

November 11, 2010

CARMEL'S HARASSMENT SUIT

A Report Prepared for Members of the Carmel Residents Association
By a Committee of the Board of Directors

A number of members of the Carmel Residents Association have asked questions about the suit against the city filed by the former human resources manager, Mrs. Jane Miller, who alleged continued harassment and unfair treatment by Rich Guillen, the city administrator. In an effort to answer some of these questions, a committee of the board of directors requested documents under the Public Records Act to uncover evidence as to Guillen's conduct, the city's handling of Miller's complaints, and the subsequent settlement. Carmel's attorneys refused to provide some documents and heavily redacted others, claiming confidentiality to protect employee privacy and attorney/client privilege. Throughout, our experience was in sharp contrast to provisions in the California Public Records Act, which specify that jurisdictions must "assist the member of the public to identify records and information that are responsive to the request and the purposes of the request." Despite the hurdles imposed by the city, we were able to obtain significant information.

We have organized this report around the most frequently asked questions.

What events preceded the settlement of Miller's harassment suit against the city?

Jane Miller was employed as a personnel specialist by the city in 1999. Her title was changed to human resources manager in 2003. The city employed Rich Guillen as city administrator in November, 2000.

During the interval between 2003 and 2008, six long-term senior management personnel left the city's employment: the assistant city administrator, the community and cultural director, the public works director, the financial services coordinator, the library director, and the executive assistant. Substantial settlements totaling in excess of \$500,000 were awarded to four of them. In each case, the employee felt compelled to seek representation by an attorney. Allegations circulated about Guillen's role in the termination of these senior employees, but complete information is not available because of confidentiality provisions in their settlement agreements or the city's claim that such matters are confidential personnel matters and will not be disclosed. The mayor currently asserts these settlements were merely "golden parachutes" for employees who chose early retirement. However, the judge who ruled on one aspect of the Miller case concluded these individuals were "employees with claims similar to Mrs. Miller."

According to Miller's complaints, Guillen gradually pursued a pattern of behavior toward her that was "unacceptable and unprofessional." He sent hundreds of emails and text messages to her stating his "physical, sexual attraction" to her. In these messages, he described her as a "hottie," a "blonde worker bee," "beautiful," and a "blonde hottie." In

emails, he called himself her “secret admirer,” that he “simply adores her,” and that he “thinks about her all the time.” He acknowledged her discomfort in receiving these emails by writing, “I know it embarrasses you to know that I liked you from the day I met you,” and “I know you don’t like compliments, but get use (sic) to them because you will always get them from me...” Many of the emails were released to the press and are now publicly available. Miller has stated that there is no email or other response from her to Guillen using such terms of endearment toward him. Guillen and the city have never produced any evidence to contradict Miller on this point.

Miller also alleged unwelcome physical contact from Guillen, including hugging her and “messaging up” her hair.

Her complaints also related to Guillen’s preferential treatment of two younger women on the city hall staff. As human resources manager, Miller was not consulted nor did she approve these actions. She believed their rapid advancement and salary increases grew out of improperly close personal relationships with the city administrator. Other staff members shared her opinion that these promotions were unwarranted. In his deposition, John Hanson, a city building inspector, stated that one of the young women who was promoted to a position of authority, “had very poor leadership skills” and “doesn’t have a lot of life experience.”

On April 16, 2008, Guillen told Miller he was eliminating her position. She claimed that subsequently he did not work with her, did not even speak to her, did not respond to her communications and went through other staff in order to communicate with her. Twelve days later, a new consultant appeared who introduced herself as the “HR person” for the city. Allegedly as a result of the stressful work situation, Miller went on sick leave on May 21.

