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FILED
SAN FRANCISCO COUNTY
SUPERIOR COURT

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12 **SUPERIOR COURT OF CALIFORNIA**
13 **COUNTY OF SAN FRANCISCO**
14 **UNLIMITED CIVIL JURISDICTION**

15 DEREK KERR,
16 Plaintiff,
17
18 v.

Case No.: **SBC-10-505443**
COMPLAINT FOR DAMAGES AND
DEMAND FOR JURY TRIAL

19 THE CITY AND COUNTY OF SAN
20 FRANCISCO, MITCHELL H. KATZ, MIVIC
21 HIROSE, COLLEEN RILEY, and DOES 1
22 through 25,
23 Defendants.

CASE MANAGEMENT CONFERENCE SET
MAR 18 2011 10⁰⁰AM
DEPARTMENT 212

24 Plaintiff alleges:

25 1. Plaintiff DEREK KERR (hereafter "Plaintiff" or "KERR") is a physician and was
26 employed in good standing at Laguna Honda Hospital in the City and County of San Francisco
27 for over 21 years.

28 2. Defendant the CITY AND COUNTY OF SAN FRANCISCO (hereafter "CCSF") is a
public entity subject to suit under 42 U.S.C. §1983, California Government Code §53298,
California Labor Code §1102.5, and Health & Safety Code §1432.

1 3. Plaintiff is informed and believes and on that basis alleges that defendant MITCHELL
2 H. KATZ, (hereafter "KATZ") is a person subject to suit under 42 U.S.C. §1983, Gov. Code
3 §53298, and Health & Safety Code §1432.

4 4. Plaintiff is informed and believes and on that basis alleges that defendant MIVIC
5 HIROSE (hereafter "HIROSE") is a person subject to suit under 42 U.S.C. §1983, Gov. Code
6 §53298, and Health & Safety Code §1432.

7 5. Plaintiff is informed and believes and on that basis alleges that defendant COLLEEN
8 RILEY (hereafter "RILEY") is a person subject to suit under 42 U.S.C. §1983, Gov. Code
9 §53298, and Health & Safety Code §1432.

10 6. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as
11 DOES 1 through 25, inclusive, and therefore sues these Defendants by such fictitious names.
12 Plaintiff will amend this complaint to allege their true names and capacities when ascertained.
13 Each of these fictitiously named Defendants is responsible in some manner for the occurrences
14 herein alleged, and Plaintiff's injuries as herein alleged were proximately caused by the
15 aforementioned Defendants.

16 7. Each of the Defendants was the agent and employee of each of the remaining
17 Defendants and, in doing the things herein alleged, was acting within the course and scope of
18 such agency and employment.

19 8. The unlawful employment practices complained of herein occurred within the City
20 and County of San Francisco.

21 9. On September 18, 2009 KERR and coworker Maria Rivero, M.D., filed a complaint
22 through the San Francisco Controller's Whistleblower Program and with the San Francisco
23 Ethics Commission alleging, inter alia, financial conflicts of interest and improper compensation
24 of Department of Public Health officers and employees directed at certain individuals who were
25 providing services for the City and at City expense.

26 10. On September 21, 2009 KERR and Dr. Rivero filed a complaint through the San
27 Francisco Controller's Whistleblower Program and with the San Francisco Ethics Commission
28 alleging a conflict of interest directed at defendant KATZ, the Director of the San Francisco

1 Department Public Health, regarding his relationship with Health Management Associates, a
2 company providing advisory services to the Department of Public Health and the City Controller.

3 11. On November 10, 2009 Dr. Rivero made a request for certain documents relating to
4 the Laguna Honda Hospital Gift Fund. On March 2, 2010 KERR and Dr. Rivero sent a
5 complaint to the San Francisco Controller's Whistleblower Program and to the San Francisco
6 Ethics Commission alleging mismanagement and misappropriation of funds relating to the
7 Laguna Honda Hospital Fund, specifically identifying defendant HIROSE as a responsible party.

8 12. The March 2, 2010 ethics complaint was received by the San Francisco Controller on
9 March 4, 2010 at 10:39 a.m. The same complaint was received by the San Francisco Ethics
10 Commission on March 4, 2010 at 12:02 p.m. and, plaintiff is informed and believes, said
11 complaint was promptly faxed to the San Francisco District Attorney. At approximately 3:30
12 p.m. that same day, KERR's union representative, Patricia Hernandez of the Union of American
13 Physicians and Dentists ("UAPD"), was informed by Willie Ramirez of Human Resources that
14 KERR would be receiving a permanent lay off notice. Ramirez explained that KERR's layoff
15 was due to a "program change" in the Laguna Honda Hospital Hospice & Palliative Care
16 Program.

