Retaliation and Bullying of City Employees

High Costs of City Attorney's Advice

by Patrick Monette-Shaw

Dr. Kerr sporting a "Speak Truth to Power" ID badge on May 8.

Spurious legal arguments creatively developed by Deputy City Attorneys to fight lawsuits against the City — often with the supervisory approval of the City's Chief Labor Attorney and probably City Attorney Dennis Herrera himself — may be so misguided as to be costing the City millions of dollars, year in and year out, and may be damaging the reputation of the City Attorney's Office.

The City Attorney and the City appear to be laboring under the age-old adage that there's plenty of money for "Defense" (of City officials), but no money for "Butter" — relief for plaintiffs harmed who are forced to sue the City.

Troubling developments in Dr. Derek Kerr's settlement agreement against the City for $750,000 have occurred since the *Westside Observer* first published details of his settlement terms in our April issue.

In addition, new information has surfaced regarding the 105 settlement agreements involving prohibited personnel practices against the City that have cost taxpayers at least $12.1 million over a six-year period, showing a disturbing trend in how the San Francisco City Attorney's Office mounts its legal defense in these cases.

"The City Attorney tried to use every pretext, lie, and smear used by the Defendants in my case to deny their whistleblower retaliation. The evidence from sworn depositions and subpoenaed documents — plus their pitiful contradictions — sank their defense," says Dr. Derek Kerr, who was awarded monetary and non-monetary damages in his wrongful termination lawsuit settled against the City last month.

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Developments in Kerr's Settlement Agreement

As the ***Observer* reported** in April, Dr. Kerr's settlement agreement included five non-monetary terms. Following the Board of Supervisors unanimous passage on second reading of Kerr's settlement agreement on March 26, the City appears to have already deliberately mucked up at least three of Kerr's non-monetary settlement deals.

First, the non-monetary provisions ordered the City to issue a formal retraction signed by Director of Public Health Barbara Garcia in the ***same*** format that former Director of Public Health Mitch Katz jointly issued with Laguna Honda Hospital (LHH) CEO Mivic Hirose in 2010, **falsely accusing Drs. Kerr and Maria Rivero** of not only being "detractors," they publicly claimed Kerr and Rivero had made, and would continue to make, "false statements" — publicly defaming the two doctors as dishonest and liars.

But Garcia's **initial "retraction" notice** was not signed by her, and was not in the same format that had been issued by Katz, which had been a key requirement of Kerr's settlement agreement. Since the settlement agreement takes place under Court supervision, Kerr is required to report any departure from agreed-upon terms to his attorneys, in order to prevent any breach of his non-monetary settlement terms. After Garcia's departure from Kerr's settlement agreement terms was reported to the City Attorney, she was required to issue a "do-over," and a **revised retraction notice** in the correct format has now been posted on the Department of Public Health's web site.

"'Kerr is required to report any departure from agreed-upon terms to his attorneys, in order to prevent any breach of his non-monetary settlement terms."

Second, the City's required public apology to Kerr at a meeting of the City's Public Health Commission was improperly announced via a deficient agenda notice for the Health Commission's April 2 meeting.

On Friday, March 29, the Health Commission released its April 2 meeting **agenda**, which listed agenda item seven merely as an "LHH Update." The item carried only a subheading, not any "meaningful description" required by the Sunshine Ordinance and the Brown Act. Members of the public had no way of knowing the "LHH Update" item would include Dr. Kerr's public apology so they may have chosen to attend the meeting, had there been a clear agenda description. Only by a stroke of accident did Kerr's associate, Dr. Rivero, discover over the weekend that the "**LHH Update**" item would include Kerr's public apology.

Once alerted, Dr. Kerr's supporters were quickly notified, and 32 speakers attended the Health Commission's April 2 meeting, all **unanimously testifying** in support of Kerr's contributions to Laguna Honda Hospital's hospice program. Had there been sufficient agenda notice, Kerr estimates attendance would have easily doubled.

Nobody spoke in support of Kerr's oppressors, particularly not in support of Mivic Hirose, LHH's CEO. Perhaps Hirose didn't want her lackey subordinates and supporters to witness her having to publicly apologize to Kerr. Curiously, LHH's highly-paid public information officer, Marc Slavin, was missing in action as a no-show, rather than standing beside his incompetent boss, as he typically does during public meetings.

Given the deficient agenda notice, a Sunshine Ordinance Task Force complaint has been filed by Dr. Rivero and this author regarding the Health Commission's ongoing, deficient agenda notices. We'll keep you posted on how the Sunshine Task Force rules on the complaint.

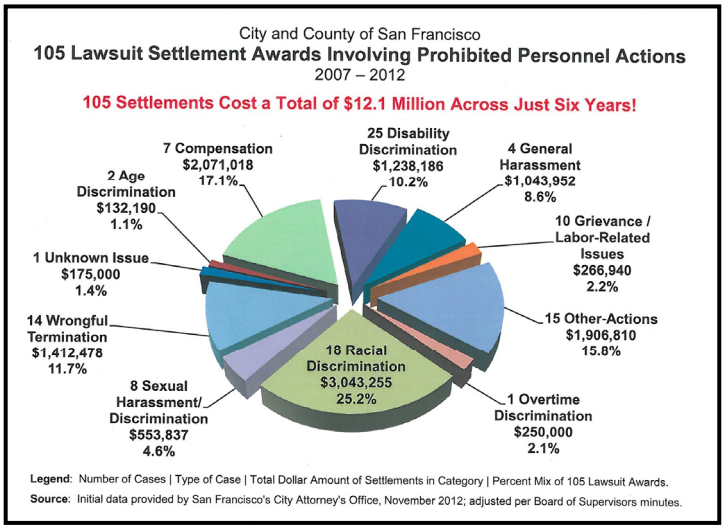

Figure 1: Corrected settlement data from the City Attorney's Office.

