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2
3 **UNITED STATES DISTRICT COURT**
4 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
5

6 **JUSTIN VINCENT,**

7 **Plaintiff,**

8 **v.**

9 **CITY OF CALIFORNIA CITY and DOES 1-**
10 **400, inclusive,**

11 **Defendants.**

1:18-cv-00549-LJO-JLT

**MEMORANDUM DECISION AND
ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS (ECF No. 4)**

12
13 **I. PRELIMINARY STATEMENT TO PARTIES AND COUNSEL**

14 Judges in the Eastern District of California carry the heaviest caseloads in the nation, and this
15 Court is unable to devote inordinate time and resources to individual cases and matters. Given the
16 shortage of district judges and staff, this Court addresses only the arguments, evidence, and matters
17 necessary to reach the decision in this order. The parties and counsel are encouraged to contact the
18 offices of United States Senators Feinstein and Harris to address this Court's inability to accommodate
19 the parties and this action. The parties are required to reconsider consent to conduct all further
20 proceedings before a Magistrate Judge, whose schedules are far more realistic and accommodating to
21 parties than that of U.S. Chief District Judge Lawrence J. O'Neill, who must prioritize criminal and
22 older civil cases.

23 Civil trials set before Chief Judge O'Neill trail until he becomes available and are subject to
24 suspension mid-trial to accommodate criminal matters. Civil trials are no longer reset to a later date if
25 Chief Judge O'Neill is unavailable on the original date set for trial. Moreover, this Court's Fresno

1 Division randomly and without advance notice reassigns civil actions to U.S. District Judges throughout
2 the Nation to serve as visiting judges. In the absence of Magistrate Judge consent, this action is subject
3 to reassignment to a U.S. District Judge from inside or outside the Eastern District of California.

4 **II. INTRODUCTION**

5 This matter concerns claims arising out of Plaintiff's employment and termination as Fire Chief
6 of the City of California City ("Defendant" or "the City"). On May 23, 2018, Defendant filed a motion
7 to dismiss Plaintiff's claims based on 42 U.S.C. § 1983 for deprivation of due process and on the
8 California Firefighters Bill of Rights, Govt. Code § 3250 *et seq.* ECF No. 4. Plaintiff filed an opposition
9 on June 1, 2018, ECF No. 6, and Defendant filed a reply on June 21, 2018, ECF No. 8. The Court
10 determined that this matter was suitable for decision on the papers under Local Rule 230(g), and the
11 matter was taken under submission on June 22, 2018. ECF No. 9.

12 **III. BACKGROUND**

13 The following facts are drawn from Plaintiff's complaint, and are accepted as true only for the
14 purposes of ruling on this motion to dismiss. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009).
15 Plaintiff, who is African-American, was hired as Fire Chief of the City of California City on May 2,
16 2017. ECF No. 1 ¶¶ 1,8. As Fire Chief, Plaintiff served as the City's fire code official and was
17 responsible for fire service operations and administration, as well as working with businesses seeking
18 marijuana growing facility permits. *Id.* at ¶¶ 9-11. Plaintiff was pressured by city officials to grant
19 permits to marijuana growing businesses, and was offered, but refused, bribes from the businesses. *Id.* at
20 ¶¶ 12-13. Plaintiff reported the pressure and attempted bribery to the City's human resources
21 department, which did not document or investigate the reports. *Id.* at ¶¶14-15.

22 At a July 25, 2017, City Council meeting, Plaintiff presented a marijuana impact report that
23 outlined fire and safety dangers associated with the marijuana industry. *Id.* at ¶ 16. The report included
24 recommendations for training, personnel, and resources. *Id.* Mayor Jennifer Wood and members of the
25 council stated concerns that the recommendations would be too costly, and Public Works Director Craig

1 Platt said that Plaintiff was going to kill the town. *Id.* at ¶¶ 17-18. Plaintiff was thereafter subjected to
2 threats, insults, and retaliation by city officials and marijuana business owners. *Id.* at ¶¶ 19, 20, 22, 25.

