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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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KAREN BIRD, an individual,

Plaintiff,

v.

WEST VALLEY CITY, a political subdivision of  
the State of Utah, and KELLY DAVIS, in his  
official and individual capacities,

Defendants.

**MEMORANDUM DECISION AND  
ORDER DENYING PLAINTIFF'S  
MOTION FOR NEW TRIAL (ECF  
NO. 169)**

Civil No. 2:12-cv-00903

Magistrate Judge Evelyn J. Furse

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Before the Court<sup>1</sup> is Plaintiff Karen Bird's Motion for New Trial (ECF No. 169) brought pursuant to Federal Rule of Civil Procedure 59. Ms. Bird seeks a new trial "due to the misconduct" of counsel for Defendants West Valley City and Kelly Davis (collectively, "West Valley Defendants") that she claims "unfairly prejudiced [Ms.] Bird's presentation of her case." (Pl.'s Mot. for New Trial ("Mot.") 1, ECF No. 169.) Specifically, Ms. Bird claims that West Valley's counsel improperly (1) questioned Layne Morris, Director of West Valley City's Community Preservation Department, regarding his military experience in an effort to "arouse sympathy" for Mr. Morris, (2) stopped the redirect/cross-examination<sup>2</sup> of Mr. Morris "by falsely claiming he would otherwise not

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<sup>1</sup> The parties consented to proceed before a magistrate judge in accordance with 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73. (ECF No. 11.)

<sup>2</sup> Ms. Bird refers to the examination as a redirect, but given that both sides called many of the same witnesses, including Mr. Morris, the examination at issue constituted both a redirect and cross-examination.

have time to put on Defendants' case," (3) relied on Mr. Morris's military experience during his closing argument to suggest that Mr. Morris would not lie, and in so doing, vouched for his credibility, and (4) suggested during his closing argument that Mr. Morris was the subject of a new movie and portrayed by a famous actor. (Id. at 2–3.) Ms. Bird asserts that "[t]his conduct as a whole was sufficiently egregious that it had the ability to influence the outcome of the case, and likely did, as the jury finding of no liability was against the weight of the evidence."<sup>3</sup> (Id. at 1–2.)

The West Valley Defendants counter that courts highly disfavor motions for a new trial and only grant them "in the face of very serious and prejudicial misconduct." (Opp'n to Pl.'s Mot. for a New Trial ("Opp'n") i–ii, ECF No. 172.) As to the specific instances of alleged misconduct, the West Valley Defendants assert (1) that Mr. Morris's military experience "was admissible background information that bears on his reliability and credibility," and in any event, "provided only a small part of his trial testimony," (2) that counsel did not mislead the Court in arguing that the West Valley Defendants may not have time to put on their case because they only made the strategic decision not to call additional witnesses after Mr. Morris concluded his testimony, (3) that during closing argument, counsel confined his argument to the record and did not vouch for Mr. Morris's credibility, and (4) that counsel did not say during closing argument that Mr. Morris was the subject of a movie or portrayed by a famous actor but instead referred to the movie to make an analogy. (Id. at ii–iii.) The West

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<sup>3</sup> Ms. Bird does not move for judgment as a matter of law under Federal Rule of Civil Procedure 50. (Id.; Reply in Supp. of Pl.'s Mot. for New Trial ("Reply") 3, ECF No. 173.)

Valley Defendants also claim that the alleged misconduct reflects “a minor part of the case” in any event and does warrant a new trial. (Id. at iii.)

The Court finds the alleged conduct does not warrant a new trial. Ms. Bird’s complaints relating to the redirect/cross-examination of Mr. Morris and the introduction of testimony concerning his military service lack any basis and do not amount to misconduct by West Valley Defendants’ counsel. However, some of the remarks of West Valley Defendants’ counsel during closing argument qualify as improper. Nonetheless, that conduct does not support the extreme remedy of a new trial. The remarks lasted only a few minutes, the Court instructed the jury on multiple occasions that attorney arguments are not evidence, and nothing indicates that these arguments clearly influenced the verdict or obviously prejudiced Ms. Bird. Accordingly, as addressed in detail below, the Court DENIES Plaintiff’s Motion for New Trial.

### **BACKGROUND**

In September 2012, Ms. Bird filed this employment discrimination case against her former employer, West Valley City, and Kelly Davis, her former supervisor. (Compl., ECF No. 2.) Ms. Bird alleges that on November 29, 2011, West Valley City unlawfully terminated her from her position as the manager of the West Valley City Animal Shelter (“Animal Shelter”). (See id.) In February 2015, the Court granted the West Valley Defendants summary judgment on Ms. Bird’s Title VII claims, § 1983 equal protection claim, contract claims, and § 1983 First Amendment retaliation claim. (Mem. Dec. & Order, ECF No. 44.) Ms. Bird appealed that decision, and the Tenth Circuit affirmed as to all the claims except her § 1983 First Amendment retaliation claim. Bird v. West

Valley City, 832 F.3d 1188, 1213 (10th Cir. 2016). As to that claim, the Tenth Circuit reversed the grant of summary judgment based on an intervening Supreme Court case and remanded for further proceedings consistent with its opinion. Id. at 1211–13.

