

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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Docket No.:

KEITH DAVIS,

Plaintiff,

-against-

**COMPLAINT**

COMMACK FIRE DEPARTMENT, INC.,  
COMMACK FIRE DISTRICT, KIERAN KEANE,  
JOHN BARRY, PAUL PURRAZZELLA,  
CHRISTOPHER CIACCIO, JOHN BICOCCHI,  
DEAN SCHNECKENBURGER, JOSEPH BICOCCHI  
and JOHN CIRILLO, in their official capacities as  
members of the Commack Fire Department, Inc.  
Executive Board, and PATRICK FAZIO, THOMAS  
MCFADZEN, STEVEN FONTANA, JEROME  
QUIGLEY and PETER PACCIONE, in their official  
capacities as Commissioners of the Commack Fire  
District, and DANIEL MCBRIDE, in his official  
capacity as Captain of Commack Fire Department  
Engine Company No. 2,

Defendants.

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Plaintiff, KEITH DAVIS, by his undersigned counsel, complains against  
Defendants as follows:

**SUMMARY**

1. This is an action under 42 U.S.C. § 1983 arising from Defendants’  
violation of Plaintiff’s due process, equal protection, and first amendment rights  
when they declined to accept his resignation as a member in good standing and,  
instead, dismissed him from the from the Commack Fire Department without good  
cause or a rational basis, without giving him sufficient notice of any charges against  
him, and without providing a proper hearing, thereby depriving him of a property

interest without procedural or substantive due process, and treating him less favorably than others who were similarly situated, with the conduct likely motivated by an intent to retaliate against him for having engaged in protected speech by expressing interest in running for an elected leadership position.

### **JURISDICTION**

2. This Court has original jurisdiction over this action under 28 U.S.C. § 1331 based upon the matter raising federal questions.

### **PARTIES**

3. The Commack Fire District is a municipal corporation and political subdivision of the State of New York with authority to, among other things, to organize, operate, maintain and equip fire companies and the membership thereof, provide for the removal of such members for cause, adopt rules and regulations governing all fire companies and fire departments in its jurisdiction, and prescribe the duties of the members thereof and enforce discipline of those members. The Fire District receives, among other funding, approximately \$5 Million per year from the taxpayers of the Town of Smithtown.

4. Commack Fire Department, Inc. is a special not-for-profit corporation and quasi-governmental agency, organized under and existing by virtue of the laws of the State of New York, which, upon information and belief, has been partially delegated authority from the Commack Fire District and/or has been relied upon by the fire district to fulfil some of its responsibilities with respect to the oversight and discipline of the volunteer firefighters within its jurisdiction.

5. Defendant KIERAN KEANE is a resident of the County of Suffolk, State of New York, and is sued herein in his official capacity as Chief of the Commack Fire Department and Chairman of its Executive Board.

6. Defendants JOHN BARRY, PAUL PURRAZZELLA, CHRISTOPHER CIACCIO, JOHN BIOCCHI, DEAN SCHNECKENBURGER, JOSEPH BIOCCHI and JOHN CIRILLO are each residents of the County of Suffolk, State of New York, and are sued herein in their official capacities as members of the Executive Board of the Commack Fire Department.

7. Defendants PATRICK FAZIO, THOMAS MCFADZEN, STEVEN FONTANA, JEROME QUIGLEY, and PETER PACCIONE are each residents of the County of Suffolk, State of New York, and are sued herein in their official capacities as Commissioners of the Commack Fire District.

8. Defendant DANIEL MCBRIDE is a resident of the County of Suffolk, State of New York, and is sued herein in his official capacity as Caption of Commack Fire Department Engine Company No. 2.

**FACTS COMMON TO ALL CAUSES OF ACTION**

9. Plaintiff was a member of the Commack Fire Department from approximately February 2005 until January 2021.

10. During 2019, 2020, and the first three weeks of 2021, as an active member of Commack Fire Department, Inc., Plaintiff was a member of Company No. 2 of the Commack Fire District.

11. At all times relevant hereto, Plaintiff was a member in good standing of the Commack Fire Department and Commack Fire District Company No. 2, and complied with all conditions required to continue as a member in good standing.

