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Attorney for Plaintiff
DAVID BROWN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

DAVID BROWN,) CV. NO. CV07 00556 ACK LEK
)
Plaintiff,)
vs.) THIRD AMENDED COMPLAINT;
) EXHIBITS A-F;
) DEMAND FOR JURY TRIAL;
STATE OF HAWAII; MELANIE) CERTIFICATE OF SERVICE
CHINEN; NANCY MCMANN IN HER)
OFFICIAL CAPACITY, LAURA)
THIELEN IN HER OFFICIAL) TRIAL Date: None
CAPACITY, DOES 1-25,)
)
Defendants,)
_____)

Third Amended Complaint

Nature of Case

1. This is a civil action brought under 42 U.S.C. § 1983 and 25 U.S.C. § 3013.

Plaintiff seeks damages against the Defendants STATE OF HAWAII and CHINEN for committing acts, under color of state law, which deprived the

Plaintiff of Federal Constitutional Civil Rights under the First Amendment.

Plaintiff additionally seeks injunctive relief against the Defendant STATE OF HAWAII in the form of a statewide injunction against fast tracking projects which harm historical resources and injunctive relief of PLAINTIFF regaining his job.

2. After only nine months on the job with excellent job performance and with no replacement available, the State Historic Preservation Division (SHPD) did not renew Plaintiff's employment because Plaintiff voiced his opinion that numerous practices at SHPD were, unethical, culturally insensitive, and/or illegal violating numerous federal laws. Plaintiff alleges that CHINEN, an unqualified political operative, was placed as administrator of the SHPD in order to fast track or stall developments for political gain at the cost of the archeological treasures and the cultural burial grounds of ancient Hawaiians.

Jurisdiction and Venue

3. The court's jurisdiction is invoked pursuant to the provisions of 28 U.S.C. §§ 1331 and 1343 (3), providing jurisdiction for claims arising under a federal question, and for protection of civil rights.
4. Defendants are guilty under 42 U.S.C. § 1983 for abusing state power to deny Plaintiff constitutional rights.

5. 25 U.S.C. Sec. 3013 grants jurisdiction in the United States district courts by any person alleging a violation of NAGPRA, as the Plaintiff in this case alleges.
6. Venue is proper in the District of Hawaii pursuant to 28 U.S.C. § 1391 (b), as, upon information and belief, Defendants reside in the State of Hawaii, because the claims arose in this judicial district, and/or because Defendants are subject to personal jurisdiction at the time of this action.

Parties

7. Plaintiff DAVID BROWN has resided within the State of Hawaii at all times relevant to this Complaint and was a civilian employee of the State Historic Preservation Division located at 601 Kamokila Blvd., Room 555, Kapolei, Hawaii 96707.
8. During all times relevant to this complaint, Defendant STATE OF HAWAII was the employer of MELANIE CHINEN, PETER YOUNG, ROBERT MASUDA, NANCY MCMAHON, and MELISSA KIRKENDALL.
9. Defendant MELANIE CHINEN was, at all times relevant to this Complaint, employed by the Defendant STATE OF HAWAII as the administrator of the State Historic Preservation Division with offices located at 601 Kamokila Blvd., Room 555, Kapolei, Hawaii 96707.

10. Defendant NANCY MCMANN is presently employed by the Defendant STATE OF HAWAII as the administrator of the State Historic Preservation Division with offices located at 601 Kamokila Blvd., Room 555, Kapolei, Hawaii 96707.

11. Defendant LAURA THIELEN is presently employed by the Defendant STATE OF HAWAII as director of the State Department of Land and Natural Resources (DLNR) with offices located in the Kalanimoku Building at 1151 Punchbowl St. Honolulu, HI 96813.

12. Defendant DOES 1-25 are other persons whose identity is presently unknown. By information and belief, during times relevant to this complaint DOES 1-25 were employed by Defendant STATE OF HAWAII, and/or resided in the State or Hawaii and were tortiously and causatively involved in the torts and constitutional violations that harmed DAVID BROWN.

Common Allegations

13. All allegations in this Complaint are based on information and belief and/or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

14. Plaintiff is ignorant of the true names and capacities, whether individual, corporate, associate or otherwise of Does 1-25. Plaintiff is informed and

believes, and on that basis alleges, that each fictitious Defendant was in some manner responsible, participated in or contributed to the matters and things in which Plaintiff complained herein and in some fashion has legal responsibility therefore. If the exact nature and identity of such fictitious Defendants' responsibility for participation in, and contribution to the matters and things herein alleged is ascertained by Plaintiff, Plaintiff will seek to amend this Complaint and all proceedings to set forth the same.