17 13. On March 5, 2010 KERR was informed that he was being laid off and his employment
18 with the City was terminated effective June 11, 2010. On that same day defendant RILEY, the
19 Laguna Honda Hospital Director, issued a Medical Staff Memo indicating that KERR's layoff
20 was "due to the budget initiatives submitted in December 2009."

21 14. On March 8, 2010 RILEY and Ramirez stated to KERR that his layoff was "part of
22 the negotiated December 2009 Mid-Year Cuts" and provided KERR a copy of the Mid-Year
23 Cuts. Nowhere in the Mid-Year Cuts is there any mention of the elimination of KERR's
24 position, nor did CCSF engage in the required Meet and Confer process relating to the potential
25 elimination of KERR's position with KERR's union representative, nor was KERR offered any
26 opportunity to reduce his hours or otherwise modify the terms of his employment, nor was
27 KERR, who is Board Certified in General Internal Medicine, offered another position at the
28 hospital despite the need for doctors with his qualifications.

1 15. Preceding KERR's layoff the following events occurred. In a January 4, 2010
2 Medical Staff Memo issued by RILEY addressing the December 2009 Mid-Year Cuts, she
3 explained that proposed cuts related to a "2232 classification . . . for night and weekend
4 coverage" – the "0.55 FTE" position as described in the Mid-Year Cuts – which position is
5 unrelated to KERR's "0.75 FTE" position.

6 16. On February 25, 2010 RILEY confirmed in a Medical Staff Meeting that as a result of
7 the December 2009 Mid-Year Cuts it was proposed that the hospital have a "0.55 FTE" cut.
8 Shortly thereafter the physician affected by the cut was engaged in the required Meet and Confer
9 process regarding the proposed elimination of his position, and through that process the
10 physician was reassigned to a 2230 position and thereby continued his employment with CCSE.

11 17. On March 3, 2010 at 12:44 p.m. RILEY sent an email to KERR requesting that he
12 serve on a newly forming subcommittee, the Resident Fund Task Group.

13 18. On March 4, 2010 RILEY confirmed in a Medical Staff Meeting that the only planned
14 "FTE" cut was the "0.55 FTE" position that had been previously announced and discussed.

15 19. Less than two hours later, and several hours after the San Francisco Ethics
16 Commission, the San Francisco District Attorney, and the San Francisco Controller received
17 KERR's complaint regarding the Gift Fund referenced in paragraphs 11 and 12 above, KERR's
18 union representative was informed that KERR's position was being eliminated.

19 20. Plaintiff is informed and believes that at no time prior to March 8, 2010 were any of
20 his fellow physicians, the Department of Medicine Chief of Staff, Steven Thompson, the Clinical
21 Chief of the Laguna Honda Hospital Medicine Service, Monica Banchemo-Hasson, or any of the
22 key staff members of the Hospice Program Interdisciplinary Team (Nurse Manager, Attending
23 Physician, Social Worker, Activity Therapist, Chaplain, Volunteer Coordinator) informed of a
24 program change to the Hospice & Palliative Care Program.

25 21. Nowhere in the Minutes of the Department of Public Health's Integration Steering
26 Committee (responsible for integrating and coordinating Department of Public Health programs)
27 is there any mention of a program change for the Laguna Honda Hospital Hospice & Palliative
28 Care Program through March 2010.

1 22. Nowhere in the Minutes of the Laguna Honda Hospital Executive Committee
2 (responsible for overseeing and managing all programs at Laguna Honda Hospital) is there any
3 mention of a program change for the Laguna Honda Hospital Hospice & Palliative Care Program
4 through February 2010.

5 23. In KERR's December 23, 2009 Annual Performance Appraisal, Medical Director
6 Hosea Thomas stated under "Work Plan for Next Reporting Period: Continue Hospice and
7 Palliative Care. Facilitate transition of Hospice Services to the new facility."

8 24. On March 15, 2010 KERR filed a Whistleblower Retaliation Complaint with the San
9 Francisco Ethics Commission alleging that his termination was in retaliation for the multiple
10 ethics complaints described above

11 25. KERR filed a government claim with the City and County of San Francisco on
12 September 2, 2010 alleging, inter alia, retaliatory termination. Said claim was denied on October
13 14, 2010.

14 26. KERR filed a claim with the California Labor Commissioner on September 2, 2010
15 alleging termination in violation of California Labor Code §1102.5. Additionally, on November
16 16, 2010 KERR gave notice, via certified mail, to the Division of Labor Standards Enforcement
17 of his intention to file a private lawsuit as against CCSF, KATZ, HIROSE, and RILEY alleging,
18 among other things, violations of California Labor Code §1102.5.