The situations that ultimately precipitated the suit were probably frequently discussed by city staff and may have even been known to elected officials. However, Miller’s complaints were first formally stated in a letter dated May 20, 2008, prepared by her attorney, and addressed to the mayor and the city council. The response to the letter, sent three days later, was written by the city administrator (the alleged harasser). It ordered her to return to work, even though she was on sick leave. Otherwise, the complaint letter was merely referred to the city attorney, even though Miller’s attorney had already sent him a copy. According to Miller’s attorney, no response from the mayor, the city council, or the city attorney was ever received. His allegation is supported by the fact that city records show that the city council convened no closed sessions between May 20 and August 20 to discuss the issue. Furthermore, in the transcript of former city councilman Gerard Rose’s deposition, he was asked, “...did you ever take a vote in regard to a response to the May 20, 2008 letter?” He responded, “Not that I recall.”

On June 23, 2008, the city referred Miller’s complaints to Liebert, Cassidy, and Whitmore (LCW), the legal firm customarily retained to deal with personnel matters. LCW, in turn, subsequently engaged Karen Kramer to investigate the complaints.

Kramer had worked for LCW as an investigator in several prior cases.

Having received no response from the city, on July 28, 2008, Miller filed a formal complaint with the California Department of Fair Employment and Housing (DFEH). DFEH automatically issued her a “right to sue” notice.

Although the investigation was already underway, in October the city council awarded Guillen a salary increase, retroactive to April 30. There is no evidence that anyone on the council ever raised any objections to the salary increase despite the alleged misbehavior. For example, Gerard Rose’s deposition cites the fact that Guillen’s raise was included on a consent agenda, and therefore no discussion would have occurred. Rose was asked, “Do you recall anyone commenting with an opinion that giving a pay raise to Rich Guillen while the Jane Miller matter was pending sent the wrong message to staff?” Rose responded, “I don’t recall that.” Furthermore, Rose only remembered that Guillen had received a pay raise “during the last couple of years.” He had no memory of whether the investigation of Miller’s complaints had been completed prior to awarding the raise. All of this offers further evidence that the council assigned little importance to Miller’s complaints.

On October 23, 2008, because she still had received no response from the city, Miller wrote a lengthy letter to the mayor and city council reiterating and expanding her complaints against Guillen. Her attorney wrote a separate letter pointing out the lack of response by the city. Once again, no response was forthcoming.

On June 17, 2009, Miller filed suit in Monterey County Superior Court. The city denied all allegations of the lawsuit.

On October 2, 2009, LCW, on behalf of the city, filed a motion to disqualify Miller’s attorney, Michael Stamp. The court formally denied the motion on February 3, 2010 for four separate reasons and castigated the city’s attorneys for making “disingenuous” arguments and factual claims. In making the motion, LCW failed to support its claims and did not interview or contact the city attorney or prior city administrators or personnel officers who were the persons with the most knowledge of the facts.

The city eventually changed the legal firm representing them from LCW to Kennedy, Archer, and Harray. The notice of the substitution was dated January 15, 2010.

A settlement agreement with Miller was signed by the mayor on behalf of the city on June 17, 2010. On July 3, the city announced that the agreement had been reached.

Did the city administration follow its published procedures in managing Miller’s harassment complaints?

City Policy C93-02 is entitled “Harassment Prohibited.” Its purposes are stated

as follows:

“The policy of the City of Carmel-by-the-Sea is that harassment in any form in the workplace is unacceptable and will not be condoned or tolerated. The purposes of this Policy are to provide working conditions free of any form of harassment, to establish a procedure by which individuals who feel they have been harassed in any manner can bring their complaint(s) to an appropriate authority without fear of retaliation, to establish a procedure by which complaints of harassment are promptly, thoroughly and fairly investigated; and to insure that individuals who are found to have violated this policy will be subjected to disciplinary action that is commensurate with the severity of the offense.”

The policy defined sexual harassment as “Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature which...creates an offensive work environment.” Clearly, Miller’s complaints met that definition.

Procedures to be followed in managing complaints were described as “informal” and “formal.” Although they encouraged employees to try to resolve complaints informally, this was not a requirement. In this instance, most informal procedures did not apply because they assigned roles to the “personnel officer,” the city administrator, and the assistant city administrator—all of whom were directly involved in the complaints.