3 Plaintiff reported these threats and incidents to human resources, but the threats were not
4 documented or investigated. *Id.* at ¶¶ 20-21, 23, 26. Plaintiff specifically told a human resources staff
5 member that he believed he was being treated unfairly, that the unfair treatment could be due to his race,
6 and that many people believed a rumor that Mayor Wood was having an affair with a police lieutenant
7 and that it was impacting her decisions regarding city personnel. *Id.* at ¶ 24. In October 2017, Plaintiff
8 attempted to terminate a fire code enforcement officer who had conducted unauthorized searches using a
9 restricted background search account, and was initially obstructed by the assistant city manager. *Id.* at ¶¶
10 27-30.

11 On November 21, 2017, Plaintiff received a performance evaluation from City Manager Tom
12 Weil, who indicated that Plaintiff “exceeds expectations” in all categories. *Id.* at ¶ 31. Mr. Weil praised
13 the performance of Plaintiff’s team, and emphasized that Plaintiff should be cooperative in working with
14 the developing marijuana industry. *Id.* at ¶¶ 31-32. Mr. Weil retired on November 28, 2017, and was
15 replaced by Interim City Manager Robert Stockwell. *Id.* at ¶ 33. At a meeting with Plaintiff in December
16 2017, Mr. Stockwell emphasized the need for the city to facilitate marijuana businesses operations, and
17 said that he did not believe that marijuana growing operations should be required to install sprinkler
18 systems. *Id.* at ¶¶ 35-36. An investigation of Plaintiff began on December 15, 2017. *Id.* at ¶¶ 38-39.

19 Plaintiff participated in a raid on an illegal marijuana growing operation on December 18, 2017,
20 and was terminated by Mr. Stockwell later that day without explanation. *Id.* at ¶¶ 40-41. Plaintiff met
21 with Mr. Stockwell on January 7, 2018, and Mr. Stockwell refused to explain the reasons for Plaintiff’s
22 termination and refused to reinstate Plaintiff. *Id.* at ¶¶ 43-44.

23 Plaintiff brings claims related to his termination as Fire Chief by the City under five causes of
24 action: (1) retaliation under California Labor Code § 1102.5; (2) violation of Plaintiff’s Fourteenth
25 Amendment due process rights under 42 U.S.C. § 1983; (3) retaliation contrary to Plaintiff’s First

1 Amendment rights under 42 U.S.C. § 1983; (4) violation of the Firefighter’s Bill of Rights, Cal. Gov’t
2 Code § 3254; and (5) retaliation in violation of California’s Fair Employment and Housing Act, Cal.
3 Gov’t Code § 12940. ECF No. 1 ¶¶ 45-88. Defendant brings this motion to dismiss Plaintiff’s second
4 and fourth causes of action. ECF No. 4 at 2.

5 **IV. LEGAL STANDARD**

6 A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the opposing party’s
7 pleadings. Dismissal of an action under Rule 12(b)(6) is proper where there is either a “lack of a
8 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.”
9 *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). When considering a motion to
10 dismiss for failure to state a claim under Rule 12(b)(6), all allegations of material fact must be accepted
11 as true and construed in the light most favorable to the pleading party. *Cahill v. Liberty Mut. Ins. Co.*, 80
12 F.3d 336, 337-38 (9th Cir. 1996). The inquiry is generally limited to the allegations made in the
13 complaint. *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

14 Rule 8(a)(2) “requires only ‘a short and plain statement of the claim showing that the pleader is
15 entitled to relief’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon
16 which it rests.’” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355
17 U.S. 41, 47 (1957)). To overcome a Rule 12(b)(6) challenge, the complaint must allege “enough facts to
18 state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. A claim is plausible on its
19 face when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that
20 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A
21 plausible claim is one which provides more than “a sheer possibility that a defendant has acted
22 unlawfully.” *Id.* A claim which is possible, but which is not supported by enough facts to “nudge [it]
23 across the line from conceivable to plausible . . . must be dismissed.” *Twombly*, 550 U.S. at 570.

