

STATE OF MAINE  
KENNEBEC, ss.

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO.

ALBERT TEMPESTA, )  
 )  
 Plaintiff )  
 )  
 v. )  
 )  
 TOWN OF BENTON, MAINE, )  
 )  
 Defendant )

**COMPLAINT**  
**(M.R. Civ. P 80B and Independent Claims)**

Plaintiff Albert Tempesta, by and through his undersigned counsel, hereby complains against the Defendant Town of Benton as follows:

**INTRODUCTION AND PARTIES**

1. This 80B appeal challenges the Town of Benton’s arbitrary, capricious and discriminatory termination of Plaintiff Albert Tempesta’s employment as the Town’s Code Enforcement Officer without warning, notice, or an opportunity to be heard, in violation of Federal and State law.

1. In addition to the 80B appeal and the claim under 42 U.S.C. § 1983 for deprivation of procedural due process, this case challenges the Defendant Town of Benton’s: (A) age discrimination against Plaintiff in violation of the Maine Human Rights Act (“MHRA”), 5 M.R.S. § 4571 *et seq.*; (B) retaliation against Plaintiff in violation of the Maine Whistleblower Protection Act (“MWPA”), 26 M.R.S. § 831 *et seq.*; and (C) violation of Maine’s Freedom of Access Act, 1 M.R.S. § 407.

2. Plaintiff Albert Tempesta (“Mr. Tempesta”) is an individual residing in the Town of Dexter, County of Penobscot, and State of Maine.

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3. Defendant Town of Benton (“the Town,” “Town of Benton,” or “Benton”) is a municipality organized under the laws of the State of Maine and located in the County of Kennebec and State of Maine.

### **BACKGROUND FACTS**

4. The Town of Benton, Maine first appointed Mr. Tempesta as a part-time Code Enforcement Officer (“CEO”) in or about the year 2013.

5. Mr. Tempesta took roughly between 5 and 20 calls per week as the CEO for Benton and earned a salary of \$15,900.00 per year.

6. At all times herein relevant, Mr. Tempesta also worked as the CEO for a number of other towns located in Penobscot and Somerset counties.

7. Mr. Tempesta has 15 years of experience as a CEO, prior to which he served as the chair of the planning board in Dexter, Maine for 17 years.

8. At the time the Town terminated Mr. Tempesta’s appointment, he was 60 years old.

9. Throughout his tenure as CEO in Benton, Mr. Tempesta never received criticism about his performance except for one call from a resident who was angry about the fact that a property within the Town was located within the flood zone.

10. Every year, the Town of Benton automatically renewed Mr. Tempesta’s appointment as CEO without discussion.

11. The Town of Benton’s Personnel Policy describes “regular part-time” employment as working “less than the normal work week, but on a continuing basis.”

12. Under the Town’s Personnel Policy, a regular part-time employee is “subject to all personnel rules and regulations.”

13. The Town's Personnel Policy also describes employment on a "continuing basis" as "indefinite."

14. Based on these personnel policies and the automatic renewal of his "indefinite" position with the Town, it was reasonable for Mr. Tempesta to expect that he would be re-employed and reappointed as the CEO in 2016.

15. Mr. Tempesta did in fact expect that he would be automatically reappointed to the position of CEO on or about March 15, 2016, as he had for the prior couple of years.

16. Because Mr. Tempesta had a reasonable expectation of continued employment, he had a property interest in his position as the CEO of Benton under Maine law.

17. Under Maine law, a CEO cannot be terminated from his position without just cause.

18. In or around July of 2015, Mr. Tempesta wrote a letter to the Board of Selectmen for the Town of Benton ("the Board of Selectmen") and asked to meet with them in executive session. Mr. Tempesta's July 21, 2015 letter, which he asked to have placed in his personnel file, read as follows:

On July 14, 2015, the planning board had a meeting concerning a proposed call tower on Benton Ave. road. When the meeting got over, I locked up the office and set the alarm about 9:15, walked out of the building and found Leo Caron, Roger Averill, Kathe Bolster and Scott Cyrway outside the building having a discussion of the earlier meeting and how to turn down this application. I reminded Scott Cyrway that he should know better than to have a meeting with 3 Planning Board members and to discuss what they were discussing. Kathe Bolster responded that there was always a squealer in the bunch. This is a cover your butt letter.

Al Tempesta

19. Mr. Tempesta wrote the above-referenced letter because he was concerned that the Town would get sued by U.S. Cellular, which had submitted a completed application for the cell tower but was receiving significant opposition and delay in approving the cell tower from the Town Planning Board.

20. Mr. Tempesta explained his concerns to the Board of Selectmen, including the fact that the Planning Board was discussing ways to derail the cell tower project, unbeknownst to the applicant U.S. Cellular.

