

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF OREGON
3 EUGENE DIVISION
4 JAMES M. CLEAVINGER,)
5 Plaintiff,) Case No. 6:13-cv-01908-DOC
6 v.)
7 CAROLYN McDERMED, BRANDON) September 21, 2015
8 LEBRECHT, and SCOTT CAMERON,)
9 Defendants.) Portland, Oregon
10 _____)
11
12 TRIAL DAY 8
13 TRANSCRIPT OF PROCEEDINGS
14 BEFORE THE HONORABLE DAVID O. CARTER
15 UNITED STATES DISTRICT COURT JUDGE
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25 * * *

1 TRANSCRIPT OF PROCEEDINGS
2 (Jury not present.)
3 THE COURT: On the record. Counsel are present. The
4 parties are present.
5 MS. COIT: Yeah, Your Honor, this is something --
6 THE COURT: We'll get the mics turned on when Christy
7 gets here. Go ahead.
8 MS. COIT: Okay. If you can't hear me, just tell me.
9 So this is something that came up over the weekend, and I'm not
10 sure -- it seems really important to me. I -- I just need to
11 bring it to the Court's attention and get your guidance. Can I
12 hand you --
13 THE COURT: Sure. Thank you. Whatever it is, it's
14 appreciated.
15 What exhibit number is it?
16 MS. COIT: It is not an exhibit. It deals with
17 Exhibit 162.
18 THE COURT: Deals with 162.
19 MS. COIT: That's the letter from the three Junction
20 City officers to the district attorney.
21 THE COURT: That letter was to the district attorney?
22 MS. COIT: Yes.
23 THE COURT: Okay.
24 MS. COIT: So we talked about that exhibit the night
25 before when we were talking about exhibits, and I objected to

1 it on the basis I believed Mr. Cleavenger had wrote it. I
2 recall specifically Mr. Cleavenger saying to Your Honor, "I did
3 not write it." Mr. Kafoury was at the podium, bent down, and
4 talked to his client, and said to Your Honor, "He did not write
5 it."

6 The next day Corey Mertz testified, and I have his
7 transcript here, and if I could have you look -- I marked the
8 pages -- page --

9 THE COURT: Before I look at it and get involved in
10 the morass of pages, tell me the concern is.

11 MS. COIT: The concern is --

12 THE COURT: The point is it was represented to you
13 that Cleavenger did not write this?

14 MS. COIT: Yes.

15 THE COURT: Then it turns out he did write this.

16 MS. COIT: And, Your Honor, he put on a witness --

17 THE COURT: Hold on. Not so fast.

18 MS. COIT: Yes.

19 THE COURT: When it was represented to you that he
20 did not write this, who on the stand testified that he did
21 write this?

22 MS. COIT: Your Honor, Officer Mertz was put on the
23 stand from Junction City by Mr. Cleavenger the next day, and
24 Officer Mertz was questioned on direct, "Did you write it?"
25 And he said "Yes." And that was about it. But then on cross I

1 THE COURT: Okay. Now, what's the next email?

2 MS. COIT: The two documents below that.

3 THE COURT: The document directly below that, "Dear
4 Lane County District Attorney Alex Gardner." This is the
5 actual letter. And I've got Exhibit 172, which is the final
6 letter.

7 MS. COIT: Yeah. So --

8 THE COURT: Okay.

9 MS. COIT: The one that's --

10 THE COURT: Is your concern that with what you
11 believe that misrepresentation to be and not having the emails
12 in your possession until the Junction City police chief went
13 back to do some research, you didn't have a chance to
14 adequately ask Mertz or confront him, or you didn't have a
15 chance to adequately ask Cleavenger?

16 MS. COIT: Neither of those is my concern.

17 My concern is the draft that he sent to the Junction City
18 police officers, Officer Mertz, is nearly identical to the
19 letter that was written.

20 THE COURT: Right.

21 MS. COIT: So he misrepresented to this Court that he
22 did not send a draft and write this letter, and he put on a
23 witness to lie and that witness did lie under oath. That's my
24 concern.

25 MR. JASON KAFOURY: Can you point me to the

1 got much further into it and said, "Did Mr. Cleavenger send you
2 a draft?" And he specifically says in the transcript, "He may
3 have sent me something, an outline to do with dates, but
4 nothing of substance. I sat there all day with Assistant Chief
5 Markell. We saw things that were incorrect and we wanted to
6 correct them, and we sat there all day, and we wrote it."

7 THE COURT: Right.

8 MS. COIT: I then I said, "Well, is there an email of
9 the document that Mr. Cleavenger may have sent you this
10 timeline?" And he said, "It may be on my work email."

11 Over the weekend, Chief Chase, who has authority to look
12 in his employee's emails, checked Officer Mertz's email from
13 that day. And I've given you the email that he found, and it
14 is from Mr. Cleavenger.

15 THE COURT: Just a moment. I haven't read that yet.

16 MS. COIT: Okay.

17 THE COURT: So you handed me three documents today.

18 MS. COIT: The one on top is Officer Mertz's
19 testimony. The next one is the email from Mr. Cleavenger.

20 THE COURT: Just a moment. Okay. The top -- top
21 document. I see the bottom paragraph of the first page where
22 it says, "After you read that draft, the second final --
23 there's a draft response letter from you guys to Gardner, and I
24 stayed up all night writing."

25 MS. COIT: Yes.

1 testimony?

2 MS. COIT: Starts on 46.

3 THE COURT: Page 46.

4 MS. COIT: Starts on 46, Your Honor, yes.

5 THE COURT: Page 46. I'm going to summarize what I
6 think I heard, and that is you believe that perjury was
7 committed because Mertz stated he was the drafter, that he
8 stayed most of the day writing it. With whom? Who was the
9 other person? I forgot.

10 MS. COIT: It was acting-Chief Markell. He came to
11 Chief Chase afterwards and said he had concerns about the
12 testimony that was coming out.

13 THE COURT: Just a moment. I'm sorry. I didn't hear
14 you. When Mertz is allegedly writing a portion of this, he's
15 depending upon another person in the room. What he said was
16 the other person was a good writer and that he sat there
17 writing as well, for a good portion of the day. Who is that
18 other person writing with Mertz? I mean, I got in my notes. I
19 just don't want to look back through my morass of documents.

20 MS. COIT: Acting-Chief Eric Markell.

21 THE COURT: Markell.

22 Now, I'm concerned that whatever you believe the remedy
23 should be, if that misrepresentation is correct, reanalyzed by
24 you, then what does the Court do with it? I'm not saying it is
25 yet. I haven't heard from opposing counsel.

1 MS. COIT: I understand, Your Honor. And I ask you
2 not to take my word for it, but to look at the transcript.
3 THE COURT: Assume -- I'm going to hear from opposing
4 counsel. Adversarial system. What do you think the remedy
5 should be?
6 MS. COIT: I believe I should be able to put a
7 witness on the stand, be it Chief Chase or the IT person who
8 pulled the email, and show to the jury what -- what the
9 documents show, and I can argue in closing arguments what
10 Officer Mertz testified to and what the documents showed.
11 THE COURT: Why wouldn't I let you do that?
12 MS. COIT: I have no idea, Your Honor. That's why I
13 wanted to bring it to you first. I'm not going to just do it.
14 THE COURT: I can't think of any rational reason why
15 I wouldn't let you do that.
16 MS. COIT: Okay.
17 THE COURT: Okay. I try to give you both a fair
18 trial, and that means, apparently, in this case, a lengthy
19 trial. You're not precluded from doing that at all. You can
20 go through those emails and impeach the statement by
21 Mr. Cleavenger.
22 All right. Now, what else has come up over the weekend?
23 I'm glad to see both of you are working.
24 MR. JASON KAFOURY: I have a bunch of things,
25 Your Honor, if you're ready.

1 THE COURT: All right. Did you want to comment on
2 this other request?
3 MR. JASON KAFOURY: Yeah. I just read 56. I
4 don't --
5 MS. COIT: 46 through 49.
6 MR. JASON KAFOURY: What were the page numbers?
7 THE COURT: Well, I'll wait while you quietly read
8 that.
9 MR. JASON KAFOURY: I read that. I just --
10 MS. COIT: 46 through 51.
11 MR. JASON KAFOURY: First of all, I think there's a
12 bunch of differences in substance between the letters, but I
13 don't think there's anything in here -- he says, "What
14 documents were written by Mr. Cleavenger?"
15 "I do not remember."
16 "Was it a document or an email?"
17 "I do not remember."
18 I mean, I don't think that that's impeachment on lying.
19 He said, "Did you actually write the letter?"
20 He says, "I typed it out and Eric Markell sat next to me."
21 He didn't say, "I wrote every word of it."
22 "And did Mr. Cleavenger send you a proposed draft?"
23 "I know we discussed it."
24 MS. COIT: Read the rest of that sentence.
25 MR. JASON KAFOURY: "I do not believe -- I wrote it.

1 I sat there all day and wrote it. Eric and I did."
2 He obviously -- Mr. Mertz didn't remember, as he sat there
3 on the witness stand, what had -- what the back and forth was a
4 year ago with my client on this document, but I don't think
5 there's evidence here that he was purposely lying. I think he
6 wasn't remembering what happened, and now they've proven --
7 THE COURT: That's argument for the jury by both of
8 you, Counsel.
9 MR. JASON KAFOURY: Yes.
10 THE COURT: Now, you had a number of items that had
11 come up over the weekend.
12 MR. JASON KAFOURY: I'm assuming if counsel is going
13 to -- we -- what exactly are you going to put before the jury?
14 THE COURT: You two have that conversation off the
15 record. We're resting now. You two talk it over.
16 (Recess taken.)
17 THE COURT: Back on the record.
18 MR. JASON KAFOURY: We have some official transcripts
19 now from the court reporter that we got over the weekend.
20 THE COURT: Are you having a daily done or an
21 expedited?
22 MR. JASON KAFOURY: We have -- we just, for example,
23 the chief -- I think we got a final on the chief's.
24 THE COURT: Just a moment. I'm confused. I haven't
25 talked with the court reporter about what your agreement is as

1 far as transcripts. Are you getting roughs? Are you getting
2 finals? Is this expedited? Is it a daily?
3 MR. JASON KAFOURY: We're getting daily roughs and
4 then we are getting some final transcripts.
5 THE COURT: And those are transcripts that each of
6 you selectively request?
7 MR. JASON KAFOURY: Yes.
8 THE COURT: Okay. I haven't talked to the court
9 reporter.
10 MR. JASON KAFOURY: I just want the Court's
11 permission to be able to use the final transcripts to impeach
12 witnesses and to use during closing argument.
13 THE COURT: How do I know when each of you get up to
14 read if you're reading from a rough draft or you're reading
15 from a final draft -- strike that -- a final transcript?
16 MR. JASON KAFOURY: I will make it clear for the
17 record that it's either a rough draft or -- we have the daily
18 roughs. Everybody has those. But there's some that we ordered
19 that are full transcripts.
20 THE COURT: I can't imagine argument being a series
21 of readings unless it's really impeachment. I won't preclude
22 you from doing that, but I'm not going to allow simply a
23 rereading ad nauseam of testimony. This is argument. And they
24 can have testimony be read to them.
25 So if you really have an impeaching portion, I won't

1 preclude you.
 2 MR. JASON KAFOURY: Okay.
 3 THE COURT: I'll give each an hour and a half now.
 4 That's going to be it.
 5 MR. JASON KAFOURY: Two hours.
 6 THE COURT: No. Trust me. An hour and a half.
 7 You're succinct and clear and competent and excellent counsel
 8 on both sides. You won't have any problems.
 9 MR. JASON KAFOURY: I just showed defense counsel an
 10 email. There's -- I anticipate testimony today and tomorrow
 11 regarding the possibility of giving my client -- client a
 12 mental fitness evaluation. He was given a mental fitness
 13 evaluation before he was hired at the University of Oregon.
 14 I've never seen that document. I just showed counsel an email
 15 where it appears to me that Mike Morrow was sent that
 16 evaluation after he requested it. I would like to have that in
 17 my possession before we get into witnesses here about --
 18 they're going to be testifying today, "Oh, we thought he
 19 deserved a fitness evaluation," but if I don't have what they
 20 have in their hands at that moment, I don't think that's fair.
 21 THE COURT: Let me repeat back to you what I heard.
 22 Because of an email that's come to your attention, you
 23 believe that there was a mental/fitness report made of your
 24 client. You haven't received that report?
 25 MR. JASON KAFOURY: Never.

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1 THE COURT: What's unfair about this is if witnesses
 2 start getting up on the stand, whether it's the chief or the
 3 lieutenant or whomever, and they say -- or base some of their
 4 examination on the lack, let's say, of mental fitness or some
 5 portion, you're blindsided. You have no ability to
 6 cross-examine.
 7 MR. JASON KAFOURY: Correct. Because --
 8 THE COURT: Just a moment. You don't need the
 9 because. Do we have such a report? Is it in existence?
 10 MS. COIT: The email he's talking about was
 11 produced -- this is not on yet. Was produced in discovery.
 12 THE COURT: Hang on. Christy, is this mic working?
 13 DEPUTY COURTROOM CLERK: I'm getting static over the
 14 microphones.
 15 MS. COIT: The email he's talking about, we produced
 16 all of Mike Morrow's emails from this time period with all the
 17 attachments. He has whatever he's requesting. I don't have it
 18 in my mind what email that is. I'm having my paralegal pull it
 19 again. But he's received it. I'm pulling it again. We will
 20 give it -- show it to him again what it is. It's not what he
 21 thinks it is because we don't have a fitness exam for
 22 Mr. Cleavenger.
 23 THE COURT: Now hold on. We don't have a
 24 fitness/mental exam for Mr. Cleavenger. Why don't you two talk
 25 about that for a moment.

1 Counsel is using the word fitness/mental. I don't know if
 2 they're two separate exams or same exam. I don't even know
 3 what counsel is referring to.
 4 MS. COIT: What's the date of that email?
 5 MR. JASON KAFOURY: We can work out that issue. We
 6 have more issues to talk about if we have time.
 7 (Pause in proceedings.)
 8 THE COURT: Back on the record.
 9 MR. JASON KAFOURY: One of the new exhibits I got --
 10 or not new, but one of the exhibits from defense counsel that
 11 they're going to talk about today --
 12 THE COURT: Just a moment. Is this the lady in the
 13 parking lot that he transports?
 14 MS. COIT: Yeah.
 15 MR. JASON KAFOURY: Correct. Yes.
 16 THE COURT: What is -- I'm confused by this phrase,
 17 "Archive. Monday, March 9, 2015." And yet it said May 15,
 18 2012. I don't understand what archive could be.
 19 MS. COIT: When emails are transmitted to our system
 20 at our firm, we save them as emails, and so that gives an
 21 archive date. That's the date I saved them at my firm.
 22 THE COURT: Oh, I see. Thank you very much. So, in
 23 other words, it's on file at the police department from 2012.
 24 The archive I should read as you received it as trial docs.
 25 MS. COIT: Yes.

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1 THE COURT: Thank you very much. What's the concern?
 2 MR. JASON KAFOURY: The concern I have, Your Honor,
 3 is the incident my client is involved with this woman is nine
 4 days earlier. There's no evidence that he knew any of this
 5 information, no evidence anybody else knew any of this
 6 information at that time. They are trying to get this before
 7 the jury to show --
 8 THE COURT: To make it appear --
 9 MR. JASON KAFOURY: To appear after the fact she was
 10 dangerous and crazy and all these things.
 11 THE COURT: That he was aware.
 12 MR. JASON KAFOURY: Exactly. But there's no evidence
 13 my client knew any of these things, and therefore I think it's
 14 incredibly prejudicial to put this out before the jurors when
 15 it's undisputed that none of this information was known to my
 16 client or Sergeant Cameron at the time that this was sent.
 17 THE COURT: Just a moment. But Lieutenant Lebrecht,
 18 who will be called today --
 19 MS. COIT: Yes.
 20 THE COURT: -- should be allowed to state that he was
 21 contacted by her. It's the impression that the email -- strike
 22 that. It's the impression that Officer Cleavenger would have
 23 known about that, that's the concern?
 24 MR. JASON KAFOURY: Yeah, there --
 25 THE COURT: But when he states on the stand, "I was

1 contacted at least three times by this woman," you've got to
 2 ask the question, walking through this with you as trial
 3 counsel --
 4 MR. JASON KAFOURY: Yeah.
 5 THE COURT: -- "no, you didn't," and then other
 6 counsel is going to come back and say, "yes, I did." So by the
 7 time we're done, it's just a circle. Isn't that left for
 8 argument? Isn't that one of those issues that -- it's obvious
 9 that this wasn't put out unless somebody says at a briefing --
 10 and I haven't heard that -- aren't you able, also, to argue
 11 that -- let me check my dates. What was the date that the lady
 12 was in the parking lot?
 13 MR. JASON KAFOURY: May 6th. Nine days earlier.
 14 THE COURT: So, therefore, this is an after-acquired
 15 thought, from your perspective?
 16 MR. JASON KAFOURY: Right. And --
 17 THE COURT: And that's -- but the other side is going
 18 to argue, no, this is part of my duties as a lieutenant and
 19 because there's been this incident, I'm going to write this up.
 20 In other words, I'm going to make a mental note of it.
 21 Now, whether, in fact, I -- I don't see the prejudice. I
 22 see the prejudice that this just came in as a document. Judge,
 23 accept 384. And the inference, then, is that your client knew
 24 about it. I don't see the prejudice, when Lieutenant Lebrecht
 25 is testifying, of you being able to ask, "Did you make any

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1 notes?"
 2 "No." Well, on that date.
 3 "Did you commit it to writing?"
 4 "No. On that date."
 5 "But you did write something down on May 15th?"
 6 "Yes."
 7 "Why?"
 8 Well, open-ended questions are bad, but why?
 9 "Because I wanted to memorialize this."
 10 Lieutenant Lebrecht is allowed to testify that he received
 11 information about this woman. That shows why he's concerned
 12 about this incident. You're allowed to show that this is after
 13 the fact, and you're allowed to show that your client obviously
 14 never had any indication about this. That's argument. That's
 15 not preclusion. That's --
 16 MR. JASON KAFOURY: Well, just for the record, I --
 17 this is at the same time this email is sent that there are
 18 emails being sent amongst the command staff about terminating
 19 my client, about sending him to different duties, all that
 20 stuff.
 21 THE COURT: I'm not precluding that. That's
 22 argument.
 23 Now, put down your notes because we're not doing this
 24 again. It's 8:07. The jury is going to come and join us
 25 today.

1 (Off the record.)
 2 (Jury present.)
 3 THE COURT: Back in session. Everyone is here. The
 4 jury is present. Be seated, Counsel. Thank you. The parties
 5 are present.
 6 Counsel, would you like to call your next witness?
 7 By the way, I didn't make that record this morning, and
 8 before going any further -- well, Counsel, why don't you call
 9 your next witness. We'll do that at the next recess.
 10 MS. COIT: Defense calls Lois Yoshishige.
 11 THE COURT: Thank you. Thank you for returning. I
 12 think she was on the stand before.
 13 Counsel, we've argued the matter.
 14 MR. GREGORY KAFOURY: Yes. I understand you made
 15 another ruling, Your Honor.
 16 THE COURT: Yes. Yes.
 17 Thank you for returning. I appreciate that. Do you
 18 recall the oath that was administered to you --
 19 THE WITNESS: Yes.
 20 THE COURT: -- last week?
 21 THE WITNESS: Yes.
 22 THE COURT: The same oath still applies. If you
 23 would return to the witness stand and if you would be seated.
 24 Thank you for driving all the way back. I am going to
 25 have you restate your name for the jury and spell your last

Yoshishige - D

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1 name one more time.
 2 THE WITNESS: Lois Kiyono Yoshishige. Last name
 3 Y-O-S-H-I-S-H-I-G-E.
 4 THE COURT: Counsel, continue with your examination,
 5 please. I believe we were on direct.
 6
 7 LOIS YOSHISHIGE,
 8 called as a witness in behalf of the Defendants, being
 9 previously duly sworn, is examined and testified as follows:
 10
 11
 12 DIRECT EXAMINATION
 13 BY MS. COIT:
 14 Q. Ms. Yoshishige, thank you for coming back. I just wanted
 15 to go over a couple more exhibits with you.
 16 MS. COIT: Your Honor, may I approach?
 17 THE COURT: You may.
 18 BY MS. COIT: (Continuing)
 19 Q. That's Exhibit 391. Ms. Yoshishige, do you recognize
 20 Exhibit 391?
 21 A. Yes.
 22 Q. Can you tell the jury what it is?
 23 A. It's an email; a response from James Cleavenger to me.
 24 Q. And can you look at the email below that and tell us what
 25 that is?

1 A. We filed a grievance, and this is hearing the grievance at
 2 step -- step three.
 3 Q. So is it an email from you to Mr. Cleavenger?
 4 A. Yes.
 5 Q. And what is the date?
 6 A. Of my email?
 7 Q. Yes, ma'am.
 8 A. October 17, 2012.
 9 MS. COIT: Your Honor, defendants offer 391.
 10 THE COURT: Received.
 11 MS. COIT: Permission to publish?
 12 THE COURT: You may.
 13 BY MS. COIT: (Continuing)
 14 Q. So I would like you to focus for me on the second email.
 15 The middle paragraph there.
 16 And, again, this is your email to Mr. Cleavenger; correct?
 17 A. Yes.
 18 Q. In the middle of the paragraph you state, "With Morrow's
 19 48-page report, I read into it his conclusion is you do not fit
 20 as a DPS officer. In the end, every employee has to give at
 21 least the appearance that they comply with management's orders.
 22 It doesn't look as if you want to do that. So what is the
 23 point?"
 24 And my question is: What did you mean by that statement
 25 it doesn't look as if he wants to comply with management's

1 orders?
 2 A. I was concerned that fighting it would have a bad record
 3 for Mr. Cleavenger, so I was suggesting not to -- to resign.
 4 Q. From your experiences as Mr. Cleavenger's steward, did you
 5 have -- did you form the opinion that he did not want to do
 6 what management was asking of him?
 7 A. I had the opinion that he thought that some of what
 8 management was asking to -- for him to do was wrong.
 9 Q. Would that include the retraining program, going back into
 10 field training?
 11 A. He was concerned that, by doing that, they would find
 12 things to terminate him by, and so he wanted the protection of
 13 a grievance on record; to not -- to not withdraw that.
 14 Q. All right. In the last -- in the last sentence of that
 15 paragraph, or, excuse me, the last paragraph, it says, "Gary
 16 told me he talked to you for a while after the meeting where
 17 management gave you notice of suspension without pay. I don't
 18 know if the people offering you the job care about if you have
 19 a dismissal on your record."
 20 And then -- let's go to the top email.
 21 Is it showing on your screen?
 22 A. No.
 23 THE COURT: We'll get the screens working. Let's
 24 just take a moment.
 25 Is your screen working?

1 THE WITNESS: No.
 2 THE COURT: Are your screens working, folks?
 3 THE JURY: No.
 4 THE COURT: None of the screens are working.
 5 Counsel, let's continue on.
 6 Witness, do you have your screen working?
 7 Ladies and gentlemen, we'll come right back to you. I
 8 want the witness to be able to see.
 9 (Jury not present.)
 10 (Recess taken.)
 11 (Jury present.)
 12 THE COURT: Back in session. The jury is present.
 13 All counsel are present. And the witness. If you would like
 14 to return to the stand. Thank you. 391 should be up on the
 15 screen, and that portion should be visible.
 16 BY MS. COIT: (Continuing)
 17 Q. Ms. Yoshishige, sorry for the delay. My only question was
 18 Mr. Cleavenger's response to your email was that top line.
 19 "Both of my job offers could care less about whether or not I
 20 was fired from my UO job, so that is not an issue."
 21 Is that the email you received from Mr. Cleavenger?
 22 A. Yes.
 23 MS. COIT: Your Honor, permission to approach?
 24 THE COURT: You may.
 25 MR. JASON KAFOURY: Which exhibit number, Counsel?

1 MS. COIT: Oh, sorry. 349.
 2 BY MS. COIT: (Continuing)
 3 Q. Do you recognize the documents I've given as Exhibit 349?
 4 A. Yes.
 5 Q. Can I have you look at -- it's page 3 of the exhibit.
 6 What is -- what is page 3 of Exhibit 349?
 7 A. This is an email from me to James Cleavenger describing
 8 the meeting that Donna Laue, chief steward, and I had with
 9 Randy Wardlow.
 10 Q. What was the date of that email?
 11 A. August 22, 2012.
 12 MS. COIT: Your Honor, offer 349.
 13 THE COURT: Received.
 14 MS. COIT: Permission to publish?
 15 THE COURT: You may.
 16 BY MS. COIT: (Continuing)
 17 Q. So in this email are you describing for Mr. Cleavenger the
 18 meeting that you had with Mr. Wardlow?
 19 A. Yes.
 20 Q. Was that meeting, the purpose of it, to discuss the
 21 retraining plan they were proposing for Mr. Cleavenger?
 22 A. Yes.
 23 Q. Can I have you look at page 4, the next page in that
 24 email? The paragraph on your screen says, "Randy said
 25 Carolyn McDermed told James that she wants him to be trained

1 and safe. Unless he has been retrind" -- I think it means
 2 retrained -- "she doesn't feel comfortable putting him out in
 3 the field."
 4 Do you recall Mr. Wardlow telling you that?
 5 A. Yes.
 6 Q. In that meeting with him, did you have any reason to doubt
 7 that he was being sincere in what he was telling you?
 8 A. No.
 9 Q. Can I have you look at the first and second pages of 349?
 10 And I want to look at the bottom. Start with the
 11 sentence, "On August 21st meeting with Randy Wardlow." Is that
 12 you reiterating to Mr. Cleavenger what Randy Wardlow told you
 13 the training offer was -- entailed? It continues on the next
 14 page, if you want to look at that as well.
 15 All right. Ma'am, so on your screen, that should be both
 16 pages, the paragraph. Is that you reiterating to
 17 Mr. Cleavenger the training offer that Randy Wardlow was
 18 making?
 19 A. I -- I'm not sure.
 20 Q. You're not sure if this was the training offer
 21 Randy Wardlow made to you to give to Mr. Cleavenger?
 22 A. I'm not sure about the -- the bottom half of it. It
 23 doesn't -- doesn't make sense to me.
 24 Q. "If training and six-month evaluation period is
 25 successfully completed, then he will be returned to officer

1 position." Is that the part you think does not make sense?
 2 A. Is this bottom portion a separate email from the one that
 3 was sent to Randy Wardlow? That's what doesn't make sense to
 4 me.
 5 Q. Okay. Ma'am, you have the documents right in front of
 6 you, so you can look at the first and second page.
 7 THE COURT: You put it on the screen. Do you have a
 8 hard copy to show her? That will stop the confusion.
 9 MS. COIT: She has it, Your Honor.
 10 THE COURT: You can look at the hard copy also.
 11 THE WITNESS: I'm just asking are these two separate
 12 emails or are they one email?
 13 BY MS. COIT: (Continuing)
 14 Q. It's one email.
 15 A. Can I ask what's the question again?
 16 Q. Yes. Ma'am, is this the training offer that you recall
 17 Randy Wardlow making to Mr. Cleavenger, through you, that you
 18 then reiterated to him?
 19 A. Yes.
 20 Q. Thank you.
 21 Now, the very top, the first email on page -- excuse me,
 22 Exhibit 349, is that Mr. Cleavenger's response to
 23 Randy Wardlow's offer to retrain?
 24 A. Yes.
 25 Q. Was this a rejection of the offer?

1 A. Randy Wardlow's offer?
 2 Q. Yes.
 3 A. No.
 4 Q. The bottom it says, "So if UODPS managers feel a
 5 retraining program is necessary, James will participate as
 6 ordered, but will not trade away his rights as part of a deal
 7 to resolve his grievance."
 8 Do you see that?
 9 A. Yes.
 10 Q. Did you understand Mr. Wardlow's proposal to be a
 11 six-month training period and Mr. Cleavenger would withdraw his
 12 grievance of the written reprimand because they felt that it
 13 was warranted?
 14 A. Yes.
 15 MS. COIT: Permission to approach?
 16 THE COURT: You may.
 17 MS. COIT: Exhibit 357.
 18 MR. JASON KAFOURY: Which exhibit, Counsel?
 19 THE COURT: Which number? 367?
 20 MS. COIT: 57.
 21 THE COURT: 357. Thank you.
 22 BY MS. COIT: (Continuing)
 23 Q. Do you recognize the chain of emails I've given you as
 24 Exhibit 357?
 25 A. Yes.

1 Q. And what are those emails? Who are they between?
 2 A. Between me and James Cleavenger.
 3 Q. Is Donna Laue on some of those emails?
 4 A. Yes. And Sean Brailey.
 5 Q. Who are Donna and Sean Brailey?
 6 A. Donna was the chief steward and Sean was union staff.
 7 MS. COIT: Your Honor, offer 357. Permission to
 8 publish?
 9 THE COURT: Received.
 10 BY MS. COIT: (Continuing)
 11 Q. All right. Can I have you look at page 6? We'll start
 12 with the earliest. All right. So the email dated
 13 September 28, 2012, is from you; correct?
 14 A. Yes.
 15 Q. And it's to Sean, James Cleavenger, and Donna. Is this
 16 discussing the meeting with Brian Smith?
 17 A. Yes.
 18 Q. And would this be the follow-up meeting, the one that
 19 occurred on October 2nd?
 20 A. Yes.
 21 Q. What did you understand to be the nature of that follow-up
 22 meeting?
 23 A. An additional meeting with Brian Smith to talk about
 24 additional things before he made a decision.
 25 Q. Were the additional things that were planning to be shared

1 with Brian Smith issues that had not previously been discussed
 2 at these meetings?
 3 A. Yes.
 4 Q. All right. Can you look at page 5 for me, please.
 5 The bottom email from Donna Laue to you, she asked, so
 6 would it be appropriate to share about Lebrecht's football
 7 tapes or the bowl of dicks discussion during briefings at this
 8 meeting with Brian? Or the culture around women in the
 9 department, not just the ones they work with, but also the ones
 10 they serve.
 11 So the first question: The reference to the bowl of dicks
 12 discussions, is that what you recall it being; that you guys
 13 had talked about was bowl of dicks discussions?
 14 A. Yes. That was part of it.
 15 Q. Okay. And then prior to this meeting you're planning to
 16 have with Brian Smith, this information hadn't been shared; is
 17 that correct?
 18 A. Yes. Yes.
 19 Q. The email above that from you is, "Donna: Yes, if we met
 20 with Brian Smith, it would be talking about all the stuff you
 21 mentioned."
 22 So, again, you hadn't talked about this with anyone else
 23 before?
 24 A. I don't recall.
 25 Q. All right. Well, let's look at the first page of

1 Exhibit 357. That's an email from Mr. Cleavenger to you, and
 2 it's dated October 1, 2012. Do you see that?
 3 A. Yes.
 4 Q. Mr. Cleavenger says, "I would prefer to go to both
 5 meetings. 10:00 a.m. with Brian Smith. 11:15 a.m. at HR. The
 6 reason is because up to now no one besides you three have a
 7 clue that I have been harassed, threatened, and intimidated by
 8 Lebrecht and Cameron. If I don't meet with Brian Smith, he
 9 will be making his decisions without hearing the whole truth,
 10 just like Randy Wardlow did. I feel that we need to get some
 11 of this stuff out there instead of only being passive and
 12 reactive."
 13 Does that refresh your memory as to whether or not any of
 14 this information had previously been shared with anyone?
 15 A. Yes.
 16 Q. Had it been?
 17 A. No.
 18 Q. What was the date of the meeting with Brian Smith? Was it
 19 October 2, 2012?
 20 A. Yes.
 21 MS. COIT: Thank you, ma'am. That's all I have.
 22 THE COURT: Redirect?
 23 ///
 24 ///
 25 ///

1 CROSS-EXAMINATION
 2 BY MR. JASON KAFOURY:
 3 Q. Good morning. I just want to go through a couple of
 4 things with you quickly.
 5 THE COURT: My absolute apologies. This should be
 6 cross-examination.
 7 MR. JASON KAFOURY: Well, we are -- we have an
 8 agreement -- or I believe we have an agreement that I can ask
 9 about some other categories of questions because -- so not to
 10 bring her back twice.
 11 THE COURT: Absolutely. I'll extend that courtesy as
 12 well, Counsel, but this is cross-examination. I said
 13 "redirect" for some reason.
 14 BY MR. JASON KAFOURY: (Continuing)
 15 Q. Now, do you recall, generally, emails with my client over
 16 the course of the summer of 2012 where my client was interested
 17 in not spreading the dirty laundry outside of the police
 18 department?
 19 A. Yes.
 20 Q. And was part of the reason that he didn't want to spread
 21 all the dirty laundry out because he was concerned that going
 22 to someone outside of the department would lead to him getting
 23 terminated?
 24 A. Yes.
 25 Q. Now, you were not there when he had a meeting on

1 August 13th with Chief McDermid, were you?
 2 A. I was not there.
 3 Q. Okay. You have no idea what he told her about things
 4 happening within the department at that meeting; right?
 5 A. That's right.
 6 Q. And over the course of those months was this meeting with
 7 Brian Smith, was the plan for this meeting that Mr. Cleavenger
 8 could finally tell someone outside of the department all the
 9 things going on as referenced in a bowl of dicks discussions,
 10 how women were treated, Lebrecht's football tapes, all that
 11 sort of stuff. This was the opportunity for him to explain all
 12 that to someone outside of the department?
 13 A. Yes.
 14 Q. My client was fine with the concept of a retraining, if
 15 that's what the department wanted in September of 2012, but he
 16 didn't want to give up his union grievance rights; right?
 17 A. Yes.
 18 Q. Now, throughout your years working there, have you had a
 19 situation where someone from HR is saying, "You have -- you, as
 20 an employee, have to give up your union rights to file
 21 grievances in order to go back and do a retraining program"?
 22 A. Not that I recall.
 23 Q. Okay. So this was a pretty unique request by human
 24 resources asking a union-represented person to give up their
 25 union rights as part of any retraining; right?

1 A. Yes.
 2 Q. And in your -- in the email you sent to Randy Wardlow, you
 3 said, "The union" -- let me get it here. "The union is in full
 4 support of James' decision in this matter." Correct?
 5 A. Yes.
 6 Q. Now, in your -- you were asked whether this was a
 7 rejection of the offer. Was this actually a counteroffer, a
 8 counterproposal that you guys were making on September 10,
 9 2012?
 10 A. That's what I understood.
 11 Q. But nobody from HR or the command staff ever responded to
 12 this counteroffer before my client was terminated; isn't that
 13 correct?
 14 A. Yes.
 15 Q. Now, you also were aware that my client was given an order
 16 at around this time to not report any crimes but felonies. Do
 17 you remember that?
 18 A. Yes.
 19 Q. Do you recall sending an email to Randy Wardlow at HR to
 20 try to confirm in writing that that was the order that my
 21 client had been given?
 22 A. I can't say that I recall that, but I --
 23 Q. I'll show it to you to refresh your memory.
 24 MR. JASON KAFOURY: Has 57 been received by the Court
 25 already?

1 THE COURT: Pardon me?
 2 MR. JASON KAFOURY: Has 57 been received by the Court
 3 already? I believe.
 4 THE COURT: I'm not sure. 57, Christy?
 5 DEPUTY COURTROOM CLERK: Yes, it has.
 6 MR. JASON KAFOURY: Permission to publish page --
 7 page 4?
 8 THE COURT: You may.
 9 BY MR. JASON KAFOURY: (Continuing)
 10 Q. While he's pulling that up, generally, throughout your
 11 years of representing union folks there at the University of
 12 Oregon, has it been particularly difficult to deal with the
 13 Department of Public Safety?
 14 A. Yes.
 15 Q. Particularly difficult to get documents from them?
 16 A. Yes.
 17 Q. Getting high-tech here. Okay. This is page 4 to
 18 Plaintiff's Exhibit 57. Take a moment and read that.
 19 A. Okay.
 20 Q. So does this refresh your memory that on -- eight days
 21 after you sent the email with the counteroffer of the
 22 retraining proposal in September of 2012, you sent an email to
 23 Lieutenant Lebrecht and to Randy Wardlow in an attempt to get a
 24 clarification on this order that had been given to my client;
 25 correct?

1 A. Yes.
 2 Q. You said, "At this meeting, he was told not to report any
 3 crimes in progress that he witnesses, except for felonies.
 4 He's being directed not to do things any citizen can do. Since
 5 this directive is in major conflict with his stated duties as a
 6 public safety officer, we would like to have this change in
 7 duties in writing. Please provide us with the letter by
 8 Friday, September 21, 2012." Correct?
 9 A. Yes.
 10 Q. You never got a response to that email, did you?
 11 A. No.
 12 Q. In fact, on Thursday, the 20th, my client was put on paid
 13 administrative leave, wasn't he?
 14 A. Yes.
 15 Q. Ever heard of any officer or anyone there at the
 16 University of Oregon ever being told they couldn't report
 17 crimes, other than felonies, on campus?
 18 A. No.
 19 Q. Was part of my client's concern that summer that if he --
 20 you spoke earlier he felt like he was being set up for this
 21 retraining proposal; right?
 22 A. Yes.
 23 Q. Was part of his concern that if he got sent to retraining
 24 management would just find something else as another reason to
 25 be able to discipline him and then eventually terminate him?

1 A. Yes.
 2 Q. And we talked about the emails that you had with my client
 3 in October about what strategy he should do in relation to
 4 meeting with Linda King and termination. Do you recall that?
 5 A. Yes.
 6 Q. Linda King testified 95 percent of the time somebody has a
 7 predissmissal hearing, they end up being terminated. Has that
 8 generally been your experience?
 9 A. Yes.
 10 Q. So when you're having discussions in October, my client
 11 has already been suspended without pay at this point and is
 12 facing termination. You knew that -- that it was almost
 13 certain he was going to be terminated eventually; right?
 14 A. Yes.
 15 Q. You had been through this before with other employees;
 16 right?
 17 A. Yes.
 18 Q. But Mr. Cleavenger felt strongly enough that this was the
 19 right thing to do, to challenge his letter of reprimand and any
 20 termination, that he decided to keep pushing forward with the
 21 grievance process, didn't he?
 22 A. Yes.
 23 Q. Was part of the reason that he decided to push forward
 24 because he felt like he had been retaliated against by Lebrecht
 25 and Cameron?

1 A. Yes.
 2 Q. Did he make that clear throughout this grievance process
 3 that he felt like he was being treated unfairly in comparison
 4 to other people in the department?
 5 A. Yes.
 6 Q. Were you surprised -- all the things you had been a part
 7 of, were you surprised at how quickly, after negotiations about
 8 a retraining, my client was suddenly terminated?
 9 A. Yes.
 10 Q. Wasn't the way it usually happens with negotiations there
 11 between HR, command staff, and -- and union officials, right,
 12 something -- something was different about this?
 13 A. Yes.
 14 Q. And at that meeting with Brian Smith on October 2nd, my
 15 client told Brian Smith everything about what was going on in
 16 the department; right?
 17 A. Yes.
 18 Q. Laid it all out for him, didn't he? Laid it all out for
 19 Brian Smith at that meeting about what was happening?
 20 A. Yes.
 21 Q. And isn't it a fact that later that day is when my client
 22 was handed his predismisal termination letter from HR? Later
 23 on on October 2nd?
 24 A. Yes.
 25 Q. I'd like to show you plaintiff's 112.

