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Attorney for Plaintiff
JACOB MALAE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JACOB MALAE, an individual,)

Case No. 5:21-cv-1453

Plaintiff,)

vs.)

**COMPLAINT FOR DAMAGES
FOR DEPRIVATION OF CIVIL
RIGHTS PURSUANT TO 42
U.S.C. SECT. 1983 (FREE
SPEECH RETALIATION);
DISCRIMINATION (RACE);
AND RETALIATION**

CITY OF SANTA CLARA, a)
Municipal entity; PATRICK)
NIKOLAI, Chief of Police, in his)
individual and official capacities;)
TODD CUMMINS, in his)
individual and official capacities;)
and DOES 1-5, inclusive,)

DEMAND FOR JURY TRIAL

Defendants.)

1 Plaintiff Jacob Malae (hereinafter “Sergeant Malae” or “Plaintiff”) hereby
2 alleges as follows:

3 **PARTIES**

4 1. Plaintiff alleges that defendant City of Santa Clara (hereinafter
5 sometimes “City” or “Santa Clara”) is, and at all material times was, a
6 Municipal entity, providing, among other things, law enforcement to Santa
7 Clara through the Santa Clara Police Department (hereinafter sometimes
8 “SCPD” or “Department”). Plaintiff alleges that SCPD is a “person” within
9 the meaning of 42 U.S.C. Section 1983.

10 2. Plaintiff alleges that defendant Patrick Nikolai (hereinafter
11 sometimes “Chief Nikolai” or “Nikolai”) is, and at all relevant times was, a
12 policy-making official of SCPD, holding the rank and title of “Chief of Police.”
13 Defendant Chief Nikolai is, and at all material times was, the individual
14 charged with the duty and granted the authority to render final decisions
15 regarding, among other things, the promotion of personnel, including decisions
16 whether or not to eliminate promotional/eligible lists, and
17 approvals/disapprovals over the granting of overtime. Defendant Nikolai is
18 sued herein in both his official and individual capacities.

19 3. Plaintiff alleges that defendant Todd Cummins (hereinafter
20 “Captain Cummins” or “Cummins”) is, and at all relevant times was, an
21 individual employed by SCPD, holding the rank and title of “Captain.”
22 Plaintiff alleges that, at all material times, Captain Cummins was a policy
23 maker and final decision maker concerning internal administrative or criminal
24 investigations of alleged misconduct by personnel. Further, Plaintiff alleges
25 that, all material times, Cummins was acting as Plaintiff’s immediate
26 supervisor. Defendant Cummins is sued herein in both his official and
27 individual capacities.

28 4. Plaintiff is ignorant of the true names and capacities of Defendants
sued herein as Does 1 through 5, inclusive, and therefore sues these Defendants

1 by such fictitious names. Plaintiff will amend this complaint to allege their
2 true names and capacities when ascertained. Plaintiff is informed and believes
3 and thereon alleges that each of the fictitiously named Defendants is
4 responsible in some manner for the occurrences alleged in this complaint, and
5 that Plaintiff's damages as alleged were proximately and legally caused by the
6 Defendants' conduct. At all times material herein, each Defendant was the
7 agent, servant and employee of each of the remaining Defendants, and acting
8 within the purpose, scope and course of said Agency, service and employment,
9 with the express and/or implied knowledge, permission and consent of the
10 remaining Defendants, and each of them, and each of said Defendants ratified
11 and approved the acts of Defendants.

12 **JURISDICTION/VENUE**

13 5. Jurisdiction of this court is founded upon 42 U.S.C. Section 1983
14 and 42 U.S.C. Section 2000e. This court has pendent jurisdiction over the
15 California State law claims, pursuant to 28 U.S.C. § 1367. Venue is proper
16 pursuant to 28 U.S.C. § 1400(a), because the defendants or their agents reside
17 or may be found within this district and because defendants transact business,
18 including the alleged tortious acts, within this district.

19 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

20 6. Plaintiff has exhausted his administrative remedies by timely filing
21 charges with the DFEH. On or about September 15, 2020, the DFEH issued a
22 right-to-sue notice.

