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ELECTRONICALLY

FILEDSuperior Court of California,
County of San Francisco**APR 06 2015**

Clerk of the Court

BY: VANESSA WU

Deputy Clerk

8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

10 KELLY O'HAIRE,
11 Plaintiff,

vs.

12 CITY AND COUNTY OF SAN
13 FRANCISCO, GREG SUHR and DOES 1-
14 100,

Defendant

) Case No.: CGC-13-531419

) **DECLARATION OF D. JAN DUFFY IN**
) **SUPPORT OF PLAINTIFF'S**
) **OPPOSITION TO DEFENDANT'S**
) **MOTION FOR PROTECTIVE ORDER**
) **THAT THE DEPOSITION OF THE**
) **MAYOR OF SAN FRANCISCO NOT BE**
) **TAKEN**

) Date: April 7 2015

Time: 9:30 a.m.

Judge: TBD

Dept.: TBD

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DECLARATION OF JAN DUFFY IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION FOR PROTECTIVE ORDER

O'Haire v City of San Francisco, et al. Case No. CGC-13-531419

1 I, D. JAN DUFFY, declare,

- 2 1. I have been retained by Plaintiff Kelly O'Haire as an expert in management practices and
3 investigations (or lack thereof) by management of the San Francisco Police Department
4 (SFPD) and the City and County of San Francisco (CCSF). I have previously qualified to
5 testify as an expert in these matters in state and federal courts more than 60 times and
6 have testified in deposition and/or trial in more than 175 cases.
- 7 2. I obtained my bachelor's degree from Stanford University in 1972 and my juris doctorate
8 from Case Western Reserve University in 1976. From 1976 – 1977, I was an associate
9 attorney in the private labor practice at Jones, Day, Reavis & Pogue, Cleveland, Ohio.
10 From 1978 – 1980, I was an associate in the private labor practice at Orrick, Herrington
11 & Sutcliffe, San Francisco, California. From 1983 – 1991, I was of counsel for labor and
12 employment matters with Sinsheimer, Schiebelhut and Baggett, San Luis Obispo,
13 California. From 1980 to 1984 I was an Associate Professor of Business, College of
14 Business at California Polytechnic State University, San Luis Obispo. From 1984 to 1998
15 I was a Professor of Law and Global Strategy, College of Business at California
16 Polytechnic State University, San Luis Obispo. Since 1991 I have been an Employment
17 Educator and Management Consultant at Management Practices Group, Inc., San
18 Francisco, California. My CV is attached as Exhibit A.
- 19 3. A significant portion of my current work with Management Practices Group, Inc. relates
20 to prevention, correction, deterrence, and remediation of retaliation against employees
21 who engage in protected activity or who refuse to engage in improper activity. As a
22 management consultant, I advise employers as to appropriate policies, procedures, and
23 programs to prevent retaliation and the appearance of retaliation. I also engage in
24 independent fact-finding or investigation on behalf of employers to help them detect,
25 correct, deter and remedy retaliation or alleged retaliation. As an educator, I have
26 published several articles and papers on effective prevention of retaliation and have
27 engaged in numerous seminars and public presentations related to handling
28 whistleblowers properly as well as conducting effective retaliation complaint

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1 investigations. In 2007, I studied for and passed an examination offered by the Society
2 for Corporate Compliance and Ethics to achieve certification as an Ethics and
3 Compliance Professional. A major component of this Certification relates to the
4 prevention and correction of retaliation. I have also frequently served both plaintiffs and
5 defendants in state and federal court as well as arbitration in cases related to
6 whistleblowing or other aspects of retaliation in the workplace. Finally, between
7 approximately 1999 and 2001, I served as the consultant to a class action decree against
8 the Los Angeles County Sheriff's Department. My work involved designing more
9 effective prevention and correction programs relating to discrimination, harassment, and
10 retaliation and Internal Affairs intake, investigation, and remediation of employee
11 complaints.