In September 2017, the Court denied West Valley Defendants' motion for summary judgment on Ms. Bird's § 1983 First Amendment retaliation claim. (Mem. Decision & Order Denying Defs.' Mot. for Summ. J., ECF No. 76.) The case then proceeded to trial from March 12 to March 16, 2018. (ECF Nos. 150, 151, 152, 154, & 161.) The preliminary instructions given to the jury described the case as follows:

To help you understand what you will see and hear, I will now explain the background of the case. Karen Bird worked as manager of the West Valley City Animal Shelter until her termination in November 2011. She worked directly for Defendant Kelly Davis, the shelter's Director of Operations, who worked for Layne Morris, the Director of West Valley City's Community Preservation Department. On November 29, 2011, Mr. Morris terminated Ms. Bird. Ms. Bird brought this lawsuit against West Valley City and Mr. Davis, alleging that her termination was motivated by their belief that she was the source of leaks to the media about the animal shelter, in violation of her First Amendment right to free speech. West Valley City and Mr. Davis claim that Ms. Bird was terminated for legitimate reasons, specifically, for being insubordinate, discourteous, and uncooperative.

(Preliminary Instructions, Instruction No. 1, ECF No. 143.) On October 17, 2011, several news outlets published articles about a cat named Andrea who twice survived West Valley City's attempts to euthanize her in the Animal Shelter's carbon monoxide chamber. (Mem. Decision & Order Denying Defs.' Mot. for Summ. J. 4, ECF No. 76.) Later that month, on October 26, 2011, a reporter contacted West Valley City about an anonymous tip he received that Mr. Davis was ordering a mass execution at the Animal Shelter. (Id.) The final instructions to the jury provided:

Ms. Bird claims the City and Mr. Davis deprived Ms. Bird of her rights under the First Amendment of the U.S. Constitution by terminating her because they believed she leaked information to the press regarding: (1) Andrea the cat, and/or (2) a mass execution at the animal shelter allegedly ordered by Mr. Davis, collectively referred to in these instructions as “the speech at issue.” Section 1983 provides that Ms. Bird may recover an award of money damages against the City or Mr. Davis if either violated her First Amendment rights under the U.S. Constitution.

The City and Mr. Davis deny violating Ms. Bird’s First Amendment rights in any way, and allege that they terminated Ms. Bird for legitimate reasons, specifically, for being insubordinate, discourteous, and uncooperative.

You will be asked to return a verdict on Ms. Bird’s First Amendment claim with respect to both the City and Mr. Davis.

(Jury Instructions, Instruction No. 10, ECF No. 160.)

The jury returned a verdict in favor of the West Valley Defendants. (Special Verdict Form, ECF No. 166.) The jury found that Ms. Bird proved by a preponderance of the evidence that West Valley City’s belief that she leaked information to the press regarding Andrea the cat was a substantial or motivating factor in the decision to terminate her employment. (*Id.*, ¶¶ 2, 3.) However, the jury also found that West Valley City proved by a preponderance of the evidence that it would have terminated Ms. Bird’s employment in the absence of any belief that she leaked information to the press regarding Andrea the cat, (*id.*, ¶ 4), resulting in a verdict in the West Valley Defendants’ favor.

### **LEGAL STANDARD**

Pursuant to Federal Rule of Civil Procedure 59, a district court may, on the motion of a party, grant a new trial on all or some of the issues “after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal

court.” Fed R. Civ. P. 59(a)(1)(A). District courts have “broad discretion” in ruling on motions for a new trial. McHargue v. Stokes Div. of Pennwalt Corp., 912 F.2d 394, 396 (10th Cir. 1990); Shugart v. Cent. Rural Elec. Co-op., 110 F.3d 1501, 1506 (10th Cir. 1997) (“A motion for new trial is addressed to the sound discretion of the trial court . . .” (quoting Canady v. J.B. Hunt Transp., Inc., 970 F.2d 710, 716 (10th Cir.1992))).

A district court is given “wide latitude with respect to [a] motion for a new trial because [the trial judge] [is] uniquely able to assess the likelihood that the [evidence] was prejudicial.” Henning v. Union Pac. R. Co., 530 F.3d 1206, 1217 (10th Cir. 2008) (1st, 3d, & 4th alterations in original) (quoting Mayhue v. St. Francis Hosp. of Wichita, Inc., 969 F.2d 919, 922 (10th Cir. 1992)). Likewise, with respect to alleged improper conduct or argument by an attorney, “[t]he decision on whether counsel's misconduct at trial was so egregious as to require retrial is left largely to the discretion of the district court.” Abuan v. Level 3 Commc'ns, Inc., 353 F.3d 1158, 1175 (10th Cir. 2003); see also Whittenburg v. Werner Enterprises Inc., 561 F.3d 1122, 1127 (10th Cir. 2009) (stating that “[t]he trial judge is in the best position to determine’ the prejudicial effect of improper arguments, and thus whether a new trial is warranted” (quoting Ketchum v. Nall, 425 F.2d 242, 244 (10th Cir. 1970))).

“ ‘A motion for a new trial is not regarded with favor and should only be granted with great caution.’ ” Franklin v. Thompson, 981 F.2d 1168, 1171 (10th Cir. 1992) (quoting United States v. Thornbrugh, 962 F.2d 1438, 1443 (10th Cir. 1992)); see also Moody v. Ford Motor Co., 506 F. Supp. 2d 823, 847 (N.D. Okla. 2007) (stating that granting a new trial and setting aside a jury’s verdict “is rarely appropriate”). “Requiring

a new trial is . . . a serious and costly remedy for all involved.” Whittenburg, 561 F.3d at 1128.

### **DISCUSSION**

Ms. Bird asserts that West Valley Defendants’ counsel engaged in various instances of misconduct. The Court addresses each of her arguments below.