24 A complaint facing a Rule 12(b)(6) challenge “does not need detailed factual allegations [but] a
25 plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and

1 conclusions, and a formulaic recitation of the element of a cause of action will not do.” *Id.* at 555
2 (internal citations omitted). In essence, “a complaint . . . must contain either direct or inferential
3 allegations respecting all the material elements necessary to sustain recovery under some viable legal
4 theory.” *Id.* at 562. To the extent that any defect in the pleadings can be cured by the allegation of
5 additional facts, the plaintiff should be afforded leave to amend, unless the pleading “could not possibly
6 be cured by the allegation of other facts. *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*,
7 911 F.2d 242, 247 (9th Cir. 1990).

8 **V. ANALYSIS**

9 **A. Judicial Notice**

10 Defendant requests that the Court take judicial notice of three documents that are relevant to its
11 motion: (1) the City of California City Code of Ordinances, § 2-4.103; (2) the City of California City
12 Code of Ordinances § 2-4.202; and (3) the California Fire Code § 102.11 (2016). ECF No. 4-1 at 2.
13 Plaintiff requests judicial notice of seven documents: (1) The City of California City Municipal Code §
14 2-3.103; (2) selected sections of the City of California City’s Personnel Rules; (3) a City of California
15 City Council meeting agenda dated September 26, 2017; (4) The City of California City Municipal Code
16 § 4-1.101; (5) Division II of the 2016 California Fire Code of Regulations, Title 23, Part 9-
17 Administration; (6) the 2016 California Fire Code of Regulations, Title 23, Part 9, Preface synopsis, p.
18 xvi; and (7) Division I of the 2016 California Fire Code of Regulations, Title 24, Part 9-California
19 Administration. ECF No. 6-1 at 3. Neither request is opposed.

20 A court may “take judicial notice of matters of public record outside the pleadings” on a motion
21 to dismiss. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). A fact may be subject to
22 judicial notice if it is “not subject to reasonable dispute because it: (1) is generally known within the trial
23 court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose
24 accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). If a court does elect to take judicial
25 notice of matters outside the pleadings, the parties are entitled to receive notice of the court’s intention

1 and an opportunity to be “heard on the propriety of taking judicial notice and the nature of the fact to be
2 noticed.” Fed. R. Evid. 201(e).

3 Municipal ordinances are proper subjects of judicial notice because they are not subject to
4 reasonable dispute. *Tollis, Inc. v. Cty. of San Diego*, 505 F.3d 935, 938 n.1 (9th Cir. 2007) (“Municipal
5 ordinances are proper subjects for judicial notice”); *Engine Mfrs. Ass’n v. South Coast Air Quality*
6 *Mgmt. Dist.*, 498 F.3d 1031, 1039 n.2 (9th Cir. 2007) (taking judicial notice of a municipal ordinance
7 and stating that “[m]unicipal ordinances are proper subjects for judicial notice”). Likewise, judicial
8 notice is proper of a City Council meeting’s agenda as a public record whose accuracy is not in dispute.
9 *Jonna Corp. v. City of Sunnyvale, CA*, Case No. 17-CV-00956-LHK, 2017 WL 2617983, at *4 (N.D.
10 Cal. June 16, 2017) (taking judicial notice of city council minutes). Accordingly, all requests for judicial
11 notice are GRANTED.

