

To: Jeffrey Londregan, Esq
Law Director, City of New London

From: Beverly J. Hodgson, Esq.

Date: December 16, 2011

Re: Investigation of Claims of Chief Margaret Ackley

This report is performed as an investigation of legal claims prepared in anticipation of litigation. It has been prepared by me as the agent of Attys. Thomas Londregan and Jeffrey Londregan in their capacity as legal counsel and is therefore a privileged document exempt from disclosure.

Scope

The scope of this report is to investigate the potential liability of the City and individuals as to the allegations made in a letter dated August 24, 2011, from Atty. Shelley Graves of Faulkner & Graves, P.C., on behalf of Chief Margaret Ackley.

Atty. Graves did not enumerate her claims as distinct causes of action, and for the sake of clarity I have characterized them under various causes of action that are recognized by the courts and that could be stated in any eventual lawsuit based on the allegations of the August 24 letter and the further information supplied to me by Chief Ackley when I interviewed her. There is substantial overlap arising from the various incidents/conduct at issue. I have endeavored to analyze each and every allegation using the same analysis I would use as a trial lawyer or judge assessing the strength of claims, based on my experience as a lawyer who represented parties in state and federal employment litigation in private practice and adjudicated such claims as a Superior Court Judge. The claims are of two categories:

1. Liability of the City of New London

Chief Ackley's allegations against the City are that as an employer it is liable for gender discrimination, interference by City employees and officials with Chief Ackley's ability to perform her duties as Chief, failure to take action to prevent a hostile work

environment, and failure to take action to address alleged defamatory remarks, threats, undue influence, improprieties, and other systematic interference allegedly orchestrated by Councilman Michael Buscetto.

2, Liability of Michael Buscetto, individually and in his capacity as a City Councillor for interference with Chief Ackley's performance of her duties, inciting disrespectful actions by police department employees, assault and slander.

Methodology

1. I interviewed Chief Ackley for three hours in the presence of her attorney, with no limit on the time taken for the interview. I requested that she tell me all evidence in support of her claims. When I later learned that she had the impression that I was investigating only Title VII claims, I invited her, through her attorney, to meet with me a second time to supply any information she had omitted during the initial interview. This second interview took two and one half hours, covering the entire contents of the August 24 letter.

2. I interviewed Police Captain William Dittman and Todd Lynch, union president, in the presence of union attorney Richard Gudis.

3. I interviewed Deputy Chief Marshall Segar without counsel.

4. I interviewed former City Manager Martin Berliner without counsel.

5. I interviewed Human Resources director Bernadette Welch without counsel

6. I interviewed Michael Buscetto in the presence of his attorney, Kelly Reardon of the Reardon Law Firm, P.C.

7. Captain Michael Lacey was scheduled to be interviewed but did not attend, reportedly because of illness, on November 16, 2011.

8. I reviewed relevant charter provisions, statutes and case law.

9. After the second interview with Chief Ackley I did follow up calls to Union Attorney Richard Gudis, City Manager Denise Rose, Martin Berliner and Bernadette Welch.

I invited all witnesses, after they had answered my questions, to tell me any further facts or background that they believed was necessary for a thorough understanding of the situation at issue. I did not record the interview sessions and have no assurance that witnesses would repeat in court hearings the things they told me during the interviews.

A. "Hostile Work Environment"

The Chief claims that Mr. Buscetto and "others working at his bequest," including members of the police department, created a hostile work environment, and generally undermined her authority by criticizing her publicly, treating her disrespectfully, and suggesting that others could do the same.

"Hostile work environment" is a term loosely used by non-lawyers. In employment law, it has a specific meaning and gives rise to two kinds of claims:

a) a claim under Title VII of the federal Civil Rights Act, which prohibits sexual harassment. Courts have divided sexual harassment claims into two categories: 1) those that take the form of a demand for sexual services in return for employment advantages (so called "quid pro quo" claims) and 2) the creation of a sexually hostile work environment in which the employer or a co-worker acting with impunity subjects the complainant to an atmosphere of sexual innuendo, threat, tension or disparagement.

