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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEREK KERR,

Plaintiff,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, MITCHELL H. KATZ, MIVIC HIROSE, COLLEEN RILEY, and DOES 1 through 25,

Defendants.

Case No. CV 10 5733 CW

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date: July 5, 2012
Time: 2:00 p.m.
Place: Hon. Claudia Wilken
1301 Clay Street, Ctrm. 2
Oakland, Ca 94612

Trial Date: October 15, 2012

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NOTICE OF MOTION AND MOTION

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on July 5, 2012, at 2:00 p.m., or as soon thereafter as the matter may be heard in Courtroom 2 of the United States District Court for the Northern District of California, located at 1301 Clay Street in Oakland, California, Defendants City and County of San Francisco (the "City"), Mitchell H. Katz, Mivic Hirose, and Colleen Riley, jointly and severally, will and hereby do move this Court for an order granting summary judgment on Plaintiff Derek Kerr's claims for relief as alleged in the Complaint. In the alternative, the Defendants seek partial summary judgment with respect to Kerr's claims. This motion is made under Federal Rule of Civil Procedure 56 on the grounds that the City is entitled to summary judgment or partial summary judgment as there are no genuine issues of disputed fact and:

1. Kerr's claims against Defendants, or any of them, under 42 U.S.C. Section 1983 for deprivation of his due process property interest are barred because as an exempt employee he had no protected property interest;

2. Kerr's claims against Defendants, or any of them, under 42 U.S.C. Section 1983 for deprivation of his due process liberty interest are barred because he cannot establish all of the elements of his claim in that he was not subjected to any stigmatizing charge, that any such charges was made in connection with his layoff, that he was foreclosed from other employment by any stigmatizing charge, or that he sought a name-clearing hearing;

3. Kerr's claims against Defendants, or any of them, under 42 U.S.C. Section 1983 for retaliation for engaging in protected speech because he cannot establish that he engaged in any protected speech, that his allegedly protected speech was a substantial motivating factor for any adverse action, or rebut Defendants' showing that they would have taken the same actions even in the absence of his allegedly protected speech;

4. Kerr's claims against the City under 42 U.S.C. Section 1983 for retaliation for engaging in protected speech are barred because he cannot show that conduct at issue is attributable to the City under Monell v. Department of Social Services, 436 U.S. 658, 691 (1978).

5. Kerr's claims against Defendants, or any of them, for retaliation in violation of California Government Code Section 53298 are barred because he cannot establish all the elements of his claim including, but not limited to, the fact that none of his alleged complaints were made under penalty of perjury, were timely, or that there was a causal link between his complaints the actions he challenges;

6. Kerr's claims against Defendants, or any of them, for retaliation in violation of California Government Health and Safety Code Section 1432 are barred because he cannot establish all the elements of his claim including, but not limited to, the fact the statute does not create a private right of action or that there is any causal link between his complaints the actions he challenges; and

7. Kerr's claims against Defendants, or any of them, for retaliation in violation of California Labor Code Section 1102.5 are barred because he cannot establish all the elements of his claim including, but not limited to, the fact that none of his alleged complaints alleged violations of state or federal law, or that there is any causal link between his complaints the actions he challenges.

PLEASE TAKE FURTHER NOTICE THAT, in the alternative, Defendants seeks an order under Federal Rule of Civil Procedure 56(g) establishing certain facts, not genuinely disputed, as established in this case.

The City's motion is based on this notice and accompanying memorandum of points and authorities, the declarations and supporting exhibits of Jonathan Rolnick, Mitchell Katz, Mivic Hirose, Colleen Riley, and ChiaYu Ma, the papers and records on file with the Court in this action, and such argument and evidence as may be presented at the hearing on this motion.

Dated: May 31, 2012

DENNIS J. HERRERA
City Attorney
ELIZABETH S. SALVESON
Chief Labor Attorney

By: /s/ Jonathan C. Rolnick
JONATHAN C. ROLNICK

Attorneys for Defendant
CITY AND COUNTY OF SAN FRANCISCO, ET AL.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff Derek Kerr, M.D., was employed by the City and County of San Francisco as a Senior Physician Specialist for more than twenty years. He was the primary case physician for the Hospice at Laguna Honda Hospital, a City-owned skilled nursing and rehabilitation facility serving primarily low income seniors and adults with disabilities. In March 2010, as a result of City-wide mid-year budget cuts, the City notified Kerr that he would be released from his position. This was not the first time, that there had been reductions in the number of physicians at Laguna Honda. But Kerr contends that he was not released for budgetary reasons but for unlawful ones. He claims the City selected him because he had filed a series of complaints with the City's Whistleblower Program and Ethics Commission beginning in September 2009. In this action, he alleges various state and federal claims for relief against the City, Mitchell Katz, M.D., the City's then Director of Health, Mivic Hirose, the Executive Director of Laguna Honda, and Colleen Riley, M.D., the Medical Director of Laguna Honda, based on this alleged whistleblowing activity.

Kerr bears the burden of proving not only that his complaints were protected, but also that he was laid off based on making them. Kerr cannot make that showing. His complaints did not allege the violation of any federal or state laws and so were not protected under California law. Moreover, the complaints were maintained as confidential, as required by City law, and there is no evidence that any of the decision makers involved in his layoff learned of these complaints until long after the layoff decision and his retirement from the City.

Kerr also contends that Defendants laid him off due to his August 2009 criticism of a consultant's recommendation to further reduce physician staffing at Laguna Honda. But this action occurred almost a year before his layoff, and Kerr's claim of *animus* is severely undercut by the fact that almost all of the physicians at Laguna Honda, including defendant Colleen Riley, joined in this criticism. Moreover, his speech was based on his concern, as the union steward for the Laguna Honda physicians, about personnel matters, not protected matters of public concern. And the evidence is clear that the City would have taken the same actions regarding Dr. Kerr even in the absence of his speech.

Finally, Kerr cannot establish that the City is liable for his Section 1983 claims. It is well-settled law that municipalities are answerable only for their own decisions and policies and that they are not vicariously liable for the constitutional torts of their agents. *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978). Kerr cannot meet his heavy burden of proof that the actions at issue were attributable to City policy or practice.

The Court should grant summary judgment in favor of Defendants on all of Kerr's claims.

STATEMENT OF FACTS

I. KERR'S EMPLOYMENT AT THE OLD LAGUNA HONDA, SIGNIFICANT CHALLENGES AND CHANGES TO LAGUNA HONDA'S MISSION, AND THE HOSPITAL'S MOVE TO A NEW, INTEGRATED RESIDENTIAL FACILITY

Plaintiff Derek Kerr, M.D., was employed by the City as a Senior Physician Specialist (Civil Service Classification 2232). (Complaint ¶ 1; Hirose Decl. ¶ 1.) Kerr work at Laguna Honda Hospital ("Laguna Honda") for over twenty years and was the primary care physician for the Hospice. (Complaint ¶ 1; Kerr Depo. 33:23-34:1.) Kerr's position was exempt from the selection, appointment and removal procedures of the City's civil service system. See S.F. Charter § 10.104(13).