**A. Ms. Bird’s Argument that the West Valley Defendants’ Counsel Cut Off the Redirect/Cross-Examination of Mr. Morris Without Legitimate Basis and for an Improper Purpose Lacks Merit**

Ms. Bird argues that the West Valley Defendants’ counsel improperly cut off her counsel’s redirect examination of Mr. Morris “without legitimate basis.” (Mot. 5, ECF No. 169.) She argues that “from early on in the trial” the West Valley Defendants’ counsel “complained about how long [Ms.] Bird was taking to present her case,” “demanded that the court put [Ms. Bird’s] case on a timer, which ran out during [the] redirect of [Mr.] Morris,” and “insisted that the court stop . . . further questioning of [Mr.] Morris, claiming [the West Valley] Defendants needed time to put on their case.” (Id.) She claims that the West Valley Defendants’ counsel improperly stopped further questioning of Mr. Morris because they “had no more case to put on” and rested after Mr. Morris’s redirect. (Id.) Ms. Bird complains that this conduct violated the Utah and Model Rules of Professional Conduct requiring candor toward the tribunal and fairness to the opposing party and counsel and that “[t]his tactic was prejudicial” because it stopped counsel from impeaching Mr. Morris. (Id. at 5–6.) Ms. Bird claims “[t]his was undoubtedly [West Valley] Defendants’ intention, as [they] would certainly have known at that point that they did not intend to put on any more witnesses.” (Id. at 6.) Ms. Bird cites no case law

in either her opening or her reply brief to support this claim of error. (Mot. 5-6, ECF No. 169; Reply 5-6, ECF No. 173.)

The West Valley Defendants respond that Ms. Bird's "telling of the subject events is misleading." (Opp'n 5, ECF No. 172.) They argue that Ms. Bird had ample time to put on her case and that by its calculations, Ms. Bird's counsel had over eleven hours with witnesses compared to under seven hours for the West Valley Defendants. (Id.) They further point out that the Court repeatedly addressed with the parties the amount of time Ms. Bird was taking to put on her case and that Ms. Bird's counsel went over the additional time the Court allowed for her redirect/cross-examination of Mr. Morris. (Id.) The West Valley Defendants further argue that Ms. Bird's assertions that they "misled the Court about the time that they needed to put on their case are unwarranted and without merit." (Id. at 6.) The West Valley Defendants point out that they intended to call additional witnesses after Mr. Morris but that after Ms. Bird rested they "evaluated where things stood" and made a "strategic decision" not to call any additional witnesses. (Id.) As addressed below, the Court finds the West Valley Defendants' counsel's conduct with respect to Mr. Morris's redirect/cross-examination and timing issues generally during trial do not provide a basis for a new trial.

First, the Court finds Ms. Bird's argument, made through her counsel, improper. The Utah Standards of Professionalism and Civility state that "[l]awyers shall not, without an adequate factual basis, attribute to other counsel . . . improper motives, purpose, or conduct." Utah R. Jud. Admin. 14-301(3). Ms. Bird and her counsel do not provide any factual basis for the assertions that West Valley Defendants' counsel knew



they did not intend to call any additional witness after Mr. Morris's redirect/cross-examination and cut off Mr. Morris's redirect/cross-examination to prevent Ms. Bird's counsel from impeaching Mr. Morris. Ms. Bird's counsel's arguments make objective statements of fact without factual basis and are thus improper since they attribute improper motivations and conduct to West Valley Defendants' counsel without any factual support.

Second, Ms. Bird distorts the events that occurred with respect to time limits imposed in this case. From the outset of this case, both sides maintained that they needed four days for trial. (Stip. Attorneys' Planning Meeting Report 5, ECF No. 15.) The Court relied on these representations in scheduling the trial. (Scheduling Order 4, ECF No. 18 (setting four-day trial); Scheduling Order from Hr'g 2, ECF No. 58 (setting four-day trial); Scheduling Order, ECF No. 72 (setting four-day trial); Am. Scheduling Order, ECF No. 77 (setting four-day trial).) The Court's Trial Order indicated that trial would run from 8:30 a.m. to 2:30 p.m. each day, from March 12 to March 15, 2018. (Am. Trial Order 1, 5, ECF No. 82.) At the final pretrial conference, Ms. Bird's counsel raised for the first time extending either the length of each trial day beyond 2:30 p.m. or extending trial into Friday, March 16. At that time, the Court kept the trial set at four days but left open the possibility to extend the trial days past 2:30 p.m. The Court indicated that it would later assess the need to extend the hours for trial but instructed the parties to make every effort narrow their cases, to exchange realistic estimates of time for each witness, and to contact the Court if they needed additional time.

Prior to trial commencing, the parties contacted the Court via e-mail and indicated that after conferring, they agreed to extend trial days to 4:00 p.m. (3/6/18 Preston E-mail, attached as Appendix (“App.”) 1.) Despite this extension of trial days, on the second day of trial, West Valley Defendants’ counsel expressed concerns about the amount of time Ms. Bird’s counsel was taking and the time that would remain to present their case. (3/13/18 Trial Tr. 22:5–22:15, attached as App. 3.<sup>4</sup>) The Court instructed the parties to make every effort to tighten up their examinations so that they could complete as much of the trial as possible the next day. (Id. at 21:12–25:15.)

