

582 Market Street, 17th Floor
San Francisco, CA 94104
Office: 415-795-3579



April 13, 2017

PERSONAL & CONFIDENTIAL
SUBJECT TO CALIFORNIA EVIDENCE CODE §§1152 AND 1154

Via E-mail – Original to Follow

Mayor Rich Tran
rtran@ci.milpitas.ca.gov

Christopher J. Diaz, Esq.
Christopher.Diaz@bbklaw.com

455 E. Calaveras Boulevard
Milpitas, CA 95035-5411

Re: Tom Williams v. City of Milpitas, Mayor Tran

Dear Mr. Tran and Mr. Diaz;

Ad Astra Law Group, LLP has been retained by Tom Williams to represent his interests with regard to his legal disputes with you and with certain of your agents and employees. This letter operates as both a demand to cease and desist violations of the Civil Rights Act, which continues to repeatedly and aggressively be violated by Mayor Tran on an almost daily basis, and also to serve as notice of pending litigation for age related discrimination, retaliation and hostile work environment, also stemming from Mayor Tran's behavior. Additionally, the Mayor and the City must preserve all evidence related to this dispute, which will be articulated in more detail in a separate letter demanding such preservation of evidence.

At the close of this letter is a demand for damages resulting from both the repeated Civil Rights violations, and the on-going treatment by the Mayor of Mr. Williams under both the Age Discrimination in Employment Act ("ADEA") as well as the related Fair Housing and Employment Act ("FEHA"). If the respective parties to this correspondence are unable to successfully resolve these on-going issues, with an agreement that the behavior from Mayor Tran cease, as well as an agreement for monetary compensation for Williams' on-going suffering at the hands of Mayor Tran, then we will file an Equal Opportunity and Employment Act complaint, as well as a related Civil Action. We demand resolution in two (2) weeks' time from the date of this correspondence. If unsuccessful, the respective complaints will be filed on April 28, 2017.

Facts:

Over the last year, both during Mayor Tran's campaign for office, and presently, during his time in office, he has openly and repeatedly disparaged Mr. Williams' job performance as City Manager of Milpitas. Mr. Williams has been City Manager for Milpitas for ten (10) years and to date, has never received a performance evaluation (which is done annually) from the City Council that has been less than excellent. Mayor Tran is aware of these excellent ratings and yet continues to insist that Mr. Williams has done less than an excellent job in his position.

In addition to these repeated and misguided public comments about Mr. Williams' constitutionally protected job evaluations, Mayor Tran has followed up his statements by directly confronting Mr. Williams' about his age (53), suggesting repeatedly that Mr. Williams should quit his job because he is "too old."

What is most concerning about the Mayor's actions is that he continues to disparage Williams' job performance in a public forum, despite being directed by the City Attorney, on multiple occasions, that he is in violation of the Brown Act (California Government Code 54950 *et seq.*) when he makes these statements. Further, the Mayor has been warned that by publicly discussing Williams' job performance, and criticizing his past performance, he is in direct violation of the City of Milpitas' own internal policies.¹

Below is just a sampling of statements and actions by Mayor Tran that support Williams' claims.

On or about October 28, 2016, Mayor Tran's statements were published in the Milpitas Post:

"If elected, I would make it a top priority to do a formal performance review of our City Manager Tom Williams."

"Mr. Williams has found ways to harm our city,"

"The exodus of department leaders is alarming and the complaints of workplace harassment are widespread."

"Furthermore, Mr. Williams [sic] actions are hurting taxpayers."

"The lawsuit from former city attorney Mike Ogaz is in the multi-millions and will be sure to drag on in the process or cost the city what might be a record amount to settle."

¹ 2004, *Internal City Memo*:

"Never publicly criticize an individual employee. The Mayor and Councilmembers should never express concerns about the performance of a City employee in public, to the employee directly, or to the employee's supervisor. Comments about staff performance should only be made to the City Manager through private correspondence or conversation. Comments about staff in the office of the City Attorney should be made directly to the City Attorney."

“The hiring of executive secretary Rachele Currie has set a poor example for long-time city employees who are looking for promotion opportunities or outside talent that may be looking at joining our fine city.”

