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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,

Defendant(s).

Case No. CV 10 5733 CW

**DEFENDANTS' REPLY BRIEF IN SUPPORT
 OF MOTION FOR SUMMARY JUDGMENT
 OR, ALTERNATIVELY, PARTIAL
 SUMMARY JUDGMENT**

Hearing Date: August 9, 2012
 Time: 2:00 p.m.
 Place: Judge Claudia Wilken
 1301 Clay St., Ctr. 2
 Oakland

Trial Date: November 13, 2012

**Attached as Appendix A: San Francisco Health
 Commission Rules and Regulations**

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INTRODUCTION

Plaintiff Derek Kerr likes to swim upstream. He had a comfortable existence at Laguna Honda Hospital ("LHH"), where many of his peers took similarly divergent paths to address the exceptional needs of the resident population. But when LHH underwent significant changes in its budget and staffing protocols, Kerr refused to follow the current, and was laid off. Laguna Honda selected Kerr for layoff due to his refusal to budge from his 25-resident quota, despite a decade of change that moved almost every other doctor to more than double that load in a new patient-care model.

Kerr makes two arguments in support of his claim that his layoff resulted from an unlawful retaliation among three layers of management. The evidence supports neither.

First, Kerr argues that because Laguna Honda's staffing changes did not unfold precisely as planned, the Court should regard its business reasons for his layoff as pretextual (Opp. at 16-19):

- Kerr argues that Laguna Honda never asked him to increase his resident load. But he was the lone holdout on this issue for years, refusing to delegate non-physician duties to nurses, counselors, gardeners or outside contractors. When Riley confronted Kerr about his failure to increase his resident load in the face of staff cuts, he refused: "I simply cannot do more clinical coverage". (Riley Decl. ¶¶ 10-12, Exh. D.)
- Kerr argues that neither doctor running the hospice/palliative care neighborhood took on an increased resident load. That is simply wrong and Kerr miscites the evidence. Dr. Bouvier provided coverage for 29 hospice residents along with 30 to 60 residents in another ward, while Dr. Williams managed a hospital-wide program *and* 30 palliative care residents. Bouvier now cares for all 60 S3 residents. (Riley Decl. ¶¶ 2, 15; Plt's Exh. CC, Williams Dep. at 81:14-25 (does not recall "exact number of [Bouvier's other] ward.")¹
- Kerr argues that Hirose and Riley wrongly regarded him as unwilling to work with residents outside hospice, since he had done so on occasion before the move. However,

¹ **Objection to Evidence:** Defendants object to the Williams' deposition to the extent her testimony concerns LHH staffing plans or decisions. Such testimony lacks foundation and is irrelevant as there is no evidence of Williams' involvement, if any, in LHH staffing plans. FRE 104, 410, 602.

1 cross-coverage is a structural and far more regular and extensive expectation at the new
 2 facility – the rule not the exception. When Riley addressed this need with Kerr, he
 3 unequivocally rejected her request: "regularly covering a General Medical ward would
 4 be excess and unprecedented in my case". (Riley Decl. ¶¶ 10-12, Exh. D.)

5 Second, Kerr seeks to distinguish himself from his peers – so as to cast himself as a natural
 6 target for retaliation – on the basis that he authored or joined in numerous public complaints relating to
 7 LHH management. (Opp. at 6-15) But those public complaints, which did not implicate matters of
 8 public concern, were in no way unique: every Laguna Honda professional joined in some or all of
 9 them, and a number of Laguna Honda doctors were (and continue to be) equally vocal. (Riley Decl.
 10 ¶¶ 4-5.) Rather, it was Kerr's enduring sense of entitlement – his refusal to shoulder the heavier
 11 workload that every other doctor agreed to – that differentiated Kerr from his peers. Moreover, Kerr's
 12 repeated assertion that the issues he raised were "critical" and "very serious", involving "ethical
 13 improprieties" regarding "high level managers", such that Hirose and Katz *must have known he made*
 14 *them* is wholly unsupported.² As discussed in detail below, the complaints were no such thing.
 15 Moreover, Kerr expected his complaints to be kept confidential (Kerr Dep. 45:16-47:8, 48:2-21); has
 16 no evidence to the contrary (Kerr Dep. 77:23-78:21); and concedes that, to accept his claims, the court
 17 would need to blindly impute to Hirose and Katz, with no foundation whatsoever, knowledge of
 18 confidential complaints made outside the Department - and that Hirose and Katz testify unequivocally
 19 did not become known until long after Kerr's layoff. (Kerr Dep. 53:4-16, 54:1-21, 228:1-229:20,
 20
 21

22 ² Kerr's claim that, months or years after the fact, various government agencies "would confirm
 23 many of Dr. Kerr's concerns" lacks foundation and is not supported by any admissible evidence. Both
 24 of Kerr's September 2009 Whistleblower Complaints were dismissed as unsubstantiated. Moreover,
 25 Kerr's argument that people's awareness of his March 2010 complaint many months later is sufficient
 26 to impute notice of his complaints to Defendants – does not meet the standard of proof required to
 27 escape summary judgment.

28 **Objection to Evidence:** Defendants object to Plaintiff's Exhibits J (November 2010 audit of
 LHH Gift Fund), P (July 29, 2011 letter to Davis Ja & Associates), and Q (Report of the Civil Grand
 Jury). This evidence is not relevant, lacks foundation, and is hearsay. FRE 104, 401, 602, 801-02.

Objection to Evidence: Defendants object to Plaintiff's Exhibits N (I-Team Investigative
 Report, May 20, 2012) and EE (I-Team Report, May 25, 2010). This evidence is not relevant, lacks
 foundation and is hearsay. FRE 104, 401, 602, 801-02.