15. To the extent contrary to the allegations contained in this Complaint; and as an alternative theory, Plaintiff is informed, believes and thereon alleges, that at all times mentioned herein each of the Defendants was the agent and/or employee of the Defendant agency; was at all times acting within the scope of such agency and/or employment; and actively participated in, or subsequently ratified and adopted, or both, each and all of the acts, conduct and/or omissions alleged with full knowledge of all of the facts and circumstances, including, but not limited to, full knowledge of each and all of the violations of the rights of the Plaintiff.

Factual Allegations

16. In December 2002, the State of Hawaii filed report No. 02-20 which was an audit on the State Historical Preservation Division (SHPD) (see Exhibit C).

17. This report pointed out numerous problems with SHPD that “has put the State to risk of losing federal grants” (see Exhibit C).

18. The December 2002 report listed specific problems which threaten federal funding and violate federal laws to include (see Exhibit C):

a. “. . . untimely and inconsistent archaeological reviews compromised the division’s ability to protect Hawaii’s unique historic sites and artifacts.”

b. “Projects were delayed for months and sometimes years.”

c. “. . . diverse standards are applied when reviewing the archaeological reports.”

d. “Inconsistent standards also plague the division’s burial program.”

e. Problems of employees accepting payments, conducting jobs on state time, abusing sick leave, and being paid overtime that was either unjustified or not approved.

f. “. . . the division’s inventory of human skeletal remains is piecemeal and does not routinely provide geographical information required by the Native American Graves Protection and Repatriation Act.”

g. “Division employees came forward under Hawaii’s Whistleblower Protection Act and alleged that staff were abusing sick leave, vacation leave, overtime, and tampering with government records.”

h. “The division also failed to adequately protect state property from fraud, waste, and theft.”

19. The auditor considered that some of the failings of SHPD violated federal law,

“The administrator caused the State to lose over \$65,000 when he failed to subgrant these federal funds to local certified governments as required by federal law.” (See Exhibit C).

20. Plaintiff became the Branch Chief Archeologist for the State of Hawaii on or about September 16, 2005 in the State Historic Preservation Department (SHPD).

21. Plaintiff was hired in part to fulfill federal requirements placed upon SHPD as per National Historic Preservation Act of 1966, 16 U.S.C. 470, section 101(b)(1) which states:

(A) provides for the designation and appointment by the Governor of a “State Historic Preservation Officer” to administer such program in accordance with paragraph (3) and for the employment or appointment by such officer of such professionally qualified staff as may be necessary for such purposes;

22. Exhibit A contains a Position Description for the job of Branch Chief Archeologist for the State of Hawaii.
23. Part of the Branch Chief Archeologist for the State of Hawaii is “to meet the minimal professional staff requirements of 36 CFR 61.3” (see Exhibit A).
24. Based on the 2002 Audit (see Exhibit C) and the job description (see Exhibit A), Plaintiff understood that his job and the SHPD was heavily regulated by federal laws.
25. The applicable Hawaii statutes are written to conform to federal laws.
26. Plaintiff understands and believes that applying a specific state statute is analogous to applying federal laws.
27. When Plaintiff took the job he found that all the problems listed above at 18 were still happening at SHPD.
28. Plaintiff understood that SHPD was violating ethical, cultural, and state statutes as well as the federal laws upon which those ethical, cultural, and state statutes were based.
29. When Plaintiff took the job he was aware that SHPD had ongoing problems to include unequal treatment of developers, unethical acceptance of money, failure

to safeguard artifacts in custody, and loose management of personal allowing then to routinely misuse sick leave and overtime (see Exhibit C).

30. During Plaintiff's approximately nine months on the job he voiced concern and objection to numerous procedures which violated legal and ethical obligations when approving or denying archeological approval for projects to include:

a. SUPERFERRY: On September 28, 2005, as documented in Exhibit D, before Kawaihae Harbor could be used by the Superferry, Plaintiff further voiced his concern to Defendant CHINEN that the Superferry should follow procedure in obtaining approvals and permits. None of the proposed procedures, however, were ever followed.

b. WALMART: Plaintiff objected to Defendant CHINEN coercing his involvement to represent CHINEN, SHPD and the STATE OF HAWAII in his capacity, as Plaintiff had no previous involvement or history in this case. CHINEN disclosed questionable actions by SHPD and the STATE OF HAWAII by not having a SHPD archaeologist trained in forensic/physical anthropology at the time.

c. GENERAL GROWTH PROPERTIES: Defendant CHINEN approved the archeological survey over Plaintiff's objection. During construction 65 Hawaiian burials were "inadvertently" found. A proper survey inventory survey of the

project area would have revealed numerous significant archeological features.

