was and is an employer able to enter into and create contracts of employment, and capable of being sued in this Court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-et seq., §102 of the Civil Rights Act of 19

11. Defendant OSU conducts business as a hospital and medical/research center and according to the Medical Center (<http://medicalcenter.osu.edu>), treats thousands of people of all ages in its medical practice and represents to the general public that they

provide state of the art medical facilities as well as excellence in patient care.

12. Through its medical center, OSU Medical Center generates \$1.5 billion dollars annually and a significant portion of this revenue is derived from the clinical treatment of patients by OSUPI and OSUPS.

13. Defendant Sanford H. Barsky, a supervisory employee/agent/shareholder of OSUPS and OSUPI, is capable of and is being sued in his individual capacity (not as an OSU employee) and is being sued in capacity as an employee/shareholder/agent of OSUPS and OSUPI with regard to 42 U.S.C. § 1981 only. In regard to Plaintiff's Eight Claim for Relief (Retaliation in Violation of the First Amendment of the United States Constitution), he is only being sued for prospective relief only and not remedial relief. And, in regard to the First, Fourth, Sixth, Seventh, Tenth, and Eleventh Claims for Relief, Defendant Barsky is only being sued in his capacity as employee/shareholder/ agent of OSUPS and OSUPI.

14. OSU Pathology Services LLC ("OSUPS") is a private employer and at all times material herein was and is the joint and/or co-employer of Plaintiff along with OSU and OSUPI.

15. In the alternative, OSUPS is a "single employer" with Defendant OSU and OSUPI during all of the conduct alleged herein insofar as OSUPS, OSU and OSUPI are so interrelated as to constitute a single employer.

16. OSUPS is a "employer" under Title VII, Section 1981 and Ohio Revised Code §4112 because it affects "commerce," employs jointly or as co-employer fifteen or more employees, and controls the manner in which Plaintiff performed his work. OSUPS is able to enter into and create contracts of employment under 42 U.S.C. § 1981, and is capable of being sued in this Court and under Title VII, 42 U.S.C. § 2000e.

17. Ohio State University Physicians Inc. ("OSUPI") is a employer and at all times material herein was the joint and/or co-employer of Plaintiff along with OSU and OSUPI.

18. In the alternative, OSUPI is a “single employer” with Defendant OSU and OSUPS during all of the conduct alleged herein insofar as OSUPS, OSU and OSUPI are so interrelated as to constitute a single employer. OSUPI is able to enter into and create contracts of employment under 42 U.S.C. § 1981, and is capable of being sued in this Court and under Title VII, 42 U.S.C. § 2000e.

19. OSUPI and OSUPS are interrelated by and through a parent/subsidiary relationship or similar relationship whereby OSUPI controls or jointly owns and operates, directly or indirectly, OSUPS at all times relevant in this action.

20. OSUPI is an “employer” under Title VII, Section 1981 and Ohio Revised Code §4112 because it affects “commerce,” employs jointly or as co-employer fifteen or more employees, and controls the manner in which Plaintiff performed his work.

21. E. Gordon Gee is capable of and is being sued in his individual capacity (not as an OSU employee) and is being sued in capacity as an agent of OSUPS and OSUPI with regard to 42 U.S.C. § 1981 only. In regard to Plaintiff’s Eighth and Ninth Claims for Relief (Retaliation in Violation of the First Amendment of the United States Constitution and Procedural Due Process Violations), he is only being sued for prospective relief only and not remedial relief, and he is being sued for actions and conduct as agent for OSUPS and OSUPI.

22. Gilbert Cloyd is capable of and is being sued in his individual capacity (not as an OSU employee or trustee) and is being sued in capacity as an agent of OSUPS and OSUPI with regard to 42 U.S.C. § 1981 only. In regard to Plaintiff’s Eight and Ninth Claims for Relief (Retaliation in Violation of the First Amendment of the United States Constitution and Procedural Due Process), he is only being sued for prospective relief only and not remedial relief.

23. Dr. Steven Gabbe is capable of and is being sued in his individual capacity (not as an OSU employee) and is being sued in capacity as an agent of OSUPS and OSUPI with regard to 42 U.S.C. § 1981 only. In regard to Plaintiff’s Eighth and Ninth Claims for Relief (Retaliation in Violation of the First Amendment of the United States

Constitution and Procedural Due Process Violations), he is only being sued for prospective relief only and not remedial relief, and he is being sued for actions and conduct as agent for OSUPS and OSUPI.

24. Dr. Caroline Whitacre is being sued in his individual capacity (not as an OSU employee) and is being sued in capacity with regard to 42 U.S.C. § 1981 only. In regard to Plaintiff's Eight and Ninth Claims for Relief (Retaliation in Violation of the First Amendment of the United States Constitution and Procedural Due Process Violations), she is only being sued for prospective relief only and not remedial relief.

25. Dr. Joseph Alutto is being sued in his individual capacity (not as an OSU employee) and is being sued in capacity with regard to 42 U.S.C. § 1981 only. In regard to Plaintiff's Eight and Ninth Claims for Relief (Retaliation in Violation of the First Amendment of the United States Constitution and Procedural Due Process Violations), he is only being sued for prospective relief only and not remedial relief.

26. Dr. Daniel Sedmak is being sued in his individual capacity (not as an OSU employee) and is being sued in capacity with regard to 42 U.S.C. § 1981 only. In regard to Plaintiff's Eight and Ninth Claims for Relief (Retaliation in Violation of the First Amendment of the United States Constitution and Procedural Due Process Violations), he is only being sued for prospective relief only and not remedial relief. And, in regard to the First, Fourth, Sixth, Seventh, Tenth, and Eleventh Claims for Relief, Defendant Sedmak is only being sued in his capacity as employee/shareholder/ agent of OSUPS and OSUPI.

27. Dr. Robert Bornstein is being sued in his individual capacity (not as an OSU employee) and is being sued in capacity with regard to 42 U.S.C. § 1981 only. In regard to Plaintiff's Eight and Ninth Claims for Relief (Retaliation in Violation of the First Amendment of the United States Constitution and Procedural Due Process Violations), he is only being sued for prospective relief only and not remedial relief.

28. John Doe and Jane Roe are unknown persons who are employed with, or who are acting on behalf of, or in concert with, one or all of the Defendants regarding all claims asserted in this action, and are capable of and is being sued in his individual capacity with regard to 1) 42 U.S.C. § 1981, (2) all relief in the form of injunctive relief as to ongoing and future retaliation against Plaintiff, and (3) state law claims asserted herein in their respective capacity as employee/shareholder/agent of OSUPI and OSUPS.

29. John Doe Corporation and/or Limited Liability Company or Entity is an unknown private entity capable of being sued as to all claims, except those requiring a state actor, and is deemed a single employer or joint/co-employer of Plaintiff at all times relevant herein.

FACTS

30. Plaintiff, Dr. Gerard Nuovo, an American of Italian race and ancestry, is an exemplary employee with a distinguished career of over twenty years as a medical pathologist. He was hired by the Department of Pathology at Ohio State University Medical Center as an Associate Professor with tenure in July 1999 and as a Clinician for the treatment of patients with OSUPS and OSUPS. In 2001, he was promoted to full Professor. He is an employee of Ohio State University, and OSUPS and OSUPI at all relevant times herein.