23 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

24 7. Plaintiff has been employed by the SCPD for over twenty-two (22)
25 years.

26 8. Currently, Plaintiff holds the rank of "Sergeant." He has been a
27 Sergeant for over ten (10) years.

28 9. Plaintiff is Samoan. He was born and raised in Santa Clara.

10. Within the SCPD, Plaintiff has served in all four (4) divisions. In

1 each assignment, Plaintiff has excelled. In addition to numerous
2 commendations, Plaintiff has been bestowed with an “Officer of the Year”
3 award and, in 2009, the “Lifesaving Award.”

4 11. Plaintiff enjoys an outstanding reputation in the community of
5 Santa Clara. A member of the Bellarmine College Preparatory Hall of Fame,
6 Plaintiff went on to San Jose State where he played Division 1 football.

7 12. Plaintiff lives with his family in San Jose.

8 ***Systemic Racism/Discrimination/A Rigged System For Command Staff***

9 13. Plaintiff alleges that, despite his career at the SCPD and his many
10 accomplishments, he – as also experienced by other minorities – has been the
11 subject of discrimination and held back from promoting to command staff
12 positions at SCPD. Plaintiff contends that, unfortunately, despite the diversity
13 represented in the community of Santa Clara, the SCPD suffers from systemic
14 racism.

15 14. Plaintiff contends that this discrimination is reflected, particularly,
16 by statistics concerning SCPD’s management. Prior to 2018, forty-six (46) out
17 of forty-nine (49) management employees were Caucasian. In an organization
18 (SCPD) that has been in existence since 1852, there have been only two (2)
19 persons of color to ascend to a rank of Captain or higher. Plaintiff alleges that
20 the top of the SCPD organization does not come close to reflecting the
21 community at large and the shift in demographics. According to the 1990
22 census, 74% of reporting citizens in Santa Clara identified as Caucasian, 18.6%
23 as Asian/Pacific Islander, 14.5% as Hispanic, and 2.5% as African American.
24 Ten years later, in 2000, the census saw a reduction in citizens identifying as
25 Caucasian and a rise in minorities, as follows: 55.6% Caucasian, 29.3%
26 Asian/Pacific Islander, 16% Hispanic, and 2.2% African American. The most
27 recent census shows a further decline in the Caucasian population and sharp
28 increase in Asian/Pacific Islanders, as follows: 45% Caucasian, 37.7% Asian,
19.4% Hispanic, and 2.5% African American.

1 15. Plaintiff alleges that, particularly when it comes to selecting a Chief
2 of Police for SCPD, the system is rigged so that Caucasians are promoted to
3 “Lieutenant,” “Captain,” and, then, put in a position to run for the top position.
4 Plaintiff alleges that a major way that the Department maintains this
5 inequitable system for top management positions, including Chief of Police, is
6 by manipulation of the promotion system, including the examination process
7 and the promotional list.

8 16. For example, Plaintiff alleges that the current Chief, Defendant
9 Nikolai, was the beneficiary of a “gamed” system. In his case, Nikolai sat for
10 the lieutenant’s exam (as has Plaintiff, as more fully set forth below). Nikolai
11 was promoted to lieutenant after finishing fourth on his list. The first two
12 individuals at that time (both Caucasian) were promoted, so less than five
13 people remained (one of whom was Johanna Green, of Mexican descent).
14 Although Green was passed over, the list was *not* eliminated in Nikolai’s case,
15 contrary to Civil Service Rule 4.8 (list may be abolished if fewer than 5
16 names). Nikolai was promoted. Green never was promoted, despite multiple
17 opportunities to advance, and, eventually, left SCPD.

18 17. Plaintiff alleges that the same passing over of qualified personnel,
19 favoring Caucasians over diverse candidates, occurred in the case of Mark
20 Shimada, who is of Japanese descent. Shimada had worked every division,
21 thrived in each assignment, made positive connections in the community, and
22 was well-respected, senior member of his patrol team. To Plaintiff’s
23 knowledge, Shimada was the only person who was required to take a FTO test
24 (“Field Training Officer”) twice (which he passed), after returning from a
25 specialized assignment. Despite exceptional evaluations, a record without
26 discipline, Shimada was passed over multiple times, and the sergeant’s list was
27 eventually killed.