Defendant Mitchell Katz, M.D., was the Director of Health from 1997 to 2010. He is currently the Director for Los Angeles County's Health Service Department. Defendant Mivic Hirose, R.N., M.S., C.N.S., is Laguna Honda's Executive Director. Katz appointed Hirose as Executive Director in 2009. Defendant Colleen Riley, M.D., is the Medical Director for Laguna Honda. Hirose appointed her to that position in late December 2009. (Katz Decl. ¶ 1, 8; Hirose Decl. ¶ 1; Riley Decl. ¶ 1, 3.)

Laguna Honda, part of the City's Department of Public Health, is a skilled nursing and rehabilitation facility primarily serving seniors and individuals with disabilities. Over the past several years, Laguna Honda has undergone substantial operational changes. In particular, in late 2010, residents and staff moved to a new, smaller facility. While the prior facility was more than 50 years old with the capacity to house in excess of 1,000 residents in 30-bed units, the new facility is capable of housing 780 patients in 60-bed "neighborhoods". (Katz Decl. ¶¶ 3-7.) The move required integration of resident populations with diverse medical needs into each neighborhood, and required physicians to provide care to residents with more medically diverse needs. For example, the 25-bed

Hospice merged with 35 other residents requiring palliative care and enhanced support in the S3 neighborhood, where a single physician cares for all 60 residents. (*Id.*; Riley ¶ 2.)

Staffing changes related to the move were developed over an extended period of time beginning in late 2008 and involved trying to match physicians based on skills, existing coverage assignments, and work schedules. (Rivero Depo. 202:12-203:15; Hirose ¶¶ 3-4; Banchero Depo. 54:23-58:19, 59:22-64:7.) The goal of these staffing models was to have a single physician per neighborhood and to avoid splitting the neighborhoods between physicians. (Rivero Depo. 211:10-214:6; Hirose Decl. ¶ 4; Riley Decl. ¶¶ 2, 9; Banchero Depo. 57:11-58:11, 60:24-62:2.) As part of this transition, many Laguna Honda physicians were providing coverage for 60 or more patients for months or even years before the final relocation. (Rivero Depo. 58:5-21; Mivic Decl. ¶ 5.)

A number of additional factors significantly impacted the transition. These factors included significant reductions in DPH's general fund (county contribution) budget. Over the last decade, DPH, like all City departments, faced increasing budget scrutiny and was forced to make significant cuts in its annual budgets, and to make further mid-year cuts to address ongoing shortfalls. These reductions often included, among other things, hiring freezes, elimination of vacant positions, reclassification of employees to lower compensated positions, and layoffs. (Katz Decl. ¶ 5.) For several years leading up to the move to the new facility, there were significant reductions in the number of Laguna Honda physicians. (Rivero Depo. 240:8-21, 247:21-248:22, Ex. 119; Banchero Depo. 50:15-51:11; Katz Decl. ¶¶ 7, 13.) Notwithstanding these reductions, the Laguna Honda medical staff continued to exceed its budget. (Rivero Dep. 216:19-217:2.)

At the same time, DPH undertook a significant shift in how it provides services, including increasing and enhancing access to home and community-based medical services in place of institutional services. (Katz Decl. ¶ 6; Hirose Decl. ¶ 2.) Laguna Honda now limits admission to the smaller facility to persons who truly need residential care in an institutional setting, and identifies alternative medical services for those who can be treated in less restrictive settings. As a result, the profile of the Laguna Honda resident population has shifted toward residents who require more intensive and complex medical services. (Katz Decl. ¶ 6; Hirose Decl. ¶ 2.)

II. KERR'S CONFIDENTIAL WHISTLEBLOWER COMPLAINTS

Beginning in September 2009, Kerr filed four complaints with the City's Whistleblower Program and Ethics Commission. (Complaint ¶¶ 9-11, 24.) Pursuant to San Francisco Charter Section F1.110, the Controller's Whistleblower Program responds to complaints regarding the quality and delivery of City services, wasteful and inefficient City practices, misuse of City funds, and improper activities by City officers and employees. The Charter requires that the Whistleblower Program's audits, investigations and reports remain confidential. *Id.* at 1.110(b); see also *San Francisco Campaign and Govt. Conduct Code* § 4.100, *et seq*. Whistleblower investigations conducted by the City's Ethics Commission are also confidential. *Charter* § C3.699-13(a). As a result, Defendants Katz, Hirose and Riley were not informed or aware of these complaints. (Kerr Depo. 45:16-47:8, 48:2-21; Katz Decl. ¶¶ 18-20, 22; Hirose Decl. ¶¶ 13, 16; Riley Decl. ¶ 5, 16-17, 25.) There is no evidence that any person involved in Kerr's lay-off had knowledge of any of Kerr's complaints to the Whistleblower Program or Ethics Commission.

A. Kerr's Claim That Davis Ja & Associates Had a Conflict Of Interest Due To Relationships With Two Laguna Honda Employees

In 2008-2009, the City negotiated with and ultimately contracted with health care consultants Davis Ja & Associates to assess behavioral health services and service access at Laguna Honda. In August 2009, Davis Ja prepared and submitted a report ("the Report") recommending, in part, that the City consider replacing some primary care physicians with mental health professionals. That proposal spurred extensive debate among physicians at Laguna Honda medical staff meetings. (Riley Decl. ¶¶ 4-5; Kerr Depo. 271:13-274:22; Rivero Depo. 157:20-158:7.)[1] Many of the physicians were upset because Laguna Honda had already significantly reduced the number of physicians on staff, such that medical service provision was already stretched thin. (Riley Decl. ¶¶ 4-5; Rivero Depo. 152:12-154:14; Banchero Depo. 68:16-69:20.)

Drs. Kerr and Rivero circulated an August 2009 petition objecting to the Report's recommendation to replace physicians. Riley signed the petition, as did the majority of Laguna Honda

[1] Dr. Rivero concedes that no one in Laguna Honda administration discouraged these discussions of the Report. (Rivero Depo. 157:20-158:7.)

physicians. (Riley Decl. ¶¶ 4-5, Exh. B; Rivero Depo. 159:9-160:25, Exh. 31.) Drs. Kerr and Rivero also prepared and distributed a written response to the Report raising concerns about its methodology and recommendations and alleging a conflict of interest in that a Davis Ja principal had a relationship with a DPH employee at the time the contract was awarded. (Kerr Depo. 54:22-56:12, 56:23-58:16; Rivero Depo. 169:13-170:10.)