238:19-240:25; Katz ¶¶ 18-20, 22; Hirose ¶¶ 13, 16; Riley ¶¶ 5, 16-17, 25)³ The City's confidential complaint programs are just that, a confidential avenue for employees to challenge practices harmful to the City, immune from the scrutiny of their superiors. *SF Charter* § F1.110.⁴

There is no evidence that Laguna Honda took any action against *any* of the physicians or other professionals who vigorously debated the wisdom of the Hospital's operational changes. It is unfortunate whenever a long-tenured professional loses his job. In difficult budget times, however, employers are forced to identify efficiencies and assess contributions toward institutional needs, and to make changes to serve that end. The Hospital's articulated business reasons explain its actions, Kerr cannot create causation where none exists, and his claims should be dismissed.

Moreover, Kerr has not and cannot meet his burden to show municipal liability under *Monell v. New York Dept. of Soc. Servs.*, 436 U.S. 658 (1978). He contends that Defendant Katz, who participated in the layoff decision, was a final policymaker. But neither City law nor the evidence supports such a claim. Not only does City law not authorize Katz to act as a final policymaker, it expressly prohibits retaliation against those, like Kerr, who raise complaints regarding City operations and management. Where a public official's decisions are constrained by such an express policies, those policies, not the subordinate official's departure from them, are the act of the municipality. *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1998).

³ Kerr claims that Hirose lied about many of the issues in the case. In each case, the evidence cited belies Kerr's claim: that the Ja Report had been approved by the Medical Executive Committee (Opp. at 15:2-6 (citing to witness testimony attempting to recall and characterize an alleged August 2009 memo)); that the Sunshine Request had been "brought to [her and Katz's] attention almost immediately" (Opp. at 13:14-16 (citing Hirose testimony that she had various discussions regarding the Gift Fund around May 2010); that Hirose, having gotten confused about a timeline in her first deposition session, "still could not explain the timing problem" in her second session (Opp. 16:22-24 (no citation to evidence); and that Hirose "hired a friend" to fill a position Kerr elected not to apply for (Opp. 21:9-12 (citing Hirose testimony that Drs. Riley and Thompson asked her to verify credentials).

⁴ **Objection to Evidence:** Defendants object to Plaintiff's Exhibit W (risk assessment guide created by the City's Office of the Controller). This evidence is not relevant, lacks foundation and is hearsay. FRE 104, 401, 602, 801-02.

ARGUMENT

I. KERR CANNOT SHOW THAT HIS PUBLIC COMPLAINTS CONSTITUTED PROTECTED SPEECH, OR THAT ANYONE IN MANAGEMENT OPPOSED THEM

Kerr's opposition blurs the distinction between his public statements, which were not protected, and his confidential complaints, which were not known to Defendants. Neither supports his claims.

A. Kerr's Public Criticism Of The Davis Ja Report's Staffing Proposals Cannot Support His Retaliation Claim Because It Did Not Constitute Protected Speech, And Because Laguna Honda Management Did Not Oppose That Dialogue

Virtually every physician at Laguna Honda took exception to Davis Ja's recommendation that the City replace primary care physicians with mental health professionals. (Riley Decl. ¶¶ 4-5; Rivero Dep. 152:12-154:14, 271:13-274:22; Rivero Dep. 157:20-158:7). When Kerr and Rivero circulated a petition objecting to that recommendation, all but two of the physicians on staff signed it, including Riley. (Kerr Dep. 59:24-61:10; Riley Decl. ¶¶ 4-5, Exh. B) Kerr and Rivero also distributed a response challenging the Report's methodology and potential researcher bias. The report does not allege any violation of City ethics laws (as opposed to "researcher bias"), does not mention Katz, Hirose or Riley, and does not accuse them of wrongdoing. (Plt's. Exh. F) ⁵

No one in Laguna Honda administration discouraged opposition to the proposed physician cuts. Laguna Honda took no action against any of the physicians who opposed the recommendations, and none were selected for layoff on that basis. (Kerr Dep. 54:22-56:12, 56:23-58:16; Rivero Dep., 157:20-158:7, 159:9-160:25, 169:13-170:10) Kerr presents no evidence that his participation in this debate played any role in his layoff a year later.

B. Kerr Cannot Claim Authorship Of Dr. Rivero's Public Records Act Requests, And Those Requests Were Not Protected Speech

Kerr's opposition repeatedly represents that he authored or co-authored the Public Records Act Requests relating to the Gift Fund. (Opp. at 2:16, 12:2, 12:26-28) ⁶ That is false: Rivero made the

⁵ The Report did not raise any allegation of a conflict of interest relating to Sherwood. That allegation was contained in Kerr's March 2010 whistleblower complaint, which Defendants learned of in June 2010. Kerr's statements did not address matters of public concern, and instead involved personnel disputes and grievances. *Coszalter v. City of Salem*, 320 F.3d at 973 (9th Cir. 2003). The debate over the staffing proposal was not designed to provide the public with an evaluation of Laguna Honda's performance, and the participants' input grew out of and reflected their duties either as City employees or as UAPD representatives. *Garcetti v. Ceballos*, 126 S.Ct. at 1959-60 (2006).

⁶ Kerr similarly claims authorship of "e-mails that circulated among all LHH physicians in early September 2009," alleging a potential conflict of interest between Katz and HMA. The evidence

1 Requests and neither Dr. Kerr's name nor signature appears on them. (Rolnick Decl. ¶ 9, Exh. H, Dep.
2 Exhs. 34, 112, 113.)

3 Moreover, the Requests were not "expressive conduct" that "convey[ed] a particularized
4 message". Rather, they identified documents sought, did not explain why they were sought, and did
5 not allege mismanagement or malfeasance. (*Id.*) Rivero at no time informed DPH of the basis for the
6 Requests, and Kerr had no communications with DPH regarding any aspect of the Requests. (Rivero
7 Dep. 174:7-175:7; Kerr Dep. 118:13-121:21, 279:24-280:5, 281:12-17, 282:6-283:11, 288:3-290:8)
8 The only concern triggered by the request was over the time-consuming nature of retrieving and
9 compiling the data from dated financial reports. (Navarro Dep. 77:15-82:17.) Laguna Honda
10 management did not learn of the nature of the Gift Fund issue until KGO's coverage in May 2010, a
11 month after Kerr had gone on FMLA leave in anticipation of terminating his employment. (Katz Decl.
12 ¶¶ 18-20, 22; Hirose Decl. ¶¶ 13, 16; Riley Decl. ¶ 5, 16-17, 25.)