The Lieutenant’s Exam/Pretext

28 18. On October 16, 2019, Plaintiff sat for the Police Lieutenant

1 Promotional examination. Plaintiff placed #2 on the hiring list, earning a score
2 of 91.5%. Thereafter, in December 2019, Plaintiff participated in the “Chief’s
3 interview.”

4 19. The promotion to the position of Police Lieutenant (two slots) was
5 to take place at the end of December 2019/January 2020. The Department
6 promoted an individual who was #1, a Caucasian. This put Plaintiff in the #1
7 slot to be promoted.

8 20. On January 1, 2020, Plaintiff received a text from then-Lieutenant
9 Greg Hill. Plaintiff had taken the day off to celebrate the New Year with his
10 family. The text read: “Hey brother, are you in today? I dropped one on your
11 desk. A 69 PC.” Plaintiff responded that, because it was his case, he would
12 handle and come in that day.

13 21. Plaintiff left his family and came to the Department. In looking
14 over the case, Plaintiff realized that it did not have to be filed until the next
15 day. What was the urgency? At some point, then-Lieutenant Nikolai dropped
16 in on the cubicle where Plaintiff was working. He asked if he could meet with
17 Plaintiff.

18 22. The two then proceeded to the closed office of then-Lieutenant Hill.
19 Nikolai opened the door and asked Plaintiff to sit down. Nikolai proceeded to
20 tell Plaintiff that he was being passed over for promotion. The Department
21 would be promoting someone lower down on the list. Nikolai said he wanted
22 to explain why. Nikolai said there were two reasons: First, Nikolai said that a
23 female co-worker had reported that, on or about September 22, 2019, there was
24 an interaction with Plaintiff that made her feel “threatened and unsafe.” (On or
25 about September 22nd, 2019, Plaintiff had been informed that the Department
26 would be denying him overtime pay in connection with a two-week homicide
27 class in Monterey, California.) Plaintiff was dumbfounded. This alleged
28 complainant/co-worker was a friend. That there was a “problem” was far-
fetched, in Plaintiff’s view. Why was Plaintiff learning about this over three

1 (3) months later? Nikolai informed Plaintiff that the co-worker had reported
2 the “incident” to Captain Cummins, among other Captains.

3 23. Plaintiff asked whether an investigation had been conducted.
4 Nikolai replied, “No.” However, Nikolai conceded, there probably should
5 have been. Plaintiff, reeling from the news about being denied the Lieutenant’s
6 position and hearing about an alleged incident told Nikolai that he was being
7 treated wrongly and differently from others. SCPD and City policy is to report
8 misconduct and for such allegations to be investigated. Plaintiff let Nikolai
9 know that he was being denied due process. Again, when asked about an
10 investigation and why none was conducted, Nikolai had no answers.

11 24. Nikolai added that there was another reason Plaintiff would not be
12 advancing. An “unnamed” records specialist, Cummins stated, had purportedly
13 reported that Plaintiff had asked that certain work be performed and that
14 Plaintiff had “stood around waiting for that person to finish.” Cummins
15 continued that Plaintiff had said nothing and did not do anything; however,
16 Plaintiff’s “presence” was “intimidating.”

17 25. As with the other alleged “incident” above, no investigation of this
18 matter involving the unnamed records specialist was investigated. Until that
19 meeting with Nikolai, neither purported incident was discussed with Plaintiff,
20 had not been reflected in any performance evaluation of Plaintiff (which had
21 been highly favorable), and had not been documented and placed in Plaintiff’s
22 personnel file. And, if there *was* documentation, Plaintiff was given no notice
23 and no opportunity to review and respond, which is a peace officer’s right
24 under the Peace Officers Bill of Rights, Section 3306.5.

