

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION  
(TOLEDO)**

**MAJOR SMITH, III**  
1319 BLUM ST.  
TOLEDO, OH 43607-4136.

**PLAINTIFF,**

**v.**

**CITY OF TOLEDO**  
C/O DEPARTMENT OF LAW  
ONE GOVERNMENT CENTER, SUITE 2250  
640 JACKSON ST.  
TOLEDO, OH 43604,

AND

**WADE KAPSZUKIEWICZ, MAYOR**  
**CITY OF TOLEDO**  
ONE GOVERNMENT CENTER, SUITE 2200  
640 JACKSON ST.  
TOLEDO, OH 43604,

AND

**CITY OF TOLEDO FIRE AND RESCUE**  
**DEPARTMENT**  
545 N. HURON ST.  
TOLEDO, OH 43604,

AND

**BRIAN BYRD, CHIEF**  
**CITY OF TOLEDO FIRE AND RESCUE**  
**DEPARTMENT**  
545 N. HURON ST.  
TOLEDO, OH 43604,

AND

**LUIS SANTIAGO, RETIRED CHIEF**  
**CITY OF TOLEDO FIRE AND RESCUE**

) **CASE No.**

) **JUDGE:**

) **COMPLAINT**  
) **WITH JURY DEMAND ENDORSED**  
) **HURON**

) **Trial Counsel:**

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) - *Atty for Plaintiff, Major Smith, III*

DEPARTMENT )  
6641 BRICK YARD CT. )  
MAUMEE, OH, 43537-9539 )  
) )  
DEFENDANTS. )  
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**PLAINTIFF’S COMPLAINT AND DEMAND FOR JURY TRIAL**

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**NOW COMES** the Plaintiff, Major Smith, III (“Plaintiff” or “Smith”), by and through his undersigned counsel, Norman A. Abood, and for his Complaint against the above-named Defendants states as follows:

**PRELIMINARY STATEMENT**

1. Major Smith, III, an African American resident of the City of Toledo, sought to fulfill his lifelong dream of becoming a firefighter by applying for employment with the Toledo Fire and Rescue Department. He was accepted by the Department as a Trainee/Recruit in December 2017, with his expectation being that he be afforded a fair chance at becoming a Fireman. During the course of his training and testing Major was repeatedly discriminated against based upon his race though disparate and/or discriminatory treatment from that afforded white Trainee/Recruits in the form of improper instruction unique to him, internal Department misrepresentation and manipulation of his training and test results, discriminatory testing, cover-up of material & discriminatory deficiencies in his training and testing protocols by the current Chief of the Department and the Mayor of the City of Toledo, culminating in Major’s wrongful termination from the Department. Major has received a Right to Sue letter from the EEOC, and been awarded unemployment compensation based upon an finding that he was discharged without just cause by the Ohio Department of Jobs and Family Services. Accordingly, Mr. Smith brings this civil rights

action seeking compensatory damages, punitive damages, and an award of attorney fees and expenses of suit from the Defendants for their racial discrimination against him in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-2 (Title VII), 42 U.S.C. §§1981 (Equal Rights under the Law), 1983 (Deprivation of Rights under Color of Law), 1985 (Conspiracy to Interfere with Civil Rights), 1986 ((Failure to Prevent conspiracy in Deprivation of Civil Rights), and 1988 (Civil Rights Attorney Fee Award Act of 1976), as well as O.R.C. §4112.02 (Unlawful Discriminatory Practices). The discriminatory practices described herein were committed by the individual named Defendants and others within the Toledo Fire and Rescue Department, acting in concert and under color of law, and were the result of policies, practices and customs of the City of Toledo and the City of Toledo Fire and Rescue Department.

### **THE PARTIES**

2. Plaintiff, Major Smith, III, is, and at all times material herein has been a citizen and resident of the United States and Lucas County, Ohio; and, is an African-American of black color.
3. Plaintiff, Maj. Smith, III is a member of a protected class under the civil rights laws of the United States and the State of Ohio.
4. The Defendant City of Toledo operates as a municipality organized and existing under the laws of the State of Ohio.
5. The Defendant City of Toledo is in entity, whether licensed or not, whether incorporated or not, doing business within the County of Lucas, State of Ohio at all times material herein.
6. At all times material herein, Defendant Wade Kapszukiewicz (“Kapszukiewicz”) was the duly elected and sitting Mayor of the City of Toledo and was acting under color of law in

the course and scope of his employment at the time of the acts and/or omissions complained of herein.

7. At all times material herein, Defendant Wade Kapszukiewicz, was the only “Appointing Authority” as that title is defined by law, for the City of Toledo.
8. At all times material herein, the Defendant City of Toledo Fire & Rescue Department was a Municipal Fire & Rescue Department of the Defendant City of Toledo.
9. Effective August 3, 2018, and at all times relevant thereafter, Defendant Brian Byrd (“Byrd”) has been the duly appointed and sitting Chief of the City of Toledo Fire & Rescue Department and was acting under color of law in the course and scope of his employment at the time of the acts and/or omissions complained of against him herein.
10. At all times material herein prior to August 3, 2018, Defendant Luis Santiago (“Santiago”) was the duly appointed and sitting Chief of the City of Toledo Fire & Rescue Department and was acting under color of law in the course and scope of his employment at the time of the acts and/or omissions complained of against him herein.
11. The City of Toledo is the public employer of Defendants Kapszukiewicz, Byrd and Santiago.
12. All of the deliberate, willful and wanton misconduct of defendant herein occurred in the City of Toledo, County of Lucas, State of Ohio.