Records were either lost or “misplaced” in the SHPD library.

d. HOKULIA: Plaintiff advised Defendant CHINEN not to continue to approve the permit because of very high density and frequency of archeological resources and Iwi Kupuna but Defendant CHINEN approved the permit.

e. TURTLE BAY: Plaintiff noted that there was a very high probability of finding burials but was told by Defendant CHINEN to work with Cultural Surveys Hawaii, Inc. to devise an archaeological inventory strategy to allow development of the property. Plaintiff advised Defendant CHINEN against project approval, and despite community outcry, Defendant CHINEN obstructed Plaintiff from further project involvement. The present plan of Defendant STATE OF HAWAII to purchase this land for \$400 million to “protect and preserve it in perpetuity” includes building at least one more resort. The building of one more resort at Turtle Bay could potentially harm or displace hundreds of Hawaiian burials.

f. KALOKO HEIGHTS: Plaintiff was directed by Defendant CHINEN on or about May 15, 2006, to fast-track approval of the Grubbing/Grading permit to allow ground-disturbing activities in and around known archaeological features and burial sites in an archaeological landscape eligible for inclusion to the National Historic Register, prior to SHPD receipt and approval of the Burial Treatment

Plan, Preservation Plan, Data Recovery Plan, and prior to completion of Data Recovery efforts. Defendant CHINEN demanded Plaintiff write a letter of exception despite his objection to the development.

g. DOWSETT HEIGHTS: Defendant CHINEN demanded that three Archeological surveys be performed to find alleged significant archeological features. When none were found and when Plaintiff recommended approval of the permit, Defendant CHINEN further delayed the project causing financial harm to the developer.

31. At the September 28, 2005 meeting on Kawaihae Harbor, Plaintiff stated:

While no harbor plans, road plans, signage, nor parking plans for the Superferry have been reviewed by the Branch so far, the State Historic Preservation Division will be actively involved with determining preservation measures for archaeological sites in the development area such as heiaus. The area should be resurveyed because the current report is over ten years old, and many archaeological discoveries have been made in the past ten years. Further, Brown noted his desire for involvement by DHHL and the various Hawaiian associations in the area. (See Exhibit D at 6).

32. In that SHPD receives federal funds, the above mentioned surveying are requirements of federal laws such as 36 CRF 800 § 106, and NEPA (National Environmental Protection Act).

33. Unknown to Plaintiff on September 28, 2005, Defendant Chinen had already waived review of the entire NEPA process.

34. In stating his commitment to abide by federal laws, Plaintiff directly stated his opposition to the scheme being carried out by Defendant Chinen in fast tracking projects in violation of federal laws.

35. Present at the September 28, 2005 meeting, besides numerous people from various state agencies, there were many people from outside of the SHPD to include: LES GOYA, Project Manager Queen Emma Foundation; LT. COL. KIMBERLY RAPACZ. U.S. Army Pohakuloa Training Area (PTA); LARRY YAMAMOTO, Acting State Conservationist, Natural Resources Conservation Service. U.S. Department of Agriculture (USDA); LLOYD NEKOBA, Office of U.S. Representative Neil Abercrombie; MIKE KITAMURA, State Director, Office of U.S. Senator Daniel K. Akaka; JEFF OVERTON, AICP, Chief Environmental Planner, Group 70 International. Inc. (Group 70); NANI SHIMABUKU. Assistant Project Manager (808) 438-0881 U.S. Army Corps of Engineer Division. Department of the Army, Pacific; AARON LEONG, Legislative Assistant, Office of U.S. Senator Daniel K. Inouye.

36. All those present at the September 28, 2005 meeting heard Plaintiff state his commitment to follow federal regulations despite any scheme of SHPD to the contrary.

37. By belief, comments made by participants of the September 28, 2005 meeting were the "complaints" underlying Defendant Chinen's June 1, 2006 letter in Exhibit B, and that ultimately resulted in Plaintiff's termination.

38. On Saturday, October 8, 2005, at 9:00 a.m. at the Radisson Kauai Beach Resort in Lihue, Plaintiff addressed the Society for Hawaiian Archeology that included the following statements:

The current mode of review is inefficient. It's time-consuming, costly, and relies on sets of out-of-date data that is sometimes inaccurate.

The inventory reports used for clearance and background research are often three to four decades old.

Our Archaeological GIS database is practically nonexistent, other databases are incomplete, very little is electronic, and many of the reports are missing from our library.

...

Many projects need immediate attention, but for obvious reasons, we are currently forced to triage the most controversial and problematic of these.

Our immediate goal is to change all of this.

Let's forget about calling names, pointing the finger, tar and feathering, or burning at the stake. This is not a witch hunt.

This is an inherited set of problems and it is now all of our KULEANA to do something about it.

We need to establish standards and requirements so that we can ALL be on the same page.

39. Plaintiff intended his comments to communicate that he would not allow the past SHPD practices of "rubber stamping" in violation of federal laws, but would require compliance with all applicable regulations.