The city’s procedures specified that if the alleged harasser was the city administrator, complaints should be addressed to the city council’s personnel committee. However no such committee existed. Gerard Rose’s deposition transcript quotes him saying, “the entire council would handle most matters rather than shove it off on a committee.” He did not recall the specifics, but apparently, as already noted, the May 20, 2008 letter from Miller’s attorney was referred to the city attorney and, for response, to the city administrator, even though he was the accused harasser.

From the outset, the mayor and city council violated stated procedures that required the recipient of complaints to “Listen to the complainant’s allegations and discuss the actions complained of with discretion, sensitivity and due concern for the dignity of everyone involved.”

Guillen’s letter, ordering Miller back to work despite the fact that she was on sick leave, was clearly retaliatory. This action also violated city policy that stated, “All employees are assured that they may make such reports and participate in any investigation without fear of retaliation by the city, department management, their immediate supervisor, or any other employee. Retaliation will be considered a serious act of misconduct. Anyone found to have committed any act(s) of retaliation will be subject to the applicable disciplinary process, up to and including termination.”

According to Miller’s attorney, except for the city administrator’s letter, “The mayor, city council, and city attorney did not respond further and took no prompt or

effective action in reaction to plaintiff's May 20, 2008 letter. Instead they referred plaintiff's letter to Guillen for him to handle, without any investigation of the conduct of Guillen or the assertions of the plaintiff, all in violation of state law and other policies and procedures designed to prevent retaliation and injury to workers who complain of inappropriate sex and age-based violations."

An interesting exchange is reported in Gerard Rose's deposition transcript. He was asked, "In your experience in working in employment law in the past have you ever worked in any case where the employer designated the accused harasser as the person to respond in behalf of the employer?" He responded, "I don't remember any instances of that."

Further violation of city procedures related to the requirement, "If the person alleged to be engaged in the harassment is the complainant's supervisor, the complainant shall be removed from direct supervision of that supervisor..." Miller remained under Guillen's supervision throughout her final months as a city employee.

City policy also required that "Investigations will be timely and extensive as required." As will be discussed in a subsequent section of this report, the investigation of Miller's complaints was cursory at best. With respect to timeliness, the policy referred to acting "immediately," which the policy suggested meant within three days. Yet, the first real action on the May 20 complaint letter was referral to the LCW law firm on June 24. Six weeks later, LCW engaged Kramer as investigator. Some concerns at LCW about delays in instituting an investigation are evident in a letter they addressed to Kramer: "Ideally we would like to get things underway as soon as possible, as some time has passed since the letter was sent to the city." The transcript shows further concern about this delay. In response to the question, "As to the starting time, are there reasons why you would want to start as soon as possible?" Kramer responded, "Because the employer has an affirmative obligation to respond as quickly as possible, to address the complaint as quickly as possible." Nevertheless, later in the deposition, she responded, "No" to the question "...did you have any concern that the complaint was at this point two and a half months old?" Her billing records show further delays-she did not conduct her first investigative interview until October 30. Her final report was submitted on January 16, 2009.

Miller has been criticized by some, but not publicly by the city or any of its attorneys, for retaining an attorney to first file her complaints. However, this was clearly permitted by stated procedures specifying, "The employee may seek the assistance from a support person of his/her choice when preparing a written complaint." In this instance the city responded by attempting unsuccessfully to disqualify her attorney from participation.

It should be noted that the comments in this segment of our report are based on the version of the city's harassment policies in force at the time the cited events occurred. Those policies are currently being revised. Nevertheless, the important consideration here is not the adequacy of the policies that existed, but rather the city officials' repeated violations of the policies they had sworn to respect.

How adequate was the city's investigation of Miller's complaints?

Karen Kramer's report of her investigation was not made available to us, presumably because it deals with legally protected confidential personnel matters. Nevertheless, we did obtain the transcript of Kramer's deposition. Several sections of the transcript were redacted, but considerable information about her investigation remains. We also obtained Kramer's billing records, which offer further information.

In describing her investigative procedures, Kramer said that initially she would "determine whether or not I needed to obtain any documents from the complainant or the employer." Yet in her deposition she responded, "No" to the question, "At any point in your work in this matter did you ask the city to put together all the documents relating to the claim and give them to you?"