1 MR. JASON KAFOURY: Is 112 in?
 2 THE COURT: Christy?
 3 MR. HESS: It's not.
 4 MR. JASON KAFOURY: Not yet? Okay.
 5 BY MR. JASON KAFOURY: (Continuing)
 6 Q. Take a look at -- I'm going to ask you some questions
 7 about this email. So what is the -- what's the date on that
 8 email?
 9 A. June 13, 2012.
 10 Q. Okay. And that's an email between you and Mr. Cleavenger?
 11 A. Yes.
 12 Q. Okay. Take a look at those last couple paragraphs there.
 13 I'll ask you a couple of questions about it.
 14 A. Thank you.
 15 Q. Does that refresh your memory for the discussions you and
 16 Mr. Cleavenger were having back in June of 2012 about how to
 17 deal with this grievance?
 18 A. Yes.
 19 Q. Do you recall Carolyn McDermid, the chief, agreeing back
 20 in June to hear a step one process? Do you have a memory of
 21 that back in June of 2012? Chief McDermid agreeing to be a
 22 step one hearing officer because my client didn't want Lebrecht
 23 or Cameron to be that step one hearing officer?
 24 A. I think so.
 25 Q. And as this email indicates, part of the reason my client

1 wanted Chief McDermid to do the step one hearing is he would
 2 like to try to keep the issues in-house, as opposed to going
 3 outside the department in step two; right? That was the
 4 strategic discussion you guys were having back in June of 2012 ?
 5 A. Yes.
 6 Q. That's because he didn't want to, quote, "air the
 7 department's dirty laundry to everyone," right, and didn't want
 8 to be confrontational? That was --
 9 A. Yes.
 10 Q. -- why he wanted to keep it in-house with everything that
 11 was going on?
 12 A. Yes.
 13 Q. Now, you testified earlier about the emails in October
 14 where you were asking Mr. Cleavenger about whether he should
 15 keep fighting this or not; right? That's what you guys were
 16 discussing in October?
 17 Part of the reason that you suggested to him he might not
 18 want to fight this is because you had been through step two,
 19 step three hearings for terminations before, haven't you?
 20 A. Yes.
 21 Q. And, in fact, as Linda King testified last week, no step
 22 three termination hearing at the University of Oregon has a
 23 termination ever been overturned throughout that process, has
 24 it?
 25 A. Yes.

1 Q. Would you -- would you agree that in terms of the offer of
 2 the retraining you had made a counteroffer to Randy Wardlow and
 3 that counteroffer, Mr. Wardlow later told you, was off the
 4 table; isn't that right?
 5 A. Yes.
 6 MR. JASON KAFOURY: That's all I have.
 7 THE COURT: Redirect?
 8
 9 REDIRECT EXAMINATION
 10 BY MS. COIT:
 11 Q. Ms. Yoshishige, 28 years you've been a steward for the
 12 University of Oregon?
 13 A. Yes.
 14 Q. Dealt with Randy Wardlow a lot during that time; is that
 15 correct?
 16 A. Yes.
 17 Q. Ever, in your history with Mr. Wardlow, did he give you
 18 any reason to believe that he was not sincere in his
 19 negotiations with you?
 20 A. I believe he was sincere.
 21 Q. Did you have any reason to suspect that Mr. Wardlow was
 22 making this training offer to Mr. Cleavenger to set him up?
 23 A. I believe that Mr. Wardlow was putting across management's
 24 offer.
 25 Q. Did you believe Mr. Wardlow was trying to set up

1 Mr. Cleavenger to be terminated by making this retraining
 2 offer?
 3 A. I didn't think that was his intention.
 4 Q. Now, the meeting with Brian Smith was October 2, 2012;
 5 correct?
 6 A. Yes.
 7 Q. Prior to that meeting, Mr. Cleavenger already had a
 8 meeting set up with HR; isn't that correct? We saw it in the
 9 emails we just looked at. He wanted to go to both meetings?
 10 A. Can you ask the question again?
 11 Q. Mr. Cleavenger had two meetings set for October 2, 2012;
 12 correct?
 13 A. Yes.
 14 Q. One was with HR; correct?
 15 A. Yes.
 16 Q. It was at that meeting that he was given his predismissal
 17 notice; is that correct?
 18 A. Yes.
 19 Q. And that notice -- that -- well, first, that meeting had
 20 already been arranged prior to the meeting with Brian Smith ; is
 21 that correct?
 22 A. Yes.
 23 Q. And the predismissal notice was dated and signed by
 24 Chief McDermid October 1st of 2012, before the meeting with
 25 Brian Smith; correct?

1 A. Yes.
 2 Q. None of the defendants -- Sergeant Cameron,
 3 Lieutenant Lebrecht or Chief McDermid -- were at the meeting
 4 with you, Mr. Cleavenger, and Brian Smith; correct?
 5 A. Yes.
 6 Q. You had no information that Brian Smith ever told any of
 7 the defendants anything that was said at that meeting; correct?
 8 A. Yes.
 9 Q. Now, would you agree with me that in October -- or, excuse
 10 me, in August of 2012, so two months before the termination
 11 decision, you were in fairly close contact with Mr. Cleavenger?
 12 A. Yes.
 13 Q. You were emailing back and forth with him two, three times
 14 a day; correct?
 15 A. Yes.
 16 Q. Do you agree with me that there is not one email from
 17 Mr. Cleavenger recounting to you or Donna Laue the meeting he
 18 claims he had with Chief McDermid on August 13th of 2012?
 19 A. I don't recall.
 20 Q. Well, this is the meeting that he says he let the cat out
 21 of the bag. He told her everything, everything you were going
 22 to tell Brian Smith; he says he did that August 13, 2012. Do
 23 you ever recall having a conversation or a discussion with
 24 Mr. Cleavenger around that time period in which he told you he
 25 let the cat out of the bag and told her everything?

1 A. I don't recall.
 2 Q. You were asked if it's hard to get documents from UOPD .
 3 Do you recall that?
 4 A. Yes.
 5 Q. Would you agree with me that when Mr. Cleavenger was in
 6 the process of grieving his written reprimand, he and the union
 7 were given thousands of documents and audios?
 8 A. I wouldn't say thousands.
 9 Q. How many would you say? Did you review them all?
 10 A. No.
 11 MS. COIT: That's all. Thank you.
 12 THE COURT: Recross?
 13
 14 RECCROSS-EXAMINATION
 15 BY MR. JASON KAFOURY:
 16 Q. Wardlow didn't have any power to make any offers; right?
 17 A. That's right.
 18 Q. He's just following what Chief McDermid is telling him to
 19 say in those meetings because that's management decision he's
 20 conveying; right?
 21 A. Yes.
 22 Q. Okay. So if Wardlow never responded and pulled the offer
 23 of retraining off the table, that would actually be a decision
 24 that Chief McDermid made; right?
 25 MS. COIT: Object. Foundation.

1 THE COURT: Sustained.
 2 BY MR. JASON KAFOURY: (Continuing)
 3 Q. In the ordinary course of business, if Randy Wardlow said
 4 the offer of retraining is revoked, that information would have
 5 to come from management; isn't that right?
 6 A. Yes.
 7 Q. And by "management," I mean Chief McDermid as the head of
 8 the Department of Public Safety at the time; right?
 9 A. Yes.
 10 Q. Not wanting to share the dirty laundry outside of the
 11 department of all the things happening to my client --
 12 Chief McDermid was inside the department, wasn't she?
 13 A. Yes.
 14 Q. So all of your discussions about sharing it to someone at
 15 the University of Oregon versus the department, that was a
 16 total separate strategic discussion you guys were having over
 17 those months, right, with my client?
 18 A. Yes.
 19 MR. JASON KAFOURY: That's all I have.
 20 MS. COIT: Nothing, Your Honor.
 21 THE COURT: All right. May the witness be excused,
 22 Counsel?
 23 MS. COIT: Yes.
 24 THE COURT: Counsel?
 25 MR. JASON KAFOURY: Oh, yes.

1 THE COURT: Thank you very much. You're excused from
 2 the proceedings. You may step down.
 3 THE WITNESS: Thank you.
 4 THE COURT: Counsel, your next witness, please.
 5 MS. COIT: Defendants call Brian Caufield.
 6 THE COURT: Sir, step forward into the well of the
 7 courtroom. Stop at that location. Raise your right hand.
 8
 9 BRIAN CAUFIELD,
 10 called as a witness in behalf of the Defendants, being first
 11 duly sworn, is examined and testified as follows:
 12 THE WITNESS: Yes, I do.
 13 THE COURT: Be seated, please. After you're seated,
 14 pull the chair as close as possible to the microphone, and
 15 state your name for the jury and spell your last name.
 16 THE WITNESS: Brian Caufield, C-A-U-F-I-E-L-D.
 17 THE COURT: Direct examination, please.
 18
 19 DIRECT EXAMINATION
 20 BY MS. COIT:
 21 Q. Mr. Caufield, who's your current employer?
 22 A. The University Shared Services Enterprise.
 23 Q. Is that a new position?
 24 A. Yes, it is.
 25 Q. Who was your employer in 2012, 2013?

1 A. The Oregon University System.
 2 THE COURT: I'm sorry. The Oregon University who?
 3 THE WITNESS: System.
 4 THE COURT: System. Thank you.
 5 BY MS. COIT: (Continuing)
 6 Q. Was that an entity separate from the University of Oregon?
 7 A. Yes.
 8 Q. What was your position at -- can we call it OUS?
 9 A. Yes. Associate general counsel for labor and employment.
 10 Q. Who was Ryan Hagemann at that time?
 11 A. He was the general counsel for the University System or
 12 OUS.
 13 Q. Was Mr. Hagemann your boss?
 14 A. Yes.
 15 Q. Are you familiar with the collective bargaining agreement
 16 between OUS and SEIU Local 503?
 17 A. Yes, I am.
 18 Q. Were you familiar with that agreement in 2013?
 19 A. Yes.
 20 Q. Tell us what OUS's role was in that -- in the grievance
 21 process during that time period.
 22 A. Sure. So OUS as the sort of state agency served as the --
 23 I guess the arbiter or decision-maker in what they call step
 24 three meetings or step three hearings and would issue a
 25 decision in a grievance that made it to step three. Certain

1 grievances made it to step three and certain grievances didn't.
 2 Some grievances were filed -- directly filed at step three, so
 3 they were -- that was the role of OUS in the grievance
 4 procedure.
 5 Q. What was the purpose of a step three grievance hearing?
 6 A. It was the union's opportunity to explain how the union --
 7 the university may have gotten the decision wrong with respect
 8 to the employment action that they had taken or to bring to
 9 light new facts that maybe the university didn't consider at
 10 the time.
 11 That was the union's sort of meeting to -- to do that.
 12 Q. Did you ever serve as a -- I guess a hearings officer, the
 13 person who heard these step three grievance hearings?
 14 A. Yes, I did.
 15 Q. And in that role were there guidelines or procedures set
 16 up in the union contract as to how these meetings were supposed
 17 to be -- how they were handled? How they were presented?
 18 A. No.
 19 Q. Whose decision was that on the format of the meeting?
 20 A. OUS.
 21 Q. At some point did you become involved in the grievance
 22 process for Mr. Cleavenger's grievances?
 23 A. Yes.
 24 Q. Did you know Mr. Cleavenger prior to that involvement?
 25 A. No.

1 Q. Explain for us what that involvement was.
 2 A. So, initially, it was dealing with the steward on some
 3 information requests that were made from the union to the
 4 university. And unions make information requests to gather
 5 information to see whether a grievance is valid, whether they
 6 should file one, or whether there's more facts that they need
 7 to bring out.
 8 And so there was a dispute, if I recall correctly, about
 9 the length of time it was taking to get some documents and also
 10 the cost that the U of O said it was to prepare these documents
 11 because the universities and other public employers can charge
 12 unions for their time in gathering those information requests.
 13 So I was sort of facilitating that and also, again, setting up
 14 the date for the step three hearing.
 15 Q. So the information request that the union was making, did
 16 anything about these requests, the volume of them, seem unusual
 17 to you, out of the ordinary?
 18 A. Yeah. I mean, it was a very extensive information
 19 request. The information request that I've seen over my
 20 career, usually a page or so, very succinct, but this was a
 21 very -- this was an extensive request for a lot of information,
 22 a lot of documents. Multiple offices, maybe, if I remember
 23 correctly. It was a while ago, so -- but it was voluminous.
 24 Q. Is there anything -- in your experience, is there anything
 25 out of the ordinary for a university to request a reasonable

1 payment for information requests?

2 A. No. It's done. I mean, our universities under the Oregon

3 University System did that. They continue to do so. They

4 charged for the time because it's -- where, you know, we're

5 employees of the State, so it's State funding. It's tuition.

6 It's dollars coming in. So we've got to justify our time for

7 that, and that's -- that's routine.

8 Q. All right. Do you recall having a step three meeting with

9 Mr. Cleavenger over his termination grievance?

10 A. Yes.

11 Q. Is a termination grievance filed at step three?

12 A. Yes. Termination grievances are directly filed at step

13 three.

14 Q. Do you know why? What is the purpose of going straight to

15 step three?

16 A. The collective bargaining agreement clearly says that

17 there are certain grievances that must be filed at step three.

18 Multi-university grievances are one of them, where it involves

19 more than one university. Terminations are another. Other

20 grievances go through the process. There's like step one and

21 then it gets to step two and then ultimately to step three.

22 But terminations are directly filed at step three.

23 Q. Do you recall doing anything to prepare for the

24 termination grievance hearing?

25 A. You know, I recall reading the termination letter. I

1 remember emails back and forth between the steward about sort

2 of the hearing that -- the number of witnesses that would be

3 present at the hearing. Kind of assessing how much time would

4 be needed for that hearing and reviewing, you know, obviously,

5 the grievance itself that was filed, the collective bargaining

6 agreement, and then, as I said, the termination letter.

7 Q. Is your general practice at a meeting like this, on a

8 termination grievance, to come into it and have the union

9 present the information to you and from there you make a

10 decision?

11 A. Yeah. The union does and the employer has an opportunity

12 as well. So the university would have an opportunity to sort

13 of say if it's something new that they were presenting, whether

14 they considered that or not. So both sides really have that

15 opportunity.

16 Q. So tell us about the meeting itself, the step three

17 termination grievance meeting.

18 A. Yeah. It was very unique. And I say that because, first

19 of all, there was a very long list of witnesses that the union

20 wanted to sort of testify or tell their story at the hearing.

21 We had set four hours for the hearing, if I remember correctly.

22 So two hours in the morning and two hours the afternoon.

23 We did that and -- over the course of just in one day, to,

24 again, save time, money, and effort, because we were -- you

25 know, I was traveling down from Portland to Eugene. We were

1 going to spend the day down there and hear the -- you know,

2 hear these -- hear the testimony and review documents and so on

3 and so forth.

4 And sort of in the initial stages of the meeting I see

5 that the union rep and Mr. Cleavenger, they have a stack of

6 documents, five, six, eight inches thick, ready to come in as

7 evidence. And I said to them, you know, "Do you intend to

8 present those documents during the course of the hearing?"

9 "Yes."

10 And I said, "Well, can I get a copy of them now because I

11 would like to go through them and not have duplicative

12 documents in there?" I tried to streamline the process

13 because, again, we only had four hours. I know there was a

14 long list of witnesses that were preparing to testify,

15 apparently, and so I wanted to kind of streamline the process.

16 Q. Was the union agreeable to that process?

17 A. No. Not at all. They -- this is what struck me as odd.

18 I -- the documents were there, and I did say -- I said, "Okay.

19 Just tell me, are -- do you have a copy for me? Because if you

20 don't have a copy for me, I'll let you use the copy machine.

21 We'll get a copy." So that way I could kind of go through

22 them.

23 And they -- at one point they -- they said, "Yeah, no, we

24 have a copy for you."

25 And I said, "Okay. Hand them over, and, you know, I'll go

1 through them as maybe witnesses are testifying."

2 But I wanted to kind of, again, streamline the process,

3 remove duplicative documents. If there's one document that can

4 say what three or four others have to say, there's no need to

5 put in 100 documents when 25 will do.

6 Q. Let me stop you real quick.

7 A. Yes.

8 Q. Who was the union steward leading?

9 A. Again, this was a little interesting because there were --

10 the union steward of -- geez, the steward of record is either

11 John Ahlen, the steward of record, the official person on --

12 but there was also a person from the member resource center,

13 and the member resource center from the union is part of the

14 union's headquarters and handles the processing of grievances.

15 Stewards are recognized on campus as the person who -- to

16 process the grievance on campus, but then when it gets to step

17 three or maybe even goes through an arbitration, the member

18 resource center gets involved a bit more.

19 So member resource person was there. His name was

20 Sean Brailey, and -- but he participated by phone, and we've --

21 we, as the University System, had difficulties with Mr. Brailey

22 in the past. Very aggressive at meetings, cutting people off,

23 demeaning to them during these meetings.

24 This had been funneled to me by others who had done these

25 type of meetings.

1 Q. So what happened at the meeting when you asked for the
2 documents?

3 A. Well, they refused, and -- but, you know, I said, "Look, I
4 really -- I really do need them." And I was trying to explain
5 why. And in explaining why, Mr. Brailey was talking over me.
6 And, again, I'm trying to explain. And now he's getting to the
7 point where he's yelling and like being belligerent on the
8 phone, just to the point where I can't even hear what he's
9 saying because he's screaming at the top of his lungs. He's
10 getting to the point where it's out of control. I couldn't see
11 him, but if I could see him, I would imagine that his face was
12 red and his veins were popping up. I got to the point where I
13 said -- I just hung up the phone. I said, "I can't deal with
14 that. I can't deal with that."

15 You know, I mean, we're trying to go through a process.
16 We're trying to get at least 10 to 15 witnesses in and out. We
17 have all these documents to go through, and he's screaming at
18 me on the phone.

19 So the union rep who was there, I think it was
20 John Ahlen -- so John Ahlen was in the room. Mr. Cleavenger
21 was in the room. Mr. Brailey was on the phone. It was like,
22 "Did you just hang up on him?" I was like, "Yeah." This is
23 like a meeting you have with -- with your boss. So if -- if
24 you said to your boss, "Hey, I would like to go in and have a
25 meeting with you," and then you get in there and you scream at

1 the top of your lungs, it's just -- it's unproductive. It
2 didn't work.

3 So, yes. I said yes.

4 And then they took a caucus, came back in, and were
5 talking about the ground rules that they wanted to have for
6 this meeting to be conducted, and that -- that was completely
7 new and never had happened. It was -- there were no ground
8 rules. It was just the employer's meeting, you know. You come
9 in, you present your testimony, and we'll take a look at it,
10 and then we'll issue a decision.

11 And during that discussion of what the ground rules should
12 be, Mr. Brailey again started to yell at the top of his lungs,
13 scream on the phone. I hung up a second time on Mr. Brailey.
14 And I said, "You know, guys, just give me the documents. Let's
15 get through this. We have witnesses waiting in the hallway,
16 and let's move on. We only have four hours."

17 Q. So you had every intention of going forward with the step
18 three meeting that day?

19 A. Yes. I was there. I mean, I blocked out the entire day.
20 I went from Portland to Eugene, so the entire day was spent --
21 was ready for this hearing.

22 Q. So what ultimately happened? Was there a hearing?

23 A. No. The reason there wasn't is because the union -- the
24 union wanted me to agree to some ground rules and said that
25 they -- they wouldn't -- they wouldn't be going forward with

1 the meeting.

2 And I said, "Well, look, if you're not going to go forward
3 with the meeting, I'm going to treat it as though you're
4 withdrawing your request for a meeting." Because we don't have
5 to have a meeting under the collective bargaining agreement.
6 You know, either party can request one, and then we'll have
7 one.

8 So I said, "Look, you mean -- if you leave today, we'll
9 just treat it as a withdrawal. And then we'll issue a
10 decision. You know, we'll look at the -- whatever we have on
11 file, and then write a decision."

12 And the union got up and left.

13 So I went back and -- to the office, and I sort of
14 recapped what occurred at the meeting and said, "You know,
15 look, I'm treating it as a -- as a withdrawal of your request
16 for the meeting, and a decision will issue in 30 days" because
17 that's the timeline under the contract.

18 Q. When you say "recount," was that in an email to the union?

19 A. Yeah. Yeah. To the union steward.

20 Q. Did they ever come back to hold the meeting?

21 A. Did -- sorry?

22 Q. Did they ever come back and actually hold the meeting?

23 A. No. There -- there was another -- there was an email that
24 they -- the union steward sent back to me sort of outlining
25 like they disagreed with the take on my email, which is fine.

1 That's okay. But then laying forth, again, these ground rules
2 they wanted to have before the meeting would go forward. And
3 it never happened, to my knowledge, in the -- you know, at step
4 three meetings that the union was going to tell the employer,
5 you know, this is how the meeting is going to be conducted. It
6 just -- it struck me as odd.

7 Q. Did UOPD or Chief McDermid or Lieutenant Lebrecht or
8 Sergeant Cameron have any influence over you on how to conduct
9 this step three hearing?

10 A. No. In fact, I wouldn't communicate with the university,
11 you know, the players involved because we were -- the agency
12 was the neutral arbiter. We were to sit there and -- and there
13 were times where we, after hearing the step three, would call
14 the university and say, "I think you have an issue. You might
15 want to try to -- try to resolve this," you know, and they
16 would.

17 But we were to -- we were to sit there as a neutral
18 arbiter. So, no, no involvement.

19 Q. Did you have any involvement in the step three meeting on
20 Mr. Cleavenger's written reprimand grievance?

21 A. Yeah. Yeah. I should have said that earlier, that the
22 step three meeting was not just for the termination, but was
23 also for the written reprimand because this was kind of -- this
24 was -- what had happened was I think the written reprimand was
25 issued and it got to step three. Now, written reprimands, by

1 the way, are the ones that start out at, like, step one or two
 2 and eventually get to step three.
 3 So in the interim of the filing of the step one and step
 4 three for the written reprimand, there was then the
 5 termination. So the termination goes directly to step three.
 6 So I said, "Okay, well, now we have this filing for a
 7 termination. Step three. And we have this written reprimand
 8 that's also at the step three level. Well, in the interest of
 9 saving time, money, and effort, let's combine them and hear
 10 them all at once."
 11 Q. In fact, the two were actually arbitrated together; right?
 12 A. I -- I believe so. I didn't handle the arbitration, but I
 13 believe that they were.
 14 Q. All right. Was it your decision or Mr. Hagemann's
 15 decision for you to take over the written reprimand grievance?
 16 A. It was a combination of both. I mean, it was mine. I
 17 said to Ryan, "Look, I -- we might as well just hear these
 18 together. There's no sense of doing two separate meetings or
 19 hearings," whatever you want to call it. "It will -- the
 20 players involved are the same or similar. We should just
 21 have -- we should just have one."
 22 So I can't remember -- I mean, when you ask that specific
 23 question, I can't say, you know, did -- did Ryan make the
 24 decision? Ultimately, he did make the decision. Right? I
 25 mean, he's the boss. But I probably said, "Hey, why don't we

1 do it this way? It might make more sense."
 2 Q. Is there a requirement in the collective bargaining
 3 agreement that an employer actually hold a hearing on a step
 4 one grievance of a written reprimand?
 5 A. No. There's no requirement that meetings be held. It's
 6 upon request, right, so once it's requested, then we would --
 7 we would hold a -- we would hold a meeting, but there's no
 8 automatic right to a meeting.
 9 Q. All right. So there was some testimony by John Ahlen that
 10 you were yelling and screaming at this step three meeting. Any
 11 truth to that?
 12 A. No yelling and screaming. I mean, did I -- did I raise my
 13 voice? Probably. You know, I did just -- I had to. I had to
 14 try to talk over Mr. Brailey. But yelling and screaming, no.
 15 Q. Did you ultimately issue a decision on the termination
 16 grievance?
 17 A. Yes.
 18 Q. Was that -- well --
 19 MS. COIT: Your Honor, permission to approach?
 20 THE COURT: May.
 21 MS. COIT: Exhibit 361.
 22 BY MS. COIT: (Continuing)
 23 Q. Do you recognize Exhibit 361?
 24 A. Yes.
 25 Q. What is that?

1 A. That is the step three decision we issued or I issued on
 2 April 22, 2013.
 3 Q. Does that cover the reprimand and the termination
 4 grievance?
 5 A. Yes.
 6 MS. COIT: Defendants offer 361.
 7 MR. MCDUGAL: No objection.
 8 THE COURT: Any objection?
 9 MR. MCDUGAL: No objection.
 10 THE COURT: Received.
 11 MS. COIT: Permission to publish?
 12 THE COURT: You may.
 13 BY MS. COIT: (Continuing)
 14 Q. All right. Is that the written decision that you issued?
 15 A. Yes, it is.
 16 Q. Did you consult with anyone at the University of Oregon
 17 Police Department prior to issuing that decision?
 18 A. No.
 19 Q. Can you go to page 3 of the document? No. Sorry.
 20 Page 4. And the last paragraph.
 21 A. Yes.
 22 Q. It says, "Based on a review of these records, the decision
 23 of the UO to reprimand and terminate Mr. Cleavenger stands and
 24 the grievances are denied." Was that your ultimate conclusion?
 25 A. Yes.

1 Q. Tell us what you did to reach that decision.
 2 A. So I reviewed the records I had in front of me at the
 3 time, which was the grievances, the -- any decision of the
 4 university that was rendered prior to step three, so, for
 5 instance, the termination grievance or the termination letter,
 6 rather, and then, just based on what I read from there,
 7 rendered a decision based on the collective bargaining
 8 agreement, whether the collective bargaining agreement was
 9 violated, whether UO violated the collective bargaining
 10 agreement.
 11 Q. And is that your focus when determining these grievance --
 12 these grievances, whether or not to uphold them or deny them,
 13 is whether or not the decision complied with the collective
 14 bargaining agreement?
 15 A. Yeah. You're bound by the terms withing the collective
 16 bargaining agreement. I mean, you can't go outside of that.
 17 It's did the union -- I'm sorry, did the university violate the
 18 terms -- the specific terms of the collective bargaining
 19 agreement in taking the action against the employee?
 20 Q. And to be in compliance with the collective bargaining
 21 agreement, discipline has to be supported by just cause; is
 22 that correct?
 23 A. Correct.
 24 Q. So that's all you're looking at in these grievances;
 25 correct?

1 A. That's correct.
 2 Q. There's also been some testimony about statements you made
 3 to Mr. Cleavenger, so I just wanted to ask, did you ever tell
 4 him that he could never succeed at arbitration and he had
 5 better -- the best he could hope for was to resign?
 6 A. I -- in off-the-record sort of discussions with the union,
 7 I said, you know, "I -- I don't know the success or failure of
 8 your case. I can just sort of say it might not -- it doesn't
 9 look very good, just sort of based on what I'm seeing." Again,
 10 I didn't -- I didn't see what the union had yet to present. I
 11 just saw what I was presented before walking into that meeting.
 12 MS. COIT: All right. Thank you.
 13 THE COURT: Does that conclude your examination?
 14 MS. COIT: Yes.
 15 THE COURT: Counsel, cross-examination?
 16
 17 CROSS-EXAMINATION
 18 BY MR. MCDUGAL:
 19 Q. Good morning, Mr. Caufield. I'm Mark McDougal.
 20 A. Good morning.
 21 Q. You're the chief negotiator or were on behalf of the
 22 university with regard to the collective bargaining agreement?
 23 A. Yes.
 24 Q. I'll speak slower. Sorry. And you're the general point
 25 of contact for the universities when it comes to the collective

1 grievance for efficiency; isn't that correct?
 2 A. Correct.
 3 Q. Isn't it a fact that Mr. Hagemann had already presided
 4 over a reprimand grievance hearing?
 5 A. He held that meeting, from what I understand, yes.
 6 Q. So there's nothing to consolidate. There's already been
 7 one with no decision; right?
 8 A. Right. So the decision would just be coming out as one.
 9 Q. So did you attend that meeting or hearing to be able to
 10 have the information to make the decision?
 11 A. No.
 12 Q. But you made the decision?
 13 A. Correct.
 14 Q. Isn't your role to attempt to mitigate the risks of the
 15 exposure of the university when it comes to grievances or
 16 firings?
 17 A. Absolutely. That's part of what the job as the general
 18 counsel is.
 19 Q. And you called these hearings meetings, but you knew they
 20 were adversarial and you had the power to overturn a grievance;
 21 correct?
 22 A. You did have the power to overturn a grievance, correct.
 23 Q. And you thought they were adversarial at the time?
 24 A. I believed coming into the role because I had -- a lot of
 25 this has to -- so everyone knows, a lot of this has to do with

1 bargaining agreement?
 2 A. Yes and no. I mean, some universities have a labor
 3 relations person --
 4 Q. Okay.
 5 A. -- at their university. Some universities don't. And so
 6 at the universities that do have a labor relations person
 7 directly there, the university usually goes to that person.
 8 And if that person may need some assistance, they would then
 9 call me. And universities that don't have a labor relations
 10 person would call me and ask for interpretation or advice on
 11 the collective bargaining agreement.
 12 Q. And at the relevant time you were given U of O, University
 13 of Oregon, legal advice on how to handle grievances?
 14 A. Correct. That was part of the job, yes. Yes.
 15 Q. And you're acting on behalf of the employer, U of O,
 16 versus the employee that was grieving the claim?
 17 A. Correct.
 18 Q. Now, how long had you been in that role as of the time
 19 this hearing that you're talking about?
 20 A. Right. So I started with the OUS in August of 2012.
 21 August 27th, I believe. And so August of 2012 -- and this
 22 happened February or March, the start of it, so about six or
 23 seven months.
 24 Q. Okay. You indicated, I believe, that you decided to
 25 consolidate the reprimand grievance with the termination

1 Mr. Brailey. Because of how Mr. Brailey had handled other step
 2 three meetings prior to sort of me getting involved with them,
 3 I -- I assumed they were adversarial. That's how the union,
 4 through Mr. Brailey, were sort of handling those step three
 5 meetings. Very adversarial in nature.
 6 After this, I -- you know, I had conversations with the
 7 union that really they shouldn't be that way, and we've
 8 attempted to now say, "Okay, well, let's go back to the way
 9 they should have been." And Mr. Brailey has really -- to my
 10 knowledge, has had a very limited role in the universities now
 11 because we've had these discussions with the union that we
 12 don't need to be adversarial. We don't need to do this. But
 13 this is -- this is why: This person is causing this. Maybe he
 14 should be removed from sort of that role, and he hasn't done
 15 much since.
 16 Q. Let's look at what happened here.
 17 A. Sure.
 18 Q. There were no rules of procedures for how a step three
 19 hearing would take place; right?
 20 A. Correct.
 21 Q. But there was a history of tradition?
 22 A. Yes, sure.
 23 Q. You were aware of it?
 24 A. I was aware of some, yeah.
 25 Q. Ryan Hagemann, he trained you to do it his way, your boss?

1 A. No. There really wasn't -- there was informal training.
 2 And here's why: I mean, I had spent the -- my entire career in
 3 labor relations. And the first part of my career was with the
 4 National Labor Relations Board. As part of my work at the
 5 National Labor Relations Board, I served as a hearings officer.
 6 So, in that role, I understood or knew how to conduct a
 7 hearing.
 8 Part of what I understood that to be was to make sure the
 9 record was not duplicative, make sure it's clear and concise,
 10 and that was my mentality, sort of, going into this step three
 11 meeting we're here on.
 12 Q. My question to you is was there a history of the way it
 13 had been being done at U of O?
 14 A. Well, at -- at U of O? No. At OUS there was a history.
 15 And then Mr. Brailey, sort of, came into the picture, so that
 16 history was changing. I can't really answer the question
 17 specifically.
 18 Q. Mr. Hagemann allowed people to present witnesses along
 19 with their documents. He didn't require any predisclosure at
 20 the beginning of the hearings?
 21 A. That, I don't know. I wasn't -- I never attended a step
 22 three meeting that Mr. Hagemann ran, so I don't -- if you say
 23 so, I'll take your word for it, but I don't know that to be
 24 true.
 25 Q. You did attend a training by Ryan Hagemann. Your

1 deposition.
 2 MR. MCDUGAL: Can I have a copy of his deposition?
 3 May I approach?
 4 THE COURT: You may.
 5 BY MR. MCDUGAL: (Continuing)
 6 Q. I will direct your attention to page 40. And as soon as I
 7 get back, I'll tell you what line.
 8 Question -- did you recall being asked the following
 9 question: Did anybody give you any training about how a step
 10 three hearing was supposed to be administered?
 11 Do you recall your answer?
 12 A. Yes.
 13 Q. Okay. And who did it?
 14 A. Ryan Hagemann and Cindy Starkey.
 15 Q. Do you recall how many -- Mr. Ahlen was there. Agree he's
 16 a pretty mellow guy?
 17 A. That was -- that was my second time interacting face to
 18 face with Mr. Ahlen, and I -- can I agree he's a mellow guy?
 19 Based on the tone of the emails that I got from him beforehand,
 20 not -- I mean, I couldn't give that assessment, so I can't -- I
 21 can't say that is true. I couldn't say that.
 22 Q. Let me ask you this: This was the first step three
 23 hearing you presided over?
 24 A. Correct.
 25 Q. And the last one?

1 A. Correct.
 2 Q. The only one?
 3 A. Correct.
 4 Q. How many had Mr. Ahlen done? Any idea?
 5 A. I do not.
 6 Q. Did Mr. Ahlen share with you that in his experience this
 7 is not how these hearings go and he would like them to go the
 8 usual way?
 9 A. I know in the email that he sent me after the meeting he
 10 explained how he would like them to go. I don't know if in
 11 that email he said this is how they go, but I know that in that
 12 email he sent afterwards, he kind of set forth how he would
 13 like it to go.
 14 Q. Didn't he, in fact, ask you at the hearing to do it
 15 Mr. Hagemann's way, the way the union was used to?
 16 A. That was so long ago. You know, maybe he did. I just
 17 don't -- I don't recall that.
 18 Q. I want to show you an email and see if you got it. You
 19 might remember it from your deposition. Do you recall this
 20 document?
 21 A. Well, I mean, the fact that it says rough draft, lines
 22 through it, sent to Brian. I'm assuming that this is the exact
 23 one that was sent to me.
 24 Q. Why don't you take a minute to read it to see if it's --
 25 A. I could read this, and this was sent in April of '13. I

1 couldn't tell you, without the original one that I -- that I
 2 got, if this is the same one.
 3 Q. Okay.
 4 A. But I -- you know, maybe -- I'll take your word for it
 5 that it is. I just -- I don't have the original one.
 6 Q. Well, let's do this: Can you read it and tell me if it's
 7 the gist of what you think the original one was?
 8 A. Uh-huh, sure.
 9 Yeah, this is what I was explaining before. There was an
 10 email afterwards where Mr. Ahlen attempted to sort of say this
 11 is what we should do going forward in, you know, any sort of
 12 meeting that we have. Sort of laying out his ground rules.
 13 Q. Does this appear to be that email?
 14 A. Not the email, but an email that I got, yeah.
 15 Q. And did you get this email or the email -- I don't want to
 16 mischaracterize it -- prior to writing your letter?
 17 A. Yes. Because the letter was April 22nd and this is
 18 April 4th. It says it was sent on April 4th.
 19 Q. You'll agree there was a day that was set aside to
 20 determine or review Mr. Cleavenger's termination. People
 21 showed up. For whatever reason, the hearing didn't go forward,
 22 and you were immediately asked to say, "Hey, can't we just
 23 mutually agree upon this: Can you do it the way Hagemann did
 24 it, and let's just have another one?"
 25 A. And your question is?

1 Q. Did that happen?
 2 A. Did what happened?
 3 Q. The request for another hearing saying, "Look, there was
 4 confusion. There was problems. We want to have a hearing
 5 where we know what the format is, and yesterday that's not what
 6 happened."
 7 A. In the end of the email he says that, Mr. Ahlen says that,
 8 you know, "Can we have another meeting?"
 9 Q. Why couldn't they have another meeting with -- with
 10 expectations set before the meeting so there's not this
 11 confrontation?
 12 A. That just had not been something we had done before, and
 13 this is already February, March, April -- we're three months
 14 into sort of setting this meeting. It's taken so long already,
 15 that, you know, the -- it was the union that -- it was the
 16 union's conduct that caused it to withdraw from the meeting,
 17 and now they're doing sort of, "Well, I'm sorry. Let's have
 18 another one." And we needed to move on and we needed to sort
 19 of say, "Okay. This is -- we're going to move forward now.
 20 And if it has to go to the next step, then it does. If it
 21 doesn't, then it doesn't."
 22 Q. Did it cross your mind at the very first and very last --
 23 very first hearing you did went so awry that maybe you should
 24 do a do-over?
 25 A. No, and I'll tell you why. Because Mr. Brailey was still

1 Q. Well, I'm asking you why you didn't have one when you knew
 2 it wasn't about personalities of the representatives. It was
 3 about Mr. Cleavenger and the university.
 4 A. Because that representative wasn't allowing the person to
 5 talk. He wasn't allowing even -- even the steward to talk in
 6 these meetings, and that was the problem. We weren't getting
 7 anywhere with Mr. Brailey being there. And it just -- it
 8 wasn't productive. It just wasn't.
 9 Q. Mr. Ahlen was the one physically present that had the
 10 documents; right?
 11 A. Correct, yeah.
 12 Q. That wanted to present them with witnesses; right?
 13 A. Yeah, that was his statement.
 14 MR. MCDUGAL: Thank you.
 15 THE WITNESS: You're welcome.
 16 THE COURT: Have you concluded, Counsel?
 17 MR. MCDUGAL: Yes.
 18 THE COURT: Redirect?
 19 MS. COIT: No more questions.
 20 THE COURT: May the witness being excused?
 21 MS. COIT: Yes.
 22 THE COURT: Counsel?
 23 MR. MCDUGAL: Yes.
 24 THE COURT: You may step down. Your next witness,
 25 please.

1 part of it. And that was the crux of the problems throughout.
 2 I mean, I had conversations with the union. This is -- this
 3 seems to be the problem here.
 4 Q. You -- you were a labor lawyer; right?
 5 A. I still am.
 6 Q. It's not really about the lawyers, is it?
 7 A. No.
 8 Q. Or the representatives, is it?
 9 A. Not at all.
 10 Q. It's about Mr. Cleavenger and the university?
 11 A. That's right.
 12 Q. And Mr. -- you would have Mr. Cleavenger lose his shot at
 13 a grievance because of Mr. Brailey, when it's not about
 14 Mr. Brailey?
 15 A. He wasn't losing his shot at a grievance because it was
 16 ultimately arbitration that was a -- a neutral arbitrator that
 17 would come in and decide one way or the other for -- whether in
 18 favor of Mr. Cleavenger or in favor of the university, so it
 19 really didn't end with me. It was -- it was -- there was
 20 always another opportunity.
 21 Q. Step three hearing. You had an obligation -- he had a
 22 right to a step three hearing. You understand my question.
 23 You expanded. Of course he could appeal. Anybody can appeal a
 24 step three hearing, so you could have none?
 25 A. What do you mean "you could have none"?

1 MS. COIT: We're seeing if Mike Morrow has arrived.
 2 Defense calls Brandon Lebrecht.
 3 THE COURT: Come up and raise your right hand,
 4 please.
 5 BRANDON LEBRECHT,
 6 called as a witness in behalf of the Defendant, being first
 7 duly sworn, is examined and testified as follows:
 8 THE WITNESS: I do.
 9 THE COURT: Thank you, sir. Please take the witness
 10 stand. And although you've been previously sworn, would you
 11 restate your name to the jury, please?
 12 THE WITNESS: Brandon Lebrecht. L-E-B-R-E-C-H-T.
 13 THE COURT: Thank you. Direct examination, please.
 14
 15 DIRECT EXAMINATION
 16 BY MS. COIT:
 17 Q. Lieutenant Lebrecht, please tell us your current position
 18 at the University of Oregon.
 19 A. I'm a police lieutenant. I oversee patrol, dispatch,
 20 property, and evidence.
 21 Q. How long have you been at the University of Oregon?
 22 A. Since January 3, 2011.
 23 Q. Were you hired into the position of lieutenant?
 24 A. Yes, I was at the time. It was public safety lieutenant.
 25 Q. Do you recall who you interviewed with?