The Chief does not claim that Mr. Buscetto sexually harassed her by creating a sexually charged hostile environment. Such a claim, according to Second Circuit case law, requires a showing of pervasive sexualized tension and behavior in the work place. The only conduct alleged that has any sexual overtones at all is the Chief's allegation that on two occasions (one confirmed by Deputy Chief Segar), Mr. Buscetto grabbed the Chief in a public setting and staged himself kissing her in order to suggest to bystanders that they were getting along well. Federal case law would characterize this conduct as "isolated incidents" and would very likely not find it to be a basis for finding sexual harassment under Title VII.

b) Harassment of a general nature that causes emotional distress

The City's personnel policy titled Harassment and Discrimination Policy, effective July 2008 supersedes a prior policy titled "Sexual Harassment Policy." Though Ms. Welch stated that the policy is meant only to address harassment and the creation of a hostile work environment based on sex, race, color, age, religion, gender, national origin, disability status, marital or civil union party status, veteran's status, or sexual orientation, Chief Ackley parses some of the sentences of the policy as prohibiting creation of a hostile work environment apart from any basis in unlawful discrimination. Ms. Welch stated that the policy has never been interpreted as a broad prohibition on intimidating or offensive conduct but only on conduct that has sexual overtones.

There is no evidence that the Human Resources department has treated Chief Ackley differently from other employees with regard to its interpretation of the Harassment and Discrimination Policy.

When employees complain of a generally hostile environment on the job, as opposed to sexual harassment under Title VII, their claims are evaluated as tort claims alleging intentional or negligent infliction of emotional distress. These are state law causes of action, and Connecticut's highest courts have recognized that employment generally involves stress from being assigned tasks and from being evaluated, sometimes harshly, by supervisors and others. Connecticut's courts limit employers' liability to situations in which the employer is purposely causing emotional distress over and above what would result naturally from performance of the job and the job's requirements. To establish a claim of intentional infliction of emotional distress, a claimant must prove that the actor intended or should have known that his actions would likely result in emotional distress, that the conduct was extreme and outrageous, and that the emotional distress it caused is severe. *Petyan v. Ellis*, 200 Conn. 243, 137 (1986).

Individual councilors are not the employer of the Chief of Police in New London; rather, the employer is the City itself, and the City Manager, not the Council, has authority under the Charter to hire the Chief. (By statute, a police chief can be terminated only upon a strong showing of good cause, a standard that is seen as very

difficult to meet.) The evidence does not support a finding that the City as an employer nor the City Manager acted intentionally to subject the Chief to emotional distress or urged any individual councilor to do so on its behalf.

While several Councilors voted to recommend that the City Manager hire Captain Dittman as chief, it does not appear that they opposed Chief Ackley after she was selected by a panel of the Association of Connecticut Police Chiefs. Only Mr. Buscetto continued to be vocal about his opposition to the selection of Chief Ackley, criticizing her to police department employees and to others. Her claims against him are complicated by the fact that much of the conduct alleged is the expression of his opinion in speech, and is therefore protected by the First Amendment unless it is defamatory. The standards for defamation of a public official are discussed below.

The Chief contends that the City condoned Mr. Buscetto's actions and adopted them by failing to do anything about them. At various times, the Chief told the City Managers Berliner and Rose and the Director of Human Resources that Mr. Buscetto was criticizing her and interfering with her ability to do her job. They urged her to put her complaints in writing with specifics so that they could be investigated. They credibly state that the Chief declined to provide specific, definite allegations in writing, and they make the credible point that they could not refer to the board of ethics or anti-discrimination authorities charges that were vague and lacking in dates, specifics and the names of those alleged to have engaged in the conduct complained of. The Chief has not filed any complaint with any municipal, state or federal agency.

The Chief may allege that the City negligently (as opposed to intentionally) inflicted emotional distress upon her by failing to curtail the actions of Mr. Buscetto, the union, or police department employees. This cause of action is very unlikely to succeed. Under Connecticut law, a cause of action for negligent (as opposed to intentional) infliction of emotional distress in the context of employment is limited to claims arising from humiliating methods of terminating an employee's employment, a fact pattern not present in this case. *Morris v. Hartford Courant Co.*, 200 Conn. 676, 682 (1986); *Olson v. Bristol-Burlington Health District*, 87 Conn. App. 1, 5 (2005).

B. Defamation

The Chief suggests that she has been subjected to defamatory comments by Mr. Buscetto, notably, innuendo that she is a lesbian. Under the standard announced by the U.S. Supreme Court in *New York Times v. Sullivan*, the Chief is almost certainly a public figure and as such is highly unlikely to be ruled unprotected from defamation/libel except in very extreme circumstances (proof of a false statement made with actual malice). The alleged defamation is, moreover ambiguous: different witnesses report different wording, and the Chief knows of the alleged comments only from the reports of others.