40. The Society for Hawaiian Archeology is a private organization, and approximately 150 people were in attendance to hear Plaintiff's comments at the October 8, 2005 meeting.
41. By belief, comments made by participants of the October, 8 2005 meeting were the "complaints" underlying Defendant Chinen's June 1, 2006 letter in Exhibit B, and that ultimately resulted in Plaintiff's termination.
42. Sunny Greer worked for SHPD until approximately May 2006.
43. Sunny Greer filed a union complaint and workers compensation case against SHPD, in particular for mistreatment by Chinen.
44. Plaintiff talked with Sunny Greer after she left SHPD, though before Plaintiff was terminated.
45. Sunny Greer talked about various problems at the SHPD, to include problems communicated by David Brown during Sunny Greer's union grievance and workers compensation claims.
46. At one time before Plaintiff was terminated, there was a meeting with David Brown, Sunny Greer, and Union agents for David Brown and Sunny Greer at the HGEA building.

47. By belief, comments by Sunny Greer were the "complaints" underlying Defendant Chinen's June 1, 2006 letter in Exhibit B, and that ultimately resulted in Plaintiff's termination.
48. Prior to being terminated, Plaintiff met other times with his union agent Jeff Morgan to complain about the problems, including illegal practices at SHPD.
49. By information and belief, complaints to HGEA union agents were communicated to Defendant Chinen prior to Plaintiff's termination date.
50. By belief, comments by the union agents were the "complaints" underlying Defendant Chinen's June 1, 2006 letter in Exhibit B, and that ultimately resulted in Plaintiff's termination.
51. In or about December 2005, Defendant Chinen sent Plaintiff to a 24 hour course called the "Human Resource Management for Supervisors."
52. This course was sponsored by the State of Hawaii, Department of Human Resources Development (DHRD).
53. Plaintiff went to two other classes called "Management Leadership for Results Courses I and II," in or about April and June of 2006, and these classes were taught by Jan Javinar, director of co-curricular activities programs and services (CAPS), at the University of Hawaii at Manoa.

54. By information and belief, the classes taught at the University of Hawaii had both government and private sector students.
55. In all these classes, Plaintiff raised concerns over unethical and illegal activities at SHPD.
56. Both instructors and fellow students heard these complaints by Plaintiff.
57. By belief, comments by the people in these classes were the "complaints" underlying Defendant Chinen's June 1, 2006 letter in Exhibit B, and that ultimately resulted in Plaintiff's termination.
58. While employed at SHPD, Defendant Chinen had an internal audit conducted by Nishihama & Kishida, CPAs Inc. (Honolulu). The auditors name was Odessa Dayondon. Chinen directed Plaintiff not to disclose anything negative about SHPD. Plaintiff told Defendant Chinen, that he would not say anything negative, but during the audit, Plaintiff disclosed everything he knew concerning the mismanagement of the office, treatment of remains, and potentially illegal, unprofessional and unethical activities.
59. By information and belief, comments made to the auditor were the "complaints" underlying Defendant Chinen's June 1, 2006 letter in Exhibit B, and that ultimately resulted in Plaintiff's termination.

60. The recent series of cases involving Joseph Brescia's property on Kauai show that the desecration of graves is ongoing (See Exhibit F), in particular:

On Sept. 15, Fifth Circuit Court Judge Kathleen Watanabe ruled that the State Historic Preservation Division did not meet its obligation to do further consultation with the council and descendants of those buried on the site over treatment of the burials (Exhibit F).

61. Development of areas with significant archeological features is governed by, among others, various state statutes to include HRS §§ 6E, 84, 92F and 710; various administrative rules to include HAR §§ 13-275, 13-277, 13-278, 13-284; state ethics rules; The National Historic Preservation Act of 1966 (16 U.S.C. 470); Code of Federal Regulations Title 36; The Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq [Nov. 16, 1990]); and 43 CFR 10.

62. Violating these laws and standards threatens accomplishing the federal mandated mission of protecting historic sites.

63. Plaintiff's job requirements do not include monitoring his supervisor, Defendant Chinen, to insure she does not violate federal laws.

64. The issues that Plaintiff spoke on, some of which are listed in paragraph 18 and 30, are issues of public concern.

65. Fast tracking and stalling projects violates the Hawaii State laws, administrative rules, state ethics and professional standards, and the federal mandated mission of protecting historic sites.
66. An important resource of any State Historic Preservation Division/Office across the United States is keeping a database and library of reports on locations with significant archeological features.
67. The National Park Service Historic Preservation grant requires that an archeological library be maintained.
68. The library at the Hawaii SHPD is in shambles.
69. The deficient library “threatens the division’s ability to protect historic sites.”
70. Every time Plaintiff attempted to fix the library and records, Defendant CHINEN told him “that was not a priority.”
71. Defendant CHINEN hindered Plaintiff from fixing the library so that she could engage in fast tracking and/or delay projects.
72. It is difficult if not impossible for an archeologist to find records of significant archeological features in an area if the records are missing or destroyed.