Halfway through the third day of trial, the Court indicated its concern with timing and West Valley Defendants’ ability to present their case. Ultimately, the Court divided the remaining eight hours of trial time between the parties, allocating three of the remaining hours to Ms. Bird’s counsel and the other five to the West Valley Defendants. (3/14/18 Trial Tr. 3:8–6:22, attached as App. 4). By the end of the third day of trial, Ms. Bird’s counsel had only thirty-eight minutes left to present the remainder of her case. (Id. at 62:6–17.) The next morning Ms. Bird’s counsel asked for an additional half hour and for the Court to extend the trial into Friday. (3/15/18 Trial Tr. 3:6–11:8, attached as App. 5.) She indicated that the Court could inform the jury that it was “[her] fault” that trial would continue an extra day. (Id.) The Court ultimately extended trial into Friday and allowed Ms. Bird an additional half hour, on top of the remaining thirty-eight

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<sup>4</sup> Neither of the parties requested a complete version of the trial transcript in this matter so the court reporter has not prepared or finalized a complete transcript. The Court requested that the court reporter prepare additional, relevant portions of the transcript for purposes of this Order and attaches those portions of the transcript to this Order as Appendices.

minutes, to complete her case. (Id.) Again, Ms. Bird's counsel used up all her time, leaving no additional time for her redirect/cross-examination of Layne Morris. (Id. at 59:17–61:1.) Nevertheless, the Court gave Ms. Bird's counsel an additional half hour for the cross examination. (Id.) This extension occurred following a discussion at the bench. (Id.) During this discussion, West Valley Defendants' counsel indicated he had three witnesses to call. (Id. at 60:25-61:4.) Once Ms. Bird's counsel again went over the time limit, West Valley Defendants' counsel objected. (Id. at 62:6–63:11.) Nonetheless, the Court allowed Ms. Bird's attorney to ask an additional question. (Id.) Following Ms. Bird's counsel's questioning, West Valley Defendants' counsel conducted a short redirect examination. (Id. at 63:20-64:21.)

After Ms. Bird rested, West Valley Defendants' counsel then made a motion for judgment as a matter of law, which he argued briefly. (3/15/18 Trial Tr. 64:24–69:15, App. 5.) After a minimal recess, West Valley Defendants' counsel returned and informed the Court that after discussing things with his clients they decided to rest their case and not call any additional witnesses:

Your Honor, I had not anticipated this at all but we feel very good how this ended. I've talked to my client at length and I don't think -- I think to take another couple of hours to put these last three witnesses on will be, if anything, cumulative. So we're willing -- we are going to rest when the jury comes in without calling any more witnesses.

(Id. at 70:1–10.)

“A trial court necessarily possesses considerable discretion in determining the conduct of a trial, including the orderly presentation of evidence.” Thweatt v. Ontko, 814 F.2d 1466, 1470 (10th Cir. 1987). As outlined above, West Valley Defendants' counsel

did not cut off the redirect/cross-examination of Mr. Morris, as Ms. Bird claims. Ms. Bird's counsel exceeded the time that the Court provided for the examination, which the Court already extended multiple times. Further, West Valley Defendants' counsel was well within his rights to point out that Ms. Bird's counsel was consuming the majority of trial time presenting her client's case and that she repeatedly exceeded the time limits imposed by the Court to present her case at trial. Ms. Bird's counsel showed a complete disregard for the time she took to present her case forcing the Court to impose time limits that she then exceeded. To the extent Ms. Bird's counsel felt she did not have adequate time to impeach Mr. Morris, this problem arose from her own strategic choices about how to use her trial time.

Certainly one could question whether an attorney had not anticipated the possibility of not putting on a defense one hour prior to making that decision when fairly predictable testimony by that attorney's own witness came out over that time. However, the Court has no reason to doubt the representation of West Valley Defendants' counsel that he did not make his decision not to call any additional witnesses until after Mr. Morris's testimony finished, and he consulted with his client. See Selsor v. Kaiser, 81 F.3d 1492, 1501 (10th Cir. 1996) (indicating that the court is entitled to rely on representations to the court by the attorneys, because they are officers of the court). After a break, West Valley Defendants' counsel represented that he discussed the matter with his clients, they were happy with how things went with Mr. Morris's testimony and therefore decided not to call any additional witnesses. The decision of a defendant to rest immediately following the plaintiff's resting is a big decision that a

party would not likely, and does not have to make, until right before the court asks it to proceed with its case. In the civil realm, counsel, in consultation with their clients, rarely forgo to opportunity to put on evidence in their case in chief. Ms. Bird argues that West Valley Defendants' counsel knew he did not intend to call additional witnesses before that time but offers no support for that accusation.

In sum, the moving party bears the burden to show that a reason for a new trial exists based on prior federal law. Fed. R. Civ. P. 59. Ms. Bird fails to meet that burden given the complete lack of citation to any case law on the point. The Court further finds that West Valley Defendants' counsel did not engage in any misconduct relating to the redirect/cross-examination of Mr. Morris or, more generally, with respect to the arguments he made during trial concerning Ms. Bird's disproportionate use of trial time and concerns about his ability to present his clients' case. Given the lack of misconduct, Ms. Bird's argument fails to support the need for a new trial.

**B. The Court Properly Admitted Mr. Morris's Testimony Concerning His Military Experience as Background Evidence**

Ms. Bird argues that West Valley Defendants' counsel improperly introduced Mr. Morris' military experience and consequent recognition for that service during his examination of Mr. Morris. (Mot. 4, ECF No. 169.) She claims that evidence concerning his military experience bore no relevance and that counsel introduced it "to paint [Mr.] Morris as a patriot and a war hero, for the purpose of influencing the jury to side with him." (*Id.* at 5.) The West Valley Defendants counter that they properly introduced background information such as military experience at trial because it bears on the credibility and reliability of the witness. (Opp'n at 4, ECF No. 172.) They further

argue that the Court already overruled Ms. Bird's objection to the introduction of this evidence during trial and that an appeals court will not disturb such decisions absent a clear abuse of discretion. (Id.) Finally, the West Valley Defendants argue that testimony concerning Mr. Morris's military background occupied only a small portion of his examination, which lasted over two hours, and that the introduction of such testimony at worst constitutes harmless error and certainly does not justify ordering a new trial. (Id. at 4–5.) The Court agrees with the West Valley Defendants.