On or about January 20, 2017, Mayor Tran entered Williams’ office and made the following statement:

“Hey, what’s up. Now ya know I told the voters I had to investigate you, so noth’en personal but I gotta do what I gotta do. Hey, by the way, when are you going to retire? I need to mix it up with some younger people around here. People that look more like me.”

On or about February 7, 2017, Mayor Tran approached Mr. Williams in the common area adjacent to Williams’ office:

“Hey there, Mr. City Manager. You don’t look so good. You look stressed. Now, I’m not stressing you out, am I? But you know what I gotta do. My people are telling you’re to blame for all this cost. You have cost the City way too much money. You sure you don’t want to retire now?”

On or about March 6, 2017, Mayor Tran posted the following on his Facebook page:

“I will be calling for an independent formal performance review of our City Manager. Nearly \$1 million settlement involved, way too much money. We will seek the truth and go from there.”

Following Mayor Tran’s Facebook post, the City Attorney issued the following statement:

Mayor Tran and Honorable City Council:

A few legal issues have come to my attention based on recent Facebook postings. ~I write with some legal guidance to follow when using social media.

Personnel Issues

I received word that the Mayor posted a Facebook post regarding the Ogaz matter and our City Manager. ~With regard to personnel issues involving any employee that you hire or fire (this would include the City Manager and City Attorney), the recommended forum to raise any issues regarding performance is in the context of a closed session discussion.

~In fact, the Brown Act specifically authorizes a closed session for performance evaluations. ~

The risk with not using the closed session forum, is that any statements you make to the media or on social media, may create on-going issues with the employee, and it may expose the City to liability. ~Finally, it may also expose the individual councilmember who is making the statements to liability, including the risk of a personal libel suit. ~I would strongly recommend that any personnel issues be discussed in a closed session forum and not in any public format, including social media...*(irrelevant text deleted)*

Thank you.

On or about March 15, 2017, Mayor Tran's statement was published in The Fly:

"Yes, there are folks in city hall who are concerned about the information I'm providing to the public on Facebook. I remind myself daily that I work for the community. I'm going to give people the truth and folks appreciate it very much. Sometimes there will be issues that are difficult and during these times I'll always be fair and balanced in my views."

"I've had formal discussions with the city attorney and I'm going to continue to post videos, photos, and comments on Facebook to the full extent of the law. We've discussed risk management. I express views as an individual and do not express any views of the city council body or city government."

"...like any great organization, there will always be those who are against change."

On or about March 15, 2017, Mayor Tran made the following statements to The Mercury News:

"I am not accusing [Williams] of wrongdoing. I just want the truth. If there is no wrongdoing by the city manager I'll stand by him. I just want there to be transparency in city hall."

"This is not a personal agenda, this just happens to be strictly professional."

"I knew beforehand there needed to be greater accountability in city hall, particularly with the lawsuit settlements."

"I would read about these lawsuit settlements and it was a concern to me...over a million have been spent on lawsuit settlements and as mayor I don't find that acceptable."

On or about March 19, 2017, Mayor Tran approached Mr. Williams in his office and made the following statement:

“I am going to put your review on the Council agenda. I don’t care what your contract says, I don’t care about Ogaz and all that, my job is to get rid of you for my people. You old guys need to move out of the way.”

On or about March 31, 2017, Mayor Tran approached Mr. Williams at the Cesar Chavez Plaza opening event in Milpitas and made the following statement:

“I am really upset with you not allowing me and Hai to just have the video recordings we requested. I don’t know why we have to pay for them. Ya know Tom, I am the Mayor. I’m putting your review on the agenda and you’ll be paying the price.”

On or about April 2, 2017, Mayor Tran posted on his Facebook page under the header, “100 Day Report Card:”

“CITY MANAGER PERFORMANCE REVIEW: Council will vote on this decision April 18.

On or about April 4, 2017, at an Open Session of the City Council, Mayor Tran repeatedly made demands that a performance review of Williams’ be made in Open Session at the Council’s next meeting. In this meeting, the City Attorney went on the record stating that Mayor Tran’s repeated discussion of Williams’ job performance in a public forum not only continues to violate the Brown Act, but also violates the Council’s own policies regarding publicly discussing a City employee’s job performance and/or publicly disparaging a City employee. (<http://vp.telvue.com/preview?id=T02061&video=308510> (31:30 - 43:45)). This discussion also violated the Brown Act and Mr. Williams’ rights under that Act because Mr. Williams’ performance evaluation and the discussion of that agenda item for future meetings was not on the agenda for the April 4th meeting and Mr. Williams was not given notice that it would be discussed, whether in an open or closed session.

