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| <p>DISTRICT COURT, WELD COUNTY, COLORADO<br/> P.O. Box 2038<br/> Greeley, Colorado 80632</p> <hr/> <p><b>Plaintiff(s): Tori McMechan</b></p> <p><b>Defendant(s): Town of Nunn, Board of Trustees of the Town of Nunn, and Jenny Johnson</b></p> <hr/> <p>Attorney for Plaintiff<br/> Mark Cohen<br/> The Cohen Law Group<br/> A Professional Corporation<br/> 110 Snyder Street, 2<sup>nd</sup> Floor<br/> PO Box 617<br/> Nederland, CO 80466<br/> Phone Number: (303) 258-0561<br/> E-mail address: mark@cohenslaw.com<br/> Atty. Reg. #: 13178</p> | <p>EFILED Document – District Court<br/> 2010CV219<br/> CO Weld County District Court 19th JD<br/> Filing Date: Apr 2 2010 9:44AM MDT<br/> Filing ID: 30378077</p> <p><b>▲ COURT USE ONLY ▲</b></p> <p>Case Number: 2010 CV 219</p> <p>Div.:                      Ctrm.:</p> |
| <p><b>AMENDED COMPLAINT</b></p>   |  |

Plaintiff, for her Complaint, alleges as follows:

**PARTIES**

1. Plaintiff, Tori McMechan, resides at 408 Garfield Avenue, Nunn, Colorado 80648.

2. Defendant Town of Nunn ("Town") is and was at all times relevant a Colorado statutory town with its principal office at its Town Hall at 185 Lincoln Avenue, Nunn, Colorado 80648.

3. Defendant, Board of Trustees of the Town of Nunn ("Board") is and was at all times relevant to this action the body in which the legislative and corporate authority of the Town is vested. § 31-4-301, C.R.S. The Board's principal address is 185 Lincoln Avenue, Nunn, Colorado 80648. The full Board is comprised of seven trustees; five of the seven trustees took office on or about December 28, 2009.

4. The Town may only act through the Board, and the Town may properly be held liable for the actions of the Board.

5. Defendant Jenny Johnson ("Johnson") resides at 480 Washington Avenue, Nunn, Colorado 80648. Johnson is a member of the Board, but is named as a separate defendant in this action in her individual capacity for intentional torts she committed.

#### **JURISDICTION AND VENUE**

6. The Court has personal jurisdiction over the parties because Plaintiff resides in Weld County, the Town is situated entirely in Weld County, and Johnson resides in Weld County.

7. The Court has subject matter jurisdiction pursuant to Article VI, Section 9 of the Colorado Constitution and pursuant to the statutes and rules cited herein.

8. Venue is proper pursuant to C.R.C.P. 98 because the facts giving rise to all claims for relief set forth herein took place in Weld County.

#### **GENERAL ALLEGATIONS**

9. On or about January 16, 2006, Town's then current Board of Trustees appointed Plaintiff to serve as the Town Clerk, Town Treasurer, and Town Court Clerk.

10. At all times relevant to this action the Town had adopted a municipal code known as the Nunn Municipal Code ("NMC").

11. At all times relevant to this action the NMC provided in relevant part:

**2.08.040 Removal from Office - Grounds.** Any town officer appointed by the Board who is incompetent or who is guilty of any willful violation of any of his/her official duties, may be removed from office, during his/her term of office, by a vote of a majority of all members elected to the Board.

**2.08.050 Removal from Office - Notice.** All charges preferred against any appointive officer shall be made in writing and shall clearly specify the cause or causes for removal. A copy of such charges, together with a notice of the time and place of hearing, shall be served upon the accused at least five (5) days prior to the date set for the hearing.

**2.08.060 Removal from Office - Hearing.** At the time and place set for the hearing, the Board shall meet and proceed according to its rules to hear the evidence against the accused, as well as the evidence offered in his/her behalf, adjourning from time to time as may be necessary, until all of the evidence has been heard. At the hearing, the accused may be heard by himself/herself or through counsel.

#### **FIRST CLAIM FOR RELIEF - REVIEW UNDER C.R.C.P. 106**

12. On January 29, 2010, the Town served a Notice of Hearing on Plaintiff that summarized certain allegations against Plaintiff and notified her that a hearing concerning those charges would be held on February 4, 2010.