13 **II. KERR CANNOT SHOW THAT DEFENDANTS RETALIATED AGAINST HIM**
14 **BASED ON HIS CONFIDENTIAL COMPLAINTS BECAUSE THERE IS NO**
15 **EVIDENCE THAT DEFENDANTS KNEW HE FILED THE COMPLAINTS**

16 Kerr's Opposition focuses primarily on confidential complaints he filed with the City's
17 Whistleblower Program in September 2009 and March 2010. The Charter requires that the
18 Whistleblower Program's audits, investigations and reports remain confidential. *Charter* § F1.110(b);
19 *cf.*, *Charter* § C3.699-13(a)(City Ethics Commission). Kerr presents no evidence, only speculation,
20 that Defendants were aware of his Whistleblower complaints.⁷

21 **A. Kerr's September 2009 Whistleblower Complaints**

22 On September 18, 2009, Kerr and Rivero filed a confidential complaint alleging that two DPH
23 employees involved in approving the Davis Ja contract had relationships that should have been
24 disclosed. Kerr understood that his complaint would be kept confidential. (Kerr Dep. 45:16-47:8,

25 is to the contrary: there was one e-mail, and it was authored by "Doctorbeth", a physician who did not
26 work at LHH, not Katz. (Plt's. Exh. H.) Kerr further asserts that he authored emails on this subject
27 but has not produced any such documents in discovery or presented any such emails in his Opposition
28 to the present motion.

⁷ **Objection to Evidence:** Defendants object to Plaintiff's Exhibits W (risk assessment guide
created by the City's Office of the Controller) and Q (Report of the Civil Grand Jury). This evidence
is not relevant, lacks foundation and is hearsay. FRE 104, 401, 602, 801-02.

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 Dep. 53:4-16, 54:1-21; 228:14-229:20.) 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 Dep. 77:23-78:21.)

On September 21, 2009, Kerr and Rivero filed a complaint alleging that Katz had performed paid services for Health Management Associates (HMA) while that firm was providing services for the City. (*Id.*; Kerr Dep. 83:15-85:8, 116:15-117:22, Exh. 3.) Kerr did not disclose the complaint to anyone other than UAPD shop stewards, and specifically not to Katz, Hirose or Riley, and has no knowledge of the Program disclosing the HMA complaint to anyone. (Kerr Dep. 90:5-92:18, 96:25-97:19, 253:11-255:7, 255:22-257:8.)⁸

It is undisputed that neither Katz, Hirose or Riley knew that Kerr filed his September 2009 Whistleblower complaints until long after he had been laid off. (Kerr Dep. 45:16-47:8, 48:2-21; Katz Decl. ¶¶ 18-20, 22; Hirose Decl. ¶¶ 13, 16; Riley Decl. ¶ 5, 16-17, 25.)

B. Kerr's March 2010 Whistleblower Complaints

Kerr's March 2010 complaints came toward the end of the layoff process. None of the decision makers in this case, Katz, Hirose or Riley, knew about those complaints as Kerr was being selected for layoff. (Katz Decl. ¶¶ 18-20, Hirose Decl. ¶¶ 13, 16; Riley Decl. ¶ 5, 16-17, 25; Kerr Dep. 45:16-47:8, 48:2-21, 53:4-16, 54:1-21; 228:1-229:20, 238:19-240:25.)

On March 2, 2010, Kerr submitted a confidential complaint alleging ethical violations related to LHH Gift Fund accounting practices long predating Hirose. (Complaint ¶¶ 11-12; Kerr Dep. 121:25-122:12.) The complaint 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. (Kerr Dep. 135:2-20.) Kerr did not disclose the Gift Fund complaint to any DPH or LHH administrator until after March 2010. (Kerr Dep. 238:19-240:25.) Katz, Hirose, and Riley first learned of Kerr's complaints regarding the Laguna Honda Gift Fund in

⁸ The Opposition asks the court to infer that Dr. Thompson's deletion of e-mails sent to Hirose suggests that he sent her e-mails relating to the HMA issue. (Opp. at fn. 2) Plaintiff misleads the Court: the e-mail file Thomas deleted was on his home computer; LHH preserved and produced all relevant LHH e-mail files, including Dr. Hirose's received mail containing the e-mails Thomas sent her. (Thompson at 232:22-235:23.)

1 May 2010, when KGO-ABC TV aired a story regarding the complaints. (Katz Decl. ¶¶ 18-20, 22;
 2 Hirose Decl. ¶¶ 13, 16; Riley Decl. ¶ 5, 16-17, 25.)

3 On March 5, 2010, Laguna Honda notified Kerr of his lay-off. Ten days later, he filed his
 4 fourth confidential complaint, alleging that his layoff was in retaliation for prior complaints.
 5 (Complaint ¶ 24; Kerr Dep. 258:24-259:23, Exh. 110.) Katz, Hirose, and Riley did not learn of this
 6 complaint, or of Kerr's underlying conflict of interest complaints, until long after his layoff.

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

13 Kerr's opposition asserts that his complaints were protected under California Labor Code
 14 section 1102.5 and California Health and Safety Code section 1432.

