

Note:

Claimant, J. Bruce Henderson, will not be available by phone from September 5 through September 26 and October 1 through October 22. All communications should, therefore, be made via email:

[jbhsdcalif@aol.com](mailto:jbhsdcalif@aol.com)

# J. Bruce Henderson

4294 Kendall St.

San Diego, CA 92109

[jbhsdcalif@aol.com](mailto:jbhsdcalif@aol.com)

858 273 8600

September 5, 2017

To Whom It May Concern

## Claim for Discrimination By the City of San Diegp and Violation of San Diego City Charter by the City of San Diego

Background

August Firing and My Response

August 14 and 15 Meetings with Eric Pooch

August 15 Meeting with Michael Giorgino

August 16 Meeting with John Hemmerling

August 30 Meeting with Eric Pooch

No Response to My Claim of Age, Gender, and Race Discrimination

Violation of City Charter

Additional Relevant Provisions of Charter Section 40

Discrimination Based on My Age, Sex, and Race

Punishment by City if I Receive Unemployment Insurance Benefits

The Provisional Rule Discriminates Against Employees Based On Age

Witnesses

Damages

Investigation Requested

## Background

On August 14, 2017, I was informed that I was being fired as a Deputy City Attorney of the City of San Diego, my service to be terminated on August 31, 2017.<sup>i</sup>

I am of the opinion that the termination of my employment on August 31, 2017, constituted a violation of my rights under the City Charter of the City of San Diego and was the result of discrimination against me based on my age (74), my race (white), and my gender (male).

I am an attorney licensed since 1970 to practice law in the State of California. Over a decade ago<sup>ii</sup> I was hired by City Attorney of the City of San Diego, Mike Aguirre,<sup>iii</sup> to serve as a Deputy City Attorney in the Criminal Division. The promise when I was hired was, given my background and experience, that my employment would be in the General Trial Unit handling misdemeanor jury trials.

Prior to being hired I had been active in the private practice of law and was receiving retirement benefits from the City of San Diego as a consequence (1) of serving as a member of the San Diego City Council from 1987 through 1991 and (2) having reached the age of 60 in April of 2003.<sup>iv</sup>

Since being hired I have served continuously as a Deputy City Attorney in the Criminal Division until my termination on August 31, 2017. During the time of my service I have devoted all of the time I have spent in the practice of law to my work for the City Attorney's office as mandated by the City Charter.<sup>v</sup>

Approximately three years ago, I along with the other Deputy City Attorneys in the Criminal Division met with then City Attorney Jan Goldsmith and with then District Attorney Bonnie Dumanis. At that time, I and the other trial deputies were sworn as Deputy District Attorneys.<sup>vi</sup> It was my understanding that this action was taken to clarify our jurisdiction to handle prosecution of misdemeanors occurring in the City of Poway.<sup>vii</sup>

## August Firing and My Response

On August 14, 2017, Deputy City Attorney Eric Pooch, my immediate supervisor in the General Trial Division, sent me an email asking to meet me as soon as possible.

August 14 and 15 Meetings with Eric Pooch

I met with Eric on August 14 at approximately 10AM at which time he informed me that I would no longer be permitted to work as a Deputy City Attorney, the date for termination having been set by the office as August 31, 2017.

I concluded from his statements that the reason for my termination was that I was no longer handling restitution claims by victims of crimes our office had prosecuted. Eric stressed that he found giving me this notice highly unpleasant (stating that it the first time he had fired someone) and stressed that in his opinion, in which he believed the office agreed, I had been doing excellent work and was a person who others enjoyed working. He made it clear that there were no complaints regarding the manner in which I had performed my work and that he would be sad to see leave.

At no time did Eric mention that the next Monday the office was hiring a number of new Deputy City Attorneys in the Criminal Division who were under 30 years of age and who, among their other assignments, would be taking on criminal trials that might otherwise be assigned to me.

The next day, August 15, at approximately 9AM I initiated contact with Eric in his office. I stated to him that I believed my firing was the result of discrimination against me based on the fact that I was an elderly, white, male. I also stated to him that the reason I was no longer dealing with restitution claims by victims was that I had been frozen out of the work in April by Jennifer Nelson immediately upon her assuming responsibility as a supervising deputy for restitution and who in that role had also assumed supervision of my restitution work.<sup>viii</sup>

Eric made no substantive response; however, later that day at 2PM he confirmed that the office had just hired approximately 7 new deputy city attorneys in the Criminal Division and was in the process of providing them extensive training.