13. The Notice of Hearing referred to Exhibits A-1 through M, but these exhibits were not served on Plaintiff on January 29, 2010.

14. The Notice of Hearing also contained a footer indicating that it contained a total of six pages, but the Notice of Hearing served on Plaintiff consisted of only three pages.

15. At least as early as January 29, 2010, again on January 31, 2010, and again on February 2, 2010, Plaintiff asked the Town to provide her with copies of the exhibits referred to in the Notice of Hearing and to provide the missing pages of the Notice of Hearing, and to postpone the hearing so she and her counsel could prepare for it.

16. The Town denied Plaintiff's request to postpone the hearing, and did not provide her with the exhibits until 3:56 p.m. on February 3, 2010. When the Town did provide the exhibits it included Exhibits N through S - exhibits not referred to in the Notice of Hearing.

17. At no time relevant to this action did the Town or Board have rules governing the conduct of removal hearings.

18. A hearing took place before the Board on February 4, 2010, at which time Plaintiff and her counsel were present.

19. The attorney representing the Town and prosecuting the case against Plaintiff attempted to call Plaintiff as the Town's first witness. Plaintiff refused to testify, invoking the 5<sup>th</sup> Amendment on the advice of counsel and also insisting that under the NMC she had a right to hear the Town's evidence against her first and then present rebuttal evidence if she desired. In view of Plaintiff's refusal to testify during the Town's case-in-chief, the Board ruled that it would not allow her to testify at all and would not allow her to testify after the Town had presented its case against her.

20. At the conclusion of the hearing the Board voted to remove Plaintiff from her offices.

21. The failure of the Town and Board to provide proper notice of the allegations, as set forth herein, their failure to postpone the hearing, and their failure to allow Plaintiff to testify to rebut the charges, severely impacted Plaintiff's ability to prepare for the hearing and deprived her of a fair hearing and due process under both the U.S. Constitution and the Colorado Constitution.

22. In conducting the hearing the Board was acting for the Town in a judicial or quasi-judicial function.

23. The Board exceeded its jurisdiction and/or abused its discretion in one or more of the following ways:

a. Failing to provide a Notice of Hearing as required by the NMC by failing to provide the exhibits referred to in the Notice of Hearing until the day before the hearing;

b. Failing to provide pages 4 through 6 of the Notice of Hearing as the footer indicated the Notice of Hearing consisted of six pages;

c. Serving exhibits on the Plaintiff the day before the hearing that were not referred to in the Notice of Hearing;

d. Failing to provide Plaintiff with a notice that clearly specified the causes for removal;

e. Failing to grant Plaintiff's request to postpone the hearing;

f. Refusing to allow Plaintiff to testify after the Town presented its case-in-chief;

g. Conducting a hearing although it had not adopted rules for the conduct of such hearings as required by Section 2.08.060 of the NMC;

h. Making an implied finding that Plaintiff was incompetent;

i. Making an implied finding that Plaintiff has committed willful violations of the NMC;

j. Considering allegations of conduct that were not violations of Plaintiff's official duties.

k. Johnson failed to recuse herself in spite of her longstanding bias against Plaintiff.

24. Plaintiff has no plain, speedy and adequate remedy at law.

25. The Town is responsible for the actions of the Board.

WHEREFORE, Pursuant to C.R.C.P. 106(a)(4), Plaintiff seeks a determination that the Board exceeded its jurisdiction and abused its discretion, for costs and attorney's fees to the extent allowed by law, for an Order reinstating her to her appointed offices, and for such other relief as the Court deems just.

#### **SECOND CLAIM FOR RELIEF – RELIEF UNDER THE OPEN MEETINGS LAW**

26. Plaintiff incorporates paragraphs 1-25 above. Further, Plaintiff incorporates each allegation in this Amended Complaint into each claim for relief set forth herein as if fully set forth in each claim for relief.

27. The Board met on January 28, 2010, and went into executive session ("the executive session") for the stated purpose of receiving legal advice.

28. The Board, which traditionally had allowed Plaintiff to be present during such executive sessions, did not allow Plaintiff to participate in the executive session.

29. At the conclusion of the executive session the Board approved charges against Plaintiff and set a hearing date.

30. Plaintiff has a reasonable belief that the Board violated the requirements of the Colorado Open Meetings Law, §§ 24-6-401 and 24-6-402, C.R.S., by, among other things, engaging in substantial discussion of matters that were beyond the scope of the exception that allows executive sessions for the purpose of receiving legal advice on specific legal questions and/or matters not enumerated § 24-6-402(4) and/or by agreeing on formal action in the executive session. See also, § 24-72-204(5.5).