District courts enjoy “broad discretion in ruling on the relevancy of evidence.” United States v. Alexander, 849 F.2d 1293, 1301 (10th Cir. 1988); see also United States v. Blackwell, 853 F.2d 86, 88 (2d Cir. 1988) (stating that “the trial court is entitled to wide discretion concerning the admissibility of background evidence”). The Advisory Committee Notes to Federal Rule of Evidence 401 state that “[e]vidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding.” Fed. R. Evid. 401, Advisory Committee Note; see also Roger Park & Tom Lininger, The New Wigmore, § 9.1(3) (“[T]he proponent of a witness is allowed to put the witness at ease and to let the jury ‘get to know’ the witness by bringing out facts such as residence, employment, and military service.”) Further, various courts have found background evidence, including military service, relevant to assessing the credibility of witnesses. See Blackwell, 853 F.2d at 88 (indicating that courts should admit background evidence to assist the jury “in gauging the credibility of a witness”); Gov’t of Virgin Is. v. Grant, 775 F.2d 508, 513 (3d Cir. 1985) (stating that background evidence “bear[s] on the credibility of the witness by

showing the witness to be a stable person”); Wells v. Davis, No. 05-CV-0811-DRH, 2009 WL 3352642, at \*2 (S.D. Ill. Oct. 16, 2009) (unpublished) (finding evidence concerning a party’s military service relevant and admissible as “[t]he credibility and the reliability of all the witnesses are crucial, relevant and reasonable”); United States v. Deel, No. 1:09CR00022, 2010 WL 519836, at \*1 (W.D. Va. Feb. 11, 2010) (unpublished) (finding background evidence, including military service, admissible “for the jury’s benefit to judge [a defendant’s] credibility”).

Mr. Morris’s testimony concerning his military experience was relevant and admissible as background evidence. Such evidence helped the jury to get to know the witness and assess his credibility. Notably, Ms. Bird does not cite any cases to the contrary, simply arguing without support that evidence concerning Mr. Morris’s military experience is irrelevant, and West Valley Defendants’ counsel should not have introduced it. Accordingly, the Court finds West Valley Defendants’ counsel did not improperly introduce evidence concerning Mr. Morris’s military background. Again Ms. Bird fails to meet her burden in showing the need for the drastic remedy of a new trial.

**C. While Portions of West Valley Defendants’ Closing Argument Were Improper, Any Errors Do Not Warrant the Extreme Remedy of a New Trial**

Ms. Bird asserts that West Valley Defendants’ counsel engaged in improper conduct during his closing argument. She claims that counsel improperly implied that a movie, 12 Strong, had Mr. Morris, portrayed by Chris Hemsworth, as its subject. (Mot. at 10–11, ECF No. 169.) Ms. Bird also argues that counsel vouched for Mr. Morris’s credibility and improperly based his argument that Mr. Morris would not lie on his military service. (Id. at 6–10.) She further asserts the outcome of the case is a “close

case” and that “[i]mproper vouching and reliance on improper evidence has the most potential to be damaging in close cases that turn on credibility of witnesses,” which weighs in favor of granting a new trial. (Id. at 4, 9.)

“In the Tenth Circuit, vacating a jury award and ordering a new trial on the basis of an inappropriate closing argument is an extreme remedy only to be granted in unusual cases.” Spahr v. Ferber Resorts, LLC, 686 F. Supp. 2d 1214, 1223 (D. Utah 2010), aff’d, 419 F. App’x 796 (10th Cir. 2011) (unpublished); see also Ramsey v. Culpepper, 738 F.2d 1092, 1100 (10th Cir. 1984) (stating that even with an improper closing argument, “ ‘judgment should not be disturbed unless it clearly appears that the remarks in question unduly aroused the sympathy of the jury and thereby influenced the verdict.’ ” (quoting Julander v. Ford Motor Co., 488 F.2d 839, 842 (10th Cir. 1973))). In Whittenburg, the Tenth Circuit identified a number of factors that district courts should consider in determining whether improper closing arguments warrant a new trial: (1) the extensiveness of the improper remarks, (2) whether the Court gave curative instructions after the remarks, and (3) the size of the verdict. 561 F.3d at 1131–33. The court also emphasized that

closing argument need not, nor should, be a sterile exercise devoid of passion. Parties are entitled to have someone speak with eloquence and compassion for their cause. [] Arguments may be forceful, colorful, or dramatic, without constituting reversible error. [] Counsel may resort to poetry, cite history, fiction, personal experiences, anecdotes, biblical stories, or tell jokes. []

Id. at 1133 (internal citations and quotations omitted).