Later in her deposition, questions focused on Miller's October 23 letter—the most detailed specification of her complaints. Kramer conceded that she had reviewed that letter and that it offered "definitely more detail than I had prior to that time." Yet she responded, "I don't think so" to the question, "After reviewing this document, the October 23rd letter, did you ask anybody at the city for any documentation referenced in or relevant to this letter?" Her billing records also show that she spent 0.4 hours in total reviewing or doing any follow up on the lengthy Miller statement.

Presumably Kramer's investigation began with her retention in August. Yet she did not review the city's harassment policy until October or November. She stated, "I don't think I reviewed the policy as of October 21, 2008." She acknowledged that she received the policy on November 10, and that it took her ten minutes to read it. She responded "No" to the question, "Did you ever ask Liebert Cassidy why they didn't send you the city's harassment policy earlier?"

Particularly surprising were her responses to questions regarding the emails from Guillen to Miller that figured so prominently among the complaints. The following exchanges in her deposition are significant:

Q. "Did you ever see any of Jane Miller's emails?"

A. "No."

Q. "Did you ever see any of Rich Guillen's emails to Jane Miller?"

A. "No."

This excerpt occurs later in the transcript:

Q. "There's several references here to emails, correct?"

A. "Yes."

Q. "Did you ever see any of those emails?"

A. "No."

Q. “Did you ever ask Mr, DePaul (an LCW attorney) for any of those emails?
A. “No.”

And still later:

Q. “Did you ask anybody at Liebert, Cassidy....to see what they could do about getting the emails that are referenced in this letter?”
A. “I don’t think so.”

The most damning evidence against Guillen we have seen is found in the Kramer deposition transcript. In her interview with Guillen, he denied ever using the offensive statements in his emails that were cited in Miller’s complaint letters. When, during the deposition, Kramer was shown copies of Guillen’s actual emails, she responds, “When he says ‘I did not say that’ and there’s an email in front of me that indicates he did in fact say that, that would cause me to believe that he was not truthful when he made that statement.”

In other words, Guillen lied to the investigator. As quoted in Gerard Rose’s deposition transcript, Guillen received a letter from an attorney at LCW prior to his interview by Kramer. This letter stated, “In order for the investigator to undertake a comprehensive investigation of the complaint you are expected to respond candidly and truthfully to the investigator’s questions....” Obviously, Guillen ignored these instructions.

It is important to note here that Guillen’s lying during his interview not only reflects on his integrity, but it also reflects on the integrity of the investigation. Kramer readily accepted the lies without bothering to request copies of the emails to check on his veracity.

Kramer interviewed a total of 12 witnesses between October 30 and December 3, 2008. According to Miller’s attorney, no more than one individual on a list of potential witnesses she submitted were ever interviewed. The persons to be interviewed were selected by city staff who reported directly to Guillen. Despite a judge’s opinion that Miller’s case shared common elements with the previously settled claims of four former employees, none of those employees was interviewed. With perhaps one exception, no other former employees were interviewed. This represents another serious violation of city policies that require “All persons named as potential witnesses and those who may have information relevant to the issues of the complaint will be contacted and interviewed during the course of the investigation.”

Miller refused to be interviewed by Kramer. We do not know the precise reasons for her refusal, but by the time it became an issue, she had little reason to believe an impartial investigation was underway. Some clues can be gleaned from correspondence between her attorney, Michael Stamp, and LCW. In a letter, written prior to informing LCW that Miller would not participate in an interview, Stamp wrote:

“Approximately one month ago, I wrote to you on behalf of Jane Miller. My letter and a detailed follow-up letter asked several very important questions about the city’s handling of the claims submitted by Ms. Miller several months ago. The City has provided no answers to most of the questions and the City does not explain why it will not answer the questions.

“Your second letter, again stating for the second time that the City would not respond to questions, was received a few days ago. It states for the first time that the investigation will be conducted ‘in accordance with’ a portion of the City’s harassment policy, although it makes no effort to discuss the deviations from the harassment policy to date.

“It would have been more convenient for everyone if you had answered Ms. Miller’s questions about the process. Instead of providing the basic information, you have chosen a different way of proceeding.”