73. In Hawaii archeologists regularly miss known and unknown archeological features because the records and library at SHPD are not kept up to date.
74. Bones that are found inadvertently are often exhumed.
75. Not all bones exhumed by agents of SHPD are reinterred.
76. Bones under custody of SHPD are not stored according to museum curatorial standards.
77. Plaintiff asked Defendant CHINEN to start a program whereby bones in SHPD custody would be handled according to museum curatorial standards according to NAGPRA and other federal regulations.
78. Defendant CHINEN stated handling bones according to museum curator standards was not a priority with the result that she prohibited Plaintiff from changing the storage standards for exhumed Iwi Kupuna.
79. Plaintiff's responsibilities included exhuming, transporting, storing, inventorying, and assist in repatriating bones in a professional and culturally sensitive manner.
80. Human remains at SHPD were not stored according to museum curatorial standards to include:

81. Bones on Kauai are kept outside in a metal container that is not environmentally sealed and that is exposed to the elements;
82. Bones on Maui are kept in a closet;
83. Bones on the Big Island were kept in a bathroom closet with bathroom supplies such as plungers, toilet cleansers, and extra toilet paper.
84. Plaintiff asked Defendant CHINEN several times to store these bones according to professional and culturally sensitive museum curatorial standards as per the requests of the various burial counsels.
85. Defendant CHINEN was either ignorant of or deliberately indifferent to professional, ethical and culturally sensitive museum curatorial standards which violated the federal mandated mission of protecting historic sites.
86. Defendant CHINEN prohibited Plaintiff from correcting the situation and told him properly storing the human remains was not a priority and was not Plaintiff's concern.
87. As Plaintiff grew in knowledge of the corrupt practice at SHPD, he became aware that Defendant CHINEN would falsify NPS Historic Preservation Grant documentation in Defendant CHINEN's efforts to acquire federal dollars for SHPD.

88. On or about June 1, 2006, Defendant CHINEN reprimanded Plaintiff for violating policy making procedures and subsequently refused to renew his contract.

89. On or about June 1, 2006, Defendant CHINEN made false, hurtful, and malicious statements about Plaintiff that Defendant CHINEN knew to be false during a meeting with Tim Lee which included the following:

“I explained that I had received complaints from all of his staff, the private archaeology community, and the Hawaiian community. I explained that the complaints stemmed from his changing policy single-handedly and inconsistently applying these changes.”

90. Plaintiff made policies concerning QAQC (quality assurance quality control) policy of report review and correspondence within months of starting employment at SHPD.

91. There was no such QAQC policy prior to the Plaintiff's policy.

92. The QAQC policy was only for the staff of SHPD.

93. Plaintiff kept Defendant Chinen aware of the QAQC policy by sending her copies of all documents regarding the QAQC policy.

94. Plaintiff had a meeting with Defendant Chinen concerning the QAQC policy and Defendant Chinen agreed that the QAQC policy should be implemented.

95. Plaintiff made a request that all final report submissions be accompanied by a copy in PDF format, which would provide an electronic copy of all reports.
96. The "electronic copy" request was made before the final report was submitted to any archeologist who submitted a report.
97. A copy of the letter making the request for final copies that included an electronic copy was sent to Chinen for approval.
98. Defendant Chinen approved of this request dozens of times.
99. If certain archeologist were not able to submit reports in the PDF format, they were not required to submit said reports, and thus requiring reports in electronic format was a request rather than a "policy."
100. Plaintiff is not aware of any other policies that he is alleged had any part in changing or creating "single-handedly" or otherwise.
101. Plaintiff is not aware of any "policies" that affected the Hawaiian Community.
102. Other than the request, which was never an official requirement or "policy," Plaintiff is not aware of any "policies" that affected the Private Archeological Community.

103. By information and belief, therefore, any "complaints" from the "private archaeology community" or the "Hawaiian community" actually dealt with Plaintiff's speaking out against illegal practices at SHPD.
104. By information and belief, Defendant Chinen is not being honest about Plaintiff "changing policy single-handedly," and that all communications underlying her June 1, 2006 letter (Exhibit B) are actually referring to Plaintiff speaking out about her illegal practices.
105. While talking with various people in the community concerning projects, some of which are listed in ¶ 30, Plaintiff would voice his concerns about illegal, unethical and culturally insensitive practices at SHPD.
106. By information and belief, comments by these people are the "complaints" underlying Defendant Chinen June 1, 2006 letter (Exhibit B), and that underlying Plaintiff's ultimate termination.
107. Numerous other false and malicious statements were made by Defendant CHINEN in the "June 1, 2006" letter.
108. On or about April 20, 2007, Defendant CHINEN made false, hurtful, and malicious statements about Plaintiff that Defendant CHINEN knew to be false to the Honolulu Advertiser.