Third, Kerr's settlement agreement provided that Hirose would read into the minutes of LHH's 40-member senior Leadership Forum the **commendation letter co-signed** by Dr. Colleen Riley, LHH's Medical Director and Dr. Steven Thompson, LHH's Chief of Staff. But Hirose instead read the letter into the minutes of LHH's much smaller Executive Committee on April 23, after which Kerr stated "We are glad that we exposed misconduct. If any of you want to blow the whistle, please contact us, " as he was leaving copies of an ***Epoch Times*** news article for the Executive Committee. Like Garcia, Hirose was required to make a "do-over." On May 8, Hirose finally read Kerr's commendation letter into the minutes of the Leadership Forum, as Kerr and Rivero wore home-made "Speak Truth to Power" ID badges after being asked not to bring handouts to the Leadership Forum do-over.

"Guns" or "Butter"?

There's little injured-party relief ("Butter") when it goes to legal Defense costs ("Guns").

> **"Deputy City Attorneys spent a total of 43,195 hours at a total cost of $8.3 million — above and beyond the nearly $12.1 million in settlement awards — defending the 105 cases against the City involving prohibited personnel practices. We're talking at least $20.4 million in preventable waste of taxpayer funds."**

On April 16, the *San Francisco Examiner* carried **an article by Chris Roberts** regarding the $11 million awarded in the 103 prohibited personnel practice cases, which Dr. Kerr uncovered through a public records request to the City Attorney and which this reporter performed a secondary data analysis of. Roberts reported that the 103 cases filed by City employees includes "$3 million paid out in 18 racial discrimination cases and more than $1 million in 25 disability discrimination cases." [**Editor's Note:** The $11 million Mr. Roberts reported was subsequently confirmed to be even higher, at a minimum of at least $12.1 million, due in large measure to **under-reporting** by the City Attorney's Office of actual settlement amounts to Dr. Kerr.]

As the pie chart in Figure 1 shows, settlements for prohibited personnel practices between 2007 and 2012 also include over $1 million awarded for "general harassment" of employees, at least $1.4 million for "wrongful termination," $553,837 for "sexual harassment" cases, and over $4.8 million for various types of other prohibited personnel actions.

The $12.1 million doled out to settle what were at least 105 cases is one clue that there's a lot of bullying of City employees, cases oftentimes pure, thinly-disguised retaliation involving personnel practices already prohibited by law.

But the costs are substantially higher when City Attorney costs are added in for the time Deputy City Attorney's (DCA) spend defending the City against these lawsuits. According to a further **public records request**, DCA's spent a total of 43,195 hours at a total cost of $8.3 million — above and beyond the nearly $12.1 million in settlement awards — defending the 105 cases against the City involving prohibited personnel practices. Combined, between actual settlement awards and City Attorney time fighting the cases, ***we're talking at least $20.4 million in preventable waste of taxpayer funds*** — preventable precisely because they involve personnel practices long prohibited by law.

"In the *Doe and Raskin v. the City of San Francisco* 9–1–1 dispatcher's case, they were awarded $726,000, but the City Attorney spent $304,508 fighting them every step of the way.

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In the *Doe and Raskin v. the City of San Francisco* 9–1–1 dispatcher's case, they were awarded $726,000, but the City spent $304,508 fighting Doe and Raskin. In the *Derek Kerr, MD v. the City of San Francisco* case that awarded him $750,000, the City spent $450,493 (1,740 hours) fighting Kerr!

In one of the racial discrimination cases a City employee won, he was awarded just $322,750, but new data shows the City Attorney's Office racked up 3,107 hours fighting his case, at a total cost of $526,597. In one wrongful termination case, a City employee was awarded just $15,000, but data shows the City Attorney racked up $247,772 fighting his case. In another racial discrimination case, although the Plaintiff was awarded $1.6 million, the City Attorney spent $488,022 and 2,817 hours fighting the settlement.

Disturbingly, in a lawsuit settlement involving compensation to a City employee, while the City Attorney's office reported the Plaintiff had only been awarded $109,583, according to the Board of Supervisors' January 17, 2008 Rules Committee agenda, the Plaintiffs was awarded $755,000, suggesting data from two City agencies don't jive. The City Attorney's Office reported in had spent 1,855 hours, at a cost of $341,946, fighting the case.

The City Attorney's Office appears to have initially **under-reported** to Kerr — by at least $1.47 million — the amount of settlements actually awarded to 15 of the 105 plaintiffs. The data discrepancies were uncovered by comparing data provided by the City Attorney's office in November 2012 to data gleaned from the Board of Supervisor's Rules Committee agendas and the full Board of Supervisors meeting minutes. The City Attorney's Office under-reporting of actual settlement awards in the 15 cases represents 12% (almost $1.5 million) of the $12.1 million reported by the Board of Supervisors.

Of the remaining 90 cases, the City Attorney reported to Kerr the correct settlement award amounts for 19 cases, but it is not yet known whether 71 of these cases were accurately reported by the City Attorney to Kerr, or if the $12.1 million will soar even higher if additional inaccurate under-reporting of actual settlement awards is uncovered.

"According to a retired senior human resources professional in the City who spoke recently on condition of anonymity, the City considers the costs of on-the-job bullying, retaliation against employees, and wrongful termination, to be a 'cost of doing business'."