In addition to the comments listed above, Mr. Williams has been informed by countless City employees of Mayor Tran’s discussions with them regarding Williams’ “poor” job performance. Members of the public approach Mr. Williams almost daily inquiring into his job performance as well, as a result of the Facebook postings by Mayor Tran.

In accordance with the policies and practices of the City of Milpitas there have been annual reviews conducted by the City Council (including the sitting mayor) into the City Manager’s job performance. Those reviews are available to the Mayor to inspect. The reviews were conducted in the years in which the lawsuits to which the Mayor constantly refers were

settled and/or defended. Williams' performance, as it relates to these past events, has already been evaluated. It would appear Mayor Tran is engaging in a witch hunt against Mr. Williams unnecessarily and with malice, in violation of Mr. Williams constitutional and employment rights, to try to oust an older employee and retaliate against him to further the Mayor's own agenda.

42 U.S. 1983 and The Ralph M. Brown Act:

42 US Code Section 1983 reads as follows, "Every **person** who, **under color of any statute, ordinance, regulation, custom, or usage**, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the **deprivation of any rights, privileges, or immunities secured by the Constitution and laws**, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

Under 42 US 1983 ("1983"), an individual may seek redress for actions taken that deprive him or her of their constitutionally protected rights as well as due process. The damages that flow from a violation of 1983 are broad and include injunctive relief as well as related monetary compensation for emotional distress, damage to reputation, and both front and back pay:

There is no requirement that the plaintiff sue in federal court because state courts have concurrent jurisdiction, and the usual rule is exhaustion of administrative and judicial state remedies is not a prerequisite to a section 1983 action. Also, the existence of concurrent state remedies is not a bar to a section 1983 action. **With respect to the extent of damages available, the Supreme Court has noted that the basic purpose of a section 1983 damages award is to compensate the victims of official misconduct, and therefore held that there is no limit on actual damages if they can be proven.** (see Carey v. Piphus, 435 U.S. 247 (1978).)

Furthermore, the Mayor can be sued for his actions not only as a public servant, thereby implicating the City of Milpitas, but also as an individual, making him personally liable, "Individual employees of federal, state and local government may be sued in their individual capacities for damages, declaratory or injunctive relief. (see Kentucky v. Graham, 473 U.S. 159, 165 (1985).)

To succeed on a 1983 claim, the individual must be able to establish a causal connection between the actions of the entity or the individual (in this case Mayor Tran acting on behalf of the

City of Milpitas) and the deprivation of an essential constitutional right. (see Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 690-691, (1978).)

In this instance, the identified essential right of which Mr. Williams is being deprived is that which is set forth in The Ralph M. Brown Act (“the Brown Act”), which governs local meetings of government bodies:

The body may conduct a closed session to consider appointment, employment, evaluation of performance, discipline or dismissal of an employee. With respect to complaints or charges against an employee brought by another person or another employee, the employee must be notified, at least 24 hours in advance, of his or her right to have the hearing conducted in public. (Government Code Section 54957.)

The public policy behind the Brown Act, specifically section 54957, is to prevent intimidation and harassment on the part of an elected official, or Council, against a Government employee who does not enjoy the same public forum as the individual making the statements about job performance. The closed session mandate set forth in Section 54597 is an exception to the general rule authorizing open sessions because of the constitutionally protected rights of an individual with regard to their private job performance and discipline. (see *Rowen v. Santa Clara Unified School District* (1981) 121 Cal.App.3d 231, 234; 68 Ops.Cal.Atty.Gen. 34, 41-42 (1985).)