109. The contents of the June 1, 2006 were similar to the April 20, 2007 statement.
110. The defamatory statements made by Defendant CHINEN directly concerned Plaintiff's ability to responsibly do his job.
111. The defamatory statements were clearly erroneous.
112. Defendant CHINEN knew or should have known that the defamatory statements were clearly erroneous.
113. Defendant CHINEN made the defamatory statements about Plaintiff so that it was broadcast to Tim Lee and then broadcast to the news media.
114. Eventually this defamatory statement was spread throughout SHPD and the general public.
115. On or about August 9, 2007, in an interview with the Hawaii Tribune Herald, Defendant CHINEN said:
- Chinen said she didn't renew Brown's contract, even though the position remains vacant because she's looking for "a better match for the requirements of the job."
- "His statements are absolutely false, and I am greatly offended," Chinen said. "David has been accusing me of things even when he was employed here. We have always had rules whether David agrees with them or not."
116. Defendant made other defamatory statements to be proven at trial.

117. Defendant intentionally, knowingly, willfully, maliciously accused Plaintiff of wrong doing in order to intimidate, embarrass, and make it difficult for Plaintiff to find employment in Hawaii or elsewhere.
118. The derogatory accusations harmed Plaintiff's reputation and ability to work in his chosen profession.
119. Defendant's actions were wanton, reckless, with malice, and without regard for Plaintiff's emotional well being.
120. The defamatory statements were clearly erroneous.
121. Defendants knew or should have known that the defamatory statements were clearly erroneous.
122. Eventually all defamatory statements were spread throughout SHPD, the professional archeological community, and the general public.
123. Defendants intentionally, knowingly, willfully, maliciously accused Plaintiff of wrong doing in order to intimidate and embarrass Plaintiff.
124. The derogatory accusations harmed Plaintiff's reputation and ability to work in his chosen profession.

125. Defendant CHINEN recruited NANCY MCMAHON, MELISSA KIRKENDALL, and ASHLEY CHINEN to defame Plaintiff by questioning his professional abilities so that she could have a pretextual reason to not rehire Plaintiff.
126. Defendant CHINEN acted in complicity with others to violate Plaintiff's civil rights, to retaliate against Plaintiff and to harm Plaintiff emotionally and economically.
127. When Plaintiff objected, Defendant CHINEN said or implied that Plaintiff would not be working at SHPD unless he became a "team player."
128. One example of this behavior is Kaloko Heights that includes the following:
129. Defendant CHINEN made ad hoc policy decisions as in allowing grubbing and grading before SHPD received the finalized and approved Data Recovery Plan, Preservation Plan, and Burial Treatment Plan for the project and after a high density of significant archeological features were found.
130. Defendant CHINEN demanded that Plaintiff write a letter for her to sign which authorized a grubbing and/or grading permit for Kaloko Heights. (See Exhibit E at 2-3).

131. Plaintiff objected because knew that such grubbing and grading would harm archeological features and Hawaiian burials in violation of principles promoted by NAGPRA.
132. To coerce Plaintiff to write the letter, Defendant CHINEN yelled at him, accused the entire Archaeology Branch of being insubordinate overall, and of failing to follow Defendant CHINEN's directives. (See Exhibit E at 1).
133. During his "exit evaluation," however, Defendant CHINEN accused Plaintiff of developing ad hoc policies and being abusive to employees, which was not the Plaintiff's behavior but that of Defendant CHINEN. (See Exhibit B).
134. Defendant's actions were wanton, reckless, with malice, and without regard for Plaintiff's emotional well being.
135. As of November 7, 2007, approximately 17 months after Plaintiff's contract was not renewed, SHPD is not fully staffed and has not yet found a replacement for Plaintiff's former position.
136. Since Defendant CHINEN was appointed to SHPD on or about October 15, 2004, approximately 21 professionals have resigned from SHPD.

137. Plaintiff's yearly contract was not renewed so his last day of employment at SHPD was June 30, 2006.

138. Plaintiff was provided numerous pretextual and fabricated reasons that his contract was not renewed by SHPD in a Memorandum allegedly written on June 1, 2006 (see Exhibit B).

Count 1, Retaliation in Violation of First Amendment, 42 U.S.C. §§ 1983 and Ex Parte Young.

(Claim For Retaliation of Plaintiff for reporting wrongdoings under First Amendment Freedom of Speech and 42 U.S.C. § 1983 Defendant CHINEN in her individual capacity and Ex Parte Young injunctive relieve against Defendant STATE OF HAWAII.)

139. Plaintiff realleges each of the allegations set forth in paragraphs 1 through 84 above, as though specifically restated here, against the Defendants STATE OF HAWAII and CHINEN in her individual capacity.

140. Plaintiff is protected by 42 USC §1983 from having his constitutional rights of freedom of speech violated by retaliation, because he spoke out against illegal, unethical and culturally insensitive practices as he did in the allegations above, specifically paragraphs 18, 30, and 41.