19
20 **FIRST CAUSE OF ACTION**
21 **(Deprivation of First Amendment Freedom of Speech, 42 U.S.C. §1983)**
22 **(Against all Defendants)**

23 27. The allegations of the preceding paragraphs are realleged as if fully set forth below.

24 28. 42 U.S.C. §1983 states that "[e]very person who, under color of any statute,
25 ordinance, regulation, custom, or usage, of any State . . . causes to be subjected, any citizen of
26 the United States or other person within the jurisdiction thereof to the deprivation of any rights,
27 privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured
28 in an action at law, suit in equity, or other proper proceeding for redress."

1 29. CCSF acted under color of state law when it deprived KERR of his First Amendment
2 right to Freedom of Speech.

3 30. CCSF retaliated against KERR by terminating him, at least in part, because 1) he
4 spoke on a matter of public concern; 2) he spoke as a private citizen, not just a public employee;
5 and 3) his protected speech was a substantial or motivating factor in CCSF's termination of him.

6 31. Each of the individual defendants – KATZ, HIROSE, RILEY – participated in or
7 directed the retaliatory termination, or knew of the retaliatory termination and failed to act to
8 prevent it.

9 32. As a proximate result of Defendants' retaliatory actions against KERR, as alleged
10 above, KERR has been harmed in that KERR has suffered the loss of wages, benefits, and
11 additional amounts of money KERR would have received if KERR had had not been subjected
12 to the retaliation alleged above. Additionally, KERR has been harmed in that KERR has
13 suffered humiliation, mental anguish, and emotional and physical distress. As a result of such
14 retaliation and consequent harm, KERR has suffered damages in an amount according to proof.

15 33. The above-cited actions of Defendants KATZ, HIROSE and RILEY in subjecting
16 KERR to gross retaliation were done with malice, fraud and/or oppression, and in reckless
17 disregard of KERR's Constitutional rights.

18
19 **SECOND CAUSE OF ACTION**

20 **(Deprivation of Fourteenth Amendment Due Process, 42 U.S.C. §1983)**
21 **(Against all Defendants)**

22 34. The allegations of the preceding paragraphs are realleged as if fully set forth below.

23 35. Violations of procedural due process may also be redressed under a 42 U.S.C. §1983
24 claim.

25 36. KERR's procedural due process rights were violated because CCSF interfered with a
26 liberty/property interest and the procedures attendant upon that deprivation were not sufficient.

27 37. KERR, as a public employee, has a property interest in employment and must be
28 afforded preremoval due process rights.

1 38. KERR was entitled to "notice of the proposed action, the reasons therefore, a copy of
2 the material upon which the action is based, and the right to respond, either orally or in writing,
3 to the authority initially imposing the action." CCSF did not provide KERR with the procedural
4 due process rights to which he was entitled as set forth above.

5 39. CCSF further deprived KERR of his procedural due process rights because the
6 proceedings under which KERR was terminated were biased in that the decision makers KATZ
7 and HIROSE were themselves the subject of various ethics complaints made by KERR.

8 40. Each of the individual defendants – KATZ, HIROSE, RILEY – participated in or
9 directed the denial of KERR's due process rights as described above, or knew of the deprivation
10 and failed to act to prevent it.

11 41. As a proximate result of Defendants' deprivation of KERR's due process rights, as
12 alleged above, KERR has been harmed in that KERR has suffered the loss of wages, benefits,
13 and additional amounts of money KERR would have received if KERR had had not been
14 subjected to the retaliation alleged above. Additionally, KERR has been harmed in that KERR
15 has suffered humiliation, mental anguish, and emotional and physical distress. As a result of
16 such retaliation and consequent harm, KERR has suffered damages in an amount according to
17 proof.

18 42. The above-cited actions of Defendants KATZ, HIROSE and RILEY depriving KERR
19 of his due process rights were done with malice, fraud and/or oppression, and in reckless
20 disregard of KERR's Constitutional rights.

21
22 **THIRD CAUSE OF ACTION**
23 **(California Government Code §53298)**
24 **(Against all Defendants)**

25 43. The allegations of the preceding paragraphs are realleged as if fully set forth below.

26 44. California Government Code §53298 prohibits reprisals against any employee who
27 files a complaint regarding gross mismanagement or a significant waste of funds, or an abuse of
28 authority.

1 45. KERR filed multiple ethics complaints, as alleged above, and was thereafter subject to
2 retaliatory termination as described herein.

3 46. Each of the individual defendants – KATZ, HIROSE, RILEY – participated in or
4 directed the retaliatory termination, or knew of the retaliatory termination and failed to act to
5 prevent it.