There are many other examples of small monetary settlements to City employees for various prohibited injuries, after the City Attorney racked up large sums in costs fighting the settlements every step of the way. And that's without considering the costs of staff time spent by City department managers during lawsuit litigations, which staff time and associated costs are not tracked at the department level.

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We've heard this justification before, including from San Francisco General Hospital nurses who acknowledge that the City may consider the failure to fix problems at SFGH that result in preventable patient outcomes, as another cost of doing business.

Supervisors Settle 305 Lawsuits Against the City

Across the same six-year period between 2007 and 2012, a total of 305 legal settlements filed against the City — for a whole host of lawsuits and other unlitigated claims beyond just prohibited personnel practice cases — were heard before the Board of Supervisors' Rules Committee prior to referral to the full Board for consideration and approval. The 305 cases cost taxpayers a total of $104.7 million — without including the costs of City Attorney time fighting the lawsuits.

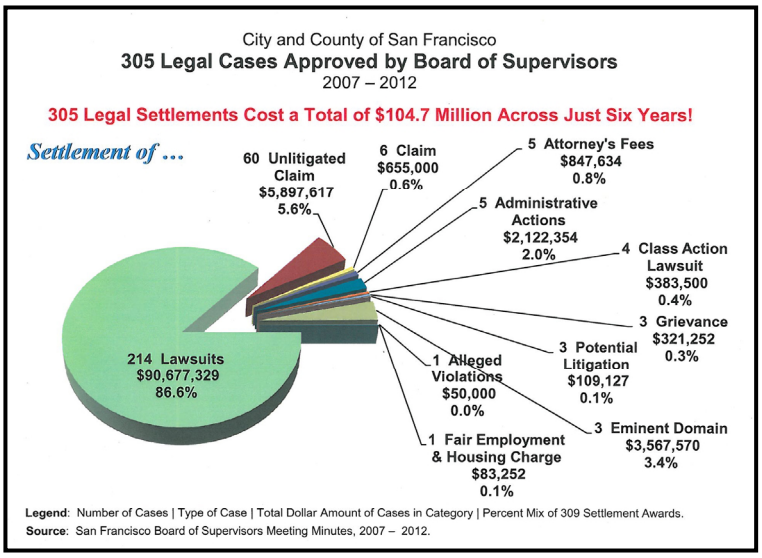

Figure 2: Settlements reported in full Board of Supervisors meeting minutes.

Although Dr. Kerr obtained a breakout of the types of prohibited personnel practice cases through a public records request to the City Attorney's Office, the Board of Supervisors are required only to publish "notice" on its agendas of the major categories of cases, whether for settlements of lawsuits, settlements of unlitigated claims, or settlements for other types of cases. So it's unclear how many of the 305 settlements involved lawsuits for Muni accidents versus, say, poor healthcare delivered at City hospitals — or bullying of, and retaliation against, City employees.

As the pie chart in Figure 2 shows, 214 of the cases heard by the Board of Supervisors involved settlements of lawsuits, fully 86.6% of all settlements. The Board heard another 60 cases involving unlitigated claims, 6 other claims, and the remaining 25 cases involved a variety of types of settlements.

It appears that the 105 cases involving prohibited personnel cases represent 34% of the 305 cases referred to the Board of Supervisors for settlement approval, and account for 11.5% of settlement awards. Clearly, the prohibited personnel practice cases and costs are completely preventable, if City managers would simply follow existing laws regarding prohibited personnel actions.

On February 28, 2012, ABC-TV Channel 7's KGO **"I-Team" investigative journalists** reported that one attorney said that all of the lawsuits and claims — not just the personnel cases — are preventable. During the six-year period it examined (a five-year period one year earlier than data reported in this article), the I-Team reported that thousands of claims and lawsuits — 10,000 of which resulted in no financial payouts whatsoever — totaled more than $212 million to resolve, plus at least $53 million in City Attorney time and costs to fight the 10,000 cases receiving no payout, ballooning to $265 million in total.

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In response to an I-Team's question about whether the $265 million was considered just a cost of doing business, City Attorney Office spokesman Matt Dorsey callously responded saying that when you consider that San Francisco spends $6.8 ***billion*** every year to run City government, "You know, it is. It's the cost of … running a major city." Dorsey said most of the claims and lawsuits stemmed from the vast amount of vehicles San Francisco has on its streets, without offering any proof that the $265 million in costs were attributable mostly to MUNI.

This is the same Matt Dorsey who claimed in 2004 that the wrongful termination case of Dr. John Ulrich from Laguna Honda Hospital in 1998 over First Amendment free speech issues that resulted in a negotiated $1.5 million payout to Ulrich from the initial $4.3 million jury award, was "not an instance of reprisal," and that the City Attorney's Office "… considers this outcome [Ulrich's award] … [to be] an aberration."

Dorsey probably also figures that City employees who file lawsuits regarding prohibited personnel practices such as racial discrimination and wrongful termination to be just another "aberration" to be chalked up to the costs of doing business.

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High-Priced City Attorneys

At the end of calendar year 2012, San Francisco's City Attorney's Office alone employed 318 staff paid a combined $38.5 million in total pay, excluding 30% to 40% fringe benefits. Of the 318, the City Attorney employed 182 attorneys across seven job classification codes, paid a combined $27.8 million in total pay. Of the 138 Civil and Criminal Attorneys, 76 of them earned over $165,000, while the remaining 44 supervising attorneys averaged $190,905 in total pay, both excluding fringe benefits. Deputy City Attorneys are paid at their highest salary step of somewhere between $82.97 and $98.44 hourly (up to $204,000 or more annually), although what they charge back to City Departments and Plaintiffs per hour is significantly higher.