August 15 Meeting with Michael Giorgino

After speaking to Eric Pooch the morning of August 15, I initiated a meeting at approximately 9:30 with Deputy City Attorney Michael Giorgino, who is Eric's immediate supervisor as well as my supervisor in the General Trial Unit. I repeated my statement regarding the discrimination I believed to be directed

against me by the office and repeated that Jennifer Nelson had frozen me out of restitution work.

Michael stated to me that I was not being discriminated against. He said that there were thirty deputies in the civil and criminal divisions who were, like me considered provisions since they were receiving retirement from the City, and that all of this group of thirty deputies had been fired for the same reasons I was being fired, namely, to effect budget savings.

Upon my inquiry, Michael confirmed something I had heard from others that day, that is, that each of these deputies was an elderly, white male. (This group of thirty deputies hereinafter referred to as the "Senior, Retired Deputies.")

Michael also stated that some of the firings had been reversed as a consequence of intervention by supervisors.

#### August 16 Meeting with John Hemmerling

Following the meeting with Michael Giorgino, the next day, August 16, at approximately 9:45, I initiated a meeting with Deputy City Attorney John C. Hemmerling who heads up the Criminal Division of the City Attorney's office and so is also my supervisor.

I restated the points that I had made to Eric Pooch and to Michael Giorgino, as my immediate supervisors, and added that I understood that all the Senior, Retired Deputies that had been fired were elderly, white males and had been fired to free up money in the City Attorney's Fiscal Year 2018 budget.

John did not deny my understanding that the Senior, Retired Deputies were all older, white males nor that they had as a group been fired to free up money in the budget; however, he did not make any mention to me of the reason the money was needed.<sup>ix</sup>

#### August 30 Meeting with Eric Pooch

On August 30, 2017, I met with Eric Pooch and asked him if I could expect to receive any statement, oral or written, from the office regarding my being fired.

His only response was that Michael Georgino had been emphatic that under no circumstances was I to be permitted to perform any work or engage in activity of any nature as a Deputy City Attorney subsequent to August 31, 2017.

#### No Response to My Claim of Age, Gender, and Race Discrimination

Up to and including the date of this claim, none of my supervisors have provided me with an oral or written response to my complaint of discrimination nor have I received from the City Attorney's office any oral or written statement regarding my firing, other than as set forth above.

On August 31, 2017, an email was distributed to the criminal trial unit listing Deputy City Attorneys in the Criminal Division. My name was omitted from that list.

#### Violation of City Charter

My firing is a violation of protections provided to Deputy City Attorneys in the San Diego City Charter.

The Charter violation is relevant to my claim regarding the discrimination I have suffered since the Charter violation is explicable only in the context of what may be the desire of City Attorney to rid her office of Senior, Retired Deputies.

Charter section 40 states in pertinent part: "No Deputy City Attorney, who has served continuously as a Deputy City Attorney in the Office of the City Attorney for one year or more shall be terminated or suspended without good cause, ...."<sup>x</sup>

On August 31, 2017, I had served continuously over a decade as a Deputy City Attorney; and I was terminated without any statement, oral or written, asserting any cause, good or otherwise, as a basis for my termination.

Charter section 40 does set out exceptions to the good cause rule, namely, a Deputy City Attorney can be made subject to "layoff" without cause "due to lack of work or insufficient appropriation to meet the salary requirements necessary to maintain existing personnel in the Office of the City Attorney."

However, the facts as they existed throughout August of 2017 preclude the application to my firing based on these exceptions.

1. There was no lack of work. In fact there was, and is, so much work in the Criminal Division of the City Attorney's office that the City Attorney just notified the division of the August hiring of seven new trial deputies. An email sent on September 1, 2017, states "Seven new deputies started in the Criminal Division on Monday: Aida Ashouri, Lindsay Caro, Monty Randhawa, Kimberly Bains, Michael Cava, James Baumann, and Joanne Heilbrun."<sup>xi</sup>
2. The City's FY2018 appropriation was sufficient to meet the salary requirements necessary to maintain existing personnel. The proposed budget presented to the City Council for Fiscal Year 2018 by the Mayor provided an increase for City Attorney personnel expenditures from \$46,139,971 in Fiscal Year 2017 to \$49,736,149 in Fiscal Year 2018 (commencing July 1, 2017), an increase of \$3,596,178.<sup>xii</sup>

Since the Charter section 40 exceptions do not apply to my termination and since I was fired without good cause, my firing violated Charter section 40.