On September 18, 2009, Kerr and Rivero filed a separate complaint ("the Complaint") with the Controller's Whistleblower Program and Ethics Commission regarding the alleged conflict of interest. (Complaint ¶ 9; Kerr Depo. 44:16-45:11, Exh. 2.) The Complaint alleged that two DPH employees involved in approving the contract had relationships with Davis Ja that should have been disclosed but were not. (*Id.*)

Kerr understood that his complaint would be kept confidential. (Kerr Depo. 45:16-47:8, 48:2-21.) He did not disclose the existence of the Complaint to Katz, Riley or Hirose, or to any other DPH or Laguna Honda employees. (Kerr Depo. 53:4-16, 54:1-21; 228:14-229:20.) Katz, Riley and Hirose did not learn of the Whistleblower Complaint until late 2010. (Katz Decl. ¶¶ 18-20, 22; Hirose Decl. ¶¶ 13, 16; Riley Decl. ¶ 5, 16-17, 25.) Kerr concedes that he has no evidence that Katz, Hirose, Riley or other DPH employees knew about this complaint at any time prior to late 2010. (Kerr Depo. 77:23-78:21.)

B. Kerr's Claim That Katz Had A Conflict Of Interest With, And Improperly Approved A City Contract For, Health Management Associates

Three days later, Kerr and Rivero filed a second complaint, this time complaining about an alleged conflict of interest involving Katz. (Complaint ¶ 10.) The second complaint alleged that Katz had performed paid services for Health Management Associates (HMA) while that firm was providing services for the City. (*Id.*; Kerr Depo. 83:15-85:8, 116:15-117:22, Exh. 3.) The complaint alleged that Katz had played a role in awarding the contract. Kerr claims that he discussed the HMA complaint with UAPD union stewards. (Kerr Dep. 85:9-86:6.) However, Kerr did not disclose the HMA Whistleblower complaint to Katz, Hirose or Riley, and has no knowledge of the Whistleblower Program or Ethics Commission disclosing the HMA complaint to anyone. (Kerr Depo. 90:5-92:18, 96:25-97:19, 253:11-255:7, 255:22-257:8.)

C. Kerr's Complaint That Hirose's Predecessors Used The Patient Gift Fund For Non-Patient Expenses

On March 2, 2010, Kerr submitted a Whistleblower Program complaint alleging ethical violations related to the Laguna Honda Patient Gift Fund. (Complaint ¶¶ 11-12; Kerr Depo. 121:25-122:12.) The complaint, received on March 4, claimed that Laguna Honda had improperly used Gift Fund monies to pay for unauthorized goods and services, including staff activities (lunches, training, and travel), rather than patient amenities and activities. (Complaint ¶¶ 11-12; Kerr Depo. 135:2-20.) The vast majority of the alleged misconduct occurred well before Hirose became Executive Director. (*Id*.) And the only patient activities Kerr and Rivero identified as being effected was the denial of culturally appropriate food on a single occasion and an alleged decrease in bus trips for residents on the dementia wards. (Rivero Depo. 271:6-272:24; Kerr Depo. 278:11-279:23; Navarro Depo. 181:25-186:8.) Kerr admits that he did not disclose the Gift Fund complaint to Katz, Hirose, or any other DPH or LHH administrator until after March 2010. (Kerr Depo. 238:19-240:25.)

Katz, Hirose, and Riley first learned of Kerr's complaints regarding the Laguna Honda Gift Fund in May 2010, when KGO-ABC TV aired a story regarding the complaints. (Katz Decl. ¶¶ 18-20, 22; Hirose Decl. ¶¶ 13, 16; Riley Decl. ¶ 5, 16-17, 25.)

Before the March 2, 2010 Gift Fund complaint, Dr. Rivero made three public records requests seeking documents related to the Gift Fund. (Complaint ¶ 11; Kerr Depo. 118:13-121:21, 279:24-280:5, 281:12-17, 282:6-283:11, 288:3-290:8, Exhs. 34, 112, 113.) Kerr's name was not on any of these requests and the requests only identified the documents being sought. The requests did explain why they were sought or otherwise make any assertion regarding misuse, mismanagement or any malfeasances related to the records requests or Gift Fund. (*Id*. at Exhs. 34, 112, 113.) Dr. Rivero concedes that DPH never asked her why she was seeking the Gift Fund documents. (Rivero Depo. 174:7-175:7.)

D. Kerr's Complaint That His Layoff Was In Retaliation For His Confidential Whistleblower Complaints

Laguna Honda notified Kerr of his lay-off on March 5. On March 15, 2010, he filed his fourth internal complaint, this time alleging that his layoff resulted from his prior confidential complaints.

(Complaint ¶ 24; Kerr Depo. 258:24-259:23, Exh. 110.) Katz, Hirose, and Riley did not learn of this complaint, or of Kerr's underlying conflict of interest complaints, until long after his layoff.

III. DUE TO 2009 BUDGET SHORTFALLS, THE CITY (INCLUDING DPH) PLANS MID-YEAR BUDGET CUTS

In late 2009, the City faced continuing budget shortfalls requiring all City departments to submit proposed budget cuts to the Mayor's Office. (Navarro Depo. 108:24-111:10; Katz Decl. ¶ 9.) The Mayor sought approximately $13,000,000 in cuts from the DPH budget that had been adopted in June 2009. (*Id.*) The Mayor requested that savings go beyond the current fiscal year to future years. Ultimately, DPH achieved this goal, identifying cuts of $7,400,000 for the 2009-2010 fiscal year and an additional $9,200,000 in savings the following fiscal year. (*Id.*)

Katz and Hirose discussed the proposed mid-year cuts for Laguna Honda shortly before DPH submitted its proposal to the Mayor's office in December 2009. (*Id.* at ¶¶ 11-14; Hirose Decl. ¶¶ 6-8.) During that meeting, they reviewed several competing proposals, including a proposal to reduce physician staffing by .55 full-time equivalent (FTE). (Katz Decl. ¶¶ 11-14; Hirose Decl. ¶ 6-8.) That proposal required elimination of two 2232 Senior Physician Specialists at 1.55 FTE, shifting savings to a 2230 Physician Specialist position for night and weekend coverage. Katz and Hirose agreed to eliminate Kerr's position, as well as that of a second 2232 physician assigned to nights and weekends. (Katz Decl. ¶¶ 11-14; Hirose Decl. ¶¶ 6-8.) They took into account staffing needs in the new facility; Dr. Kerr's 25-patient load; and the importance of having a physician assigned to Hospice who would provide care to non-Hospice patients. (Katz Decl. ¶¶ 11-14; Hirose Decl. ¶¶ 6-8.)[2]