WHEREFORE, Plaintiff prays for an Order directing the Town and Board to provide the Court with an accurate and complete copy of the electronic recording of the executive session, for an *in camera* review of the record of the executive session, for a determination that Defendants violated the Open Meetings Law, for an Order making public the record of matters not entitled to be discussed in the executive session, for costs and attorney's fees, and for such other relief as the Court deems just.

### **THIRD CLAIM FOR RELIEF – RELIEF UNDER THE OPEN RECORDS ACT**

31. On or about February 11, 2010, Plaintiff submitted a written request to the Town pursuant to the Colorado Open Records Act, § 24-72-200.1 C.R.S., et. seq. ("the C.O.R.A. request"). A copy of the C.O.R.A. request is attached as **EXHIBIT 1**.

32. On or about February 18, 2010, the Town, through its attorney, submitted a response to Plaintiff's C.O.R.A. request. A copy of the response is attached as **EXHIBIT 2**.

33. Although Plaintiff disagrees with many of the assertions in the Town's response, she thereafter made numerous efforts to meet with Town officials to inspect such records as the Town was willing to let her inspect, all to no avail.

34. The Town's response did not comply with the requirements of the Open Records Act and the Town has not since complied with the requirements of the Open Records Act.

35. Further requests by Plaintiff to the Town for the requested records would be futile.

36. More than three business days prior to filing this Amended Complaint, Plaintiff sent a notice to the Town as required by § 24-72-204(5) C.R.S. A copy of that notice is attached as **EXHIBIT 3**.

WHEREFORE, Plaintiff prays for an Order directing the Town and Board to permit the requested inspection, for costs and attorney's fees, and for such other relief as the Court deems just.

**FOURTH CLAIM FOR RELIEF – BREACH OF CONTRACT AS TO WAGES**

37. At the time she accepted employment with the Town, Plaintiff had an oral agreement with the Town pursuant to which the Town agreed to pay her for her work. The agreement provided that the Town would pay Plaintiff \$14.00 per hour and that it would give her "comp time" at time and ½ if she worked more than forty hours per week.<sup>1</sup> The Town also agreed to allow Plaintiff vacation time, sick time, and a personal day. The Town also agreed and represented that it had and would continue to have an assistant on staff for Plaintiff. Subsequent to hiring Plaintiff, the Town raised Plaintiff's compensation to \$15.00 per hour. Plaintiff accepted her position based on these terms and the parties then entered into a course of dealing pursuant to which they abided by these terms for a period of time.

38. After the Board removed Plaintiff from her offices, the Town breached the agreement by refusing to pay Plaintiff in accordance with the terms of the agreement for work she had performed.

39. Plaintiff has made repeated requests to the Town and the Board for the sums owed her, but the Town continues to refuse to pay her.

40. Plaintiff has been damaged by the Town's actions in an amount to be determined at trial.

WHEREFORE, Plaintiff prays for judgment against the Town for such damages as may be proven at trial, for costs and attorney's fees to the extent allowed by law, and for such other relief as the Court deems just.

**FIFTH CLAIM FOR RELIEF – VIOLATION OF FAIR LABOR STANDARDS ACT**

41. The Town has failed to promptly pay wages owed to Plaintiff as required by the Fair Labor Standards Act, 29 U.S.C. § 201, et. seq.

42. The Town's failure has been willful.

WHEREFORE, Plaintiff prays for judgment against the Town for such damages as may be proven at trial, for costs and attorney's fees to the extent allowed by law, for all penalties and damages Plaintiff is entitled to under the Fair Labor Standards Act, and for such other relief as the Court deems just.

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<sup>1</sup> For example, if Plaintiff worked 44 hours in a given week, the Town would allow her "comp time" of six hours, representing the extra four hours multiplied by 1.5.

**SIXTH CLAIM FOR RELIEF - UNJUST ENRICHMENT**

43. Plaintiff performed work for the Town expecting that the Town would pay her for that work.

44. The Town accepted the benefits of Plaintiff's work.

45. Equity requires that the Town pay Plaintiff for the fair value of the work she did for the Town.

WHEREFORE, Plaintiff prays for judgment against the Town for such damages as may be proven at trial, for costs and attorney's fees to the extent allowed by law, and for such other relief as the Court deems just.