Although attorney's employed by the City are paid, at most, $98.44 per hour, data provided by the City Attorney shows that in the 105 prohibited personnel practice cases, total costs of City Attorney **time and expenses ranged** from $165 per hour to $263 per hour, suggesting that the City Attorney bills back at an hourly rate far higher than salaries paid to lawyers employed by the City Attorney.

For his part, elected City Attorney Dennis Herrera earned $216,129 in total pay, excluding fringe benefits. He's paid that, a taxpayer might think, to ensure his employees know what they are doing. And you might think given these attorney's high salaries, the City's lawyers would offer expert legal advice and would know what they we're doing. You might be wrong, on all counts.

Questionable Rationales for "Summary Judgment"

As Mr. Roberts reported in the *San Francisco Examiner* on April 16, two recent and prominent City employee retaliation cases include "a pair of 9-1-1 [public safety] dispatchers who received $762,000 after City employees violated federal communications law, a jury found," and Dr. Kerr, who received a $750,000 settlement involving wrongful termination, after complaining about misuse of the Laguna Honda Hospital patient gift fund.

"In both cases, the City Attorney attempted to convince both judges in these two cases to grant a 'Motion for Summary Judgment,' a legal process in which judges make summary judgment regarding disputed facts prior to a case advancing to jury trial. … Summary judgment is only appropriate when there are no genuine disputes regarding 'material' facts in a case."

In both cases, the City Attorney attempted to convince both judges in these two cases to grant a "Motion for Summary Judgment" (MSJ), a legal process in which judges make a summary judgment regarding disputed facts prior to a case advancing to jury trial. In both cases, the rationales Deputy City Attorneys used to seek summary judgment calls into question their understanding of the law.

Summary judgment is appropriate when there are no genuine disputes regarding "material" facts in a case; material facts are those that may affect the outcome of a case. Disputes as to material facts are "genuine" when there is sufficient evidence for a reasonable jury to return a verdict for the party in a case who had ***not*** sought summary judgment. The party requesting summary judgment bears the initial burden of informing the Court of the basis for its MSJ,

and of identifying those portions of a case that might demonstrate the *absence* of a genuine dispute of material fact.

Deputy City Attorneys in both cases had to have known genuine disputes of material facts did, in fact, remain — and that there was no *absence* of genuine dispute — but they still petitioned both Judges for summary judgment, possibly driving up unnecessarily the costs of litigation.

Flagrant MSJ Rationale: "No City Municipal Liability"

The most flagrant issue raised in the City's MSJ in Dr. Kerr's case involved whether there was any municipal liability at all; municipal liability is determined using the *Monell* standards.

In the Defendants' 32-page *Notice of* ***Motion for Summary Judgment*** against Dr. Kerr dated July 5, 2012, creative City Attorneys used four pages to claim that Kerr could not establish that the City was liable for the retaliation Kerr alleged. Defendants claimed Kerr could not assert "*respondeat superior*" liability against the City under *Monell v. Department of Social Services*, claiming it is "well settled law that 'municipalities are answerable only for their own decisions; [and] are not vicariously liable for the constitutional tort of their agents'." [**Note:** "Tort" refers to an act that injures a party in some way, for which the injured party may sue a wrongdoer for damages; here, San Francisco tried to assert that it is ***not*** vicariously liable if one City employee injured another employee.]

> **"Wilken noted that the Ninth Circuit Court of Appeals has previously held that City employees to whom decision-making power is delegated, are 'not authorized to violate the law'."**

Respondeat superior — Latin for "let the master answer" — is a common-law doctrine that makes employers vicariously liable for actions of their employees, when their employees actions take place within the scope of employment. The doctrine was established in seventeenth-century England to define the legal liability of employers for the actions of their employees, and provides a better chance for injured parties to actually recover damages from injuries caused by an employers' "agent" working within the scope of their employment.

Defendants attempted to assert there was no *Monell* liability in Kerr's case because "Defendants Katz and Hirose did not have final policy making authority" over Kerr's termination. The City contended it was entitled to summary judgment because Kerr had not established that Katz was a "final policymaker," arguing instead that it was the Civil Service Commission that had final "policymaking" authority regarding San Francisco employment matters, not Katz or Hirose.

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> **So Judge Wilken had to remind the Defendants' City lawyers that 'by the City's own admission [Civil Service Commission rules] did not constrain Dr. Katz's decisionmaking or provide for review in any way applicable [to Kerr's termination]'."**

On August 9, 2012, Defendants filed an additional 26-page ***Reply Brief in Support of Motion for Summary Judgment***, using another five pages to claim there was no municipal liability under Section 1983, arguing that Defendant Mitch Katz's decision-making authority was constrained by other City policies prohibiting retaliation. Defendants brazenly argued that to the extent Dr. Katz or Ms. Hirose had ***possibly departed*** from policies prohibiting retaliation, their conduct could not be attributed to the City, arguing in part that Katz could not delegate to Hirose authority he didn't possess as a final policymaker. Remind me: What rubbish is this?

In her **47-page *Order*** ruling on the 58 pages between the City's two MSJ briefs, Judge Wilken had to wade through issuing an eight-page analysis dissecting whether Defendants held municipal liability under *Monell*. Among other observations, Wilken noted the Ninth Circuit Court of Appeals has previously held that City employees to whom decision-making power is delegated, are "not authorized to violate the law," and it is not sufficient to "insulate a governmental entity from [*Monell*] liability, 'without more'."