DPH submitted its mid-year budget proposal to the Mayor's office in December 2010. The Department also submitted the proposed cuts for review by the Health Commission. (Katz Decl. ¶ 15.) When submitting budget cuts to the Health Commission, DPH describes their impact on services, e.g., a reduction in physician staffing by a specific number of FTEs, but does not identify individual employees impacted by the proposed cuts. (*Id.*)

[2] This was not the first time DPH had reduced physician staffing at Laguna Honda. (Katz Decl. ¶¶ 11-14.) The Mayor's office and the Health Commission had instructed Katz to find ways to reduce the number of physician at Laguna Honda. Both the Mayor's office and the Health Commission had repeatedly indicated that the number of physicians at Laguna Honda was high relative to the number of residents. (*Id.*)

DPH provided a spreadsheet to the Mayor's Office setting forth the budget cuts at Laguna Honda identifying the elimination of two 2232 positions, accounting for 1.55 FTE, and an increase in as-needed 2230 staffing by 1.0 FTE, resulting in an net cut of 0.55 FTE. (Ma Decl. ¶ 3, Exh. A; Navarro Depo. 271:2-274:12, Exh. 36.) The two 2232 Senior Physician Specialist positions ultimately affected were Dr. Kerr's .75 FTE position and Dr. Dennis Bouvier's .80 FTE position. [3]

In early 2010, Katz met with Riley to discuss her responsibilities as Medical Director. (Katz Decl. ¶ 16; Riley Decl. ¶ 9-10.) Among the topics they discussed were mid-year budget cuts, including Dr. Kerr's position. Riley indicated that, given the impending changes to Hospital operations, it was essential to have as much flexibility as possible to assign physicians to the various units within the Hospital. (Riley Decl. ¶¶ 9-10; Katz Decl. ¶ 16.) They discussed the staffing model being developed, including the fact that most physicians would be required to provide coverage for 60 residents. They also discussed whether Kerr was willing to accept new clinical duties outside the Hospice program. Riley informed Katz that she had asked Kerr to take on such responsibilities and he had rejected them. (Riley Decl. ¶ 11, Exh. D; Katz Decl. ¶ 16.)

Kerr told Riley that the additional assignments "would be excessive and unprecedented in my case," and that he simply "could not do more clinical work." (Riley Decl. ¶ 11, Exh. D; Kerr Depo. 147:16-148:5, Exh. 106.) He offered numerous reasons for his refusal to take on the requested assignments: he was not a good fit for the particular assignments; he suggested other physicians who he felt would be a better fit; there had been significant changes in the Hospice staff; he needed to engage in fundraising work; and the Hospice's status as a high acuity unit. (Kerr Depo. 154:9-156:8, 168:23-170:4, 171:21-176:25, 190:17-192:7, 185:3-189:16, 192:8-193:23, Exh. 106; Riley Decl. ¶ 11, Exh. D.) He made clear that he would not and was not interested in providing services to non-Hospice patients. (Kerr Dep. 198:5-201:12, 205:7-207:5; Banchero Depo. 42:4-23, 44:10-46:14, 117:6-13.)

[3] Dr. Bouvier provided night and weekend coverage, holding both a 2232 Senior Physician Specialist and a 2230 Physician Specialist requisition. Laguna Honda sought to eliminate the use of 2232 Senior Physician Specialists for night and weekend coverage. Dr. Bouvier continued at Laguna Honda, but only as a 2230 Senior Physician. (Riley Decl. ¶¶ 7-8.)

IV. LAGUNA HONDA NOTIFIES KERR OF HIS LAY-OFF ON MARCH 5, 2010

Laguna Honda notified Kerr of his lay-off on the afternoon of March 5, 2010. (Complaint ¶ 13.) The City provided Dr. Kerr with sixty-days notice of his lay-off, in excess of the notice required. The City had provided the UAPD with copies of the Laguna Honda budget proposal at or around the time they were submitted and advised it of the layoffs the day before Riley met with Dr. Kerr. (Complaint ¶ 12; Kerr Depo. 293:16-294:23, 295:23-297:21, 309:2-23, Exhs. 20, 114.) During the meeting, Riley advised Dr. Kerr that his layoff was part of the mid-year budget cuts. (*Id.*) Ultimately, the effective date of Dr. Kerr's layoff was set for June 11, 2010.

In April 2010, Riley and Hirose developed a plan to provide for coverage of the Hospice. (Riley Decl. ¶ 20, Exh. E.) There had been significant changes in the Hospice over the previous months and, with Kerr's departure and the unit's long-time Nurse Manager's upcoming retirement, further extensive changes were anticipated. (Riley Decl. ¶¶ 19-21; Kerr Depo. 171:21-176:25, 190:17-192:7, Exh. 106.) Riley's primary concern in beginning the transition was to ensure stable and consistent care for residents, and to have an overlap between Kerr and Bouvier to ensure a smooth transition.

On April 16, 2010, Riley and Laguna Honda Chief of Staff Dr. Steven Thompson met with Kerr. (Riley Decl. ¶ 21; Kerr Depo. 324:13-326:3.) They anticipated that Dr. Kerr would remain on, participate in the treatment of residents in the Hospice, and provide coverage in other areas of the Hospital. (Riley Decl. ¶ 21.) They asked Kerr to sign over Hospice residents to Dr. Bouvier, who would be covering the unit on a temporary basis while attending to other duties. (*Id.*) Kerr did not transition the patients, and instead went on leave the following week to the date of his termination. (Kerr Dep. 327:13-328:16, Exh. 117.)

Hiring announcements for several 2232 positions were posted in 2010 after Dr. Kerr received his layoff notice. (Riley Decl. ¶ 24.) The postings arose as a result of the retirement of other members of the Laguna Honda medical staff, including Dr. Rivero, Dr. Hosea Thomas, Dr. Julio Pineda, and Dr. Victoria Sweet. (*Id.*) Dr. Kerr was free to apply for any of these openings, but did not do so. (*Id.*; Kerr Depo. 335:5-7.) Moreover, Kerr made no effort to discuss alternatives to his layoff with Ms.

Hirose or DPH human resources representatives. (Kerr Depo. 329:24-332:20.) He has made little, if any, effort to find employment in the past two years. (Kerr Depo. 335:8-337:17.)

V. THE COMPLAINT

Kerr's Complaint alleges five claims for relief: (1) retaliation for engaging in protected speech under 42 U.S.C. § 1983; (2) deprivation of due process under Section 1983; (3) retaliation in violation of California Government Code Section 53298; (4) retaliation in violation of California Health and Safety Code Section 1432; and (5) retaliation in violation of California Labor Code Section 1102.5.