Miller’s refusal of the interview did not seem to trouble Kramer. This exchange is found in her deposition transcript:

Q. “What did Michael DePaul tell you?”

A. “That Ms. Miller was not going to participate.”

Q. “Did you ask him why?”

A. “No....I don’t know if it mattered for the purpose of my fact finding.”

Q. “Did you think you could draft an accurate report without Jane Miller?”

A. “I did the best I could.”

Kramer’s final report was delivered on January 16, 2009, almost eight months after Miller’s initial letter of complaint. Despite the specification in her retention letter from LCW, “Transcribed witness statements or signed notes should be included with your report,” she conceded in her deposition that “I did not provide transcribed witness statements or signed notes.”

What were the terms of the settlement and release agreement between Miller and the City of Carmel-by-the-Sea?

By payment from the city’s insurer, the city provided Miller with a total sum in the amount of \$600,000. This payment settled all claims in the suit filed by Miller. The city also reinstated four months of accrued leave and paid her salary for those four months.

In accepting the settlement, Miller released the city from any and all “allegations, charges, grievances, causes of action, judgments, liens, indebtednesses, damages, losses, claims, liabilities and demands” which could be imposed and from any future claims. Miller and the city agreed that each party would bear their own costs of the suit and attorney fees.

The agreement does not impose any constraints on the release of information related to the suit by either Miller or the city.

The agreement uses typical settlement language to say that it is a “compromise settlement of disputed claims” and should not be considered as an “admission of liability” by either party. Disclaimers of guilt are standard features in legal settlements. Nevertheless, the fact that the city’s insurer approved such a large settlement clearly indicates that sufficient evidence would be forthcoming to risk a much larger settlement if the case ever went to trial. That, and the avoidance of embarrassing testimony in a trial, were obviously major advantages seen by city officials and the city’s insurer that caused them to pay such a large settlement fee. Nevertheless, former and current city officials are now using the argument that, since no guilt was proven, we must “move on” and stop the “witch hunt” of trying to hold anyone responsible for the consequences of the city administrator’s misbehavior and the city’s mismanagement of the situation.

The agreement was signed by Miller, Mayor McCloud, the city’s attorney, and Miller’s attorney on June 17, July 12, and July 13, 2010.

How much did it cost the city to defend the lawsuit?

It has been difficult to answer this question. Several requests for information about who paid for what and how much was paid to whom have been refused on the basis of attorney/client privilege or by claims that the city’s accounting procedures do not permit answers to some specific questions. Nevertheless, we are able to answer some questions and note some important questions that remain to be answered.

The largest share of the total cost has probably been covered by CSAC Excess Insurance Authority, the city’s insurer. “CSAC” stands for “County Supervisors Association of California,” also known as “California State Association of Counties”. Its Excess Insurance Authority was established by a joint powers agreement “entered into by the member counties and member public entities in order to develop and fund insurance services.”

A \$10,000 deductible was paid by the city. The \$600,000 settlement to Miller was covered by insurance. CSAC claims that this settlement alone will not influence future premiums. We requested all documents pertaining to expenditures for this case, but CSAC did not honor our request.

Payments to the two legal firms that primarily represented the city have totaled \$226,447 as of August 31, 2010, with LCW paid \$85,395 and Kennedy, Archer, and Harray paid \$141,051. CSAC paid all bills from the latter firm, but we don’t know what portion of LCW’s bills were covered by insurance.

The suit was filed on June 17, 2009. It was reported to CSAC on July 27. The insurer considered this to be timely reporting. Because the Kennedy, Archer, Harray firm

had been only recently engaged to represent the city, it seems reasonable that their fees were covered. However, insurance coverage of the lengthy involvement of LCW before the complaints were reported to CSAC may be another matter.

City policies require that all complaints that may lead to litigation must be reported to the insurer within three days. Yet, 14 months elapsed between the receipt of Miller's first complaint letter and the ultimate reporting of the case to the insurer. We wonder whether this affected the insurance coverage of the legal fees charged during that interval. It seems likely, for example, that the substantial legal fees paid for the unsuccessful attempt to disqualify Miller's attorney would not have been covered by insurance.