12. In addition to personal fulfillment through public service, members of the Commack Fire Department and former members who left the Department in good standing are entitled to valuable rights and benefits.

13. Current members of the Fire Department receive, among other things, a 10% reduction on real estate taxes and a state income tax benefit.

14. Both current members and former members who leave the Department in good standing are entitled to a monetary death benefit.

15. In or around 2019, Plaintiff expressed interest in running for an elected leadership position in the Department, but was advised – without explanation -- that he was not eligible and would not be placed on the ballot.

16. Following Plaintiff expressing an interest in seeking an elected leadership position, Chief Kearnan, as well as the other individual Defendants, changed their demeanor towards Plaintiff and became increasingly cold and/or hostile.

17. Beginning in or around March 2020 and continuing thereafter, was a national, state, and local state of emergency related to the Covid-19 pandemic.

18. On or about January 5, 2021, the Commack Fire Department, via a letter signed by Vice President Dean Schneckenburger, ordered “per the Chiefs Office” that Plaintiff attend an executive Board meeting on January 21, 2021 to

“provide a reason for” failing to attend three consecutive monthly meetings during calendar year 2020.

19. The January 5, 2021 notice does not identify what meetings Plaintiff allegedly missed.

20. In response to the January 5, 2021 notice, Plaintiff requested that Defendants identify what meetings he allegedly missed, explaining that if he did miss three consecutive meetings, which he does not believe to be the case, it would have been attributable to his responsibilities and commitments as a critical care nurse during the height of the Covid-19 pandemic.

21. Defendants declined to provide Plaintiff with any further information regarding the allegations against him.

22. On or about January 17, 2021, Plaintiff submitted a letter of resignation, seeking to resign from the Commack Volunteer Fire Department as a member in good standing after approximately 15 years of service.

23. Defendants refused to accept Plaintiff's resignation.

24. Plaintiff appeared at the January 21, 2021 Executive Committee meeting to address the allegations against him and reiterate his request to resign as a member in good standing.

25. During the January 21, 2021 Executive Committee meeting, allegations of absenteeism were addressed by at least one other member of the Department (“John Doe Comparator 1”).

26. Upon information and belief, John Doe Comparator 1 had legitimately violated the Department's attendance policy, and did not offer any reasonable explanation, but was not disciplined in any way.

27. During the January 21, 2021 Executive Committee meeting, Plaintiff reiterated his request that the Department identify what dates he allegedly missed so as to better respond to the allegation, and indicated that any absences during calendar year 2020 were attributable to his work as a critical care nurse during the Covid-19 pandemic.

28. Defendants declined to identify what dates Plaintiff was accused of being absent, and declined to consider his explanation for any alleged absence.

29. During the January 21, 2021 meeting Plaintiff re-iterated his request to resign as a member in good standing, but the Department again declined to accept his resignation.

30. Defendants, including specifically Chief Kieran Keane, advised plaintiff, wrongly, that they do not need to provide a hearing or give any reason for terminating him as a member of the Fire Department, but can instead terminate him "at will."

31. On or about January 23, 2021, the Fire Department, by Chief Kieran Keane, sent Plaintiff a letter stating that he was "dismissed from the Commack Fire Department," and it "was the determination of the Executive Board at its meeting on January 21, 2021 that you failed to adhere to the Commack Fire Department By-laws" regarding attendance.

32. By dismissing Plaintiff from the Commack Volunteer Fire Department, Defendants have deprived him of the opportunity to continue volunteering as a firefighter.

33. By dismissing Plaintiff from the Commack Volunteer Fire Department and by declining to accept his resignation as a member in good standing, Defendants have deprived Plaintiff of valuable benefits and property rights, including a monetary death benefit.

34. Upon information and belief, the Commack Fire Department applied its attendance policy to Plaintiff in a manner that was different, and less favorable than, every other member of the Department, without any rational basis for the disparate treatment.

35. Upon information and belief, other members of the Commack Fire Department, whose names are known to Defendant but have not been disclosed to Plaintiff and are thus identified as John Doe Comparators 2 – 10 for the purposes of this pleading, were treated more favorably than Plaintiff under prima-facie identical and/or substantially similar circumstances.