1 A. I remember Chief Tripp being there and now Chief McDermid.
 2 I believe she was there for part of the interviews. It was a
 3 long process. It was about eight hours total and there were
 4 officers that dropped in. I don't remember all that was -- I
 5 think Casey Boyd was there, Sean Brathwaite. Those are the
 6 ones I remember.
 7 Q. Where were you working at that time?
 8 A. At the Lincoln Police Department in California, in the
 9 Sacramento area.
 10 Q. All right. So give us a description of both your
 11 professional background and your education, if you could.
 12 A. Okay. I went to the academy in 1995 in Sacramento. It's
 13 called the Sacramento Basic Recruit Academy, SBRA 95-1. After
 14 the academy, I started working for the Sacramento sheriff's
 15 department as a deputy sheriff.
 16 I started out 10/1/95, my official hire date, full time,
 17 but before that I was sworn in as an on-call, which is paid,
 18 but no benefits, and that was 9/7/95. So for about three
 19 weeks, or so, I volunteered my time at the academy until they
 20 swore me in full time.
 21 Once I began full time, I went to the jail, where everyone
 22 goes when they first start at the sheriff's department. And I
 23 partook in patrol training. They called it Patrol First
 24 Training. You actually had to pass patrol training to stay on
 25 the department. I think that was about four months, or so, at

1 the time. Maybe five. And then after that I rotated back to
 2 the jail until January 1998, at which time I went to north
 3 patrol and did some update patrol training. And I worked north
 4 patrol, which had a lot of areas in Sacramento, and responded
 5 to calls for service.
 6 I became a field training officer, and then we had
 7 contract cities. One of them being Citrus Heights Police
 8 Department. And I transferred to Citrus Heights Police
 9 Department through the sheriff's department in April of 2000.
 10 And I worked there until December 26, 2002.
 11 At that point I went to work for the Rockland Police
 12 Department as a patrol officer. While I was there, I was also
 13 a field training officer. I was on tactical training
 14 committee. I was a SWAT officer.
 15 I left there on 9/3/2004 after I applied for a sergeant
 16 position with Lincoln PD, and I accepted that position, began
 17 there on 9/23/04. And while I was at Lincoln PD, I held
 18 different assignments -- patrol sergeant, administrative
 19 sergeant, detective sergeant; had a lot of auxiliary duties,
 20 such as background investigations, internal affairs
 21 investigations, officer-involved shooting investigations,
 22 computer -- computer voice stress analyzer, CVSA. People refer
 23 to it as lie detectors. Kind of an alternate to the polygraph.
 24 And I oversaw the field training and evaluation program.
 25 FTEP. I had some other assignments.

1 I was an associate member of the Placer County Dispute
 2 Resolution Committee, and was also part of the team that put
 3 together the officer-involved fatal incident protocol for
 4 Placer County. Those are the ones I remember at this time.
 5 Q. Did you attend a police academy?
 6 A. Yes. In 1995.
 7 Q. And was that in California?
 8 A. Yes, Sacramento.
 9 Q. Since 1995, have you maintained all your certifications
 10 with the -- whatever the agency is in the state you were
 11 working?
 12 A. Yeah. After you leave, I think it's three years or five
 13 years after you leave, it expires, so I did a recertification
 14 course actually there in June of this year. So I'm currently
 15 certified in California and Oregon at this time. Sorry.
 16 Q. All right. How big is Lincoln? The Lincoln Police
 17 Department? Or, excuse me, the City of Lincoln that you
 18 patrolled.
 19 A. Well, when I first started there it was considered the
 20 fastest growing city in the nation. They went from about 7900
 21 to I think around 43- or 44,000 while I was there. And then
 22 there was big budget cuts that hit. So at one point I know we
 23 had over 30-something officers, but it might be down to 12 to
 24 14 now due to a lot of people being laid off when the economy went
 25 bad.

1 Q. Why did you make the decision to come to UOPD?
 2 A. Well, a lot of people being laid off, I wasn't in the
 3 layoff list or anything like that, but we had a lot of pay
 4 reductions, as well, and my last year there I took over an
 5 800-dollar-a-month pay cut, and that was after we took a pay
 6 cut the year before, as well. So it just became difficult to
 7 maintain paying my bills, and that's why I started looking for
 8 other jobs.
 9 Q. Was there anything about the University of Oregon that
 10 attracted you to it specifically?
 11 A. Yeah. I saw that it was trying to become the first police
 12 department at a university in the state of Oregon, so I thought
 13 that would be actually pretty cool to be part of that process
 14 and the transition.
 15 Q. And you have family?
 16 A. Yes, I do.
 17 Q. And tell us, are you married? Kids?
 18 A. Yes, I'm married. I've been married for about 14 years,
 19 and I have three kids, all girls, ages eight, 10, and one of
 20 them just turned 13 recently.
 21 Q. Tell us what it's like for you personally to come into a
 22 new department, especially in the role as a lieutenant.
 23 A. Well, I went into a new department as a supervisor
 24 previously in Lincoln PD, and I noticed a lot of the officers
 25 were kind of standoffish, because they weren't used to having

1 lateral people come in as management or supervisors, and so I
 2 kind of stayed quiet for a while, just to kind of feel people
 3 out and see how they react, and I know at one point I got
 4 feedback that it took -- basically, it was I was quiet for, you
 5 know, a while and then people finally got to know me -- when I
 6 went to Lincoln -- sorry, University of Oregon, I tried it the
 7 other way. I tried to fix that problem, so I jumped right in
 8 trying to joke around with everybody. So I took the feedback I
 9 was given and tried to change it.

10 Q. Can you describe for us your supervisory style? What kind
 11 of a supervisor are you?

12 A. Yeah. I was always referred to as a lead -by-example type
 13 of supervisor at Lincoln PD. I had more arrests, tickets, and
 14 citations, reports taken than all the other sergeants combined.
 15 I did a lot of training at the briefings. I, you know, worked
 16 in California for a while. I made a lot of arrests. I knew a
 17 lot about the laws there, so I commonly give scenarios and have
 18 the officers try to figure out all the case -- or all the codes
 19 that applied to them. And also we participate as a team in
 20 probation and parole searches, which you can't really do here
 21 in the state of Oregon, but there someone was on searchable
 22 probation. You can go to their houses or even contact them in
 23 public and do probation/parole searches.

24 Q. Do you give your subordinate officers feedback?

25 A. Yes. Yes. I've always given people feedback that I feel

1 is necessary for them to actually succeed. Whether it be good
 2 or bad.

3 Q. Would you describe yourself as one to get angry and yell
 4 at subordinates?

5 A. No. Not at all.

6 Q. What is most important for you in law enforcement?

7 A. It's the same thing my sergeants told me when I started
 8 working in Sacramento County. Same thing when I was in
 9 Rockland. The sergeants and the lieutenants, too, is the goal
 10 of everybody is to get home at the end of the day. And so that
 11 was my goal, to make sure everybody got safe -- home safely at
 12 the end of each shift.

13 Q. When you came to the University of Oregon Police
 14 Department, did that -- did that goal change, because you were
 15 on a college campus?

16 A. No. Still the goal was to make sure everybody got home at
 17 the end of the day.

18 Q. How would you describe the job patrolling the campus as
 19 opposed to a police officer in a city?

20 A. Well, the types of calls are different. I mean, obviously
 21 we didn't have firearms when I first got there, so in a lot of
 22 aspects it was more dangerous, because you're still dealing
 23 with people who have been known to have been violent with
 24 officers, you know, convicted felons, people with drugs in
 25 their history, a lot of violence. And, you know, not having an

1 option to defend yourself, we've had officers that actually
 2 contacted people that had guns on them with violent histories,
 3 and so it was just -- it was really different. I mean, a lot
 4 of it, too, especially at night, there's a lot of drunk college
 5 students. And, you know, that was different for me, because I
 6 didn't have a lot of experience dealing with that.

7 But the biggest thing for me was the fact that you're
 8 dealing with -- especially on graveyard, a lot of people who
 9 have violent histories and they could be armed, and we really
 10 didn't have anything other than a baton and pepper spray.

11 Q. So how does that fact -- the fact that you're not armed --
 12 excuse me, the fact that you're not armed, how does that change
 13 how you -- you approach a contact and interact with the people
 14 you're contacting on graveyard?

15 A. Well, I believe everybody should always be cautious. I
 16 mean, sure, be pleasant with everybody. I never had a
 17 complaint in my entire career from a citizen. That's over a
 18 20-year career. Never been a subject of an internal affairs
 19 investigation or anything; only a witness on a few occasions.

20 But you be professional with them. As you talk to them,
 21 you listen to their side of the story, but you have a tactical
 22 way you're standing to where you can react if they were to pull
 23 any weapon on you or try to fight you, so you don't want people
 24 to get behind you. You don't want to turn your backs to them.
 25 You always want to have them in front of you, so you can see

1 their hands and what they're doing. Especially because you're
 2 unarmed and it would take just a very short period of time for
 3 someone to pull out a gun. That's why I usually stand about an
 4 arm's length from people.

5 Q. Are these sort of -- these tactics and mindsets something
 6 that you taught your subordinate officers at the University of
 7 Oregon?

8 A. Yeah. I can't remember specifics, but I do know we had a
 9 lot of discussions about tactics and how you stand when you
 10 talk to people, and that sort of thing. I just can't remember
 11 specifics. It's been a long time.

12 Q. Did you instill in your officers the need always be
 13 cautious and always be safe?

14 A. Like I said, that's just something we always talked about
 15 at briefing -- not every day, but it was something that would
 16 be brought up to make sure everybody is safe, make safe
 17 contact, make sure everybody gets home. It's like a family, a
 18 team, everybody needs to watch everyone's back out there in the
 19 field.

20 Q. All right. So before this lawsuit that we're here for
 21 today, did you ever see Mr. Cleavenger's job application or his
 22 resumé?

23 A. No.

24 Q. Did you have access to it?

25 A. No.

1 Q. Let's talk a minute about your politics. Are you a
 2 vehement Republican as you have been described by
 3 Mr. Cleavenger?
 4 A. No, not at all.
 5 Q. How would you describe yourself?
 6 A. Well, if people were to talk about issues, I would listen
 7 to everybody's viewpoint, and I'm usually somewhere kind of in
 8 the middle. In fact, I haven't even voted since 1991 for the
 9 '92 election.
 10 And, you know, back in 1987, I believe, when Al Gore was
 11 running, I think he -- he didn't end up getting selected. It
 12 was I think Dukakis that went. That was actually the candidate
 13 I liked at the time. But I was too young to vote anyway. But,
 14 I don't know, I just -- I look at every -- everything that they
 15 talk about and try to see which one I would side more with.
 16 But I just don't really consider myself one or the other.
 17 Q. Have you -- are you the type of person who tries to import
 18 your political beliefs on others?
 19 A. No. In fact, I didn't bring up any political
 20 discussion -- discussions. As you heard from Kent Abbott, it
 21 was joking. Kent Abbott was the one who would initiate things.
 22 And sometimes I would respond back.
 23 Q. How did this political joking happen at the office?
 24 A. Well, I would walk into briefing, and I would say at least
 25 50 to 100 times he said something to me about

1 Q. Would you have stopped making political jokes with
 2 Kent Abbott had Mr. Cleavenger asked you to?
 3 A. Yes. In fact, I even told Kent Abbott to, you know, lay
 4 low on that stuff when Mr. Cleavenger is around, because after
 5 that comment that he made in response, you know, to me talking
 6 about the birth certificate, I could tell he wasn't really
 7 happy about it. And I also talked to Sergeant Cameron, prior
 8 to coming to shift, to watch any political stuff, as well,
 9 because of that response from Mr. Cleavenger. And
 10 Sergeant Cameron actually told me, "Oh, that won't be a problem
 11 at all. I'm a Democrat."
 12 Q. Are you a bully?
 13 A. No.
 14 Q. You heard the description Mr. Cleavenger gave about you
 15 cornering him in the hallway and poking him in the chest. Did
 16 that ever happen?
 17 A. That was absolutely completely fabricated. That never
 18 happened whatsoever.
 19 Q. Tell us what did happen.
 20 A. Okay. The Occupy briefing. There's several briefings.
 21 He's making accusations that somebody made a rape joke. I
 22 still maintain I never heard that. I wasn't there for the
 23 whole briefing that I'm going to refer to today. I walked in a
 24 little late, so I can't say what happened before I walked in.
 25 I never saw him stand up, and he tried to explain the

1 anti-Californians, anti-Republicans, and he just assumed I was
 2 Republican because I'm from California. I don't know why. But
 3 he just kept assuming I was a Republican, and he had made
 4 comments like, "Oh, yeah, you know, God's punishing
 5 Californians by all the earthquakes that are going on." I
 6 would joke back and say, "Oh, no, Kent. He punishes them by
 7 sending them to Oregon," because I know he's really set in
 8 living in Oregon his whole life, so I knew that would kind of
 9 get to him.
 10 It was a fun thing where we go back and forth.
 11 Q. Did you ever try to convince anyone at UOPD that
 12 President Obama was Muslim?
 13 A. No. I know there was some joking about that. I remember
 14 specifically -- I don't remember about Muslim, but I remember
 15 specifically about the "not being born in the United States"
 16 accusation.
 17 Q. What do you recall about that?
 18 A. I walked in one day and Kent Abbott said something to the
 19 effect of, "You know, what did George Bush ever do? Obama got
 20 Osama." And I said, "Hey, seen his birth certificate yet?"
 21 Like that. Totally sarcastic. And at that point
 22 Mr. Cleavenger was at his computer, he turned around and said,
 23 "He turned it in right away." And I said, "You're right. He
 24 turned it in about a month later." And that was the end of the
 25 discussion.

1 movement. All I remember is we were sitting there.
 2 Lieutenant Bechdolt was there, as well. And I know he tried to
 3 say it was commanded by me, but there was two lieutenants
 4 there. Somebody asked if they had seen the Occupy camp, and
 5 Lieutenant Bechdolt's guy -- I believe it was Andrew Johnson;
 6 he was a public safety officer -- sitting right next to
 7 Lieutenant Bechdolt -- said, "Oh, it looks like District 9 down
 8 here," and everyone started laughing because of the movie.
 9 Well, it appeared everyone did. I didn't look over at
 10 Mr. Cleavenger at that point, but it appeared that the majority
 11 of the people were laughing. Because of the shanty town look
 12 of the tent city that Occupy had set up down there. There was
 13 a point during that briefing -- there was a lot of things that
 14 was discussed. I don't think I was even in there when
 15 Sergeant Cameron gave Mr. Cleavenger an assignment for the
 16 night to watch the Occupy camp.
 17 It was pointed out to me by Sergeant Matchulat, you know,
 18 "Hey, why is Cleavenger upset over there?"
 19 I said, "I don't know."
 20 So he pointed it out, and I looked at him, and he had his
 21 legs crossed. And it looked like he was kind of pouting a
 22 little bit. You could tell something was bothering him. At
 23 one point he just got up and walked out. You know, Matchulat
 24 looks over at me. Matchulat was sitting to my left. I think
 25 Cameron was to my right, Sergeant Cameron. He's like, "What's

1 up with him?"

2 "I don't know. We'll find out after the briefing."

3 So all I remember after that is I'm pretty sure

4 Sergeant Cameron went and got him, but I was sitting in my

5 office, behind my desk. Mr. Cleavenger was sitting in a chair

6 against the wall, maybe 10 or 15 feet away in front of my desk,

7 and then Sergeant Cameron was sitting at another desk over my

8 left.

9 And we were asking him, "Hey, what's going on? Why are

10 you upset?" And he kept saying he wasn't upset.

11 And I said, "Even your response, you can tell you're

12 upset," because of his tone of voice.

13 And it went back and forth a couple times. And then

14 finally he leans forward in his chair, and he throws his hands

15 out to the side and he shouts, "I didn't like the assignment

16 you gave me."

17 And so at that point -- this is where my deposition it

18 said my voice was a little elevated. I said, "You're going to

19 do any damn assignment you're given." Because it completely

20 caught me off guard. I never experienced Mr. Cleavenger

21 yelling at me at that point or any other officer that I

22 supervised. So it just completely caught me off guard.

23 And then I -- I added in, after that, "Unless it's I,

24 immoral, or unethical, you have to do the assignments you're

25 given."

1 And Sergeant Cameron says to him, "You're the low man on

2 the totem pole. Sometimes you're going to get assignments you

3 don't like." And then he goes, "You understand?"

4 Mr. Cleavenger said, "Yes." That was the end of the

5 discussion.

6 There was no confrontation in the hallway. Nobody ever

7 poked him. In fact, when they brought up that poking thing in

8 the opening statement, as I pointed out, that's the first time

9 we've ever even heard about that before.

10 And I would think if I poked somebody, that's a harassment

11 or assault or there would have been a report about it.

12 Q. All right. Did -- so there was no cornering in the

13 hallway that you recall?

14 A. Not by me. Absolutely not. I couldn't say what anybody

15 else did, but I know for a fact I never talked to him in the

16 hallway after that briefing.

17 Q. All right. So let's -- let's talk a minute about this

18 list. Can you -- first describe for us what is the physical

19 setup of a briefing. What is it like?

20 A. A lot of people sitting around in chairs. Sometimes

21 people are doing stuff on the computers. But it's really a

22 team-building thing. I don't know how it is in the, you know,

23 private industry or anything like that, because I've worked in

24 law enforcement since I was 22, 23 years old. But in law

25 enforcement, people are joking around a lot, saying a lot of

1 things that probably wouldn't sound appropriate if you were in

2 the private industry. People are talking about their personal

3 lives and kind of -- I don't know. It's like a family team

4 building thing and almost -- almost venting to each other

5 once -- once in a while so you don't ruin your relationship

6 with your spouse or significant other at home, because some of

7 the stuff that goes on at work, you know, the spouse doesn't

8 want to hear about it or significant other.

9 Q. All right. Is there -- is there like someone standing in

10 the front of the room that leads this briefing, or is it more

11 everyone sitting down together discussing things?

12 A. Completely informal. Everyone is sitting in chairs. I

13 mean, someone who walks in might be standing up and if they

14 have a few things to say, then they'll leave. But that could

15 be anyone. Even an officer. But everyone is sitting around

16 completely informal, in chairs.

17 Q. How did this idea of added to the list, how did this start

18 as far as you know?

19 A. You know, I don't really know. I just remember that Eric

20 LeRoy had some names on his phone, and he said he had a list.

21 I remember he mentioned Eli Manning. I don't remember. He

22 mentioned a couple other things. And then, you know, you drive

23 into work -- on Franklin Boulevard the lanes are pretty narrow,

24 so people often come into your lane, and you have to kind of

25 move out of the way. So it would be like, "Hey, Eric, people

1 who don't maintain their lanes on Franklin Boulevard, put them

2 on your list." It was stuff that was a complete joke. Almost

3 like a shock factor sometimes. Like people suggesting ABBA.

4 That was one of my favorite groups. They're on the list. And

5 it's people trying to say the funniest things to make people

6 laugh. Like Yanni and Enya, or whatever else. It was just

7 ridiculous stuff that was a joke.

8 Q. Did you tell Officer LeRoy to keep this list?

9 A. No. Not at all.

10 Q. Was it, the discussion itself, about "so and so" and "put

11 that on the list," was it ever mean-spirited?

12 A. Not when I was around, no.

13 Q. Was there ever a theme to the list?

14 A. No. Not that I remember. I mean, it seems to have gone

15 on quite a while after 2011. I mean, I didn't hear about it

16 since 2011, and there was a lot of stuff when I actually saw

17 it -- because I had never seen the actual list before. It was

18 a surprise to me. There's a lot of -- like 225 things on that

19 list, and there was nowhere near that in 2011.

20 I know that, because, you know, I remember once he read

21 some stuff that was on his list, and he said Brian Vizzusi. So

22 I said, "Oh-oh. Now I know for a fact he's actually got a list

23 on his phone," because, you know, he was looking at his phone

24 and he was reading stuff off of it. And I went to him after

25 that -- after that briefing, and I said, "Can you take Brian

1 Vizzusi off that list?" I said, "Nobody knows who he is
 2 anyway." He says, "He's earned his spot. I'm taking him off."
 3 Q. That was your former boss?
 4 A. That's correct.
 5 Q. Was this ever a "let's target and hate liberals" list?
 6 A. No. I never heard anything like that.
 7 Q. Looking back on it, this whole idea of Officer LeRoy
 8 having a list on his phone and talking about things to go on a
 9 list, would you do anything differently?
 10 A. Yeah. I would have put a stop to it right away. I mean,
 11 obviously, I would never partake in anything like that again.
 12 Even though it was a joke, I wouldn't do that again.
 13 Q. All right. Last question about the list. Not last
 14 question.
 15 A. All right.
 16 Q. Was Ann Aiken ever discussed to be put on this list?
 17 A. You know, I don't remember her name ever being mentioned
 18 when I was there, so when I -- I saw Mr. Cleavenger's
 19 allegations in the newspapers, shortly after the *Brady* material
 20 was submitted, I had to actually Google who Ann Aiken was, who
 21 Lauren -- I don't know if it's Reagan or Regan -- who she was.
 22 There's a lot of people I never even heard of before.
 23 Q. So you heard Mr. Cleavenger testify that she got on the
 24 list, he thought, because there was a bike ride you and he went
 25 on and you talked about a garden. Do you recall that

1 testimony?
 2 A. I recall him saying that, yes.
 3 Q. And any truth to that?
 4 A. I went on bike rides with him and LeRoy. I never remember
 5 Drake going with us. And I don't remember going by a garden
 6 and talking about Ann Aiken or whatever he said.
 7 Q. Before this lawsuit was filed, did you even know who
 8 Ann Aiken was?
 9 A. No. Like I said, I had to Google her name to figure out
 10 who she was.
 11 MS. COIT: Your Honor, this might be a good time for
 12 our break.
 13 THE COURT: All right. Ladies and gentlemen, don't
 14 discuss this matter or form or express any opinion concerning
 15 the case. We'll come get you in about 20 minutes. Have a nice
 16 recess.
 17 Lieutenant, you may step down.
 18 (Jury not present.)
 19 THE COURT: Counsel, 20 minutes.
 20 Okay. Let's take 20 minutes.
 21 (Recess taken.)
 22 THE COURT: The jury is present, all counsel and
 23 parties are present. The witness is on the stand. Counsel, if
 24 you would like to continue your direct examination.
 25 MS. COIT: Thank you, Your Honor.

1 BY MS. COIT: (Continuing)
 2 Q. Lieutenant Lebrecht, would you consider yourself a nice
 3 guy?
 4 A. I would think so. I consider myself that.
 5 Q. Do you care about your officers?
 6 A. Absolutely.
 7 Q. Have you, on occasion, let officers come into your office
 8 for a while, while on graveyard shift?
 9 A. Yes. In fact, all the officers, to my recollection, would
 10 come into my office and talked from time to time.
 11 Q. Is there a specific reason that sometimes it's important
 12 for officers to do that during graveyard shift?
 13 A. Yes. Because graveyard shift really affects people's
 14 sleep cycles. And a lot of times, especially when there's not
 15 a lot of calls on certain nights, and it's sometimes hard for
 16 people to stay awake, so we have had officers that have fallen
 17 asleep on duty. So I said, "Instead of doing that, which could
 18 pose a safety risk, come in, get a cup of coffee. Come talk to
 19 me. You know, walk around the office. Do that instead of
 20 falling asleep."
 21 Q. And, specifically, the officer that fell asleep was
 22 Officer LeRoy; correct?
 23 A. He's one of the two that I'm aware of, yes.
 24 Q. And, on occasion, would Officer LeRoy, after this
 25 happened, come into your office for a while to talk with you to

1 wake up?
 2 A. Yeah. I mean, it might have been once a shift or a couple
 3 times a week that he would come by.
 4 Q. Have you and Officer LeRoy ever sat for almost an
 5 eight-hour shift in your office just wasting time?
 6 A. Absolutely not.
 7 Q. All right. Former Lieutenant Boyd, Casey Boyd, testified
 8 that you told her many times that you like to mother fuck
 9 people. Is there any truth to that statement?
 10 A. I never said that to Casey.
 11 Q. Ever said to that anybody?
 12 A. No. I'm familiar with the phrase. And the phrase is if
 13 somebody is badmouthing somebody, you would say, "Hey, I heard
 14 such and such is MFing you." So that's the only context I
 15 would have ever heard it being used, to my recollection.
 16 Q. That's not something you said to Casey Boyd?
 17 A. Absolutely not.
 18 Q. Is -- from what you know, is Ms. Boyd mad at you?
 19 A. Oh, yes. Definitely.
 20 Q. Tell us why you think that.
 21 A. Well, as she testified, I reported several of the things
 22 she had done, which I felt were completely unprofessional and
 23 not becoming of a -- somebody in law enforcement, such as
 24 pounding on the window with a flashlight. And, you know, "Give
 25 me my F'ing drink." And you know another time I was in the

1 car -- I was in the car with her in the passenger seat. And it
 2 was at a McDonald's drive-through on Broadway, right off of
 3 Franklin. And I remember sinking down saying, "Oh my gosh,"
 4 because it was so embarrassing, and she exchanged words with
 5 that employee when they came to the drive-through.
 6 "Give me my F'ing drink. It's right there. Give it to
 7 me. I know you're doing this to me on purpose." He said, "I
 8 got a call from my manager."
 9 I mean, it was really embarrassing.
 10 Another time we were coming back -- oh.
 11 Q. Sorry. At some point did you make some complaints about
 12 Ms. Boyd's activity that led to her internal affairs
 13 investigation?
 14 A. Yes. I'd say a few.
 15 Q. Did she become aware that you had given information about
 16 that internal affairs investigation?
 17 A. Yes, she did.
 18 Q. Tell me how you know that.
 19 A. Well, because I shared an office with her, and Mike Morrow
 20 had told me that the former Chief Tripp told him he had to
 21 disclose to Casey Boyd what exactly I had said about her. And
 22 I guess it had something to do, from what I recall, about her
 23 inability to recall specific things. And so he was giving me
 24 the heads-up, because I had to share an office with her and
 25 kind of watch my back.

1 And, strangely, after she was talked to that night, I came
 2 in the office and I said "hi" to her, and she just glared at
 3 me, and her face was just red. You could tell she was angry.
 4 She didn't say anything back. I checked some emails, or
 5 whatever. I went off to briefing for, I don't know, 20 minutes
 6 or so. And I came back. And my fan that I turned on at my
 7 desk was completely smashed. And I said -- you know, there's
 8 no way anyone else was in there, because everyone else was in
 9 briefing.
 10 I said, "What happened to my fan?" And she was just at
 11 her computer, and she just looks over at me with this evil look
 12 and kind of smiles and just kept typing on her computer again.
 13 And I was like, oh, man.
 14 And then a little bit after she got removed from the
 15 building, it got back to me she was saying karma was going to
 16 get me, and then my tire got slashed one day later.
 17 But I couldn't be certain that was her. It was just weird
 18 timing.
 19 Q. But Lieutenant Morrow expressed to you that he had shared
 20 with Casey Boyd that you were one of the ones that made the
 21 complaints against her?
 22 A. Yes, he did.
 23 Q. During 2011, did you supervise Mr. Cleavenger?
 24 A. Yes.
 25 Q. What was your role vis-à-vis him?

1 A. I was the lieutenant in charge of the patrol shift on the
 2 graveyard shift. I believe I supervised him for part of 2012,
 3 as well, on a swing shift, I believe. But 2011, lieutenant
 4 that oversaw the briefings. There was also a sergeant there.
 5 Q. Up to about October, November of that year, how would you
 6 describe your relationship with Mr. Cleavenger?
 7 A. I thought it was great.
 8 Q. How did he present to you as a person and as an officer
 9 during that time period?
 10 A. Well, it was kind of hard to think back and really explain
 11 it, but I remember he was contacting a lot of people. I mean,
 12 that's from -- it's undisputed. I rode bikes with him a few
 13 times, and I remember we joked around a few times. But other
 14 than that, I mean, it seemed that when you talked to him about
 15 performance was when he started getting defensive.
 16 But he seemed like, at that point, like a happy-go-lucky
 17 guy.
 18 Q. At some point during 2011 did you begin to have concerns
 19 about Mr. Cleavenger's performance?
 20 A. Yes.
 21 Q. Tell us, what were those concerns?
 22 A. Well, one of them is on a bike ride. I believe Eric LeRoy
 23 talked about it. Me, Eric LeRoy, and Mr. Cleavenger were
 24 riding bikes, and we were behind the night library. There were
 25 some students somewhere in this courtyard area, and they were,

1 you know, messing around out there. Mr. Cleavenger got off his
 2 bike, stood up, kind of like a superhero, with his hands on his
 3 hips, and spoke in a deep voice, "Halt, you hooligans."
 4 I mean, it was just kind of awkward. I remember me and
 5 Mr. LeRoy were like, "We need to get out of here." It's kind
 6 of embarrassing. So it's things like that here and there that
 7 were a little weird, I thought.
 8 Q. Were other officers coming to you during this time period
 9 with their own stories about Mr. Cleavenger and what he was
 10 doing on shift?
 11 A. Yes. There were a few stories.
 12 Q. All right. At some point did you speak to
 13 Lieutenant Morrow about what was going on with Mr. Cleavenger,
 14 what was being observed with him during early 2012?
 15 A. Yes. I believe I spoke with --
 16 Q. I'm sorry. My time period is wrong. Late 2011.
 17 A. Yes, 2011. I believe it was the end of October of 2011.
 18 Part of it was Mike Morrow -- I don't know who the second
 19 person was, but there was two people that pointed out
 20 Mr. Cleavenger's lack of grooming. And Mike Morrow asked me to
 21 talk to him about it. So that's one of the things.
 22 And me and Sergeant Cameron had Mr. Cleavenger in the
 23 office. We're talking about his grooming. We offered to give
 24 him the policy. He said he knew what the policy was. And I
 25 said, "Well, you're clearly unshaven." And he said, "Well, I

1 shave, on average, every other day."
 2 I said, "Well, the policy says you have to be clean
 3 shaven. Male employees have to be clean shaven."
 4 He said his skin gets irritated. And that's when
 5 Sergeant Cameron said, "Well, perhaps you can get a doctor's
 6 note and maybe we can do something about it."
 7 When he left we were under the understanding that he
 8 realized he had to shave every day. And there were a couple
 9 times after that when he still didn't. That was pointed out by
 10 the people again.
 11 Q. At some point did you share some notes with
 12 Lieutenant Morrow about concerns that had been observed with --
 13 or, excuse me, Officer Cleavenger?
 14 A. Yes. I know I sent some email. That was either to
 15 Mike Morrow. Maybe to the chief -- Chief McDermed, as well.
 16 It was --
 17 MS. COIT: Permission to approach, Your Honor?
 18 THE COURT: You may.
 19 THE WITNESS: It was email.
 20 MS. COIT: Exhibit 420.
 21 THE COURT: What number?
 22 MS. COIT: 420.
 23 THE COURT: 420? Has that already been received,
 24 Counsel?
 25 MS. COIT: No, Your Honor.

1 BY MS. COIT: (Continuing)
 2 Q. Do you recognize Exhibit 420?
 3 A. Yes.
 4 Q. Is that a series of emails, one from you and a response
 5 from Mike Morrow?
 6 A. That's correct.
 7 Q. What's the date on that?
 8 A. October 29th.
 9 Q. Is Chief McDermed copied on that email?
 10 A. Yes, she is.
 11 Q. Is the subject of that email Mr. Cleavenger?
 12 A. It says: Subject, informal notes and regarding informal
 13 notes. It's discussing Mr. Cleavenger.
 14 MS. COIT: Your Honor, I offer 420.
 15 MR. JASON KAFOURY: Is this -- do you have one that
 16 has an email time on it? Is it the same one we had last week?
 17 THE COURT: 420 is received, Counsel.
 18 MS. COIT: Permission to publish.
 19 THE COURT: You may.
 20 BY MS. COIT: (Continuing)
 21 Q. All right. The top of that email is from
 22 Lieutenant Morrow, and he says he shared your notes with
 23 Chief McDermed. It was agreed you need to immediately take
 24 corrective action. Is this in regard to Mr. Cleavenger?
 25 A. Yes. Yes, it is.

1 Q. Tell me why you shared your concerns with
 2 Lieutenant Morrow at this point.
 3 A. Well, from what I remember at the time, he had exhibited
 4 some bizarre behavior. You know, some of which I witnessed,
 5 some of which others had witnessed and reported to me, and it
 6 also had to do with the grooming that he just failed to follow,
 7 for whatever reason, and I was concerned about his performance.
 8 And a lot was officer safety issues, as well.
 9 Q. Tell us some of the officer safety issues that you were
 10 aware of at this point.
 11 A. Well, one of them was the August 27th -- what is referred
 12 to as the javelin incident. And I think that was out of
 13 Hilyard and Eighth. And Mr. Cleavenger had contacted someone,
 14 I believe, for prohibited camping. The subject -- it came over
 15 the radio, and so it was Mr. Cleavenger, Eric LeRoy. And me
 16 and Drake, Michael Drake, were standing, I don't know, maybe 25
 17 to 30 feet away, perhaps. From what I remember. It's been
 18 like four years.
 19 But I remember we were standing a little bit of distance
 20 away from Mr. Cleavenger and Eric LeRoy, who were both with
 21 this subject that Mr. Cleavenger contacted.
 22 It comes over the radio. He runs a records check. And it
 23 comes over the radio that this guy had a warrant. I don't
 24 remember what the warrant was for at this point. And he was
 25 also known to be aggressive with officers and was known to

1 carry a javelin. And as I'm looking over to where they are, as
 2 I'm talking to Mr. Drake, all of a sudden, I see this guy
 3 digging through a backpack. I mean, I can't see exactly how
 4 far his hands are in it or how far he's digging in there. I
 5 see his hands appear to go into a backpack.
 6 Then he's making a phone call.
 7 So I said, "Hey, put that guy in handcuffs over there."
 8 And so they did. And I am talking to Michael Drake a
 9 little more. And so after the incident we tried to debrief it.
 10 Q. Tell us, first, what were the concerns about that?
 11 A. Okay. Well, the concerns are, first, this guy has a
 12 warrant, which Mr. Cleavenger did tell him, "Oh, you have a
 13 warrant," so I -- I didn't add that part in, but he did tell
 14 him he had a warrant. And he's known to be aggressive with
 15 officers and that he's known to carry weapons, be it a javelin
 16 or not, to me, because he's known to be aggressive with
 17 officers, has a warrant, which means he's going to jail, and is
 18 known to carry any weapon. It doesn't matter to me what the
 19 weapon is. It's really unsafe, especially us all being
 20 unarmed, to let somebody go through a backpack or make a phone
 21 call.
 22 I mean, that guy could say, "Hey, you know, we're over
 23 here. Come get me real quick." I mean, it's just completely
 24 unsafe in my opinion.
 25 And so we debriefed it afterwards, and I expressed my

1 concerns to Mr. Cleavenger, and then he just didn't really seem
 2 to get some of it. Like, well, it was a javelin. I don't see
 3 how he could have a javelin in his backpack.
 4 And then Eric LeRoy said to him, "You know, you didn't --
 5 you didn't search his pockets either before you put him in the
 6 car. You kind of just touched the outsides of them."
 7 And then Mr. Cleavenger said, "Well, EPD" -- Eugene Police
 8 Department -- "they search him anyway."
 9 I said, "You still want to make sure -- you search him
 10 anyway to make sure there's no one going in your car with a gun
 11 or any other weapon."
 12 So there was just a lot of concern for that one incident,
 13 in particular, but there's other incidents, as well.
 14 Q. Okay. What is the purpose of debriefing after an incident
 15 like that?
 16 A. Yeah. It's to learn from possible mistakes that were
 17 made, to see what you did that's good and what you can improve
 18 on. I mean, some of the things were good. He made a proactive
 19 stop. But after that, after the warrant return came back, I
 20 thought it was really necessary to go over it so we correct any
 21 kind of unsafe -- potentially unsafe behavior, and hopefully he
 22 wouldn't do that again in the future.
 23 So my point is to try to get him to understand, get
 24 everyone else's viewpoint, too. When you do a debriefing,
 25 everyone gets to talk.

1 Then if they basically second-guess -- because that's what
 2 you're doing is talking after the fact -- it's open for
 3 everybody. They can say, "Well, I didn't like the way you did
 4 this to me."
 5 So rank is disregarded when you are doing debriefings.
 6 It's an open discussion that everybody basically holds a
 7 similar rank to where you're all just talking about how things
 8 could be done better in the future.
 9 Q. The purpose there, talking to Mr. Cleavenger, was it to
 10 teach, to help him learn from the mistakes he had made?
 11 A. That's correct.
 12 Q. It wasn't disciplinary, was it?
 13 A. No.
 14 Q. All right. So back to 420. So is Lieutenant Morrow
 15 suggesting you take some action with Mr. Cleavenger?
 16 A. Yes. It says immediately take corrective actions to
 17 attempt to change his undesired behavior. Especially the lack
 18 of officer safety awareness.
 19 Q. Okay. Was this -- did this precede you giving
 20 Mr. Cleavenger a letter of clarification?
 21 A. Yes. That's correct.
 22 Q. There's been some testimony about the work plan he was put
 23 on, the weekly evaluations. Is that the formal work plan that
 24 Lieutenant Morrow was suggesting you do?
 25 A. Yes. Discussed right here.

1 Q. Did you issue a letter of clarification to Mr. Cleavenger?
 2 A. Yes. I attempted once on November 4th, but then
 3 eventually issued the final version after discussing with him
 4 on November 18, 2011.
 5 Q. Well, tell me what you mean by that. You attempted to.
 6 A. Well, when I brought the letter of clarification to him --
 7 usually, when you have a letter of clarification -- it's called
 8 different things at different departments, but it's not
 9 discipline. It's almost like a verbal counseling, but it's in
 10 writing.
 11 And so usually when you give these to employees -- I've
 12 given out many before, since I was a sergeant at Lincoln PD,
 13 for about -- a little -- little under six and a half years
 14 before I came here. I had experience giving out a lot of these
 15 things.
 16 You give it to them. They read it over. They talk to you
 17 a little bit about it, and it's done.
 18 But Mr. Cleavenger was writing notes on it. He said, "Do
 19 you mind if I write on this?" He's basically saying that the
 20 stuff in there is not true. It's inaccurate. He wanted to
 21 make a lot of changes to it.
 22 Q. Did you make some changes in -- and present him with a
 23 revised version?
 24 A. Yes. I made some wording changes.
 25 MS. COIT: Permission to approach, Your Honor?

1 THE COURT: You may.
 2 MS. COIT: Exhibit 312.
 3 THE COURT: 312?
 4 MS. COIT: It's already -- it's offered and received
 5 in evidence as Plaintiff's Exhibit 3, Your Honor.
 6 THE COURT: Is 312 and 3? I'm confused by that.
 7 MS. COIT: Plaintiff introduced the same document.
 8 It's the same as Plaintiff's 3. We'll just --
 9 THE COURT: 312 is 3. We'll just refer to it as
 10 Exhibit 3. That's already been received, Counsel.
 11 MS. COIT: Thank you.
 12 BY MS. COIT: (Continuing)
 13 Q. All right. Is this the letter of clarification you issued
 14 to Mr. Cleavenger?
 15 A. Yes. It appears signed by both of us on November 18,
 16 2011.
 17 Q. Let's go through a couple of the things -- again, is this
 18 a disciplinary document?
 19 A. It's nondisciplinary.
 20 Q. What is its purpose?
 21 A. To correct any undesired or potentially undesired
 22 behaviors to make someone be successful in the future and not
 23 have the things that you have to discuss in this reoccur.
 24 Q. Did it generally come after you already discussed the
 25 issues with the employee?