21. Mr. Tempesta specifically told the Board of Selectmen, "I think you're going to get sued before this deal is done."

22. Soon after Mr. Tempesta engaged in the aforementioned whistleblowing, the Town sought out advice from the Maine Municipal Association ("MMA") about terminating Mr. Tempesta, stating that Plaintiff was "trying to be fired."

23. Ms. Patterson's email to the MMA cited "several complaints" about Mr. Tempesta's behavior, but she never raised these issues with Mr. Tempesta.

24. In response to Ms. Patterson's inquiry, the MMA explained that any complaints about Mr. Tempesta from residents should be put in writing or the Board should at least "hear the complaint and the CEO's side of things as well in an impartial manner."

25. The MMA also advised the Town that a CEO "would be entitled to 'just cause'," meaning Mr. Tempesta should not be terminated without making a determination of whether there was just cause to support the termination.

26. On Tuesday, March 8, 2016, Mr. Tempesta slipped on some ice while working for the Town of Dexter and hit his head.

27. While Mr. Tempesta was home recovering from his injury on March 8<sup>th</sup>, the head Selectman for the Town of Benton, Dan Chamberlain, called and said Plaintiff would not be reappointed to the position of CEO.

28. In disbelief, Mr. Tempesta asked why he was not being reappointed, to which Mr. Chamberlain responded: "We found someone younger who we think will be a better fit."

29. Mr. Chamberlain mentioned on more than one occasion that Mr. Tempesta's replacement was "younger."

30. Mr. Tempesta was completely shocked to learn that he would not be reappointed to the position of CEO.

31. Mr. Chamberlain also indicated the decision not to reappoint Mr. Tempesta had occurred after the Board of Selectmen interviewed the "younger" replacement for Plaintiff "about a week ago."

32. Mr. Tempesta asked Mr. Chamberlain, "don't you think you should have told me before you interviewed someone else for my job?" and Mr. Chamberlain replied, "Maybe we should have, but we didn't."

33. Mr. Chamberlain also told Mr. Tempesta not to attend the upcoming Board of Selectman meeting at which the new CEO would be appointed, because "there's nothing you can do."

34. The Town failed to afford Mr. Tempesta any notice of this decision or opportunity to be heard.

35. The minutes of the Town's annual meeting on March 12, 2016 make no mention of Mr. Tempesta's appointment or replacement, or a specific date when his employment would terminate.

36. The reappointment process followed by the municipal officials of the Town of Benton was flawed to the point of nonexistence, in that Mr. Tempesta was afforded no process whatsoever.

37. Given Melissa Patterson's email accusing Mr. Tempesta of "trying to be fired," and citing specious "complaints" from residents, the Board relied on inadequate and unsupported evidence in reaching the decision not to reappoint Mr. Tempesta.

38. Just cause did not exist to deprive Mr. Tempesta of his reappointment to the position of CEO.

**COUNT I**  
**(Appeal Pursuant to M.R. Civ. P. 80B)**

39. Plaintiff repeats the allegations contained in Paragraph 1 through 38 of his Complaint as if fully set forth herein.

40. The Board's decision not to reappoint Mr. Tempesta to the position of CEO was arbitrary, capricious, unlawful, and motivated by discriminatory, age-related bias.

41. Mr. Tempesta made a request by letter dated March 25, 2016 to have the decision not to reappoint him rescinded, but the Town made no substantive response.

WHEREFORE, Plaintiff Albert Tempesta asks that the Court enter judgment in his favor on his Rule 80B appeal; that the Court vacate the decision of the Board not to reappoint him as arbitrary, capricious, unlawful and unsupported by substantial evidence; that the Court order Mr. Tempesta reinstated with back pay and restoration of his benefits; that the Court order an award of reasonable attorney's fees, costs, interest and any further relief as this Court deems appropriate and just.

**COUNT II**  
**(42 U.S.C. § 1983)**  
**Violation of Procedural Due Process**

42. Plaintiff repeats the allegations contained in Paragraph 1 through 41 of his Complaint as if fully set forth herein.

43. Mr. Tempesta had a legitimate property interest in continued employment as the CEO of the Town of Benton.

44. The Town of Benton, operating under color of statute, ordinance, regulation, custom or usage, caused Mr. Tempesta to be deprived of certain rights secured to him by the United States Constitution including, without limitation, those rights secured to him by the Due Process Clause of the Fourteenth Amendment.

45. The Town of Benton, by and through its duly elected municipal officials, and pursuant to official municipal policy and custom, gave Mr. Tempesta no warning, notice or any opportunity to be heard prior to the decision to terminate him in violation of his due process rights.

46. The Town of Benton acted in an arbitrary, capricious, discriminatory, and unconstitutional manner toward Mr. Tempesta when it admittedly decided not to reappoint him in favor of someone “younger” who would be “a better fit.”