25 26. Plaintiff advised Nikolai that, if the above allegations were truly
26 made, they should be taken seriously and investigated fully. Nikolai responded
27 that they were not going to be investigating. Plaintiff asked whether he
28 [Nikolai] had reviewed Plaintiff’s most recent evaluation, Nikolai said, “No.”
The meeting was concluded.

1 to terrorize the publishers as follows:

- 2 • Sending items such as live cockroaches, books on surviving the loss
- 3 of a spouse, pornography in the couple's names (but sent to their
- 4 neighbors), a bloody pig mask, and a funeral wreath;
- 5 • "Doxing" the couple, inviting area college students to "swinger"
- 6 parties at the couple's home after hours; and
- 7 • Sending a team to surveil the couple and their activities.

8 30. Further, on information and belief, Gilbert offered to use his SCPD

9 connections in order to mislead law enforcement about the scheme.

10 31. In Plaintiff's discussion with the POA, Plaintiff was not only

11 critical of Gilbert's alleged conduct, Plaintiff was deeply disturbed that Gilbert

12 and his confederates allegedly established a fake Twitter account that would be

13 viewed as belonging to Samoans. To Plaintiff, the Samoan reference was

14 obvious and reprehensible: Gilbert allegedly wanted to create, with all the

15 stereotypes, an aura of menace. Reminded of the incident where Plaintiff had

16 apparently "intimidated" someone merely by his "presence," Plaintiff believed

17 that Gilbert had, if the allegations were true, tapped into a prejudice about

18 Samoans. Further, Gilbert's mindset, in Plaintiff's view, was evidence of a

racism that currently infected SCPD.

19 32. Plaintiff urged the POA to make a statement encouraging members

20 to read the FBI Affidavit concerning Gilbert and to denounce Gilbert's

21 behavior, especially the racism connected to the scheme. In Plaintiff's view,

22 SCPD issued no public statement about the George Floyd incident (May 25

23 '20), should have condemned what occurred, and should have made a

24 statement about no tolerance for racism. With the Gilbert criminal allegations,

25 Plaintiff advised that the SCPD should now take the opportunity to denounce

26 racism, especially since news outlets were running the eBay story with pictures

27 of Brian Gilbert in a SCPD uniform. POA President Torke disagreed, saying

that he was satisfied with the Department's response.

1 33. The following day, on June 19, 2020, Plaintiff walked through the
2 hallways of SCPD and noted that Gilbert’s photograph was prominently
3 displayed on the SCPD “Legacy Wall.” Later that day, Plaintiff encountered
4 Chief Nikolai in the locker room. Plaintiff believed that Gilbert’s photo should
5 be removed from the “Legacy Wall.” Nikolai refused. He said, “When there’s
6 a conviction.”

7 34. Plaintiff, thereafter, contacted Assistant Chief Rush. Plaintiff
8 explained how the photo affected him, as a Samoan. He asked that it be taken
9 down. Rush listened and, later that day, informed Plaintiff that Gilbert’s photo
10 *would* be removed. Plaintiff responded by emailing Chief Nikolai and
11 thanking him.

Adverse Employment Actions

12 35. On June 29, 2020, eleven (11) days after speaking to the POA
13 leadership about retired Captain Gilbert and about Plaintiff’s view that racism
14 had not yet been addressed either internally at SCPD and publicly and ten (10)
15 days after speaking to Chief Nikolai in the locker room, the Lieutenant’s
16 Promotional List was eliminated. With the list’s elimination, Plaintiff’s
17 promotion was stymied. Nevertheless, Plaintiff was led to believe that he stood
18 a good chance of promoting from the next, successive Promotional List and
19 should be “patient.” However, on or about October 30, 2020, Plaintiff received
20 a call from Assistant Chief Rush and was told that the new Promotional List
21 was being eliminated. No reason was given.