#### **JURISDICTION AND VENUE**

13. This action arises under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-2 (Title VII), 42 U.S.C. §§1981 (Equal Rights under the Law), 1983 (Deprivation of Rights under Color of Law), 1985 (Conspiracy to Interfere with Civil Rights), 1986 ((Failure to Prevent

conspiracy in Deprivation of Civil Rights), and 1988 (Civil Rights Attorney Fee Award Act of 1976), as well as O.R.C. §4112.02 (Unlawful Discriminatory Practices).

14. This Court has original jurisdiction over this action pursuant to 28 U.S.C. §1331 (Federal Question Jurisdiction) and 28 U.S.C. §1343(a) (Civil Rights Jurisdiction).
15. Plaintiff timely filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission (“EEOC”), Detroit Field Office alleging discrimination based on race in violation of Title VII of the Civil Rights Act of 1964, as amended on September 18, 2018, a true and accurate copy of which is attached hereto as Exhibit 1.
16. The EEOC issued Plaintiff its Right to Sue letter on September 26, 2018, a true and accurate copy of which is attached hereto and made a part hereof as Exhibit 2.
17. This Court has original jurisdiction over Title VII claims filed within 90 days of a charging party’s (Plaintiff herein’s) receipt of the EEOC’s right to sue letter and, thus, this Court has jurisdiction over Plaintiff’s Title VII claims pursuant to 42 U.S.C. §2000e-5(f)(3).
18. This Court has pendent jurisdiction over discriminatory practice claims arising under O.R.C. §4112.02 pursuant to 28 U.S.C. §1343(a)(3).
19. Venue for this action properly lies in the United States District Court for the Northern District of Ohio, Western Division (Toledo), pursuant to 29 U.S.C. §1391(b) because the defendants all reside and/or are located within the State of Ohio and this judicial district (29 U.S.C. §1391(b)(1)), the claims at issue arose in this judicial district (29 U.S.C. §1391(b)(2)) and pursuant to 42 U.S.C. 2000e-5(f)(3) because the unlawful employment practices were committed in this judicial district.

### **FACTS**

20. Plaintiff repeats and reiterates each and every allegation set forth in paragraphs 1 through 17 above as if fully rewritten herein.
21. On or about December 1, 2017, Plaintiff Major Smith, III was hired as a Recruit (Fire-Trainee) by the City of Toledo Fire & Rescue Department and enrolled in the Toledo Fire and Rescue Recruit Academy under the direct supervision of Sally A. Glombowski, Battalion Chief where Plaintiff worked and studied until unjustifiably discharged from his employment on June 12, 2018.

**CITY OF TOLEDO FIRE & RESCUE DEPARTMENT HISTORY OF EMPLOYMENT DISCRIMINATION**

22. The City of Toledo Fire & Rescue Department has a history of and has continually since at least 1972 through the present engaged in racial discrimination in its hiring and employment practices as earlier evidenced by the 1974 Consent Decree entered into by the City of Toledo Fire & Rescue Department in the case captioned *Brown v. Neeb*, United States District Court for the Northern District of Ohio, Western Division case no. C-72-282. As noted by Judge Young in a subsequent ruling on a claimed violation of the 1974 Consent Decree, *Brown v. Neeb, supra*, was “brought under 42 U.S.C. §§ 1981 and 1983, the Civil Rights Acts of 1866 and 1871” to “eliminate vestiges of past discrimination”, *Brown v. Neeb*, (1980) 523 F. Supp. 1, 5, 1980 U.S. Dist. LEXIS 14391, 25 Fair Empl. Prac. Cas. (BNA) 262, 24 Empl. Prac. Dec. (CCH) P31,271.
23. As held by the United States Court of Appeals for the Sixth Circuit in affirming Judge Young’s ruling on the 1980 claimed violation of the 1974 Consent Decree, “the consent decree imposed a duty upon the city [of Toledo Fire & Rescue Department] to inaugurate and maintain affirmative action ... in hiring” *Brown v. Neeb*, (1981) 644 F.2d 551, 557, 1981 U.S. App. LEXIS 19667, 25 Empl. Prac. Dec. (CCH) P31593, 25 Fair Empl. Prac.