**SEVENTH CLAIM FOR RELIEF - BREACH OF CONTRACT  
AS TO GOOD FAITH AND NON-WAGE ISSUES**

46. The agreement between Plaintiff and the Town included an obligation of good faith.

47. The agreement between Plaintiff and the Town included an understanding that the Town would make reasonable efforts to provide Plaintiff with the resources required to properly perform her duties, including but not limited to, an assistant such as the one Plaintiff had when the Town appointed her to her offices and Plaintiff accepted the appointment.

48. At the time the Town hired Plaintiff and until approximately June of 2009, the Town employed an assistant whose duties were to assist Plaintiff in the performance of her duties.

49. The assistant quit her position in approximately June of 2009.

50. Plaintiff thereafter made repeated requests to the Town and the Board for a new assistant and repeatedly explained that without such help she would be unable to perform for the Town all of the duties she had traditionally performed.

51. The Town and Board ignored all of Plaintiff's requests for an assistant.

52. In approximately October of 2009, the Board also reduced the number of overtime hours that Plaintiff was allowed to work, thus making it even more difficult for Plaintiff to perform all her duties. Plaintiff so informed the Board.

53. The Town and Board's actions as set forth herein rendered it impossible for Plaintiff to perform all of the duties she had traditionally performed in spite of her best efforts.

54. The refusal of the Town and the Board to replace Plaintiff's assistant, their refusal to provide any additional help, and their reduction of overtime hours while demanding more from Plaintiff, were material breaches of Plaintiff's employment agreement.

55. The refusal of the Town and the Board to replace Plaintiff's assistant, their refusal to provide any additional help, and their reduction of overtime hours while demanding more from Plaintiff, were material breaches of the Town's obligation of good faith.

56. The removal of Plaintiff for allegedly unsatisfactory performance, after the Town and Board created a situation that made it impossible for Plaintiff to perform all her duties satisfactory was a breach of the Town's obligation of good faith.

57. After the Board removed Plaintiff from office, it nearly immediately hired two people to perform the duties it had been asking Plaintiff to perform by herself since her assistant quit.

58. Upon information and belief, the breaches as set forth herein were attended by circumstances of malice, or willful and wanton conduct as defined in § 13-21-102(1)(b), C.R.S., for the purpose of causing Plaintiff's performance to decline so the Town and Board could terminate her for cause.

59. The actions of the Town and Board damaged Plaintiff in an amount to be determined at trial.

WHEREFORE, Plaintiff prays for judgment against the Town for such damages as may be proven at trial, for costs and attorney's fees to the extent allowed by law, and for such other relief as the Court deems just.

**EIGHTH CLAIM FOR RELIEF - 42 U.S.C. § 1983**

60. At all times relevant to this action Plaintiff had rights under the U.S. Constitution that included a right to due process of law, a right to equal protection under law, a right to freedom of speech, and the right to petition the government for a redress of grievances.

61. At all times relevant to this action Plaintiff also had an interest in her appointed position, at least through the end of her appointed term in her offices, which term was to have ended in April of 2010.

62. In approximately August of 2009, Plaintiff, as a resident of the Town, signed a recall petition in support of the recall of trustees Johnson, Joyce Taylor ("Taylor"), and Karen Burd. Johnson and Taylor were members of the Board at the time the Board removed Plaintiff from her offices.

63. The Board purposely deprived Plaintiff of procedural due process in removing her from office as set forth herein. The members of the Board are "persons" within the meaning of 42 U.S.C. § 1983, and they took the actions complained of herein.

64. Upon information and belief, the Board removed Plaintiff from her offices and engaged in the other conduct complained of herein to retaliate against Plaintiff for signing the recall petition and to retaliate against her for other lawful conduct including, but not limited to, her filing of a worker's compensation claim in August of 2009, her notifying a trustee that he should not be using a road grader owned by the Town because the Town's insurance policy prohibited such use, and her refusal to authorize replacement of a water meter free of charge when a trustee or trustee's significant other caused it to freeze and break.

65. The Town and Board acted under color of state law and violated clearly established law, as they knew or should have known.

66. The Town and Board's conduct deprived Plaintiff of rights, privileges, or immunities guaranteed under federal law or the U.S. Constitution.