1 A. Correct. There's usually verbal discussions, and this
 2 would be a second step or even third or fourth on some
 3 occasions. But, yeah, verbal discussions generally happen.
 4 First, unless it's so significant that it might go to something
 5 like this.
 6 Q. When you discuss Exhibit 3 -- 312 -- with Mr. Cleavenger,
 7 did you explain to him what the purpose was of a clarification?
 8 A. I don't recall exact conversation we had.
 9 Q. Okay. All right. So let's go through the clarification.
 10 The part on grooming, can you explain that for us, what -- what
 11 was the context? What was the background?
 12 A. Yeah, that was -- it was, like I said, initially pointed
 13 out to me by Mike Morrow, who was professional standards and
 14 training lieutenant at the time. Like I said, someone else had
 15 pointed it out, as well. I can't remember who the second
 16 person was. So I talked to him with Sergeant Cameron present.
 17 I explained to him that he had to shave every day. Be clean
 18 shaven.
 19 So basically it's you had to be clean shaven, which means
 20 you had to shave every day. It was in our policies. We tried
 21 to hand him the policy. He said he already knew it. That's
 22 when we discussed with him the doctor's note, the opportunity
 23 to do a doctor's note. He said his skin got irritated. He
 24 said, "I shave, on average, every other day."
 25 Q. Did he again violate the policy, and that's how it ended

1 up in this clarification?
 2 A. Yes, it was pointed out to me, again, on October 27th and
 3 28th for not having shaved on either day. And it, again, says,
 4 "I was notified of this by two other department employees."
 5 And I recall one of those being Sergeant Cameron on that
 6 occasion.
 7 Q. And was the issue here the fact that you just didn't like
 8 him being unshaven, or was it more that he was ignoring the
 9 policy?
 10 A. Yeah. Like I said, I liked him. So to me it's -- he was
 11 ignoring the policy, for whatever reason, and he clearly said
 12 he understood what it was. So I just still, to this day,
 13 wondering why he just chose not to shave.
 14 Q. All right. So the next paragraph, does this -- this
 15 involves the incident we just spoke about with the javelin --
 16 or not with the javelin, but with the person who is known to
 17 have a javelin?
 18 A. That's correct.
 19 Q. Okay. Let's go to the next paragraph. So this is the
 20 incident on October 29th. Tell us what happened here.
 21 A. All right. So Officer Hermens went out with the subject
 22 that was down on the ground. I believe it says "Downed
 23 subject" in there. That means somebody that's on the ground.
 24 It was off property, from what I recall, so Officer Hermens was
 25 checking on his welfare to see if this guy is okay. Does he

1 need medical assistance? And I remember Officer Hermens
 2 cleared the call and shortly after that, Mr. Cleavenger goes
 3 out with the same subject, and there's some radio traffic that
 4 Officer Hermens told him to stand by; that subject is
 5 intoxicated and aggressive. And I recall -- I don't know the
 6 exact wording, but it was, you know, "He's okay and in the back
 7 of my car now."
 8 And so I remember Hermens cleared himself on the radio
 9 from the call, but he later came in to talk to me that he was
 10 concerned about that incident and -- oh, yes, and then
 11 Mr. Cleavenger also put over the radio that he is transporting
 12 the missing person back to Occupy Eugene or back to Occupy,
 13 however he said it, but he meant Occupy Eugene.
 14 And I heard that, and I said, "Missing person? What
 15 missing person is he referring to?" Because I was working that
 16 night with him, and there was nothing over the radio about a
 17 missing person.
 18 So I even made phone calls to dispatch confirming, "Hey,
 19 is there anything about a missing person tonight?" And they
 20 told me no. So that was another concern.
 21 Then Officer Hermens later came in to me to talk to me
 22 about his concerns.
 23 Q. What were his concerns?
 24 A. Well, he, you know, told me that he told Mr. Cleavenger to
 25 stop, but it was really, "Standby. He's intoxicated and

1 aggressive." He told me, "You know, I told him not to put him
 2 in his vehicle," I believe were his exact words to me. And
 3 then he said he put him in his vehicle without patting him down
 4 for weapons. And he's like, "I don't understand that. That
 5 guy was aggressive. He put him in the back of his car without
 6 patting him down for weapons."
 7 And then he said, "I followed him to the Occupy camp for
 8 his safety." And he goes, "I saw Mr. Cleavenger open the door,
 9 and the guy kind of, you know, jumped out of the car and ran
 10 into the Occupy area, the Occupy camp."
 11 Q. Was there also an issue about him not being run for a
 12 records check?
 13 A. Yes. I talked to Mr. Cleavenger about that when I talked
 14 to him later about the incident.
 15 Q. Okay. And what was that issue?
 16 A. Well, when I brought him in, brought Mr. Cleavenger in to
 17 talk to him, I asked him, "Why would you transport this guy?
 18 You hadn't patted him down." He said, "Well, I did pat him
 19 down."
 20 I said, "Well, Jim, you were seen not patting him down
 21 prior to putting him in your car."
 22 He said, "Well, maybe I didn't then."
 23 Then I said, "Well, then you put on the radio that this is
 24 a missing person from Occupy." I said, "Nobody knew what you
 25 were talking about."

1 He said, "Everybody knew what I was talking about. I put
 2 that on the radio."
 3 I said, "Jim, you didn't put that on the radio." I
 4 believe I even mentioned to him I checked with dispatch and
 5 they couldn't find it either.
 6 And then I said, "Plus, this guy that you transported,
 7 without patting him down, he's known to be intoxicated and
 8 aggressive. You put him in your car without patting him down .
 9 You say he's missing. There's no information saying he's
 10 missing. And then you didn't even run him for a records check
 11 to see who this guy even was or if he had a warrant or what."
 12 So the whole combined situation was very concerning to me
 13 because Officer Hermens had thought this guy was intoxicated
 14 and aggressive. He sees Mr. Cleavenger put him in his car,
 15 without patting him down. Mr. Cleavenger tells me he patted
 16 him down until I told him, "Well, somebody saw you not patting
 17 him down." Then he said, "Well, maybe I didn't." And then he
 18 said, "This is some missing person," and "I put it over the
 19 radio," he says, and he never did.
 20 And then after doing some more research, I made some phone
 21 calls to dispatch. I looked in the computer logs, and I
 22 found -- oh, yeah, Mr. Cleavenger had told me, "Well, if it's
 23 not on the radio, then I called dispatch on the phone and asked
 24 them to run this person for warrants."
 25 So I called the dispatcher and got a hold of Michelle, who

1 was in dispatch, and she says, yeah, she recalled talking to
 2 Mr. Cleavenger on the non-recorded line in dispatch. She says
 3 he didn't ever run him for warrants. He just said, "Is this
 4 guy in jail? Because his wife is looking for him."
 5 I said, "So it's confirmed? So he never asked you if this
 6 person had warrants or to check if he had warrants?"
 7 And she said, "No."
 8 I said, "Did you check him for warrants?"
 9 And she said "No."
 10 And so I -- I talked about that with Mr. Cleavenger later,
 11 and he basically was, well, I was under the assumption that,
 12 you know, she ran him for warrants.
 13 So it's -- it's every time I give him information, the
 14 story seems to change.
 15 Just like part of the research I did was I found he was at
 16 Franklin and Onyx on a wave-down in that same time frame, which
 17 was a little bit before, within an hour, or so, probably,
 18 before that. And I asked him, "You were out on a wave-down
 19 near the Occupy camp?"
 20 He goes, "Oh, yeah, that's when somebody told me that
 21 there was a missing person."
 22 I said, "Again, you never told anyone that anyone was
 23 missing."
 24 And he still insisted that he did.
 25 Q. All right. So after this clarification was issued, did

1 you put Mr. Cleavenger onto a work plan?
 2 A. Yes. The one that's discussed in that prior email.
 3 Q. At that point in time, what was your -- what was your
 4 thoughts about what a work plan should entail?
 5 A. Well, basically performance guidelines to get him to
 6 improve on the issues that I thought he was having.
 7 Q. Did you express to Chief McDermed that you thought you
 8 should ride with him; be with him?
 9 A. I recall at least talking to Chief Tripp about that, and
 10 he told me that he didn't want me to ride with him.
 11 Q. So what ultimately was decided upon for the work plan?
 12 A. That I would do weekly evaluations based on his
 13 performance. I would occasionally show up to some of the
 14 calls, get feedback from some of his co-workers, and review
 15 records in the computer.
 16 Q. Did you tell Mr. Cleavenger that he was being put on this
 17 work plan?
 18 A. Yes, I did. I believe it's even in that letter of
 19 clarification he was handed. Somewhere near the bottom.
 20 MS. COIT: Permission to approach?
 21 THE COURT: You may. What's the document?
 22 MS. COIT: 31.
 23 THE COURT: 31?
 24 MS. COIT: 31. It's been received by plaintiff.
 25 THE COURT: That's already been received? You can

1 publish it, then.
 2 BY MS. COIT: (Continuing)
 3 Q. Can you tell us what Exhibit 31 is?
 4 A. Yeah. It's the weekly performance plan summary that I put
 5 together for Mr. Cleavenger.
 6 Q. Okay. So did you actually put these documents together?
 7 You created this document?
 8 A. You know, I don't remember -- it's been so long -- if I
 9 created them myself or if I created part of them, but I know I
 10 at least input them.
 11 Q. So the categories, looking on the first page, we have
 12 grooming, professionalism, and officer safety. Do you see
 13 that? I went bottom to top. Sorry.
 14 A. Yes. Yes, I see that.
 15 Q. Were those the three areas of concern that you were
 16 focusing on with Mr. Cleavenger?
 17 A. Yes.
 18 Q. So these are weekly summaries. So is this from the first
 19 week?
 20 A. 11/16 to 11/20. Yeah, that looks like the first week.
 21 Q. So let's look at strengths.
 22 A. Okay.
 23 Q. Officer Cleavenger's greatest strengths are his level of
 24 productivity and positive mental attitude. He stays busy doing
 25 security checks of campus properties, impounding unsecured

1 bicycles, and conducting contacts of suspicious persons and
 2 bicycle traffic violaters. So that was a good thing?
 3 A. Yes.
 4 Q. Let's look at areas for improvement.
 5 A. Okay.
 6 Q. So were there still a few things you were having concerns
 7 with over this first week?
 8 A. Yes.
 9 Q. Explain that to us.
 10 A. Well, it says Officer Cleavenger can improve upon find ing
 11 a balance of discretionary action. He seems to favor issuing
 12 many warnings rather than taking corrective enforcement action.
 13 On one occasion, he issued a warning to a subject who was
 14 intoxicated while riding a bicycle. The reason for the stop
 15 was riding a bicycle without proper lighting equipment. The
 16 subject reminded Cleavenger -- Mr. Cleavenger he had stopped
 17 him the previous week for the same violation. Mr. Cleavenger
 18 still gave the subject a warning.
 19 Q. Why is that an area for improvement?
 20 A. Well, because usually when you already had given someone a
 21 warning the first time, the second time would be a citation.
 22 Q. Did you talk about that with Mr. Cleavenger?
 23 A. Yes.
 24 Q. All right. Let's go to page 2.
 25 A. Okay.

1 Q. Let's go to areas for development.
 2 A. All right.
 3 Q. Here you say that Mr. Cleavenger has been quickly advising
 4 that he's code four after contacting subjects. Why is that a
 5 concern?
 6 A. Well, code four, in the police speak, is cancel anyone
 7 else. Meaning, you're okay. You don't need assistance. And I
 8 remember the impression at the time that we had -- me and
 9 Sergeant Cameron -- was that, you know, he might be canceling
 10 people that are coming to his call so they don't see him
 11 messing anything up. That's the impression we had.
 12 And that by doing so, I mean, he could be jeopardizing his
 13 safety if he really does needs a backup unit and he just
 14 immediately is canceling backup. So that was the concern.
 15 Q. All right. And you -- it sounds like you spoke to
 16 Mr. Cleavenger about it, and his response was -- he could
 17 immediately determine the contact was going to be low-key.
 18 Do you recall that discussion with him?
 19 A. Yes.
 20 Q. Any concerns with that perception he's having?
 21 A. Well, you know, when I'm not there with him, I'm not aware
 22 of his perception of what he's seeing. I mean, there are
 23 occasions when you can tell things might be low-key, but you
 24 still stay aware and on guard anyway.
 25 So I've cancelled people. I've cancelled backup on calls,

1 too. So without me really being there, I don't know what his
 2 perception was.
 3 But it still was concerning, because, you know, the
 4 perception that he was doing it to avoid having anyone
 5 reporting anything on it. Because that's kind of how we came
 6 to these evaluations is people were voicing concern to us.
 7 Q. Okay. Let's look at page 3. Page 3. Officer Cleavenger
 8 did well in all areas this week.
 9 So a good week for Mr. Cleavenger?
 10 A. Yes.
 11 Q. Page 4?
 12 A. Okay.
 13 Q. Again, he had a good week?
 14 A. Yes.
 15 Q. So, in your mind, at this time period, was Mr. Cleavenger
 16 improving? He was accepting what you were telling him, and he
 17 was getting better?
 18 A. Yes. I didn't see him exhibiting any behavior that he
 19 exhibited before.
 20 Q. So let's go to the last. Under area for development.
 21 A. Okay.
 22 Q. Now, I want to look at the last sentence or
 23 second-to-last.
 24 Officer Cleavenger should realize that debriefings are for
 25 future training benefits for everyone on scene during the

1 incident and not an attack or a "got you" moment.
 2 Explain for us why you wrote that there. What does that
 3 mean?
 4 A. Well, it was specific to an incident that Mr. Cleavenger
 5 had called out a criminal mischief in progress. I don't
 6 remember if he said criminal mischief or vandalism, but it's
 7 the same thing. Then he voiced that people were running. And
 8 at the time we had someone doing a specific graffiti tag all
 9 over campus, and so we thought this could be the person that
 10 was doing that.
 11 And so everybody rushes over there. And when we got
 12 there -- you know, I remember Mr. Cleavenger gave good
 13 instructions as to where these people went to, so everyone was
 14 accounted for, to what I can recall. He said whatever
 15 direction the people went. You know, he did a good job setting
 16 people up.
 17 So when we debriefed it afterwards -- well, I remember
 18 before debriefing, and I said, "Well, where are the people that
 19 ran?"
 20 And he made a comment something similar to, "Well, they
 21 weren't actually running, but they were walking really fast."
 22 And I said, "Well" -- then we're into a debriefing at this
 23 point. And I said, "Well, you know, where's the criminal
 24 mischief or vandalism?"
 25 And he said, "Well, they were throwing things out of a

1 dumpster."

2 And I said, "Well, everyone is running here thinking it's

3 this person that's been doing all the graffiti all over campus,

4 and it's just someone throwing stuff out of a dumpster."

5 And then you could tell he got a little upset, and he

6 said, "Well, I guess I could have said it was just people

7 throwing things out of a dumpster." And then he says, "I feel

8 as if you're trying to get me," right in front of everybody.

9 And I said, "Jim, this isn't an 'I got you' moment. We're

10 doing a debriefing here."

11 So that's why I put that in here.

12 Q. Okay. So this is the fifth week. At this point, did you

13 recommend that these evaluations be terminated?

14 A. Yes.

15 Q. Why is that?

16 A. Well, because even with him -- with him saying the "I got

17 you" moment on the debriefing, I mean, I thought debriefings

18 were probably still new to him, and I did see the improvement

19 in the areas I noted here. The officer safety, professionalism

20 in the public, you know, the angel wings and all that stuff,

21 and grooming.

22 And so to me I didn't take into consideration really that

23 he didn't take a debriefing really well. I was still focused

24 on what these evaluations were for.

25 And so I felt he was doing a good job and had vastly

1 improved in those other areas.

2 Q. Did you write an end-of-evaluation-period summary?

3 A. Yes.

4 MS. COIT: Permission to approach?

5 THE COURT: You may.

6 MS. COIT: Exhibit 314.

7 THE COURT: 314.

8 THE WITNESS: Thank you.

9 BY MS. COIT: (Continuing)

10 Q. What's Exhibit 314?

11 A. This is basically an end-of-an-evaluation email in the

12 form of a memorandum I sent to Chief McDermid, who was the

13 assistant chief at the time.

14 Q. What was the purpose of this memorandum?

15 A. It was to explain that I felt Mr. Cleavenger had improved

16 to acceptable levels and I didn't think the weekly evaluations

17 were further necessary.

18 MS. COIT: Your Honor, defendants offer 314.

19 MR. JASON KAFOURY: No objection.

20 THE COURT: Received.

21 MS. COIT: Permission to publish.

22 THE COURT: You may.

23 BY MS. COIT: (Continuing)

24 Q. So the top categories, did those explain what led to him

25 being put on weekly evaluations?

1 A. That's correct.

2 Q. All right. So here you say that your behavior should have

3 been addressed and corrected during the FTO program. I believe

4 Officer Cleavenger was a product of the training officer's

5 influence and corrective action was necessary. Tell me what

6 you mean by that.

7 A. Well, Mr. Drake had a tendency to just sit in dispatch for

8 quite a bit of time and show up on Eugene police calls instead

9 of doing our job at the University of Oregon. We also had

10 another person that trained with him after Mr. Cleavenger, and

11 that's Jared Davis, who already testified.

12 And there was concern that Mr. Davis, Jared Davis, wasn't

13 being very proactive. What we found was because -- it had

14 nothing to do with him. It was because Mr. Drake was bringing

15 his trainees into dispatch for an extended period of time and

16 spending a lot of time off campus.

17 Q. All right. So you say, lower down, "Because of this

18 friendship" -- did you know that Mr. Drake and Mr. Cleavenger

19 had become friends during the training period?

20 A. Yes. They often talked at briefing about going skiing. I

21 don't know how many times they went, but they talked about it

22 and they said spelunking, which is caving, I guess. Cave

23 exploring. So I heard them talk about those things at

24 briefing.

25 And also another thing that Drake had said that

1 Mr. Cleavenger was his wingman and got him a date from the

2 university district hospital -- with a nurse -- and that's why

3 I felt they were friends.

4 Q. So because of this friendship, I believe Officer Drake

5 treated Officer Cleavenger more as a friend than a trainee and

6 allowed him to get away with inappropriate and at times unsafe

7 behavior. There was no documentation to support the officer

8 safety issues and peculiar behavior that Officer Cleavenger was

9 displaying due to a breakdown in the FTO program.

10 Does that mean that it was your opinion that these

11 behaviors were probably in existence during the FTO or the

12 field training stage?

13 A. Oh, definitely, based on what I heard Mr. Drake say quite

14 often.

15 Q. Okay.

16 A. Do you want to know what he told me?

17 MR. JASON KAFOURY: Your Honor, I'll object as to

18 hearsay again and again.

19 THE COURT: Overruled.

20 But, Counsel, there's no question pending.

21 BY MS. COIT: (Continuing)

22 Q. All right. Let's go to the next page.

23 A. Okay. In the middle of this paragraph it says, "I met

24 with Officer Cleavenger several times to discuss his

25 performance and conducted debriefings of calls he's handled.

1 Officer Cleavenger was initially hesitant to accept feedback,
 2 but he advised he now understands the importance of feedback
 3 for his development."
 4 Q. Did Officer Cleavenger at some point acknowledge to you
 5 that he had trouble accepting feedback?
 6 A. Yes, he did. That's why I put it in here.
 7 Q. And it was his intent to start accepting feedback in the
 8 future?
 9 A. Yes. That's why I thought he wasn't familiar with
 10 debriefings.
 11 Q. Okay. Let's go to the next paragraph.
 12 Here it says he had established a representation with his
 13 peers as having poor officer safety and not issuing citations
 14 for anything. What did you base that statement on?
 15 A. It was a lot of feedback from his co-workers. That he
 16 just gives warnings. I remember specific incidents. Some
 17 people up on a roof, and they ran away, and he was expected to
 18 give a person a citation. He didn't. He gave them a warning
 19 instead.
 20 There was another situation where there was a known
 21 trespasser on campus who had been issued a letter of trespass,
 22 and Mr. Cleavenger filled out a field interview card instead of
 23 writing a citation or having Eugene police arrest the guy.
 24 So there was stuff like that.
 25 Q. So even though this is a college campus, is it, at times,

1 imperative to take enforcement action?
 2 A. Yeah. At times, definitely.
 3 Q. Why is that? Why not just issue warnings?
 4 A. It's to keep the campus safe. It really depends upon what
 5 it is. Is it a dangerous person? Is it that they're
 6 continuously going through campus, running stop signs, and that
 7 sort of thing?
 8 So the overall thing is our job is to keep the campus
 9 safe. Sometimes you have to take action, corrective action, to
 10 make that happen.
 11 Q. All right. Would you, all in all, characterize this
 12 evaluation as being a positive comment on Mr. Cleavenger's
 13 performance?
 14 A. Yes. Definitely.
 15 Q. All right. Let's move to the Spencer View incident.
 16 A. Okay.
 17 Q. Do you recall when you were first made aware of the
 18 Spencer View call?
 19 A. Yes. I believe it was on April 1, 2012, via email from
 20 Sergeant Cameron.
 21 MS. COIT: Permission to approach?
 22 THE COURT: You may. And the exhibit?
 23 MS. COIT: This is 421.
 24 THE COURT: 421. Thank you. Has that been received?
 25 MS. COIT: No.

1 BY MS. COIT: (Continuing)
 2 Q. I've given you a two-page document. Exhibit 421. Can you
 3 tell me what that is?
 4 A. Yes. It's an email Sergeant Cameron sent to me April 1,
 5 2012, at 9:47 p.m., and it says: Subject, Cleavenger. And
 6 parking in front of call document. Cleavenger's latest. He's
 7 been counseled, and my notes are attached.
 8 And then he had an attachment with the notes that he took.
 9 Q. What was the date of the Spencer View incident, as far as
 10 you understand?
 11 A. From what I recall, it was April 1, 2012.
 12 Q. And the second page, are those the notes that
 13 Sergeant Cameron forwarded to you with this email?
 14 A. Yes.
 15 Q. So they were an attachment to the email?
 16 A. That's correct.
 17 MS. COIT: Defendants offer 421.
 18 THE COURT: Received.
 19 MS. COIT: Permission to publish.
 20 THE COURT: You may.
 21 BY MS. COIT: (Continuing)
 22 Q. Go to the second page. All right. So these notes from
 23 Sergeant Cameron, was this your first notice of something
 24 occurring at the Spencer View incident?
 25 A. Yes, it is. I wasn't working that night. That's why he

1 emailed it to me.
 2 Q. From reading these notes, was it your impression that
 3 Sergeant Cameron had spoke to Mr. Cleavenger that evening after
 4 the Spencer View event?
 5 A. Yes.
 6 Q. What did you understand to be Sergeant Cameron's concern
 7 with what happened at that call?
 8 A. Well, that he had spoken with him about it and that
 9 Mr. Cleavenger didn't appear to get that he potentially
 10 violated officer safety concerns and that he felt there was no
 11 need -- some of this isn't on here, but he felt no need to walk
 12 in cautiously, and it was a cold call.
 13 Q. Last paragraph. Sounds like that's the last paragraph
 14 there. Officer Cleavenger told me he didn't see any threat to
 15 us and no need to walk in cautiously. And Sergeant Cameron
 16 advised him on how they should respond.
 17 A. Yes.
 18 Q. All right. Did you talk to Sergeant Cameron after you
 19 received these notes about the call?
 20 A. Yes. There was a period where either he was off or I was
 21 off, and so to actually talk in person was probably on about
 22 maybe the 4th or 5th after this, I believe.
 23 Q. What was that conversation? What was it about?
 24 A. Well, I remember we discussed what can we do at this
 25 point. I mean, we've already had to give him the clarification

1 for officer safety issues, and now he's not understanding that
 2 he potentially jeopardized his safety here, as well. So we --
 3 we discussed, you know, the next step is likely a possible
 4 reprimand.
 5 Q. And at that point in the discussion, what was going to
 6 be -- as far as you understood, what was going to be the
 7 purpose -- the focus of this written reprimand?
 8 A. From what I recollect, it was going to be officer safety,
 9 but I think we did talk on the phone over some of this stuff,
 10 though, because I remember there was a draft reprimand written
 11 before the 4th or the 5th, I believe; but the focus was going
 12 to be officer safety issues.
 13 Q. The concern with what had occurred at Spencer View;
 14 correct?
 15 A. Correct. A continuous pattern of officer safety issues.
 16 THE COURT: Counsel, was that Exhibit 421?
 17 MS. COIT: Yes, Your Honor.
 18 THE COURT: Thank you.
 19 BY MS. COIT: (Continuing)
 20 Q. All right. Did you discuss this issue of giving
 21 Mr. Cleavenger a written reprimand with anyone from the human
 22 resource department?
 23 A. Yes. With Randy Wardlow.
 24 Q. Why did you discuss it with Randy Wardlow?
 25 A. Well, any time you're dealing with potential discipline,

1 it's been my experience you involve human resources and the
 2 department command staff in those sort of discussions.
 3 Q. In that discussion with Randy Wardlow, did you give him a
 4 background of your prior experiences with Mr. Cleavenger and
 5 officer safety issues?
 6 A. Yes, I believe I sent him an extensive email discussing
 7 some issues at some point.
 8 Q. Was Mr. Wardlow supportive of the discipline?
 9 A. Yeah. He appeared to be.
 10 Q. And this was all before you met with Mr. Cleavenger to
 11 talk about it; correct?
 12 A. That's correct. We met with him on, I believe, April 7th.
 13 Q. All right. So tell me what was the purpose of meeting
 14 with Mr. Cleavenger on April 7th.
 15 A. Well, I mean, it could have been the outcome of a
 16 reprimand, because there was potential discipline, because he
 17 didn't understand that he violated officer safety. He was
 18 unwilling to accept it. That's why there's potential for
 19 discipline. We follow progressive discipline, as far as verbal
 20 warnings, letter of clarification, and now he's not accepting
 21 he jeopardizes his safety in the Spencer View call.
 22 So Sergeant Cameron read him it -- I think it was a
 23 bifurcated form of *Garrity* and *Weingarten*.
 24 Q. Let me stop you.
 25 A. Okay.

1 Q. Is the purpose of *Garrity*, the *Garrity* warning, from what
 2 you understand, is to compel a statement from the officer?
 3 A. Yes, it is.
 4 Q. And, in exchange, they're told no criminal charges can
 5 result. Is that correct?
 6 A. That's correct.
 7 Q. And then the *Weingarten* warning, is it your understanding
 8 that that gives them notice that they have a right to union
 9 representation?
 10 A. That's correct.
 11 Q. All right. So was there an actual form that
 12 Mr. Cleavenger was read?
 13 A. Yeah. I don't remember holding a form myself, but I
 14 remember Sergeant Cameron sitting off to my left with
 15 Mr. Cleavenger sitting in front of them and Sergeant Cameron
 16 read it to him and then allowed Mr. Cleavenger to read it, and
 17 I believe he signed it.
 18 Q. Okay. Did Mr. Cleavenger waive his right to have a union
 19 steward at that meeting?
 20 A. From what I recall, he said, "I waive for now," were his
 21 words.
 22 Q. Had he requested a union steward, would the meeting have
 23 been postponed until he got that representation?
 24 A. Well, he didn't postpone the meeting, so he could have
 25 requested.

1 Q. Correct. If he had, would you have postponed the meeting?
 2 A. Oh, definitely, yes.
 3 Q. So going into this meeting, you were anticipating that a
 4 letter of reprimand would issue afterwards; right?
 5 A. That's correct.
 6 Q. So tell us what happened at the meeting.
 7 A. Well, I remember Sergeant Cameron was explaining the
 8 concerns about the incident and the fact that he felt -- again,
 9 I wasn't there at this incident, so I'm listening to Sergeant
 10 Cameron's input as he is discussing this with Mr. Cleavenger at
 11 this time; that he was concerned that he couldn't accept the
 12 fact that he had potentially put himself in harm's way by
 13 driving right in front of the apartment and pretty much almost
 14 parking in front of it momentarily before moving to where the
 15 other officers were.
 16 I remember he got extremely defensive and he said that we
 17 should be talking to Hermens instead of him and Hermens is the
 18 one that parked in view.
 19 And so I asked him, "Well, where did Hermens park?"
 20 And he said, "Well, he parked so close I could read the
 21 apartment numbers at the time I passed his vehicle."
 22 So we asked him a couple of more questions, and I came
 23 back to that, and I said, "So how far away did Zach park" --
 24 his name is Zach Hermens.
 25 And he goes, "About 50 yards."

1 I said, "You could really read those tiny apartment
 2 numbers from 50 yards away?"
 3 And then he goes, "Well, maybe it wasn't 50 yards, but it
 4 was close enough to where I could read the apartment numbers."
 5 Q. Sitting here today, you specifically remember
 6 Mr. Cleavenger saying he could read the apartment numbers when
 7 he passed Officer Hermens' vehicle?
 8 A. Correct. That is what he said.
 9 Q. Did Mr. Cleavenger raise his voice during this meeting?
 10 A. Yes. After further, more discussion about the issue, he
 11 again leaned forward in his chair and threw his hands out to
 12 the sides and shouted, "What do you expect me to do?" And at
 13 that point I sat silent for a while.
 14 And this is the second time now that he's yelled at me.
 15 This time it was at me and Sergeant Cameron. Sergeant Cameron
 16 was there the first time, but he looked directly at me that
 17 first meeting.
 18 And I sat silently for a while and I said, "Jim" -- I
 19 said, "I'm tired of you yelling at us every time I try to talk
 20 to you."
 21 And he says, "Well, it's not every time." And he looks
 22 over to Sergeant Cameron, and he says, "Is it Sergeant
 23 Cameron?"
 24 Well, no, not every time.
 25 I said, "Okay. It's not every time, but if you do this

1 again, it will being deemed insubordination. You can't be
 2 yelling at your supervisors."
 3 And he apologized at that point.
 4 Q. Did Mr. Cleavenger -- throughout this meeting, did he
 5 continue to insist that this was a cold call?
 6 A. Yes, he did. And he continuously said we should be
 7 talking to Zach Hermens instead of him, and said we were
 8 picking on him and not anybody else. At this point we didn't
 9 know any video existed.
 10 Q. Once he told you Officer Hermens was parked within view of
 11 the apartment, did you and Sergeant Cameron reevaluate whether
 12 a reprimand should be issued?
 13 A. Yeah. I remember discussing with Mr. Cleavenger at that
 14 point, "Well, you know, if Zach parked in view, then, you know,
 15 maybe you weren't the one that jeopardized everybody's safety .
 16 Maybe it was really Zach."
 17 That's probably how he could get the impression that we
 18 didn't think it was that big of a deal at that point.
 19 I remember we still iterated, "Either way, you still don't
 20 drive right in front of someone's apartment."
 21 Q. And, in fact, you did not issue the letter of reprimand at
 22 that point; correct?
 23 A. That's correct. We decided not to at that point.
 24 Q. So what did you do next?
 25 A. We brought in Zach Hermens to talk to him about potential

1 officer safety issues.
 2 Q. At that point -- well, let's go back to the meeting. At
 3 any point did Mr. Cleavenger say, "Go look at my dash cam if
 4 you want to see where Officer Hermens was"?
 5 A. No. In fact, we wouldn't have even thought of that,
 6 because they exited their cars and went to the apartment. And
 7 we had these other digital portable recorders, called PUMA
 8 devices, they carried in their pockets. And those were the
 9 ones that would be often used when people would leave their
 10 vehicle to go into apartments or dorms. We had no idea there
 11 would be video.
 12 Q. So when you went and talked to Officer Hermens, were you
 13 intending to counsel him?
 14 A. Oh, yes.
 15 Q. What did he tell you?
 16 A. And this was a first meeting I had with, you know,
 17 Zach Hermens about potentially unsafe behavior. And so we
 18 weren't going into it with a reprimand or anything like that,
 19 but we were concerned that he potentially parked in view of
 20 this apartment.
 21 And so I remember we asked him, "Hey, you know, where did
 22 you park when you were at this apartment? Why did you
 23 jeopardize people's safety?"
 24 I don't remember the exact wording, but it was along those
 25 lines. And he said, "I parked quite a distance away. In fact,

1 you can look at my video."
 2 And I remember saying, "You have video of this?"
 3 And he said, "Yeah."
 4 And so I pulled it up, with him sitting right there, and I
 5 saw that he was parked quite a distance away.
 6 Q. All right. Did you also pull up Mr. Cleavenger's dash cam
 7 video?
 8 A. Later, yes.
 9 MS. COIT: All right. Your Honor, Exhibit 9 has been
 10 received. Permission to play it?
 11 THE COURT: You may.
 12 MS. COIT: I'll play it all the way through and then
 13 we'll go back and talk about it. Okay.
 14 THE COURT: How long is this?
 15 MS. COIT: This is just a couple minutes.
 16 THE COURT: Okay. Thank you.
 17 (Video played for the jury.)
 18 BY MS. COIT: (Continuing)
 19 Q. Is this Mr. Cleavenger's dash cam video?
 20 A. From what I recall, yes, it is. That's Zach Hermens'
 21 vehicle. The apartment is either that one or the next one. I
 22 don't remember which one.
 23 Q. We're going to go back and look at it.
 24 (Video played for the jury.)
 25 ///

1 BY MS. COIT: (Continuing)
 2 Q. All right. So is that the dash cam video from
 3 Mr. Cleavenger's vehicle?
 4 A. Yes. That's part of it.
 5 Q. All right.
 6 MS. COIT: Your Honor, permission to replay this,
 7 stopping at certain parts?
 8 THE COURT: You can replay that.
 9 MS. COIT: Also, permission to start at about minute
 10 1:39, so we don't have to watch the driving up.
 11 (Video played for the jury.)
 12 BY MS. COIT: (Continuing)
 13 Q. Okay. So these are the Spencer View Apartments; correct?
 14 A. Correct.
 15 Q. Mr. Cleavenger was responding to apartment 64 and 60;
 16 correct?
 17 A. Correct.
 18 Q. Those are upstairs/downstairs neighbors?
 19 A. That's correct.
 20 (Video played for the jury.)
 21 BY MS. COIT: (Continuing)
 22 Q. All right. Is that Officer Hermens' vehicle we can see
 23 there?
 24 A. Yes.
 25 Q. Is there any way to see the apartment numbers from 60 and

1 64?
 2 A. Absolutely not.
 3 Q. How about here? Can you see the apartment numbers?
 4 A. No.
 5 Q. In fact, you have to turn this corner, correct, before the
 6 apartment comes into view?
 7 A. I believe so.
 8 Q. Can you show -- I believe it's the far north apartments
 9 from the map we've seen. I don't know if you can write on
 10 there.
 11 A. Yeah. I can't tell if it's this one or if it's this one.
 12 Q. Okay. So it's one of those two apartments?
 13 A. From what I recall, yes.
 14 Q. So after you reviewed that video, what we just saw, is
 15 there any way Mr. Cleavenger, in your opinion, could have been
 16 mistaken when he said he saw the apartment numbers when he
 17 passed Officer Hermens' vehicle?
 18 A. No.
 19 Q. Why is that?
 20 A. Well, I think it was basically just a lie that he just
 21 wanted to get out of getting in trouble. You clearly couldn't
 22 see the apartment from where Hermens was parked.
 23 Q. What is Mr. Cleavenger doing here?
 24 A. To me, it appears he's pulling over to park and there's
 25 audio with that.

1 THE COURT: Just one moment. Why don't we all stand
 2 up and stretch for a second. Then you can reask the question.
 3 Why don't you reask that question, please.
 4 BY MS. COIT: (Continuing)
 5 Q. The question was: What does it appear Mr. Cleavenger is
 6 doing here?
 7 A. To me, it appeared he was trying to park and then his
 8 co-workers came in view. And you hear him say -- if the audio
 9 was on, you would hear him go "humph," and to me that meant he
 10 had just seen his co-workers, and so then he decided to drive
 11 to where they were.
 12 Q. After watching Mr. Cleavenger's dash cam video, did you
 13 think Officer Hermens had done anything wrong?
 14 A. No.
 15 Q. Did the scope of the issues that you were planning to
 16 address in the written reprimand expand at that point?
 17 A. Yes.
 18 Q. What did they include now?
 19 A. Untruthfulness.
 20 Q. Why did you reach the opinion that he was being
 21 untruthful?
 22 A. Because he was so specific about Officer Hermens' parking
 23 in view and within 50 yards and say he could read the apartment
 24 numbers from 50 yards, and then when I questioned whether he
 25 could really read from that far, "Well, maybe it wasn't

1 50 yards, but I could still read them."
 2 But he was so very specific about it that I think he
 3 intentionally misled us and I think he forgot there was video,
 4 because he didn't ever mention it to us.
 5 Q. So after you reviewed the video, did you confer with Randy
 6 Wardlow about what you had discovered?
 7 A. I believe so.
 8 Q. Was a new version of the written reprimand drafted at that
 9 point?
 10 A. Yes. There was the stuff about untruthfulness added in.
 11 Q. Who do you recall drafting the written reprimand?
 12 A. Sergeant Cameron drafted the original, and I remember
 13 either we sat down together and talked about editing, or I
 14 edited it a little bit.
 15 Q. Did your editing come after you had watched the videos?
 16 A. Yes.
 17 Q. Did Randy Wardlow review the written reprimand before it
 18 was issued?
 19 A. Yes, he did.
 20 Q. Do you recall there being discussions with Randy Wardlow
 21 about this written reprimand and its contents?
 22 A. Yes. And I -- I believe I sent it to him for potential
 23 edits, as well.
 24 Q. Do you recall discussing the written reprimand with
 25 Chief McDermid before it was issued?

1 A. Yes.
 2 Q. What was her role in the reprimand?
 3 A. It was just to be informed about it, as far as I remember .
 4 MS. COIT: Permission to approach.
 5 THE COURT: You may. What's the exhibit number?
 6 MS. COIT: Plaintiff's Exhibit 1, and it's been
 7 received.
 8 THE COURT: All right. Thank you.
 9 BY MS. COIT: (Continuing)
 10 Q. All right. Is Exhibit 1 the written reprimand that was
 11 issued to Mr. Cleavenger?
 12 A. Yes, it is.
 13 Q. And tell us why the written reprimand is only from
 14 Sergeant Cameron.
 15 A. Because discipline comes from the primary supervisor.
 16 Q. And that's a requirement in the collective bargaining
 17 agreement; correct?
 18 A. I believe that's what it said. I think we actually have a
 19 policy about it now, too. I don't know if we did back then.
 20 Q. From your recollection of the discussion that went into
 21 preparing and issuing the written reprimand, were you,
 22 Mr. Wardlow, Chief McDermid all in favor of issuing this
 23 reprimand?
 24 A. Can you reask that?
 25 Q. Were you and Chief McDermid and Randy Wardlow all

1 supportive of issuing this written reprimand to Mr. Cleavenger?
 2 A. Yes.
 3 Q. All right. This version of the reprimand includes
 4 discussion of the meeting that you had with Mr. Cleavenger on
 5 April 7th. Why was that added to this reprimand?
 6 A. Mind if I review it real quick?
 7 Q. Yes. Absolutely.
 8 A. Yes. That was added in because of the discussion we had
 9 where he said that we should be talking to Hermens instead of
 10 him and he could read the apartment numbers as soon as he
 11 passed Officer Hermens' vehicle.
 12 Q. All right. There's also discussion in here about
 13 Mr. Cleavenger insisting this was a cold call and not a real
 14 threat. Why did that continue to be a concern for you?
 15 A. It just seemed he couldn't accept the fact that he
 16 potentially put himself and others in danger, and that just
 17 seemed to be kind of a common theme at times.
 18 And, to me, if you can't accept you have done something
 19 wrong, it's hard to retrain them.
 20 Q. Why is it important to not tip off people in an active
 21 call of officer presence?
 22 A. It's for a lot of safety reasons. I mean, sometimes
 23 throughout years I've gotten calls -- I mean, our people have
 24 been shot at by snipers and whatnot. You don't know what the
 25 call is going to be just because it's a cold report call. I'm

1 not saying this one was, but if you had a cold report call, it
 2 might be something completely different. There could be a
 3 domestic violence issue going on in there or they could be
 4 lying in wait for the officers.
 5 No matter what, you don't -- you try your best not to pass
 6 in front of an apartment; but, if you do -- sometimes that
 7 happens, because what you're not going to know exactly where
 8 every house is and the numbers might be missing or you couldn't
 9 see them. But you don't try to park in front of it. You would
 10 park a distance away from it. That way, if there was any
 11 potential threat, you're farther away now.
 12 Q. Now, there's been some testimony in this case about
 13 Officer Hermens actually driving up to the front of this
 14 apartment. Did you become aware of that incident at some
 15 point?
 16 A. Yes.
 17 Q. Did you talk to Officer Hermens about that?
 18 A. Yes, I did.
 19 Q. What did you counsel him about?
 20 A. About whether it's a report or not that you can't go and
 21 park right in front of an apartment or even try to pass by it,
 22 and he said he understood; he wouldn't do it again.
 23 Q. And did Officer Hermens receive discipline for that
 24 action?
 25 A. No.