Additional Relevant Provisions of Charter Section 40

Section 40 also provides: "The City Attorney shall appoint such deputies, assistants, and employees to serve him or her, as may be provided by ordinance of the Council, but all appointments of subordinates other than deputies and assistants shall be subject to the Civil Service provisions of this Charter."

[Emphasis added]

Deputy City Attorneys, as this provision makes clear, are not subject to the various rules and regulations of the San Diego Civil Service Commission as provided in Article VIII of the Charter.<sup>xiii</sup>

Section 40 also provides: "The attorney and his or her deputies shall devote their full time to the duties of the office and shall not engage in private legal practice during the term for which they are employed by the City, except to carry to a conclusion any matters for which they have been retained prior to taking office."

This section is important because its effect on me was that for over a decade I was precluded from any other practice of law while a Deputy City Attorney even though my working time was restricted to 720 hours per fiscal year. As a

consequence, I have not engaged in the private practice of law for some twelve years making it difficult for me to reintegrate myself into the legal market place.

Discrimination Based on My Age, Sex, and Race

I am unaware of any reasonable basis for the office's decision to fire me other than a decision of the office to eliminate from the pool of office personnel a group of older (most, if not all, older than 60 years of age), white males, namely, the Senior, Retired Deputies.

From statements made to me by other employees of the office, I believe the decision to fire the Senior, Retired Deputies was a consequence of City Attorney Elliott believing this group of individuals to be beneficiaries of, and directly or indirectly responsible for, years of what the City Attorney may believe to have been wage disparities in the office negatively impacting female employees.

It appears to me that the City Attorney, having decided to arbitrarily<sup>xiv</sup> raise the wages of a specific cohort of female employees identified by the City Attorney as having statistically suffered wage disparity, determined that the source of funding for the resulting wage increases would be budget savings derived, in whole or in part, from the wholesale firing of the Senior, Retired Deputies.

As a member of that group, I believe the sole basis for firing me was that I am an elderly, white male and that the actions of the City Attorney discriminated against me as such.

I believe my conclusions are strengthened by the fact that the office has never in any manner responded to me suggesting that it has in any way reviewed, considered, or investigated my complaints as made to my three supervisors on August 15 and August 16, as explained above.

I believe additional evidence of the discrimination by the office against me as an elderly, white male was the behavior of Deputy City Attorney Jennifer Nelson, who when appointed on April 12, 2017 to supervise restitution matters, was effectively my supervisor.

Nelson, immediately upon her appointment on April 12, 2017, to supervise restitution, froze me out of that activity in the Criminal Division. Although I had been extensively involved in handling restitution claims for some six months prior



to her appointment and had been supervising approximately six legal interns in preparing restitution claims, interviewing victims, preparing motions, and presenting claims in court, upon her appointment Nelson refused to meet with me to review the status of ongoing cases; had all my active files delivered to her; stopped all my supervisory work with interns on restitution matters; and refused to ever speak to me in any context. She only asked me by email to provide her with my files containing any of my work product on restitution following my meeting with Eric Pooch on August 15 at which time I had complained to Eric of Nelson freezing out of restitution work.

I am not aware of any reason for Nelson's behavior toward me following her appointment as my supervisor in restitution other than the fact that I was an elderly, white male.

In this connection, in May of 2017 I initiated a meeting with John Hemmerling to alert him to the fact that I was no longer being allowed to work on restitution and that it had come to my attention that claims were not being handled in a timely manner, as had been the situation before I became involved, and that appropriate coordination with victims and proper briefing of their claims was also again a problem.

John thanked me for my input but he never afterwards mentioned the issues to me nor did anyone else in a supervisory role, e.g., Nelson, in the office acknowledge my concerns.

From my discussions in the last two weeks in August with other older, white males, it is my impression there is a general practice in the office to favor females over white males when positions are filled or new positions created.<sup>xv</sup>

#### Punishment by City if I Receive Unemployment Insurance Benefits

One of the effects of being fired without cause is that an employee has a right under California law to apply for unemployment insurance benefits.

However, should one apply and receive unemployment insurance benefits, the City of San Diego has adopted a code provision that precludes an employee who is receiving City of San Diego retirement benefits from ever being rehired in any capacity.

This ordinance (O-10681) was adopted by the San Diego City Council on July 19, 2016, effective August 18, 2016. The relevant Municipal Code provision that was adopted reads in pertinent part as follows:

Municipal Code §23.0806          Provisional Appointment

(Rule VII, Section 5 of the Rules of the Civil Service Commission)<sup>xvi</sup>

(a) ....