22 36. On or about August 26, 2020, Plaintiff alleges that Captain
23 Cummins, through a lieutenant, issued an order denying Plaintiff and the
24 Traffic Unit overtime. Despite grant funds that had been earmarked for the
25 Traffic Unit, Plaintiff alleges that the grant was, inexplicably, allowed to expire
26 leaving approximately \$40,000 in funds that had not been used. Plaintiff
27 alleges that Captain Cummins made the decision to allow the grant to expire,
28 which Plaintiff contends was a further adverse employment action that Plaintiff

1 attributes to his exercise of free speech under the First Amendment, as more
2 fully set forth below.

3 37. On or about October 28, 2020, Plaintiff also learned that a SCPD
4 officer and good friend of Plaintiff's, Officer Paul Lozada, had been informed
5 by SCPD, despite Officer Lozada's experience, performance, and seniority,
6 was summarily terminated. Plaintiff alleges that SCPD command staff know
7 of his strong friendship with Officer Lozada. Plaintiff contends that the
8 termination of Officer Lozada is another manner by which SCPD has taken an
9 adverse employment action against Plaintiff, in retaliation for Plaintiff's
10 exercise under the First Amendment.

11 **FIRST CAUSE OF ACTION FOR DAMAGES FOR**
12 **DEPRIVATION OF CIVIL RIGHTS UNDER**
13 **42 U.S.C. SECTION 1983**

14 **(For Free Speech Retaliation -- Against Defendants City of Santa Clara,**
15 **Patrick Nikolai, and Todd Cummins, in their individual and official**
16 **capacities)**

17 38. Plaintiff hereby adopts, incorporates, and reiterates all of the
18 preceding allegations of this complaint.

19 39. The conduct of Defendants deprived Plaintiff of his rights,
20 privileges and immunities secured by the Constitution of the United States,
21 including, but not limited to, the right to free speech under the First
22 Amendment.

23 40. By speaking out about systemic racism at SCPD and criticizing
24 SCPD for failing to speak publicly about racism, as more fully set forth herein,
25 Plaintiff was speaking out, as a private citizen rather than as a public employee,
26 on matters of public concern and, thus, was engaged in protected speech.

27 41. Plaintiff alleges that he had no official duty to make the statements
28 he made to both the POA and to Chief Nikolai, as set forth hereinabove.

42. By terminating the Lieutenant's Promotional List and disallowing

1 Plaintiff overtime, Defendants took adverse employment actions against
2 Plaintiff.

3 43. Plaintiff further alleges that Defendants would not have taken the
4 adverse employment actions above, absent the protected speech by Plaintiff
5 alleged herein.

6 44. Plaintiff alleges that his speech, as more fully set forth herein, was
7 a substantial or motivating factor behind the termination of the Lieutenant's
8 Promotional list, on June 29, 2020, and the denial of overtime, on or about
9 August 26, 2020.

10 45. Plaintiff alleges that, by denying Plaintiff's request for a take-down
11 of Gilbert's photo, Chief Nikolai was expressing his opposition to Plaintiff's
12 speech.

13 46. In performing these acts, Defendants acted under color of state law.
14 The acts of Defendants Nikolai, and Cummins were the moving force behind
15 the constitutional violation alleged herein. Therefore, Defendants Nikolai and
16 Cummins are liable, in both their individual and official capacities, and City of
17 Santa Clara is liable under *Monell*.

18 47. As a direct and proximate result of Defendants' conduct as alleged
19 above, Plaintiff has been damaged by loss of earnings and earning capacity,
20 impairment of his ability to obtain employment within his profession, damage
21 to his reputation, humiliation, fear, anxiety, torment, degradation and extreme
22 emotional distress in an amount according to proof but not less than Three
23 Million Dollars (\$3,000,000).

24 48. Plaintiff is entitled to his attorney's fees pursuant to 42 U.S.C.
25 Section 1988.

26 49. Plaintiff is informed and believes and thereon alleges that the
27 above-described acts of Defendants depriving Plaintiff of his constitutionally
28 protected rights, privileges and immunities was done with evil motive or intent,
or with reckless or callous indifference to Plaintiff's rights. Accordingly,

1 Plaintiff seeks an award of punitive damages against the individual defendants
2 in an amount according to proof.

3 **SECOND CAUSE OF ACTION FOR DAMAGES FOR**
4 **DISCRIMINATION (RACE)**

5 **(Against Defendants City of Santa Clara, Patrick Nikolai, and Todd**
6 **Cummins)**

7 50. Plaintiff hereby adopts, incorporates, and reiterates all of the
8 preceding allegations of this complaint.