31. In June 2005, OSU and OSUPS and OSUPI employees/agents adopted and implemented a Quality Assurance Procedures to Major Discrepancies for GYN Cytology (the “QA”). The QA was a quality control policy whose purpose was to “identify and, where appropriate, remedy major discrepancies in the diagnosis made by the cytotechnologists,” who review Pap smears derived women patients. (Exhibit 1, QA policy).

32. The QA policy is considered the “gold standard” by the the federally mandated Clinical Laboratory Improvements Amendments (“CLIA”) and by the American College of Pathologist (“CAP”) for detecting and correcting Pap smear and cytopathologist errors and mistakes. www.cms.hhs.gov/CLIA ; www.cap.org/apps/cap.portal. CLIA and CAP ensure that errors and misdiagnoses are discovered, corrected and remedied in a clinical

laboratory. Compliance with CLIA regulations are required by law for certification and for the treatment of patients. CAP guidelines are customarily relied on by pathologists.

33. On June 16, 2005, in accordance with the QA policy, Plaintiff Nuovo identified and reported 3 major discrepancies (i.e., cytotech states that Pap smear shows a women has HPV but a subsequent bioposy shows no HPV). The discrepancies were reported to Thom Smith, the Director of University Reference Labs. (Exhibit 2, QA policy Report of discrepancies and attached chart showing overdiagnosis as high as 42% while accepted rate is 5-10%).

34. The discrepancies discovered by the QA policy were then reported to Elizabeth Seely, then the senior administrator in charge of cytotechs and under the direct supervision of Dr. Mekhjian Ms. Seely ordered Plaintiff Dr. Nuovo to suspend the application of the QA policy once the discrepancies was discovered, despite the fact that administrators and practioneers had agreed on the QA policy in place in June 2005.

35. In mid-2005, Plaintiff Dr. Nuovo objected to the suspension of the policy and requested that the cytotechnologists who were misdiagnosing women patients be removed from the clinical practice and immediately retrained. Concerned that more discrepancies had occurred, Plaintiff Dr. Nuovo also reviewed additional Pap smear results and biopsies and found that 23 misdiagnoses had occurred and additional misdiagnoses were occurring on a continuous basis.

36. The QA policy mandates that a cytotech be removed from clinical serve and immediately retrained in Pap Smear diagnoses. Despite the QA policy, no cytotech were removed from clinical service and retrained.

37. The QA policy was later amended in 2005, but the discrepancy rule was not removed from the policy.

38. On November 8, 2005, Plaintiff Dr. Nuovo objected to the suspension and the fact that non-substantive changes were being made to the QA policy while patients were being misdiagnosed and

undergoing unnecessary surgeries. (Exhibit 3, email to Ms. Seely from Dr. Nuovo).

39. Concerned that the QA policy was not being implemented and that patients were being misdiagnosed, on November 9, 2005, Plaintiff Dr. Nuovo, acting as licensed physician, notified Defendant Mekhjian in over 40% of patient cases the diagnosis of malignant HPV was incorrect. Defendant Mekhjian, acting as agent of OSUPS and OSUPI, took no action and later supported the suspension of the QA policy, despite the fact that he was notified that the QA policy had been triggered and that the overdiagnosis rate was as high as 40%. (Exhibit 4, email to Mekhjian notifying him of QA policy trigger and overdiagnosis of women).

40. On November 30, 2005, Ms. Seely, as administrator in charge of the cytotechs and acting as an agent of OSUPI and OSUPS, wrote to Plaintiff Dr. Nuovo suggesting significant, unlawful changes to the QA gold standard policy. In particular, Ms. Seely suggested that the requirement that biopsies, used to verify the accuracy of Pap Smear results, be removed from the QA policy; that cytotech and cytopathologist screening results only be used without the benefit of a biopsy to verify that the screening results are correct or incorrect; and Ms. Seely recommended that the QA policy's effective date (which is intended to detect discrepancies) not be back-dated and that the effective date be January 1, 2006. (Exhibit 5, Seely email to Nuovo). Defendant Mekhjian had knowledge of, and approved Ms. Seely's suggestions and recommendation.

41. Seely and Mekhjian knew that the removal of biopsy and HPV objective tests from QA policy was in violation of CLIA regulations and CAP guidelines, insofar as the verification tools needed to detect discrepancies would be removed from the QA policy, effectively rendering the policy meaningless.

42. Seely and Defendant Mekhjian, acting as an agent of OSUPS and OSUPI, also knew that not back dating the policy and recommending its adoption in January 1, 2006 would cover-up the discrepancies and additional misdiagnoses identified by Plaintiff Dr. Nuovo.

43. Plaintiff Dr. Nuovo objected to suggested changes and recommendation regarding the adoption and implementation date of January 1, 2006 and refused to sign off on QA policy with Seely's and Defendant Mekhjian's changes to the policy.

44. In December 2005, Plaintiff Dr. Nuovo contacted University legal counsel and risk management and informed them that he did not agree with changes and refused to sign off as medical director as the clinical practice.

45. University legal counsel and risk management informed Plaintiff Nuovo that he had to sign off on Seely's and Defendant Mekhjian's changes and recommendation, but Plaintiff Nuovo again refused to sign off on them and wrote to University counsel and risk management objecting to the QA policy revisions and re-adoption in January 2006.

46. In his correspondence and meetings with University legal counsel and risk management, Plaintiff Nuovo also expressed the concern that the changes, no back dating of the policy and an effective date of January 1, 2006 appeared to be a cover-up and that he, as licensed physician charged with protecting the public, would not sign off on such a policy.

47. Plaintiff Nuovo also expressed the concern that he might be subject to direct suit by a patient as licensed physician and thus was ethically duty bound to report and object the handling of the QA policy. For these reasons, Plaintiff Dr. Nuovo, stated he could not comply with QA changes and recommendation.

48. In early January 2006, Plaintiff Dr. Nuovo again reiterated his disagreement and refusal to sign off on the changes and the recommended January 1st effective date of the QA policy.

49. On January 6th 2006, in course of treating patients, Plaintiff Dr. Nuovo reported to Defendant Barsky, acting as an OSUPS and OSUPI agent/employee/shareholder, and Dr. Saul Suster that based on the 2005 QA discrepancies found and the failure to remove cytotechs from clinical service and retrain them, as well as the continued misdiagnosis of women from June 2005 through January

2006, that hundreds of women had and were being misdiagnosed with either a venereal disease or a pre-cancer condition, when in fact the patients were perfectly healthy. (Exhibit 6, Letter to Dr. Barsky)

50. All Defendants at no time have notified the patients, or even notified them of the possibility of such an occurrence and offered to retest them.

51. In particular, Plaintiff Dr. Nuovo reported to Defendant Sanford Barsky, agent and employee of OSU, OSUPI and OSUPS, that two cytotechnologists working in the pathology laboratory were incorrectly interpreting routine Pap smear tests conducted on women. The incorrect interpretation indicated the women, either suffered from a life threatening pre-cancer condition, or had a venereal disease.

52. On January 6, 2006, Dr. Deborah Bartholomew, a leading OB-GYN physician and clinician wrote to Dr. Saul Suster about the possible removal of Plaintiff Dr. Nuovo from the clinical practice and the harm it would cause to patient safety. (Exhibit 8, Letter from Dr. Bartholomew).

53. In her January 6th letter, Dr. Bartholomew complained that prior to Plaintiff Dr. Nuovo joining the clinical practice, the overall rate and lack of correlation of cytology (Pap smears) and biopsies was a “serious problem” and that Plaintiff Dr. Nuovo has significantly improved cervical pathology.