1 Q. Why not?
 2 A. He -- it's the first time I had to talk to him about
 3 stuff. Well, I talked to him about the allegation that he, you
 4 know, put everyone in danger before, but this is the first time
 5 I ever had proof that he potentially put himself or anyone else
 6 in potential danger. He accepted it and he said he wouldn't do
 7 it again, so I didn't feel the need for discipline.
 8 Q. Was your concern with Mr. Cleavenger in this Spencer View
 9 incident the fact that he had driven in front of the house and
 10 not realized it was an active call, or was it more that he
 11 couldn't appreciate that perhaps he was wrong; that it wasn't a
 12 cold call?
 13 A. Yeah. It was the fact that he went to such lengths to
 14 blame somebody else and the fact that he just couldn't
 15 comprehend that he had done anything potentially unsafe.
 16 MS. COIT: Your Honor, we're going to get into a
 17 whole different topic if you want to break now.
 18 THE COURT: It's noon. All right.
 19 MS. COIT: Yeah.
 20 THE COURT: Okay. 1:00. So we'll see you at 1:00.
 21 Don't discuss this matter or form or express your opinions on
 22 anything. Have a nice lunch.
 23 (Jury not present.)
 24 (Lunch recess taken.)
 25 THE COURT: The jury is present. All parties are

1 present. Be seated. All counsel are present.

2 They agreed between themselves to call a witness who's

3 available at 1:00, out of order, and then they're going to

4 continue with the examination for Lieutenant Lebrecht on direct

5 and cross.

6 So, Counsel, if you would like to call the next witness

7 please.

8 MS. COIT: Defendant recalls Lieutenant Morrow to the

9 stand.

10 THE COURT: Thank you, sir. Step forward. We will

11 reswear you at this time.

12 MICHAEL MORROW,

13 called as a witness in behalf of the Defendants, being first

14 duly sworn, is examined and testified as follows:

15 THE WITNESS: I do.

16 THE COURT: Thank you. Be seated there. Once again,

17 pull your chair close to the microphone. Thank you.

18 Would you restate your name for the jury, please, and

19 spell your last name?

20 THE WITNESS: Yes, Your Honor. Michael Lee Morrow.

21 M-O-R-R-O-W.

22 THE COURT: Thank you. Counsel, if you would like to

23 continue your examination, please.

24 MS. COIT: Thank you, Your Honor. We briefly

25 introduced and it was received Exhibit 331 for the defendants.

1 Permission to publish his report again?

2 THE COURT: You may.

3

4 DIRECT EXAMINATION

5 BY MS. COIT:

6 Q. Lieutenant Morrow, thank you for coming back.

7 A. You're welcome, ma'am.

8 Q. Last time we talked we were discussing the allegation --

9 one of the spinoff allegations into whether or not

10 Mr. Cleavenger had violated policy by conducting a traffic

11 stop, and I think you had explained that that was not

12 sustained.

13 My question for you, and I don't think we were able to

14 explain it, is what you did to investigate that allegation.

15 A. Yes, ma'am. I reviewed -- well, first, I interviewed the

16 supervisors from the patrol operation side to get an

17 understanding as to what a traffic stop was and whether the

18 traffic stops were permissible.

19 Further, I researched our policies and could not find any

20 written record of a policy outlining what a traffic stop was to

21 include a campus version of a traffic stop, nor any

22 restrictions on conducting a traffic stop written-wise.

23 Certainly, within the supervisor's mindset, a conventional

24 traffic stop was not allowed, but a campus version was. But,

25 again, there was no written record that I could find to

1 substantiate that belief.

2 Q. Do you recall interviewing Mr. Cleavenger's field training

3 officer Michael Drake?

4 A. Yes, I do.

5 Q. What did he explain to you about what he taught

6 Mr. Cleavenger regarding traffic stops?

7 A. He basically stated that traffic stops were not allowed

8 other than a campus version.

9 Q. Did he explain that that is what he had taught

10 Mr. Cleavenger as part of his field training?

11 A. Well, he -- if I recall correctly, he explained that he

12 did not teach him to conduct a traffic stop. But if there was

13 a traffic stop, it was a campus version, which an officer would

14 not use traffic signals. They activate traffic lights to force

15 a vehicle over, rather wait for the driver to pull over

16 voluntarily and leave the vehicle before being approached.

17 Q. All right. And then allegation -- I have it up on your

18 screen. Allegation number four. The violation of recording --

19 the recording statute. Did you have to do anything further to

20 investigate that allegation?

21 A. Well, from reviewing the video recordings substantiated

22 that there was no admonishment or briefing made to the drivers

23 that the conversations were being recorded as well as

24 Mr. Cleavenger admitting that he did not admonish them.

25 Q. All right. And on page 44 of your report, in the middle

1 of your findings, it says, "Officer Cleavenger claimed his

2 routine of making introductory remarks to each of the drivers

3 on both incidents to include the conversations were being

4 recorded were thrown off, interrupted when he initially made

5 contact with each of the involved parties."

6 Is that what Mr. Cleavenger told you?

7 A. Yes, ma'am.

8 Q. All right. And then the final allegation, the fit -- the

9 spinoff allegations with a fitness for duty. Allegation number

10 five. Can you explain for the jury what "fitness for duty"

11 means in law enforcement terms?

12 A. Well, basically that the employee has the mental,

13 emotional, and physical capabilities to carry out their

14 assigned duties.

15 Q. Why is fitness for duty important for an officer?

16 A. Well, for safety of the officer and safety of the public,

17 in very general terms. The ability to carry out assigned

18 duties.

19 MS. COIT: All right. Let's call that out.

20 BY MS. COIT: (Continuing)

21 Q. I just want to look at some of the things you put in your

22 findings. These are examples of questionable behavior that was

23 of concern. The first one is lack of command presence and an

24 inability to remain focused by being easily interrupted by

25 unanticipated questions or statements from persons he

1 encounters.
 2 Can you explain for me what you were conveying there?
 3 A. Yes. Mr. Cleavenger stated the reason he was unable to
 4 admonish either driver that the conversations were being
 5 recorded was because his routine was interrupted when they
 6 asked him a question.
 7 The first driver, the female student, asked him basically
 8 was it about her tags, and the second driver he claimed
 9 challenged his authority to conduct the traffic stop, and both
 10 times threw him off.
 11 Police officers -- excuse me, public safety officers
 12 conducting a stop should be able to remain focused and
 13 anticipate questions are going to be asked. If you stop
 14 someone, often we're trained to explain the nature of the stop,
 15 identify yourself without losing track of the focus of the
 16 stop. So it was concern on both of these instances his reason
 17 he gave could suggest that he's easily distracted.
 18 Q. All right. The next category: His inability to accept
 19 responsibility for his actions with denial of culpability and
 20 projection of blame and even when confronted with evidence to
 21 the contrary.
 22 Tell us what you meant when you were putting that in there
 23 as a concern.
 24 A. Yes. For the traffic stop of the student, Mr. Cleavenger
 25 failed to understand the concern of hers that she expressed

1 What I tried to explain to him is, when he's driving,
 2 there was no vehicle in front of him for the lights to bounce
 3 off and reflect back to him but they were on.
 4 And when I showed him how the in-car video camera system
 5 tracked these different aspects of the vehicle, he even made
 6 the assertion that the equipment was faulty. Not his
 7 recollection of turning on the lights, but likely the
 8 equipment. So when I further showed him, "Here's when you
 9 applied the brakes. Here's the speed you were going," then he
 10 eventually made the comment, well, he could have turned them on
 11 earlier than he thought.
 12 Q. And then -- I'm sorry. Go back to the first page. All
 13 right. The next category was a propensity to either exaggerate
 14 or embellish information as factual or the inability to recall
 15 information with accuracy. What did you base that statement
 16 on?
 17 A. Well, when asking about his stops on this particular one,
 18 and he made a mention that while he was a traffic petitions
 19 officer, he processed tons and tons of traffic violations, and
 20 I asked him again, "Tons?" And then he said, "Well, dozens and
 21 dozens."
 22 I went back and pulled up the number of petitions that he
 23 had processed as a traffic petition officer, and there was a
 24 little more than 1,600 of them. And of those 1,600, there were
 25 12 for moving violations. Again, the moving violations could

1 about his actions. He asked, "What? Was I being too
 2 friendly?" He kept going back to being too friendly. He just
 3 didn't see that asking a female student for identifiers that
 4 weren't listed on the driver's license could raise concern to
 5 the driver as to "Why am I being asked these questions?"
 6 Also, with the second traffic stop, or -- or the one of
 7 the driver with the expired plates, again, he just could not
 8 understand why the driver was upset and even made the comment
 9 to the driver, "What's the big deal," when she's challenged his
 10 authority, and he just would not understand that that was a
 11 concern of hers and kept asserting to her he had the authority
 12 to cite her for the expired plates.
 13 Q. Now, along the same lines, did you also have an issue with
 14 him trying to convince him that he had activated his lights too
 15 early?
 16 A. Yes. When I asked him at what point did he turn on his
 17 lights, he stated after the vehicle had stopped and he came up
 18 on it. The in-car video system tracks when a vehicle -- the
 19 lights are activated, as well as the speed of the vehicle, when
 20 brakes are applied. And I showed him at what point the lights
 21 were activated, and that was upon completing his U-turn. And
 22 he became argumentative about it, stating that you can see he
 23 turned the lights on after the vehicle was stopped by the
 24 reflection of the traffic -- of the lights on the stopped
 25 vehicle.

1 be either for vehicles or it could be for bicycles. Seven of
 2 those were for bicycles and only five were for vehicles. So
 3 the amount that he actually processed for a traffic violation
 4 involving a vehicle was less than one percent. That was just
 5 one example.
 6 I'm trying to recall from my investigation. I don't have
 7 that in front of me.
 8 Q. Let me take you down, before you move on from that, to the
 9 paragraph I have called out on the screen for you. The last
 10 portion where you say, "Regardless of the cause, it reflects
 11 poorly upon his integrity when he cites information with
 12 certainty and confidence and it is inaccurate. This deficiency
 13 can potentially and severely impact his ability to testify in
 14 court as an employee of the Department of Public Safety."
 15 What did you mean by that statement?
 16 A. Well, if you go into court, if you don't know something,
 17 just plainly state, "I don't recall it," rather than to assert
 18 something with a high degree of confidence and have it to be
 19 inaccurate. That, if shown, would certainly destroy the
 20 integrity of the case.
 21 Q. All right. And did Mr. Cleavenger also talk to you about
 22 a letter of clarification he had received?
 23 A. He did.
 24 Q. Was that another area of concern for you for the
 25 exaggeration or embellishment?

1 A. Yes. He stated that as a result of receiving a letter of
 2 clarification for failing to run a person for wants or
 3 warrants, he did that routinely to maintain consistency.
 4 In reviewing the letter of clarification, it wasn't, as
 5 portrayed to me, that he was admonished for not running
 6 someone. The circumstances were different in that he was
 7 giving a ride to a person, an unknown person, and there was no
 8 record of him running that person for wants and warrants before
 9 putting him in the vehicle.
 10 The letter of clarification was he had asserted that he
 11 ran the person for wants and warrants not on the radio. Once
 12 it was determined there was no radio traffic to show that he
 13 ran it, but rather he commented he called by phone and ran
 14 wants and warrants by phone. The letter of clarification was
 15 not to run wants and warrants by phone, but to use the radio.
 16 So it was not as portrayed that, "Hey, you didn't run this
 17 person for wants and warrants, and you have to do that."
 18 Q. Back on page 45, under your findings, another area of
 19 concern was his difficulty in applying learned legal training
 20 to hands-on applications during contacts with persons in the
 21 field.
 22 What did this statement mean?
 23 A. Well, basically, with the traffic stop for the expired
 24 registration, as a public safety officer, Mr. Cleavenger did
 25 not have authority to enforce that violation, yet he would not

1 acknowledge that -- that he didn't.
 2 He likened that, conducting a traffic stop for that
 3 violation, to stopping someone on campus along the river for
 4 camping, which traffic officers -- excuse me, public safety
 5 officers did not have authority to cite for illegal camping,
 6 but he said we have the authority to stop them and talk to them
 7 and approach the subject.
 8 What he failed to realize is that stopping someone on the
 9 street, they don't have to cooperate unless you have reasonable
 10 suspicion to believe that they have committed a crime or are
 11 about to commit a crime, then you can detain them.
 12 Stopping to talk to someone for illegal camping, they
 13 could choose not to cooperate and walk away and there's nothing
 14 a public safety officer could do about that. He wanted to
 15 liken that to the traffic stop in which the traffic stop, that
 16 driver did not have the ability to walk away or drive away.
 17 They were detained until released by Mr. Cleavenger. And that
 18 was a concern that he did not see the difference between the
 19 two situations.
 20 Q. All right. And, finally, a concern was his self-reported
 21 condition of staying awake for 35 consecutive hours and the
 22 impact this potentially has on his ability to safely and
 23 competently perform his assigned duties.
 24 I think you discussed this on page 47. Can you tell us
 25 what this concern was about?

1 A. When Mr. Cleavenger reviewed his written statement, he
 2 wanted added onto it that he had been up for 35 hours at the
 3 time of the interview. Had he made that known to me, I
 4 certainly would have remembered being up for 35 hours because I
 5 would have been concerned whether he was of the frame of mind
 6 to be interviewed and would have asked him questions along
 7 those lines.
 8 But I did add it to the written statement with an
 9 asterisk, indicating this is what he wanted to have added.
 10 But, again, that caused concern about either his ability to
 11 recall information accurately or just inadvertent memory loss.
 12 But certainly 35 hours -- being up for 35 hours straight would
 13 be a concern, not only then, but is he doing that at other
 14 times, especially while as a public safety officer?
 15 Q. All right. Then down to the bottom of that page, I think
 16 you made some general -- go to the next page too -- some
 17 general observations about what Mr. Cleavenger -- whether or
 18 not he could competently perform or demonstrate the important
 19 mindset.
 20 Explain to me what this quotation -- where this comes from
 21 and why this is important.
 22 A. It -- the mental conditioning, just talking about as a
 23 public safety officer, you don't blindly put trust in people.
 24 You put trust in people who have earned it. Basically, for
 25 officer safety purposes, you -- you -- such as putting a person

1 in your vehicle without validating the potential harm there is,
 2 and it's -- it's just something you don't do tactically.
 3 But I was not looking at a performance issue. I was
 4 looking more at the allegations, and these were the spinoff
 5 that comes back to the mental conditioning and tactical-wise
 6 command presence.
 7 Q. So, ultimately, based on these findings, did you suggest
 8 that a fitness for duty examination be done?
 9 A. Well, I did not rule on that one way or the other because
 10 I'm not in a position to make that judgment myself, but it was
 11 suggested that it should be referred or considered for referral
 12 to a police psychologist to evaluate Mr. Cleavenger.
 13 Q. Why can't you make that determination yourself, whether or
 14 not he's fit for duty?
 15 A. It's not within my scope of duties.
 16 Q. Does that have to go to a psychiatrist or a psychologist?
 17 A. It should.
 18 Q. Do you take an allegation or a referral for fitness for
 19 duty -- do you take that referral lightly?
 20 A. No. It's very serious.
 21 Q. Yet you felt in this case it was warranted?
 22 A. Well, based upon the information that I had outlined.
 23 Q. Do you believe Mr. Cleavenger should work in law
 24 enforcement?
 25 A. That's -- based upon -- I would have to have you go into

1 more detail. If it's based upon the findings of the internal
 2 affairs investigation that he violated a person's right with an
 3 illegal stop, I think that there should be corrective action.
 4 He never acknowledged that he did wrong in that. I feel
 5 that -- again, in my position, I was not to make
 6 recommendations for corrective action, so that's a difficult
 7 question to answer.
 8 Q. Who ultimately was to make that decision?
 9 A. Well, ultimately, the chief would consult with HR and
 10 general counsel to come to a decision.
 11 Q. Were any of the findings that you made in your internal
 12 affairs investigation motivated by an intent to retaliate
 13 against Mr. Cleavenger for anything?
 14 A. No, ma'am.
 15 Q. Did any of the defendants -- Chief McDermid,
 16 Lieutenant Lebrecht, or Sergeant Cameron -- influence your
 17 findings in that investigation?
 18 A. No, ma'am.
 19 Q. Did you agree with Chief McDermid's decision to terminate
 20 Mr. Cleavenger's employment?
 21 A. Under the circumstances, yes.
 22 Q. There's one other area I want to talk with you about real
 23 quickly. Linda King, from HR, are you familiar with her?
 24 A. Yes, ma'am.
 25 Q. And she testified last week regarding some follow-up

1 investigations she did after her predismissal hearing with you.
 2 MS. COIT: Permission to approach, Your Honor?
 3 THE COURT: You may tell me the exhibit first.
 4 MS. COIT: Defendant's 427.
 5 THE COURT: 427. Thank you.
 6 BY MS. COIT: (Continuing)
 7 Q. Do you recognize Exhibit 427?
 8 A. Yes, I do.
 9 Q. What is that?
 10 A. It's an email response from me to Linda King in regards to
 11 her inquiry whether Lieutenant Lebrecht's notes and files
 12 reflect a discussion about a policy. Basically, trying to
 13 determine whether Lieutenant Lebrecht was present during a
 14 briefing.
 15 MS. COIT: Your Honor, defendants offer Exhibit 427.
 16 MR. MCDUGAL: No objection.
 17 THE COURT: Received.
 18 MS. COIT: Permission to publish?
 19 THE COURT: You may.
 20 BY MS. COIT: (Continuing)
 21 Q. Let's look at page 2. The email from Linda King. She
 22 says, "In his predismissal hearing, James alleged that
 23 Lebrecht's notes and files reflect a discussion about a
 24 recording policy that could not have existed."
 25 Did you do some research in response to that inquiry to

1 determine whether or not Lieutenant Lebrecht -- whether or not
 2 his notes were accurate, reflecting that the discussion did
 3 occur?
 4 A. Yes, I did.
 5 Q. All right. Let's look at the first page. Is this the
 6 email that you sent to Ms. King setting forth your findings?
 7 A. Yes, it is.
 8 Q. And just summarize for us. What did you conclude?
 9 A. I concluded that Lieutenant Lebrecht was at the briefing
 10 based upon a computerize-aided dispatch query in which
 11 Lieutenant Lebrecht called into service. He had finished his
 12 duty at a football game and came back on campus to fulfill his
 13 shift and attended a briefing at that time.
 14 Q. Did you understand Ms. King's inquiry to you to be
 15 stemming from an allegation that Mr. Cleavenger had made that
 16 he had never been trained that he had to advise people he was
 17 recording them?
 18 A. I'm sorry. Would you repeat that question.
 19 Q. What did you understand Linda King was following up on?
 20 What claim had Mr. Cleavenger made to her?
 21 A. Let me -- basically, that a discussion did not occur
 22 because Lieutenant Lebrecht could not have been present during
 23 the briefing to give out that information.
 24 Q. In your internal affairs investigation, Mr. Cleavenger, in
 25 fact, told you that it was part of his introductory remarks to

1 advise people he was recording them; correct?
 2 A. Yes, he did.
 3 Q. All right. I just want to look at one -- your last
 4 sentence in this top paragraph that you make to Ms. King. "I
 5 have difficulty believing further assertions made by this
 6 employee who's already been established in my internal
 7 investigation as one who exaggerates information and is either
 8 unable to recall information accurately or intentionally
 9 provides misleading information."
 10 Is that an accurate portrayal of your thoughts at that
 11 time?
 12 A. Yes, it is.
 13 MS. COIT: Thank you, sir. Nothing else.
 14 THE COURT: Cross-examination?
 15
 16 CROSS-EXAMINATION
 17 BY MR. MCDUGAL:
 18 Q. Good afternoon.
 19 A. Good afternoon, sir.
 20 Q. Mr. Morrow, I'm Mark McDougal. I think we met briefly in
 21 the hallway.
 22 A. Yes, sir.
 23 Q. When did you first form the opinion that Mr. Cleavenger
 24 should be fired?
 25 A. I don't recall a specific time, but certainly at some

1 point during when -- the conclusion of the investigation and at
 2 the time he was terminated.
 3 Q. So after you had done a thorough investigation, looked at
 4 the webcams, interviewed a lot of people, done your long IA
 5 report, that's when you decided he should be fired?
 6 A. No, sir. Not at that point.
 7 Q. At what point did you?
 8 A. Again, I do not recall a specific time, but certainly in
 9 agreement with the decision that was made.
 10 Q. And can you help with an understanding of an internal
 11 affairs investigation? Should the person who does the
 12 investigation be impartial?
 13 A. Absolutely.
 14 Q. Should they be in a position where they haven't prejudged
 15 the outcome?
 16 A. Yes, sir.
 17 Q. And do you know when you first started the internal
 18 affairs investigation?
 19 A. That would have been shortly after I came back from leave.
 20 A voicemail was on the recorder. I think, officially, it was
 21 approximately a month later. It's in the investigation when
 22 the preliminary inquiry was opened up as an internal affairs
 23 investigation.
 24 Q. You go from preliminary inquiry to formal investigation?
 25 A. Yes, sir.

1 Q. Is the benchmark for when that formal investigation
 2 started when you interviewed Mr. Cleavenger?
 3 A. No, sir.
 4 Q. When did it start? Do you know?
 5 A. Again, it's in the IA file. I think it was somewhere 1st
 6 of June.
 7 Q. Okay.
 8 A. But it was after locating the voicemail message between
 9 the dispatcher and the female student in which she went into
 10 great detail as to her state of mind and concern about the
 11 public safety officer who pulled her over. That was at the
 12 time the preliminary inquiry was converted into an internal
 13 affairs investigation.
 14 Q. Can you tell us why it's so important that someone doing
 15 an IA investigation wouldn't have a predetermined, you know --
 16 they wouldn't start off with the notion that Mr. Cleavenger
 17 would be fired. How important would that be?
 18 A. You want to be objective.
 19 Q. One second, please.
 20 And if an IA report is done by somebody who's not
 21 objective, should it be thrown out?
 22 A. If you could show that it's not objective.
 23 Q. It was done by somebody that was not impartial.
 24 A. I -- give me a specific example. I can answer you better,
 25 sir.

1 Q. Isn't it a fact that you thought that Mr. Cleavenger
 2 should be fired before you even started the IA investigation?
 3 A. No, sir. Not before the IA.
 4 Q. On your own? On your own?
 5 A. I'm saying I did not think he should be fired for the
 6 internal affairs investigation before it was concluded.
 7 Q. That wasn't my question. Did you think he should be fired
 8 before you started the internal affairs investigation?
 9 A. Fired for what, sir?
 10 Q. Well, that's what we're going to get into.
 11 MR. MCDOUGAL: May I approach?
 12 THE COURT: You may. Does this exhibit have a
 13 number?
 14 MR. MCDOUGAL: 279.
 15 THE COURT: 279.
 16 MS. COIT: Do you have a copy of that?
 17 MR. MCDOUGAL: What?
 18 MS. COIT: Do you have a copy of it?
 19 MR. MCDOUGAL: Another copy of it? That one might
 20 have some highlighting on it.
 21 THE WITNESS: (Viewing document .)
 22 BY MR. MCDOUGAL: (Continuing)
 23 Q. Have you had a chance to read the email?
 24 A. The series emails.
 25 Q. Okay. Are these emails that you were involved in?

1 A. I'm copied in some and directed in one, yes.
 2 MR. MCDOUGAL: I want to offer 272 -- 279. I'm
 3 sorry.
 4 THE COURT: Received.
 5 MR. MCDOUGAL: May it be published?
 6 THE COURT: It may.
 7 MR. MCDOUGAL: Mr. Hess, can you go up to "From
 8 Mike Morrow, sent Thursday, May 17th"? It's the last page of
 9 the exhibit.
 10 Let me have you do one thing first. Can you pull up
 11 Exhibit 331? I want to make sure we have the dates right.
 12 Page 433. Bates number 433.
 13 BY MR. MCDOUGAL: (Continuing)
 14 Q. Sir, in your IA report, can you read to me on the screen
 15 what is documented on June 1, 2012?
 16 A. I briefed -- June 1, 2012, I briefed Acting Chief of
 17 Police McDermid as to my meeting with Officer Cleavenger and
 18 advised of the investigation.
 19 MR. MCDOUGAL: Now can you pull up the May 17, 2012,
 20 approximately two weeks later -- earlier -- two weeks earlier.
 21 BY MR. MCDOUGAL: (Continuing)
 22 Q. Is this your email?
 23 A. It is.
 24 Q. Can you read the first sentence?
 25 A. Yes. This is my email in response to

1 Lieutenant Lebrecht's performance for duty investigation, not
 2 the IA investigation.
 3 Q. I agree.
 4 A. "I believe, moving forward, dismissal for cause is
 5 appropriate. I suggest not pursuing criminal charges in that
 6 the actions are minor compared to what generally is pursued
 7 against law enforcement officials and is what district
 8 attorneys prefer to present to a jury. Plus, it will likely
 9 open the door for counter-allegations against other PSOs who
 10 may have also failed to advise someone of the recording or stop
 11 off campus property -- or failed to advise someone of a
 12 recording or stop off campus property and now we are besieged
 13 with possibly numerous allegations of similar activities and
 14 expected to open and investigate all for consistency and
 15 fairness. I can see him making false allegations against
 16 others as misdirection and deflection defense."
 17 Q. Okay. So before you started this IA investigation, you
 18 thought he should be fired?
 19 A. That's not true, sir. I opened the IA -- you're saying
 20 before I opened the IA, and this is following. The IA is
 21 already under investigation, and this is in response to the
 22 performance investigation that Lieutenant Lebrecht conducted.
 23 Q. As of this date, you hadn't even watched a dash cam, had
 24 you?
 25 A. I would have to look at the IA report and the dates in

1 there that I viewed dash cams are in that.
 2 Q. Did you believe that your IA investigation should be done
 3 independently?
 4 A. Yes.
 5 Q. Can you read the second paragraph of your email?
 6 A. "The product Brandon put together we can format into an IA
 7 format with supporting exhibits and make a strong presentation
 8 for HR. I can assist Brandon with the editing and formatting.
 9 We can also work into it the conversation with Dr. Corey. I
 10 believe it would be appropriate and relevant. If Cleavenger
 11 asks -- was to challenge Dr. Corey's opinion and it would open
 12 the door for his further involvement and possibly an assessment
 13 or disclosure of the psych evaluation."
 14 This was referring to a separate IA. Not the one that I
 15 had conducted.
 16 Q. I thought you said it was a performance evaluation.
 17 A. Well, I'm making a referral here that it can be formatted
 18 into an IA. It's of what he found of the misconduct or
 19 misperformances in his investigation could be rolled over into
 20 an IA, and it should be when he finds that Mr. Cleavenger was
 21 failing to advise people that they're being recorded, which is
 22 against state law.
 23 Q. This is not the first time Dr. Corey came up. You said at
 24 the very end of your IA report that maybe Dr. Corey -- or maybe
 25 a psychological assessment should be done. Dr. Corey does

1 psychological assessments; right?
 2 A. That's correct.
 3 Q. So even before you started your IA, you were thinking
 4 about Dr. Corey and how he might be used with HR?
 5 A. That's correct.
 6 Q. And, in fact --
 7 MR. MCDOUGAL: May I approach?
 8 THE COURT: Yes. But tell me the exhibit number.
 9 MR. MCDOUGAL: Exhibit 280.
 10 THE COURT: 280. Thank you.
 11 BY MR. MCDOUGAL: (Continuing)
 12 Q. Sir, this has some highlighting on it. The highlighting
 13 is not in the original. I don't want to mislead you.
 14 A. Thank you, sir.
 15 Q. Do you recognize Exhibit 280 or -- when you have a chance
 16 to read it.
 17 A. Yes, I recognize this.
 18 Q. Are these your emails and an email from Dave Corey?
 19 A. It's my email to Dr. Corey, yes.
 20 MR. MCDOUGAL: Plaintiff offers Exhibit 280.
 21 THE COURT: Received.
 22 MS. COIT: Do you have a copy of that one?
 23 BY MR. MCDOUGAL: (Continuing)
 24 Q. Can you let me know -- can you look at your first email to
 25 Dr. Corey in that chain and tell me the date of it?

1 A. The date is April 23, 2012.
 2 Q. What prompted this email?
 3 A. I don't recall. I'm trying to read it and determine what
 4 precipitated it.
 5 THE COURT: Counsel, the screen went blank.
 6 MR. MCDOUGAL: Oh.
 7 THE COURT: Do you have --
 8 MR. MCDOUGAL: We haven't published it yet. Sorry.
 9 THE COURT: It went blank.
 10 MR. MCDOUGAL: Can you publish the April 23rd email,
 11 Mr. Hess? Exhibit 280. Bates number 11247.
 12 THE COURT: No. Just a moment. I thought you were
 13 referring to 280, the May 17, 2012, email.
 14 MR. MCDOUGAL: That's 279. We're at 280 now.
 15 THE COURT: All right. I understand that. What's
 16 the date on your email?
 17 MR. MCDOUGAL: April 23, 2012.
 18 THE COURT: Okay. You misstated that. You before
 19 said May 17th.
 20 MR. MCDOUGAL: Sorry.
 21 MR. HESS: May I publish?
 22 MR. MCDOUGAL: Yes.
 23 BY MR. MCDOUGAL: (Continuing)
 24 Q. All right.
 25 A. Yes, sir.

1 Q. You don't remember why you sent this?
 2 A. I would think it would be in relation to the complaints
 3 received that opened the internal affairs investigation I
 4 conducted.
 5 Q. The complaints about the two traffic stops?
 6 A. That's the only thing that comes to mind.
 7 Q. At the time were you aware that other officers were making
 8 traffic stops?
 9 A. No, sir.
 10 Q. You first became aware of that during the IA
 11 investigation?
 12 A. The extent of them, yes. Traffic stops, the campus
 13 version. Again, on the internal affairs side, training side.
 14 I didn't have a lot to do with the operations side.
 15 Q. What was your formal title?
 16 A. At the U of O?
 17 Q. Yeah.
 18 A. The lieutenant of professional standards and training.
 19 Q. Wouldn't training be the operations side?
 20 A. No, sir.
 21 Q. What is it?
 22 A. Training.
 23 Q. Training who?
 24 A. Officers.
 25 Q. So you would expect that you, being in charge of training

1 officers, would know the policy on traffic stops; correct?
 2 A. We didn't have a policy on traffic stops, as I testified
 3 earlier.
 4 Q. Did you know that at the time?
 5 A. No. I did not know that there was not a written policy in
 6 effect.
 7 Q. But you thought his behavior was so -- of such a nature
 8 that he might need a psychological evaluation?
 9 A. Certainly from these documents, absolutely. Fitness for
 10 duty would be the more appropriate term. Not a psychiatric,
 11 but a fitness-for-duty examination.
 12 Q. Who took over your position?
 13 A. Lieutenant Lebrecht.
 14 Q. Do you know whether or not Officer Cleavenger, under the
 15 Oregon Revised Statutes, had the authority to make a stop?
 16 A. No, he did not.
 17 Q. Do you have any understanding or any reason to think that
 18 Lieutenant Andy Bechdolt would not know whether or not
 19 Mr. Cleavenger had a right to make a traffic stop?
 20 A. He certainly should know.
 21 Q. Would you have any explanation for why he testified that,
 22 yes, he had a right to make a stop?
 23 A. I don't know. I could not answer for Lieutenant Bechdolt.
 24 Q. When you say he didn't have a right to make a stop, did
 25 you look at the law to see what it said?

1 A. Yes. I researched the law. I researched what a public
 2 safety officer's legal authority was.
 3 Q. Any reason why you didn't put the prohibition against him
 4 making a stop in your IA report?
 5 A. Because, again, once I was thorough in my investigation, I
 6 determined that there was no policy to prohibit that, even
 7 though verbally the supervisors had made known to the officers
 8 they could not do a traffic stop other than a campus version of
 9 a traffic stop.
 10 Q. Sir, I think we've already established you didn't have a
 11 policy. Now I'm asking about the law.
 12 You say you went and researched the law and saw that the
 13 law prohibited it. Any reason you didn't put a citation to the
 14 law in your IA report?
 15 A. The law did not prohibit a traffic stop. The law
 16 prohibited Mr. Cleavenger, without the authority, to stop for
 17 an expired license registration. That's what the issue was.
 18 The issue was not whether he had the lawful authority to
 19 conduct a traffic stop. It's what lawful authority he had to
 20 enforce an expired license plate, which he did not have the
 21 authority to do.
 22 Q. Did you put that -- the prohibition against him doing
 23 that, did you put that in your report?
 24 A. If we look at the report, I can advise you on that. My
 25 report is pretty complete, as you said earlier.

1 Q. Right. Well, the jury will have the report, so I'll skip
 2 that. If it's not in there, you didn't put it in there. Fair
 3 enough?
 4 A. Fair enough, if it's not in there.
 5 Q. But you did put some laws in; right?
 6 A. I'm sorry, sir?
 7 Q. Did you put some laws in; right?
 8 A. What laws are you referring to, sir?
 9 Q. The dash cam recording. Did you reference that law?
 10 A. Yes, sir, I did.
 11 Q. Now, on the dash cam recording, were you responsible for
 12 training in regard to dash cam recordings?
 13 A. No. I don't believe I did until we had a policy in effect
 14 on that. And then our field training officers would train the
 15 officers on that. The operations side, again, supervisors
 16 would train the officers on that.
 17 Q. That was 2013. After all this; right?
 18 A. After all of what, sir?
 19 Q. After Mr. Cleavenger -- your report on Mr. Cleavenger.
 20 After he was fired is when the new dash cam policy was written?
 21 A. The new policy, in general, for the police department was
 22 rolled out as a whole. We did not piecemeal policies out once
 23 we started incorporating a policy manual.
 24 Q. Did they have a policy manual under your watch?
 25 A. There was a manual. Yes, sir.

1 Q. Okay. Did it have this video cam recording statutory
 2 requirement in it?
 3 A. I believe we -- we had some type of ICB, but I cannot
 4 recall what it is.
 5 Q. The ORS -- the ORS about audio video cam recording
 6 mentioned anywhere?
 7 A. In that policy, sir?
 8 Q. Yeah.
 9 A. Again, I don't recall the policy without having to look at
 10 it.
 11 Q. Let's put it this way: If the policy was there in either
 12 the field training manual, the department's policies and
 13 procedures manual, or even a reserve police academy handbook,
 14 that's something that UOPD could easily get and bring into
 15 court to say, "Hey, we did have a policy," or "He was trained
 16 on a policy, and here it is"; correct?
 17 A. You're asking me to answer for our counsel over there, and
 18 I don't feel it's my scope to answer for our counsel.
 19 Q. Let me question it differently. Certainly, Mr. Lebrecht,
 20 Mr. Cameron, or Carolyn McDermid, they would have the skills
 21 and ability to do so and bring it in; correct?
 22 A. If asked to, I'm sure they would.
 23 Q. If there was one, you likely would have mentioned it in
 24 your report?
 25 A. One of what, sir?

1 Q. A policy about video cam recording, advising suspects.
 2 A. The law was made reference to.
 3 Q. I'm asking about a policy, sir.
 4 A. Well, the IA did not focus on whether he broke the
 5 violation or policy of an in-car video. It was that he broke
 6 the Oregon statute that you have to advise persons unless you
 7 don't have a reasonable opportunity to that the contact is
 8 being recorded. That's what was at issue, sir.
 9 Q. But it might be relevant if he was never trained?
 10 A. That was never alleged during the IA. When I interviewed
 11 Mr. Cleavenger, he never asserted "I was not trained in this."
 12 He acknowledged that he failed to admonish the people. That
 13 issue was not discussed at all because he did not even assert
 14 that as a defense.
 15 Q. Did he tell you that he had signed up to try to get dash
 16 cam training and that's one of the training that was reejected?
 17 A. He did not state that during the interview, no.
 18 Q. Did you ask him if he had ever gotten training?
 19 A. That was not part of the questioning, no.
 20 Q. I think you testified earlier that you thought it would be
 21 inappropriate for Mr. Cleavenger to get FBI training --
 22 A. I --
 23 Q. -- or go to that class.
 24 A. I testified that him asking to go to a national academy,
 25 which is an FBI academy, which he never attended, yes, would be

1 unusual. That would stand out in my mind.
 2 Q. Could you have said "inappropriate"?
 3 A. It would be an inappropriate request? I don't know.
 4 You -- if you have what I said there, please refresh my memory.
 5 Q. Do you know for a fact that that was one of the trainings
 6 that was approved out of the very few approved?
 7 A. Approved by who, sir?
 8 Q. With Junction City.
 9 A. Well, that's Junction City, sir. That's not his
 10 employment at the University of Oregon. The decisions they
 11 make there, I have no authority over.
 12 Q. You recommended the selection of Chief McDermid?
 13 A. To what, sir?
 14 Q. The chief.
 15 A. Yes, sir.
 16 Q. You made a positive recommendation for Lieutenant Lebrecht
 17 to replace you?
 18 A. I did. He was the only lieutenant with investigative
 19 experience. Lieutenant Bechdolt had very limited experience.
 20 Q. True that you can only do an internal affairs
 21 investigation if the chief instructs you to do so?
 22 A. I act under her direction.
 23 Q. Now, how many IA investigations did you do, say, in 2012?
 24 A. I don't recall, sir.
 25 Q. 50 or 100?

1 A. I doubt there were 50 to 100.
 2 Q. 10 to 20?
 3 A. I -- again, I don't recall, but that's more likely a
 4 number than 50 to 100, sir.
 5 Q. Could it be less than five?
 6 A. It could be less than five. It could be 10 to 20. I
 7 don't recall, sir.
 8 Q. Have you ever heard of any other supervisor saying along
 9 the lines or doing the following type of conduct: Reviewing a
 10 whole bunch of dash cam videos of an officer and then giving
 11 you his findings?
 12 A. I recall Chief Tripp advising the supervisors as part of
 13 their duties to review dash cams in order to ensure the
 14 officers are conducting their duties as assigned and as a
 15 quality control.
 16 Q. That's a little different than a comprehensive review of
 17 dash cam videos or reviewing, say, 25 to 50 dash cam videos;
 18 correct?
 19 A. I'm not sure where you're referring to, sir.
 20 Q. Well, do you know anybody else who had as many dash cam
 21 videos reviewed, or even close, as Mr. Cleavenger?
 22 A. I don't know of anyone on the department because I didn't
 23 oversee those reviews.
 24 Q. Do you know of any other public safety officer that's had
 25 an IA done on them as a result of a traffic stop?