36. Upon information and belief, the Commack Fire Department selectively enforced its attendance against Plaintiff.

37. Upon information and belief, the Commack Fire Department is or should be in possession of records that would specifically identify and provide additional information pertaining to John Doe Comparators 1 – 10.

38. On November 19, 2021, by counsel, Plaintiff submitted a FOIL request via the Commack Fire Department's online FOIL request portal, seeking:

1. All records related to Keith Davis' request to resign, made on or about January 17, 2021; all records evidencing the Department's final determination of that request and how that determination was communicated to Mr. Davis; and all records evidencing the Department's basis for declining to accept his resignation (including but not limited to correspondence, reports, meeting minutes, and resolutions)
2. All records related to the removal of Keith Davis as a member of the Fire Department, including: the final determination, in whatever form it may take, and evidence as to the manner in which that determination was communicated to Mr. Davis; all notices, correspondence or communications with Mr. Davis related to any hearing or the basis for that hearing; all documents or other evidence relied upon or considered in connection with the determination; any meeting or hearing minutes and/or recordings; and any other documents or other evidence setting forth the Department's basis for removing Mr. Davis as a member.
3. In the event Mr. Davis' removal as a member is based or allegedly based upon attendance issues: (a) provide all documents, records, or reports of Mr. Davis' absences in calendar year 2020; (b) provide documentation (such as annual summary reports or similar documentation) showing the absences of all other members in all companies in calendar years 2018, 2019, and 2020; and (c) for each individual whose absences in any of those three years were greater than or equal to Mr. Davis' absences in 2020, provide documents (such as meeting minutes and written hearing determinations) identifying whether those individuals were removed or otherwise disciplined and, if not removed, provide any documents that demonstrate or identify the basis for treating that individual differently than Mr. Davis.



39. Plaintiff did not receive a timely response to this FOIL request.

40. Plaintiff followed up via letter dated November 22, 2021.

41. On December 28, 2021, Plaintiff's counsel was contacted by the Commack Fire Department's District Manager, who advised that the person handling the requests was away on vacation but a response would be forthcoming upon their return on January 4, 2021.

42. By letter dated March 21, 2022, the Commack Volunteer Fire Department provided a belated partial response to Plaintiffs' FOIL request. Among other things, Defendants failed to provide: any records pertaining to Keith Davis' resignation request or the consideration thereof; any meeting minutes or similar records from the January 21, 2021 meeting, or any records or meeting minutes pertaining to absenteeism or discipline of potential comparators.

## **CAUSES OF ACTION**

### **I. VIOLATION OF THE DUE PROCESS CLAUSE**

43. Plaintiff repeats, reiterates, and realleges each and every allegation hereinabove as if fully set forth herein.

44. The Fourteenth Amendment provides that state actors may not deprive a person of life, liberty, or property, without due process of law.

45. Plaintiff had a property right, analogous to the rights of municipal employees, to continued volunteer service.

46. Plaintiff had a property right, pursuant to Town Law § 176(10), to continued membership in a fire company unless removed "for cause."

47. Plaintiff had a property right in the benefits, including monetary death benefit, available to volunteer fire fighters, including those who resign in good standing.

48. Defendants deprived Plaintiff of the above-referenced property interests without due process of law.

49. The procedure followed by Defendants, including failing to sufficiently advise Plaintiff of the allegations against him, failing to provide him with a meaningful opportunity to be heard, failing to consider his explanation for any absences, failing to provide any hearing whatsoever or a hearing that could only be described as perfunctory and illusory, violated Plaintiff's procedural due process.

50. The substance of Defendants' action in dismissing Plaintiff was taken without any rational basis, and thus violated Plaintiff's substantive Due Process rights.

51. Pursuant to 42 U.S.C. 1983, a person who has been deprived of a constitutional right has a cause of action against the person who, under color of law, caused such deprivation.

52. Pursuant to 42 U.S.C. 1988, Plaintiff seeks recovery of attorneys' fees.

53. Defendants, and each of them, violated Plaintiff's constitution due process rights, causing damages, including but not limited to emotional distress, loss of continued service opportunities, and loss of a vested death benefit.

54. The individual Defendants, in their official capacities, are the final policy and decision-makers of Commack Fire Department, Inc., such that the entity

itself is liable for the conduct described herein in addition to the individually named defendants.