15 Kerr argues that "to avoid summary judgment [under section 1102.5] plaintiff need only
 16 identify *in the course of the litigation* the particular rule, regulation or statute that may have been
 17 violated". (Opp. at 22:23-26, citing *Love v. Motion Industries, Inc.*, 309 F.Supp.2d 1128 (N.D. Cal.
 18 2004). Kerr is wrong. It is true that counsel bears the burden of identifying the specific statutory
 19 provision implicated by the employee's complaint, a burden not met here. But even where an attorney
 20 identifies a legal prohibition, the employee must at minimum have placed the employer on notice of an
 21 alleged legal violation that "sufficiently describe[s] the type of prohibited conduct to enable an
 22 employer to know the fundamental public policies that are expressed in that law." *Sequoia Ins. Co. v.*
 23 *Superior Court*, 13 Cal.App.4th 1472, 1480 (1993). Kerr's complaints were not protected under
 24 section 1102.5, as they did not place the City on notice of any alleged violation of federal or state law.
 25 *Cal. Lab. Code* § 1102.5(b); *Carter v. Escondido Union High School Dist.*, 148 Cal.App.4th 922, 929
 26 (2007)(teacher's complaint that football coach recommended nutritional supplements to students).

27 Kerr's claim under Health and Safety Code Section 1432 fares no better. That section prohibits
 28 retaliation against an employee at a long-term health care facility who brings a complaint or grievance
 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. Rather, the statute provides that a licensee who

engages in prohibited retaliation is subject to civil penalties not to exceed \$10,000, to be assessed by the state Department of Health Services. *Id.*⁹

IV. KERR WAS NOT THE ONLY PHYSICIAN LAID OFF, AND HE HAD EVERY OPPORTUNITY TO REMAIN AT LHH IF HE WAS WILLING TO ASSUME THE HIGHER WORKLOAD HIS COLLEAGUES ASSUMED

Kerr's Opposition argues that the court should infer ill intent because he was the only doctor to lose his job.¹⁰ In fact, however, Drs. Kerr and Bouvier were both laid off. For Dr. Bouvier, that meant having to exercise his reversion rights under his alternate requisition. For Kerr, it meant having to apply for another position whose workload was acceptable to him.

On April 16, 2010, Riley and Thompson met with Kerr. (Riley Decl. ¶ 21; Kerr Dep. 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 Dep. 335:5-7.) Moreover, Kerr made no effort to discuss alternatives to his layoff with Hirose or DPH human resources representatives. (Kerr Dep. 329:24-332:20.) He has made little, if any, effort to find employment in the past two years. (Kerr Dep. 335:8-337:17.)

⁹Kerr does not contest the legal inadequacy of his claims under Government Code Section 53298, which requires that a complaint be filed within 60 days and be under penalty of perjury. *Neveu v. City of Fresno*, 392 F.Supp.2d 1159 (E.D. Cal. 2005).

¹⁰Kerr's assertion that Katz could have realized equivalent costs savings by eliminating a vacant requisition (Opp. at 21:16-20) makes no sense and mischaracterizes Katz's testimony. Kerr's argument of increased cost because of an increase in Hospice staffing ignores the fact that the nurse in question, Anne Hughes was employed before Kerr's layoff and continues to work in various units, not just Hospice. (Riley Decl. ¶20, Exh. E.)

1 **V. KERR HAS FAILED TO DEMONSTRATE MUNICIPAL LIABILITY ON HIS**
 2 **CLAIMS UNDER SECTION 1983.**

3 Kerr contends that municipal liability attaches to his Section 1983 claims because Katz was a
 4 final policymaker with respect to personnel matters and either delegated that authority to Hirose or
 5 ratified her decision regarding Kerr. Kerr contends that Katz's policymaking authority is set forth in
 6 the City's Charter, Administrative Code and the Bylaws adopted by the San Francisco Health
 7 Commission for Laguna Honda Hospital. But Kerr's argument misconstrues the applicable provisions
 8 of City law, and blurs the distinction between Katz's authority as an "appointing officer" to make
 9 employment-related decisions and his lack of authority to set employment-related policy.

10 In deciding whether an employee is a final policymaker, a court "would not be justified in
 11 assuming that municipal policymaking authority lies somewhere other than where the applicable law
 12 purports to put it." *St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988). Under California law, "a city's
 13 Charter determines municipal affairs such as personnel matters." *Hyland v. Wonder*, 117 F.3d 405,
 14 414 (9th Cir. 1997). Here, the City's Charter clearly and unmistakably places final policymaking
 15 authority for personnel matters with the City's Civil Service Commission. San Francisco Charter
 16 Section 10.101, establishes the Commission's powers, providing that it "shall adopt rules, policies and
 17 procedures" to govern the City's merit system including, among other things: applications; leaves of
 18 absence for employees and officers; appointments; promotions; transfers; resignations; lay-offs or
 19 reductions in force; the designation and filling of positions as exempt, temporary, provisional, part-
 20 time, seasonal or permanent; status and status rights; pre-employment and fitness for duty medical
 21 examinations. S.F. Charter § 10.101.

22 Under the Charter, as an exempt employee, Kerr was not required to be "appointed through
 23 competitive examination," which limits the application of only a subset of the Commission's rules,
 24 namely the "competitive civil service examination, appointment, and removal procedures." S.F.
 25 Charter § 10.104. But that exemption is not, as Kerr contends, a blanket exemption from the
 26 Commission's rules or its policymaking authority. Citing to the testimony of the City's 30(b)(6)
 27 witness, Kerr contends that the CSC rules do not apply to exempt employees. But he misstates her
 28 testimony. She testified, consistent with the Charter, that the rules do not apply only with respect to

1 *competitive* civil service rules regarding appointment and removal. (Stephenson Decl. Exh. K, Jacobi
 2 Dep. 37:8-13.) Kerr fails to account for the numerous other rules that apply to all employees. For
 3 example Rule 103 provides that "no person shall be appointed, reduced, removed, or in any way
 4 favored or discriminated against in employment because of . . . other non-merit factors or any other
 5 category provided by ordinance". S.F. Civ. Serv. Comm'n Rule 103; See also S.F. Civ. Serv. Comm'n
 6 Rules 118 (Conflict of Interest), Rule 120 (Leaves of Absence).