Cas. (BNA) 267. As stated by the Sixth Circuit, the City of Toledo's proposed action at the time (1980), to lay off recently-hired minority fire fighters under the guise of following seniority practices would "make a mockery of the consent decree." *Id.*, at 558. Further, as noted by the Sixth Circuit from the time of the Consent Decree (1974) to the time of its upholding Judge Young's 1980 finding of violation of the Consent Decree (1981) the "city of Toledo did not come close to complying with the consent decree's 5 year minority employment goal and reiterated Judge Young's ruling that "the consent decree required affirmative action, not negative action or no action." *Id.*, at 558. The consent decree essentially required the City of Toledo Fire & Rescue Department to hire minorities in proportion to the ratio of minorities found in Toledo's general population. *Brown v. Neeb*, (1980) 523 F. Supp. 1, 1.

24. Further, in response to the City of Toledo's argument that it had not conceded liability for employment discrimination in the hiring practices of the City of Toledo Fire & Rescue Department Sixth Circuit found the City's arguments "disingenuous", *Brown v. Neeb*, (1981) 644 F.2d 551, 562, fn. 20. As stated by the Sixth Circuit,

In fact, so clear was the existence of past discrimination, that Judge Young in his opinion, stated:

The consent decree was entered because in spite of the careful professional efforts of the skilled attorneys to avoid admitting that which could not truthfully be denied, there was no doubt that members of racial minorities were excluded from the police and fire division."

- *Brown v. Neeb*, (1981) 644 F.2d 551, 562,

Continuing its review, the Sixth Circuit found,

Examination of the decree and the circumstances under which it was entered compels a conclusion that the city agreed that it had a constitutional duty to eradicate discrimination in the hiring of firefighters. The only issues in question were the specific steps the city would take to integrate the fire department. That was what the consent decree in this case was all about.

- *Brown v. Neeb*, (1981) 644 F.2d 551, 562-563.

25. As of July 2010, the City of Toledo Fire & Rescue Department had so failed to satisfy the mandates of the 1974 Consent Decree that the City's compliance was challenged by Advocates for Basic Legal Equality with the filing of a motion in Federal Court seeking to enforce provisions of a 1995 Order requiring the continuous recruitment program, See *Order Amending June 8, 1993, Order*, Doc. No. 29, U.S. Dist. Ct. N. Dist. Ohio case no. 3:72-cv-00282-DAK, filed 07/12/95 amending the Court's June 8, 1993, Order which established the Dispute Resolution and Case Closing Procedure for the case, which July 10, 2010 Motion was resolved in October 2010 by entry of a settlement agreement providing that selection and hiring practices that had been required as part of the consent decree would become institutionalized as policy within the Civil Service Commission for the City of Toledo. As part of this 2010 settlement agreement, the District Court ended its oversight of the hiring and selection process by vacating the Consent Decree, see, *Stipulated Order Vacating Consent Decree*, Doc. No. 45, U.S. Dist. Ct. N. Dist. Ohio case no. 3:72-cv-00282-DAK, filed 10/13/10.

26. Despite this history of litigation, the various consent decrees and the ultimate 2010 settlement agreement, racial discrimination in the City of Toledo Fire & Rescue Department's hiring practices have continued such that the City has not achieved the integration of minorities as mandated in the 1974 Consent Decree.

### **DISCRIMINATORY PRACTICES SUFFERED BY PLAINTIFF, MAJOR SMITH, III**

27. Throughout the course of his employment since December 1, 2017, Plaintiff has been subjected to racial discrimination, retaliation and harassment and has received different treatment than Caucasian employees.

28. Initially, supervising personnel in the City of Toledo Fire & Rescue Department falsely represented that Plaintiff had failed his agility tests and attempted to have his employment terminated when in fact he had one of the highest scores in his class on the subject agility tests.
29. During the course of his training Plaintiff was subjected to almost weekly disparate and/or discriminatory harassment by supervisory personal in that he was disciplined, reprimanded and written up for incidents for which other Caucasian recruits in the same circumstance were not written up in a course of systematic discrimination designed to result in Plaintiff's inability to successfully complete the training program. Specifically, but not by way of limitation,
- a. Plaintiff was written up for not having his suspenders on his shoulders when under the same circumstance involving at least one other Caucasian recruit it was dealt with as a laughing matter;
  - b. Plaintiff was disciplined for studying for an upcoming test after having finished his designated duties (e.g., area cleanup, floor sweeping) instead of helping other recruits finish their assigned task;
  - c. Plaintiff was repeatedly denied tutoring help and other assistance in learning prescribed firefighter skills while Caucasian recruits were provided and allowed the same type of help;
  - d. Plaintiff was repeatedly given pretextual excuses why additional training assistance was not available when Caucasian recruits were provided the same type of assistance.