1 A. No. I do not recall any.
 2 Q. Were you doing the IA to make a strong presentation to HR ?
 3 A. I was conducting the IA to determine what the allegations
 4 were, whether they were founded or unfounded, sir.
 5 Q. Would it ever be appropriate to do any IA for the purpose
 6 of making a strong presentation for HR?
 7 A. The purpose is to make a presentation of what the facts
 8 show to be, sir.
 9 MR. MCDUGAL: Mr. Hess, can you pull up 279? The
 10 May 17, 2012, email. Last page of 279.
 11 MR. HESS: Last page? Top portion?
 12 MR. MCDUGAL: Yeah. Yeah, the second paragraph.
 13 BY MR. MCDUGAL: (Continuing)
 14 Q. Can you read the first sentence?
 15 A. Yes, sir. "The product Brandon put together we can format
 16 into an IA format with supporting exhibits and make a strong
 17 presentation for HR."
 18 Q. Can you go to the May 18, 2012, email? It's the
 19 second-to-last page of Exhibit 279. Did you get an email from
 20 Chief McDermid?
 21 A. I did.
 22 Q. And what was it about?
 23 A. Well, from this clipping, it states -- Chief McDermid
 24 stating, "This is good. I think we need to advise Randy of our
 25 preferred approach so we take the right steps related to

1 contract."
 2 Q. What did you -- and this is May 18, 2012; right?
 3 A. Correct.
 4 THE COURT: And the exhibit number again?
 5 MR. MCDUGAL: It's page -- second-to-last page of
 6 279.
 7 THE COURT: 279. Thank you.
 8 THE WITNESS: It's in relation to
 9 Lieutenant Lebrecht's investigation.
 10 BY MR. MCDUGAL: (Continuing)
 11 Q. Related to contract, which might have been an IA
 12 investigation, as you said?
 13 A. Could be referred into an IA investigation if there's
 14 misconduct.
 15 Q. Well, doesn't your earlier email anticipate that you're
 16 going to format it into an IA format?
 17 A. Said that it could be, of which it never was.
 18 Q. Well, this is in writing at the time; right? I'm asking
 19 what you are thinking at the time.
 20 A. Yeah, at the time.
 21 Q. And at that time what was Carolyn McDermid's response to
 22 you?
 23 A. That it is a good -- preferred approach and to take the
 24 right steps related to the contract.
 25 Q. Related to contract. What is that referring to in your

1 mind?
 2 A. I'm sure it has to do with the union.
 3 Q. It's referring to firing. Not misstepping while firing;
 4 isn't that correct?
 5 A. No, I would not say that. As in all remedial actions,
 6 preferred steps is to try to remediate the behavior through
 7 training, unless it's something that is significant enough to
 8 warrant strong or corrective action.
 9 Q. Well, your May 17th email doesn't mention anything about
 10 training. "I believe moving forward with dismissal for cause
 11 is appropriate"; right?
 12 A. That's referring to him violating Oregon State law by not
 13 advising people who he stops that their contacts are being
 14 recorded. That is a significant misconduct.
 15 Q. Did you review the *Brady* materials?
 16 A. What *Brady* materials are you referring to?
 17 Q. The ones that were sent to the DA.
 18 A. No, I did not.
 19 Q. Were you aware that Lieutenant Lebrecht attempted to
 20 summarize portions of your IA report?
 21 A. I became aware of it at some point after the fact.
 22 Q. And did you suggest that perhaps you should look at his
 23 summary to see if you agree with it?
 24 A. No. I do not recall that at all. I was no longer
 25 employed with the University of Oregon and not in a position to

1 have an opinion one way or the other on that.
 2 Q. Were you ever asked to do an IA investigation of Cameron's
 3 sexual harassment charges?
 4 A. No, sir.
 5 Q. Royce Myers. Did you ever do an IA investigation about
 6 his complaints?
 7 A. Complaints regarding what, sir?
 8 Q. I'll take that as a no.
 9 A. I don't recall any, but I want to be sure to be as
 10 specific and accurate as possible.
 11 Q. They were against Sergeant Cameron.
 12 A. Regarding what type of behavior, sir?
 13 Q. Dishonesty.
 14 A. No. There never had allegation raised to Mr. -- or
 15 Sergeant Cameron's dishonesty.
 16 Q. And were you ever asked to investigate anything about a
 17 Sergeant Clark Hansen involving a person in handcuffs jumping
 18 in the Willamette River?
 19 A. No, sir. That would be a performance issue.
 20 Q. Aren't traffic stops performance issues?
 21 A. Unless they break someone's law by unlawfully detaining
 22 them.
 23 Q. You don't know whether or not -- well, it may be that
 24 Sergeant Bechdolt has a different view of that than you; right?
 25 MS. COIT: Object. Argumentative.

1 THE COURT: Sustained.
 2 BY MR. MCDUGAL: (Continuing)
 3 Q. Correct?
 4 MS. COIT: He said "sustained."
 5 THE COURT: Sustained.
 6 MR. MCDUGAL: Oh, I'm sorry.
 7 BY MR. MCDUGAL: (Continuing)
 8 Q. Are you normally involved in HR matters?
 9 A. In what scope of employment, sir?
 10 Q. Let me -- in firing. Firings.
 11 A. It depends on whether -- what they were fired for, sir.
 12 Q. Why don't you just help me out. How many other firings
 13 have you been involved in?
 14 A. I -- I don't recall.
 15 Q. More than one?
 16 A. I don't recall. As far as from an internal affairs
 17 investigation, Mr. Cleavenger was the one that I'm familiar
 18 with.
 19 Q. In fact, you were sent to the meeting where Mr. Cleavenger
 20 would be given his predismissal letter. Do you recall that?
 21 A. I do.
 22 Q. You don't even know why you were there; right?
 23 A. No, sir. I suspected if it was if there were questions
 24 regarding the IA investigation by Mr. Cleavenger that I would
 25 be present so I could answer those.

1 Q. That's the first time you had ever done something like
 2 that?
 3 A. Yes, sir.
 4 Q. Last time you had ever done something like that?
 5 A. That's correct.
 6 Q. Do you recall -- had Mr. Cleavenger even been given the IA
 7 report so he could ask questions about it by that time?
 8 A. I'm not sure if he was or not.
 9 Q. Do you recall him asking you for a copy?
 10 A. No. He asserted that he made that request on the day he
 11 was released, and I did not recall that. But, again, I would
 12 have made a referral that he needs to inquire with the chief if
 13 he could have one. Releasing the IA report was not normal
 14 practice.
 15 Q. Do you recall escorting Mr. Cleavenger out of the
 16 building?
 17 A. I do.
 18 Q. Now, the exchange between yourself and Linda King, how --
 19 did Mr. Cleavenger say, "Hey, you guys are saying I was at
 20 three different meetings, and there's no record of it." Do you
 21 recall that?
 22 A. No, I don't. I recall what's in the email here.
 23 Q. Did -- I think it's Captain Deshpande -- review your IA
 24 report?
 25 A. Yes, he did.

1 Q. Before you even started this investigation, you had a
 2 hunch that Mr. Cleavenger was going to assert that other
 3 officers did traffic stops; right?
 4 A. No, sir. I don't know where you come up with a hunch on
 5 it, sir.
 6 Q. At any point did Mr. Cleavenger try to give you documents
 7 about other traffic stops?
 8 A. He offered other information on traffic stops. I asked
 9 him if he wanted to make a complaint against those officers.
 10 He said no.
 11 Q. Well, obviously, he wouldn't want to make a complaint for
 12 traffic stops if he thought you could do traffic stops; right?
 13 A. No, I don't believe so. He -- as he put it, he did not
 14 want to throw anyone else under the bus.
 15 Q. Well, there would be two reasons to show traffic stops,
 16 right, at least, that one could think of. One is, "Hey, this
 17 is what people are doing. Not that I want to throw them under
 18 the bus. Consider this. Consider that possibly I wasn't out
 19 of line." That's a legitimate reason; right?
 20 A. If that was intent.
 21 Q. Did you ask him why he wanted you to see these?
 22 A. He wanted to try to direct the investigation. I asked him
 23 again if he wants to make a complaint against the others, I'm
 24 glad to do that separately, and he said no.
 25 Q. Never crossed your mind he was offering you evidence that

1 he wasn't violating policy?
 2 A. I was conducting the investigation, and I was able to
 3 determine -- determine that separate of anything Mr. Cleavenger
 4 had to offer on what others were doing. I had to remind him
 5 that the investigation was focused on his actions and that is
 6 what I was looking at; his thought process of what he was doing
 7 at the time.
 8 Mr. Cleavenger wanted to try to distract the focus of the
 9 investigation by bringing other people into the investigation.
 10 I gave him the opportunity to formally file a complaint, at
 11 which he declined to do so.
 12 Q. He told you he wanted to pursue charges against other
 13 people. Are you saying that?
 14 A. No. He declined. He did not want to throw anything else
 15 under the bus.
 16 Q. But he still wanted to give you the information; right?
 17 A. What information, sir?
 18 Q. About other traffic stops to show you --
 19 A. As I said --
 20 Q. -- that other people did it?
 21 A. -- I was a seasoned investigator. I would be making a
 22 thorough inquiry, of which I did; which my investigation did
 23 disclose other people were making traffic stops without his
 24 assistance.
 25 Q. How many officers did you talk to?

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1 A. I did not talk to any officers.
 2 Q. So you were relying almost entirely on hearsay?
 3 A. No, sir. I relied upon the testimony and statements that
 4 were developed from talking with all the supervisors who
 5 indicated that there was a campus version of a traffic stop
 6 that was accepted. Then upon review of the CAD, the
 7 computer-aided dispatch, it disclosed that there were over 200
 8 traffic stops, of which I could not determine whether they were
 9 made by vehicles, of vehicles, or if they were of pedestrians
 10 or of bicyclists.
 11 With that, I determined that it would be unfair to
 12 found -- or find the allegation against Mr. Cleavenger for
 13 conducting a traffic stop because other officers were doing it.
 14 That way -- that is why I did not sustain that allegation.
 15 Q. If you wanted to find out what other officers are doing,
 16 one way to do it would be to simply ask them; right?
 17 A. I did not need to.
 18 Q. Did you ever have an email exchange with Casey Boyd?
 19 A. Regarding what, sir? Yes. When she worked there, I had
 20 plenty of opportunities for emails.
 21 Q. I mean texts. Sorry. Text exchange.
 22 A. I did.
 23 Q. Do you remember one about men with alternative lifestyles
 24 or however you want to phrase it?
 25 A. I remember one in which she did not provide the text that

1 THE COURT: Exhibit number?
 2 MR. MCDUGAL: 273.
 3 THE COURT: 273, thank you.
 4 MS. COIT: Do you have a copy of that for us?
 5 MR. MCDUGAL: I'm sure I can get one, but --
 6 MS. COIT: I don't know why you guys don't give us
 7 your exhibits.
 8 MR. JASON KAFOURY: Because we're on cross.
 9 THE COURT: Why don't you put this up on the screen,
 10 and that way everybody will have it, okay?
 11 MR. MCDUGAL: Can you put 273 up on the screen?
 12 THE COURT: Just put it up. That way everybody can
 13 see it. Let me see if I can guess what this is about. This
 14 would be back in 2010 for just brief -- I just briefly glanced
 15 at the exhibit. And it would concern Lieutenant Morrow?
 16 MR. MCDUGAL: Yes.
 17 THE COURT: All right. Put that up on the screen so
 18 I can see it. And what does this purport to show? That he's a
 19 pervert?
 20 MR. MCDUGAL: No. This is between Casey Boyd and
 21 Mike Morrow. And this is a --
 22 THE COURT: Between Lieutenant Casey Boyd.
 23 MR. MCDUGAL: And Mike Morrow.
 24 THE COURT: At that time was he a lieutenant?
 25 MR. MCDUGAL: He was a lieutenant at that time.

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1 preceded my response, nor did she provide her response, and it
 2 was three years after the fact. Yes, I recall that.
 3 Q. But regardless of what it was --
 4 MS. COIT: Your Honor, I object to this. It's far
 5 outside the scope, and it's improper evidence on this witness.
 6 MR. MCDUGAL: He's criticizing Mr. Cleavenger for
 7 inappropriate behavior. I'm just asking him --
 8 MS. COIT: Your Honor, I would like to take this up
 9 on a sidebar.
 10 THE COURT: Time for a break for just a moment. Let
 11 me see where we're going with this. I just want to be sure.
 12 Don't discuss this matter amongst yourself or form or express
 13 an opinion about this case. Have a nice recess. We'll come
 14 and get you. I think 20 minutes. Maybe a little longer. I'm
 15 just not sure.
 16 (Jury not present.)
 17 THE COURT: Counsel, help me. You may step down for
 18 a moment.
 19 THE WITNESS: Thank you, sir.
 20 THE COURT: I want you to remain in the hallway. If
 21 we need you, I'll call you back. I'm not sure where this
 22 discussion is going.
 23 Counsel, what did you want to bring up?
 24 MR. MCDUGAL: The -- this exhibit, which I'll hand
 25 you.

1 THE COURT: Was she a lieutenant?
 2 MR. MCDUGAL: Yes.
 3 THE COURT: Okay. Now, this would allegedly show
 4 that there's inappropriate conversation on the Internet or, I'm
 5 sorry, email?
 6 MR. MCDUGAL: Text. Text. Phone text. Telephone
 7 text message.
 8 THE COURT: Oh, text. Okay. Email. Fine. And it
 9 would say, "What happened?" This is Mike Morrow. "I'm glad it
 10 is you and not me. Men on men is total perversion."
 11 Would it show that Lieutenant Casey Boyd, first of all, is
 12 incorrect when she stated that she didn't carry on this
 13 conversation? Would it show that Lieutenant Morrow is
 14 incorrect when he infers that he's not involved in this
 15 conversation, or would it show that there's a lack of
 16 investigation of some type concerning Internet usage? And if
 17 that's the case, who would have ordered this? In other
 18 words --
 19 MR. MCDUGAL: The chief testified she read
 20 Casey Boyd's letter. Casey Boyd's letter to the chief says,
 21 "Hey, what about Morrow sending this text about men on men
 22 being total perversion?" That letter is already in evidence.
 23 That's Exhibit 119.
 24 THE COURT: I see. Can I see 119? Put it up on the
 25 screen for me.

1 MR. MCDUGAL: Can you put up 119, Mr. Hess?
 2 THE COURT: Makes it easier for all of us to see it.
 3 Okay. "While working at Pacific forum event where a
 4 silent kiss-off protest was taking place, Professional
 5 Standards Lieutenant Mike Morrow texted me on my work cell
 6 phone, quote, 'I'm glad it is you and not me. Men on men is
 7 total perversion.' Photo of text message attached. It is
 8 unimaginable that a person who will make this statement while
 9 on duty has any credibility or integrity to judge or
 10 investigate another. This discriminatory behavior runs rampant
 11 in UODPS, though it was -- though was not as a result of my
 12 personal conversation with Tyler."
 13 I want to just humbly say to you, I'm lost.
 14 MR. MCDUGAL: Okay.
 15 THE COURT: Sit down. Get this right. I'm lost.
 16 MR. MCDUGAL: One issue is comparators. Okay?
 17 He's -- the first IA investigation, and perhaps only for a
 18 traffic stop, there are allegations of, quote, "unprofessional
 19 behavior." He's accused of much unprofessional behavior. The
 20 man saying that he's unprofessional is sending a text message
 21 to a female, who is on duty, saying "men on men is perversion."
 22 THE COURT: Saying what?
 23 MR. MCDUGAL: "Men on men is perversion."
 24 THE COURT: Now, how does that make him unethical,
 25 immoral, inappropriate?

1 some suspicion by the other officers that he was gay, and she
 2 had felt that that was inappropriate.
 3 MR. MCDUGAL: Right. Now, here you have somebody on
 4 duty saying "men on men is perversion."
 5 THE COURT: I still don't understand the nexus. I
 6 apologize.
 7 MR. MCDUGAL: Well, it was never looked into, for
 8 one. Everybody agrees it was never looked into. The Casey
 9 Boyd letter was never investigated.
 10 THE COURT: Okay.
 11 MR. MCDUGAL: Another reason is --
 12 THE COURT: Second thing is was this called to
 13 somebody's attention at the time? You're not giving me that
 14 yet.
 15 MR. MCDUGAL: A letter was given to McDermid later
 16 when she was still in charge and he was still in charge, and it
 17 was not investigated.
 18 THE COURT: Why can't McDermid be asked that? Why is
 19 this witness -- other than, you know, character --
 20 MR. MCDUGAL: I think if he's saying my guy is
 21 unprofessional, we can take a look at his professionalism and a
 22 jury can say, "Wait. He's gone down heavy on this guy, and
 23 he's doing this type of thing himself."
 24 THE COURT: But, once again, I don't -- well, let me
 25 read the second paragraph. I haven't. "This investigation

1 MR. MCDUGAL: It's inappropriate to say that in a
 2 workplace, I believe, a juror can find. It's fine if it's
 3 personal opinion, but do you send it to --
 4 THE COURT: What's he responding to? That's what I'm
 5 missing. I don't know -- I don't have the first part of that
 6 conversation. It's just -- it's a statement, and I don't know
 7 what it's related to, except the accusation by Boyd. And I
 8 would have to have a little bit more foundation from Boyd if
 9 you wanted to call her back. I don't understand.
 10 MR. MCDUGAL: I think the letter gives a little more
 11 foundation a paragraph up.
 12 THE COURT: Let's go a paragraph up, then.
 13 See, I'm having trouble with a statement by Boyd in a
 14 letter and I don't understand what came before Exhibit 273. I
 15 just humbly say that to you. I just don't understand.
 16 It certainly may strike at character. It may -- the
 17 prejudicial effect may outweigh the probative value or vice
 18 versa. The value may be there. I don't understand.
 19 MR. MCDUGAL: I believe that Boyd testified that
 20 part of the reason why she was fired is because she had asked
 21 her friend if he was gay, and she said, "No, that -- that was
 22 my friend. Yes, I had that conversation, but it wasn't a
 23 malicious conversation."
 24 THE COURT: That's correct. She did testify. Now, a
 25 person who was working in the department and he had come under

1 furthers a pattern of being treated unfairly in this
 2 investigation, as I reported to Morrow on July 20, 2011, that
 3 Lebrecht had made a statement about Drake being gay and talking
 4 and joking with his officers about it and an investigation was
 5 not conducted regarding his statements. Further, I told Morrow
 6 that a subordinate officer had complained to me that Lebrecht
 7 had called an athlete a faggot pussy in front of others and,
 8 again, he was not investigated."
 9 And the discriminatory behavior you're talking about is
 10 the statement that men on men is a total perversion?
 11 MR. MCDUGAL: Right. It's not really
 12 discriminatory. He's entirely entitled to have that opinion.
 13 He's entirely entitled to hold it to himself when he's --
 14 THE COURT: Why wouldn't he be responding to
 15 something that had been -- start the inception with Lieutenant
 16 Boyd, Casey -- Counsel, why are you standing there?
 17 MR. GREGORY KAFORY: I was getting water.
 18 THE COURT: Thank you. I'm baffled.
 19 Why --
 20 MR. MCDUGAL: I think the extent.
 21 THE COURT: Why wouldn't you be responding literally,
 22 quote/unquote, "company time" if you have another lieutenant
 23 who's calling this to your attention? How is that
 24 inappropriate?
 25 In other words, if this was just a statement out of the

1 blue, I would understand it. But when you have Lieutenant
2 Casey Boyd reporting this on company time, and he's
3 responding -- or am I missing this issue?

4 MR. MCDUGAL: His response is not, "Oh, I understand
5 what you say." It's, "Yeah, gay is awful. Men on men is total
6 perversion." It's not --

7 THE COURT: With what -- I'm glad to revisit it this
8 evening. Judges aren't always right. I'm the first to
9 recognize that, but it's too clouded, Counsel. The second
10 problem I have is it appears he's responding on official time
11 to an inquiry made by Lieutenant Boyd, Casey, on official time.

12 Take the time to talk to your client and look through this
13 one more time so I'm certain I understand, but, frankly -- now,
14 these are the prejudicial effect outweighs the probative value.
15 I don't want to do that. If it's relevant, I want to give you
16 as broad of a trial as possible on both sides. I'm having
17 trouble with this.

18 MR. MCDUGAL: Let's put it in this context: The
19 statement is already in the record in Exhibit 119 because it
20 says what it says.

21 THE COURT: Let's put up 119 on the screen.

22 MR. MCDUGAL: It's on the screen right now. It
23 says, "Men on men is total perversion," in quotes. Photo of
24 text message attached.

25 THE COURT: So Mike Morrow texted Lieutenant Casey

1 me because it's just not out of the blue. It's not a -- I hate
2 to use the word "perverted," but the word "perversion" is used
3 in the text -- a perverted statement of some kind that's
4 inappropriate.

5 It's -- we may not agree with the statement. It may be
6 discriminatory, but it's coming at a time when you've got a
7 response coming because of something professionally that
8 Casey Boyd is involved in. So at the present time, I'm very
9 uncomfortable with this.

10 MR. MCDUGAL: Okay. I am --

11 THE COURT: I'm not asking you to give up yet, okay,
12 so get your co-counsel over there and you can have a
13 consultation. I'm not trying to hold evidence out, but it has
14 to be relevant, and I'm having a difficult time with this.

15 MR. MCDUGAL: He couldn't remember what his text --
16 whether or not he texted that. It's in the record that that is
17 Casey Boyd's allegation. I'm simply trying to show that the
18 allegation is true.

19 THE COURT: Say that one more time.

20 MR. MCDUGAL: It's in the record that Casey Boyd
21 made this allegation. He cannot remember what his text said.
22 I know that from his deposition. I'm trying to show that
23 Casey Boyd's allegation was true.

24 THE COURT: And the relevance?

25 MR. MCDUGAL: Well, it's -- A, it's in the record.

1 Boyd, "I'm glad it is you and not me. Men on men is total
2 perversion," but he's responding to something. What is he
3 responding to?

4 MR. MCDUGAL: He's responding to her working at the
5 Pacifica Forum, which is a kiss-off taking place.

6 THE COURT: Let's put up her statement so I see it.

7 MR. MCDUGAL: It's right there. "While working at
8 Pacifica Forum event, where a silent kiss-off protest was
9 taking place" --

10 THE COURT: No, no.

11 MS. COIT: Put up her text.

12 THE COURT: Yeah, I want to see what she is texting
13 to him.

14 MR. MCDUGAL: I don't think we have that because
15 this was never investigated at the time, and she gave them
16 their part of the text message. They never responded and said,
17 "Well, let's see the whole thing."

18 THE COURT: So you don't have that?

19 MR. MCDUGAL: I don't have that.

20 THE COURT: I see. Well, it's not your fault. It's
21 just --

22 Well, first, I don't think it strikes to his character.
23 I'm having a difficult time believing that this isn't a
24 response to something that occurs during the working hours, and
25 I'm having difficulty with this issue that you're bringing to

1 B, they're going to attack Casey Boyd's credibility. But,
2 also, and this is my last pitch, because I know I'm not getting
3 it across, you can hold the opinion that men on men is total
4 perversion, but for a supervisor at a police department to be
5 telling that to a co-employee during working hours is
6 unprofessional.

7 There's no question that could rightly provoke that
8 answer. His personal opinion is -- is just not appropriate.
9 And he's judging others.

10 THE COURT: I'll repeat back to you what I heard. No
11 matter what was said to invoke this response, it would be
12 inappropriate because it's a personal opinion?

13 MR. MCDUGAL: Right.

14 THE COURT: So let's say that Lieutenant Casey Boyd
15 texted him, emailed him, or spoke to him -- it doesn't
16 matter -- conveyed to him information about I saw two men doing
17 something at this particular event. If he said, "You should
18 take them into custody for a lewd act in public. Did you
19 charge them? What action did you take," then that would be
20 appropriate. But when he makes the personal comment that, "I'm
21 glad it is you and not me. Men on men is total perversion,"
22 that's the inappropriate statement that does two things.
23 You're arguing to me that, first, it bolsters the credibility
24 of Lieutenant Casey Boyd, who's going to be attacked; second,
25 it shows that by whatever standard Lieutenant Morrow is

1 operating, he is making inappropriate statements and -- and now
2 fill in the "and." And?

3 MR. MCDUGAL: And the jury is entitled to know --

4 THE COURT: Not that the jury is entitled to know.
5 They're not entitled to know anything unless I let it through.

6 MR. MCDUGAL: Well, I understand.

7 THE COURT: And.

8 MR. MCDUGAL: And if that's his standard when he
9 applies it to himself, is he fairly applying standards to my
10 client?

11 THE COURT: What inappropriate action did your client
12 take that might have some nexus? I'm going to say to you one
13 would be the accusation that he was dancing on a table and
14 making thrusting movements.

15 MR. MCDUGAL: Right.

16 THE COURT: That would be a reason given in the IA
17 for his termination?

18 MR. MCDUGAL: It was not given in the IA, no.

19 THE COURT: Uhm?

20 MR. MCDUGAL: No, it was not given.

21 THE COURT: No. No, it wasn't. Let's make it
22 simple. No.

23 MR. MCDUGAL: Right.

24 THE COURT: Okay. That there's no comparable
25 investigation taking place, but nobody knows about this email.

1 to the effect of, "Oh, my God, there's two men kissing here.
2 It's the most disgusting thing I've ever seen," and he sends
3 back the, "What are you talking about? Glad it's you not me
4 there."

5 So for them to be portraying this as some sort of
6 discriminatory behavior towards her is completely out of
7 context and not true.

8 THE COURT: Sit down. That's really distracting to
9 me. I apologize, but that's about the fourth warning on this
10 team's side over here. Don't do it again. Okay?

11 Now, I'm sorry, Counsel. My apologies.

12 MS. COIT: Thank you. So that was the context for
13 the texts. She sent it to him giving her thoughts that this
14 was a horrible thing she's witnessing. He sent a text back
15 that somehow may be interpreted as agreeing. It was from his
16 personal phone on his personal time. They're both lieutenants.
17 This was in 2010. It was not brought to the attention of
18 anyone until late 2012 when Casey Boyd sends this long letter
19 in. And Chief McDermid did, in fact, have a discussion with
20 Lieutenant Morrow about what this was about.

21 So it's completely irrelevant to the situation here, and
22 the only reason it's being put in is to try to get the jury to
23 think he's a big homophobe and it's not fair. It's -- there's
24 no relevance. So whether it's prejudicial or not shouldn't
25 even come into the matter.

1 MR. MCDUGAL: When they do learn, they don't do
2 anything.

3 THE COURT: So it simply goes to character, doesn't
4 it? If you want this in front of the jury, this simply goes to
5 the character of this witness.

6 MR. MCDUGAL: I think it goes to comparators. They
7 call people to say he was thrusting. They point out the
8 smallest thing that he does wrong.

9 THE COURT: I think I tentatively disagree with that,
10 but I'll take a recess to use the bathroom for just a moment.
11 I'm just kidding you. It's time for a restroom break. I'll
12 come back.

13 Give me about 10 minutes, Counsel.

14 (Recess taken.)

15 THE COURT: Okay. Thank you, Counsel, for giving me
16 the time to think about this issue. We're back on the record,
17 and I appreciate your patience with the Court.

18 I want to hear, Counsel, from you for a moment.

19 MS. COIT: Thank you, Your Honor.

20 THE COURT: I'm expecting 403. Prejudicial effect
21 outweighs the probative value.

22 MS. COIT: Absolutely it's prejudicial. But before
23 we even get to that point, I just spoke with Lieutenant Morrow
24 and what the text involved, and it's his recollection
25 Casey Boyd was at this event, sent him a text saying something

1 THE COURT: Let me ask you two things. I'm assuming
2 the chief takes the stand again. I don't know that as a fact,
3 but it's been represented to me that she will. Those same
4 questions are going to be asked of the chief; in other words,
5 "Did you receive this from Casey Boyd? How did you respond to
6 that?"

7 Now, the chief is going to appear to be the sole recipient
8 and actor in whatever this is. Remember, I'm a gatekeeper, not
9 a decider, about whether this is true or not. And when
10 Lieutenant Morrow exits the stand, it's going to look like this
11 information was hidden or not spoken about, and he never had a
12 chance to respond. When you ask to re-call him, that's out
13 there.

14 The problem I'm having is that it seems to have come up
15 prematurely. In other words, it would have been easier for the
16 Court to make a determination, for both of you, if the chief
17 had testified to this and then Morrow had an explanation of
18 what occurred. But I can't imagine curtailing plaintiff's
19 counsel from asking, "Did you receive this and did you act on
20 it," concerning Casey Boyd's allegation.

21 Now, help me with that. Because eventually it sounds like
22 it's going to come in in some form, but I'm trying to look
23 ahead to tomorrow when the chief testifies, but I may be wrong.

24 MS. COIT: If the question is --

25 THE COURT: Are you saying it should be precluded?

1 Because if I preclude Morrow, what it does is it puts me in a
2 position of potentially you're asking me to preclude any
3 inquiry into Casey Boyd's allegation and whatever action the
4 chief took. Let's think ahead 24 hours.

5 MS. COIT: Okay.

6 THE COURT: Okay. Here, Morrow has a chance to
7 respond to it. Now, that doesn't make it a good legal ruling.
8 That's just a practical side of what's about to happen.

9 MS. COIT: Your Honor, may I?

10 THE COURT: Yeah.

11 MS. COIT: If the allegation is going to be made that
12 Casey Boyd submitted some sort of complaint to Chief McDermed
13 and that she did not follow up on it, she did not properly
14 investigate it, then I agree that that is proper -- and that is
15 somehow related to what happened with Mr. Cleavenger. Then
16 that would be proper questioning for Chief McDermed.

17 And in that context she can describe what this complaint
18 said to her in that letter, what she did to follow up, what she
19 was told by Lieutenant Morrow, and what her determination was.
20 That's all that matters. It goes to her state of mind. It's
21 not hearsay at that point.

22 THE COURT: Now let me take this second concern. In
23 the opening statement there was a statement about what I call
24 virtue. By the way, it was an excellent opening statement on
25 both counsel's part, but one of the things I heard was, "Folks,

1 come up and through the chief anyway.

2 And so here, Morrow, in a practical world, has a chance to
3 explain, while he's on the stand, what occurred, which isn't
4 part of this legal issue.

5 MS. COIT: Then, Your Honor, why don't they just have
6 to limit themselves to the exhibit that's already put in --
7 been put in Casey Boyd's complaint to the chief.

8 THE COURT: Because this bolsters it. The text
9 bolsters her credibility. So it would seem to me there are
10 only two questions that could be asked. One, "Did you send
11 this text?" Yes or no. And, two, "Did you think that this was
12 professional, this last portion of the statement?" Yes, I did,
13 or no, I didn't, or I was responding.

14 MS. COIT: How does that comment on anything having
15 to do with anything in the case? All that does is --

16 THE COURT: It goes to credibility.

17 MS. COIT: Whether or not he thinks that's
18 professional?

19 THE COURT: No. To both -- to Lieutenant Casey
20 Boyd's credibility, which is now an issue. Now, push back.
21 I'm giving you the same --

22 MS. COIT: I was waiting for you to --

23 THE COURT: I'm giving you the same opportunity the
24 other side has. Remember, I'm a gatekeeper. I have to sort
25 through all sorts of things.

1 you should believe Lieutenant Morrow because he's, one,
2 professional, and, two, he's been an FBI agent for X number of
3 years." In other words, the cloth of virtuousness.

4 And the insinuation is that therefore he's impartial and
5 he conducts an IA investigation, and the inference is that he
6 doesn't enter into this kind of discussion. So put this
7 exhibit -- I lost track of it -- one whatever back up on the
8 Elmo for me. The alleged inappropriate statement. 273, I
9 think, is the -- I want to see Boyd's. I don't want to see it
10 273. It was one something. 116? 113? I forget.

11 MR. JASON KAFOURY: 119, Your Honor.

12 THE COURT: 119. Put that back up for a minute.

13 MR. HESS: It's up, Your Honor.

14 THE COURT: Okay. The first portion, "I'm glad it is
15 you and not me," I don't think I have any concern with. It's
16 "men on men is total perversion." This Court would never be in
17 a position of saying that was an appropriate or an
18 inappropriate statement. I don't make those value judgments in
19 terms of being a gatekeeper. But when he's clothed in
20 virtuousness and being portrayed as this very fair arbiter,
21 then doesn't that potentially do two things: First, since Boyd
22 is going to be attacked, as counsel said, concerning her
23 credibility, it bolsters Boyd's credibility that she's not
24 making things up from whole cloth, and the department's
25 response to the reporting of this exchange, which is going to

1 MS. COIT: The problem is we don't have the rest of
2 the text messages, so Casey Boyd giving this to them --

3 THE COURT: But who else would? Who had control of
4 these text messages?

5 MS. COIT: Apparently, Casey Boyd and Mr. Cleavenger.
6 So they select this part of the text to blow up and to show
7 Mike Morrow. So his response --

8 THE COURT: Now I'm hearing the reverse of what
9 plaintiff has been complaining about.

10 MS. COIT: Well, plaintiff is not giving you the
11 whole story, Your Honor, on that.

12 THE COURT: Okay.

13 MS. COIT: Mike Morrow is going to be faced with this
14 text that, yes, it's from his personal phone. He wrote it.
15 But what can he say? He can say, "Well, you're not showing the
16 first text before me, and you just have to just take my word
17 for it." That's not fair to him. If you just put up this
18 document here --

19 THE COURT: Well, half of this case is built on that
20 for both sides. There's only been a partial -- and I don't
21 mean discovery, but there's only partial things coming in for
22 each side. Both the chief and Cleavenger and
23 Lieutenant Lebrecht are always in the position of just partial
24 texts. Not always, but many times.

25 Now, consult with your group, okay, for a moment. Make

1 sure we're not missing something here.
 2 Okay. Counsel?
 3 MS. COIT: I disagree that it's relevant.
 4 THE COURT: Okay.
 5 MS. COIT: If it is relevant, I believe under 403 it
 6 is incredibly prejudicial because it is playing on the lowest
 7 form of biases that they're hoping the jury is going to find.
 8 THE COURT: Let me stop there and ask you one
 9 question and go on.
 10 I'm sorry. Please continue. My apologies.
 11 MS. COIT: But if Your Honor is inclined to allow 273
 12 in, we would prefer to have Mike Morrow testify about it.
 13 THE COURT: That's not -- in a practical world, if I
 14 allow it in -- frankly, you may not want the chief, by herself,
 15 absorbing that because it gives Morrow a chance to respond to
 16 it. So you're right. If I'm allowing it in, it potentially
 17 comes through both Morrow, who can give an explanation while
 18 he's on the stand, and then the chief who follows.
 19 It gives you, as the plaintiff, a full view concerning
 20 bolstering the credibility of Boyd, which is now at issue, and
 21 potentially also the department's response to the reporting of
 22 this exchange. And the difficulty I'm having, when we started
 23 the argument, was I don't see it as a, quote/unquote,
 24 "comparator." I see it as a response and how they're
 25 responding. But it officially opens up Pandora's box.

1 the chief, then, is in the position where this would come in
 2 front of the jury -- in other words, when she's on the stand, I
 3 would allow those questions to be asked and what she did about
 4 it, and now she doesn't stand alone. She has Morrow's
 5 explanation before she testifies. It's not being hidden, and
 6 she's not in the position of being isolated as if she has done
 7 something that's just hanging out there without an explanation.
 8 So I think in fairness, also, that it turns out to be a
 9 very close call, and I want to admit that to both sides. But I
 10 think it's fair because it gives the explanation and doesn't
 11 make the chief look like she's hiding this information or being
 12 uncredible.
 13 Now, I know that's taken way too long, and my apologies.
 14 Can we get the jury? Is that okay? Can we get back to
 15 work?
 16 MS. COIT: I'm going to go get Mike Morrow, Your
 17 Honor.
 18 THE COURT: If you want to talk to him and tell him
 19 that's coming, you have my permission.
 20 (Jury present.)
 21 THE COURT: Jury, once again, is present. The
 22 counsel are present. The witness is returning to the witness
 23 stand.
 24 I apologize. That delay was my responsibility. I needed
 25 time with counsel.

1 All right. This is the ruling -- well, anything further
 2 by either side? Counsel, either side?
 3 MR. MCDUGAL: No, Your Honor.
 4 THE COURT: Now you can stand up, Counsel, when
 5 you're addressing the Court. That's fine. If there's too many
 6 of you milling around over here, it's like a bunch of cattle
 7 grazing. I want you to stop.
 8 MR. MCDUGAL: Yes, Your Honor.
 9 THE COURT: Understood?
 10 MR. MCDUGAL: Yes.
 11 THE COURT: Quit wandering around. All right. Thank
 12 you.
 13 This evidence is admissible. I agree, after considering
 14 this, that confirming that this text exchange took place is
 15 important in the context of determining Boyd's credibility and
 16 the department's response to the reporting of this exchange.
 17 I'm not finding, though, that this is, quote/unquote, "a
 18 comparable." I don't want to make that record. I don't think
 19 it's appropriate.
 20 Now, it's limited, though. It's limited to, "Did you send
 21 this text?" And you can ask if it's professional or not. I'm
 22 not going to frame the questions for you. But this should be a
 23 pretty brief exchange. And that throws this back on the
 24 defense side to decide where to go.
 25 And I think it's fair for this reason: I don't think that

Morrow - X

1 Can the witness retake the stand, please?
 2 Thank you. You can be seated.
 3 THE WITNESS: Thank you, Your Honor.
 4 THE COURT: Counsel, if you would like to continue
 5 with your cross-examination, please.
 6 BY MR. MCDUGAL: (Continuing)
 7 Q. Did you ever come to learn that Lieutenant Casey Boyd had
 8 made allegations and that some of those allegations involved
 9 you, allegations of misconduct?
 10 A. I'm aware of an allegation, not allegations, of a text
 11 that I sent to her that bothered her three years after the
 12 fact.
 13 Q. At that time did you try to go on your phone and try to
 14 get any texts you might have had?
 15 A. I did not have a smart phone. Those texts were long gone.
 16 Q. Did you know of any way that you could retrieve them?
 17 A. No, sir.
 18 Q. Did anybody ever ask you about the text?
 19 A. Not until after three years after the fact. Yes.
 20 Chief McDermed spoke to me about it.
 21 Q. Did she have a copy of the text at that time?
 22 A. I'm not sure. I'm sure she did. I --
 23 Q. Sitting here today, do you know what Casey Boyd's
 24 allegation was against you, the specifics of what words she
 25 said you had said to her -- or texted to her?

1 A. No. The content, what I recall, is she sent me a text
 2 saying something derogatory about two men kissing out in the
 3 corridor where she was at, and I responded I found that to be
 4 perverted, using my own personal cell phone and her cell phone.
 5 We were both lieutenants, peers, at the time.
 6 And three years later, when Lieutenant Boyd was
 7 terminated, she brought forth this, among other things, I
 8 guess -- I never saw the letter -- to the university's
 9 attention, and Chief McDermed spoke to me about that.
 10 Q. Do you recall having your deposition taken in this case?
 11 A. I do.
 12 Q. At the time, had you remembered this text or the context
 13 of it?
 14 A. Not until my memory was refreshed.
 15 Q. When was your memory refreshed?
 16 A. At the disposition.
 17 Q. What do you mean the disposition? The deposition, you
 18 mean?
 19 A. Deposition. Thank you.
 20 Q. I'm going to hand you what's been marked as Exhibit 273.
 21 Do you recognize Exhibit 273?
 22 A. Yes, sir.
 23 Q. Can you describe what it is?
 24 A. It's a partial text message of a series of exchanges with
 25 my response. Nothing with Lieutenant Boyd's texts.