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON KERR'S DUE PROCESS CLAIMS

In analyzing federal due process claims, "[a] threshold requirement . . . is the plaintiff's showing of a liberty or property interest protected by the Constitution." *Dittman v. California*, 191 F.3d 1020, 1029 (9th Cir. 1999) *cert. denied* 530 U.S. 1261 (2000). Kerr can demonstrate neither interest.

A. As An Exempt Employee, Kerr Did Not Have A Property Interest In Continued City Employment

Whether or not a particular property interest is protected by the Constitution is a matter of state law. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The Roth Court held that "[t]o have a property interest in a benefit, a person must … have a legitimate claim of entitlement to it." Id. Such a claim arises where the public employee holds a position from which he can be discharged only for cause. *Id.* at 578.

The *Roth* Court rejected the claim that an held a property interest in continued employment in that position:

> [T]he terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment. *Roth, supra*, 408 U.S. 564, 578.

Every federal circuit to address the issue has concluded that a government employee whose civil service employment is not in a permanent civil service position has no property interest in the position. See, *e.g., Baron v. Arizona*, 270 Fed. Appx. 706, 2008 WL 754221 (9th Cir. 2008); *Jannsen v. Condo*, 101 F.3d 14 (2d Cir. 1996); *Booher v. U.S. Postal Service*, 843 F.2d 943 (6th Cir. 1988); *accord, Kreutzer v. San Francisco* (2008) 166 C.A.4th 306, 313 (2008)(physician's position remained exempt even where he performed nonexempt duties, barring his entitlement to pretermination hearing).

Pursuant to the City's Charter, the Civil Service Commission has promulgated rules governing appointments to both non-exempt and exempt positions. These rules establish far more rigorous requirements for non-exempt appointments. Unlike their exempt counterparts, non-exempt appointees must submit to a competitive civil service examination posted in an announcement, be certified from an eligible list, and serve a probationary period. Moreover, non-exempt appointments are not valid until the appointing officer reports the appointment to the City's Department of Human Resources (DHR), and DHR sends an official notice validating the appointment. Indeed, "[n]o person shall hold a position outside of the classification to which the person has been appointed ...." (Charter § 10.103.)[4]

Kerr's position as a Civil Service Class 2232 Senior Physician Specialist was exempt from the civil service system's selection, appointment and removal procedures. See S.F. Charter § 10.104(13). Kerr did not submit to a civil service examination posted in an announcement, was not certified from a civil service eligible list, and did not serve a probationary period. Accordingly, Kerr had no constitutional property interest protected by due process. *Roth*, 408 U.S. at 578.

[4] Charter Section 10.104 provides that "All employees of the City and County of San Francisco shall be appointed through competitive examination unless exempt by [the] Charter." Individuals appointed to non-exempt civil service positions through competitive examination may only be discharged "for cause upon written charges and after having an opportunity to be heard in her/his own defense." (S.F. Civil Service Com. Rule (Com. Rule) Rule 122.7.1.) The Charter identifies positions that "shall be exempt from competitive civil service selection, appointment and removal procedures." (Charter, § 10.104.) Individuals appointed to those positions "serve at the pleasure of the appointing authority" (*Id*.) and are not "subject to civil service ... removal procedures" (Com. Rule 114.44). Exempt positions include "physicians and dentists serving in their professional capacity (except those physicians and dentists whose duties are significantly administrative or supervisory)." (Charter § 10.104(13).) Although the Charter identifies certain positions that should be classified as exempt or non-exempt, it also states that "[n]o person shall hold a position outside of the classification to which the person has been appointed...." (*Id*. at § 10.103.)

B. Kerr Cannot Establish The Elements Of A Due Process Liberty Interest Claim

The liberty interest protected by the due process clause of the Fourteenth Amendment encompasses the freedom to work and earn a living. Thus, when the government terminates an individual's employment based on allegations of moral turpitude that might seriously damage his opportunities for future employment, he is entitled to notice and a hearing to clear his name. *Paul v. Davis*, 424 U.S. 693, 711 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 573 & n.12 (1972).

Under this "stigma-plus" test, injury to reputation by itself is not protected. *Paul, supra*, 424 U.S. 708-09. The fact that termination of employment or accompanying public criticisms negatively impacts future employment prospects – a "kind of foreclosure of opportunities" − does not give rise to a right to a hearing. *Roth, supra*, 92 S.Ct. 2701; *Jablon v. Trustees of the California State Colleges*, 482 F.2d 997, 1000 (9th Cir. 1973).

Termination of employment is not actionable as a liberty interest even when coupled with public justification of the decision and harsh criticism of the individual's job performance sufficient to impede future employment, absent allegations of moral turpitude. *Roley v. Pierce County Fire Protection District No. 4*, 869 F.2d 491, 495 (9th Cir. 1989)(statements that plaintiff was incompetent Fire Chief and unable to get along with and to manage others); *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1096 (9th Cir. 1981) *cert denied*, 455 U.S. 948 (1982) (statements that plaintiff was unable to get along with co-workers); *Loeher v. Ventura County Community College District*, 743 F.2d 1310, 1318 (9th Cir. 1984)(publicized charges of "gross incompetence" and "conflict of interest"; *Gray v. Union County Intermediate Educ. Dist*., 520 F.2d 803, 806 (9th Cir.1975) (accusations of deliberate undermining of social agencies, insubordination, incompetence, hostility toward authority and aggressive behavior).

Kerr fails to identify any statements made in conjunction with the elimination of Kerr's position even approaching the criticisms in each of these cases. Rather, he points to the following: Katz's characterization of those who complained about the Gift Fund as "detractors", without identifying Katz or anyone else; Hirose's promise in July 2010 that Laguna Honda intended to continue "to improve the hospice program"; and Laguna Honda's termination of his staff privileges, e-mail account and medical chart access following his layoff. (Rolnick Decl. II ¶ 3, Exh. A (Plt's

Response to Special Interrogatory No. 9.)[5] These actions did not accompany the elimination of Kerr's position and do not constitute stigmatizing charges triggering a liberty interest. See *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 981-982 (9th Cir. 2002).

Finally, even if Kerr could show that Defendants' statements deprived him of his liberty interest, his claim would still fail because he cannot show that he was foreclosed from other employment opportunities or that he requested and was denied a name-clearing hearing. *Roth, supra,* 408 U.S. at 573; *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 981-982 (9th Cir. 2002) With regard to other employment opportunities, Kerr concedes that he has made no effort to find other employment. (Kerr Depo. 335:5-337:17.) With regard to requesting a hearing to clear his name, Kerr concedes that he had no desire for such a hearing, and that he instead sued for damages. The Due Process Clause does not entitle an individual to forego a liberty interest hearing in order to sue, and in fact limits the remedy for the liberty violation to the resolution of factual disputes arising from the government's statements. *Codd v. Velger*, 429 U.S. 624, 627 (1977) (per curiam).