7 Kerr asserts final policymaking authority was granted to Katz under the Charter's delegation of
 8 powers to the Public Health Commission. But the Health Commission's authority is limited to setting
 9 policy as its relates to providing public health services and not personnel policy. The Charter provides
 10 that the Health Commission is charged with managing and controlling the City's hospitals, emergency
 11 medical services, and "in general provide for the preservation, promotion and protection of the
 12 physical and mental health of the inhabitants of the City and County." S.F. Charter § 4.110; See also,
 13 Health Commission Rules and Regulations (Amended January 17, 2012)("As a policy making body,
 14 the Commission shall develop guide principles and mission for the provision of public health
 15 services").¹¹ But, the Health Commission's authority to manage and control the City's hospitals
 16 limited to the extent, "the Charter grants such authority to another officer or department." *Id.*; See also
 17 S.F. Charter § 4.126 (a department may adopt rules and regulations "governing matters within the
 18 jurisdiction of their respective departments"). As noted above, authority for employment policy is
 19 expressly granted to the Civil Service Commission.

20 This limitation on the Health Commission's policymaking authority is expressly acknowledged
 21 not only in the Charter and the Health Commission's Rules and Regulation, but also in the Bylaws for
 22 LHH that Kerr relies on. Those Bylaws expressly acknowledge that in operating LHH the Health
 23 Commission's authority is subject to the authority granted in the Charter to other officials and City
 24 departments including "personnel matters placed under the jurisdiction of the Civil Service
 25 Commission." (Stephenson Decl. ¶ 33, Exh. FF at 5.) This limitation is further reflected in the LHH
 26

27 ¹¹ The City requests that the Court take judicial notice of the Health Commission's Rules and
 28 Regulations which are attached as an appendix to this brief. The Rules and Regulations are posted on
 the Health Commission's website at www.sfdph.org/dph/comupg/aboutdph/hc/default.asp

1 Medical Staff Bylaws adopted by the Health Commission. (Riley Decl. ¶23, Exh. H.) The Medical
 2 Staff Bylaws provide a framework for extending medical staff privileges so as to ensure an appropriate
 3 level of medical care at the Hospital. (*Id.*) They do not override the rules established by the CSC. (*Id.*
 4 at 14, 47-48.)¹²

5 What the City's Administration Code does establish is that Katz was the "appointing officer"
 6 for the Department of Public Health. Under Administrative Code Section 2A.30, as a department
 7 head, Katz was the "appointing officer" for both exempt and non-exempt employees. S.F.
 8 Administrative Code § 2A.30. Relying on *Cortez v. County of Los Angeles*, 294 F.3d 1186 (9th Cir.
 9 2002), Kerr contends this delegation of authority is sufficient to tag Katz as the final policymaker for
 10 employment policy. Under Kerr's formulation of the rule, a court need only determine if the
 11 government official had the authority to make the decision in question. But Kerr misstates the holding
 12 in that case and his burden to show municipal liability is significantly more onerous. In *Cortez*, the
 13 Ninth Circuit noted that a court must first identify "particular area or issue for which the official is
 14 alleged to be the final policymaker." *Id.* at 1189. Second, a court must "analyze state law to discern
 15 the official's actual function with respect to the particular area." *Id.* The Court explained, "by
 16 reviewing state law, we seek to ascertain to what degree the municipality has control over the official's
 17 performance of the particular function." *Id.* Thus, the Court made clear that the mere authority to
 18 make a decision is not enough, a court must look to the nature and quality of that authority. *Id.*; See
 19 also *Praprotnik*, 485 U.S. at 126 ("If the mere exercise of discretion by an employee could give rise to
 20 a constitutional violation, the result would be indistinguishable from respondeat superior liability");
 21 *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.12 (1986); *Christie v. Iopa*, 176 F.3d 1231, 1238
 22 (9th Cir. 1999)("Delegating discretion is not equivalent to delegating final policymaking authority").¹³

23
 24 ¹² The LHH Bylaws and Medical Staff Bylaws do not give Katz, as Kerr asserts, authority to
 25 set policy regarding appointments or termination of City employment. These Bylaws related to
 26 appointment to the LHH Medical Staff, *i.e.*, the extension, limitation, and revocation of medical
 privileges. (*Id.*) And like the Charter, Civil Service Rules, and Governmental Conduct Code, the
 bylaws restrain Katz and LHH administrators' discretion relating to such privileges and provide for
 review of decisions impacting them. (*Id.*)

27 ¹³ Kerr's reliance on *McKinley v. City of Eloy*, 705 F.2d 1110 (9th Cir. 1983), similarly is
 28 misplaced. In that case, the Ninth Circuit determined that the city manager who had decision making
 authority regarding employment matters was also the final policymaker. The city manager's
 policymaking authority had been expressly delegated to him. *Id.* at 1116-1117. Under that city's

1 The delegation of authority under Administrative Code Section 2A.30 is a delegation of
 2 discretionary decision making authority. But the Administrative Code does not authorize Katz or any
 3 other department head to make employment policy. Rather, Katz's decision making authority is
 4 restrained by policies that he had no power to establish or change. An official may be found to have
 5 delegated final policymaking authority where their "discretionary decision is [not] 'constrained by
 6 policies not of that official's making' and . . . [not] 'subject to review by the municipality's authorized
 7 policymakers.'" *Christie*, 176 F.3d 1236-37, citing *Praprotnik*, 485 U.S. at 127. Here, the decision
 8 affecting Kerr's employment was constrained by policies not within Katz's control. Significantly, by
 9 the City's Campaign and Governmental Conduct Code specifically prohibits retaliation against
 10 employees who engage in protected speech, and provides for review of any claim of such retaliation.
 11 S.F. Campaign and Governmental Conduct Code § 4.115. Similarly, the Civil Service Rules prohibit
 12 discrimination against any person with respect to their appointment or removal because of race,
 13 gender, age and numerous other protect status including "other non-merit factors or any other category
 14 provided by ordinance". S.F. Civ. Serv. Comm'n Rule 103. These City policies expressly constrained
 15 Katz's decision making authority with respect to the exact type of claims in this case.