30. In furtherance of the City of Toledo's and the City of Toledo Fire & Rescue Department's discriminatory scheme against Plaintiff, Plaintiff was intentionally misled and wrongfully instructed by assigned instructors within the City of Toledo Fire & Rescue Department resulting in Plaintiff's failure of a required ventilation test wherein the recruit/trainee is required to use a chainsaw to cut an opening into a facility. Specifically, but not by way of limitation

- a. Plaintiff was improperly instructed in the use of a chain saw contrary to the manner in which Caucasian Recruit/Trainees were instructed, which disparate and/or discriminatory treatment led to Plaintiff failing the ventilation test which failure was then used as a basis for his termination.
- b. Plaintiff was isolated/separated from other members of his class thereby depriving him of the opportunity to intermingle and learn the skills along with other members of his class needed to successfully complete training as a Firefighter Recruit for the City of Toledo Fire & Rescue Department.
- c. Plaintiff's training/education was manipulated by being told what to do without being provided demonstrations on how to perform required tasks, all the while when demonstrations were provided to Caucasian Recruit/Trainees.
- d. During "ventilation testing" Plaintiff was required to complete this task in the air on actual structures while Caucasian Recruit/Trainees were allowed to complete the ventilation test on a simulator, which disparate and/or discriminatory treatment led to Plaintiff failing the test which failure was then used as the basis for his termination.

- e. Plaintiff's failure of the ventilation testing was used as a basis for his termination while Caucasian Recruit/Trainees were allowed to successfully complete Recruit/Trainee training without passing the ventilating test.
  - f. Plaintiff was required to satisfy ventilation testing requirements far more severe and demanding - to the point of guaranteeing failure – than that required of Caucasian trainees, which disparate and/or discriminatory treatment led to Plaintiff failing the test.
31. On May 31, 2018, Karen Poore, Deputy Chief of Staff for Defendant Kapszukiewicz, informed Alicia Smith, Plaintiff's mother, by phone that there was gross negligence in the Fire Department's testing of Recruit Smith and that the Fire Department training staff would provide Plaintiff an opportunity to retest. Ms. Poore apologized for the mistreatment afforded Plaintiff and asked if there was anything that would make a difference in the testing to which Ms. Smith responded with the request that a person of color would accompany Plaintiff, Recruit Smith, in the retesting.
32. Then Battalion Chief Byrd, Defendant herein, listened into and witnessed the call from Ms. Poore to Ms. Smith detailed above.
33. At a meeting held on May 31, 2018, during which the City of Toledo and the City of Toledo Fire & Rescue Department were confronted with the fact of the disparate and/or discriminatory treatment to which Plaintiff was subjected, the City of Toledo Fire & Rescue Department and the City of Toledo, through the direct representations of Defendant Kapszukiewicz, and City of Toledo Fire & Rescue Department subordinates acting under the control and direction of Defendant Santiago, including, but not limited to Defendant Byrd,

- a. admitted that Plaintiff Smith had been misinformed on testing procedures, had been improperly isolated from his class, had been provided improper training (including but not limited to being instructed in procedures which would assure his failing the ventilation test), been deprived of demonstrations on how to perform tasks while Caucasian members of Plaintiff's recruit/training class were provided with such demonstrations and subjected to unfair testing; elevation and extreme slope;
  - b. agreed that Plaintiff Smith would be allowed to retake the ventilation test;
  - c. agreed that steps would be implemented to properly instruct and train plaintiff Smith in the methods and techniques required for performance of the ventilation test requirements;
  - d. agreed that prior Plaintiff's failure of the ventilation test would be not held against him;
  - e. agreed that Plaintiff Smith would be allowed 3 opportunities (Ohio Administrative Code §4765-20-06(2)(e) allows for 3 attempts per physical skills examination with no more than 2 attempts occurring on the same day) to pass the ventilation test within the following 2 weeks;
  - f. agreed that a Battalion Chief would be assigned to observe Plaintiff Smith's retraining and testing to ensure these tasks were fairly and properly performed.
34. In furtherance of the agreements detailed in the foregoing paragraph, a Battalion Chief was in fact assigned to be an observer of Plaintiff Smith's retraining and retesting to ensure these tasks were fairly and properly performed.

35. During the retraining process, numerous qualified firefighters offered to assist Plaintiff Smith in being retrained in techniques and skills needed for successful completion of ventilation testing.
36. Contrary to the Defendants' joint and/or several assurances of fair, and agreement to allow, fair, nondiscriminatory treatment in retraining and retesting as detailed above, City of Toledo Fire & Rescue Department subordinates acting under the control and direction of Defendant Santiago, and under the ultimate supervision and control of Defendant Kapszukiewicz, refused to allow Plaintiff Smith the assistance of other qualified firefighters who had offered to assist Plaintiff Smith in being re-trained in techniques and skills needed for successful completion of ventilation testing while routinely allowing Caucasian Recruit/Trainees to be assisted in their training by other qualified firefighters, which disparate and/or discriminatory treatment contributed to Plaintiff inability to successfully complete retesting.
37. Contrary to the Defendants' joint and/or several assurances of, and agreement to allow, fair, nondiscriminatory treatment in retraining and retesting as detailed above, Plaintiff Smith was again given improper training, and subjected to ventilation testing requirements far in excess of those required of Caucasian Recruit/Trainees. Specifically, but not by way of limitation,
- a. When Plaintiff's chain saw malfunctioned during testing, the test was not stopped, and contrary to the treatment afforded Caucasian Recruit/Trainees, Plaintiff Smith was required to continue the test with a malfunctioning chainsaw, which disparate and/or discriminatory treatment contributed to Plaintiff failing the test.