II. KERR CANNOT ESTABLISH A CLAIM FOR RETALIATION BASED ON PROTECTED SPEECH

To state a *prima facie* claim of retaliation for engaging in protected speech, Kerr must show: (1) he engaged in protected speech; (2) he suffered an adverse employment action; and (3) his speech was a substantial motivating factor for the adverse employment action. *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003).

In *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), the Supreme Court held that in determining whether a public employee's speech is protected requires an examination of whether the speech addresses a matter of public concern and whether the employee's speech was made as a citizen. *Id*. at 1956. "Whether a public employee's speech addresses a matter of public concern is a question of law. *Connick v. Myers*, 461 U.S. 138, 148 n. 7, 103 S.Ct. 1684 (1983). This determination is made in light of "the content, form, and context" of the speech. *Coszalter*, 320 F.3d at 973-974 (internal quotation

[5] Kerr's claim that the union or its members distanced themselves from him after his layoff does not support his claim against Defendants. Rather, the additional serious injury required for this claim must be caused directly by the governmental conduct, and not by actions of a third party. *WMX Technologies v. Miller,* 80 F.3d 1315, 1320 (9th Cir. 1996).

marks omitted). Content is "the greatest single factor in the *Connick* inquiry." *Johnson v. Multnomah County*, 48 F.3d 420, 424 (9th Cir. 1995) (quoting *Havekost v. United States Dept. of the Navy*, 925 F.2d 316, 318 (9th Cir. 1991)).

A public employee addresses a matter of public concern when his speech relates to an issue of "'political, social, or other concern to the community.'" *Brewster v. Board of Education*, 149 F.3d 971, 978 (9th Cir. 1998) quoting *Connick*, 461 U.S. at 146; see also *Johnson*, 48 F.3d at 422. "Speech that concerns issues about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government merits the highest degree of first amendment protection." *Coszalter*, 320 F.3d at 973 (internal quotation marks omitted). In contrast, "speech that deals with individual personnel disputes and grievances and that would be of no relevance to the public's evaluation of the performance of governmental agencies, is generally not of public concern." *Id*.

First, Kerr cannot establish a *prima facie* claim of retaliation as it relates to his various complaints to the Controller's Whistleblower Program or Ethics Commission as there is no genuine dispute that none of the decision makers in this case, Katz, Hirose or Riley, had any knowledge of those complaints until well after Kerr left City employment. (Katz Decl. ¶¶ 18-20, Hirose Decl. ¶¶ 13, 16; Riley Decl. ¶ 5, 16-17, 25; Kerr Depo. 45:16-47:8, 48:2-21, 53:4-16, 54:1-21; 228:1-229:20, 238:19-240:25.) Accordingly, those complaints could not have been a substantial motivating factor in Kerr's layoff or any of the other adverse actions that he challenges.

As to Kerr's speech related to the August 2009 medical staff discussion regarding the Davis Ja Report, that speech did not address matters of public concern. Rather, his speech in that instance clearly involved personnel disputes and grievances and, thus, was not protected speech. *Coszalter*, 320 F.3d at 973. This speech was not designed to, nor would it, provide the public with an evaluation of Laguna Honda's performance. Instead, like the public prosecutor in *Garcetti*, this speech arose from his duties as a City employee and UAPD representative. *Garcetti*, 126 S.Ct. at 1959-60. As he noted in his deposition, the controversy regarding the Ja Report concerned primarily its recommendation regarding the potential elimination of physicians and as the UAPD representative he spoke on behalf of his union members. (Kerr Depo. 271:13-274:22.) Further, this action occurred

almost a year before his layoff, and Kerr's claim of *animus* is severely undercut by the fact that almost all of the physicians at Laguna Honda, including defendant Colleen Riley, joined in this criticism.

Neither were any of the public records requests about the Gift Fund protected speech. The language of the public records requests demonstrates that they had no expressive conduct. They were simply a request for documents without any complaint of improper, unethical, or unlawful conduct. There is nothing about this "speech" that informs public debate. (Kerr Depo. 118:13-121:21, 279:24-280:5, 281:12-17, 282:6-283:11, 288:3-290:8, Exhs. 34, 112, 113.) The documents were nothing more than requests for information. Moreover, Kerr did not engage in this "speech," he is not the person requesting the information. (*Id*.)

And the evidence is clear that the City would have taken that action even in the absence of the speech at issue and summary judgment is appropriate on that ground as well. *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 287 (1977). As set forth in Section III above, the City's decision to release Kerr from his employment was based on need to reduce staffing at Laguna Honda.

III. KERR CANNOT ESTABLISH CITY LIABILITY FOR THE ALLEGED RETALIATION

The City is not liable on any of Kerr's Section 1983 claims because Kerr cannot prove that the conduct at issue is legally attributable to the City. Kerr bears the burden of proving that his lay-off resulted from an official City policy, and cannot assert *respondeat superior* liability against the City. *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978)("[A] municipality cannot be held liable under § 1983 on a *respondeat superior* theory"). It is well-settled law that "municipalities are answerable only for their own decisions and policies; they are not vicariously liable for the constitutional tort of their agents." *Auriemma v. Rice*, 957 F.2d 397, 399 (7th Cir. 1992). *Monell* is not an affirmative defense; rather, municipal liability is an element of a Section 1983 cause of action and "the plaintiff bears a heavy burden in proving municipal liability . . ." *Thomas v. City of Chattanooga*, 398 F.3d 426, 433 (6th Cir. 2005).

When a municipal employee commits a constitutional tort, the trial court must inquire whether that employee had "final policymaking authority" over the matter in question. *City of St. Louis v. Prapotnik*, 485 U.S. 112, 123 (1988) (plurality opinion). "[T]he identification of policymaking

officials is a question of state law" (*Id*. at 142), and is a legal question to be resolved by the trial judge. *Jett v. Dallas Indep. Sch. Dist*., 491 U.S. 701, 737 (1989). The fact that a manager has independent decision-making power does not render him a final policymaker. "If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from respondeat *superior* liability." *Prapotnik*, 485 U.S. at 126; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.12 (1986) ("[I]f county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board"). For municipal liability to attach, "the official who commits the alleged violation of the plaintiff's rights [must have] authority that is final in the special sense that there is no higher authority." *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 469 (7th Cir. 2001).

A. The City's Civil Service Commission Is The Final Policymaker With Respect To Employment Matters In San Francisco

In deciding whether an employee is a final policymaker, a court "would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Praprotnik*, 485 U.S. at 126. Under California law, "a city's Charter determines municipal affairs such as personnel matters." *Hyland v. Wonder*, 117 F.3d 405, 414 (9th Cir. 1997).