67. The Board acted with malice.

WHEREFORE, Plaintiff prays for judgment against the Town for such damages as may be proven at trial, for costs and attorney's fees to the extent allowed by law, for an order reinstating Plaintiff to her appointed offices, for such other damages, penalties, and relief as is available under 42 U.S.C. § 1983 and the related statutes, and for such other relief as the Court deems just.

**NINTH CLAIM FOR RELIEF – INTERFERENCE WITH CONTRACT**  
**(As to Johnson)**

68. Even before taking office as a trustee, and since becoming a trustee, Johnson knew of Plaintiff's agreement with the Town.

69. Even before taking office as a trustee, and since becoming a trustee, Johnson, by words and conduct, engaged in a pattern of knowingly presenting false and/or incomplete information to the Town and Board about Plaintiff with the intent of portraying Plaintiff in a bad light so as to cause the Town and Board to remove Plaintiff. This pattern includes, but is not limited to, falsely representing to the Board that she Johnson is an "accountant" and that she had found substantial amount of money missing from accounts that Plaintiff was responsible for, making false reports to the Town's police department concerning the Plaintiff, and making false statements to the Town and Board that Plaintiff had used Town resources for personal expenses.

70. Even before taking office as a trustee, and since becoming a trustee, Johnson, by words and conduct, intentionally caused the Town to breach its agreement with Plaintiff, and interfered with the Town's performance of its agreement, thereby causing the Town

not to perform its contract with Plaintiff, making it impossible for Plaintiff to perform all her assigned duties, and causing the Board to remove Plaintiff from office. Upon information and belief, Johnson is also responsible for the Town's refusal to pay Plaintiff the wages owed to her.

71. Johnson's interference with the agreement was improper.

72. Johnson's interference with the agreement caused Plaintiff damages in an amount to be proven at trial.

73. Upon information and belief, Johnson's conduct as set forth herein was attended by circumstances of malice, or willful and wanton conduct as defined in § 13-21-102(1)(b), C.R.S.

WHEREFORE, Plaintiff prays for judgment against Johnson for such damages as may be proven at trial, for costs and attorney's fees to the extent allowed by law, and for such other relief as the Court deems just.

**TENTH CLAIM FOR RELIEF – INTERFERENCE WITH CONTRACT**  
**(As to Johnson)**

74. Johnson engaged in extreme and outrageous conduct.

75. Johnson did so recklessly or with the intent of causing Plaintiff severe emotional distress.

76. Johnson's conduct caused the Plaintiff severe emotional distress.

77. Upon information and belief, Johnson's conduct as set forth herein was attended by circumstances of malice, or willful and wanton conduct as defined in § 13-21-102(1)(b), C.R.S.

WHEREFORE, Plaintiff prays for judgment against Johnson for such damages as may be proven at trial, for costs and attorney's fees to the extent allowed by law, and for such other relief as the Court deems just.

**ELEVENTH CLAIM FOR RELIEF – DEFAMATION**  
**(As to Johnson)**

78. Within the period of time allowed by the statute of limitations Johnson has published or caused to be published statements that generally characterize Plaintiff as incompetent in her position, as someone who has used Town resources for personal needs, stolen from the Town, sabotaged the Town, and as having threatened and harassed Johnson.

79. The statements caused Plaintiff actual damage.

80. The gist of the statements were false at the time they were published.

81. At the time of publication Johnson knew the statements were false or she made the statements with reckless disregard as to whether they were false.

WHEREFORE, Plaintiff prays for judgment against Johnson for such damages as may be proven at trial, for costs and attorney's fees to the extent allowed by law, and for such other relief as the Court deems just.

**RESERVATION OF OTHER CLAIMS**

Plaintiff reserves the right to ask the Court to allow her to add tort claims, including a claim for wrongful discharge in violation of public policy, after she has complied with the requirements of the Colorado Governmental Immunity Act pertaining to tort claims.

**JURY DEMAND**

Plaintiff demands a jury trial on all issues so triable and hereby tenders the required fee.

THE COHEN LAW GROUP  
A Professional Corporation

*The signed original document is kept  
in the Nederland office of The Cohen Law  
Group, A Professional Corporation.,  
as required by C.R.C.P. 121 §1-26(9)*

s/ Mark Cohen  
Mark Cohen - # 13178  
ATTORNEY FOR PLAINTIFF