- b. Plaintiff Smith was required to perform ventilation testing on a roof that Caucasians did not use for testing having characteristics - elevation and slope - that was not required of Caucasian Recruit/Trainees, which disparate and/or discriminatory treatment contributed to Plaintiff failing the test.
  - c. Plaintiff Smith was required to perform the above ground ventilation testing wearing more and heavier equipment than that required of Caucasian Recruit/Trainees, which disparate and/or discriminatory treatment contributed to Plaintiff Smith failing the test
  - d. Plaintiff Smith was required to perform a bigger cut in an above ground ventilation test on a facility presenting more extreme conditions than that required of Caucasian Recruit/Trainees, which disparate and/or discriminatory treatment contributed to Plaintiff Smith failing the test.
38. Contrary to the Defendants' joint and/or several assurances of, and agreement to allow, fair, nondiscriminatory treatment in retraining and retesting as detailed above, rather than allowing plaintiff Smith the full opportunity to successfully complete retesting, on June 12, 2018 was summarily and wrongfully terminated without notice or an opportunity to be heard. See, Exhibit 3 hereto, correspondence City of Toledo Fire & Rescue Department, Fire Chief Luis Santiago, dated June 12, 2018 executed by Karen Marquardt, Acting Dir./Chief Toledo Fire and Rescue Department.
39. Plaintiff, Major Smith's termination was not required by law.
40. Plaintiff was wrongfully terminated as only the City of Toledo Appointing Authority had the authority to terminate Plaintiff.

41. When Plaintiff Smith directly and/or through his representatives sought to meet with Defendant Kapszukiewicz to address the breaches of agreement and Plaintiff Smith's wrongful, Defendant Kapszukiewicz without justification refused to meet.
42. Plaintiff Smith immediately and within 10 days of his receipt of notice of termination requested a review, including a name clearing hearing, through the Civil Service Commission of the City of Toledo.
43. The City of Toledo refused to allow him an appeal asserting he did not qualify for appellate rights through the City of Toledo Civil Service Commission.
44. On or about July 20, 2018, Defendant Santiago, represented to the Toledo Blade that Plaintiff Major Smith, III failed the ventilation portion of his physical testing then was fired for not meeting the applicable state standards, but refused to provide truthful information as to the manipulative and discriminatory treatment perpetrated upon Plaintiff Smith ultimately resulting in Plaintiff Smith's termination.
45. After becoming Chief of the Toledo, Fire & Rescue Department, Chief Byrd represented to Plaintiff Smith's representatives that he would conduct a fair investigation into Plaintiff Smith's termination.
46. A fair investigation into Plaintiff Smith's termination would include, but not be limited to, obtaining the report of the Battalion Chief assigned to observe Plaintiff Smith's retraining and retesting.
47. The observations of the Battalion Chief assigned to observe Plaintiff Smith's retraining and retesting detail and establish the Defendants' disparate and/or discriminatory treatment of Plaintiff Smith in the retraining and retesting process.

48. Defendant Byrd, without legal justification, failed to conduct a fair investigation into Smith's termination.
49. Specifically, but not by way of limitation, Defendant Byrd, individually and in his capacity as Chief of the Toledo Fire & Rescue Department, without justification, and in agreement with Defendants City of Toledo and Kapszukiewicz to perpetrate and cover-up the disparate and/or discriminatory actions of the City of Toledo & the City of Toledo Fire and Rescue Department never requested, nor did he ever obtain the report of the Battalion Chief assigned to observe Plaintiff Smith's retraining and retesting.
50. Defendants' joint and/or several discrimination against Plaintiff as aforesaid and Plaintiff's purported inability to pass the ventilation test was used as an unlawful pretext to deny Plaintiff employment with the City of Toledo and the City of Toledo Fire & Rescue Department.
51. Plaintiff Smith has timely exhausted all administrative remedies available to him in the pursuit of redress of the wrongs perpetrated upon him by Defendants as aforesaid.
52. As detailed above, Defendants jointly and/or severally targeted Plaintiff from the time of his hiring into the City of Toledo Fire & Rescue training/recruitment program with racial bias.
53. As detailed above, Defendants City of Toledo, the City of Toledo Fire & Rescue Department and Defendant Santiago jointly and/or severally anticipatorily decided not to hire Plaintiff as a full-time member of the City of Toledo Fire & Rescue Department.
54. As detailed herein above, Defendants' joint and/or several acts of discrimination against Plaintiff was purposeful and undertaken with the discriminatory intent to deprive Plaintiff of his rights under federal and state law.