54. In particular, Dr. Bartholomew points out that because of the lack of correlation, many patients have received unnecessary surgery.

55. Dr. Bartholomew further states that she considers Plaintiff Nuovo a world class cytopathologist and gynecologic pathologist and that she always agrees with his clinical impressions.

56. On January 12, 2006, Plaintiff Nuovo wrote to Seely stating that he was concerned about misdiagnosis of women and her refusal to back date the policy so that the 2005 discrepancies and ongoing misdiagnoses would be detected and corrected. (Exhibit 7, letter to Seely).

57. A carbon copy of the memorandum was given to Defendants Drs. Barsky and Mekhjian, acting as agents and employees of OSUPI and OSUPS.

58. Plaintiff Nuovo identified the errors and mistakes, who was making them, and informed Dr. Seely that her failure to correct this situation was “*denying our women patients the best care . . . and putting them at increased risk for serious mistakes*” and that her efforts to postpone the policy and correct the errors appeared to be a “*cover-up.*”

59. In addition, in the January 12, 2006 memorandum, Plaintiff Nuovo informed Dr. Seely that diagnoses for high grade SIL (HPV) were 300% to 1000% above the accepted norm.

60. Just two weeks after reporting the misdiagnoses to Defendant Barsky and only three weeks after refusing to sign off on the Seely’s and Defendant Mekhjian’s changes and recommendation as to the effective date of QA policy, Plaintiff Dr. Nuovo was removed from gynecologic positions with OSU in January 2006 and OSUPS and OSUPI, as well as their agents, barred him from clinical treatment of women, preventing him from detecting and reporting the misdiagnosis of women.

61. Plaintiff Dr. Nuovo was removal from OSU’s gynecologic pathology laboratory prevented from engaging in cervical biopsy tests and thus was prevented from stopping the misdiagnosis of women patients.

62. Defendant Dr. Barsky informed Plaintiff’s immediate supervisor, Dr. Saul Suster that he was removing Plaintiff from his position and from lab access to clinical pap smears and biopsies. Dr. Suster objected to this action and the firing of Plaintiff Dr. Nuovo.

63. Plaintiff complaints were based on the fact that, as a result of false positive Pap smears, a significant number of women had a significant portion of their cervix removed by a medically unnecessary treatment procedure. The unnecessary medical procedure

involves the removal of the cervix tissue, which is connected to the uterus, resulting in a condition known as an incompetent cervix.

64. It is a well established medical fact that an incompetent cervix significantly increases the likelihood of miscarriage, as well as premature births and premature rupture of membranes, and has resulted in miscarriage for some of the women who received the medically unnecessary procedure.

65. Another injury caused by the misdiagnoses and unneeded surgery is that the misdiagnosed women, in addition, have to live with fear and shame of being unable to have a child, or fear that once pregnant, they are highly susceptible to losing the child, marital discord and divorce as a result of being wrongfully diagnosed with HPV and having to undergo unneeded surgery.

66. Plaintiff also complained that the unnecessary colposcopy and cervical biopsy examinations were likely to have severe adverse physiological and psychological effects on women patients. The misdiagnosed women have and continue to live with stigma, humiliation, shame, marital problems and related problems arising from the misdiagnoses.

67. In August 2006, OSUPS and OSUPI formally terminated Plaintiff because he complained about the misdiagnosis of women and prevent access to data and treatment records showing past and ongoing misdiagnosis of women.

68. OSUPS and OSUPI's stated reason for firing Plaintiff Dr. Nuovo is that he is not board certified and thus is unqualified. This reason is a pretext and a cover-up because Plaintiff Dr. Nuovo is board certified and is only pathologist with clinical cervical pathology training.

69. OSUPI and OSUPS non-profit corporations are the medical providers under medicaid and medicare regulations for patients whose services were paid for by these programs.

70. A significant number of the women who were misdiagnosed had their treatment paid for by the medicaid and medicare programs.

71. As providers, OSUPI and OSUPS certify by participation in the medicare and medicaid programs that they will not perform medically unnecessary treatment and procedures and that they will not engage in (i) waste and abusive practices inconsistent with professional standards of care, and (ii) that they will not over-utilize services, resulting in unnecessary costs to these programs.

72. OSUPI and OSUPS, as medicaid and medicare providers of services, knew that misdiagnosis of women has and will result in the billing for services that are not medically necessary.

73. OSUPI and OSUPS retaliated against Plaintiff for reporting the misdiagnosis of women was medically unnecessary, constituted wasteful and abusive practices and was over-utilization of medical services.

74. The women who were misdiagnosed did not need the treatment provided to them and, as a result of the misdiagnoses, received additional treatments and care that were not needed, was wasteful and abusive and was over-utilization of medical services in order to generate additional revenue.

75. The additional revenue generated from the misdiagnoses were paid to OSUPI and OSUPS and to privately held billing entities owned, controlled, or in which members of OSUPS and OSUPI OSU pathology department have an interest.

76. Plaintiff requested that Defendant Barsky restore his laboratory privileges, since he did important research work for the Director of the Cancer Center at the Ohio State University. Dr. Barsky, and that he wanted to continue the clinical treatment of women patients. Defendant Barsky called Plaintiff just another “stupid Italian” and told him no.

77. Soon after being removed from his laboratory duties, Plaintiff Dr. Nuovo was replaced by a non-Italian physician who had no clinical cervical pathology training.

78. In addition to losing his clinical salary and benefits as a result of August 2006 firing, Plaintiff Nuovo has had his OSU professor salary drastically reduced on basis of his race and for reporting the misdiagnoses and his QA policy related complaints.

79. Since 2006, Plaintiff has and is making substantially less OSU salary than all similarly situated non-Italian employees under Defendant Barsky's supervision. Plaintiff Nuovo has had an OSU salary of \$41,000 since 2006 as a tenured, full professor until it has increased in December 2009 after protests from Plaintiff.

80. Despite the modest December 2009 increase in his OSU based salary only, OSU has failed to adequately pay him for his grant generated income in accordance with National Institutes of Health guidelines, industry practice and OSU practices.

81. Plaintiff is providing research services in over \$60 million dollars in NIH and privately funded research.

82. As a researcher, Plaintiff is entitled to a percentage of the income from grant funds.

83. In retaliation, Plaintiff is not receiving appropriate income from the grants.

84. Defendants intentionally denied this requests, or were deliberately indifferent to the denials, based on his race and national origin and based on his reporting of a public policy violation.

85. Defendants stated reason for reducing OSU salary is a pretext for unlawful discrimination insofar as Plaintiff Nuovo has more experience, more published work and more research expertise than non-Italian employees in cervical pathology.

86. In addition to Plaintiff Dr. Nuovo, Defendant Barsky, acting an employee of OSU, has engaged in unlawful discrimination

against other Italian-American professors during their employment at OSU, based on their Italian race and ancestry.

87. Additionally Dr. Nuovo's laboratory and clinical privileges were suspended by Defendant Dr. Barsky on August 4th 2006. The suspension was allegedly made on the grounds that Plaintiff violated standards of professional conduct and created an environment detrimental to patient safety. A Credential Committee later found the actions of Defendant Dr. Barsky to be unjustified and reinstated Plaintiff's privileges. Despite this, Dr. Nuovo's professional standing and respect in the medical community has been irreparably damaged.

88. On September 11, 2007, Plaintiff's clinical privileges, which permitted to Plaintiff to perform medical consultations for the treatment of patients, were again suspended.