While Defendants argued that neither Kerr nor Rivero had subsequently applied for other vacancies on LHH's medical staff that had become available, the DCA's neglected to consider that since Katz as the "appointing officer" had made the decision to remove Kerr, Katz would not have been likely to rehire Kerr.

The Defendants tried to argue that a number of Civil Service Commission (CSC) rules for exempt employees constrained Dr. Katz's ability to terminate Dr. Kerr. Wilken had to remind City Attorney's that the Defendants' own CSC "expert witness" had testified that "in general, no one reviews decisions" the Director of Public Health makes to lay off exempt physicians, nobody had the "authority to overrule the director of [public] health's decisions," and claimed the Directors' "decisions can't be prohibited by law."

The Defendants' own "expert witness" also noted that the City's Human Resources Director does not review lay-off decisions when a complaint involves retaliation based on whistleblowing.

So Judge Wilken had to remind the Defendants' City lawyers that "by the City's own admission [the CSC rules] did *not* constrain Dr. Katz's decisionmaking or provide for review in any way applicable to [Kerr's termination]," as the City wrongly claimed.

"Wilken ruled that Plaintiff Dr. Kerr had presented sufficient evidence of *Monell* municipal liability against the City, and denied Defendant's MSJ to dismiss Kerr's Section 1983 claim, putting the City on the liability hook."

Wilken observed that the City regulations Defendants cited do not provide for review of termination decisions, and simply required Katz to comply with the law. She further noted that Section 4.115 of San Francisco's Campaign and Government Conduct Codes that can sanction officers or employees who engage in retaliation does ***not*** provide any mechanism for ***review or reversal of unlawful decisions***. Although Defendants suggested Kerr and Rivero could have appealed, the DCA's failed to acknowledge that there are ***no*** appeal procedures whatsoever for exempt employees who are terminated by their "appointing authorities."

Wilken noted that, by its own terms, Section 4.115 ***only*** sets policies prohibiting retaliation against employees who file formal complaints or participate in formal investigations, but does ***not*** provide retaliation protections for employees who engage in using First Amendment free speech and subsequently face retaliation.

When will voters demand that San Francisco's Charter be changed to include basic First Amendment protections for City employees?

After wading through reading 105 pages of motions for and against summary judgment and Judge Wilken's *Ruling*, it looks to this author like the weight of evidence in *Derek Kerr v. City and County of San Francisco; Mitchell Katz, Mivic Hirose, and Colleen Riley* caused the Defendants' case to fall apart.

Wilken ruled that Plaintiff Dr. Kerr had presented sufficient evidence of *Monell* municipal liability against the City, and denied Defendant's MSJ to dismiss Kerr's Section 1983 claim, putting the City on the liability hook.

City's "Uncontroverted Facts" Claim Washes Out

At the tail end of Defendant's MSJ dated July 5, 2012, they petitioned the Court to grant summary judgment in their favor, alleging five separate times that the Defendants "were not on notice" of Kerr's complaints. They claimed that even if Defendants lost summary judgment, they asked the Court "to issue an order specifying certain facts were uncontroverted in order to narrow the scope of issues for trial." Instead, Judge Wilken ruled otherwise.

"The City Attorney hadn't originated the smears, he was just 'representing' the *ad hominem* smears, lies, and pretexts concocted by the guilty Defendants he was representing."

Although Defendants raised many objections to evidence — which evidence and objections Judge Wilken considered — she only discussed and ruled in her *Order Granting in Part and Denying in Part Motion for Summary Judgment* on the admissibility of the evidence that made a difference in the case, overruling the Defendants' other objections as moot — irrelevant.

Although Defendants contended the City Charter removes exempt employees such as Kerr through Civil Service Commission rules, Wilken noted that "even if this were true, the Charter and Administrative Code … specifically exclude exempt employees from the authority of the Civil Service Commission for removal procedures," observing that exempt employees serve at the pleasure of appointing officers such as Dr. Katz, who are allowed to remove employees holding exempt positions without any further review, or an appeals process.

Just as DCA's in the 9-1-1 dispatcher's case smeared Ms. Raskin (below), City Attorney's unnecessarily smeared Kerr. In its August 2012 *Reply Brief*, DCA's wrongly claimed "It was Kerr's enduring sense of entitlement — his refusal to shoulder the heavier workload that every other doctor agreed to — that differentiated Kerr from his peers." This was clearly a disputed fact, which Kerr's lawyers disproved. Defendants further smeared Kerr, writing "Plaintiff Derek Kerr likes to swim upstream. He had a comfortable existence at Laguna Honda Hospital, where many of his peers took … divergent paths to address … [needs of the patients]. Kerr refused to follow the [downstream] current." I wondered, did the City smear Kerr again, really alleging he didn't address his hospice patients' needs?

The City Attorney hadn't originated the smears, he was just "representing" the *ad hominem* smears, lies, and pretexts concocted by the guilty Defendants he was representing, who were grasping at straws to extricate themselves from their bungled, retaliatory hit-job against Kerr.

As a layperson having read many legal filings, this author was shocked that Defendants resorted to using smears in their legal briefs, smears clearly irrelevant and disproven by factual evidence:

"Wilken ruled the audit report was clearly relevant to Plaintiff's claims, and noted that 'The fact that the City's own Auditor found later that there had in fact been misuse of the [patient] Gift Fund is probative [evidence] of Defendants' motives in terminating Plaintiff'."