55. Defendants joint and/or several acts of discrimination against Plaintiff as aforesaid was a continuation of the invidious racial discrimination in hiring practices perpetrated by the City of Toledo and the City of Toledo Fire & Rescue Department as admitted to by the City of Toledo and the City of Toledo Fire & Rescue Department in the 1974 Consent Decree.
56. As a direct and proximate result of the Defendants' joint and/or several wrongful and discriminatory actions as this aforesaid, Plaintiff, Major Smith, III has suffered discrimination, including, but not limited to, the loss of employment and employment opportunities, in violation of the United States laws and the laws of the State of Ohio.
57. As a direct and proximate result of the Defendants' joint and/or several wrongful and discriminatory actions as this aforesaid, Plaintiff, Major Smith, III has suffered emotional distress, mental anguish, embarrassment and humiliation and damages to reputation.
58. As a direct and proximate result of the Defendants' joint and/or several wrongful and discriminatory actions as this aforesaid, Plaintiff, Major Smith, III has been denied due process of law in violation of the United States laws and the laws of the State of Ohio.
59. As a direct and proximate result of the Defendants' joint and/or several wrongful and discriminatory actions as this aforesaid, Plaintiff, Major Smith, III has suffered a loss of his property interests in violation of the United States laws and the laws of the State of Ohio.
60. Defendants' joint and/or several wrongful and discriminatory conduct against Plaintiff as detailed above was undertaken under color of law.

61. 42 U.S.C. §1988(b) allows for the award of attorney fees in an action to enforce 42 U.S.C. §§ 1981-1983, 1985, 1986 and Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d et seq.).

62. 42 U.S.C. §1988(c) allows for the award of expert fees as part of an attorney's fee award in an action to enforce 42 U.S.C. §§ 1981-1981 (a).

**COUNT ONE**  
**(42 U.S.C. §1981)**

63. Plaintiff repeats and reiterates each and every allegation set forth in paragraphs 1 through 62 hereinabove as if fully rewritten herein.

64. At all times material herein, Plaintiff, Major Smith, III, was qualified for the position of employment he sought with the City of Toledo in the City of Toledo Fire & Rescue Department.

65. Plaintiff, Major Smith, III was considered for but denied a position of employment with the City of Toledo in the City of Toledo Fire & Rescue Department despite his qualifications.

66. Caucasian members of the same recruit/training class as Plaintiff, having the same or similar qualifications as Plaintiff graduated from the training program and were employed by the City of Toledo in the City of Toledo Fire & Rescue Department.

67. While Plaintiff was allowed to graduate with his class, Defendant City of Toledo and City of Toledo Fire & Rescue Department terminated Plaintiff based upon the pretextual claim that he had not passed the ventilation test, despite his having passed the EMT test.

68. 42 U.S.C. §1981 prohibits intentional race discrimination in the making and enforcing of contracts involving both public and private actors and provides a cause of action for both race-based employment discrimination and retaliation.

69. As detailed above, Plaintiff belongs to an identifiable class of persons who are and have been subject to discrimination based on their race.
70. As detailed above, Defendants' jointly and/or severally intended to discriminate against Plaintiff on the basis of his race.
71. As a direct and proximate result of the Defendants' joint and/or several wrongful and discriminatory actions as this aforesaid, Plaintiff, Major Smith, III suffered a materially adverse change in the terms and/or conditions of his employment with the City of Toledo and/or the City of Toledo Fire & Rescue Department, e.g., he was wrongfully terminated, all in violation of the United States laws and the laws of the State of Ohio.
72. As detailed above, Defendants joint and/or several discriminatory conduct towards Plaintiff (1) abridged Plaintiff's right to contract with the City of Toledo and/or the City of Toledo Fire & Rescue Department free from discrimination, and/or (2) to have and enjoy the full and equal benefit of all laws and proceedings for the security of his property as is enjoyed by white citizens.
73. As a direct and proximate result of Defendants joint and/or several discriminatory conduct in violation of 42 U.S.C. §1981 towards Plaintiff, Plaintiff is entitled to an award of compensatory and punitive damages, as well an award of attorney fees and costs reasonably incurred herein.

**COUNT TWO**  
**(42 U.S.C. §1983)**

74. Plaintiff repeats and reiterates each and every allegation set forth in paragraphs 1 through 73 hereinabove as if fully rewritten herein.
75. As a direct and proximate result of Defendants' joint and/or several discriminatory conduct against Plaintiff as detailed hereinabove, Defendants' jointly and/or severally deprived

Plaintiff of a liberty interest without adequate procedural safeguards in violation of 42 U.S.C. §1983.

76. Defendants' jointly and/or severally deprived Plaintiff of a liberty interest without adequate procedural safeguards in violation of 42 U.S.C. §1983, publicly issuing false statements of a stigmatizing nature regarding Plaintiff's discharge without affording Plaintiff a name clearing hearing.
77. Defendants' joint and/or several discriminatory conduct against Plaintiff as detailed hereinabove so denigrated the plaintiff that it has impaired and/or prevented Plaintiff from finding other employment.
78. As a direct and proximate result of Defendants joint and/or several discriminatory conduct in violation of 42 U.S.C. §1983 towards Plaintiff, Plaintiff is entitled to an award of compensatory and punitive damages, as well an award of attorney fees and costs reasonably incurred herein.