At present, Mayor Tran has disparaged Williams’ job performance in the public sphere repeatedly, as seen in the opening facts of this letter.² The Milpitas City Attorney has directed Mayor Tran to cease making these statements on no less than two occasions, in an email and also publicly at the April 4th City Council meeting, to no avail. Despite the fact that Tran has been informed of his continued violations of the Brown Act, he persists in publicly degrading Williams’ job performance. These actions seem nonsensical given the fact that Mr. Williams has been subject to annual reviews of performance for the last ten years, by Council members and mayors that observed first hand his work in any given year. There is little to be gained by attempting to retrospectively impose a performance review, of a time in which Mayor Tran has no knowledge. Which leads to discussions of other possible motives for Mayor Tran’s actions, age discrimination.

² In addition to the claims described in this letter, we are investigating whether the Mayor has liability for libel and slander regarding the numerous harmful statements he has made about Mr. Williams.

Violation of the City Council's Own Rules and Policies:

Additionally, the Mayor's words and conduct have violated at least three of the rules adopted by the City Council in the 2004 City of Milpitas City Council Handbook in the section for Mayor and Council Conduct with City Staff (*see* Handbook pages 10-11).

First, under these rules the Mayor must never publicly criticize an individual employee. Specifically, under the Handbook, "[t]he Mayor and Councilmembers should never express concerns about the performance of a City employee in public, to the employee directly, or to the employee's supervisor. Comments about staff performance should only be made to the City Manager through private correspondence or conversation." Mayor Tran has clearly violated this rule with his comments and posts on social media about Mr. Williams, statements given to the press, statements made on the record at City Council meetings, and conversations with voters and citizens of Milpitas.

For example, as I have described above, in Mayor Tran's Facebook post about the City's settlement with Mr. Ogaz, he wrote "I will be calling for an independent formal performance review of our City Manager. Nearly \$1 million settlement involved, way too much money. We will seek the truth and go from there." As another example, Mayor Tran spent a significant portion of time during the open session of the April 4, 2017 City Council meeting asking questions about Mr. Williams' upcoming performance assessment and whether the assessment could be held in an open session. We are also aware that the Mayor has been making such statements during public conversations on numerous occasions questioning Mr. Williams' performance and his role in certain legal actions involving the City (for which we still maintain Mr. Williams' engaged in no wrongdoing).

Second, the Mayor is required to direct staff issues and assignments to the City Manager. The Handbook requires that "[a]ssignments for City staff and/or requests for additional background information should be directed **only** to the City Manager unless the matter involves the desire for a legal opinion or other legal issue in which case the request should be directed to the City Attorney." Further, "[r]equests for follow-up or directions to staff should only be made through the City Manager or the City Attorney when appropriate."

Third, the Mayor must limit requests for staff support. For this rule the Handbook requires that "[r]outine secretarial support will be provided to the Mayor and all Councilmembers. Requests for additional staff support - even in high priority or emergency situations — should be made to the City Manager who is responsible for allocating City resources in order to maintain a professional, well-run City government."

For each these last two rules, Mayor Tran has routinely gone around the City Manager's office and engaged with administrative staff employed by the City. As one example, Mayor Tran

has been harassing the City Clerk and her staff about his demand to place the performance review of Mr. Williams on the City Council meeting agenda for April 18, 2017. Mayor Tran has been engaging in this kind of improper direct conduct and aggressive behavior towards city employees on a nearly daily basis. This results in a less professional and well-run City government because such employees are given conflicting instructions from the Mayor and their supervisors, they become less efficient, they are made to feel that they are being forced to pick sides between Mayor Tran and Mr. Williams, and they are made to feel as if there is a witch hunt against Mr. Williams. This conduct undermines Mr. Williams with city employees, supporting the argument that Tran has an ulterior, discriminatory agenda.

Age Discrimination:

The Age Discrimination in Employment Act of 1967 (ADEA) protects certain applicants and employees 40 years of age and older from discrimination on the basis of age in hiring, promotion, discharge, compensation, or terms, conditions or privileges of employment. The ADEA is enforced by the Equal Employment Opportunity Commission (EEOC).

The Department of Fair Housing and Employment (“DFEH”) enforces the Fair Employment and Housing Act (“FEHA”) which prohibits discrimination and harassment based on race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, mental and physical disability, medical condition, age, pregnancy, denial of medical and family care leave, or pregnancy disability leave, or retaliation based on any of these protected categories.