141. Plaintiff is protected by the First Amendment from retaliation for speaking out against practices of his supervisor Defendant CHINEN which violated federal laws.
142. Plaintiff is protected by *Ex Parte Young* for violation of his the First Amendment rights against Defendant STATE OF HAWAII.
143. Plaintiff spoke out about principles of federal laws that must be observed to his supervisor Defendant CHINEN, to his fellow workers at SHPD, to those he related with in the professional archeological community, and with members of the community such as indicated in 30. For example, Exhibit D shows the minutes of Plaintiff indicating inspections that federal law requires that SHPD perform on structures prior to the operation of the Superferry.
144. Prior to his termination date, Plaintiff reasonably communicated to Defendant CHINEN that he intended to continue to speak out about the illegal practices and eventually Plaintiff did such as when he testified before the State Legislature in or about April 2007.
145. Defendant CHINEN told Plaintiff he was not allowed to talk with the State Attorney about any issue, and threatened Plaintiff with the loss of his job if he did talk to the State Attorney.

146. Defendant CHINEN told Plaintiff he was never allowed to talk with anybody above her in the chain of command, and threatened Plaintiff with the loss of his job if he did talk to those in Defendant CHINEN's chain of command.
147. Plaintiff was under the impression that if he did talk with the State Attorney or those in Defendant CHINEN's chain of command, then those people would do nothing but tell Defendant CHINEN and Plaintiff would suffer uncertain consequences.
148. Plaintiff knew that Defendant CHINEN worked at the auditor's department and was even involved in the 2002 audit (see Exhibit C) and thus anyone at the auditor's department would not listen to Plaintiff if he complained about Defendant CHINEN's illegal activities.
149. Plaintiff knew that Defendant CHINEN received many of her assignments and policy orders from BOB AWANA, chief of staff for Governor LINDA LINGLE, so Plaintiff knew no one would listen if he complained directly to the Governor's office.
150. After his termination date, Plaintiff did tell ROBERT MATSUDA about the illegal activity during Plaintiff's union grievance period but ROBERT MATSUDA did nothing to remedy the situation.

151. Plaintiff wrote and filed the memorandum of May 15, 2006 (see Exhibit E) because he not could think of anyone in the administration to tell about Defendant CHINEN's illegal practices.
152. Plaintiff often confided with his friend Dr. John Peterson, former member of the advisory counsel on Historic Preservation, to seek counsel about what to do about the illegal activity within SHPD.
153. Plaintiff, in his frustration, confided in many friends, many with professional qualifications, for advice about what to do in response to the illegal activities at SHPD.
154. Defendants retaliated against Plaintiff by fabricating false testimony for pretextual reasons to silence, intimidate, and discredit Plaintiff from making legitimate complaints about illegal, unethical and culturally insensitive practices which violated principles of federal law by Defendants and at SHPD as he did in the allegations above, specifically paragraphs 30 and 41.
155. Defendants took the above retaliatory actions with an improper motive to interfere with the Plaintiff's rights under the First Amendment of the Constitution.

156. Defendants used their authority as government actors to carry out this violation of Plaintiff's constitutional rights.
157. Defendants' discrimination is part of a widespread management program within SHPD whereby individuals are promoted and rewarded for allegiance to the top level of management rather than by qualifications and competence.
158. PETER YOUNG and ROBER MATSUDA, and/or other officials at the Department of Land and Natural Resources (DLNR) knew or should have known about the practices at SHPD that violated federal laws.
159. Officials at DLNR actively approved of or were passively indifferent to the violation of federal laws by SHPD.
160. Officials at DLNR actively approved of or were passively indifferent to the violation of Plaintiff's civil rights under the First Amendment.
161. As a proximate result of the retaliation, Plaintiff's job was not renewed beyond June 30, 2006.
162. As a proximate result of the retaliation, Plaintiff has suffered the violation of his constitutional rights with accompanying emotional and physical pain and suffering, humiliation, great embarrassment, loss of sleep, worry, anxiety,

emotional distress, loss of pay, loss of reputation, and loss of future earning capacity.

Count 2, Section 3013 NAGPRA

(Claim For violation of the Native American Graves Protection and Repatriation Act, aka NAGPRA under section 25 U.S.C. § 3013 against Defendants STATE OF HAWAII, Melanie Chinen in her official capacity, Laura Thielen in her official capacity and Nancy McMahon in her official capacity.)

163. Plaintiff realleges each of the allegations set forth in paragraphs 1 through 108 above, as though specifically restated here, against Defendants STATE OF HAWAII, Melanie Chinen in her official capacity, Laura Thielen in her official capacity and Nancy McMahon in her official capacity.

164. Defendants STATE OF HAWAII, Melanie Chinen in her official capacity violated numerous policies of the Native American Graves Protection and Repatriation Act (NAGPRA) also known as 25 USC 32, and these violations are ongoing under Laura Thielen in her official capacity and Nancy McMahon in their official capacity.