(b) With the approval of the Personnel Director, and subject to limitations set forth in section 23.0806(c), any person who has retired from the City service may be appointed provisionally to a position requiring special skills or knowledge, as determined by the Appointing Authority, for a period not to exceed 720 hours in any one fiscal year.

(c) The City will not appoint a retired person as a provisional employee under subsection (b) if the retired person received unemployment insurance compensation arising out of prior employment as a provisional employee under subsection (b). The eligibility for provisional employment under subsection (b) will be reviewed on a regular basis. (emphasis added)

Almost without exception this provision affects persons older than 40 years of age.

It affects me directly since I am purportedly classified and have been purportedly employed “provisionally” under subsection (b).

Quite obviously it denies me a statutory right available to others, particularly younger workers, who are not receiving retirement benefits from the City.

The adoption of the ordinance is also indicative of the attitude of the City of San Diego that older persons do not inherently enjoy the same civil rights as other citizens. As such it serves as an additional example of age discrimination as official policy of the City of San Diego.

The Provisional Rule Discriminates Against Employees Based On Age

The City of San Diego’s provisional rule against allowing retirees to work full time (the “provisional” rule) constitutes age discrimination which has impacted me

adversely for some twelve years. The provisional rule limits persons receiving retirement benefits from the City to working a maximum of 720 hours per fiscal year (San Diego Municipal Code section 23.0806(b)). In creating this constraint, this law discriminates based on age for at least the following reasons:

- Persons retired from other agencies can be hired full time;
- Provisionals are almost exclusively 60+ years of age;
- Some provisionals, e.g., this claimant, receive minimal retirement pay;
- The constraint on hours of employment appears to result nothing more than the political goal to avoiding double-dipping as opposed to achieving the best price for the work to be done;
- Provisional employees are generally subject to all work restrictions of fulltime employees, e.g., this claimant is precluded from undertaking any legal work outside of office assignments (Charter section 40);
- Provisionals are discriminated against in layoffs (San Diego Municipal Code section 23.0602).

#### Witnesses

I have not named witnesses, other than my supervisors, for fear of retaliation against them.

#### Damages

I believe I could have continued working as a Deputy City Attorney in the Criminal Division for at least another decade given my current state of health and the constraint that I would not be required to work more than 720 hours annually.

Because of the violation of the City Charter and the discrimination directed against me as an elderly, white male, I believe I have been deprived of the income I would have derived from this employment over the next decade.

Additionally, I am put to an economic choice. Do I apply for and receive unemployment insurance or do I attempt to remain available for rehiring by the City as an attorney working provisionally? Due to this violation of my rights, I ask that I be awarded the amount of my benefits under unemployment insurance law so that I can retain my opportunity for reemployment under current law.

Investigation Requested

I ask that this matter be thoroughly investigated. Here are some of the possible lines of inquiry:

- How many of the Senior, Retired Deputies employed in August of 2017 were over 40 years of age?
- What is the percentage of the Senior, Retired Deputies who were employed in August of 2017 who are over 40 years of age and white males?
- Were all the Senior, Retired Deputies fired in August 2017?
- How many of the Senior, Retired Deputies who were fired in August of 2017 rehired?
  - As to each of the Senior, Retired Deputies rehired what was the basis for rehiring each of them?
- What were the ages of persons hired in August of 2017 as Deputy City Attorneys?
- What was the race of each of the persons hired in August of 2017 as Deputy City Attorneys?
- What was the sex of each of the persons hired in August of 2017 as Deputy City Attorneys?
- Is there any written or other record of the reason or reasons the Senior, Retired Deputies were fired in August 2017?
  - What were those reasons?
- Is there any written or other record of the reason or reasons that I was fired in August 2017?
  - What was the reason or reasons?
- Since the newly elected City Attorney took office in December of 2016, what percentage of new hires by the office are elderly (40 or above in age) white males?
  - What was the total percentage of white male hires?
  - What is the percentage of white males in the San Diego population?
- What was the FY2018 budget for the City Attorney's office as adopted by the City Council?

- What was the projected budget savings from firing the Senior, Retired Deputies?
- Is there a set of procedures to be followed by the City Attorney in firing a Deputy City Attorney under the terms of City Charter section 40?
  - What does the City consider a basis for a “for cause” firing of a Deputy City Attorney under the provisions of Charter section 40?
  - If procedures exist, what are they?
  - If procedures exist, were they followed in my termination?
  - How did my firing comply with the requirements of Charter section 40 and any procedures adopted to implement the constraints set forth in Charter section 40?
  - If I was fired due to the occurrence of one of the budget exceptions to the Charter section 40 good cause requirement, do I have rights of reinstatement under any particular future circumstances?
- Why wasn't I offered some other position in the City Attorney's office?
- Were my reports of August 15 and 16 of discrimination passed on to others in the office?
- Were my reports of discrimination documented by the office in written form?