**COUNT THREE**  
**(42 U.S.C. §1985(3))**

79. Plaintiff repeats and reiterates each and every allegation set forth in paragraphs 1 through 78 hereinabove as if fully rewritten herein.
80. 42 U.S.C. §1985(3) amongst other matters, prohibits two or more persons from conspiring to deprive, either directly or indirectly, any person of the equal protection of the laws or of the equal privileges and immunities under the laws.
81. Defendants' discriminatory conduct against Plaintiff as detailed hereinabove was undertaken jointly and in a concerted and agreed-upon effort (conspiracy) to deprive Plaintiff, Major Smith, III, the equal protection of the law and/or the equal privileges and

immunities afforded him under law directly and proximately resulting in injury to plaintiff in his property, liberty interests, rights and privileges as a citizen of the United States.

82. Defendants Kapszukiewicz, Santiago, and Byrd knew that Plaintiff had been discriminated against by members of the City of Toledo Fire & Rescue Department through false documentation of his actions, daily harassment, improper training and discriminatory testing, and then in concert, and by conspiratorial agreement covered it up by creating a further a pretext for terminating Plaintiff – the supposed fair opportunity to retrain and retest.
83. Defendants Kapszukiewicz', and Santiago's, conspiracy to deprive Plaintiff of his rights under law was motivated by their invidious racial, discriminatory animus seeking to prevent Plaintiff's participation as a member of the African-American protected class as an employee in the City of Toledo Fire & Rescue Department.
84. Defendant Byrd joined in and continued the conspiracy with Defendants Kapszukiewicz and Santiago to deprive Plaintiff Smith of his legal rights for the purpose of protecting his own newly acquired position as Chief of the City of Toledo Fire & Rescue Department.
85. Defendants Kapszukiewicz', Santiago's and Byrd's actions as aforesaid were undertaken in violation of 42 U.S.C. §1985(3).
86. As a direct and proximate result of Defendants conduct in violation of 42 U.S.C. §1985(3) towards Plaintiff as aforesaid, Plaintiff has been denied the equal protection of law and/or enjoyment of the equal privileges and immunities afforded him under law.
87. As a direct and proximate result of Defendants conduct in violation of 42 U.S.C. §1985(3) towards Plaintiff as aforesaid, Plaintiff is entitled to an award of compensatory and punitive damages, as well an award of attorney fees and costs reasonably incurred herein.

**COUNT FOUR**  
**(42 U.S.C. §1986)**

88. Plaintiff repeats and reiterates each and every allegation set forth in paragraphs 1 through 87 hereinabove as if fully rewritten herein.
89. 42 U.S.C. §1986 provides that any person having knowledge of any wrongs conspired to be done to deprive a person of the equal protection of law or the equal enjoyment of the privileges and immunities afforded under law, who having the power to prevent or aid in the prevention of the commission of such wrongs and who neglects to do so, once so wrongs are committed is liable to the injured party for all damages caused by the wrongful act which such person by the exercise of reasonable diligence could have prevented.
90. Defendants Kapszukiewicz, Santiago and Byrd each independently new of the conspiracy to deprive Plaintiff of the equal protection of law and/or the equal enjoyment of the privileges and immunities afforded him under law being perpetrated.
91. Defendants Kapszukiewicz, Santiago and Byrd each independently had the power to prevent or aid in the prevention of the commission of deprivation of Plaintiff's equal protection of law and/or his equal enjoyment of the privileges and immunities afforded under the law yet each independently failed to do so.
92. As a direct and proximate result of Defendant Kapszukiewicz' failure to prevent or aid in the prevention of the deprivation of Plaintiff's equal protection of law and/or the deprivation of Plaintiff's equal enjoyment of the privileges and immunities afforded under the law, plaintiff is entitled to judgment against Defendant Kapszukiewicz for compensatory and punitive damages, as well an award of attorney fees and costs reasonably incurred herein. .

93. As a direct and proximate result of Defendant Santiago's failure to prevent or aid in the prevention of the deprivation of Plaintiff's equal protection of law and/or the deprivation of Plaintiff's equal enjoyment of the privileges and immunities afforded under the law, plaintiff is entitled to judgment against Defendant Santiago for compensatory and punitive damages, as well an award of attorney fees and costs reasonably incurred herein.

94. As a direct and proximate result of Defendant Byrd's failure to prevent or aid in the prevention of the deprivation of Plaintiff's equal protection of law and/or the deprivation of Plaintiff's equal enjoyment of the privileges and immunities afforded under the law, Plaintiff is entitled to judgment against Defendant Byrd for compensatory and punitive damages, as well an award of attorney fees and costs reasonably incurred herein.

**COUNT FIVE**  
**(42 U.S.C. 2000e-2(a)(1), Title VII)**

95. Plaintiff repeats and reiterates each and every allegation set forth in paragraphs 1 through 94 hereinabove as if fully rewritten herein.

96. 42 U.S.C. 2000e-2(a)(1) prohibits employers from discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

97. At all times material herein, Defendant City of Toledo was the employer of Defendants Kapszukiewicz, Santiago and Byrd.

98. At all times material herein, Defendant City of Toledo Fire & Rescue Department was the employer of Defendants Santiago and Byrd.

99. Defendants City of Toledo and City of Toledo Fire & Rescue Department were Plaintiff's employer for purposes of Plaintiff maintaining an action against them pursuant to 42 U.S.C. 2000e-2(a)(1).

100. Defendants City of Toledo and City of Toledo Fire & Rescue Department jointly discriminated against Plaintiff, Major Smith, III by terminating his employment because he is African-American.

101. As a direct and proximate result of Defendants City of Toledo's and City of Toledo Fire & Rescue Department's discrimination against Plaintiff as aforesaid, Plaintiff is entitled to judgment against Defendants City of Toledo and City of Toledo Fire & Rescue Department jointly and/or severally for compensatory and punitive damages, as well an award of attorney fees and costs reasonably incurred herein.

**COUNT SIX**  
**(Unlawful Discrimination under O.R.C. §4112.02)**

102. Plaintiff repeats and reiterates each and every allegation set forth in paragraphs 1 through 101 hereinabove as if fully rewritten herein.

103. Pursuant to O.R.C. §4112.02, "It shall be an unlawful discriminatory practice: (A) for any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to higher, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment."

104. Defendants City of Toledo and/or City of Toledo Fire & Rescue Department are both Ohio employers.

105. Defendants City of Toledo and/or City of Toledo Fire & Rescue Department unlawfully discriminated against Plaintiff, Major Smith, III, because of his race by discriminating against him as aforesaid, by refusing to hire him, and/or by discharging him

from his employment without just cause and/or under the pretext of a manufactured failure to pass a ventilation test.

106. As a direct and proximate result of Defendants City of Toledo's and/or City of Toledo Fire & Rescue Department's discrimination against Plaintiff in violation of O.R.C. §4112.02 as aforesaid, Plaintiff is entitled to judgment against Defendants City of Toledo and City of Toledo Fire & Rescue Department jointly and/or severally for compensatory and punitive damages, as well an award of attorney fees and costs reasonably incurred herein.

**COUNT SEVEN**  
**(Intentional Infliction of Emotional Distress)**

107. Plaintiff repeats and reiterates each and every allegation set forth in paragraphs 1 through 106 hereinabove as if fully rewritten herein.
108. Defendants jointly and/or severally, continuously harassed Plaintiff, subjected Plaintiff to improper disciplinary actions, interfered with his training and testing requirements and removed him from his employment for reasons unrelated to reasonable and/or statutory work rules and policies, for reasons based upon his race and for reasons contrary to law all of which conduct Defendants knew or should have known would cause Plaintiff serious emotional harm.
109. Defendant's conduct, jointly and/or severally in discriminating against plaintiff, harassing plaintiff, subjecting plaintiff to improper disciplinary actions, interfering with plaintiff's ability to train and test for employment, removing Plaintiff from his employment without just cause and for such other and further reasons as set out hereinabove have jointly and or severally inflicted emotional distress upon Plaintiff and he has suffered mental anguish and depression as a result of Defendant's conduct towards him as aforesaid.

110. Such actions of Defendants, jointly and/or severally, constitute ill will, malice, extreme and outrageous conduct and were committed intentionally, recklessly and without regard for Plaintiff's rights.

111. As a direct and proximate result of Defendants joint and/or several actions against Plaintiff as aforesaid, Plaintiff is entitled to judgment against Defendants jointly and/or severally for compensatory and punitive damages, as well an award of attorney fees and costs reasonably incurred herein.

**COUNT EIGHT**  
***(Respondeat Superior-City of Toledo)***

112. Plaintiff repeats and reiterates each and every allegation set forth in paragraphs 1 through 111 hereinabove as if fully rewritten herein.

113. As the employer of Defendants Kapszukiewicz, Santiago and Byrd, Defendant City of Toledo is liable to Plaintiff for all damages caused jointly and/or severally to Plaintiff by said Defendants under the doctrine of *Respondeat Superior*.

**COUNT NINE**  
***(Respondeat Superior-City of Toledo Fire & Rescue Department)***

114. Plaintiff repeats and reiterates each and every allegation set forth in paragraphs 1 through 102 hereinabove as if fully rewritten herein.

115. As the employer of Defendants Santiago and Byrd, Defendant City of Toledo Fire & Rescue Department is liable to Plaintiff for all damages caused jointly and/or severally to Plaintiff by said Defendants under the doctrine of *Respondeat Superior*.

**WHEREFORE**, Plaintiff prays for judgment against Defendants, jointly and/or severally, for compensatory damages and punitive damages, reasonable attorney fees and costs all in such

amount as shall be shown at trial upon the merits hereof, and for such other and further relief as this Court may deem just or equitable.

Dated: December 21, 2018

Respectfully Submitted,  
**THE LAW OFFICE OF NORMAN A. ABOOD**  
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*Attorney for Plaintiff, Major Smith, III*

**JURY DEMAND**

Plaintiff demands trial by jury on all issues so triable herein.

/s/ Norman A. Abood  
Norman A. Abood