The total cost of Kramer's investigation was \$15,678. According to a letter from CSAC Excess Insurance Authority, they do not "launch an independent investigation" but "are provided copies of the investigation conducted by the entity." We do not know whether her fees were included in the LCW billings or whether those fees were paid by CSAC.

Costs of expended staff time were not provided. Time spent by the city attorney must have also been substantial. As part of the settlement, the city also paid Miller for four months of accrued leave. These costs added significantly to expenditures in connection with the suit.

What are the provisions regarding termination in the city administrator's Employment Agreement?

After a detailed review of available documents, the committee has concluded that the time has arrived to terminate Guillen's Employment Agreement. That agreement contains the following provisions:

The city administrator is an "at will" employee whose employment may be terminated by the city council without cause. There is no express or implied promise made for any form of continued employment. However, for the 90-day period immediately following a general or special election at which a city council member is elected to office, the city may not terminate the administrator's services without cause.

Deliberations and decisions by the city regarding termination shall be made in closed session in accordance with the Brown Act. Except where the administrator is charged with or alleged to have committed criminal misconduct or acts involving moral turpitude, the city shall provide the opportunity to resign in lieu of being terminated, and the parties shall cooperate regarding public announcements about his or her separation from the city.

Unless terminated for cause while the administrator is still willing and able to perform assigned duties, the city agrees to make a payment equal to six months of the then current aggregate salary. This payment will release the city from any further

obligations. If the administrator is terminated because of conviction of any felony, or any crime involving moral turpitude or any offense involving a violation of official duties, or if the city determines that the administrator has misappropriated public funds, commingled public funds with personal funds, or engaged in willful corrupt conduct in office, then the city shall have no obligation to continue the administrator's employment or to pay severance

Summary

On May 20, 2008, the attorney representing Jane Miller, Carmel's human resources manager, addressed a letter to the mayor and city council complaining of harassment by Rich Guillen, the city administrator. That letter was forwarded to the city attorney and, for response, to the city administrator, the alleged harasser. No other immediate response was forthcoming. Five weeks later, the city referred the matter to the law firm of Liebert, Cassidy and Whitman. After another six weeks elapsed, LCW engaged Karen Kramer as investigator. Her first investigative interviews occurred at the end of October and her final report was submitted the following January. In the meantime, having received no direct response from the city, Miller referred her complaints to the California Department of Fair Employment and Housing, and, eventually filed a suit against the city in June of 2009. A settlement of the suit was achieved in June of 2010.

From the outset, the city violated stated harassment policies and procedures in managing Miller's complaints. For example:

- The city failed to respond to the initial statement of complaints with "discretion, sensitivity, and due concern for the dignity of everyone involved."
- Policies prescribe immediate referral to a nonexistent council personnel committee. Instead complaints were referred for response to the alleged harasser.
- Policies require that "investigations will be timely and extensive as required." The investigation essentially began five months after the complaints were filed and was cursory at best. The report on the investigation was submitted eight months after the initial letter of complaint.

The many shortcomings in the investigation include:

- The investigator failed to review many significant documents, most importantly the emails from Guillen to Miller that were so prominent among her complaints.
- The investigator failed to interview several important witnesses, including former employees and those recommended by Miller.
- The investigator accepted untruths from the city administrator without checking their veracity.

- The investigator failed to submit “transcribed witness statements or signed notes” as required in her instructions.

A settlement of Miller’s suit, involving a payment of \$600,000 and four month’s salary for accrued leave, was achieved in June of this year. As is typical of such settlement agreements, no guilt is conceded. Yet, it is highly unlikely that the city and its insurer would have approved such a large settlement unless they believed an even larger sum might be awarded if the facts were revealed during a trial.

The city’s insurance covered the settlement fee and at least some of their legal costs. Nevertheless it seems likely that some legal fees and other costs to the city were not covered by insurance. At this date there has been no resolution of the obviously offensive conduct of the city administrator, even though he is an “at will” employee, serving at the pleasure of the city council.