The statements made by Mayor Tran to Mr. Williams regarding his age are clear evidence of discriminatory motive and intent. These statements, combined with Mayor Tran’s tireless attempts to disparage Williams’ job performance in the public forum, support a finding that Mayor Tran is attempting to get Williams fired, or to make him retire, due to his age.³

In addition to supporting a finding of discriminatory pattern and practice on the part of the Mayor against Williams, the statements themselves create a hostile work environment, also actionable under the law.

³ The City also remains under the April 13, 2016 Consent Decree with the EEOC resulting from Northern District Court Case No. CV 15-04444, which enjoins the City from, among other things, unlawfully discriminating against any employee due to his or her age, or retaliating against any employee or former employee because he or she opposes or opposed discriminatory practices made unlawful by the ADEA. Further, the Consent Decree requires certain affirmative steps be taken by the City to prevent further discrimination like what Mayor Tran has been perpetrating against Mr. Williams; however, the Mayor has been causing delays in implementing this training.

Damages:

The most significant aspect of William's damages to date are those relating to damage to reputation. Mr. Williams has been working as a City Manager in the Bay Area for many years. With the dissemination of negative statements regarding his job performance in the press, on the internet, and generally to the public, he has detrimentally been affected. Not only has Mr. Williams' ability to perform his own job has been radically transformed by the statements and actions of the Mayor, which have undermined his authority with City staff and employees, but Mayor Tran's statements have been echoing around the Bay, making Williams' ability to find a new job next to impossible. Williams' job prospects have been radically altered for life. Even if he were to try to leave Milpitas and work in another State, a quick internet search would pull up Tran's repeated disparaging comments.

In addition to radically altering Williams' job prospects for the rest of his career, Mayor Tran's statements, and actions against him, have had a deep and resounding emotion impact on Mr. Williams and his family. Mr. Williams has gone from being a trusted and loved City Manager, to someone treated with suspicion and hostility by both City employees and members of the public. Mr. Williams has begun to suffer from depressed thoughts and anxiety as a result of his private, job related performance being played out in a public forum.

Mr. Williams is entitled to seek attorney's fees relating to various claims brought against the Mayor and City of Milpitas, including, but not limited to, those authorized under 42 US 1983 as well as ADEA and DFEH related statutes.

Mr. Williams is willing to resolve these on-going issues with the City and Mayor Tran if the following compensation is paid, as well as an agreement entered into whereby the Mayor agrees to cease and desist any and all public statements that relate to Williams' performance of his job at City Manager and his age.

Damage to reputation:	\$500,000.00
Emotional Distress Damages:	\$500,000.00
Attorney's fees to date:	\$15,000.00

Obviously, if this matter is not resolved quickly and efficiently it is possible that evidence will be uncovered that will make Mayor Tran liable for punitive damages, which could more than

AD ASTRA LAW GROUP, LLP
Mayor Tran and City Attorney Diaz
April 13, 2017
Page 11

double Williams' current damages.⁴ Further, attorney's fees will continue to grow substantially with the filing of complaints and related discovery practice.

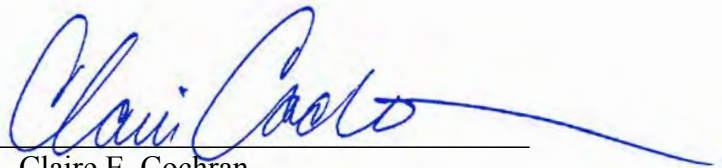
Conclusion:

I am hopeful that this matter can be resolved to the mutual benefit of all parties. The Mayor will arrive at an understanding of the current state of the law, which prevents him from making personal, private, employment related topics a matter of public discussion, and Mr. Williams will be able to move forward in his position as City Manager without the constant worry that his private information will be disseminated to the public.

As noted in the opening paragraphs of this correspondence, we would like to move quickly and efficiently to get this matter resolved before moving to litigation. Please contact me at your earliest convenience to discuss resolution.

AD ASTRA LAW GROUP, LLP

By: _____



Claire E. Cochran
Senior Counsel

cc: Tom Williams via email.

⁴ 42 US 1983 allows for punitive damage against an individual. (see Farrar v. Hobby, 506 U.S. 103, 112 (1992); Carey v. Piphus, 435 U.S. 247, 266-267 (1978).)