- **KGO, ABC Channel 7, I-Team News Reports, May 2010:** Defendants objected to evidence of the multiple investigative news reports that alleged mismanagement of LHH's patient gift fund, claiming the evidence wasn't relevant, lacked foundation, and was hearsay. Judge Wilken ruled the Defendants objections were overly vague and failed to provide any explanations why they believed the evidence was objectionable. Wilken noted that evidence of the **May 20, 2012 I-Team broadcast** news report was clearly relevant, the evidence had been offered to prove Kerr's assertion he was terminated as a result of the news reports, and ruled the broadcasts weren't hearsay. Instead, Wilken ruled that Kerr had established a material dispute of facts as to whether his termination was carried out in retaliation for the ABC7 news reports. Wilken denied summary judgment on the issue.

- **Audit of Patient Gift Fund:** The Defendants objected to the City Controller's audit report of LHH's patient gift fund, stating the audit was also not relevant evidence, lacked foundation, and was hearsay. Wilken ruled the audit report was clearly relevant to Plaintiff's claims, and noted that "The fact that the City's own Auditor found later that there had in fact been misuse of the [patient] Gift Fund is probative [evidence] of Defendants' motives in terminating Plaintiff." Wilken also noted that since the audit was issued by the City and was a public record, the report was either non-hearsay or subject to a hearsay exception. Shouldn't the DCA's employed by the City Attorney know these rationales won't survive summary judgment?

- **Protected Speech:** Next, although Defendants didn't dispute that Plaintiff's ***formal*** complaints constituted protected speech, Defendants ***did*** argue that Kerr's public discussion of the Ja Report and gift fund records requests didn't constitute protected speech. Defendants asserted in their MSJ that Plaintiffs' public records requests were not protected speech, and were nothing more than requests for information. Defendants further claimed that Plaintiffs' August 2009 speech concerning the Ja Report during a medical staff meeting — which report recommended replacing doctors with nurses, social workers, and psychologists — was speech that "didn't address matters of public concern" (as if reducing access to physicians would not be of public concern), it was only speech regarding personnel disputes, and the speech wouldn't reach the public at large. Judge Wilken disagreed, concluding Kerr's critique of the Ja Report was protected speech, and that there was a material dispute of fact regarding whether Kerr's gift fund records requests constituted protected speech.

- **Conflicts of Interest**: Defendants claimed that the Plaintiff's critique of the Ja Report "had not raised any allegations of a conflict of interest," and that the Plaintiff had first raised the conflict of interest allegation in March 2010. However, Wilken noted that the Plaintiff had, in fact, submitted evidence that the conflict of interest issue had been raised in a September 18, 2009 whistleblower complaint, long before the eventual decision to terminate Kerr had been made. How could highly-paid City Attorney's have missed this important timeline dispute?

- **Labor Code Violation:** Plaintiff had claimed Labor Code Section 1102.5(b) provided protection against retaliation for disclosing information to a government or law enforcement agency if they believed the information disclosed violated state or federal statutes. Defendants argued that Plaintiff had not engaged in protected 1102.5 b) activity, claiming Kerr did not reasonably believe his complaints disclosed an alleged violation of federal or state law; he had not pointed to a specific statute, rule, or regulation that had been violated; and he had not clearly identified prohibited conduct to place the City "on notice" of its potential legal liability.

  Although Wilken noted the conflict-of-interest allegations "could have violated several state laws" and that Kerr's "media and formal complaints about mismanagement of the patient gift fund implicated several state laws," she ruled that his gift fund records request didn't point to specific violations of sections of laws (that Wilken then thoughtfully identified), and that media reports were not complaints to a government or law enforcement agency in order to provide Kerr with Labor Code 1102.5(b) retaliation protection. Wilken split her ruling on summary judgment of the 1102.5(b) issue, granting Defendants' MSJ claim only to the extent Plaintiff alleged retaliation for his formal whistleblower complaints, records requests, and media reports about the gift fund, but denying Defendants' MSJ claim regarding Labor Code 1102.5(b) to the extent Plaintiff ***had*** alleged retaliation for his critique of the Ja Report.

"Given her rejection of many of the City Attorney's dubious rationales seeking summary judgment in Kerr's case, Wilken ordered that a previous ruling be maintained to begin a ten-day jury trial on November 13, 2012. It may have only been then that the City began to negotiate in earnest to develop settlement terms with Kerr."

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It may have only been then that the City began to negotiate in earnest to develop settlement terms with Kerr, perhaps fearing a jury trial might further unravel the City's nincompoop defense of Katz, Hirose, and Dr. Colleen Riley, and risking greater monetary settlement awards to Kerr.

Specious MSJ Smears of 9–1–1 Dispatchers

In the 9-1-1 dispatcher's lawsuit, *Jane Doe and Anne Raskin v. City and County of San Francisco*, the Deputy City Attorney (DCA) claimed there were no disputes involving material fact, and requested that eight claims for relief be granted in its 29-page ***Motion for Summary Judgment***. Defendants also smeared Plaintiffs in its MSJ, claiming "Plaintiff Ann Raskin ***lived a charmed life*** at DEM prior to the e-mail incident," a snide statement wholly out of place in a legal filing.

U.S. District Court Judge Thelton **Henderson granted** only one of the City Attorney's dubious claims for summary judgment, and denied the City's other seven claims, including:

"In the 9-1-1 dispatcher's lawsuit, *Jane Doe and Anne Raskin v. City and County of San Francisco* … Defendants also smeared Plaintiffs, claiming 'Plaintiff Ann Raskin lived a charmed life at DEM prior to the e-mail incident,' a snide statement wholly out of place in a legal filing.

Judge Thelton Henderson granted only one of the City Attorney's dubious claims for summary judgment, and denied the City's other seven claims."