89. Prior to the January 2006 letters reporting that women's health was being endangered, Plaintiff Dr. Nuovo received exceptional evaluations from his superiors from the date of joining the Ohio State University Medical Center in 1999 through 2005. He is regarded as a "world class" physician and professor by many of his colleagues and by the NIH. He has also published numerous articles and books on pathology and cytology, appeared on CNN as health contributor, and wrote on women's health for Glamour Magazine and the Saturday Evening Post.

90. In August 2007, Dr. Sanford Barsky, conducted Plaintiff's annual review in the office of the Dean of Academic Affairs and in the presence of the Dean, Dr. Robert Bornstein to evaluate Plaintiff Nuovo as OSU professor.

91. Plaintiff Dr. Nuovo was given a D evaluation by Dr. Barsky during his OSU professor evaluation. During the evaluation, Dr. Barsky stated: "Why do you think I have taken all of these negative actions against you." Dr. Nuovo said in response: I don't know." Barsky then stated: "How bout, it's because I don't like Italians." Dr. Nuovo responded by looking in shock at Dr. Barsky.

92. The statement was made in Office of Defendant Robert Bornstein and was later reported to Ms. Kate Dillingham, who in her capacity as the Director of Human Resources at the UMC, made a note for a follow up action on ethnic diversity training for Dr. Barsky, but no action was taken by OSU to stop the racially hostile conduct against Plaintiff Dr. Nuovo: no ethnic training occurred and no steps were taken to correct prior demotions, salary reductions and other abusive conduct by Dr. Barsky.

93. Plaintiff Nuovo requested that OSU Human Resources look into statement made by Defendant Barsky during the evaluation.

94. Human Resources deemed the ethnic comment inappropriate, but took no corrective action against Defendant Barsky in December 2007.

95. Plaintiff Nuovo appealed this decision. In the course of the appeal, OSU's senior Human Resources director told Plaintiff Nuovo that Dr. Barsky would undergo ethnic diversity training and that Plaintiff Nuovo would receive a report within 45 days. No report was given to Plaintiff Nuovo and Defendant Barsky did not undergo ethnic diversity training.

96. On October 4th 2007, Defendant Barsky filed a complaint with the OSU's office of research integrity accusing Plaintiff Nuovo of misconduct in research and scholarly activities in violation of University policy. The letter and its content were knowingly false.

97. Plaintiff had no knowledge of charges at the time they were filed and had not seen the complaint at the time they were filed.

98. Beginning in June 2007, Defendant OSU, acting through its supervisory employees, made several promises to Plaintiff Nuovo that the discrimination against him by Defendant Barsky would be resolved soon and that he would be transferred to a department where Defendant Barsky was not his supervisor.

99. In reliance on supervisory employee's representations, Plaintiff Nuovo delayed filing a complaint with the EEOC. Defendant OSU knew no transfer would occur and deliberately mislead Plaintiff

Dr. Nuovo for the purpose of causing him not to file an EEOC complaint.

100. In a letter dated June 27, 2008, Plaintiff Nuovo informed E. Gordon Gee that he was being retaliated against for his exposure of a cover-up of misdiagnosis by employees of OSU, OSUPI and OSUPS. Additionally, Plaintiff also reported that he continued to suffer discriminatory acts against himself from OSU, OSUPS and OSUPI employees and that these acts directly caused by his Italian American race and ancestry. Defendant Gee was provided with supporting documents and information to show the misdiagnosis and cover-up by OSU, OSUPI and OSUPS employees and agents.

101. Defendant Gee was and is an agent of OSUPS and OSUPI because of the contracts and business activities by and between OSU and OSUPI and OSUPS. And, he is a supervisory employee under Title VII on behalf of OSU and individual under Section 1981 as to his deliberate indifference and affirmation and support of the racially discriminated acts by Defendant Barsky and others.

102. Defendant Gee was deliberately indifferent and supported Defendant Barsky's discriminatory acts based on Plaintiff Dr. Nuovo's race and national origin in that Defendant Gee knew about the discriminatory conduct, knew that it continued after the HR investigation and that the HR investigation failed to remedy the discrimination.

103. Unable to stop the discrimination himself and due to HR's failure to address remedy it, Plaintiff Dr. Nuovo appealed to Defendant Gee again in 2008/2009 but Defendant Gee was deliberately indifferent and continued to support and affirm the racially and ancestrally motivated acts against Plaintiff Nuovo.

104. Defendant Gee has a duty to enforce bylaws, rules and regulations of the board of trustees, which include that no faculty member shall be subjected to discrimination in violation of federal and state anti-discrimination laws (section 1981). See University Rule book, §3335-1-03 ("It shall be the duty of the president to enforce the

bylaws, rules and regulations . . . president is hereby clothed with authority requisite to that end”).

105. At all relevant times, Plaintiff is a tenured full professor.

106. As a tenured full professor, he has a right to communicate directly with the University President himself and not just his Office. University Rule, 3335-1-04 (E).

107. Accordingly, Defendant Gee had a duty to receive and address the complaints made to him personally.

108. On July 7, 2008, Plaintiff appealed the Human Resources department’s findings regarding the slurs.

109. On July 23, 2008, the Human Resources Department summarily dismissed the charge because of Plaintiff’s initial personal feelings, rather than on whether the slurs in and of themselves violated University policy and Title VII.

110. In a letter dated August 3, 2008, Plaintiff again requested that his privileges be reinstated, but this request was denied.

111. On August 3, 2008, Plaintiff Nuovo informed Defendant Dr. Alutto, acting as an agent of OSUPI and OSUPS, as an OSU employee under Title VII, and individually under Section 1981, that women patient’s health was being endangered due to over-diagnosis of HPV and that he was suffering discrimination as a direct result of his Italian race and ancestry.

112. Defendant Dr. Alutto was deliberately indifferent and affirmed and supported the discriminatory acts against Plaintiff Nuovo insofar as Vice Provost he had a duty to investigate and address discriminatory acts against an OSU employee, especially if such acts continued after an HR investigation that failed to remedy the discrimination. As an agent of OSUPS and OSUPI, he also affirmed and supported the retaliatory acts toward Plaintiff Nuovo based on him reporting the misdiagnosis of women patients to cover up this fact to protect the reputation and revenue of the clinical practices.

113. In a August 3, 2008 letter from Plaintiff Dr. Nuovo to the OSU Board of Trustees, by and through its then chairman, Dr. G. Gilbert Cloyd, the Board was informed of the past and ongoing retaliatory acts against Plaintiff Nuovo because he reported that women patient's health and safety was and is being threatened.

114. In the August 3, 2008 letter to the Board of Trustees and Dr. Cloyd, Plaintiff Nuovo also informed the Board and Dr. Cloyd that his supervisor, Dr. Barsky, was directly mistreating him and retaliating against him because he hated Italians.

115. Despite being informed of Barsky and other senior individuals' ongoing retaliatory acts and the ongoing threat to women patient safety, Cloyd and the Board of Trustees took no action and affirmed the retaliatory acts against Plaintiff Nuovo.

116. Defendant Gabbe was deliberately indifferent and supported Defendant Barsky's discriminatory acts based on Plaintiff Dr. Nuovo's race and national origin.

117. Defendant Gabbe received Plaintiff's complaints about retaliation based on his race and national origin in July 2008 and was personally involved in supporting and affirming the discrimination suffered by Plaintiff. (Doc# 98, Motion of Individual Defendant E. Gordon Gee for Summary Judgment, Exh. C).