The City Charter makes clear that the Civil Service Commission ("CSC"), not Department Directors, has the authority to set personnel policies. Section 10.101 makes it the responsibility of the CSC to adopt "rules, policies and procedures" to govern an exhaustive list of topics relating to city employment." The Charter further provides that the Commission shall establish rules to review and resolve alleged "violations of civil rights" based on "non-merit factor or any other category provided for by ordinance." S.F. Charter § 10.101, 17. The CSC has exercised this grant of power by adopting numerous rules on a broad array of employment issues. *Id.*

The case law makes clear that the Civil Service Commission is the final policymaker with respect to employment and personnel matters. *Praprotnik*, 485 U.S. at 126, 129. The Ninth Circuit

has confirmed that the CSC is the final City policymaker for employment matters for purposes of municipal liability. *See, e.g,. Hyland, supra,* 117 F.3d 405.

B. Kerr Fails To Identify Any Conduct That Would Render The City Liable Under Sections 1983

A municipality may be liable under *Monell* for a single incident where: (1) the person causing the violation has "final policymaking authority;" (2) the "final policymaker" "ratified" a subordinate's actions; or (3) the "final policymaker" acted with deliberate indifference to a subordinate's constitutional violations. *Christie v. Iopa*, 176 F.3d 1231 (9th Cir. 1999).

Kerr has not identified any policy of the City or the CSC that caused his alleged injuries. Nor could he. Instead, he alleges that the following personnel actions specific to his employment establish *Monell* liability: Katz, Hirose and Riley's decisions to "terminate" his employment, deny him hospital privileges, relieve him of his duties as a treating physician, deny him access to his City email, defame him, and deny him placement or rehire in another position. (Rolnick Decl. ¶ 8, Exh. G (Amended Responses to First Set of Special Interrogatories.) He contends that these managers are final policymakers or, in the alternative, that their actions were ratified by a final policymaker. Kerr is wrong as a matter of law. S.F. Charter § 10.101.

Kerr contends that Katz, Hirose and Riley had been delegated final policymaking authority because their discretionary decision were not "constrained by policies" and not "subject to review by the municipality's authorized policymakers." *Id*. at 1236-37. But the fact that the Director of Health (or his subordinates) exercised the discretion of an appointing officer to make decisions regarding the employment of physicians is insufficient to establish *Monell* liability. Moreover, the decisions at issue were governed and constrained by the City's personnel policies, Civil Service Commission's Rules and, significantly, by the City's Campaign and Governmental Conduct Code which prohibits retaliation against those who engage in protected speech and provides for review of any claim of such retaliation by the City's Ethics Commission. [6] Exercising such discretion is not policymaking, and

[6] The City's Campaign and Governmental Conduct Code specifically prohibits retaliation against employees who engage in protected speech, and provides for review of any claim of such retaliation by the City's Ethics Commission. S.F. Campaign and Governmental Conduct Code § 4.115. Further, the Charter empowers the Ethics Commission to investigate, hold hearings, and remediate violations of the City's whistleblower protections. S.F. Charter § C3.669-13.

holding the City liable based on the decisions at bar would improperly impose *respondeat superior* liability on the City.

Kerr may argue, in reliance on *Ulrich, supra,* 308 F.3d at 985, that the final policymaker relating to his lay-off is the City's Health Commission. But such reliance is misplaced.[7] The Health Commission's policy-making authority is limited to provision of public health services. S.F. Charter § 4.100. Under that authority, the Commission has adopted Medical Staff by-laws for Laguna Honda providing a framework for self-governance and extending medical staff privileges so as to ensure an appropriate level of medical care at the Hospital. (Riley Decl. ¶ 23, Exh. H.) The by-laws govern physician privileges to practice medicine at the Hospital, but in no way address physicians' employment status with the City. (*Id.*) And like the Charter, Civil Service Rules, and Governmental Conduct Code, the by-laws restrain Laguna Honda administrators' discretion relating to such privileges and provide for review of decisions impacting them. (*Id.*)

Nor can Kerr show ratification by the Civil Service Commission. To show ratification, a plaintiff must "prove that an official with final policy-making authority ratified a subordinate's decision or action *and the basis for it*." *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992); *Praprotnik*, 485 U.S. at 127. There is no evidence that the Civil Service Commission, or any other policy-making authority, considered and ratified Kerr's lay-off or Defendants' alleged retaliatory motives.

The Court should dismiss Kerr's Section 1983 claims.

IV. KERR'S STATE LAW RETALIATION CLAIMS FAIL BECAUSE KERR DID NOT IDENTIFY ANY VIOLATION OF LAW OR PLACE THE CITY ON NOTICE THAT HE CONSIDERED THE PRACTICES UNLAWFUL, BECAUSE THE DECISION MAKERS WERE NOT AWARE OF THE COMPLAINTS, AND BECAUSE THERE IS NO CAUSAL LINK BETWEEN HIS COMPLAINTS AND THE ELIMINATION OF HIS POSITION

Kerr's Complaint alleges three claims for relief based on alleged retaliation for filing complaints protected by California Labor Code Section 1102.5, Health and Safety Code Section 1432,

[7] The Ninth Circuit in *Ulrich* posed, but did not answer, the question as to whether the Health Commission, or its designee was the final policymaker for the decisions at issue in that case, or whether questions concerning employment matters were governed by Laguna Honda Medical Staff by-laws.

and Government Code Section 53298. Each of these claims utilizes a shifting burdens approach regarding the plaintiff's proof of his claim. *Patten v. Grant Joint Union High School Dist.*, 134 Cal.App.4th 1378, 1384 (2005)(Labor Code § 1102.5); *Muller v. Automobile Club of So. California,* 61 Cal.App.4th 431, 451-452 (1998)(Labor Code § 6310); see also *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003)(First Amendment).

For a complaint to be protected, it must disclose violations of law, and not merely City policies. A complaint is protected if it discloses to a governmental agency "reasonably based suspicions of illegal activity." *Green v. Ralee Engineering Co.*, 19 Cal. 4th 66, 86–87 (1998) (emphasis added). In *Yanowitz v. L'Oreal USA*, 36 Cal.4th 1028, 1047 (2005), the California Supreme Court has rejected the argument that an employee's speech is subject to protection under state law where it fails to put the employer on notice of an actual legal claim:

> [The complaint] must oppose activity the employee reasonably believes constitutes unlawful discrimination and complaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct. (*See Garcia–Paz v. Swift Textiles, Inc.* 873 F.Supp. 547, 560 (D. Ka. 1995) ["Employees often do not speak with the clarity or precision of lawyers. At the same time, however, employers need not approach every employee's comment as a riddle, puzzling over the possibility that it contains a cloaked complaint of discrimination"]; *Booker v. Brown & Williamson Tobacco Co.*, (6th Cir.1989) 879 F.2d 1304, 1313–14 [affirming district court's determination that an allegation of "ethnocism" was too vague to constitute protected opposition under Michigan's antidiscrimination statute].)