6 47. As a proximate result of Defendants' retaliatory actions against KERR, as alleged
7 above, KERR has been harmed in that KERR has suffered the loss of wages, benefits, and
8 additional amounts of money KERR would have received if KERR had had not been subjected
9 to the retaliation alleged above. Additionally, KERR has been harmed in that KERR has
10 suffered humiliation, mental anguish, and emotional and physical distress. As a result of such
11 retaliation and consequent harm, KERR has suffered damages in an amount according to proof.

12 48. The above-cited actions of Defendants KATZ, HIROSE and RILEY in subjecting
13 KERR to gross retaliation were done with malice, fraud and/or oppression, and in reckless
14 disregard of KERR's statutory rights as defined in California Government Code §53298.

15
16 **FOURTH CAUSE OF ACTION**
17 **(California Health & Safety Code §1432)**
18 **(Against all Defendants)**

19 49. The allegations of the preceding paragraphs are realleged as if fully set forth below.

20 50. California Health & Safety Code §1432 prohibits discrimination or retaliation against
21 any employee for initiating or participating in proceedings relating to care, services, or
22 conditions of a long-term health facility.

23 51. KERR filed multiple ethics complaints, as alleged above, and was thereafter subject to
24 retaliatory termination as described herein.

25 52. Each of the individual defendants – KATZ, HIROSE, RILEY – participated in or
26 directed the retaliatory termination, or knew of the retaliatory termination and failed to act to
27 prevent it.

28 53. As a proximate result of Defendants' retaliatory actions against KERR, as alleged
above, KERR has been harmed in that KERR has suffered the loss of wages, benefits, and

1 additional amounts of money KERR would have received if KERR had had not been subjected
2 to the retaliation alleged above. Additionally, KERR has been harmed in that KERR has
3 suffered humiliation, mental anguish, and emotional and physical distress. As a result of such
4 retaliation and consequent harm, KERR has suffered damages in an amount according to proof.

5 54. The above-cited actions of Defendants KATZ, HIROSE and RILEY in subjecting
6 KERR to gross retaliation were done willfully.

7
8 **FIFTH CAUSE OF ACTION**
9 **(California Labor Code §1102.5)**
10 **(Against CCSF)**

11 55. The allegations of the preceding paragraphs are realleged as if fully set forth below.

12 56. California Labor Code §1102.5 prohibits retaliation against any employee for
13 disclosing information to a government or law enforcement agency, where the employee has
14 reasonable cause to believe that the information discloses a violation of state or federal statute, or
15 a violation or noncompliance with a state or federal rule or regulation.

16 57. KERR filed multiple ethics complaints, as alleged above, and was thereafter subject to
17 retaliatory termination as described herein.


18 58. As a proximate result of Defendant CCSF's retaliatory actions against KERR, as
19 alleged above, KERR has been harmed in that KERR has suffered the loss of wages, benefits,
20 and additional amounts of money KERR would have received if KERR had had not been
21 subjected to the retaliation alleged above. Additionally, KERR has been harmed in that KERR
22 has suffered humiliation, mental anguish, and emotional and physical distress. As a result of
23 such retaliation and consequent harm, KERR has suffered damages in an amount according to
24 proof.

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3 WHEREFORE, Plaintiff prays for judgment as follows:

- 4 1. For back pay, front pay, and other monetary relief according to proof;
- 5 2. For general damages according to proof;
- 6 3. For punitive damages in an amount appropriate to punish defendants KATZ,
7 HIROSE, and RILEY for their wrongful conduct and set an example for others;
- 8 4. For injunctive relief;
- 9 5. For interest on the sum of damages awarded according to proof;
- 10 6. All penalties required by California law, including but not limited to Labor
11 Code §§ 206, 218.6, 1102.5, Health & Safety Code §1432, Government Code
12 §53298.5, and all other applicable authority;
- 13 7. For reasonable attorney's fees and costs, including expert witness fees, pursuant
14 to 42 U.S.C. §1988(b), California Code of Civil Procedure §1021.5, California
15 Government Code §53298.5, California Labor Code §§ 218.5, 1102.5,
16 California Health & Safety Code §1432, and all other applicable authority;
- 17 8. For costs of suit herein incurred; and
- 18 9. For such other and further relief as the court deems proper.
- 19

20 Dated: November 12, 2010

21 KOCHAN & STEPHENSON


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23 
24 Mathew Stephenson
25 Attorneys for Plaintiff
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27
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DEMAND FOR JURY TRIAL

1
2 Plaintiff hereby demands a trial for each and every claim for which he has a right to a
3 jury trial.

4 Dated: November 12, 2010

5 KOCHAN & STEPHENSON

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8 _____
9 Mathew Stephenson
10 Attorneys for Plaintiff
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