118. Based on Defendant OSU's admission (Doc. #98), Defendant Gabbe knew or should have known about the discrimination, should have known that that Human Resources department findings were false and/or incorrect, and that Plaintiff continued to suffer post-HR investigation discrimination.

119. Plaintiff continued to complain about post-Human Resources Department investigation discrimination and retaliation, but Defendants Gee, Gabbe, Alutto and Cloyd were deliberately indifferent and affirmed and support the discrimination and retaliation.

120. On February 15, 2008, Plaintiff Dr. Nuovo was informed by the University for the first time that scientific misconduct charges

had been filed against him by Defendant Barsky and for the first time discovered the substance of the misconduct claims. Plaintiff was shocked and in disbelief.

121. Defendant Barsky, acting in his capacity as OSU employee filed the scientific misconduct charges against Plaintiff Nuovo directly motivated by his Italian race and ancestry.

122. Defendant Barsky, acting as agent/employee/shareholder of OSUPS and OSUPI, retaliated by filing the misconduct charges against Plaintiff Nuovo for his initial and ongoing reporting of the misdiagnoses of women patient to intimidate him, suppress his complaint and clinical findings, and damage his reputation and credibility as a clinician.

123. Subsequently to the February 15, 2008 disclosure to the Plaintiff about scientific misconduct charges, Defendants initiated a formal inquiry and convened an inquiry committee to investigate the misconduct charges from February 2008 through October 2008. During this period, Plaintiff was subjected to ongoing harassment, ongoing humiliation, ongoing damage to his reputation and standing, and ongoing retaliation as a result of the research misconduct charge and inquiry during this time period.

124. Misconduct charges are rare in a University community and the fact that charges were filed and were being investigated, and not immediately dismissed, caused damage to and stigmatized Plaintiff Dr. Nuovo.

125. On October 16th 2008, the Vice Provost for Academic Policy and Faculty Resource at Ohio State University informed Plaintiff Dr. Nuovo that the charges brought against the Plaintiff by the Chair of the Dept. of Pathology were dismissed and lacked merit.

126. In a letter dated December 8, 2008, Plaintiff Nuovo informed Dr. Wendy Frankel, then acting Chair of the Pathology Department, about the many women patients who had and were being told they had a sexually transmitted disease and had a pre-cancerous when, in fact, they are neither; about Barsky's continuing refusal to allow him a role in cervical surgical pathology; about Barsky's

statement that Plaintiff Nuovo was “over-hill” and his continued acts (i.e., barring role in surgical pathology, continued demotion, and continued salary reduction) toward him in this regard; that Barsky hated “Italians” and his continued acts toward him in this regard; and that Barsky would ruin Plaintiff Nuovo’s career and his continued acts toward Plaintiff Nuovo in this regard.

127. Dr. Frankel requested reinstatement of Plaintiff Nuovo, but all supervisory Defendants refused to take action and continued to affirm and ratify the ongoing retaliatory acts against Plaintiff Dr. Nuovo, resulting in humiliation and irreparable damage to his reputation, and loss of income among other things stated in this action.

128. In a letter dated December 30, 2008, Plaintiff Nuovo informed Dr. Souba, Vice President and Executive Dean for Health Sciences and Dean of the College of Medicine, that he has and continued to be retaliated against by Dr. Daniel Sedmak, acting as agent and employee of OSUPI and OSUPS because of his complaints about endangering women’s health. Plaintiff Nuovo requested that he be reinstated to cervical pathology and placed back in biopsy service.

129. Despite Plaintiff Nuovo’s request and complaint dated December 30, 2008 to Souba, no action was taken and the retaliatory acts taken against him were affirmed and ratified inasmuch as he continued to suffer reduced salary, no reinstatement, humiliation and irreparable damage to his reputation, among other things stated in this action.

130. In February 2009, out of concern for public and patient safety, Plaintiff Dr. Nuovo, acting as licensed physician and as private citizen, reported the misdiagnosis of patients in the clinical practice to the Joint Commission on Accreditation. At time of his Complaint, Plaintiff Dr. Nuovo had no role in the clinical practice and indeed had been removed from all aspects of the clinical practice and treatment of patients.

131. In March 3, 2009, Defendant Barsky, acting in individual capacity, as well as an employee/shareholder/agent of OSUPS and OSUPI, retaliated against Plaintiff Dr. Nuovo by denying Plaintiff’s

request to have his salary reinstated and/or approve a salary appropriate to his experience and research grant activity.

132. In May 2009, Plaintiff Dr. Nuovo was informed that scientific misconduct charges had been filed against him again and that Defendant OSU and Dr. Whitacre decided to re-open the previously dismissed scientific misconduct charges filed by Dr. Barsky in 2007 and to initiate a formal inquiry into the new charges of scientific misconduct that were not previously investigated in 2007.

133. On June 23, 2009, Plaintiff Dr. Nuovo learned for the first time that Defendant Barsky had re-filed the same scientific misconduct against him and that new charges of misconduct had been brought against him.

134. Defendant Barsky, acting in his capacity as OSU employee filed the scientific misconduct charges against Plaintiff Nuovo directly motivated by his Italian race and ancestry.

135. Defendant Barsky, acting as agent/employee/shareholder of OSUPS and OSUPI, retaliated by filing the misconduct charges against Plaintiff Nuovo for his initial and ongoing reporting of the misdiagnoses of women patient to intimidate him, suppress his complaint and clinical findings, and damage his reputation and credibility as a clinician.

136. The University's misconduct policy provides, inter alia, that when allegations are referred to the Office of the Vice President for Research, the University shall conduct a preliminary assessment to determine if (1) the allegations fits within the definition of Research Misconduct in the policy and (2) if the allegation is sufficiently credible and specific so that potential evidence of Research Misconduct may be identified. In addition, a preliminary assessment must be performed by the Dean of the College of Medicine and the University coordinator.

137. Federal regulations governing University conducted scientific misconduct charges require a preliminary assessment as a required procedure for a University receiving federal funding. OSU is

required to comply with federal regulations as a recipient of federal funding.

138. The Preliminary Assessment requires the Dean and Coordinator to investigate the information and circumstances of misconduct, and complete the Preliminary Assessment within one week of receiving the allegation.

139. As part of the Preliminary Assessment, the University may 1) determine that the allegations do not fit the University's misconduct policy definition, or 2) determine the misconduct allegations are not credible. In course of making the determination of whether it fits within the misconduct policy definition, the University must determine if the allegations do not involve honest error or a difference of opinion and that the allegations are not frivolous.

140. Under the University's policy, frivolous allegations are those that are made in "bad faith or with malice," allegations that are "unsupported by credible evidence, and which are found to be without merit." OSU Policy, Definitions Section III, subpart B. Filing frivolous allegations are deemed an abuse of procedures, and may result in disciplinary action, according to the policy.

141. Defendants Whitacre and Bornstein elected to "reopen" the 2007 misconduct case.

142. The Defendants may reopen a case "only if, in the opinion of the Vice President of Research, new and potentially significant information of research misconduct, not previously considered, has been presented." Section V, Miscellaneous Matters, subpart J. The reopened charges of misconduct do not present information of misconduct on part of Dr. Nuovo that was not previously considered.