To have a reasonably based suspicion of illegal activity, an employee must point to some statute, rule or regulation arguably violated by the conduct disclosed. *Love v. Motion Indus., Inc.*, 309 F. Supp. 2d 1128, 1135 (N.D. Cal. 2004)(Labor Code Section 1102.5). Even where the employee's complaint references a statute or other legal provision, which Kerr's complaints did not, it must clearly and sufficiently identify prohibited conduct to place the employer on notice of its potential legal liability. *Sequoia Ins. Co. v. Superior Court*, 13 Cal.App.4th 1472, 1480 (1993). *Accord, Stevenson v. Superior Court*, 16 Cal.4th 880, 901 (1997)(discharge actionable only if it violates policy "(1) delineated in either constitutional or statutory provisions; (2) 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) 'substantial' and 'fundamental.'")

Whether a complaint is protected for purposes of California anti-retaliation law is a pure question of law. *Ghirardo v. Antonioli*, 8 Cal.4th 791, 799 (1994).

Kerr's complaints were not protected, as they did not place the City on notice of any alleged violation of federal or state law.

Moreover, Hirose, Katz and Riley were not aware that he made the complaints. An employee asserting retaliatory dismissal must prove that the decision makers had specific, actual knowledge of his protected complaints. *Morgan v. Regents of the Univ. of Cal.*, 88 Cal.App.4th 52 (2000).

Finally, there is no causal nexus between any of Kerr's complaints and the decision to eliminate his position in the context of Laguna Honda's dramatically changing business needs.

Accordingly, each of his state law retaliation claims fails.

A. Labor Code Section 1102.5

Labor Code Section 1102.5 prohibits retaliation based on an employee's disclosure to a government entity or law enforcement agency information he reasonably believes shows the employer's violation of state or federal law or regulation. Cal. Lab. Code § 1102.5(b). But Kerr's complaints did not allege that Laguna Honda had violated state or federal law. *Love v. Motion Industries, Inc., 309 F.Supp.2d 1128 (N.D. Cal. 2004)*(employee's complaint that construction was unsafe did not assert violation of federal or state statute); *Carter v. Escondido Union High School Dist.*, 148 Cal.App.4th 922, 9(2007)(teacher fired based on complaint that football coach recommended nutritional supplements to students did not assert unlawful conduct).

Moreover, even if the court could construe Kerr's complaints as alleging a violation of state law, there is no evidence of a causal link between those complaints and the elimination of his position. In fact, Kerr produces no evidence that any of the decision makers were even aware of his complaints at the time they identified his position for elimination or issued his layoff notice.

B. Health and Safety Code Section 1432

Health and Safety Code Section 1432 prohibits retaliation against an employee at a long-term health care facility who has brought a complaint or grievance (or participated or cooperated in such a process) relating to care, services or conditions at the facility. Cal. Health & Safety Code § 1432(a).

But Section 1432 does not create a private right of action for an employee to bring a civil action. Rather, the statute expressly notes that a licensee who violates the prohibition on retaliation is subject to civil penalty, not to exceed $10,000, to be assessed by the director of the California Department of Health Services. *Id*. The statute only provides a civil enforcement mechanism to collect any such penalty assessed by the director. *Id*.

C. Government Code Section 53298

Government Code Section 53298 prohibits retaliation against an individual who has filed a written complaint with a local public entity regarding gross mismanagement or a significant waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The elements for a claim under § 53298 include: (1) filing a complaint with a local agency regarding gross mismanagement, a significant waste of funds, an abuse of authority, or a specific and substantial danger to public health or safety; (2) within 60 days of the date of the act or event that is the subject of the complaint; (3) that the complaint be filed under penalty of perjury; (4) in accordance with the locally adopted administrative procedure; (4) the employee made a good faith effort to exhaust all available administrative remedies before filing the complaint; and (6) a local agency officer, manager, or supervisor took a reprisal action against the employee for filing the complaint. *Neveu v. City of Fresno*, 392 F.Supp.2d 1159 (E.D. Cal. 2005).

None of Kerr's complaints satisfy all six of these elements: only the Ja complaint was made within 60 days, and none of the complaints were made under penalty of perjury. Accordingly, his whistleblower claim fails.

V. THE COURT SHOULD MAKE FINDINGS OF FACT EVEN IF IT DOES NOT ENTER JUDGMENT FOR DEFENDANTS

Federal Rule of Civil Procedure 56 was amended effective December 1, 2010 and provides that a party may "move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought." F.R.C.P. 56(a). A district court shall grant summary judgment if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." F.R.C.P. 56(a). Where a district court "does not grant all the relief requested by the motion, it may enter an order stating any material fact –

including an item of damages or other relief – that is not genuinely in dispute and treating the fact as established in the case." F.R.C.P. 56(g). Subdivision 56(g), like former subdivision 56(d), allows a district court, in the event a motion for summary judgment failed, to issue an order specifying certain facts as uncontroverted in order to narrow the scope of issues for trial. *Evergreen International v. Marinex Construction Company, Inc.*, 477 F.Supp.2d 697, 699 (D.C. SC 2007); *SEC v. Thrasher*, 152 F.Supp.2d 291, 295 (S.D. NY 2001).

As there is no genuine dispute, Defendants request that the Court enter an order establishing that:

a. The Defendants were not on notice of Kerr's complaints to the City's Whistleblower Program or Ethics Commission regarding the Davis Ja Report at the time Defendants made any of the adverse decisions challenged in this action;

b. The Defendants were not on notice of Kerr's complaints to the City's Whistleblower Program or Ethics Commission regarding the relationship between Mitchell Katz and Health Management Associations at the time Defendants made any of the adverse decisions challenged in this action;

c. The Defendants were not on notice of Kerr's complaints to the City's Whistleblower Program or Ethics Commission regarding the Laguna Honda Gift Fund at the time Defendants made any of the adverse decisions challenged in this action ;

d. The Defendants were not on notice that Kerr had engaged in any alleged protected speech related to the Laguna Honda Gift Fund until the time of the KGO television story broadcast in May 2010; and

e. The Defendants were not on notice of Kerr's complaints to the City's Whistleblower Program or Ethics Commission regarding the his claims of retaliation at the time Defendants made any of the adverse decisions challenged in this action.

CONCLUSION

For all of the reasons set forth above, the Court should enter judgment in favor of Defendants.

Dated: May 31, 2012

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