165. To the degree that SHPD receives federal funds and accomplishes federal purposes, SHPD is an instrumentality of the United States for the requirements of NAGPRA as per 25 U.S.C. Sec. 3001(4).

166. To the degree that SHPD receives federal funds, it is a “museum” under 25 U.S.C. Sec. 3001(8)
167. Plaintiff is a professional archeologist dedicated to the federal mandated mission of protecting historic sites.
168. Plaintiff moved to Hawaii with the purpose of getting a Job at SHPD so that he could continue his dedication to the federal mandated mission of protecting historic sites.
169. Plaintiff work for nine months at SHPD to achieve the purpose of the federal mandated mission of protecting historic sites.
170. Plaintiff plans to continue in his chosen profession as an archeologist working among the irreplaceable features and artifacts in Hawaii.
171. Because of the specific acts and omissions listed above in 30, together with other acts and omissions to be proven at trial, numerous archeological cultural items have been and are being permanently lost in Hawaii.
172. As a proximate result of insufficient library at SHPD, Native Hawaiian organizations cannot obtain adequate information as required by NAPGRA at 3005(a)(2) and elsewhere.

173. As will be proven at trial, Defendants, through negligence or intentional acts or omissions, violated, are violating, and intend to violate other provisions of NAGPRA.

174. As a direct and proximate result of the policies carried and/or being carried out by Defendants STATE OF HAWAII, Melanie Chinen in her official capacity, Laura Thielen in her official capacity and Nancy McMahan in her official capacity, numerous future features and artifacts will be lost to include the excavation of Hawaiian gravesites in violation of NAGPA such as gravesites located in and around the Turtle Bay area.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, by counsel, prays this honorable Court to grant judgment against Defendants as follows:

- 1) Reinstatement against Defendant STATE OF HAWAII under *Ex Parte Young* and/or under 42 USC § 1988, 25 U.S.C. Sec. 3013.
- 2) General and special damages, amount to be proven at trial, for loss of reputation, loss of future pay, loss of earning capacity, physical injuries and emotional distress against Defendant CHINEN in her individual capacity under 42 USC § 1983;

- 3) Exemplary/punitive damages against Defendant CHINEN in her individual capacity, amount to be proven at time of trial under 42 USC § 1983;
- 4) Reasonable attorney's fees and costs of this action under 42 USC § 1988.
- 5) Any and all remedies available under 25 U.S.C. Sec. 3007, 3012, 3013 and/or any other applicable statute or theory of law;
- 6) State Wide Injunctive relief in the form of enjoining all relevant parts of the STATE OF HAWAII, Laura Thielen in her official capacity and Nancy McMahon in her official capacity under *Ex Parte Young* or under 25 U.S.C. Sec. 3013 from continuing the policies complained of above to include negligent policy concerning handling of human remains and violating archeological treasures by fast tracking development projects such as is presently happening at Turtle Bay and numerous other parts of the State. At Turtle Bay, Defendant STATE OF HAWAII, Laura Thielen in her official capacity and Nancy McMahon in her official capacity, are preparing to allow construction in an area where there is an 80% or more probability that a large number of Hawaiian burials will be impacted. Specific details of said injunction to be decided at trial;
- 7) Declaratory relief to remedy harm done to Plaintiff's reputation;
- 8) All other just and proper relief.

Certification

The matter in controversy within this Complaint is similar to a state law case filed by the same Plaintiff herein as **BROWN v. STATE OF HAWAII et.al.** Civil No. 08-1-1193-06 KSSA filed on June 13, 2008.

Exhibits

- A. Job description for Branch Chief Archeologist for the State of Hawaii
- B. June 1, 2006 Memorandum “evaluating,” defaming, and firing David Brown
- C. Report No. 02-20, December 2002, Audit of the State Historic Preservation Division
- D. Minutes from September 28, 2005 Superferry meeting.
- E. Letters involving Kaloko Heights
- F. Article from the Honolulu Advertiser by dated September 19, 2008

DATED: Kaneohe, Hawaii March 12, 2009

/s/ Mark S. Beatty, MA, THM, PHD, MBA, JD
Attorney for Plaintiff

Demand for a Jury Trial

Plaintiff David Brown demands a trial by jury on all issues as are set forth.

DATED: Kaneohe, Hawaii March 12, 2009

/s/ Mark S. Beatty, MA, THM, PHD, MBA, JD
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

DAVID BROWN,) CV. NO. CV07 00556 ACK LEK
)
) Plaintiff,)
)
 vs.) CERTIFICATE OF SERVICE
)
)
)
 STATE OF HAWAII; MELANIE)
 CHINEN; DOES 1-25,)
)
)
 Defendants,)
)
 _____)

CERTIFICATE OF SERVICE

Services was sent through CM/EFC to

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DATED: Kaneohe, Hawaii March 12, 2009

/s/ Mark S. Beatty MA, THM, PHD, MBA, JD
Attorney for Plaintiff