16 And to the extent Katz or Hirose departed from these policies prohibiting retaliation, their
 17 conduct cannot be attributed to the City. *Praprotnik*, 485 U.S. at 127 ("When an official's
 18 discretionary decisions are constrained by policies not of that official's making, those policies, rather
 19 than the subordinates departure from them, are the act of the municipality"). *Praprotnik* is instructive.
 20 In that case, the Supreme Court explored the standard for determining *Monell* liability based on the
 21 isolated decisions of municipal officials or employees. The plaintiff, an architect working for the city
 22 of St. Louis, challenged his layoff alleging that he had been the victim of unlawful retaliation.
 23 *Praprotnik*, 485 U.S. 116-118. The plaintiff argued that municipal liability attached because his
 24 supervisors were "appointing authorities" who held the authority to initiate his layoff and, thus, were
 25 policymakers. *Id.* The Court rejected these contentions finding that under the city's Charter, the

26
 27 charter, the city counsel was charged with promulgating rules and regulations for personnel. Both the
 28 Mayor and city manager had testified that the City had delegate the ultimate responsibility for
 personnel decisions to the city manager and admitted that the personnel decisions of the city manager
 represented "official city policy." *Id.* There is no such evidence in this case.

1 power to set employment policy rested with the Mayor, Alderman, and Civil Service Commission. *Id.*
2 at 128-130. Moreover, the Court determined that the fact that the supervisor's decisions were not
3 reviewed for "substantive propriety" by higher officials and that any review of those decision by the
4 Civil Service Commission were circumscribed to give deference to the original decision maker were
5 insufficient to support the conclusion that the supervisors set employment policy for the city. *Id.*

6 Kerr also argues that he can establish *Monell* liability because Katz either delegated his final
7 policymaking authority to Hirose or ratified her decisions. But Katz could not delegate to Hirose
8 powers he did not possess and, as noted above, as he was not the final policymaker he could not by
9 delegation or otherwise make Hirose a final policymaker. Similarly, his alleged ratification of Hirose's
10 decisions did not convert those decisions into final municipal policy.

11 CONCLUSION

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

13 Dated: July 26, 2012

14 DENNIS J. HERRERA
City Attorney
15 ELIZABETH S. SALVESON
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16 JONATHAN C. ROLNICK
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18 By: /s/ Jonathan C. Rolnick
JONATHAN C. ROLNICK

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20 Attorneys for Defendant
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APPENDIX A

HEALTH COMMISSION
RULES AND REGULATIONS

(In accordance with City Charter Section 4.104)

Approved on July 11, 1989
Amended on January 26, 1993
Amended on February 21, 1995
Amended on July 16, 1996
Amended on March 19, 2002
Amended on May 6, 2008
Amended January 17, 2012

Health Commission Authority and Governance

The Commission shall be the Governing Body of the Department of Public Health, which includes San Francisco General Hospital and Laguna Honda Hospital, as well as Community Mental Health, Substance Abuse, Community Public Health, Environmental Health, the Emergency Medical Services Agency, Forensics, and other administrative and service functions. The Commission, consistent with the overall objectives as established by the Mayor and the Board of Supervisors through the adoption of City legislation of the City and County, shall establish policy matters governing the various divisions of the Department and the hospitals, as established by the Mayor and the Board of Supervisors through the adoption of City legislation. As a policy making body, the Commission shall develop guiding principles and mission for the provision of public health services. The Powers and duties of the Commission are in accordance with the City Charter Section 4.102.

Management

The Director of Health shall be the Chief Executive Officer of the Commission and shall carry out the policies set forth by the Commission. The Director of Health shall be responsible for the administration and management of the Department, will represent the Department with governmental bodies, and shall serve as the principal liaison between the Department and the Mayor. The Director of Health is appointed by the Mayor after the Commission submits at least three qualified applicants to the Mayor. The Commission removes the Director of Health. The Mayor may recommend removal of the Director of Health; and the Commission shall act on the Mayor's recommendation by removing or retaining the Director of Health within 30 days. Failure to act on the Mayor's recommendation shall constitute official misconduct. The Health Commission shall annually evaluate the Health Director.

Appointments

Health Commissioners are appointed by the Mayor pursuant to the City Charter Section 3.100. The term of each member is four years. Each Commissioner must be registered to vote in the City and County of San Francisco at all times during their term of office. The Commission shall have less than a majority of direct care providers. Vacancies occurring on the Commission either during or at the expiration of the terms of the Commission shall be filled by the Mayor. The Board of Supervisors may reject a Mayor's appointment by a two third (2/3) vote of the Board within 30 days following transmittal of Notice of Appointment. A Commissioner may be suspended by the Mayor and removed by the Board of Supervisors in accordance with City Charter Section 15.105. A Commissioner shall be removed by the Mayor if the Commissioner is guilty of official misconduct or convicted of a crime involving moral turpitude.

Organization and Election of Officers

The Commission shall select a President and a Vice President from its members on a majority vote at the second meeting in March of each year or whenever there is a vacancy. The President and Vice President shall not serve in their respective office for more than four consecutive years. The President shall preside at all meetings of the Commission, shall preserve order and decorum, shall decide all questions of order subject to appeal to the Commission by any member, and shall in consultation with Commissioners appoint any and all committees of the Commission. The President shall have the right to participate in the proceedings of the Commission.

The Vice President of the Commission shall assume the duties of the President in the President's absence or when the President shall designate the Vice President to act. In the event of the death,

resignation or permanent disability of the President, the Vice President shall act for the President until the Commission elects a President.

Meetings

Meetings of the Commission will be held in the meeting room of the Public Health Department at 101 Grove Street, Room #300 or Room 302, in San Francisco, on every first and third Tuesday of each month at 4:00 p.m., subject to change due to unusual circumstances, with proper notification to all interested parties. If the regularly-scheduled meeting is on a holiday, the meeting date shall be designated by a motion of the Commission.

The Commission shall conduct all of its business in a public forum. Meetings are noticed at the Main Public Library, 101 Grove, the Department of Public Health website and other appropriate public buildings at least 72 hours prior to each meeting.