## 1. 12 Strong

Ms. Bird argues that during closing argument West Valley Defendants' counsel "suggest[ed] that [Mr.] Morris was the subject of a new movie out, 12 Strong, and his character was being played by Chris Hemsworth." (Mot. at 10, ECF No. 169.) She claims that "counsel put the jurors in the position of having to find against [Ms.] Bird, or against a war hero who was the subject of a new movie played by Chris Hemsworth." (Id.) The West Valley Defendants counter that counsel stated the movie is about "one group" of first responders, not Mr. Morris's group; so he "never suggested that Mr. Morris was the subject of 12 Strong or that he was played by Chris Hemsworth." (Opp'n at 10, ECF No. 172.) They further assert that the closing argument falls within the permissible parameters of a closing argument, as outlined in the Tenth Circuit's decision in Whittenburg. (Id.)

During the portion of the closing argument at issue, West Valley Defendants' counsel stated:

There is a movie out called 12 Strong. It's about one group of the first special forces responders that was sent to Afghanistan right after 9-11. . . . Layne Morris was one of the first responders in the Green Berets to go out there as a special forces man to go to Afghanistan. Now, he is not as tall, doesn't have as much hair, and he is not as handsome as Chris Hemsworth who stars in that movie, but Layne Morris is the real deal.

(3/16/18 Partial Tr. 28:2–14, ECF 169-2.) At trial, the Court interpreted counsel's argument as drawing a comparison between Mr. Morris's first responder group and the first responder group in the movie. Counsel did not directly state that Mr. Morris's group was the subject of the movie or that Chris Hemsworth portrayed Mr. Morris.

Accordingly, the Court finds Ms. Bird's argument that counsel improperly suggested that

Mr. Morris was the subject of 12 Strong and portrayed by Chris Hemsworth unpersuasive. Further, counsel may properly reference a movie in closing argument. As the Tenth Circuit set forth in Whittenburg, closing “arguments may be forceful, colorful, or dramatic . . . [and] [c]ounsel may resort to poetry, cite history, fiction, personal experiences, anecdotes, biblical stories, or tell jokes.” 561 F.3d at 1133 (internal quotations omitted).

This portion of the closing argument formed part of counsel’s argument concerning Mr. Morris’s credibility, which Ms. Bird attacks on other grounds. The Court recognizes that the jury does not have the benefit of the transcript and may not have parsed the argument the same way. Therefore, below, the Court will assume the impropriety of this portion of the closing argument.

## **2. Vouching/Bolstering**

Ms. Bird also argues that during closing, West Valley Defendants’ counsel “vouch[ed] for [Mr.] Morris’s credibility and integrity, based on his irrelevant military experience.” (Mot. 6, ECF No. 169.) Ms. Bird states that counsel also “teared up while arguing about how patriotic [Mr.] Morris is.” (Id. at 7.) The relevant portion of the closing argument that Ms. Bird argues is improper states as follows:

Layne Morris is not a man who would lie. Look at his character. He has been a public servant. He has served this country and the citizens of West Valley City his entire life. You don't become a First Class Sergeant in the Green Beret unless you are a leader and a man of integrity. . . .

Did you see how emotional he got when I asked him about his oath to defend the Constitution? He knows by firsthand what it is to live and fight against a country, a leadership, a government, that doesn't have these constitutional rights. The Taliban. And he put his life on the line doing that.

But now you're asked to find that he would violate Karen Bird's Constitutional rights and he would lie in a United States Courtroom about it.

(3/16/18 Partial Tr. 27:22–28:2, 28:14–21, ECF No. 169-2.) The piece of the argument about 12 Strong falls right between these two paragraphs. (Id. at 28:2-14.)

Ms. Bird claims that Mr. Morris's military experience "has nothing to do with [Mr.] Morris' decision-making in his role at West Valley City, but was invoked (complete with counsel's tears) to play on the jury's sympathies." (Mot. 7, ECF No. 169.) Ms. Bird points out that she objected to these remarks, and the Court overruled that objection, but "the fact that the court allowed it signaled to the jurors that they were allowed to consider the evidence/argument." (Id. at 9.) Finally, she argues that the jury's decision in the West Valley Defendants' favor "suggest[ed] that the improper evidence and argument prejudiced [Ms.] Bird in her presentation of her case," since "no credible evidence" existed "that [Ms.] Bird was going to be fired absent the public relations problems [Mr.] Davis and [Mr.] Morris believed she created." (Id. at 9–10.)

The West Valley Defendants dispute that counsel "vouched for the credibility of Mr. Morris." (Opp'n 7, ECF No. 172.) They state that counsel "never expressed a personal belief in Mr. Morris' credibility and confined his argument to the evidence already presented to the jury regarding Mr. Morris'[s]" military service. (Id. at 8.) Specifically, the West Valley Defendants argue that counsel never used the word "I" when referring to Mr. Morris, so he did not vouch for Mr. Morris's credibility. (Id.) West Valley Defendants further state that counsel

appropriately used evidence of Mr. Morris' military record and his oath to defend the Constitution to bolster his already credible testimony that he fired

[Ms. Bird] for legitimate reasons and not in violation of her First Amendment rights.

(Id. at 10.)

In reply, Ms. Bird claims that counsel did not confine his closing argument to evidence in the record. (Reply 8, ECF No. 173.) She claims that no testimony exists in the record that Mr. Morris is a “First Class Sergeant” as counsel stated in his closing remarks and that Mr. Morris’s testimony does not make clear that he is a “Sergeant first class.” (Id.) Ms. Bird argues that even if counsel transposed the words to “First Class Sergeant,” this transposition is “misleading, as it suggests some superior-ranking or award-winning sergeant.” (Id.)