C. Gender discrimination

The charges include allegations that the Chief has been subjected to different treatment by the City as her employer on the basis of her gender, in violation of Title VII and the Connecticut Fair Employment Practices Act. She cites a 5-2 vote by the City Councilors in favor of the male candidate for the office of police chief and a general culture of "New London boys" in municipal affairs. I do not think that this is a strong claim against the City. The City Manager, the official with the authority to select the chief of police, having been forbidden by the Council to conduct a national or open search (which could have made it easier to avoid selecting a female candidate had there been any wish to do so), asked the state police chiefs' association to supply a panel to assess the internal candidates. The City Manager abided by the choice of the panel. No witness supported any inference of gender discrimination by the City Manager, the female director of human resources, or any department head in treatment of the Chief on the job. The Chief identified as the sources of discriminatory conduct members of the City Council and employees of the police department, whom she regards as feeling empowered to treat her disrespectfully because of her gender.

The gist of the Chief's complaint is that the City failed to supervise Mr. Buscetto or curtail his criticism of her. Under the Charter, it appears that the only recourse against individual councilors is removal by the electorate or sanctions for proven claims of ethical violations.

The Chief claims that she has been treated in a discriminatory manner in that neither City Manager Berliner nor his successor, Denise Rose, initiated ethics charges or other discipline against Mr. Buscetto when she requested that he do so. The credible testimony is that she declined to make a written complaint with specific allegations after being asked to do so. I do not think a court would regard this response as evidence of discrimination against the Chief by the City. Ms. Rose stated that she asked the Councillor/Mayor to speak to Mr. Buscetto about his comments and advised all members of the council that all department heads should be treated in a respectful fashion. The City Manager does not have supervisory authority over the Council.

The Chief claims that Mr. Buscetto disparaged her by failing to conduct public safety meetings on a regular basis, setting up an alternative committee and scheduling it on a meeting schedule that she had asked him not to select, and instigating a "no confidence" movement against her by officers. I have found no evidence that any such actions by Mr. Buscetto were performed at the behest of the City Manager or of the council as a whole; and indeed, the evidence suggests that other council members were supportive of the Chief.

The Chief cites the filing of great numbers of grievances by the police union as gender discrimination. Other witnesses persuasively suggest that the grievances have increased in response to the Chief's tightening of rules and management expectations after the departure of a chief who had been somewhat easy-going in his final years on the job. Union officers have a responsibility to file grievances on behalf of their members and a tendency to prove their worth to their peers by being aggressive toward management.

An employer is not liable when underlings treat a supervisor in a discriminatory manner based on gender unless the employer can be shown to have refused to take actions available to it to curtail the discriminatory conduct, such that the employer can be seen as having authorized it by inaction. The City cannot prohibit the police union from filing grievances: to do so would be an unfair labor practice. The authority to discipline police officers lies not with the City Manager or Human Resources department but with the Chief, who has the authority to discipline officers who are insubordinate or treat her

disrespectfully. She has not done so, so there is no basis for any inference that the City would not support her imposition of discipline.

The Chief's theory appears to be that Mr. Buscetto acted on behalf of the City in disparaging her and undermining her authority by remarks made to others, including police department personnel. It seems most likely to me that the outcome of a trial of this claim would result in a conclusion that acts complained of are those of Mr. Buscetto, as an individual politician, not acting on behalf of or by authority of the City, and the motivation is likely to be found to be political rivalries and allegiances rather than gender discrimination. It would count in the City's favor that other important offices in the City are filled by women: the Human Resources director is female and the most recent City Manager (chosen by the Council) was female.

D. Claim for attorney's fees

Claimants are entitled to attorney's fees if they prove unlawful discrimination under the federal or state anti-discrimination statutes. Claimants who win common law claims for intentional or negligent infliction of emotional distress do not recover attorney's fees but pay them out of any verdict recovered from the trial. Because I conclude that the City has not violated federal or state anti-discrimination statutes, my opinion is that Chief Ackley has no basis for an award of attorney's fees.

RANGE OF DAMAGES

My opinion is that most of the conduct of which the Chief complains constitutes political animosity but is not actionable at law. As to those claims that could be the subject of legal claims, the Chief would have an extremely difficult time recovering in a lawsuit against the City on any of her claims. Now that Mr. Buscetto is out of office, such that his actions cannot even possibly be taken as the actions of the City, any suit against the City would likely be limited to a period of emotional distress of just over two years. Even cases in which a claimant is very unlikely to succeed have a "settlement value," that is, an amount that a potential defendant might pay to avoid even the remote risk of losing and to save expense. In my estimation the settlement value of Chief

Ackley's claims would be under \$30,000, though the expense of defending against a lawsuit, if it were brought, would be much higher.

I have not been asked to estimate the settlement value of potential claims against Mr. Buscetto individually.

Please do not hesitate to contact me if more information is needed.

Respectfully submitted,

Beverly J. Hodgson