1 Q. Did you ever ask Lieutenant Boyd to print anything else?
 2 A. Regarding this?
 3 Q. Yeah.
 4 A. It wasn't directed to me, sir.
 5 MR. MCDUGAL: Permission -- plaintiffs offer 273 .
 6 MS. COIT: Defense objects. Relevance.
 7 THE COURT: I'll allow it, Counsel. Received.
 8 MR. MCDUGAL: Permission to publish?
 9 THE COURT: You may.
 10 BY MR. MCDUGAL: (Continuing)
 11 Q. Fair to say that Casey Boyd's allegation that you sent a
 12 text that included language "men on men is total perversion"
 13 was a true allegation?
 14 A. I'm not following your question. Regarding -- allegation
 15 regarding what, sir?
 16 Q. Regarding your conduct.
 17 A. She basically said it made her uncomfortable.
 18 Q. She said you said, "men on men is total perversion."
 19 A. That's correct.
 20 Q. And you said that?
 21 A. That's correct. I texted that.
 22 Q. Sorry. When I said "said," I mean conveyed.
 23 Do you know if the allegations -- about what time the
 24 allegations Casey Boyd was making came against you?
 25 A. At the time she was terminated or after she was

1 terminated.
 2 Q. Would it be at the early part of your investigation of
 3 Mr. Cleavenger, June of 2012?
 4 A. I'm not sure, sir. I don't think this allegation came in
 5 until -- I'm not sure, but it had nothing to do with the
 6 internal affairs investigation.
 7 Q. And just because it's a little blurry, I don't know -- can
 8 you read the date of your text?
 9 A. May 14, 2010.
 10 Q. Thank you.
 11 MR. MCDUGAL: That's all I have.
 12 THE COURT: Redirect.
 13
 14 REDIRECT EXAMINATION
 15 BY MS. COIT:
 16 Q. Lieutenant Morrow, there were prior texts from
 17 Lieutenant Boyd than what we just saw; correct?
 18 A. Yes, ma'am.
 19 Q. Plaintiff's counsel hasn't put those up on the screen for
 20 the jury to see, have they?
 21 A. No, ma'am.
 22 Q. What -- do you recall those texts being derogatory in
 23 nature?
 24 A. Just derogatory in nature, how she was offended by the
 25 behavior.

1 Q. All right. In 2012, how many lieutenants are at the
 2 University of Oregon Police Department?
 3 A. Not sure I know. Lieutenant Lebrecht. I'm not sure what
 4 time Lieutenant Boyd was terminated. It certainly could have
 5 been Lieutenant Boyd. Lieutenant Herb Horner was also
 6 employed. And myself. And I am not sure what time
 7 Lieutenant -- Sergeant Bechdolt was promoted to lieutenant.
 8 Q. During Mr. Cleavenger's employment, was the command staff
 9 fairly informed about what was going on in the department with
 10 the officers?
 11 A. The officers in general or --
 12 Q. Problems that were -- that may have been going on with any
 13 specific officers.
 14 A. Well, there were meetings with the management, with the
 15 chief, assistant chief, in general, where issues would be
 16 discussed.
 17 Q. Do you recall any of those issues being discussed to
 18 involve Mr. Cleavenger?
 19 A. I don't recall specific conversations, but I'm certain
 20 that there were conversations concerning his performance.
 21 Q. Look at -- plaintiff showed you Exhibit 280.
 22 THE COURT: 280. 2-8-0?
 23 MS. COIT: Yes.
 24 THE COURT: Thank you.
 25 ///

1 BY MS. COIT: (Continuing)
 2 Q. All right. So the email from you on April 23, 2012, when
 3 you were writing to Dr. Corey, is it fair to say at that time
 4 you were aware of problems that the department was having with
 5 Mr. Cleavenger?
 6 A. Yes. Also, I was the point of contact with Dr. Corey.
 7 Dr. Corey conducted background investigations for us. The
 8 fitness-for-duty type. And I was our department point of
 9 contact for that because I was overseeing background
 10 investigations. So it would be appropriate for me to reach out
 11 to Dr. Corey.
 12 Q. And in this email to Dr. Corey on April 23rd, you note,
 13 "There's several complaints against the public safety officer
 14 that are behavioral in nature. We're wondering if your
 15 previous evaluation on him he went through our selection
 16 process had any side notes of your observations during the
 17 psychological assessment."
 18 Is it fair to say you were trying to gather additional
 19 information regarding Mr. Cleavenger?
 20 A. Yes, ma'am.
 21 Q. There's no mention in there about terminating him at that
 22 point, is there?
 23 A. No, ma'am.
 24 Q. Do you recall having conversations with Chief Tripp about
 25 Mr. Cleavenger?

1 A. I don't recall conversation specifically. During this
 2 time, I believe Chief Tripp was away at an academy. And
 3 Assistant Chief McDermid was filling in as the interim.
 4 Q. Was Chief McDermid the point person for Chief Tripp?
 5 A. Yes, ma'am.
 6 Q. All right. We looked at another email that counsel showed
 7 you, dated May 17th, regarding Mr. Cleavenger. And I just want
 8 to take you back to that time period. Was that shortly after
 9 you and Chief McDermid had discovered that Mr. Cleavenger had
 10 transported this female with the gun?
 11 A. I would have to -- to look for notes, but it could very
 12 well be.
 13 MR. MCDUGAL: Objection. Leading.
 14 THE COURT: All right. Counsel, your question, did
 15 you -- you said -- your answer was -- your answer was --
 16 THE WITNESS: I don't remember specifically, but
 17 certainly it could very well have been.
 18 BY MS. COIT: (Continuing)
 19 Q. All right. We spoke about Lieutenant Lebrecht's
 20 performance review. You were aware that that was ongoing;
 21 correct?
 22 A. Yes, ma'am.
 23 Q. Were there portions of that performance review, issues
 24 that were being uncovered, that you felt rose to the level of
 25 internal affairs investigation?

1 A. Specifically, violations of Oregon statute where
 2 Mr. Cleavenger was not apprising people he contacted that the
 3 conversations were being recorded. Yes, those are the areas of
 4 concern that could be referred to an internal affairs
 5 investigation.
 6 Q. And what is the distinction between the repeated
 7 violations of law that Lieutenant Lebrecht was uncovering
 8 versus a performance review? Why does one rise to the level of
 9 an internal affairs investigation?
 10 A. Well, if there's misconduct, that would warrant an
 11 internal affairs investigation. Where the distinction was,
 12 others are just performance issues, where an employee may not
 13 be performing the job as expected.
 14 Q. Did you believe that that portion of
 15 Lieutenant Lebrecht's -- or, excuse me, performance review
 16 could have been an internal affairs investigation?
 17 A. Yes. Each incident in which I -- a person was not advised
 18 that their contact conversations were being recorded could be
 19 referred to an internal affairs investigation.
 20 Q. Okay. All right. I want to show you again -- it's the
 21 transcription of the second half of Mr. Cleavenger's interview
 22 that you conducted during the internal affairs investigation.
 23 MS. COIT: And, Your Honor, this is Exhibit 331.
 24 Exhibit 14. It's previously been received.
 25 THE COURT: Thank you.

1 MS. COIT: Can I publish?
 2 THE COURT: You may.
 3 BY MS. COIT: (Continuing)
 4 Q. This is the portion of the interview when Mr. Cleavenger
 5 was questioned about his failure to record. He told you, "I
 6 generally advise the persons I contact that I'm recording them.
 7 It is part of my routine here but not part of my duties in
 8 Junction City."
 9 Did you ever have a concern or were you told by
 10 Mr. Cleavenger that he did not inform these people that he was
 11 recording them because he had not been trained on that law?
 12 A. No. That was never conveyed.
 13 Q. Now, your internal affairs investigation began around
 14 April of 2012. Is that what you recall?
 15 A. I recall the complaint coming in shortly -- or shortly
 16 upon my return from leave, which had been in the middle of
 17 April.
 18 Q. Okay. And then do you recall when it was completed?
 19 A. Well, I would have to refer to the IA file to be precise,
 20 but I believe it would have been end of August.
 21 Q. Let me find it for you here.
 22 MS. COIT: Same exhibit, Your Honor. 331.
 23 THE COURT: Thank you.
 24 BY MS. COIT: (Continuing)
 25 Q. Does that refresh your memory when you completed this

1 internal affairs investigation?
 2 A. Yes, ma'am.
 3 Q. So over four months you took investigating these
 4 allegations; correct?
 5 A. Approximately, yes, ma'am.
 6 Q. Do you feel you did a thorough investigation?
 7 A. I do.
 8 Q. Do you believe you did an unbiased investigation?
 9 A. Absolutely.
 10 Q. Do you stand behind your findings?
 11 A. Absolutely.
 12 MS. COIT: Thank you, sir.
 13 THE COURT: Are you completed, Counsel?
 14 MS. COIT: Yes.
 15 THE COURT: Recross?
 16
 17 RECCROSS-EXAMINATION
 18 BY MR. MCDUGAL:
 19 Q. You were asked about your April email to Dr. Corey.
 20 MR. MCDUGAL: Can you put up that email, Mr. Hess?
 21 It's not showing on the screen, Mr. Hess. The April 27th --
 22 the first page, Mr. Hess.
 23 BY MR. MCDUGAL: (Continuing)
 24 Q. What do you mean when you tell Dr. Corey that you're,
 25 quote, "grateful for your support"? Do you see that in that

1 email?
 2 A. Yes, sir. That would be support of our program.
 3 Q. Okay. Let's go to the May 17, 2012, last page of
 4 Exhibit 279.
 5 Second paragraph. Again, you can see the whole thing, but
 6 my question is in your email you say, "We can also" -- well, I
 7 should read the whole thing out of fairness. "The product
 8 Brandon" -- that would be Lieutenant Lebrecht?
 9 A. Yes, sir.
 10 Q. -- "put together, we can format into an IA format with
 11 supporting exhibits and make a strong presentation for HR. I
 12 can assist Brandon with the editing and formatting. We can
 13 also work it into -- into it the conversation with Dr. Corey.
 14 I believe it would be appropriate and relevant. If Cleavenger
 15 was to challenge Dr. Corey's opinion, it would open the door
 16 for his further involvement and possibly an assessment or
 17 disclosure of the psych evaluation."
 18 Had Dr. Corey given an opinion yet?
 19 A. I do not recall, but I doubt that would be the case.
 20 Q. Were you anticipating that his opinion would be in your
 21 favor?
 22 A. Opinion about what, sir?
 23 Q. Well, it says, "I believe it would be appropriate and
 24 relevant. If Cleavenger was to challenge Dr. Corey's
 25 opinion" -- the only reason he would have to challenge it was

1 if it was against him; right?
 2 A. If it was unfavorable to him, correct.
 3 Q. And that's what you're anticipating. And it appears you
 4 already know when you're writing this email?
 5 A. Sir, as you know, you try to anticipate all outcomes.
 6 Q. This only anticipated one; correct?
 7 A. Without more information on this particular one, I can't
 8 say so.
 9 MR. MCDUGAL: That's all I have. Thank you.
 10 THE COURT: May the witness be excused?
 11 MR. MCDUGAL: Yes.
 12 THE COURT: Counsel?
 13 MS. COIT: Yes.
 14 THE COURT: Thank you very much for returning, sir.
 15 Counsel, would you like to call your next witness, or
 16 would it be Lieutenant Lebrecht returning to the stand?
 17 MS. COIT: It would be Lieutenant Lebrecht, Your
 18 Honor.
 19 THE COURT: Counsel, would you like to call your next
 20 witness or would it be Lieutenant Lebrecht returning to the
 21 stand?
 22 MS. COIT: It would be Lieutenant Lebrecht,
 23 Your Honor.
 24 THE COURT: Lieutenant Lebrecht, please return to the
 25 stand.

1 Counsel, if you would like to continue your direct
 2 examination.
 3 BRANDON LEBRECHT,
 4 called as a witness in behalf of the Defendants, being
 5 previously duly sworn, is examined and testified as follows:
 6
 7 DIRECT EXAMINATION
 8 (Continuing)
 9 BY MS. COIT:
 10 Q. Thank you. All right. Lieutenant Lebrecht, so we've
 11 heard all about your performance review. Can you tell us how
 12 it is that you came to start doing a performance review of
 13 Mr. Cleavenger?
 14 A. Yes. I received, I believe, a voicemail message from
 15 Matt Fisher who was essentially an associate of
 16 Lieutenant Morrow for professional standards. He's the
 17 professional standards administrator.
 18 Q. And what was that voicemail about?
 19 A. It was about a complaint that had come in, and I don't
 20 believe we knew who it was regarding at the time. It was an
 21 exact name given of the person who had called in, and I had to
 22 do some research to find out who was associated with it, from
 23 what I recall. Sometime in April 2012.
 24 Q. Was this the -- did this ultimately end up being the
 25 complaint by the student that Lieutenant Morrow looked into?

1 A. Yes.
 2 Q. And the complaint was from the student we heard from the
 3 voicemail message?
 4 A. That's correct.
 5 Q. All right. Did you review the video of that stop that
 6 Mr. Cleavenger did of that student?
 7 A. Yes, I did.
 8 Q. And from that review did you identify any concerns with
 9 his performance?
 10 A. Yeah. There was a few issues that I thought I saw.
 11 Q. Were those issues of such concern to you that you thought
 12 you should be looking further into his dash cam videos and the
 13 stops that he was making?
 14 A. Yes.
 15 Q. Now, who was aware that you were looking at
 16 Mr. Cleavenger's video?
 17 A. I believe it was both Lieutenant Morrow and
 18 Chief McDermid.
 19 Q. And how were they aware of this?
 20 A. Well, from what I recall I told them to take a look at the
 21 video, because I found it a little bit troubling, the fact that
 22 he didn't advise that he was recording. I felt that the
 23 behavior was a little bizarre, possibly flirty, from what I
 24 recall. And that's how they became aware of it.
 25 Q. All right. You -- tell us how you started conducting the

1 as well.
 2 Q. All right. In your review -- well, Zach, at some point
 3 during this review of videos, did you review a video having to
 4 do with the woman named Whitney Harder?
 5 A. Yes. I came across a video of that.
 6 Q. And tell us how you came to look into that incident.
 7 A. I believe it was sometime -- can't remember the exact
 8 month. Might have been May of 2012. But I remember
 9 Zach Hermens -- I walked into a briefing, and I heard him
 10 telling someone that Mr. Cleavenger transported an armed person
 11 in the back of his car. And I said, "What was that Zach?"
 12 And he's like, "Oh, nothing. Nothing."
 13 I said "Oh, no, no. What's going on?"
 14 I pulled him aside and talked to him, and then he briefly
 15 explained it was something to do with a female that wanted an
 16 escort and Mr. Cleavenger gave her a ride knowingly with a gun.
 17 And I said, "Are you sure that he knew?"
 18 And he goes, "Yeah, he told me she was packing heat."
 19 Q. So did you find the video of that incident?
 20 A. Yes, I did.
 21 MS. COIT: All right. Your Honor, Exhibit 351 is the
 22 entire performance review.
 23 THE COURT: Okay.
 24 MS. COIT: 351G is the Ms. Harder video.
 25 THE COURT: 351. "G" like good or goat?

1 review. What did you actually do?
 2 A. Well, after I saw the behavior exhibited on that one, I
 3 began looking at other videos to see if there was consistent
 4 behavior.
 5 Also, on that video itself I thought there were things I
 6 saw officer safety concerns -- walking in between the vehicle,
 7 standing up square at the driver's side door, that kind of
 8 thing. Also, I was looking for other instances of those
 9 particular things as well.
 10 Q. Why are those things just mentioned of concern to you?
 11 Are those safety issues?
 12 A. Yes. They could put his safety at risk.
 13 Q. How so?
 14 A. Well, officers are trained to actually not stand square at
 15 the driver's side door. You're supposed to stand almost at the
 16 passenger door behind there and then kind of turn sideways and
 17 lean forward and talk, and that's so if somebody were to pull
 18 out a handgun they would have -- you'd have more time to react
 19 if they're turning around with a gun in their hand or turning
 20 out with this hand. So that's why you stand back behind,
 21 basically, the pillar; not right square on with the door.
 22 Q. So did you want to see if this was out-of-the-ordinary
 23 conduct for Mr. Cleavenger?
 24 A. Yes. Also walking in between the vehicles, if the person
 25 was in the vehicle, they could back up and run an officer over

1 MS. COIT: Or gun.
 2 THE COURT: Gun. 351G.
 3 MS. COIT: It's a really long video, so I'm going to
 4 play excerpts, and I have the time stamps.
 5 THE COURT: Okay. Just follow the same procedure we
 6 did before and then --
 7 MS. COIT: All right. So I'll start at minute
 8 930 and play to 1030.
 9 THE COURT: 930 to 1030.
 10 MS. COIT: It will resume at 1315.
 11 THE COURT: Resume at 1315.
 12 MS. COIT: Through minute 29.
 13 THE COURT: Through minute 29.
 14 MS. COIT: Permission to play, Your Honor.
 15 THE COURT: Please.
 16 (Video played for the jury.)
 17 BY MS. COIT: (Continuing)
 18 Q. What video are we seeing? Is this Mr. Cleavenger's dash
 19 cam footage?
 20 A. This appears to be the one.
 21 MS. COIT: Christy, I believe there's audio on this.
 22 THE WITNESS: It could also be that the audio doesn't
 23 kick on for two minutes. Our video, once someone activates it,
 24 it has no audio for two minutes, because it goes backwards and
 25 starts recording.

1 (Video played for jury.)
 2 BY MS. COIT: (Continuing)
 3 Q. All right. Is this lot 52 by the police station?
 4 A. Yes, it is.
 5 Q. Is that Ms. Harder's car?
 6 A. Yes. Yes, it is.
 7 MS. COIT: I'm going to stop you here. There's
 8 supposed to be audio.
 9 THE COURT: Do you want to replay it since there's
 10 audio?
 11 MS. COIT: Yes, Your Honor.
 12 THE COURT: Why don't you do that. Back it up.
 13 DEPUTY COURTROOM CLERK: Do you have your volume
 14 turned on? Your outputting volume.
 15 MR. JASON KAFOURY: Counsel, just for the record, 9,
 16 30 to 10, 30 you're playing. And then 13, 15 to what?
 17 THE COURT: 13, 15 to 29.
 18 DEPUTY COURTROOM CLERK: I'm showing I have the
 19 volume turned on.
 20 MS. COIT: Same thing when we switch over to them and
 21 switch back we lose our audio.
 22 DEPUTY COURTROOM CLERK: Let's try this. Can you
 23 try? Start again.
 24 MS. COIT: There it is. Start over.
 25 (Video played for the jury.)

1 BY MS. COIT: (Continuing)
 2 Q. All right. So I'd like to go back and play certain
 3 portions of that and ask you to comment.
 4 A. Okay.
 5 MS. COIT: Your Honor, may I do that?
 6 THE COURT: Yes.
 7 MS. COIT: Thank you.
 8 BY MS. COIT: (Continuing)
 9 Q. Who's Mr. Cleavenger talking to?
 10 A. I believe Zach Hermens.
 11 Q. Earlier in the video we saw a public safety officer car
 12 drive up and cross the camera. Who was that?
 13 A. That would be Zach Hermens.
 14 Q. Why can't we see what's going on?
 15 A. Mr. Cleavenger's camera is pointed in a different
 16 direction than where everybody is standing.
 17 Q. Is it supposed to be pointed at the people?
 18 A. It's desirable to be pointed at the people.
 19 (Audio played for the jury.)
 20 BY MS. COIT: (Continuing)
 21 Q. What did you say he said there?
 22 A. Something about a card, I believe. It's probably the
 23 license-carry concealed weapon.
 24 (Audio played for the jury.)
 25 ///

1 BY MS. COIT: (Continuing)
 2 Q. All right. What was that?
 3 A. Wonder if she's -- is she carrying? She is. That's the
 4 handgun they're referring to.
 5 Q. That's Mr. Cleavenger confirming that she's carrying?
 6 A. That's correct.
 7 Q. All right. He says, "I'm going to ask 1030 if I can do
 8 that." Who's 1030?
 9 A. Sam 30. That would be Sergeant Cameron.
 10 Q. So Sergeant Cameron is not there?
 11 A. No. It doesn't appear he's there.
 12 Q. Right there, was he calling to Sergeant Cameron on the
 13 radio?
 14 A. He was.
 15 (Audio played for the jury.)
 16 BY MS. COIT: (Continuing)
 17 Q. All right. What was that?
 18 A. You can't hear what she's saying, but I talked to her on
 19 the phone later, and she said she was referring to her handgun.
 20 MR. JASON KAFOURY: Objection. Hearsay.
 21 MS. COIT: Goes to state of mind, Your Honor.
 22 THE COURT: Overruled.
 23 THE WITNESS: She told me later on she was referring
 24 to her handgun and was basically asking him if he wanted her to
 25 put it in the trunk, and you can hear him say either "leave it

1 on" or "keep it on."
 2 (Audio played for the jury.)
 3 BY MS. COIT: (Continuing)
 4 Q. All right. Who's Mr. Cleavenger talking to there?
 5 A. I believe it's Sergeant Cameron.
 6 Q. He's on the radio still?
 7 A. It could be on the radio or it could be on the phone.
 8 Q. Let's go back. Sorry I kept stopping it.
 9 A. I know I heard him say, "Go to channel two," and I didn't
 10 hear him talk about the phone numbers yet.
 11 Q. So let's play this through and you tell me what you hear.
 12 (Audio played for the jury.)
 13 BY MS. COIT: (Continuing)
 14 Q. All right. So that prior conversation, that was
 15 Sergeant Cameron?
 16 A. That's what it appears to who it was with.
 17 Q. Is he on the radio at that point?
 18 A. It sounds like they're probably talking on channel two,
 19 because these are what Mr. Cleavenger said prior to that
 20 discussion, or maybe channel one.
 21 Q. Do you recognize the other voice?
 22 A. Zach Hermens is in the background.
 23 Q. Why is it we can hear Mr. Hermens and Mr. Cleavenger's
 24 conversation?
 25 A. Because Mr. Cleavenger is recording and it's picking up

1 the people in the area talking where the recording device is.
 2 Q. So he's recording on his dash cam?
 3 A. That's correct.
 4 Q. That's what we're listening to; correct?
 5 A. That's correct.
 6 (Audio played for the jury.)
 7 BY MS. COIT: (Continuing)
 8 Q. Even if they went to three, which is an unrecorded line,
 9 correct --
 10 A. Right. It's not recorded. It's secure.
 11 Q. -- we're still going to hear Mr. Cleavenger's side of the
 12 conversation?
 13 A. Because his dash cam is recording.
 14 (Audio played for the jury.)
 15 BY MS. COIT: (Continuing)
 16 Q. All right. I'm going to stop that too early, but I want
 17 you to just to watch on the street -- sorry. Am I not playing
 18 the video?
 19 THE WITNESS: It's not on.
 20 MS. COIT: Sorry.
 21 (Video played for the jury.)
 22 BY MS. COIT: (Continuing)
 23 Q. All right. That car there, is that Officer Hermens
 24 leaving?
 25 A. Yes. That would be Hermens leaving.

1 Q. This is prior to Mr. Cleavenger leaving the parking lot
 2 with Ms. Harder; correct?
 3 A. That's correct.
 4 (Video played for the jury.)
 5 BY MS. COIT: (Continuing)
 6 Q. All right. So Mr. Cleavenger is leaving with Ms. Harder
 7 right there; right?
 8 A. Correct.
 9 Q. We heard the entire conversation that he had with
 10 Sergeant Cameron; right?
 11 A. We heard Mr. Cleavenger's side, correct.
 12 Q. And we heard that because it was being recorded on his
 13 dash cam; correct?
 14 A. Correct.
 15 Q. Did you ever hear Mr. Cleavenger tell Sergeant Cameron ,
 16 "Hey, this woman has a gun"?
 17 A. No. Not in that discussion.
 18 Q. Did you hear Sergeant Cameron say, "Too bad. Take her on
 19 this safety escort"?
 20 A. No.
 21 Q. You heard Mr. Cleavenger testify that he told
 22 Sergeant Cameron on channel three that the woman had a gun and
 23 Sergeant Cameron ordered her -- ordered him to do the transport
 24 anyways?
 25 A. I believe that's what he said.

1 MR. JASON KAFOURY: Objection. Misstates testimony.
 2 THE COURT: Sorry. I couldn't hear. Ask the
 3 question again.
 4 MS. COIT: I asked if he recalled Mr. Cleavenger
 5 testifying that he asked Sergeant Cameron on the unrecorded
 6 line, channel three, told her that she had a gun, and
 7 Sergeant Cameron ordered him to do the transport.
 8 THE COURT: Overruled. You can answer the question.
 9 THE WITNESS: I believe that's what he said.
 10 BY MS. COIT: (Continuing)
 11 Q. Was that statement true?
 12 A. By what we just heard, no.
 13 Q. And we heard Mr. Cleavenger's entire conversation there
 14 with Ms. Harder -- excuse me, with Sergeant Cameron?
 15 A. That's correct.
 16 Q. All right. Mr. Cleavenger also testified that he felt he
 17 had to give this transport to this woman because Zach Hermens
 18 said that the guy was no longer in his car so he thought it was
 19 urgent to get her out of there. Do you recall that?
 20 A. I don't really recall.
 21 (Video played for the jury.)
 22 BY MS. COIT: (Continuing)
 23 Q. So that was Mr. Cleavenger talking; correct?
 24 A. Correct.
 25 Q. Does it sound like he's directing Officer Hermens to find

1 the car?
 2 A. That's what it sounds like.
 3 (Video played for the jury.)
 4 BY MS. COIT: (Continuing)
 5 Q. Should he be giving her the license plate number and the
 6 name?
 7 A. No.
 8 (Video played for the jury.)
 9 BY MS. COIT: (Continuing)
 10 Q. All right. What did he just say there?
 11 A. "I'm not supposed to give you this, but I'm going to give
 12 you this."
 13 Q. Why is he not supposed to give that information?
 14 A. Because it's a Law Enforcement Database System, LEDS
 15 information.
 16 (Video played for the jury.)
 17 BY MS. COIT: (Continuing)
 18 Q. All right. Why are you not supposed to give out
 19 information that's protected by LEDS?
 20 A. Well, it's a violation of one of their policies, for one
 21 thing. I mean, if there's an investigative purpose, you can
 22 release some information. I would say in a situation that he
 23 had there, perhaps something to the effect of, "Does the name
 24 Roger Tidwell ring a bell with you?" When she says no, then,
 25 "Okay, maybe are you familiar with a blue Jeep Cherokee?"

1 Something along those lines. But anything past that, as far as
 2 releasing drug history, or, you know, the license plate
 3 connected with the name, that's where you're kind of bordering
 4 violating LEDS.
 5 Q. And Mr. Cleavenger acknowledged on that tape that he knew
 6 he was violating the policy; correct?
 7 A. Twice I believe he said, "I'm not supposed to give you
 8 this."
 9 Q. All right. After you watched this video, did you get in
 10 touch with Ms. Harder?
 11 A. Yes, I did.
 12 Q. And what did she tell you happened?
 13 A. Well, it's been a while, but she's told me she had
 14 contacted --
 15 MR. JASON KAFOURY: Objection. Hearsay again,
 16 Your Honor.
 17 MS. COIT: Goes to his state of mind and the chief's
 18 that he relayed this to.
 19 THE COURT: Overruled.
 20 THE WITNESS: She had been contacted by
 21 Mr. Cleavenger twice that night, and there was something to do
 22 with she might have been stalked by an ex-boyfriend or husband,
 23 or whoever it was, and Mr. Cleavenger ended up giving her a
 24 safety escort to a hotel that was nearby, and she told me that
 25 she advised him that she was wearing a gun. She offered to put

1 it in the trunk, and he told her to leave it on.
 2 And I asked her if it was a loaded gun. And she said,
 3 "Oh, yeah, it was loaded."
 4 And I said, "Well, where was it?"
 5 And she said, "Well, I was so upset I either had it in my
 6 lap or at my side."
 7 And I said, "In the back of the car?"
 8 And she said, "Yeah, in the back of the car."
 9 So that was really concerning to me. And she -- I said,
 10 "Well, what was your impression of Mr. Cleavenger?"
 11 And she said something along the lines of that he was way
 12 too trusting but he seemed nice or something like that.
 13 BY MS. COIT: (Continuing)
 14 Q. All right. Now, this incident, this transport of
 15 Ms. Harder, was discussed with Mr. Cleavenger by you ; correct?
 16 A. Correct.
 17 Q. Tell us when this was discussed.
 18 A. This incident was discussed twice. Once was at a meeting
 19 with human resources. Mr. Cleavenger, Lois Yoshishige, and
 20 Scott Cameron, me, and Randy Wardlow. And it was on July 13,
 21 2012, when we first discussed it.
 22 Q. All right. What was the purpose of that first meeting?
 23 A. Well, part of it was to go over the reprimand that he had
 24 been issued in May of 2012. And part was to show him a
 25 sampling of four of the videos that were in a series of, I

1 don't know, 33 or whatever there were.
 2 Q. All right. What did Mr. Cleavenger tell you about why he
 3 did what he did; why transported the female with the gun?
 4 A. He said that there was a letter from Jamie Moffitt, who
 5 was the vice president of finance administration at the
 6 university, who said we couldn't disarm people.
 7 Q. Did he tell you that Sergeant Cameron told him he could do
 8 the transport with the loaded gun?
 9 A. Yes. He did say that. And Sergeant Cameron differed in
 10 that opinion.
 11 Q. From what we just saw on that video, had Mr. Cleavenger
 12 told Sergeant Cameron she was carrying a loaded gun when he
 13 requested the transport?
 14 A. Not on that video, no.
 15 Q. Did you question Mr. Cleavenger about why he violated the
 16 LEDS policy?
 17 A. Yes. I brought that up as well.
 18 Q. What was his response?
 19 A. Basically -- essentially, I don't remember if it was that
 20 particular meeting or the one on August 13, 2012, but I know it
 21 was discussed in one of those, as far as the LEDS. And I
 22 remember him saying something about the effect of, "But have
 23 they heard my side of the story?"
 24 Q. Is there any side of the story Mr. Cleavenger could have
 25 presented that would have justified his violation of giving out

1 that information?
 2 A. Not by what I saw and heard.
 3 Q. All right. Did you report this incident with Ms. Harder
 4 to the chief?
 5 A. Yes, I did.
 6 Q. And I mean Chief McDermed.
 7 A. Correct.
 8 Q. Did you report that in person to her?
 9 A. I don't remember if it was in person or through email or
 10 maybe both.
 11 Q. Do you recall what her reaction was?
 12 A. Yes. She was really shocked and concerned that one of our
 13 officers would transport an armed person in the back of the
 14 car.
 15 Q. Was Mr. Cleavenger removed from public safety officers'
 16 duties after you told Chief McDermed about this incident?
 17 A. Yes. On 5/18 of '12 he was reassigned.
 18 Q. All right. Let's go back to your performance review. So
 19 as you were conducting the performance review, what were the
 20 primary concerns that you were finding in your review of the
 21 videos?
 22 A. A lot of them was the failure to advise of recording, a
 23 lot of officer safety videos. Some decision-making and
 24 judgment -- officer safety issues, excuse me, decision-making
 25 and judgment.

1 Q. What did you believe was the objective of this performance
 2 review that you were conducting?
 3 A. Well, I don't know. Stuff went back and forth several
 4 times, and I remember for a while we were trying to prepare for
 5 a training plan to get him to be successful.
 6 Q. At some point did you put all of your findings from these
 7 reviews into a report?
 8 A. Yes.
 9 Q. Was that report completed after you had met with
 10 Mr. Cleavenger to discuss the review -- the performance review ?
 11 A. Yes, it was.
 12 Q. Do you recall when that meeting was with Mr. Cleavenger to
 13 discuss the performance review?
 14 A. August 13, 2012.
 15 Q. Who was there?
 16 A. It was Mr. Cleavenger, me, Randy Wardlow, and
 17 Lois Yoshishige.
 18 Q. I'm going to give you a copy of your report just for
 19 reference. Okay?
 20 MS. COIT: Your Honor, may I approach?
 21 THE COURT: You may.
 22 MS. COIT: This is 351.
 23 THE COURT: You said 351?
 24 MS. COIT: Yes.
 25 THE COURT: Thank you.

1 BY MS. COIT: (Continuing)
 2 Q. Take a look at that and tell us if that's your report.
 3 A. Okay. Yes, this is it.
 4 MS. COIT: Permission to publish, Your Honor.
 5 THE COURT: You may.
 6 BY MS. COIT: (Continuing)
 7 Q. All right. Did you do a synopsis at some point?
 8 A. Yes.
 9 Q. When was this synopsis completed?
 10 A. I don't remember. I mean, there were -- I updated this
 11 document several times, so I couldn't tell you.
 12 Q. Okay. I want to look at page 5.
 13 Now, on page 5, the summary of incidents, tell us what
 14 these are.
 15 A. Basically, those are brief summaries of the videos that I
 16 looked at involving Mr. Cleavenger for his performance review.
 17 Q. And does -- for each of the videos, did you create one of
 18 these summaries that listed your concerns with his performance ?
 19 A. Yes.
 20 Q. Looking at your review there, do you recall how many
 21 videos were a part of this performance -- or performance
 22 review?
 23 A. Mind if I look at it real quick? It appears there were
 24 33.
 25 Q. Do you recall, out of those 33, approximately how many of

1 those did Mr. Cleavenger fail to advise the person he was
 2 recording?
 3 A. I think of these 33, there's two that were actually
 4 referred to professional standards, so it might be more. 31?
 5 But, overall, I -- from what I recall, there were 25 occasions
 6 of failed to advise a recording to the ones I actually looked
 7 at.
 8 Q. So what happened in the other six?
 9 A. My -- I believe he -- in two of them I believe he advised
 10 people he was recording, and then other ones two of them
 11 probably referred back to Mike Morrow, from what I recall, and
 12 then the other ones could -- could have been someone else
 13 advised a recording. I remember Zach Hermens advised a
 14 recording on at least one of them.
 15 Q. I want to play just a few of these videos so you can
 16 explain to the jury what it was you were having concerns with
 17 with Mr. Cleavenger's performance.
 18 A. Okay.
 19 MS. COIT: Your Honor, permission to play 351B.
 20 THE COURT: 351 -- "B," like boy?
 21 MS. COIT: "B" like boy.
 22 THE COURT: Thank you.
 23 MS. COIT: It will be time-stamped from two minutes
 24 to four minutes.
 25 THE COURT: Two minutes to four minutes.

1 MS. COIT: And then minute 46 through minute 4930.
 2 MR. JASON KAFOURY: 46 to what?
 3 MS. COIT: 4930.
 4 (Video played for the jury.)
 5 BY MS. COIT: (Continuing)
 6 Q. At the very end of that video, is that Mr. Cleavenger
 7 talking?
 8 A. Yes, it is.
 9 Q. What's he saying?
 10 A. "Just letting you know our conversation is being
 11 recorded."
 12 Q. So going back to the video, as a whole, what were some of
 13 the concerns you discussed with Mr. Cleavenger about that
 14 video?
 15 A. Well, he recorded a lot of people without advising them he
 16 was recording. It's an accident going on.
 17 He referred to the car as a silver slug bug from what I
 18 recall. That he was going code three without sirens, and he's
 19 not exempted, per the Oregon Revised Statute, while responding
 20 to an emergency, if you don't have your sirens -- lights and
 21 siren going.
 22 He was responding to an emergency. Zach Hermens had
 23 called for a backup for someone who was fighting him. He was
 24 going pretty fast there, but officers often drive pretty fast
 25 when their co-workers are in fights, so I believe, you know,

1 certain speeds are reasonable.
 2 He passed on the right at least two or three times with
 3 his lights on, it appeared. That's another thing you don't do,
 4 because people are supposed to pull off to the right. So that
 5 could cause an accident.
 6 So if you're going to pass on the right, if they're not
 7 yielding to the right, you are supposed to shut down lights and
 8 sirens.
 9 Again, he didn't have his siren going this whole time.
 10 He went through a couple of the stoplights and, again,
 11 without his sirens. So if he was going to have an accident
 12 with anybody, he wouldn't be exempted from the Oregon Revised
 13 Statute.
 14 Q. So when you go code three, what does that mean?
 15 A. Lights and siren, responding to a emergency.
 16 Q. So Mr. Cleavenger was supposed to have his siren on during
 17 this?
 18 A. Correct. I believe we even heard just a little bit of it
 19 when the other car was responding at the very end. It sounded
 20 like they just turned their siren off.
 21 Q. This was one of the videos you discussed these performance
 22 issues with Mr. Cleavenger?
 23 A. Correct.
 24 MS. COIT: Next one I want to play is 351H.
 25 THE COURT: 351H.

1 MS. COIT: Just start at 140 with no clips in
 2 between.
 3 THE COURT: 140. How long will you go with that?
 4 MS. COIT: I believe it's about eight minutes, Your
 5 Honor.
 6 THE COURT: Okay.
 7 (Video played for the jury.)
 8 MS. COIT: I'll stop it there. I want to go back to
 9 the beginning. Is that all right, Your Honor?
 10 Your Honor, may I replay it from the beginning?
 11 THE COURT: You may.
 12 BY MS. COIT: (Continuing)
 13 Q. All right. I just want you to tell me, in your opinion,
 14 if you found any reason for Mr. Cleavenger to make this stop.
 15 A. Okay.
 16 (Video played for the jury.)
 17 THE WITNESS: Are you referring to the stop sign he
 18 rolled through or this person?
 19 BY MS. COIT: (Continuing)
 20 Q. Not Mr. Cleavenger. Was there any reason for
 21 Mr. Cleavenger to stop this man that's walking along the
 22 street?
 23 A. I don't see any reason by looking at that video.
 24 Q. Did you see anything on this video to indicate this man
 25 was digging through the garbage can?

1 A. It looked like he's at least a few feet away from the
 2 garbage can when he first came into view.
 3 Q. Does Mr. Cleavenger or any of the public safety officers
 4 have the legal authority to stop and detain people for no
 5 reason?
 6 A. Not that I'm aware of.
 7 (Video played for the jury.)
 8 BY MS. COIT: (Continuing)
 9 Q. Again, he advised of recording; correct?
 10 A. This would be the third one then.
 11 (Video played for the jury.)
 12 BY MS. COIT: (Continuing)
 13 Q. Is it appropriate for Mr. Cleavenger to offer that man
 14 cans?
 15 A. No. I mean, it kind of sounded, from the exchange -- I
 16 was under the impression he was trying to bargain for his ID by
 17 giving him cans in exchange for the ID. And, to me, I mean,
 18 he's got his lights on -- to me, it's a detention. I didn't
 19 see the guy do anything. Even if he was looking in a garbage
 20 can, I don't know if that's against the law to glance over a
 21 garbage can.
 22 Q. Did you hear Mr. Cleavenger run a wants and warrants check
 23 on him?
 24 A. At some point does, yes.
 25 Q. Is that appropriate to do if he had no reason to stop this

1 man?
 2 A. Yeah, I'd say once it's an illegal detention, that
 3 wouldn't be appropriate to do.
 4 Q. Is this one of the videos you discussed with
 5 Mr. Cleavenger on the August 13 meeting?
 6 A. I believe it was the August 13th meeting. I know I
 7 discussed it with him at one of them.
 8 Q. Was there anything else about this video that caused you
 9 concern that you discussed with Mr. Cleavenger?
 10 A. Well, the name was either Granham or Granhan, and
 11 Mr. Cleavenger wrote it down, ran it. There was a -- you know,
 12 through the records check. There was some miscommunication
 13 about either Mr. Cleavenger got the last letter wrong, with an
 14 "N" or an "M," or did the guy tell it to him wrong.
 15 So later on in the video Hermens says, "Hey, I know this
 16 guy. He has a record," or something to that effect. And they
 17 end up recontacting him over by McArthur Court, over by the old
 18 basketball court.
 19 And then at another point Mr. Cleavenger is walk ing right
 20 in front of this guy who's following behind him, so I felt that
 21 was unsafe.
 22 Q. Why is that unsafe?
 23 A. Because if people aren't in front of you, you can't see
 24 what's in their -- potentially in their hands or if they might
 25 act out in anger.