12 **B. Due Process**

13 42 U.S.C. § 1983 creates a civil cause of action when any person, acting under color of state law,
14 subjects another “to the deprivation any rights, privileges, or immunities secured by the Constitution and
15 laws” of the United States. The Due Process Clause of the Fourteenth Amendment states that states shall
16 not “deprive any person of life, liberty, or property without due process of law.” U.S. Const. amend.
17 XIV § 1. Accordingly, “[a] § 1983 action may be brought for a violation of procedural due process.”
18 *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). To state a § 1983 claim for denial of procedural due
19 process, a plaintiff must allege (1) the deprivation of a constitutionally protected liberty or property
20 interest; and (2) a denial of adequate procedural protections. *Brewster v. Bd. of Educ. of Lynwood*
21 *Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998). Property interests “are created and the dimensions
22 are defined by existing rules or understandings that stem from an independent source such as state law.”
23 *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). To possess a property interest in a
24 benefit, an individual must have “a legitimate claim of entitlement to it,” not merely “an abstract need or
25 desire for it.” *Id.* Where a protected property interest exists, due process requires, at the very least, notice

1 of the proposed deprivation and an opportunity to respond. *Cleveland Bd. of Educ. v. Loudermill*, 470
2 U.S. 532, 546 (1985).

3 Defendant argues that Plaintiff had no property interest in his position as Fire Chief, as he was a
4 probationary employee, and accordingly was not deprived of any due process when he was summarily
5 discharged. ECF No. 4 at 5. The Personnel Rules contained in the City's Municipal Code specify that
6 the appointments of safety employees, such as fire fighters, are subject to a probationary period of 12
7 months, during which the employee may be terminated without cause or hearing, according to
8 Defendant, and Plaintiff was both a safety employee and terminated before completing that 12-month
9 probationary period. *Id.* at 6-7. Plaintiff argues in opposition that, as Fire Chief, he was not subject to the
10 personnel rules. ECF No. 6 at 4. Instead, Plaintiff contends, the City's Fire Code, which provides that a
11 fire code official may not be removed from office except for cause and after a hearing, and which does
12 not provide for a probationary period, was the applicable Municipal Code provision. *Id.* at 5-6.

13 California law pertaining to civil service employment "confers upon an individual who achieves
14 the status of 'permanent employee' a property interest in the continuation of his employment which is
15 protected by due process." *Skelly v. State Personnel Bd.*, 15 Cal. 3d 194, 206 (1975). The same regime
16 has been determined to confer no property interest in the continued employment of employees who are
17 not permanent. *Barthuli v. Bd. of Trs.*, 19 Cal. 3d 717, 723 (1977). "If under state law, employment is at-
18 will, then the claimant has no property interest in the job." *Portland v. Cty. of Santa Clara*, 995 F.2d
19 898, 904 (9th Cir. 1993).

20 The City of California City's Municipal Code provides, in relevant part, that "[a]ppointments,
21 including promotional appointments, of safety employees shall be for a probationary period of twelve
22 (12) months. During the probationary period the employee may be rejected without cause or hearing."
23 California City, Cal. Mun. Code § 2-4.202(a); ECF No. 4-1 at 7. "Safety personnel" are defined as
24 "persons employed by the . . . fire department as . . . fire fighters." California City, Cal. Mun. Code §2-
25 4.103(p); ECF No. 4-1 at 5. It is not clear from the definition provided whether the Fire Chief is

1 employed as a fire fighter. However, the Court need not make that determination, as the Municipal Code
2 also provides that “[p]ersons holding the following offices or positions are at-will management
3 employees and not subject to the Personnel Rules affecting other employees: . . . Fire Chief.” California
4 City, Cal. Mun. Code § 2-3.103(a). As a management employee, Plaintiff was exempt from the
5 probationary period and was an at-will employee not entitled to the procedural protections of the
6 Personnel Rules.

7 Plaintiff argues that this designation is not fatal to his claim because, as Fire Chief, his position
8 was subject under the Municipal Code to other procedural protections. ECF No. 6 at 5-6. After Plaintiff
9 was appointed Fire Chief, but before he was terminated, the City adopted the 2016 version of the
10 California Fire Code published by the California Building Standards Commission. ECF No. 6 at 5;
11 California City, Cal. Mun. Code § 4-1.101. The Fire Code establishes a department of fire prevention
12 headed by a fire code official, who “shall not be removed from office except for cause and after full
13 opportunity to be heard on specific and relevant charges by and before the appointing authority.” Cal.
14 Fire Code Div. II § 103.2; ECF No. 6-6 at 3. The Fire Code also specifies, however, that “[t]he
15 provisions of this code shall not be deemed to nullify any provisions of local, state or federal law.” Cal
16 Fire Code Div. II § 102.11; ECF No. 6-6 at 3.