- **Federal Stored Communications Act**. Plaintiff Jane Doe claimed her private e-mail had been improperly searched by Defendants over an 18-month period on a shared computer, and was bullied and harassed by supervisors as a result. Defendants asserted there had been no search of any kind, and that Plaintiffs had no

expectation of privacy — and even ***if*** the e-mails ***had*** been searched, it wasn't a "serious" offense, which Plaintiffs refuted. DCA's snarked, "Doe and Raskin decided that their best defense was a good offense," and asked for summary judgment to dismiss each of the Plaintiffs claims.

DCA's asserted that Defendant's inadvertent discovery of Plaintiffs work-related, but personal e-mail account documents viewed on a shared computer, did not constitute a "serious invasion" of Plaintiff's privacy. Since both sides had presented evidence supporting each version of events, Judge Henderson ruled there was a genuine issue of material fact for the jury, denying Defendants claim for summary judgment on the issue.

- **Privacy Claims**: Plaintiffs alleged there was a reasonable expectation of privacy, given their union contract that explicitly states "employees [covered by the contract] shall have a reasonable expectation of privacy," which labor agreement City lawyers must have known about. Ignoring the union contract, the DCA's argued there was no such reasonable expectation. The Judge ruled that facts around the alleged violation of Jane Doe's e-mail account were clearly in dispute, such that summary judgment wasn't appropriate.

- **California Labor Code Claims:** Defendants moved for summary judgment on Labor Code claims contending Plaintiffs had failed to exhaust administrative remedies through other channels. Since the Plaintiffs conceded they had not exhausted administrative remedies, the Judge granted summary judgment only on this single issue.

- **Gender Discrimination Claims:** Plaintiffs alleged that the abusive mistreatment they received from their female supervisors would not have occurred had the Plaintiffs been men, since men in their workplace would not have been treated in the same manner. Defendants argued that the Plaintiffs claim of woman-on-woman discrimination seemed improbable, as if City Attorneys have never heard that women can, and do, discriminate against one another, just as men do. Since the facts underlying this claim were in dispute, the Judge ruled it a proper issue for a jury's determination, and found it inappropriate to grant summary judgment.

"Instead, the DCA's contended the conduct in question didn't rise to emotional distress, and was merely 'rigorous, difficult training that dispatcher's must go through.' Judge Henderson again ruled the dispute involved a question of fact that had to be presented to a jury, not determined via summary judgment."

- **Sexual Harassment Claim:** Plaintiffs pointed to case law allowing circumstantial evidence of gender-based abuse, and contended the conduct they endured had occurred. DCA's representing the Defendants contended the conduct was nothing more than reprimands concerning the Plaintiffs work performance, not sexual harassment. Judge Henderson ruled that there were actual disputes to the material facts regarding this issue, ruling summary judgment was inappropriate.

- **Failure to Prevent Claims**: The Defendants entire argument was that there was no triable issues involving Plaintiffs claims of discrimination, harassment, or retaliation and, therefore, no misconduct had occurred that could have been prevented. Therefore, if the Court found there ***was*** a triable issue on these claims, the Defendants had made no other argument as to why the claims should be decided on summary judgment. Plaintiffs pointed out it is unlawful for employers to "fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring, but that the City and County of San Francisco did nothing to step in, or investigate" Plaintiffs complaints. Since material facts underlying the claim were in dispute, Judge Henderson again ruled summary judgment would be inappropriate.

- **Retaliation Claims**: The Court noted that Defendants "largely lump their retaliation argument in with their argument about the Plaintiffs' whistleblower claims." While the Defendants presumably disagreed with Plaintiffs contention that bullying, abuse, and negative treatment had occurred in the workplace, the Defendants devoted their argument to Plaintiffs' "failure to exhaust remedies."

  Judge Henderson noted that the Defendants' argument was undermined by another court case that held that employees who suffer employment-related discrimination are ***not*** required to exhaust internal administrative remedies before filing discrimination claims. Again, shouldn't the City and its DCA's have known this all

along? Judge Henderson noted the disagreement between the two parties regarding retaliation claims was factual and was, therefore, inappropriate for summary judgment.

- **Intentional Infliction of Emotional Distress**: Defendants appear to have wrongly asserted that Plaintiffs' emotional distress claim duplicated their Fair Employment and Housing Claim. The Court had to point out to Defendants' DCA's that it is established law that Plaintiffs can allege both employment discrimination and additional intentional infliction of emotional distress. Yet again, shouldn't the DCA's — or at least their supervisor, the City's Chief Labor Attorney Elizabeth Salveson, who was paid $184,827 in calendar year 2012 — have known this?

  Instead, the DCA's contended the conduct in question didn't rise to emotional distress, and was merely "rigorous, difficult training that dispatcher's must go through." Judge Henderson again ruled the dispute involved a question of fact that had to be presented to a jury, not determined via summary judgment.

"'The City Attorney used every trick in the book — but the evidence of Laguna Honda Hospital's wrongdoing was so overwhelming, that they were forced to settle,' notes Dr. Rivero.

'It took us three years to convince the City Attorney — and the Court — that the truth was true,' she laments."

As with Dr. Kerr's case, the City attempted to claim that the 9-1-1 dispatcher lawsuit had not identified specific violations of law by citing a particular statute, rule, or regulation that prohibited an illegal activity that was violated by the conduct complained of. The City claimed that for a complaint to be protected and upheld, the complaint must specify violations of law by citing a relevant statute that was violated.