9 51. Plaintiff alleges that, in addition to the adverse employment actions
10 and constructive discharge alleged above, he was subjected to discrimination
11 and disparate treatment based on his Samoan race/national origin in at least the
12 following respects:

13 52. Plaintiff was ranked #2 on the eligibility list, based on the
14 Lieutenant's exam, given October 16, 2019. Nevertheless, that Lieutenant's
15 list was eliminated, despite the fact that, on prior occasions, the Promotional
16 list has been held open (notably, for a Caucasian applicant) even though there
17 have been five (5) or fewer on the list. [With respect to the most recent
18 Lieutenant's exam, SCPD promoted #1 and #3 off the list, while Plaintiff, who
19 was #1 on the last list, has been held back.]

20 53. Plaintiff alleges that he was more qualified than similarly situated,
21 white officers who sought the same position, yet he was denied a promotion.

22 54. Plaintiff alleges that he was discriminated against on the basis of
23 race and national origin (Samoan) and that this was a substantial motivating
24 reason for the adverse employment actions, including failing to promote and
25 the denial of overtime as alleged above.

26 55. Plaintiff further alleges that the purported allegations by co-
27 employees about feeling "unsafe" and "intimidated," and SCPD's position that
28 such incidents were the reasons Plaintiff did not promote, were/are a pretext.

56. Plaintiff alleges that he was harmed as a result, in an amount

1 according to proof but not less than Three Million Dollars (\$3,000,000).

2 **THIRD CAUSE OF ACTION FOR DAMAGES FOR**
3 **RETALIATION**

4 **(Against Defendants City of Santa Clara, Patrick Nikolai, and Todd**
5 **Cummins)**

6 57. Plaintiff hereby adopts, incorporates, and reiterates all of the
7 preceding allegations of this complaint.

8 58. Plaintiff alleges that his criticisms about racism and failing to
9 promote non-white officers constituted protected activity under the Fair
10 Employment and Housing Act [Cal. Gov. Code § 12940 (h)] and under Title
11 VII of the Civil Rights Act of 1964, because Plaintiff had opposed practices
12 forbidden under FEHA and under Title VII.

13 59. Plaintiff alleges that Defendants subjected Plaintiff to adverse
14 employment actions, as more fully set forth above, which resulted in material
15 changes to the terms of Plaintiff's employment, impaired Plaintiff's
16 employment in a cognizable manner, and/or injured Plaintiff in his
17 employment.

18 60. Plaintiff alleges that Plaintiff's above complaints about the lack of
19 diversity, failure to hire, and failure to promote diverse candidates were
20 motivating reasons behind the adverse employment actions taken by
21 Defendants, and each of them.

22 61. Plaintiff was harmed.

23 62. Defendants' retaliatory conduct was a substantial factor in causing
24 Plaintiff's harm.

25 63. As a direct and proximate result of Defendants' conduct, Plaintiff
26 has sustained and will continue to suffer harm and damages in an amount
27 within the jurisdiction of this court, the exact amount to be proven at trial, but
28 not less than Three Million Dollars (\$3,000,000). Such damages include, but
are not limited to:

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- 7. For costs of suit incurred herein; and
- 8. For such other and further relief as this court may deem just and proper.

DATED: March 1, 2021

LAW OFFICES OF PHILIP J. KAPLAN

By /s/Philip J. Kaplan
 Philip J. Kaplan
 Attorney for Plaintiff
 JACOB MALAE

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DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial in this action pursuant to Federal Rules of Civil Procedure, Rules 38 and 81.

Dated: March 1, 2021 LAW OFFICES OF PHILIP J. KAPLAN

/s/Philip J. Kaplan
PHILIP J. KAPLAN
Attorney for Plaintiff
JACOB MALAE