17 As the fire code official for the City, Plaintiff was entitled to procedural protections before
18 termination under the Fire Code only if those protections did not “nullify” any other provision of the
19 Municipal Code. To nullify means to “make void; to render invalid.” *Nullify*, *Black’s Law Dictionary*
20 1173 (9th ed. 2009). When employment is at-will, either party may end the employment without cause,
21 for any reason or no reason at all, and at any time. *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 335 (2000).
22 If the procedural protections of the Fire Code were applied to Plaintiff, they would have the effect of
23 transforming his at-will employment into one which may only be terminated for cause. This would have
24 the effect of nullifying the statutory mandate that the City’s Fire Chief be an at-will employee.
25 Consequently, the Court concludes that the procedural protections in Fire Code § 103.2 cannot be

1 construed as applying to the position of Fire Chief.

2 Because his position was at-will and not subject to any hearing or other procedural protection in
3 advance of termination, Plaintiff has not alleged facts indicating that he was deprived of any process due
4 to him when the City Manager terminated his employment as the City's Fire Chief. Therefore,
5 Defendant's motion to dismiss Plaintiff's second cause of action is GRANTED. Because it is plausible
6 that Plaintiff could conceivably amend his complaint to allege that some other circumstances or
7 agreement created a protected property interest and entitlement to due process, Plaintiff is granted leave
8 to amend.

9 **C. Firefighter's Bill of Rights**

10 The Firefighters Procedural Bill of Rights Act ("Firefighters Bill of Rights"), Cal. Gov. Code §
11 3250-3262, defines a firefighter as "any firefighter employed by a public agency." Cal. Gov. Code §
12 3251(a). The definition of firefighter also contains a limitation stating that "[t]his chapter does not apply
13 to any employee who has not successfully completed the probationary period established by his or her
14 employer as a condition of employment." *Id.* "Fire Chief" is not a term defined in the Firefighters Bill of
15 Rights. The Firefighters Bill of Rights provides that "[p]unitive action . . . shall not be undertaken by
16 any employing department or licensing or certifying agency against any firefighter who has successfully
17 completed the probationary period without providing the firefighter with an opportunity for
18 administrative appeal." Cal. Gov. Code § 3254(b). Additionally, a "fire chief shall not be removed by a
19 public agency or appointing authority without providing that person with written notice, the reason or
20 reasons for removal, and an opportunity for administrative appeal." Cal. Gov. Code. § 3254(c).

21 Defendant initially argues that Plaintiff cannot state a claim based on the procedural protections
22 provided for in the Firefighters Bill of Rights because that section specifically states that it does not
23 apply to any employee who has not completed their probationary period. ECF No. 4 at 8. Defendant's
24 argument is unavailing. As previously discussed, as Fire Chief Plaintiff was an at-will management
25 employee not subject to a probationary period. The limited application of the Firefighters Bill of Rights

1 to employees who had passed through their probationary period is not a bar to Plaintiff because no
2 probationary period applied to his position. To interpret the statute as not applying to employees who are
3 not subject to any probationary period would be illogical. For the foregoing reasons, Defendant's motion
4 to dismiss Plaintiff's fourth cause of action is DENIED.

5 **VI. CONCLUSION AND ORDER**

6 For the foregoing reasons, Defendant's motion to dismiss is GRANTED as to Plaintiff's second
7 cause of action and DENIED as to the fourth cause of action. Plaintiff is granted leave to amend his
8 complaint as to the second cause of action. Any amended complaint shall be filed within 30 days of the
9 entry of this order, and this should be considered the last opportunity to amend.

10
11 IT IS SO ORDERED.

12 Dated: July 20, 2018

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE