

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE DISTRICT OF OREGON
 3 EUGENE DIVISION
 4 JAMES M. CLEAVENGER,)
 5 Plaintiff,) Case No. 6:13-cv-01908-DOC
 6 v.)
 7 CAROLYN McDERMED, BRANDON) September 24, 2015
 8 LEBRECHT, and SCOTT CAMERON,)
 9 Defendants.) Portland, Oregon
 10

11 TRIAL DAY 11
 12 TRANSCRIPT OF PROCEEDINGS
 13 BEFORE THE HONORABLE DAVID O. CARTER
 14 UNITED STATES DISTRICT COURT JUDGE
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1 APPEARANCES
 2 FOR THE PLAINTIFF: JASON L. KAFOURY
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 20 COURT REPORTER: Jill L. Jessup, CSR, FMR, RDR, CRR
 21 United States District Courthouse
 1000 SW Third Avenue, Room 301
 22 Portland, OR 97204
 (503)326-8191
 23
 24 * * *
 25

1 TRANSCRIPT OF PROCEEDINGS
 2 (Jury present.)
 3 THE COURT: Good morning.
 4 Counsel, if you would have a seat, along with the parties,
 5 please.
 6 Okay. Verdict form.
 7 And then, Christy, if you turn the page. And slide it
 8 down just a little bit. Christy, the other way. Perfect.
 9 We, the jury, first being duly sworn, return our verdict
 10 as follows: Carolyn McDermed. Answer the following questions,
 11 one through two, as to Defendant Carolyn McDermed only.
 12 One: Did Carolyn McDermed take an adverse employment
 13 action against the plaintiff for which the plaintiff's speech
 14 on a matter of public concern was a substantial or motivating
 15 factor? Yes or no.
 16 Question two: If you answered yes to question one, which
 17 speech motivated Defendant Carolyn McDermed to take adverse
 18 employment action against the plaintiff? Check any and all
 19 that apply.
 20 And then there are a series.
 21 When he spoke about the Tasers in 2008.
 22 Complaints that he thought he was not being afforded his
 23 rights under the Public Safety Officers Bill of Rights in
 24 violation of state law.
 25 Complaints that he thought he was being retaliated against

1 by his supervisors because of the Taser speech.
 2 Complaints about the list or bowl of dicks list and the
 3 time it wasted.
 4 Complaints about the disparagement of people in the Occupy
 5 Movement.
 6 Complaints concerning the legality of his order to only
 7 report felonies in September 2012.
 8 Filing a lawsuit in October 2013 and its contents.
 9 And I think it should be clear that if you answer no to
 10 question one, you wouldn't answer any of these questions in
 11 question two.
 12 Agree, Counsel?
 13 MR. JASON KAFOURY: Agree.
 14 MS. COIT: Yes.
 15 THE COURT: If you answer yes, then we're asking
 16 which of those you're finding.
 17 And if you would turn the page. Thanks, Christy.
 18 Brandon Lebrecht. Answer the following questions , three
 19 and four, as to Defendant Brandon Lebrecht only.
 20 Question three: Did Brandon Lebrecht take an adverse
 21 employment action against the plaintiff for which the
 22 plaintiff's speech on a matter of public concern was a
 23 substantial or motivating factor? Yes or no.
 24 If you answered yes to question three, which speech
 25 motivated defendant Brandon Lebrecht to take adverse employment

1 Now, Christy, the last page.
 2 As to all defendants: If you answered yes to question
 3 one, three, and/or five -- so if you get to question six, you
 4 may have answered yes to one, three, and five, you may have
 5 answered yes to -- these are hypotheticals -- three and five
 6 and not one, whatever, but if you answer yes to question one,
 7 three, and/or five, what are plaintiff's damages? Economic
 8 damages. Noneconomic damages. Nominal damages.
 9 If you found that any defendant was not liable, do not
 10 answer question seven as to that defendant.
 11 Should plaintiff be awarded punitive damages against: A.
 12 Carolyn McDermed, yes or no. Brandon Lebrecht, yes or no.
 13 And, if so, in what amounts. For Scott Cameron, yes or no.
 14 Sign it and date it.
 15 Now, the evidence should be back -- I'm going to send my
 16 verdict form back to you. I'm going to send my instructions.
 17 Return them when you're done. It's my only copy.
 18 Christy, if you would be kind enough to raise your right
 19 hand.
 20 (Balliff sworn.)
 21 THE COURT: Now, you're going to dine deluxe. We'll
 22 have lunch brought in for you today. Lobster, steak. I'm
 23 kidding you. But it will be decent.
 24 Well, let your deliberations begin. Thank you.
 25 (Jury deliberating.)

1 action against the plaintiff? Check any and all that apply.
 2 When he spoke about Tasers in 2008.
 3 Complaints that he thought he was not being afforded his
 4 rights under the Public Officers Bill of Rights -- under the
 5 Public Safety Officers Bill of Rights, in violation of state
 6 law.
 7 Complaints about the list or bowl of dicks list and the
 8 time it wasted.
 9 Complaints about the disparagement of people in the Occupy
 10 Movement.
 11 Complaints concerning the legality of his order to only
 12 report felonies in September 2012.
 13 Filing a lawsuit in October of 2013 and its contents.
 14 Once again, if you answer yes to question three, then we
 15 would like to know which of these apply. If you answer no,
 16 then you won't answer question four.
 17 Scott Cameron. Answer the following question five as to
 18 Defendant Scott Cameron only.
 19 Did Scott Cameron take an adverse action which was
 20 reasonably likely to deter protected speech against the
 21 plaintiff in retaliation for plaintiff's speech about Tasers?
 22 Yes or no.
 23 If you answered no to questions one, three, and five, do
 24 not continue to questions six and seven. Please simply sign
 25 this form.

1 THE COURT: Where will you be? I won't hold you to
 2 court. You can go get coffee or whatever. Are your offices
 3 close by?
 4 MS. COIT: We're about three blocks up.
 5 THE COURT: Two blocks away.
 6 You're about four, five?
 7 MR. JASON KAFOURY: Five, yeah.
 8 THE COURT: How long does it take you to get here?
 9 MS. COIT: Ten minutes.
 10 MR. JASON KAFOURY: Five minutes. Ten.
 11 THE COURT: Five minutes, ten. If you want to go
 12 back to your offices, fine. If you want to go to a restaurant,
 13 fine. Leave your cell phone with Christy. And if we have
 14 something, I mean, we'll just immediately be right back here.
 15 Okay? Well, there's nothing else to do except wait then.
 16 MR. JASON KAFOURY: Your Honor, how do you handle
 17 juror questions, then?
 18 THE COURT: I get them, I read them, and then I give
 19 them to you for comment. In other words, I don't make
 20 unilateral decisions without your input. Some of those are
 21 easily resolved. Some of those are legal issues. We may have
 22 an issue where they don't believe that they were adequately
 23 instructed. Sometimes they're simple requests for readback.
 24 But you'll know. That's why I need you here immediately. And
 25 I want your input about those questions before I send back a

1 response.

2 I split whether I bring them in to court -- obviously, for
3 readbacks, et cetera. Or whether sometimes we have a
4 stipulation that we just send a note back on whatever they were
5 asking. So I -- we just wait.

6 MR. JASON KAFOURY: Okay.

7 MS. COIT: Can I ask you a question? And I'm just
8 curious. Since we only need six, what happens if they're hung
9 seven/one? Do you let go of the one? No?

10 If we go in with eight, we need eight unanimous?

11 THE COURT: We need eight unanimous.

12 Unless you want to stipulate.

13 MS. COIT: No, I was just asking.

14 THE COURT: A lot of courts use alternates. I don't
15 want burdens on plaintiff as I go up in numbers because every
16 time you go up in a number, it's a potential detriment because
17 you have to convince more people and you have the burden. But
18 it could also work the reverse way.

19 I don't like alternates because I'm used to much longer
20 trials. And what happens is over the years is I believe the
21 alternates just aren't paying the same kind of quality
22 attention. Although, the record reflects that they are. The
23 second reason for that is I don't select alternates versus -- a
24 case we finished we had to have 10 alternates because it took
25 six months. I don't want there to be an alternate of one, two,

1 testimony when called by the plaintiff the first time he
2 testified. And just after we called each of you, we received a
3 second note. "We're missing the four-page -- we are missing
4 Exhibit 208, the four-page letter for/by Royce Myers."

5 Now, we don't have that four-page letter as ever having
6 been received, so I'll let you two sort that out during the
7 reading. The court reporter is prepared to read, and we'll
8 conduct that reading first.

9 And I'm going to instruct the jury that if at any time
10 they wish to stop that reading, they may do so if they're
11 searching for a particular portion, but, beyond that, we're
12 going to read the entire testimony when called by the
13 plaintiff. We take that literally.

14 So any questions?

15 MS. COIT: No.

16 THE COURT: Counsel?

17 MR. JASON KAFOURY: What are you going to tell them
18 in relation to Exhibit 208?

19 THE COURT: Nothing. I'll let the two of you discuss
20 that. The last time I looked at the evidence code, the item
21 wasn't received by the Court. I can't receive that item.

22 So I don't know if one of you wanted that received or not,
23 but that's a private discussion between the two of you. The
24 record stands as it is right now, and 208 was not received.

25 So let's get through the reading. That's about an hour or

1 three, four, five, six, seven, eight, nine, ten because
2 alternate ten believes that he or she will never be called.
3 And so you're losing a vast amount of your alternates. Or they
4 treat it with novelty and think I'm number ten. "My uncle came
5 to town. I don't have to serve. I'm going to raise a problem
6 with the judge." So that's why I traditionally have used
7 eight. Okay? I didn't think it increased that much of a
8 burden on either of you, and I didn't have to deal with
9 alternates.

10 Any more questions?

11 MR. JASON KAFOURY: No.

12 MS. COIT: No.

13 THE COURT: Now, if you can stipulate to the seven to
14 one and you want me to remove that juror --

15 MS. COIT: I was just asking.

16 THE COURT: -- I'll gloriously kick he or she out of
17 court. I'll set a bad example. Now, I'm just joking with you.

18 MS. COIT: Can we make the decision when we know
19 whose side the seven is on?

20 THE COURT: No. We start with eight. We end with
21 eight. We'll thank you. We'll see you whenever.

22 (Off the record.)

23 THE COURT: We're on the record, and counsel are
24 present. The parties are present. We received two notes. The
25 first note we received was that the jury needs Scott Cameron's

1 more. Maybe a couple hours. And let's stand for the jury.

2 I'll tell them we'll resolve the next note after the
3 reading or --

4 MR. JASON KAFOURY: Your Honor --

5 (Jury present.)

6 THE COURT: All right. The jury is present. All
7 counsel are present. The parties are present. You may be
8 seated. Thank you for your courtesy.

9 When we received the note, the first note, "Need Scott
10 Cameron's testimony when called by the plaintiff the first time
11 he testified." So the court reporter is prepared to read that
12 to you. If you are looking for a particular portion, at any
13 time if you tell us to stop, we will; but otherwise we take
14 that note very literally, and we'll go through that entire
15 reading for you.

16 We also take that note literally, and that is when called
17 by the plaintiff, so we'll stop at the end of the testimony by
18 the plaintiff.

19 So if you would like, at your convenience, for the court
20 reporter.

21 THE COURT REPORTER: Can I clarify? Is that
22 cross-examination as well or just --

23 THE COURT: No. When called by the plaintiff.

24 A JUROR: Your Honor, I just kind of had a question.
25 I don't know if we can clarify the note, but I think what we

1 meant by the plaintiff is -- I think we did want to hear cross
2 because Cameron was called twice. Once by the plaintiff and
3 once by the defense.

4 THE COURT: All right. I have to keep a very careful
5 record. I'll give you back this note, and if you want all the
6 testimony, the called by the plaintiff and the
7 cross-examination, I literally need to know that at this point.
8 I've got to be very careful with this record. Okay? I'll give
9 that note back to you. Just go back over it for one second.
10 If you want, just write down exactly what you want.

11 A JUROR: Okay.

12 THE COURT: So -- maybe you can do it there, if you
13 decide to. I don't want to be part of that -- go back. I have
14 to be very careful what you're requesting.

15 (Jury not present.)

16 (Jury present.)

17 THE COURT: Thanks, Christy. The jury has returned.
18 We're, of course, in section with parties present and counsel
19 present.

20 "Could we have all the testimony given by Scott Cameron
21 when he was called by the plaintiff to include direct, cross,
22 redirect, and recross. Absolutely.

23 And the court reporter can begin reading at any time.

24 (The testimony of Scott Cameron, when called by the plaintiff,
25 was then read back by the court reporter to the jurors in open

1 tell the jury that.

2 MR. JASON KAFOURY: I believe that's accurate. I --
3 I am a little --

4 THE COURT: Why don't you work with the court
5 reporter and just --

6 MS. COIT: If we can just -- is there a way to search
7 the transcript for the number 208?

8 THE COURT: Yes, there is. So let me just take a
9 recess and come on up and work with the court reporter.

10 MR. JASON KAFOURY: Can I bring up one more issue?
11 It's very small, but there were two video clips played to the
12 witness that weren't read just now that were impeachment clips.
13 I'm having those clips brought over from his deposition right
14 now, so I would like the opportunity for the jurors to hear
15 what he actually said on impeachment.

16 THE COURT: Let me ask if they would like those clips
17 because I'm literally taking their note verbatim.

18 MR. JASON KAFOURY: Okay.

19 THE COURT: And I'm not certain that it's appropriate
20 for me just to include the clips, but I'm certainly willing to
21 ask them if that completes the reading when they come back out.
22 Take a look at 208 for just a moment and see if there's any
23 disagreement that it was not received.

24 (Recess taken.)

25 THE COURT: We're back on the record. Counsel has

1 court.)

2 THE COURT: We're going to ask you to -- we're going
3 to have a discussion about the second note in just a moment.

4 (Jury not present.)

5 The jury is no longer present. We received a second note
6 just after we received the first note that requested the
7 rereading of Sergeant Cameron. Let me read the second note
8 once again. We are missing Exhibit 208, four-page letter
9 for/by Royce Myers.

10 The clerk and I have been checking our records. We show
11 that as marked but never received into evidence. And I cannot
12 supplement that record. That's why I've continually requested
13 each of you along the way -- I think on four or five
14 occasions -- to take a look at each item of evidence and to
15 sign the back of the exhibit, which meant that counsel had
16 personally looked at the exhibits.

17 Now, per chance, we're wrong. I don't think so, so I'll
18 invite you to work with the court reporter for a moment to see
19 if that was ever moved into evidence, but I have no
20 recollection of that occurring.

21 MS. COIT: It was objected to and the court agreed
22 with my objection. It was hearsay. He was allowed to be
23 asked, I think, questions about the content.

24 THE COURT: Well, then the record has to stand, and
25 that is it wasn't received into evidence, and I simply need to

1 been able to consult with the court reporter. Counsel?

2 MR. JASON KAFOURY: Yes. After reviewing the record,
3 it was offered and you did not receive it, Your Honor.

4 THE COURT: The objection was hearsay?

5 MS. COIT: Yes.

6 THE COURT: I need to inform the jury that that item
7 has not been received into evidence. Simple statement by the
8 Court.

9 The second request, though, was that -- did you want me to
10 inquire if that completed the reading and inform them that
11 there were videos?

12 MR. JASON KAFOURY: So what happened was the court
13 reporter did not type when we impeached playing video clips, so
14 we -- there were two clips. They're probably 30 seconds' worth
15 of testimony.

16 THE COURT: I need to inquire of the jury, though.
17 If they want those, we'll, of course, make those available.
18 Otherwise, their reading was literally a request of a reading.
19 But let's make certain.

20 MR. JASON KAFOURY: I'm having that brought over, the
21 deposition, right now.

22 THE COURT: Okay. Well, let's find out if they want
23 that or not.

24 Also, we are the ones that should keep the record. I
25 don't --

1 MR. JASON KAFOURY: I -- I'm realizing this. I'm
2 going to have someone go back through the transcript and
3 provide you a marked copy of every depo that had clips -- most
4 of them we couldn't play. There's only a few that got played.
5 I will have to do that.

6 THE COURT: I don't understand.

7 MR. JASON KAFOURY: So I will provide to the Court as
8 court copies depositions with brackets on any sections that
9 were played by witness as impeachment.

10 THE COURT: Okay. But the -- the jury has those
11 videos already.

12 MR. JASON KAFOURY: No. They don't -- these were
13 deposition transcript videos. Do you remember? There was only
14 a couple witnesses that you allowed us to do it for, where we
15 would play their clip from the -- to impeach them, we would
16 play the clip of their deposition.

17 THE COURT: During the deposition?

18 MR. JASON KAFOURY: No, during trial testimony we
19 would play the clip from the deposition to impeach.

20 THE COURT: Okay. Well, let's find out if that
21 completes the reading and if that's satisfactory. And if it
22 doesn't and they want those clips, let's ask them.

23 Christy, would you bring back in the jury for just a
24 moment, and we'll resolve the second issue.

25 MR. JASON KAFOURY: I have the deposition here.

1 THE JURY: Okay.

2 (Off the record.)

3 THE COURT: All right. We're on the record. Counsel
4 are present and the parties are present. The court received a
5 note from the jury dated at -- or 5:13, and it states the
6 following: Was the Public Service Officers Bill of Rights
7 pertinent to state law entered into evidence. The answer is
8 no.

9 If either one of you disagree, please show me the document
10 and I'm happy to --

11 MS. COIT: I did not enter it into evidence.

12 THE COURT: I don't recall. It was spoken about
13 numerous times, but the actual bill of rights I don't recall
14 ever being entered into evidence.

15 MR. JASON KAFOURY: Yeah, we did not offer it.

16 THE COURT: I think we should bring the jury in and
17 instruct them. I want to be guided by your wisdom in just a
18 moment.

19 Christy was approached by the young juror in the front row
20 who has a broken tooth and asked if she could make a call to
21 the dentist. Emergency situation for tomorrow. So she's
22 trying to stay with the jury. I don't know if she was able to
23 contact the dentist. I don't know what time the appointment
24 is. But if a juror can return in a reasonable period of time,
25 that doesn't allow the Court to simply excuse. So you could be

1 THE COURT: Unless the jury requests them, Counsel.
2 So let's be seated now, Counsel. You cannot assume that
3 that is going to occur. I'll ask the jury, and they'll send
4 out a note if they do.

5 (Jury present.)

6 THE COURT: The jury is present. All counsel are
7 present. The parties are present. Thank you for your
8 courtesy. If you would be seated.

9 The second question you had is we are missing Exhibit 208,
10 four-page letter for/by Royce Myers. That was not received
11 into evidence.

12 Second, counsel had inquired on behalf of the parties
13 whether you were satisfied with the reading, and if you're not,
14 make that note to us right away. Also, there were some video
15 clips played during that reading, and we took your note
16 literally about the testimony, which we've read. If you need
17 those video clips, we can reread that portion just before if
18 you desire. Those clips were played -- play those clips in
19 synchronization with the testimony, but that was not shown to
20 you during this last reading. So you decide back there, folks,
21 and tell us what -- we're at your disposal to serve you. Okay?
22 So please continue your deliberations.

23 THE JURY: All right.

24 THE COURT: If you're not satisfied with anything,
25 get right back to us.

1 in a position of -- if the jury is not reaching a verdict this
2 evening, you could be in a position of being out of session for
3 tomorrow or a portion of tomorrow and returning on Monday, and
4 that is pretty devastating for each of you, respectfully, I
5 would imagine, because the one juror we -- apparently, we
6 stipulated to excuse. So I just want you to be aware of that.

7 No decision has to be made, but that information came to
8 me about an hour ago, and I waited until you both were
9 assembled.

10 Only because Christy informed me a juror had approached
11 her and of course we're going to make her -- let that call --
12 or make that call to the dentist.

13 Now, how -- how should I be guided? My thought is that
14 they could continue their deliberations, if they choose, this
15 evening, or they could go home and return tomorrow and then let
16 them bring attention to any problems they have, such as the
17 young lady saying, "I've got a dental appointment at 10:00 or
18 2:00" or whatever.

19 I don't want to simply leave them, though, with the
20 impression that they're going to be here until midnight unless
21 they reach a verdict, because what you may get is a contrived
22 verdict where they rush or you may get a hung jury where they
23 say, "Judge, under those circumstances, without any further
24 guidance" -- I think we should say to them you're free to
25 continue your deliberation this evening until you tell us you

1 would like to go home or you're free to inform us, you know,
 2 that you're returning tomorrow, and, if so, at 8:00. And then
 3 that juror will raise the problem.
 4 So why don't you two talk informally. Let me take your
 5 wisdom as counsel for guidance on my part, so I'm causing no
 6 harm to either of you. But we need to inform the jury
 7 immediately about this note because if they're wrestling with
 8 this, maybe they can proceed this evening.
 9 Your thoughts, Counsel?
 10 MR. JASON KAFOURY: We're in agreement that
 11 the jurors -- we should let them do whatever they would like to
 12 do.
 13 THE COURT: Christy, would you summons the jury?
 14 We'll answer the one question and tell them that they're free
 15 to continue deliberating this evening or free to go home.
 16 MR. JASON KAFOURY: For the record I have no
 17 objection to giving them the officers bill of rights.
 18 Counsel objects.
 19 THE COURT: Well, that's fine, Counsel, but I can't
 20 supplement --
 21 MR. JASON KAFOURY: I understand.
 22 MS. COIT: That's what I told him.
 23 (Jury present.)
 24 THE COURT: If you would be seated, Counsel, and the
 25 parties. The jury is present. We received a note from you at

1 THE COURT: Thank you. We'll wait.
 2 MR. JASON KAFOURY: I'll be downstairs on the first
 3 floor, so I'll be ready to come back up.
 4 (Off the record.)
 5 (Jury present.)
 6 THE COURT: Okay. We're on the record. All counsel
 7 are present. The parties are present. The jury is present.
 8 The jury sent a note: We've determined to recess for the
 9 day to return tomorrow at 8:00 a.m.
 10 Thank you. We'll see you tomorrow at 8:00. Don't discuss
 11 this matter with anybody. Now, don't think about it. Don't go
 12 back and do your individual deliberations tonight. You're a
 13 deliberating body and you collectively, with your wisdom,
 14 decide these issues. So goodnight. Drive safely. We'll see
 15 you tomorrow at 8:00.
 16 (Recess taken.)
 17 (Trial Day 11 adjourned.)
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1 5:13 and the note stated as follows: Was the Public Service
 2 Officer Bill of Rights, pertinent to state law, entered into
 3 evidence?
 4 All counsel and the Court agree it was not. It was not.
 5 A JUROR: That's all we needed.
 6 THE COURT: Now, let me say to you that we're here
 7 absolutely at your disposal. We're here to serve you. If you
 8 would like to continue deliberating this evening, please do so.
 9 If you would like to go home, just inform Christy, and then
 10 we'll return at 8:00 tomorrow. But I think it's arrogant on a
 11 Court's part to inject a time frame and call it at 5:00 or
 12 4:30 or 6:00. You tell us what your wishes are. But we're
 13 here. If would you like to continue this evening, please do
 14 so.
 15 A JUROR: For the moment, we are.
 16 THE COURT: For the moment, you are. Okay. Let
 17 Christy know. We'll let you continue your deliberations.
 18 (Jury not present.)
 19 THE COURT: Now I'm going to order all the parties
 20 and counsel to remain in the courthouse.
 21 MR. JASON KAFOURY: Yeah.
 22 THE COURT: You can't get back in through the front
 23 doors after 5:30, apparently. So there's no way to summons you
 24 from the law offices.
 25 MR. JASON KAFOURY: All right.

1 C E R T I F I C A T E
 2
 3 Cleavenger v. McDermed, et al.
 4 6:13-cv-01908-DOC
 5 TRIAL DAY 11
 6 September 24, 2015
 7
 8 I certify, by signing below, that the foregoing is a true
 9 and correct transcript of the record, taken by stenographic
 10 means, of the proceedings in the above-entitled cause. A
 11 transcript without an original signature, conformed signature,
 12 or digitally signed signature is not certified.
 13
 14 /s/Jill L. Jessup, CSR, RMR, RDR, CRR
 15
 16 Official Court Reporter Signature Date: 12/28/15
 17 Oregon CSR No. 98-0346 CSR Expiration Date: 9/30/17
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