"The Truth [of Retaliation] Was True"

By denying seven of the Defendants' eight claims for summary judgment, Henderson effectively moved *Jane Doe and Anne Raskin v. City and County of San Francisco* to trial. At trial, the jury ruled in *Doe* and *Raskin's* favor, and they were eventually awarded the $762,000 settlement, suggesting that the City — City Attorney Dennis Herrera and his legal defense teams — often barks up the wrong tree, tossing out flaky defense strategies hoping to see what will stick on the wall.

To do that, Herrera's team not only resorted to using *ad hominem* smears against Plaintiffs ***Kerr*** and ***Doe and Raskin***, they used wrongful claims and disingenuous arguments, and ended up acting just like their clients — the Defendants.

Such strategies drive up the time and costs of litigation, costing taxpayers millions of dollars, and forcing opposing counsel and judges to wade through the muck of what is, essentially, garbage proffered as the City's legal defense. Desperate to prevail, the City Attorney continues doing so, anyway.

"The City Attorney used every trick in the book — but the evidence of Laguna Honda Hospital's wrongdoing was so overwhelming, that they were forced to settle," notes Dr. Rivero. "It took us three years to convince the City Attorney — and the Court — that the truth was true," she laments.

Dr. Rivero also sported a "Speak Truth to Power" ID badge — since she and Dr. Kerr were explicitly asked not to bring handouts to the Leadership Forum meeting on May 8.

If Kerr's and the 9-1-1 dispatchers lawsuits prove nothing else, the two cases demonstrate that all too often the City Attorney defends City officials ***against*** City employees ***and*** the very citizens paying the miscreant officials' bloated salaries.

After all, between the settlement awards and the City Attorney's costs fighting the prohibited personnel practices, we're talking about a minimum of at least $20 million that was a completely preventable, unnecessary expense, had careless City managers who bullied City employees simply followed existing personnel law.

It's long past time to confront the City Attorney's spurious legal advice, which appears to be costing taxpayers millions that could be better spent on other City needs.

Monette-Shaw is an open-government accountability advocate, a patient advocate, and a member of California's First Amendment Coalition. Feedback: *monette-shaw@westsideobserver.com.*

A Comical Postscript

In a comical twist of irony, City Attorney spokesman Matt Dorsey rises again.

"Dorsey is comical; he was quoted as saying 'The City Attorney is going to vigorously defend the Police Department, and we're going to do everything we can to protect taxpayer dollars'."

On May 16, the ***San Francisco Examiner*** reported that the day before a former internal affairs attorney for the San Francisco Police Department — Kelly O'Haire — filed a wrongful termination and whistleblower lawsuit in San Francisco Superior Court against Police Chief Greg Shur, against the Police Department, and presumably, against the City.

O'Haire's job involved investigating and prosecuting misconduct claims against San Francisco Police Department members, and bringing misconduct cases before the Police Commission. O'Haire alleges she was fired in retaliation for having investigated Greg Shur when he was a high-ranking official before being appointed Police Chief. She sought Suhr's termination in 2009 for an alleged pattern of misconduct and policy violations. Following Suhr's appointment as Police Chief in April 2011, O'Haire was terminated within a month.

Dorsey is comical: On May 15, the ***Marin Independent Journal*** carried an article by Gary Klein reporting on O'Haire's lawsuit. Dorsey, City Attorney Dennis Herrera's spokesman, asserts O'Haire's lawsuit "lacks merit." Dorsey was quoted as saying "The City Attorney is going to vigorously defend the Police Department, and we're going to do everything we can to protect taxpayer dollars."

This is the same City Attorney's Office that settled the 105 prohibited personnel practice cases for the princely sum of $12.1 million, and the same City Attorney who spent $8.3 million fighting the 105 cases, for a combined waste of $20.4 million in taxpayer funds. And that's not including the $1.3 million of taxpayer funds racked up in City Attorney time wasted during the City Attorney's inept proceedings on behalf of Mayor Ed Lee to oust Sheriff Ross Mirkarimi for alleged official misconduct. After wasting fully $22 million, Dorsey now wants us to believe the City Attorney is trying to "protect" taxpayer dollars?

Supervisor Jane Kim noted during the Board's vote to remove Mirkarimi that the charges against the Sheriff — developed by the City Attorney on behalf of the Mayor — did not rise to the City Charter's definition of official misconduct, and that the Ethics Commission had not found that Mirkarimi had used his official duties to commit wrongdoing. Kim voted against removing the Sheriff, indicating that a clear, articulable test to remove public officials had not been established. To that extent, the persecution of Mirkarimi was a complete waste of $1.3 million in City Attorney time, at taxpayer expense, which appears to have escaped Mr. Dorsey.

Chances are that as O'Haire's case plods through the court system, the City Attorney will likely mount spurious reasons for a *motion for summary judgment*. But O'Haire will likely prevail and will probably win a significant settlement amount, while the City Attorney wastes more taxpayer funds spending thousands of hours fighting O'Haire.

After all, this ***is*** San Francisco, where whistleblowing City employees who expose wrongdoing of high-level members of the "City Hall Family" — for example exposing the City Family's former Director of Public Health Mitch Katz, former Housing Authority Director Henry Alvarez, and now Police Chief Greg Suhr — face 100% retaliation, bullying, and wrongful termination. Is the 100% retaliation rate a new San Francisco "value"?

The print edition of this Westside Observer article was a condensed version; this expanded version — providing additional details of the spurious rationales the City Attorney used seeking summary judgment, a status update on Kerr's non-monetary settlements, and data regarding costs of prohibited personnel practices — is available on-line at www.westsideobserver.com.