1 MS. COIT: Your Honor, permission to play 351F?
 2 THE COURT: 351F.
 3 MS. COIT: This is from minute 140 to minute 725.
 4 Again, we'll just let it play.
 5 MR. JASON KAFOURY: Are from what time to what time?
 6 THE COURT: 140 to 725.
 7 (Video played for the jury.)
 8 BY MS. COIT: (Continuing)
 9 Q. I'm going to stop that one there. What were the concerns
 10 with this interaction?
 11 A. Well, this guy is urinating on the wall, and it would be
 12 desirable to keep the camera focused on him, because it's a
 13 violation. So it would be nice if he could actually keep the
 14 camera focused on him the whole time, but at least he comes
 15 over, back in view of the camera, and Mr. Cleavenger does
 16 advise him it's being recorded.
 17 This is the third one I was referring to. I remembered
 18 two right offhand. Not that other one you just showed.
 19 But he is standing right next to him. This guy is placing
 20 his hands in his pockets several times. That's another thing.
 21 If you see someone with their hands in their pockets, you say,
 22 "I need to have you keep your hands out of your pockets." You
 23 don't know if they have a weapon or anything in their pockets.
 24 I mean, just because the guy appears nice doesn't mean that
 25 they're always going to be like that. So you just treat every

1 situation the same.
 2 "I just need you to keep your hands out of your pockets."
 3 Do it very politely, and the majority of the time people don't
 4 get offended with that.
 5 He was standing really close to him, as he's running him
 6 for warrants, a records check on him, side by side. And then
 7 he's writing a ticket here, and this guy is leaning right up
 8 against him on the car.
 9 And I remember at one point in this video he turns his
 10 back to the guy and walks away.
 11 Then you have this auxillary public safety officer that
 12 was standing in the area. But, still, it just seemed
 13 nonchalant; almost like they had known each other for a long
 14 time. Like it's a buddy.
 15 Q. Was that familiarity with contacts a pattern that
 16 Mr. Cleavenger displayed throughout your supervision of him?
 17 A. From what I recall, he was at times overly friendly and
 18 not really understanding safety measures.
 19 Q. Had you spoken to him before this performance review was
 20 done about being too trusting and too familiar with people?
 21 A. I don't remember exact words, but I did have discussion
 22 with him regarding safety.
 23 MS. COIT: All right. Last one. I promise. I'll
 24 play 351C and the times are 445 through 652 and then
 25 957 through the end.

1 MR. JASON KAFOURY: 957 to the end. And what was the
 2 other portion you were playing?
 3 MS. COIT: Minute 445 through 652.
 4 (Video played for the jury.)
 5 BY MS. COIT: (Continuing)
 6 Q. All right. Now, what were the safety concerns with that
 7 contact?
 8 A. Well, first of all, he rolled through the stop sign
 9 himself, and I believe he was going about 45 miles per hour in
 10 a 15-mile-per-hour zone. It's usually a lot of students around
 11 here. I don't know about the particular time or day, but there
 12 usually is. And, to me, that's more careless driving than
 13 rolling through a stop sign. Driving 45 or 47 miles per hour,
 14 trying to catch up to somebody like that.
 15 Q. And was he following her with his lights on?
 16 A. It appeared his lights were on. I don't know exactly what
 17 point, but you could tell that they were on.
 18 Q. Would this be considered a traffic stop or a campus
 19 version of a traffic stop?
 20 A. I guess that depends on whose version it is. I thought it
 21 was a traffic stop, personally.
 22 Q. Okay. What other safety concerns did you see with this
 23 video?
 24 A. Well, as you could see, his vehicle placed -- I mean, I
 25 can understand why he placed it that way, because he probably

1 didn't want to block all on the other cars. But, to me, if
 2 someone was to stop here, I probably still would have
 3 positioned it behind the vehicle, even if it did block other
 4 cars, because you're just at a disadvantage here. I mean, it's
 5 easy for someone to point their hand this way if they were to
 6 have a gun, and you're just right almost in a target zone.
 7 Then he walks in between the vehicles and goes right
 8 square up to the window, and it looks like he has his hands in
 9 his pocket, and he's leaning into the window. To me, that was
 10 a big concern.
 11 Q. Why is that a concern?
 12 A. Well, again, he's putting himself in potential harm's way.
 13 It would be easy if someone wanted to shoot him. They could
 14 have shot him.
 15 Q. Anything else with this video?
 16 A. Yeah. He also stood in front of a vehicle on a couple of
 17 occasions. I don't know if the vehicle was on or off at that
 18 point. But, still, if somebody is sitting in the vehicle, and,
 19 I don't know -- he looks like he's probably trying to read a
 20 plate that's probably -- a license plate maybe that was up in
 21 the front window.
 22 Well, I mean, it would probably be a lot better if you're
 23 standing off to the side so they don't lunge forward and
 24 potentially run you over.
 25 So that's just another concern I saw.

1 Q. Are these all safety precautions that should be kept in
 2 mind with any contact that you're making?
 3 A. Yes, they should be. In fact, I remember a comment he
 4 made to me once at one point when I was trying to discuss with
 5 him proper positioning when you go up to a vehicle, and his
 6 comment was -- it was almost sarcastic, but it was, "Am I
 7 supposed to stand basically behind the pillar and lean
 8 forward?" And I was like, "Yeah, that is what you're supposed
 9 to do."
 10 So I just -- I don't understand why he doesn't understand
 11 how to do a proper approach on a traffic stop. He was a
 12 reserve officer with Junction City Police Department.
 13 Q. Was the purpose of going over these videos with
 14 Mr. Cleavenger and discussing these safety concerns to help him
 15 learn?
 16 A. Yes.
 17 Q. Anything else with the video? Did he allow the woman to
 18 sit in the car with him?
 19 A. I couldn't tell. It looked like she was off to the side.
 20 I don't know if she was in the car or not. I know he had told
 21 her he had excellent video, but he didn't say that he was
 22 recording an audio and that kind of thing. But he did tell her
 23 he had excellent video. And he mentioned that he was a lawyer,
 24 too, for the second video we've seen now.
 25 The first one being the law school dean.

1 words, this was all work over the weekend. I don't know if you
 2 want that. So let's go on the record. Are we on the record?
 3 Good.
 4 First, it was submitted to me by plaintiff initially with
 5 one and two in the jury instruction first amended free speech
 6 claims against defendants McDermed and Lebrecht. That was your
 7 original proposal, and then we added three. We thought three
 8 was necessary to be included.
 9 Now, as the case rolled along, I started to think about
 10 the specificity -- take a moment and decide if you really want
 11 that.
 12 MR. JASON KAFOURY: Well --
 13 MR. MCDUGAL: Don't jump to speech categories yet.
 14 MR. JASON KAFOURY: The issue I have is some of the
 15 speech -- by going through the categories, we'll see that some
 16 of the speech happened before the August 13, 2012, meeting.
 17 THE COURT: And that would be with --
 18 MR. JASON KAFOURY: That would be with conversations
 19 my client had with the chief back in June, for example, about
 20 the federal -- or the state public officer's bill of rights not
 21 being followed.
 22 THE COURT: Okay.
 23 MR. JASON KAFOURY: That's an example. I can give
 24 you more, but that's an example.
 25 THE COURT: Well, then I'm going to go into chambers,

1 THE COURT: Counsel, I'm going to send the jury home
 2 in a moment at a convenient place. How many more tapes?
 3 MS. COIT: This was the last one, so this would
 4 probably be a good spot.
 5 THE COURT: Is this a good place to stop or are you
 6 close to with your direct? If you're close with your direct,
 7 we'll conclude it.
 8 MS. COIT: I have more.
 9 THE COURT: Okay. I'll send you home at 5:00. Don't
 10 discuss this matter amongst yourselves; don't form any opinion
 11 or express any opinion about the case. I'll see you in the
 12 morning.
 13 Off the record for a moment.
 14 (Jury not present.)
 15 (Recess taken.)
 16 THE COURT: So I want you to pay particular
 17 attention. By the way, this isn't the order. This is the way
 18 we put it together. You can eventually choose your order. I
 19 want you to pay particular attention to First Amendment free
 20 speech claims against defendants McDermed and Lebrecht. You'll
 21 see a highlighted portion beginning "specifically." If we
 22 decide that, the rest of the decisions are relatively easy.
 23 MR. JASON KAFOURY: Your Honor, you asked for the
 24 protected speech categories, and I made a list for you.
 25 THE COURT: Yeah, I don't know. I'm -- in other

1 and let you draft this. In other words, this is a suggestion.
 2 I don't mind that you two injected, but I'll put that back on
 3 the plaintiff, then, for the drafting of this instruction so
 4 the defendant can then make their objections.
 5 MR. JASON KAFOURY: Okay.
 6 THE COURT: Okay. So tell me what time I need to
 7 return.
 8 MR. MCDUGAL: I don't think it will take long.
 9 THE COURT: An hour?
 10 MR. MCDUGAL: No, no, no. Five minutes.
 11 THE COURT: Give me a time period.
 12 MR. MCDUGAL: Ten minutes max.
 13 THE COURT: Ten minutes. Okay.
 14 (Recess taken.)
 15 THE COURT: We're on the record and the Court had
 16 submitted an instruction it worked on over the weekend to both
 17 counsel. The plaintiffs are concerned and would like
 18 specificity concerning the areas of protected speech, of which
 19 they drafted seven -- I'm sorry, nine, in number, and the
 20 defendant objects.
 21 MS. COIT: Yes. The -- it's the Court's
 22 responsibility, it's my understanding, to tell the jury what
 23 the plaintiff complained about that was a matter of public
 24 concern. So before we can draft the instruction on what the
 25 Court is going to tell the jury, there needs to be a decision

1 by the Court on what was a matter of public concern.
 2 Like, for example, number two there, declaring his intent
 3 to file a grievance and going through the grievance process,
 4 that is textbook private concern. I mean, there's case law on
 5 that. That is not a matter of public concern.
 6 And then number three, "during a June 1st meeting." Well,
 7 he has to -- we need to know what it was that was a matter of
 8 public concern that was stated during that meeting.
 9 MR. JASON KAFOURY: I have that.
 10 THE COURT: Let me ask this: I'm assuming that each
 11 of you want to only try this case one time. It goes up for
 12 review for whomever prevails or whoever prevails. If the Court
 13 is right, let's say, on three, hypothetically -- up to four
 14 areas that would be submitted to the jury, but I'm wrong on
 15 one, that means that the circuit could reverse in total unless
 16 they know and have a special finding of some kind, and that's
 17 why I'm -- whatever I would decide on this, it might be
 18 segmented out -- strike that. We might have different
 19 delineations, depending upon what I decide, so that the circuit
 20 knows which protected speech areas were either sustained or
 21 rejected.
 22 Now, if you disagree, please help me.
 23 MS. COIT: I agree with that, Your Honor. But I
 24 think before we can get there, there needs to be a decision on
 25 what evidence he's presented on -- of him making complaints on

1 letter of reprimand and his termination. Your arguments?
 2 MS. COIT: That matter is purely personal to
 3 Mr. Cleavenger. It does not touch on anything that's a matter
 4 of public concern. And there's no complaint being made. He
 5 filed his grievance. That's fine. He went through the
 6 process. That's not a matter of public concern. This was
 7 fully briefed in our summary judgment motion, and I thought it
 8 was decided by Your Honor.
 9 THE COURT: Counsel?
 10 MR. JASON KAFOURY: Your Honor, we're talking about
 11 the exercise of the right and not the contents of it. That's
 12 what's the protected speech. The jury could find that if he
 13 just hadn't have done the grievance that it never would have
 14 terminated him.
 15 THE COURT: Can this be better drafted?
 16 MR. JASON KAFOURY: Sure.
 17 THE COURT: Why don't you do that?
 18 MR. JASON KAFOURY: Okay.
 19 MS. COIT: It still doesn't touch on matters of
 20 public concern. This is a First Amendment claim, not a --
 21 THE COURT: I want to see the first best draft,
 22 Counsel. I understand.
 23 Okay, three. During the June 1, 2012, meeting with
 24 McDermid.
 25 MS. COIT: That gives no examples of what he's

1 matters of public concern.
 2 THE COURT: I understand. But each of you came to me
 3 in a much different light. Initially, it was very general.
 4 Except, I delayed, as you said, the areas of public concern and
 5 said I would decide them.
 6 I want to take the first one for just a moment. Taser
 7 speeches and statements made to the media. Your argument?
 8 MS. COIT: If the statements made to the media refer
 9 to the Taser speeches, then I'm in agreement. That's the
 10 public speech with regard to Sergeant Cameron.
 11 THE COURT: Counsel?
 12 MR. JASON KAFOURY: Yes. But just as an example,
 13 Cameron clearly communicated his philosophy about Tasers and my
 14 client to Lieutenant Lebrecht. That's in the record. So to
 15 limit Tasers only to Cameron is not true. Lieutenant Lebrecht
 16 could have been retaliating, the jury could find, against --
 17 THE COURT: Just a moment. This says to the media.
 18 MR. JASON KAFOURY: No. I know. I'm pointing out
 19 that she's attempting to limit the Taser speech to Cameron as a
 20 defendant, and that's not accurate.
 21 THE COURT: We'll go through these one by one.
 22 Remember you drafted it. That way the defense isn't going
 23 to -- second, by declaring his intent to file a grievance on
 24 May 18th and filing of his grievance on June 18, 2012, and
 25 going through the levels of the grievance process for the

1 talking about.
 2 THE COURT: Exactly. So if I do give a ruling about
 3 some areas of protected speech -- let's take the Taser and
 4 let's say that there's two or three others. Should they all be
 5 listed under the June 1, 2012, with specificity?
 6 MS. COIT: If the protected speech was engaged in in
 7 the June 1st meeting, then, yes.
 8 THE COURT: Okay. Just a moment. So your suggestion
 9 is if I gave Taser and something else, whatever that is, under
 10 the June 1st meeting, I should delineate each one of those
 11 areas, which means if I was to follow that recommendation, I
 12 would do that again with the meeting of August 13th with
 13 Chief McDermid.
 14 To be consistent, in other words, each time -- let's just
 15 assume, hypothetically, there's two, four -- it doesn't matter,
 16 but there's more than one. On each occasion, then, for
 17 June 1st, August 13th, September 2012 -- strike that. Let's
 18 say Brian Smith. Number six. October 2, 2012. If I believe
 19 that those were conveyed or it's arguable that they were
 20 conveyed, then you ask for specificity as to each one of those
 21 redundantly?
 22 MS. COIT: Yes.
 23 THE COURT: Okay. Number four. During a meeting
 24 with Defendant McDermid on August 13, 2012.
 25 MS. COIT: So that -- that would be the same thing.

1 Your Honor would need to decide what the evidence showed is
2 likely he discussed on a matter of public concern during that
3 meeting.

4 THE COURT: By conversations and emails -- number
5 five, by conversations and emails concerning the legality of
6 his order to only report felonies in September of 2012.

7 MS. COIT: It needs to identify who he's reported
8 this to. It has to be specific to the defendant.

9 THE COURT: In other words, that's cumulative if
10 anything. It would have to be either June 1st, with McDermed,
11 or, hypothetically, June 18th, I'm sorry, or with Brian Smith
12 on October 2nd.

13 MS. COIT: I agree.

14 THE COURT: Okay. So this is -- okay. Six. During
15 a meeting with University of Oregon, assistant vice president
16 of financial affairs, Brian Smith, on October 2, 2012, and in
17 subsequent correspondence with him. So, once again, if I
18 decide that there's any matter of public policy, I would list
19 those redundantly.

20 MS. COIT: I agree.

21 THE COURT: Okay. Seven. During the predismissal
22 hearing with Linda King on October 12, 2012. The same?

23 MS. COIT: Same.

24 THE COURT: Okay. By filing for arbitration on
25 April 2013 and statements made during the actual arbitration

1 MR. JASON KAFOURY: And, Your Honor, let me -- I
2 threw out some examples here. I wasn't making this a full
3 exhaustive list, but you said today to put together categories
4 of protected speech, so I want to make sure I'm --

5 THE COURT: Explain what the non-responding calls
6 are -- what the evidence is in this record of those.

7 MR. JASON KAFOURY: I believe there's been testimony
8 that these shift briefings lasted hours. Casey Boyd
9 testified --

10 THE COURT: That's not the response to calls. You
11 already got unnecessarily long shift briefings. That's your
12 first one.

13 MR. JASON KAFOURY: Right. As a result of that,
14 Casey Boyd testified that there were dispatchers that were
15 contacting her complaining about the fact that calls were going
16 unanswered because the shift briefings were so long.

17 THE COURT: Counsel?

18 MS. COIT: There's no evidence that Mr. Cleavenger
19 made that complaint. This isn't Casey Boyd's lawsuit. He
20 presented no evidence that he made that complaint to anyone.

21 THE COURT: Number three. Complaints about
22 discrimination within a police force and misconduct related to
23 political bias. And then under that you have mistreatment of
24 females within the department and campus community,
25 overcharging of students, and disparagement of people in the

1 and thereafter. The same?

2 MS. COIT: Yeah, and it needs to be specific to what
3 was complained of in that arbitration that was a matter of
4 public concern.

5 THE COURT: And by filing a federal lawsuit on
6 October 25, 2013, including the statements made within it?

7 MS. COIT: Correct. I agree.

8 THE COURT: Okay. Counsel? What are my matters of
9 public concern?

10 MR. JASON KAFOURY: Well, let me give you --

11 THE COURT: Why don't you put this up on the screen?

12 MR. JASON KAFOURY: Can you put this up on the
13 screen, Mr. Hess?

14 MR. HESS: I do not have --

15 MR. JASON KAFOURY: We can use the Elmo.

16 MR. HESS: I can use Elmo. That's true.

17 THE COURT: Okay. The first is Taser speeches and
18 statements made to the media about the same. I think there's
19 already an agreement that this goes to the jury as a matter of
20 public concern.

21 Second: Complaints about misconduct within a police
22 force, misuse of public funds, and wasted resources.
23 Unnecessary long shift briefings, the bowl of dicks list,
24 watching football videos on department time, and not responding
25 to calls.

1 Occupy Movement.

2 MR. JASON KAFOURY: And I would add I think the bowl
3 of dicks actually goes under two and three.

4 THE COURT: Counsel?

5 MS. COIT: Well, can I go back to two or do we --

6 THE COURT: Sure.

7 MS. COIT: Okay. I -- again, we briefed all this and
8 I'm happy to do it again, but complaints about misusing public
9 funds -- him talking about telling someone that I think that
10 the shift briefings went too long, it doesn't rise to that
11 level of being a matter of public concern. He never went to
12 the public with any of this stuff, and it's not something what
13 rises to the level of a misuse of public funds, as that is
14 interpreted in First Amendment speech.

15 This -- I don't think there's been any evidence that
16 Lebrecht was involved in this watching of football videos other
17 than what Mr. Cleavenger put into his lawsuit.

18 THE COURT: How about Sergeant Cameron?

19 MS. COIT: I'm sorry?

20 THE COURT: Sergeant Cameron?

21 MS. COIT: Said --

22 THE COURT: Is he a part of that?

23 MS. COIT: Watching the football videos? No. I --
24 they just said Lebrecht put -- watched football videos.

25 THE COURT: I believe so also. Counsel?

1 MR. JASON KAFOURY: I'm pretty sure Officer Drake
2 testified that there was a football video being watched, and
3 I'm pretty sure my client testified he complained to Brian
4 Smith about that. I'll have to go back and check the record.

5 THE COURT: Why don't you do that for me. Find the
6 place.

7 MR. JASON KAFOURY: Okay.

8 MS. COIT: But, again, I mean, in the same breath
9 Mr. Cleavenger said, "You know, well, I watched skiing videos,
10 but those were for only 30 seconds or so," but somehow telling
11 someone that Lieutenant Lebrecht put on a video of an old
12 football highlight somehow rises to the matter of public
13 concern complaining about the wasting of public funds? It
14 just -- these are tikkittakki little things. I mean, it's not
15 matters of public concern.

16 MR. JASON KAFOURY: It all goes to the weight, I
17 think.

18 THE COURT: Complaints about -- four. Complaints
19 about acts of retaliation and improper threats of retaliation
20 by superiors. Cutting off of access to IA. Threat made after
21 the Occupy briefing.

22 MR. JASON KAFOURY: Those are just a couple of
23 examples. There's a lot in the record.

24 THE COURT: Counsel?

25 MS. COIT: Again, these are private matters that

1 THE COURT: Okay. So filing of grievances, verbal
2 notice to superiors of intent to file grievance, statements
3 made throughout the grievance process, filing of appeal to
4 arbitration, and statements made during the three-day
5 arbitration. You would see that the same as number three, the
6 complaints about discrimination, et cetera. No, strike that.
7 My apologies.

8 You would see that as number two on the prior page by
9 declaring his intent to file a grievance on May 18th.

10 MS. COIT: Correct.

11 THE COURT: Okay.

12 MS. COIT: And the same issue with the statements
13 made during the arbitration. I mean, they have to be
14 statements on matters of public concern.

15 THE COURT: Okay.

16 MR. JASON KAFOURY: There's already been extensive
17 testimony that bowl of dicks was discussed at the arbitration,
18 so --

19 THE COURT: Eight. The filing of this lawsuit.

20 MS. COIT: Which I agree if there are matters in
21 there that are matters of public concern.

22 THE COURT: Okay. And nine. Statements made to the
23 media about this lawsuit.

24 MR. JASON KAFOURY: I'll withdraw that because I
25 don't think we can prove there's any adverse -- we'll withdraw

1 concern only his employment, his complaints about his
2 supervisors, not matters of public concern. They're purely
3 personal to him.

4 THE COURT: Okay. Five. Complaints about state law
5 violations and the Public Safety Officers Bill of Rights.

6 MR. JASON KAFOURY: Yeah. There's extensive
7 testimony that he complained to Chief McDermid, starting with
8 that meeting on 6/1, and throughout these various meetings with
9 Lebrecht and with HR and, again, with McDermid, I believe, on
10 August 13th, that he was not being given his legal rights to
11 officer's bill of rights to record these meetings, to know the
12 allegations against him. There were these secret
13 investigations going on. I think there's a whole ton of
14 testimony all throughout the summer that he was complaining
15 about that.

16 THE COURT: Okay. Counsel?

17 MS. COIT: I think I agree that that touches on
18 matters of public concern.

19 THE COURT: Okay. So five and one so far. Am I
20 correct?

21 MS. COIT: Yes.

22 THE COURT: Okay. Complaints about federal law
23 violations, the Clery Act, and directive to PSO Cleavenger not
24 to report anything but felonies.

25 MS. COIT: That I agree as well.

1 that.

2 THE COURT: So one, five, six, and eight thus far.
3 I'll go back in chambers for a while. Why don't you start
4 drafting what you think one, five, six, and eight would look
5 like in an instruction.

6 MS. COIT: Okay.

7 THE COURT: Before I go back with these instruction s
8 I have laid out on the table, concerning the causal connection
9 instruction, you heard me indicate that I think the
10 instruction's unnecessary and you heard me indicate this
11 morning, informally -- and I don't think it was on the
12 record -- that the legal standard is used by the courts in the
13 Ninth Circuit -- and this addresses whether there's sufficient
14 evidence to support an inference of causation under a summary
15 judgment standard. I think it's up to the jury to determine
16 whether the speech was a substantial factor. Although, I do
17 subscribe that the plaintiff is free to argue that any of these
18 three factors support an inference that the speech was a
19 substantial factor in causing the adverse action to the jury in
20 the closing argument.

21 Now, why don't you argue that as well, Counsel.

22 MR. MCDOUGAL: Oh, I -- I've made my argument before,
23 Your Honor.

24 THE COURT: Any other comment, then?

25 MR. MCDOUGAL: No.

1 THE COURT: Any other by defendant?
 2 MS. COIT: No, Your Honor.
 3 THE COURT: I think as soon as we finish this
 4 protected speech issue this evening that the only thing I can
 5 foresee of what the jury verdict form would look like
 6 eventually -- and do you have any thoughts or suggestion --
 7 suggestions? Because you know the four categories, at least,
 8 are agreed upon. It's the way they get drafted. What is my
 9 special verdict form? Am I going to have a special verdict
 10 form?
 11 MR. MCDUGAL: We're not requesting one, Your Honor.
 12 THE COURT: Counsel, what are your thoughts?
 13 MS. COIT: I'm sorry. I missed that.
 14 THE COURT: Well, they're going to request a general
 15 verdict form. Are you going to want a special verdict form?
 16 Depending upon what the Court eventually decides -- and there's
 17 two problems that face each of you and they're equally damaging
 18 to you. Assume that you, as the defendant, prevailed for a
 19 moment, but that I've made an incorrect decision on what
 20 protected speech is. In one of these categories. It comes
 21 back and gets tried again in that category.
 22 MR. MCDUGAL: Not if it's not on the verdict form ;
 23 right?
 24 THE COURT: Pardon?
 25 MR. MCDUGAL: If it's not on the verdict form, does

1 one category and didn't.
 2 Now, that -- I leave that to you to resolve or not to
 3 resolve because it's just another trial to me. Just, you know,
 4 two and a half weeks of trial. It makes no difference whether
 5 I'm with you or on an antitrust or patent case. It really
 6 doesn't. So I leave that to you and your client, and I leave
 7 that in the wisdom of the defendant because, if I guess wrong,
 8 you're both equally harmed. So all right. We'll go back.
 9 Counsel, start drafting and call me when you're done. Now
 10 time doesn't mean anything to me.
 11 (Recess taken.)
 12 THE COURT: We're back on the record. Counsel ?
 13 MR. JASON KAFOURY: Yeah, we -- we redid number two.
 14 THE COURT: Let me see it on the screen. I can't see
 15 what you're doing.
 16 MR. JASON KAFOURY: Yeah. Mr. Hess, put this back on
 17 the screen.
 18 THE COURT: Have you shown that to the opposition?
 19 MR. JASON KAFOURY: No. Just literally finished it
 20 right now. It's not --
 21 THE COURT: Why am I out here, Counsel? This is a
 22 waste of my time.
 23 MR. MCDUGAL: They were the ones drafting the
 24 instructions that you were waiting on, Your Honor.
 25 MR. JASON KAFOURY: Yeah, you only asked us to do

1 it come back?
 2 THE COURT: No. You're not listening. That's a
 3 decision you have to make.
 4 Is the Court going to be right on the remaining of those?
 5 And if I'm too narrow, the circuit is going to reverse and send
 6 this back because I missed one of those.
 7 So I'm not encouraging you to be expansive at all. I'm
 8 just pointing out the real practical issues involved. If I,
 9 for instance, exclude one of these or more than one, let's say,
 10 because they are inappropriate. So I'm not encouraging you to
 11 ever change your position. I'm just pointing out the danger.
 12 By the same token, for the plaintiffs, if I give a general
 13 verdict form and I've inappropriately included one of these
 14 areas, it's coming back.
 15 Tremendous risk to each of you in terms of not being able
 16 to come together.
 17 Now, you -- it makes no difference to me. I frankly don't
 18 think you can sustain the lawsuit, probably going to be a
 19 burden, and I don't think your clients want to go through it
 20 again with the notoriety.
 21 So I'll make my best attempt at it, but what I'm saying to
 22 you is unless this is severable, if it's put together and if
 23 I'm incorrect in any one of these categories, I don't see what
 24 choice the circuit has except to say, you know, in category
 25 number eight, or whatever, the judge should have included this

1 one. They were the one that was drafting them.
 2 THE COURT: Well, let's just start with how much
 3 specificity is required. Taser speeches and statements made to
 4 the media. Two. By stating his intent to file a grievance on
 5 May 18th and exercising his right to file a grievance on
 6 June 18, 2012, and exercising his right of grieving the letter
 7 of reprimand and his termination.
 8 Now, just a moment.
 9 I don't tend to think that that's a matter of public
 10 policy. I'll let you conclude it, but I don't think it is.
 11 Three. During a June 1, 2012, meeting with McDermid.
 12 Where is my specificity concerning what was relayed on
 13 June 1st?
 14 MR. JASON KAFOURY: I -- I think I --
 15 THE COURT: Are you including -- you've given me two
 16 sheets. Are you including on the June -- you just can't say
 17 June 1st meeting.
 18 MR. JASON KAFOURY: No.
 19 THE COURT: Are you including, for instance, that
 20 there was allegedly a statement about misconduct within the
 21 police force and wasted resources? Are you alleging that the
 22 bowl of dicks list took place at that meeting?
 23 MR. JASON KAFOURY: No.
 24 THE COURT: On the -- well, you have to be specific.
 25 June 1st is far different than August 18th.

1 MR. JASON KAFOURY: I believe --
 2 THE COURT: So watching football videos on department
 3 time. I'm a little hesitant about that, frankly; that
 4 category. I also don't see the misuse of public funds. You
 5 can argue it, but I'm just telling you tentatively. It's not a
 6 final ruling. I don't think this is a classic misuse of public
 7 funds. You can argue that they were not used wisely because
 8 people wasted time. I don't think that's a misuse that I'm
 9 used to anyway.
 10 During a meeting with defendant, McDermid, on August 13,
 11 2012 -- where's -- see, you're assuming that on each of these
 12 dates the exact same thing was said. I know when you get to
 13 Brian Smith that the general statement by your client was
 14 "Everything that I said to McDermid, I said to Smith." So from
 15 that statement, it got lumped together.
 16 Is that sufficient to give it to the jury, Counsel? In
 17 other words, just that general statement that he makes,
 18 "Everything I said to Chief McDermid, I said to Brian Smith"?
 19 I'm assuming it is, by the way. I'm assuming if you're
 20 incorporating that in one statement by your client and he's
 21 laid out what he said to McDermid, that that's your
 22 responsibility to go back through the record and then Counsel's
 23 to object.
 24 MR. JASON KAFOURY: I'll put him back on rebuttal if
 25 we need to have me go through it with specificity. We went

1 being afforded his rights under the officer's bill of rights.
 2 We all agree on that?
 3 MR. JASON KAFOURY: Yeah.
 4 THE COURT: Okay. Three. When he complained to
 5 Brian Smith on October 2, 2012. Well, let me stop for a
 6 minute.
 7 MS. COIT: I have subcategories there.
 8 THE COURT: He thought he was not being afforded his
 9 rights under the officer's bill of rights. Okay. That he
 10 thought the instruction not to call out crimes other than
 11 felonies was a violation of federal law. What about the
 12 general category that counsel includes on his third piece -- or
 13 second piece of paper? He spoke out about misconduct within
 14 the police department, allegedly, and he spoke out about wasted
 15 resources.
 16 Now, it seems to me that those might be combined. I don't
 17 know.
 18 MS. COIT: I don't think anything he spoke about
 19 regarding the bowl of dicks list, unnecessary long shift
 20 briefings, watching football is a matter of public concern.
 21 THE COURT: Well, just a moment. Do you two -- you
 22 want me to make that ruling --
 23 MS. COIT: Yes.
 24 THE COURT: -- about those categories?
 25 MS. COIT: Yes.

1 through it in specificity in his deposition and --
 2 THE COURT: He won't come back on rebuttal for that,
 3 Counsel.
 4 MR. JASON KAFOURY: Okay.
 5 THE COURT: You've had your opportunity with that.
 6 So I'm just warning you.
 7 MR. JASON KAFOURY: Okay.
 8 THE COURT: So the record will be what it is. If
 9 it's true rebuttal, it will be on, but he's had his
 10 opportunity.
 11 Now, do you have a proposed instruction?
 12 MS. COIT: I do.
 13 THE COURT: Put it up on the Elmo.
 14 MS. COIT: Two pages.
 15 THE COURT: Okay. I instruct you that if
 16 Mr. Cleavenger made the following complaints, these complaints
 17 were a -- on a matter of public concern: One. When he spoke
 18 about Tasers in 2008.
 19 I think we all agree about the general category anyway.
 20 Two. When he complained to Brian Smith on October 2,
 21 2012. Now, that may be sufficient.
 22 MS. COIT: No, Your Honor -- I'm sorry. We missed
 23 number two. It's the Chief McDermid one.
 24 THE COURT: Oh, I'm sorry. When he complained to
 25 Chief McDermid on August 13, 2012, that he thought he was not

1 THE COURT: Okay. And number three is as far as you
 2 go. Is that correct? I can't see the bottom of your paper.
 3 MS. COIT: That's it. And then --
 4 THE COURT: Oh, there.
 5 MS. COIT: Sorry.
 6 THE COURT: When he complained to Linda King on
 7 October 12, 2012.
 8 MS. COIT: The same two categories as he complained
 9 to Smith about. Sorry. I write really slow.
 10 THE COURT: And when he complained --
 11 MS. COIT: In the arbitration.
 12 THE COURT: -- in the arbitration in 2013.
 13 MS. COIT: Same two categories.
 14 THE COURT: And when he complained in this lawsuit on
 15 November 2013.
 16 Now, I like that structure. That's a lot cleaner
 17 structure. The question is what gets filled in in addition
 18 to -- turn your paper over. Okay. What else would you fill
 19 in, Counsel, hypothetically, for the plaintiff?
 20 MR. JASON KAFOURY: What's that?
 21 THE COURT: What else would you fill in?
 22 MR. MCDUGAL: Into which number?
 23 THE COURT: Any of them. They're redundant.
 24 Now, this is the night you pay a price. Okay? Both of
 25 you. I'll have these instructions in good order by tonight,

1 and I'm not going to keep my court staff here. So you pick a
 2 place to meet and you pick it before midnight, and that's where
 3 we'll be. I'm not joking. You pick one of your offices or the
 4 lobby of the hotel that I'm staying in, but we're going to
 5 complete this or get darn close to it tonight.
 6 MS. COIT: We can go to my office, Your Honor.
 7 THE COURT: Okay. I'll meet you there in two hours?
 8 Three hours? What time? This is what you both should be
 9 doing. I should have plaintiff's instruction with specificity.
 10 I should have the defendants' response. And I'm not waiting
 11 until tomorrow, and I'm not waiting until tomorrow night just
 12 in case we go to the jury on Wednesday because you two will be
 13 exhausted, so we might as well start tonight.
 14 Give me the location.
 15 MR. MCDUGAL: Do you have somebody?
 16 THE COURT: That way we can grab a little bit of
 17 dinner and I'll meet you at 11:00 tonight. You're laughing. I
 18 wouldn't be laughing, Counsel.
 19 MS. COIT: I've got my instruction, Your Honor.
 20 THE COURT: Okay. But I'm not going to sit here with
 21 my court staff. We can do this informally tonight. I'll let
 22 my court staff go home. 10:00? 11:00? What time? I'll give
 23 you a couple of hours. That way you've got a little bit of
 24 dinner in you.
 25 MS. COIT: 8:30?

1 MR. JASON KAFOURY: 8:30?
 2 THE COURT: No. Not enough time for you.
 3 MR. JASON KAFOURY: 9:00?
 4 THE COURT: No. Not enough time for you. This is
 5 going to be complete. Earliest time is 8:00 -- or 10:00. Very
 6 earliest time. And I'm doubtful you'll have it done. I'm
 7 going to call, and if you don't, I'll meet you at 11:00. And
 8 whether you sleep tonight is of no concern to me now.
 9 MS. COIT: Your Honor, you want us to agree on the
 10 instructions?
 11 THE COURT: No. You don't have to. I still have
 12 decisions to make, but I want the basic format. In other
 13 words, I want to see plaintiff's laid out with preciseness and
 14 then I can start ruling out. I want this typed so that the
 15 redundancies are actually typed. Not just "same as Smith."
 16 MS. COIT: Gotcha.
 17 THE COURT: That way I can simply make the rulings.
 18 I can look at those categories. And that way you two know what
 19 to argue from these transcripts about. You know, "Judge, it
 20 really wasn't said at that meeting," or "It didn't come up."
 21 MS. COIT: Did you say we could go to your office?
 22 MR. MCDUGAL: If we do it local --
 23 MS. COIT: That's fine.
 24 THE COURT: Give me the location. Dress casually.
 25 MR. JASON KAFOURY: 411 Southwest Second. Second

1 floor.
 2 THE COURT: Just a second. 411 Southwest Second.
 3 And what floor?
 4 MR. MCDUGAL: Second floor.
 5 THE COURT: Second floor. How do I get in?
 6 MR. MCDUGAL: You'll have to call upstairs, and let
 7 me give you --
 8 THE COURT: What's the number?
 9 MR. MCDUGAL: 971.
 10 THE COURT: 971.
 11 MR. MCDUGAL: 563.
 12 THE COURT: 563.
 13 MR. MCDUGAL: 3234.
 14 THE COURT: 3234.
 15 Now, there's something else we can do. The reason I'm
 16 meeting you is I don't believe you'll get it done tonight if
 17 you leave and I'm not around. If you really think you two can
 18 work together and you're over in an office together, you don't
 19 have to meet me. You can do it tomorrow morning. That way --
 20 but I want it at 7:30 in the morning.
 21 MR. MCDUGAL: That's fine. We can follow her format
 22 and we can see if she disagrees certain things were said.
 23 THE COURT: So far we know the following, don't we:
 24 We know that Taser speeches, one -- I'm just going to meet you
 25 at 10:00. I'll see what you have then. Okay? All right.

1 That takes care of that problem. Okay. Goodnight.
 2 Also, work on the verdict form. Remember, I start taking
 3 things out: In other words, you can be as complete as you
 4 want. But what I don't want to do is have you start -- I want
 5 a format, and here's why: What you did with Smith was
 6 interesting. It was kind of a volume -- an all-encompassing
 7 question. Well, you included -- you said everything. It all
 8 came out. Probably have to let that go to the jury based upon
 9 what your client says that he said to McDermed. And I may have
 10 Smith reversed with McDermed, by the way.
 11 But the most complete, I think, was actually in the June
 12 meeting. Then we got into August. And I don't know that
 13 everything was included. Sounded like it was. When we got
 14 into Smith, I think it was just kind of a summary because by
 15 that time we heard it. I think that's enough to go to the
 16 jury.
 17 Okay. Now I'm going to wear a pair of Levi's. I'm going
 18 to dress casually and we'll see what you've got done.
 19 MR. MCDUGAL: I don't want to get sideways with the
 20 Court. If we want a general verdict, do you still want us to
 21 propose --
 22 THE COURT: No. If you both stipulate to a general
 23 verdict, I'll give a general verdict. But, therefore, I have
 24 it on the record that you both requested it. It makes it
 25 harder for the circuit to reverse me.

1 MR. MCDUGAL: What if we want a general verdict and
 2 they don't?
 3 THE COURT: They'll get a special verdict , but they
 4 will have to draft it.
 5 MR. MCDUGAL: Okay.
 6 THE COURT: In other words, I'm not going to buy into
 7 a general verdict because the circuit has the right, hopefully,
 8 to see what was decided by the jury and hopefully that avoids a
 9 wholesale reversal . Because if there's a wrong decision by me,
 10 the whole thing comes back in a general verdict. So, Counsel,
 11 you've got some drafting to do also.
 12 Now, that doesn't mean --
 13 MS. COIT: Fill it in? Can -- my -- my desire would
 14 be to do it by individual defendant.
 15 THE COURT: Well, I leave that to the two of you.
 16 MS. COIT: Okay.
 17 THE COURT: 10:00 is the first meeting . If not, I'll
 18 disappear. I'll go for a walk across the river and come back
 19 at midnight.
 20 I know you don't believe that, but you watch.
 21 MR. JASON KAFOURY: Your Honor, do you have a
 22 telephone that we can get in touch with you in case we --
 23 THE COURT: No. Absolutely not. I'll be calling
 24 you. And if I'm not satisfied you're far enough along, then
 25 I'll just set it by phone and it will be later. I've got your

2371

1 number. (971)536-3234. I may call in to see how you're doing.
 2 (Trial Day 8 adjourned.)
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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 8
 6 September 21, 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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