Special Meetings

Special meetings of the Commission may be called at any time by the President or by a majority of the members of the Commission. Notice of the meeting must be given at least 24 hours prior to the special meeting. The Commission may also hold informational meetings for the purpose of conveying information to the public and to receive information from the public. Informational meetings may be held at any convenient location and date as designated by the Commission. No official business shall be transacted at informational meetings.

Open and Public Meetings

The Commission is governed by provisions of the Ralph M. Brown Act and the San Francisco Sunshine Ordinance, Chapter 67 of the San Francisco Administrative Code.

All Commission meetings shall be open and public and all persons shall be permitted to attend any meeting of the Commission. However, the Commission may, with appropriate notice, meet in closed session to consider and act upon matters authorized by Charter Section 4.104(2), the Ralph M. Brown Act, and the San Francisco Sunshine Ordinance.

Temporary Meeting Place

The Commission may designate some other appropriate meeting place as its temporary meeting place by providing notice to the public.

Attendance

Unless excused, all members of the Commission shall be in their respective seats at the hour appointed for each meeting of the Commission. The Director of Health and the Executive Secretary shall attend Commission meetings unless excused by the President of the Commission. Except in the event of a notified absence (defined below), each member of the Health Commission is expected to attend each regular or special meeting of the Health Commission. The Health Commission Executive Secretary shall maintain a record of members' attendance.

Notified Absences

A member's absence shall constitute a "notified absence" where the member, in advance of the meeting, informs the Health Commission Executive Secretary or other person whom the Health Commission has designated that the member will be absent. An absence due to unforeseen

circumstances such as illness or emergency shall also qualify as a notified absence where the member reports such absence to the Health Commission Executive Secretary as soon as reasonably possible. The Health Commission Executive Secretary shall record as non-notified all absences involving neither advance notice nor unforeseen circumstances.

Reporting of Absences to the Mayor

The Health Commission Executive Secretary shall report all instances of non-notified absences as well as any instance of three consecutive absences of a member from regular meetings to the Mayor.

Annual Attendance Report

At the end of each fiscal year, the Health Commission Executive Secretary shall submit a written report to the Mayor detailing each Health Commissioner's attendance at all meetings of the Health Commission for that fiscal year. The report will include attendance at the Health Commission's Committee meetings.

Quorum

The Health Commission shall have a quorum of four members in order to transact official business. (Charter Section 4.104.)

Call to Order and Roll Call

The President shall call each Commission meeting to order at the appointed hour. Immediately after the call to order, the Executive Secretary to the Commission shall call the roll of the members of the Commission and shall record those present and those absent and shall enter in the minutes the names of those members present at the first roll call as well as the names and time of appearance of those members who arrive subsequent to the first roll call.

Voting

All Commissioners present shall vote on all action items pending before the Commission unless a member is excused from voting by a motion adopted by a majority of the members present (Charter Section 4.104). Action items on the Commission calendar shall be voted on either by roll call vote, voice vote or by a show of hands. The vote on resolutions and motions shall be "ayes" and "nays".

Except as otherwise provided herein, an affirmative vote of the majority of the members of the Commission shall be required for the passage of any resolution or motion. A majority vote of the Commission is four out of seven.

Rules of Debate

When a member desires to address the Commission, he or she shall seek recognition by addressing the presiding officer, and when recognized, shall proceed to speak, confining his or her remarks to the question before the Commission. No discussion shall take place until a resolution or motion has been moved and seconded, or a calendared item has been introduced.

Minutes of the Proceedings

The Executive Secretary of the Commission shall tape record each Commission meeting. The Executive Secretary shall also record the proceedings of each Commission meeting in the minutes of the Commission and shall forward a copy of the minutes to the Mayor, the Board of Supervisors and to the Main Public Library within ten (10) days of the completion of the meeting.

All motions/resolutions will be noted with an indication of who will implement the motion/resolution, what will be implemented, and the date for any requested follow-up report. The Executive Secretary will include any follow-up report as an agenda item on the date specified in the original action. Such follow-up reports may be removed from the agenda only by action of the Commission.

Recess During a Meeting

The Commission meeting may have one or more recesses at the discretion of the President.

Adjournment of Meetings

The Commission may adjourn any regular, special or adjourned special meeting to a time and place specified in the order of adjournment.

Agendas

Agendas for the Commission meetings will be set by the Commission President, in consultation with the Director of Health. The Commissioners may recommend items for consideration through the Executive Secretary of the Commission or Commission President. The Mayor, members of the Board of Supervisors and members of the public may also request items to be considered by the Commission. Requests shall be made by notifying the Executive Secretary.

Items to be Heard by the Commission

Only matters that have been calendared will be heard by the Commission at any meeting, unless action on the item is authorized under the Brown Act and the Sunshine Ordinance. The Commission shall consider information items and action items. The Commission shall approve the budget for the Department, including estimates of revenues and expenditures, reappropriations, accepting and expending grants, receipt of gifts, and contractual agreements. The Commission shall also approve budget modifications, fund transfers, and major program deletions, additions, and changes. Authorization for the Department to accept and expend grants, enter into contractual agreements, accept gifts, or approve expenditures of funds may be made in the form of a motion. The Commission shall review proposed rates, fees and other similar charges. If approved, the Commission shall recommend such rates, fees and other similar charges to the Mayor for submission to the Board of Supervisors.

The Commission shall consider policy matters relating to health needs of the public, including program additions, deletions, or modifications. All declarations of policy shall be made in the form of a resolution.

The Commission shall develop and keep current an Annual Statement of Purpose outlining its areas of jurisdiction, authorities, purpose and goals, subject to review and approval by the Mayor and the Board of Supervisors. The Commission may include in the Annual Statement of Purpose the Annual Report describing the Commission's activities that is required by Charter Section 4.103.