143. Defendants Bornstein and Whitacre exercising their discretion failed to perform a preliminary assessment and failed to first determine if the charges are frivolous under the University's research misconduct policy, despite their knowledge that Barsky had been sued by Plaintiff Nuovo on April 21, 2009, that the same charges had been dismissed in 2007 after a full inquiry, that Defendant Barsky

was motivated by bad faith and malice, unlawful discrimination and that the charges were frivolous.

144. In regard to the May 2009 charges of research misconduct, no preliminary assessment occurred, no assessment was performed within one week of the receipt of the allegations, and no writing was given to Plaintiff detailing its Preliminary Assessment findings.

145. No opinion was provided by Defendant Whitacre as to whether “new and potentially significant information of research misconduct, not previously considered, has been presented.”

146. Defendants Bornstein and Whitacre purported legitimate non-discriminatory reason for not dismissing the charges as frivolous and made with bad faith and malice is that it is compelled to launch a formal inquiry by a non-regulatory federal entity, the Office of Research Integrity (“ORI”) and bypass its own misconduct policy procedures.

147. ORI is a non-regulatory body and its referral of Defendant Barsky’s charges to OSU for inquiry does not require OSU to abrogate its own misconduct policy and procedures.

148. Both Defendants Bornstein and Whitacre knew that 2009 charges were motivated by Defendant Barsky, acting as OSU employee, to directly discriminate against Plaintiff Nuovo because he was Italian. In particular, Defendant Bornstein knew that Defendant Barsky stated that all of his acts against Plaintiff Nuovo was motivated by discriminatory animus, that the HR investigation failed to correct and remedy the conduct, and frivolous and bad faith filed 2009 charges were a continuation of the racial and ancestral animus.

149. Defendant Whitacre, acting as agent for OSUPS and OSUPI, knew that Plaintiff Nuovo had reported the misdiagnosis of women, that Defendant Barsky had filed prior frivolous charges that were dismissed, and that other acts were retaliatory acts and conduct was taken against Plaintiff Dr. Nuovo for clinical misdiagnosis findings. She affirmed and supported this conduct in effort to

suppress and punish Plaintiff Nuovo for his ongoing reporting of the misdiagnoses by deliberately violating federal and OSU scientific misconduct procedures and policy in an effort to discredit Plaintiff Nuovo.

150. Defendant Bornstein's purported rationale is a pretext for unlawful discrimination and retaliation because Defendants have deemed other, substantially similar cases of research misconduct to be frivolous and without merit at the Preliminary Assessment stage, and conducted no formal inquiry and investigation, even if the charges were referred to the University by ORI.

151. Defendant Bornstein's purported rationale is a pretext for unlawful discrimination and retaliation because Defendants have deemed other, substantially similar cases of research misconduct to be frivolous and without merit at the Preliminary Assessment stage, and conducted no formal inquiry and investigation, even if the charges were referred to the University by ORI.

152. Defendants Whitacre's and Bornstein's purported rationale is a pretext for retaliation because they have deemed other, substantially similar cases of research misconduct to be frivolous and without merit at the Preliminary Assessment stage, and conducted no formal inquiry and investigation, even if the charges were referred to the University by ORI.

153. Defendants' rationale is also pretextual because the University is not required to abrogate and/or violate its own policy to comply with a referral from ORI.

154. In other cases that fall within the University's misconduct policy guidelines, the University has reported to ORI that the charges are without merit or are frivolous, and has taken no further action.

155. Instead of complying with the University research misconduct policy, the Defendants have rushed the process, failed to comply with the University misconduct policy and deprived Plaintiff of due process and retaliated against him for exercising his First Amendment rights.

156. Despite its knowledge that Defendant Barsky is motivated by bad faith and malice, and that the 2007 charges were summarily dismissed, Defendants have taken no disciplinary action against Defendant Barsky.

157. From January 2006 through the date of present, OSUPI and OSUPS have engaged in multiple acts of ethnic intimidation by and through its agent and employee Dr. Sanford Barsky in violation of Revised Code § 2927.70.

158. Based on Plaintiff's race and Italian ethnicity, Defendant OSUPI and OSUPS, by and through their employee/agent Defendant Barsky, engaged in the following acts: (i) physically chased Plaintiff and caused Plaintiff to fear for his life and safety, (ii) filing 6 misconduct investigations against Plaintiff, all of which were meritless and dismissed, (iii) caused loss of grant and University salary, (iv) engaged in efforts to preclude Plaintiff from receiving work and income as expert witness, and (v) informed Plaintiff that the adverse acts of malicious conduct was motivated by Plaintiff's race and ethnicity.

159. Plaintiff Dr. Nuovo has been deeply humiliated by the pattern of adverse conduct towards him by the Ohio State University, OSUPS, OSUPI, individual defendants and John Doe individuals and entities.

160. Plaintiff has loss significant consulting clinical and expert income as a result of Defendants OSUPS, OSUPI and Barsky's conduct.

161. As a result of the adverse actions meted out to Plaintiff by Defendants, Plaintiff Dr. Nuovo has been emotionally depressed and suffered other emotional conditions as a result of the outrageous and defamatory conduct by Defendants.

162. Additionally, the pattern of adverse actions taken against Plaintiff by all Defendants has tarnished the reputation of Plaintiff in the University and scientific community at large. And, because Plaintiff reported the misdiagnosis and the continued misdiagnosis of

women, Defendants' ongoing retaliatory actions against the Plaintiff are motivated by malice and ill will.

163. As a result of Defendants' conduct stated herein, Plaintiff Nuovo has been unable to obtain other employment and academic/research employers have informed him that the accusations and charges against him, even if untrue, will bar employment at their respective institutions.

164. Each and every individual and entity identified in this Complaint has and is causing, participating in, ratifying, affirming and conspiring to cause discriminatory and retaliatory acts against Plaintiff Nuovo because of his multiple reports about the misdiagnosis of women patients and Defendants' cover-up of such misdiagnoses and his complaints about his supervisor's discriminatory animus against him due to his national origin and ancestry.

First Claim for Relief
Retaliation in Violation of Ohio Law and Public Policy
against OSUPS and OSUPI

165. Plaintiff Dr. Nuovo hereby re-alleges and incorporates by reference as if fully set forth herein, the allegations of paragraphs 1 through 164 above.

166. From 2006 through the date of this Amended Complaint, Defendants intentionally, willfully, and wantonly retaliated against Plaintiff Dr. Nuovo in response to his initial and ongoing reports concerning the misdiagnosis of women patients, a significant number of whom received medical services paid for by the Medicaid program.

167. Plaintiff complaints and protests constituted notice and reporting of medically unnecessary treatment because women were told they had a condition they did not have, and were subjected to follow-up treatment for a condition that did not exist.

168. Defendants OSUPS and OSUPI billed for services that were medically unnecessary.

169. OSUPS and OSUPI are medical providers under the Medicaid program, Ohio Administrative Code § 5101:3-4-01.

170. Defendants OSUPI and OSUPS knew the medically unnecessary procedures performed and billed for were in violation of Ohio Administrative Code § 5101:3-1-01 (A)(2), (3).

171. Defendants OSUPI and OSUPS also engaged in over-utilization of medical procedures and treatment in violation of Medicaid regulations.

172. Defendants OSUPI and OSUPS has engaged in waste and abuse, which are defined as practices inconsistent with professional standards, are medically unnecessary or are over-utilized services, OAC § 5101:3-1-29.

173. Defendants' retaliation, punishment and termination of Plaintiff jeopardized Medicaid regulations and federal statutes protecting whistleblowers, 31 U.S.C. § 3730 (h).