First, Mr. Morris testified during trial that he “retired as sergeant first class.” (3/15/18 Trial Tr. 14:2–4, App. 5.) West Valley Defendants’ counsel transposed the words when he said “First Class Sergeant” during his closing argument. “Closing arguments of counsel[] are seldom carefully constructed in toto before the event[] [and] improvisation frequently results in syntax left imperfect and meaning less than crystal clear . . . [,] [so] a court should not lightly infer that [an attorney] intends an ambiguous remark to have its most damaging meaning.” Donnelly v. DeChristoforo, 416 U.S. 637, 646–47 (1974). The Court will not hold a minor change such as this against counsel given Mr. Morris testified as to his military rank during trial.

As to the substantive argument Ms. Bird advances, the Court notes that the parties use vouching and bolstering interchangeably. However, the Tenth Circuit treats them as distinct concepts. See United States v. Bowie, 892 F.2d 1494, 1499 n.1 (10th Cir. 1990) (stating that while “[a] number of courts appear to regard credibility-bolstering

as no different from credibility-vouching, and merge the two concepts. . . . We consider these to be different issues.” (citations omitted). Vouching occurs where an attorney “personally vouched for the credibility of its witness”, and bolstering occurs where an attorney “improperly bolstered the witness’s credibility prior to any challenge to the witness’s credibility, contrary to Rule 608.” United States v. Lord, 907 F.2d 1028, 1030 n.2 (10th Cir. 1990).

The Court finds that certain of counsel’s remarks during closing constitute vouching. The Tenth Circuit has held that

impermissible vouching occurs only when “the jury could reasonably believe that [an attorney] is indicating a personal belief in the witness’s credibility, either through explicit personal assurances of the witness’s veracity or by implicitly indicating that information not presented to the jury supports the witness’s testimony.”

United States v. Orr, 692 F.3d 1079, 1097 (10th Cir. 2012) (quoting Bowie, 892 F.2d at 1498). West Valley Defendants’ counsel did not use phrases such as “I believe” or “I think” when addressing Mr. Morris’s credibility—hallmarks of improper vouching—or directly insert himself into the argument. However, since no one testified that “Layne Morris is not a man who would lie” one can only interpret counsel’s statement as a personal belief and assurance as to Mr. Morris’s veracity. The same holds true for counsel’s statement that “[y]ou don’t become a First Class Sergeant in the Green Beret unless you are a leader and a man of integrity.” Further, the fact that counsel choked up while addressing Mr. Morris’s truthfulness and integrity gave his arguments a more personal tone. Thus the Court finds these statements constitute improper vouching in this context.

The Court also finds that some of counsel's remarks during closing constitute improper bolstering. While, as addressed above, the Court can admit testimony concerning military service as background evidence as it allows the jury to get to know a witness and establish that he or she is a stable person worthy of belief, counsel's use of that evidence during closing argument to suggest directly that Mr. Morris would not lie presents problems. See Roger Park & Tom Lininger, The New Wigmore, § 9.1(3) (stating that where "background evidence" is used to bolster a witness's credibility, this may run afoul of Federal Rule of Evidence 608). Federal Rule of Evidence 608(a) provides that "evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked." Fed. R. Evid. 608(a). Ms. Bird did not directly attack Mr. Morris's veracity. Therefore, West Valley Defendants' counsel's use of Mr. Morris's military experience to suggest he would not lie crossed the line into improper argument.

The Court notes that other courts have found that military service does not necessarily afford witnesses a higher degree of credibility. See Howard v. Horn, 56 F. Supp. 3d 709, 727 (E.D. Pa. 2014) (stating that the petitioner "offered no support for the conclusion that referring to [witness's] military background would necessarily afford him higher credibility—and other courts have held that it does not."); Illinois v. Lane, 922 N.E.2d 575, 586 (Ill. App. 2010) ("[W]e do not believe that support for members of the military automatically accords them a higher degree of credibility as witnesses."). However, counsel's remarks directly linked Mr. Morris's military experience to his truthfulness thus removing any potential ambiguity about the purpose of the evidence.

Thus the Court finds certain of the closing remarks made by West Valley Defendants' counsel concerning Mr. Morris improper. The Court must now consider, using the factors set forth in Whittenburg, whether those improper remarks, in combination with the 12 Strong comments, warrant the extreme remedy of a new trial.

**a. Extensiveness of Remarks**

The first factor outlined by the Tenth Circuit—the extensiveness of the improper remarks, or lack thereof—weighs against granting a new trial in this case. Counsel's arguably improper remarks during closing argument concerning Mr. Morris's credibility were very brief, lasting less than two minutes during an almost hour-long closing argument. (See 3/16/18 Trial Tr. 7:20–37:11, attached as App. 6 (West Valley Defendants' entire closing argument).) Where improper closing remarks are brief, courts generally find a new trial unwarranted. See Ramsey, 738 F.2d at 1100 (finding that an arguably improper rebuttal argument during closing did not warrant reversal of the jury verdict because the remarks “consumed only a couple of minutes at the end of a full trial”, and the district judge supervising the trial “did not believe that the argument unduly aroused the sympathy of the jury”); Garcia v. Sam Tanksley Trucking, Inc., 708 F.2d 519, 522 (10th Cir. 1983) (finding a new trial unwarranted where counsel improperly referenced the wealth of the parties during closing argument because the statements reflect “minor aberrations”); Canada Dry Corp. v. Nehi Beverage Co., 723 F.2d 512, 526–27 (7th Cir. 1983) (finding district court did not abuse its discretion in refusing to grant a new trial where counsel's improper vouching for the honesty and

credibility of his client “occupied about one minute in a ninety minute closing statement”).