47. Mr. Tempesta was deprived of any opportunity to defend himself against or even learn about any purported complaints that in part motivated the Board’s decision to terminate his employment as CEO.

48. A deprivation of Mr. Tempesta’s federally protected rights secured under the United States and Maine Constitution has occurred within the meaning of 42 U.S.C. § 1983.

49. An award of attorney’s fees is permitted pursuant to 42 USC §1988.

WHEREFORE, Plaintiff Albert Tempesta asks the Court to enter judgment in his favor on Count II and find that the Town of Benton, acting under color of state law, deprived Mr. Tempesta of his constitutional rights; that Mr. Tempesta be reinstated with back pay and full restoration of benefits; that attorney's fees be awarded pursuant to 42 USC §1988; and award such other and further relief as this Court deems appropriate and just.

**COUNT III**  
**(5 M.R.S. §§ 4572 *et seq.*)**  
**Age Discrimination**

50. Plaintiff repeats the allegations contained in Paragraph 1 through 49 of his Complaint as if fully set forth herein.

51. The Town of Benton discriminated against Mr. Tempesta and failed to reappoint him to the position of CEO because of his age.

52. Direct evidence of age discrimination exists in this case.

53. The Town of Benton showed discriminatory bias toward younger workers in its hiring practices.

54. Mr. Tempesta has begun the process of exhausting his administrative remedies by preparing a charge of discrimination to be filed with the Maine Human Rights Commission.

WHEREFORE, upon exhaustion of his administrative remedies, Plaintiff Albert Tempesta asks the Court to enter judgment in his favor on Count III and award him economic and compensatory damages for age discrimination, civil penal damages, punitive damages, attorney's fees and costs, interest, and such other and further relief as this Court deems appropriate and just.



**COUNT IV**  
**(26 M.R.S. § 831 *et seq.*)**  
**Whistleblower Retaliation**

55. Plaintiff repeats the allegations contained in Paragraph 1 through 54 of his Complaint as if fully set forth herein.

56. Mr. Tempesta engaged in protected activity within the meaning of the Maine Whistleblower Protection Act by making a complaint of illegal practices by the Town Planning Board, which he believed could subject the Town to liability.

57. Mr. Tempesta had a reasonable basis for believing that the conduct of the Planning Board in surreptitiously discussing ways to derail the cell tower application described above, without the knowledge of the applicant, was illegal and/or could subject the Town to a civil lawsuit.

58. Mr. Tempesta engaged in the aforementioned protected activity in good faith.

59. The aforementioned instance of protected conduct bears a causal relationship to the adverse employment action(s) alleged herein.

60. As a result of the Town of Benton's whistleblower retaliation, Mr. Tempesta has suffered and is entitled to damages, including but not limited to: lost wages and benefits, front pay, compensatory damages including emotional pain and suffering and lost enjoyment of life, civil penal damages, attorney's fees, costs and expenses.

WHEREFORE, Plaintiff Albert Tempesta requests that the Court award him damages in the form of lost back pay, front pay, compensatory damages, civil penal damages, punitive damages, attorney's fees, costs and expenses, equitable and injunctive relief, and all other relief afforded to him by law.

**COUNT V**  
**(1 M.R.S. § 407)**  
**Violation of Maine's Freedom of Access Act**

61. Plaintiff repeats the allegations contained in Paragraphs 1 through 60 of his Complaint as if fully stated herein.

62. In response to a request for Mr. Tempesta's personnel file under 26 M.R.S. § 631, the Town of Benton produced no written record of its decision not to reappoint Mr. Tempesta to the position of CEO.

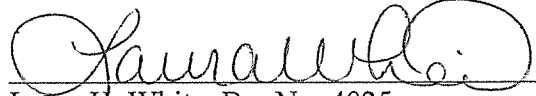
63. The Town of Benton knowingly and willfully failed to make any written record of its decision not to reappoint Mr. Tempesta to the position of CEO, in violation of the Maine Freedom of Access Act.

64. The record contains no reasons or findings of fact in support of the Town's decision not to reappoint Mr. Tempesta that would be sufficient to apprise Plaintiff or any other interested party of the basis for the decision.

65. For the Town of Benton's willful violation of Maine's Freedom of Access Act, the Town is subject to civil forfeiture damages up to \$500.00.

WHEREFORE, Plaintiff Albert Tempesta requests that the Court award him civil forfeiture damages in the amount of \$500.00, attorney's fees, costs and expenses, equitable and injunctive relief, and all other relief afforded to him by law.

Dated at Kennebunk, Maine this 12<sup>th</sup> day of April, 2016.

A handwritten signature in cursive script, appearing to read "Laura H. White", written over a horizontal line.

Laura H. White, Bar No. 4025

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