174. Defendants OSUPI and OSUPS were motivated to terminate Plaintiff because his reports and protests would have resulted in loss of Medicaid reimbursement funds and participation in the program.

175. Defendants OSUPI and OSUPS lacked a business justification because each basis for termination is patently false and misleading.

176. Defendant Barsky, acting as agent of OSUPI and OSUPS, retaliated against Plaintiff because he knew that Plaintiff's complaints and protests would result in a loss of clinical income allocated to him from the medically unnecessary procedures and over-utilized treatment.

177. Defendant Barsky's retaliation against Plaintiff jeopardized Medicaid and Ohio public policy which prohibits medically unnecessary procedures and treatments and over-utilization of procedures and treatments.

178. Defendant Barsky lacks a legitimate business reason for his retaliation.

179. After Plaintiff's termination in August 2006, Defendants OSUPS, OSUPI and Barsky continued to use their authority and influence to retaliate against Plaintiff who made multiple complaints from 2006 through 2009 by filing frivolous misconduct complaints, subjecting him to investigations, and other malicious conduct.

180. As a direct and proximate result of Defendants' retaliatory conduct, as described herein, Plaintiff Dr. Nuovo has suffered loss of income and benefits and impairment of earning capacity, emotional distress, anxiety, anguish, humiliation, demotion, irreparable damage to his professional and academic reputation and suffered false and malicious charges of misconduct and other incidental and consequential damages and expenses, all to Plaintiff's damages in an amount according to proof.

Second Claims for Relief

National Origin and Ancestral Discrimination in Violation of 42 U.S.C. § 2000e-et seq., §102 of the Civil Rights Act of 1991 against Defendants OSU, OSUPS, OSUPI and John Doe Private Entities for Retaliation, Disparate Treatment and Hostile Environment

181. Plaintiff hereby re-alleges and incorporates by reference as if fully set forth herein, the allegations of paragraphs 1 through 180 above.

182. Defendants discriminated against Plaintiff on the basis of his national origin and ancestry by retaliating, harassing, targeting, investigating, disciplining, demoting, unfairly reducing his compensation, making false charges and irreparably damaging his academic and professional reputation, among other acts set forth in this Complaint.

183. Defendants' pattern of wrongful conduct was a continuing one and Plaintiff's injury continued to accrue after his discrimination based on his National Origin and Ancestry. Moreover, Plaintiff made every effort to diligently resolve his claim internally

and was promised by Defendants that suitable action would be taken to stop the discriminatory acts as early as June 2007, all to no avail.

184. Defendants directly discriminated against Plaintiff Nuovo because a supervisory employee stated that he took all of adverse actions against Plaintiff Nuovo because he was Italian.

185. Defendants' agent, Barsky, statement regarding his intent as to all of the adverse employment decisions constitutes continuous, related discriminatory conduct.

186. Plaintiff Nuovo was discriminated against because similarly situated, non-Italian professors and clinicians were not subjected to continuous discriminatory conduct and hostile environment as was Plaintiff Nuovo.

187. As a direct and proximate result of Defendants' creation of a hostile work environment and/or workplace harassment, retaliation, demotion, pay discrimination and other acts, as described herein, Plaintiff has suffered loss of income and benefits and impairment of earning capacity, emotional distress, anxiety, anguish, humiliation, irreparable damage to his academic and professional reputation and other incidental and consequential damages and expenses, all to Plaintiff's damages in an amount according to proof.

Third Claim for Relief
Intentional Infliction of Emotional Distress in Violation of Ohio Law
against OSUPS and OSUPI

188. Plaintiff hereby re-alleges and incorporates by reference as if fully set forth herein, the allegations of paragraphs 1 through 187 above.

189. Defendants knew and intended to cause Plaintiff emotional distress as result of acts and conduct from January 2006 to the present.

190. Defendants by and through their agent, Barsky, engaged in extreme and outrageous behavior by chasing Plaintiff with intent to cause him physical harm, making insulting and derogatory statements

on multiple occasions, subjecting him to 6 misconduct investigations, most of which have been dismissed at considerable expense and costs to Plaintiff, and causing Plaintiff to lose the respect and professional esteem of colleagues as a consequence of being constantly under investigation.

191. Defendants knew that retaliation against Plaintiff for reporting on multiple occasions that women were misdiagnosed with HPV would cause emotional distress.

192. Defendant knew that terminating him for the clinical practice would cause a significant loss of his income and undue financial hardship and poverty.

193. As a direct and proximate result of Defendants' outrageous conduct, Plaintiff suffered embarrassment, mental anguish, loss of reputation, and other harm.

Fourth Claim for Relief
Race and/or Ancestry Discrimination in Violation of 42 U.S.C. § 1981
against Barsky, Gee, Gabbe, Alutto, Cloyd, and Bornstein and OSUPS,
OSUPI and John Doe Individuals and Entities

194. Plaintiff hereby re-alleges and incorporates by reference as if fully set forth herein, the allegations of paragraphs 1 through 193 above.

195. At all times mentioned herein, Plaintiff is a person protected against discrimination by virtue of being a member of a protected class inasmuch as the Plaintiff's ancestral and/or racial background, name and physical characteristics, are Italian in nature and Defendants' conduct was motivated by such factors.

196. Defendant OSU and OSUPS contracted with Plaintiff by hiring him to his respective position as a tenured professor and as a clinician-physician.

197. Defendants Barsky, Gee, Alutto, Cloyd and Bornstein were personally involved either as a result of deliberate acts and/or continuous conduct of racial discrimination, or as a result of being

deliberately indifferent to and consciously affirming and supporting discriminatory animus against Plaintiff Nuovo.

198. Defendants discriminated against Plaintiff by retaliating, investigating, demoting, discharging him, making false and defamatory scientific misconduct charges, humiliating him, and causing other damages and harm, based on his race in course of his employment with Defendants.

199. The individual defendants maliciously and in bad faith caused, participated in, affirmed, ratified, and abetted in the discriminatory employment acts against Plaintiff on the basis of his race. Furthermore, individual defendants exhibited a pattern of deliberate indifference towards discriminatory acts committed against Plaintiff.

200. As a direct and proximate result of Defendants' national origin and/or ancestral discrimination, Plaintiff has suffered loss of income and benefits and impairment of earning capacity, emotional distress, anxiety, anguish, humiliation, and other incidental and consequential damages and expenses, all to Plaintiff's damages in an amount according to proof.

Fifth Claim for Relief
Breach of Contract against OSUPS and OSUPI

201. Plaintiff hereby realleges and incorporates by reference as if fully set forth herein, the allegations of paragraphs 1 through 200 above.

202. Plaintiff's position was held under both express and implied promises of job security and in accordance with Defendants OSU, OSUPS and OSUPI policies, practices, employee manual, and communications from Defendants' employees, managers, staff, and agents, all of which constituted a contract of employment.

203. Defendants' oral representations and its conduct and practices constitute a willful breach of contract inasmuch as Plaintiff was fired and loss significant income in breach of contract because he reported on the misdiagnosis of women patients.

204. Defendants' contracted with Plaintiff Nuovo to provide ethical and competent treatment of patients and when Plaintiff did so, by reporting misdiagnoses, Defendants fired him.

205. Defendants' breach of contract was motivated by malice and ill will toward Plaintiff.

206. Defendants' reasons for terminating him constitute fraud, tortious inference with his contractual relationships and contracts as a consulting clinical physician and expert witness, resulting in significant loss of income.