The Executive Secretary shall call each item prior to consideration by the Commission. Discussions by the Commission shall be limited to the items called from the agenda. Each Commission agenda shall have a general discussion item, **Other Business**, during which Commissioners, the Director, and the public may bring up topics for discussion, providing that any action on a topic is taken after

public notice is provided, as well as an agenda item for Announcements/Reports from Commissioners

Public Participation and Testimony

Members of the public are encouraged to attend the meetings and address the Commission on the items under consideration. The President of the Commission shall ask for public comments prior to calling for a vote on action items. Testimony shall be limited to comments pertaining to the items under consideration by the Commission. The President shall be the judge of the pertinence of such comments, and has the authority to limit this privilege if the comments are not pertinent to the question before the Commission or the comments are reiterative of points made by previous speakers. Members of the public may address the Commission on items of interest to the public ~~that are within the subject matter jurisdiction of the Commission that are not on the meeting agenda~~ during general public comment. The Brown Act forbids a Commission from taking action or discussing any item not appearing on the posted agenda, including those items raised at general public comment. Members of the public may address the Commission for up to three minutes each. The President may place a reasonable overall limit on testimony on a particular item. The Executive Secretary may be asked to time the speakers, and notify the speakers when they have exceeded the time limitation. Speakers who wish to testify before the Commission shall be requested to sign up at the beginning of each meeting, but they may remain anonymous if they choose. During public comment to the Commission remarks shall be addressed to the Commission as a whole, not to individual commissioners and not to the audience. When a member of the public is addressing the Health Commission, and when time limits have been placed on public testimony, the Chair of the meeting, in order to afford all public speakers a uniform time limit for testimony, shall allow persons requesting translation assistance to testify for twice the amount of the time limit, thereby providing uniform time for the speaker's testimony, as well as the time necessary for the translation of the testimony for the benefit of the Commissioners and the public. When an agenda item is heard at one meeting and public testimony is taken on the item and the item is continued to the next meeting for deliberation and action, the President of the Commission can preclude individuals who have already provided testimony from testifying at the subsequent meeting. Individuals who have points to make regarding issues that were not raised at the first meeting will be allowed to testify.

Adoption and Amending Rules and Regulations

The adoption of the Rules and Regulations shall be by motion and shall require an affirmative recorded vote of a majority of the members of the Commission.

When adopted, such Rules and Regulations shall remain in effect, unless suspended or amended as provided herein. An amendment to the Rules and Regulations may, after at least two weeks notice, be adopted by the affirmative vote of a majority of the members of the Commission.

Rules of Order

Unless provided herein, Robert's Rules of Order shall guide the Commission in its proceedings.

Suspension of the Rules and Regulations

Except for this rule and such other rules already stated in the Charter, ordinances or resolutions by the Board of Supervisors, or other provisions of the law, any of these Rules and Regulations may be

suspended by the affirmative vote of two thirds (2/3's) of the members of the Commission, provided that such suspension is entered in the minutes of the Commission.

A motion to suspend the Rules and Regulations is debatable.

Reports

For each Commission meeting, the Executive Secretary shall provide the Commission with written reports prepared by the Department providing background information on the items under consideration. The Executive Secretary shall provide all resolutions recommended by Department of Public Health staff for consideration by the Commission, and shall amend the resolutions as directed by the Commission. The Executive Secretary shall make available to the public copies of resolutions under consideration at the Commission meeting.

For each Commission meeting, the Director of Health shall provide the Commission with a summary of pertinent information on the operations of the Department. The Director's Report shall be summarized in the Commission's minutes.

Committees

The Commission shall have committees to review the policies, operations and directions of the Department. Committees may be appointed by the President as necessary. Policies shall be considered and established by the whole Commission. The President of the Commission will appoint one Commissioner to be a liaison to any other appropriate body needing Commission representation.

The Commission President is an "ex-officio" member of every Committee of the Commission and has the right to vote on the Committee. A majority of the members of the Health Commission may be in attendance and vote at committee meetings. However there will be no discussion of or deliberations on any matter not on the committee agenda. Committees will be noticed as a meeting of the full Commission in the event that a quorum is present under Sec. 67.3(b)(1) of the San Francisco Administrative Code.

Joint Conference Committees for Quality Assurance

At least two members of the Health Commission shall serve on the Joint Conference Committee for Quality Assurance at San Francisco General Hospital and at least two members of the Commission shall serve on the Joint Conference Committee for Quality Assurance at Laguna Honda Hospital as required under the policies of the Joint Commission on Accreditation of Hospitals. A Commissioner shall chair each Conference Committee for Quality Assurance.

Joint Conference Committee meetings shall be open to the public. However, Joint Conference Committees may, with appropriate notice, meet in Closed Session to consider and act upon matters authorized by Charter Section 4.104(2), the Ralph M. Brown Act, the San Francisco Sunshine Ordinance, California Evidence Code Sections 1157(a) and (b), Health and Safety Code Section 1461, the California Constitution, Article I, Section 1, and any other applicable laws. The agendas for the Joint Conference Committees for Quality Assurance shall be set by the Chair of the Committee, in consultation with the administrator of the hospital or deputy of a division.

Role of the Executive Secretary

The Commission shall appoint an Executive Secretary to manage the affairs and operations of the Commission. The Executive Secretary shall serve at the pleasure of the Commission. In the performance of all duties, the Executive Secretary shall be responsible to the Commission and shall report directly to the President of the Commission.

The Executive Secretary shall handle Commission correspondence and shall respond to letters and inquiries on behalf of the Commission. The Executive Secretary shall record the actions of the Commission and shall maintain minutes of the Commission meetings. The Executive Secretary shall prepare the agenda and notice for each Commission meeting, brief members of the Commission on agenda items, and may provide analyses on budgetary, programmatic and policy items under consideration by the Commission.

The Executive Secretary has the authority to review and sign financial and personnel transaction records, leases, and purchase orders on behalf of the Commission. The Executive Secretary shall review and sign all ordinances and resolutions upon approval of the Commission. The Executive Secretary shall perform such other duties as defined by the Commission. The Commission shall annually evaluate the Executive Secretary.