Sincerely,



J. Bruce Henderson

---

<sup>i</sup> The day following my termination, that is, on September 1, 2017, the City Attorney's office announced that “Seven new deputies started in the Criminal Division on Monday [August 28]: Aida Ashouri, Lindsay Caro, Monty Randhawa, Kimberly Bains, Michael Cava, James Baumann, and Joanne Heilbrun.” To the best of my knowledge, part of the work that these new hires by

now have taken on, or soon will take, is trial work that would otherwise have been assigned to me had I remained employed. I believe this fact is relevant as a factor to be considered in my complaint of discrimination since all of these new hires are, or so I understand, currently under the age of 30.

<sup>ii</sup> To the best of my recollection I commenced employment as a Deputy City Attorney in the Criminal Division for the City of San Diego in December of 2005.

<sup>iii</sup> Aguirre was elected City Attorney in 2004 and served through early December of 2008.

<sup>iv</sup> Due to the fact that when I was hired I was receiving retirement benefits from the City of San Diego, the office took the position that I was subject to a constraint on my hours of work pursuant to San Diego Municipal Code section 23.0806(b) which operated to cause me to be classified as a “provisional” employee. Part of the problem of this classification is that the retirement of elected officials, governed by San Diego Municipal Code Charter 2: Government, Article 4: City Employees' Retirement System, Division 17: Elected Officers' Retirement Plan, does not in its provisions state that a person receiving retirement as an elected official is subject to provisional employee constraints as set forth in other Divisions of the Municipal Code.

<sup>v</sup> San Diego City Charter section 40 states in pertinent part: “deputies shall devote their full time to the duties of the office and shall not engage in private legal practice during the term for which they are employed by the City,....”

<sup>vi</sup> In this regard San Diego City Charter section 40.1 provides: Concurrent Jurisdiction of City Attorney with District Attorney. The City Attorney shall have concurrent jurisdiction with the District Attorney of the County of San Diego to prosecute persons charged with or guilty of the violation of the state laws occurring within the city limits of The City of San Diego for offenses constituting misdemeanors.

<sup>vii</sup> I have not been informed that this appointment as a Deputy District Attorney has ever been terminated; however, I assume it automatically terminated on August 31, 2017, when I ceased holding the position of Deputy City Attorney in the Criminal Division.

<sup>viii</sup> There is an irony to Jennifer Nelson refusing to allow me to work on restitution matters as her appointment came as a result of my advice to the office to appoint a fulltime deputy to handle restitution since I was available for no more that 720 hours per year to work on these matters.

<sup>ix</sup> Prior to this meeting with John, I had been informed by others in the office that they understood that the Senior, Retired Deputies were being fired to free up money in the budget in order to allow the newly elected City Attorney to implement a plan of hers to remedy what in her opinion were salary disparities affecting females working in the office. I did not raise this point with John.

<sup>x</sup> See Grimm v. City of San Diego (1979) 94 Cal.App.3d 33 in which the Court states at page 38 that "The charter operates not as a grant of power, but as an instrument of limitation and

restriction on the exercise of power over all municipal affairs which the city is assumed to possess....”

<sup>xi</sup> Also, on August 31, 2017, a deputy city attorney in the Criminal Division, Howard Guess, retired, opening up his position. No other retirements have been announced regarding deputies in the Criminal Division so far as I am aware for Fiscal Year 2018.

<sup>xii</sup> I have not been able to determine the amount of the City Attorney’s FY2018 budget as adopted by the City Council.

<sup>xiii</sup> It is unclear if this Charter section 40 provision also precludes application of various sections of Chapter 2, Article 3: Civil Service of the San Diego Municipal Code to Deputy City Attorneys.

<sup>xiv</sup> It is suggested that wages were increased without reference to merit or any history of raised based on merit review.

<sup>xv</sup> It is a fact, however, that no supervisor in the office has ever stated to me directly and explicitly that I was being discriminated against as a white male or as an older person. Additionally, I have never seen a statistical study showing hirings by sex since City Attorney Elliott took office; and I have never seen any written evidence of changes in pay over this same time period for various women as opposed to various men.

<sup>xvi</sup> Note that Charter section 40 states that deputies in the office of the City Attorney are not subject to Civil Service provisions of the Charter. The question that arises is whether this provision precludes these deputies from being subject to Civil Service rules set forth in the City’s Municipal Code.