207. As a result of Defendants' actions, Plaintiff have suffered irreparable injuries, including but not limited to, loss of pay, benefits, and other economic losses, loss of income from clinical consulting work and expert witness work, and other intangible injuries, all for which they should be compensated.

Sixth Claim for Relief
Promissory Estoppel against OSUPS and OSUPI

208. Plaintiff hereby realleges and incorporates by reference as if fully set forth herein, the allegations of paragraphs 1 through 207 above.

209. OSUPS and OSUPI representatives caused the Plaintiff to conclude that they would comply with Medicaid certification and policies that provide that medically unnecessary procedures would not be performed and that procedures would not be over-utilized. Further, OSUPS and OSUPI certified to the College of American Pathologist (CAP) and the Clinical Laboratory Improvement Amendments (CLIA) that gynecological screening and quality control would be performed in accordance with these organizations' standards.

210. Relying on these representations, OSUPS and OSUPI caused members of their provider group to provide services to patients covered by Medicaid and to participate, receive and rely on screening procedures and protocols in violation of CLIA and CAP certifications and standards.

211. These specific representations communicated to Plaintiff and Medicaid caused Plaintiff to believe he would not be fired for reporting violation of the Medicaid program and CAP and CLIA standards.

212. Based on Defendants' policies, Plaintiff was entitled to rely and believe that he was expected to report his findings and that no adverse action would be taken against him.

213. Plaintiff relied on Defendants' policies, as communicated and demonstrated to the faculty and staff, to his detriment.

214. By the aforementioned acts and/or omissions, policies and practices, Plaintiff has been directly and legally caused to suffer actual damages including, but not limited to, loss of earnings, reliance damages, costs of suit, and other pecuniary losses in an amount not presently ascertained, but to be proven at trial.

215. As a further direct and legal result of the acts and conduct of Defendants, as aforesaid, Plaintiff suffered compensatory and punitive damages.

Seventh Claim for Relief
Civil Ethnic Intimidation Against OSUPS and OSUPI
In Violation of Revised Code § 2307.70 (A)

216. Plaintiff hereby realleges and incorporates by reference as if fully set forth herein, the allegations of paragraphs 1 through 215 above.

217. OSUPI and OSUPS, by and through their agent/employee, engaged in ethnic intimidation based on Plaintiff's race, national origin and ethnicity.

218. OSUPS and OSUPI's employee, Barsky, physically chased Plaintiff in March 2008, causing Plaintiff to fear for his life and safety.

219. OSUPS and OSUPI's employee, Barsky, filed six frivolous misconduct related claims and investigations, beginning in August 2006 to the present, based on Plaintiff's race and ethnicity.

220. OSUPS and OSUPI employee, Barsky, caused Plaintiff to loss clinical consulting and expert witness income, as a result of the filing of frivolous, malicious and menacing charges and investigations against him.

221. Barsky engaged in derogatory, racially offensive statements to Plaintiff and informed co-workers of Plaintiff that he intended to ruin the Plaintiff.

222. At all times relevant, Barsky was agent/employee of the OSUPI and OSUPS and these entities knew about Barsky's conduct.

223. As a further direct and legal result of the acts and conduct of Defendants, as aforesaid, Plaintiff has suffered personal and property losses, attorneys' fees, expenses and costs.

Eighth Claim for Relief
National Origin, Race and Ancestral Discrimination in Violation of
Ohio Revised Code §§ 4112.02 and § 4112.99 against Defendants
OSUPS, OSUPI and John Doe Private Entities

224. Plaintiff hereby re-alleges and incorporates by reference as if fully set forth herein, the allegations of paragraphs 1 through 223 above.

225. Defendants discriminated against Plaintiff on the basis of his national origin and ancestry by retaliating, harassing, targeting, investigating, disciplining, demoting, unfairly reducing his compensation, making false charges and irreparably damaging his academic and professional reputation, among other acts set forth in this Complaint.

226. Defendants retaliated against Plaintiff for engaging in protected activity: Plaintiff's complaints about retaliation and discriminatory acts against him due his national origin and ancestry.

227. As a direct and proximate result of Defendants' creation of a hostile work environment and/or workplace harassment, retaliation, demotion, pay discrimination and other acts, as described herein, Plaintiff has suffered loss of income and benefits and impairment of earning capacity, emotional distress, anxiety, anguish, humiliation, irreparable damage to his academic and professional reputation and other incidental and consequential damages and expenses, all to Plaintiff's damages in an amount according to proof.

Ninth Claim for Relief
Unjust Enrichment, Civil Theft, and Fraud Against OSUPS
and OSUPI

228. Plaintiff hereby re-alleges and incorporates by reference as if fully set forth herein, the allegations of paragraphs 1 through 227 above.

229. OSUPI and OSUPS and Harry Pukay-Martin and Barsky, acting as agents of OSUPS and OSUPI and/or independent, unrelated entities, engaged in a scheme to unjustly deprive, without permission, Plaintiff and other members of OSUPS clinical income that they should have received as an allocation.

230. During the course of Plaintiff's employment with OSUPI and OSUPS, from 1999 to August 2006, Plaintiff and other members were entitled to distribution income from the clinical treatment of income.

231. OSUPS, OSUPI, Pukay-Martin and Barsky owned, controlled, or had an interest in entities that overbilled for related services as part of the clinical treatment of patients, and failed to inform member physicians, such as Plaintiff, about this relationship and their activities.

232. As a result of the overbilling and failure to disclose conflicts of interest, Plaintiff and other members received less clinical income without their knowledge and permission.

233. The disgorgement of clinical income constituted fraud, deceit, malfeasance, theft and unjust enrichment.

234. As a direct and proximate result of Defendants' conduct, Plaintiff is entitled loss clinical income, interest and other related damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Dr. Gerard Nuovo respectfully requests that this Court:

A. Award back pay, front pay and/or reinstatement of the terms and conditions of employment and any benefits Plaintiff enjoyed had Defendants not discriminated and retaliated against him on the basis of his national origin, ancestry and his report of misdiagnosis;

B. Award Plaintiff liquidated and consequential damages for economic loss he has suffered as a proximate result of Defendants' conduct;

C. Award Plaintiff compensation for past and future pecuniary losses resulting from Defendants' unlawful employment practices, including compensatory and punitive damages for humiliation, damage to reputation, mental and emotional distress and pain and suffering that he experienced and endured as a result of Defendants' conduct;

D. Award Plaintiffs punitive damages for malicious and reckless conduct against Defendants OSUPS, OSUPI, and the Individual Defendants as Employees/Shareholders/Agents of OSUPS and OSUPI.

E. Award Plaintiff pre and post judgment interest on all sums awarded;

F. Award Plaintiff the costs incurred in this action and reasonable attorneys' fees; and

G. Grant such other legal and equitable relief as is necessary and proper.

H. Grant Injunctive Relief directly against Defendant OSU and individual defendants directing them to comply with OSU's research misconduct policy and procedures.

Respectfully submitted,

s/William W. Patmon III
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Gerard Nuovo

JURY DEMAND

Plaintiff requests a jury to hear and decide all issues of fact.

Respectfully submitted,

s/William W. Patmon III
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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing Second Amended Complaint was served by electronic mail through the Court's ECF system on this 30th day of December 2010, and all parties may access the document through the electronic filing system.

s/William W. Patmon III

William W. Patmon, III

(#0062204)