## II. VIOLATION OF THE EQUAL PROTECTION CLAUSE

55. Plaintiff repeats, reiterates, and realleges each and every allegation hereinabove as if fully set forth herein.

56. The Fourteenth Amendment provides that state actors may not deprive a person within their jurisdiction of equal protection of the laws.

57. Plaintiff was treated less favorably than John Doe Comparators 1 - 10 under substantially similar circumstances.

58. Upon information and belief, John Doe Comparators 1 – 10, were accused of attendance policy violations and/or actually committed attendance policy violations, but were not dismissed from the Fire Department.

59. Upon information and belief, the circumstances of John Doe Comparators 1 – 10 were prima-facie identical to Plaintiff's circumstances in all material respects and/or any difference in circumstances would weigh in Plaintiff's favor rather than provide a justification for less-favorable treatment.

60. Defendants have prevented Plaintiff from providing additional factual information regarding Comparators 1-10 by unlawfully failing to respond to a Freedom of Information Law request.

61. The disparity in treatment between Plaintiff and John Doe Comparators 1-10 occurred without a rational basis.

62. Although Defendants' conduct violates the Equal Protection Clause even under a rational basis standard, there are affirmative indicia that Defendants' disparate treatment was motivated by bad faith, including being motivated by a desire to violate other constitutional rights and chill Plaintiff's free speech, such that in the event Defendants attempt to provide some basis for the disparity in treatment heightened scrutiny should apply.

63. Pursuant to 42 U.S.C. 1983, a person who has been deprived of a constitutional right has a cause of action against the person who, under color of law, caused such deprivation.

64. Pursuant to 42 U.S.C. 1988, Plaintiff seeks recovery of attorneys' fees.

65. Defendants, and each of them, violated Plaintiff's constitution equal protection rights, causing damages, including but not limited to emotional distress, loss of continued service opportunities, and loss of a vested death benefit.

### **III. FIRST AMENDMENT RETALIATION**

66. Plaintiff repeats, reiterates, and realleges each and every allegation hereinabove as if fully set forth herein.

67. The First Amendment, made actionable against state actors by the Fourteenth Amendment, provides that freedom of speech shall not be abridged.

68. Plaintiff engaged in protected speech by expressing an intention to run for an elected leadership position in the Commack Fire Department.

69. Expressing an interest in candidacy for an elected position is separate and distinct from the ordinary duties of Plaintiff's position as an active member of the Commack Fire Department.

70. The leadership and competition within the process for electing leadership of a publicly-funded quasi-governmental entity that provides emergency services is a matter of public concern.

71. Plaintiff's expression of interest in running for an elected leadership position is speech that conveys both political aspiration by Plaintiff and can be construed as critical of the then-current leadership's preferred alternative candidate(s).

72. Defendants retaliated against Plaintiff for engaging in protected speech by, among other things, refusing to accept Plaintiff's resignation and dismissing Plaintiff from the Fire District.

73. Pursuant to 42 U.S.C. 1983, a person who has been deprived of a constitutional right has a cause of action against the person who, under color of law, caused such deprivation.

74. Pursuant to 42 U.S.C. 1988, Plaintiff seeks recovery of attorneys' fees.

75. As a direct and proximate result of Defendants, and each of them, violating Plaintiff's constitution right to free speech, Plaintiff has suffered damages, including but not limited to emotional distress, loss of continued service opportunities, and loss of a vested death benefit.

**DEMAND FOR RELIEF**

WHEREFORE, Plaintiff demands Judgement against Defendants, jointly and severally, in a sum that will fully and fairly compensate him for the damages he has suffered; together with injunctive relief including but not limited to reinstatement and/or a directive that Plaintiff's status with the Department be changed to resigned in good standing, with all applicable benefits restored; plus costs, disbursements, and attorneys fees; together with such other and further relief in Plaintiff's favor as is deemed just, equitable, and proper.

Dated: September 16, 2022

Respectfully submitted,

DEVITT SPELLMAN BARRETT, LLP

/s/ Scott Kreppein

By: Scott J. Kreppein  
50 Route 111, Ste 314  
Smithtown, NY 11787  
(631) 724-8833