- 12 4. In forming my opinions in this case I have reviewed the following documents: The First
13 Amended Complaint, CCSF Employee Handbooks 2008 and 2012 editions, documents
14 related to CCSF whistleblower program, the City Charter, the depositions, including
15 exhibits, of Kelly O'Haire, Greg Sutr, Thomas Shawyer, Alice Villagomez, Deborah
16 Landis, James Lynch, Denise Schmitt, and the declarations of Jerry Tidwell, Paget
17 Mitchell, and Kelly O'Haire in support of Plaintiff's Opposition to Defendant's Motion
18 for Summary Judgment.
- 19 5. Employers such as the SFPD and CCSF have a duty to prevent, correct, remedy and deter
20 whistleblower retaliation. This duty has its basis in four sources: in public policy under
21 the California Labor Code and other anti-retaliation statutes; under federal and state
22 whistleblower protection statutes and advisory guidance, particularly that offered by the
23 Federal Sentencing Guidelines for Organizations that essentially mandate employers to
24 have an effective compliance program whereby employees can report potential or actual
25 criminal activity without fear of retaliation; in legal precedent, including United States
26 Supreme Court precedent such as Crawford v. Metropolitan Government of Nashville
27 and Davidson County, Tenn. (2009) 555 U.S. 271; and in the extensive body of
28 knowledge relied upon by compliance professionals in advising and assisting employers

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1 as to their obligations and relevant standard of care regarding necessary anti-retaliation
2 measures in the workplace.

3 6. Employers have a duty to respond effectively to retaliation concerns and complaints.

4 This usually includes by conducting appropriate, prompt, thorough, accurate and fair
5 investigations or fact-finding when retaliation concerns are known or should be known.

6 Based on my review of the evidence in this case, I am of the opinion that, as the head of
7 CCSF and as the direct superior of SFPD Chief Greg Suhr, Mayor Lee had a duty under
8 usual and appropriate management practices standards to initiate an appropriate response,
9 including investigation, into potentially retaliatory conduct raised by Kelly O'Haire over
10 her treatment by then SFPD Chief Greg Suhr. Despite apparently being informed by
11 former Police Chief George Gascon of retaliation concerns, Mayor Lee failed to initiate a
12 thorough investigation (and/or direct that an investigation be undertaken by an
13 appropriate party). The only thing that Mayor Lee appears to have done in response to
14 the District Attorney's report of concern about Greg Suhr's termination of Kelly O'Haire
15 was speak to Greg Suhr, the person accused of retaliation. This was manifestly
16 inadequate. An appropriate response including a necessary investigation would have
17 included interviewing other witnesses to the decision-making behind the termination of
18 Kelly O'Haire, interviews of witnesses related to the alleged protected activity, and
19 especially would have included interviewing the complaining employee, Kelly O'Haire.

20 7. Usual and appropriate management practices related to effective anti-retaliation measures
21 clearly require organizations to set the tone from the top. When the head of CCSF sets
22 the tone to his subordinate managers (such as Chief of Police Greg Suhr) that retaliation
23 concerns will not be investigated or otherwise effectively addressed, the organization
24 fails to operate under the basic standard of care to prevent and correct retaliation. This in
25 turn emboldens wrongdoers and deters potential whistleblowers from reporting suspected
26 illegal activity.

27 8. The head of an organization, including the head of a public entity, has a duty to assure
28 that actual retaliation against whistleblowers is detected and remedied. If Mr. Lee had

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O'Haire v City of San Francisco, et al. Case No. CGC-13-531419

1 conducted or directed an appropriate investigation and discovered that there was in fact
2 whistleblower retaliation against Kelly O'Haire, a question that now can only be
3 answered by the jury in this case, he would have had a duty under usual and standard
4 management practices to remedy the retaliation against Kelly O'Haire by reinstating her
5 to her position and communicating to Greg Suhr and all of the organization's employees
6 that retaliation is not acceptable and will not be tolerated.

7 I declare under penalty of perjury under the laws of the State of California that the foregoing is
8 true and correct.

9 Executed this 6 th day of April, 2015, at San Francisco, California.

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11 By: 
12 D. Jan Duffy
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O'Haire v City of San Francisco, et al. Case No. CGC-13-531419