In contrast, where improper remarks permeate the closing argument, courts will more likely grant a new trial. For example, in Whittenburg, the court found a new trial appropriate where, among other things, “counsel's improper comments were repeated and emphasized throughout closing argument” and in fact “were the heart and soul of the argument.” 561 F.3d at 1131; see also Gilster v. Primebank, 747 F.3d 1007, 1010–13 (8th Cir. 2014) (finding new trial warranted in sexual harassment case where “improper vouching permeated counsel’s rebuttal argument,” and counsel introduced facts not in evidence when recounting her own similar experiences with sexual harassment).

Courts will also more likely grant new trials where counsel engages in improper conduct throughout trial. See Cadorna v. City & Cty. of Denver, 245 F.R.D. 490, 494–97 (D. Colo. 2007) (ordering a new trial where counsel engaged in “continual, contumacious conduct” throughout trial); Moody v. Ford Motor Co., 506 F. Supp. 2d 823, 831–47 (N.D. Okla. 2007) (ordering a new trial where plaintiff’s counsel engaged in misconduct throughout trial, including violating in limine rulings, making personal attacks on defense witnesses and counsel, and asking the jury to place themselves in the plaintiff’s position); Stollings v. Ryobi Techs., Inc., 725 F.3d 753, 758–763 (7th Cir. 2013) (finding new trial appropriate where counsel attacked the motivations of opposing counsel throughout trial, beginning with the opening statement and continuing through the closing statement).



Here, the only misconduct by West Valley Defendants' counsel that Ms. Bird raised occurred during a few brief minutes of closing argument. Therefore this factor weighs against the extreme remedy of a new trial in this case.

#### **b. Curative Instructions**

The second factor outlined by the Tenth Circuit—whether the Court gave curative instructions after the remarks—also weighs against granting a new trial. In Spahr, “the court g[a]ve[] weight to the fact that . . . the jury was instructed that attorney argument is not evidence on two occasions: once before the opening statements and once before the closing arguments.” Spahr, 686 F. Supp. 2d at 1224. Further, the court provided each juror with a written copy of the instructions, allowing jurors to follow along while the court read them and take their copies to the jury room. Id. The court also stated that “[t]he Tenth Circuit has emphasized that such instructions can mitigate the effects of references to matters not in evidence.” Id. (citing Whittenburg, 561 F.3d at 1131 (“[W]e have sometimes suggested that a general instruction at the close of trial, reminding the jury that counsels' arguments are not evidence, can help mitigate an improper closing argument.”) (citation omitted)). In affirming the district court's decision in Spahr, the Tenth Circuit recognized “that the jury was instructed that ‘statements and arguments of counsel are not evidence.’ ” 419 F. App'x at 806. Further, other courts have found that such instructions help mitigate improper attorney remarks during closing. See Canada Dry, 723 F.2d at 527 (finding district court did not abuse its discretion in refusing to grant a new trial where the improper remarks during closing were brief, and the trial judge reminded “the jury that statements of counsel are not evidence”).

In this case, as in Spahr, the court instructed jurors both before and after trial that arguments of counsel are not evidence. (See Preliminary Instructions, Instruction No. 4, ECF No. 143 (“Statements, arguments and questions by lawyers are not evidence.”); 3/12/18 Trial Tr. 7:16–19, attached as App. 2; Jury Instructions, Instruction No. 2, ECF No. 160 (“Statements and arguments of counsel are not evidence in this case.”); 3/16/18 Trial Tr. 5:23–24, App. 6.) The Court also gave copies of the final instructions to the jurors, allowing them to follow along while the Court read the instructions, and to take them into the jury room. (Id. at 3:11–19.) Of course such an instruction may not always sufficiently mitigate improper remarks, depending on the context. Whittenburg, 561 F.3d at 1132 (“Here, where the improper comments were extensive and the district court expressly overruled a contemporaneous objection, we cannot say a general instruction, issued much later and merely reminding the jury that the lawyers' arguments are not evidence, is fairly scaled to the size of the problem.”). However, in this case, similar to Canada Dry, the Court finds that these instructions, combined with the brevity of the arguably improper remarks, helped mitigate any prejudicial effect those comments may have had. Accordingly, the Court finds that this factor weighs against a new trial.

### **c. Influence on Verdict/Prejudicial Impact**

The third factor outlined by the Tenth Circuit—the size of the verdict—is not directly applicable here since the jury found in favor of the West Valley Defendants. Nevertheless, the Court considers whether the counsel’s misconduct clearly influenced the verdict or obviously prejudiced the opposing party. See Lambert v. Midwest City

Mem'l Hosp. Auth., 671 F.2d 372, 375 (10th Cir. 1982) (stating that “even though an argument may be improper, a judgment will not be disturbed unless it clearly appears that the challenged remarks influenced the verdict”); Ramsey, 738 F.2d at 1100 (stating that a “judgment should not be disturbed unless it clearly appears that the remarks in question unduly aroused the sympathy of the jury and thereby influenced the verdict.” (quoting Julander, 488 F.2d at 842)); Smith v. Atl. Richfield Co., 814 F.2d 1481, 1488 (10th Cir. 1987) (indicating that a new trial is not warranted where counsel makes an improper argument during closing “unless it obviously prejudiced one of the parties”); Moody, 506 F. Supp. 2d at 835 (stating that a court “should consider the prejudicial impact of plaintiffs' counsel's statements when ruling on [a] motion for a new trial”). In considering this factor, the Court also considers the effect of its overruling Ms. Bird’s counsel’s objection to the 12 Strong argument. (3/16/18 Partial Tr. 28:2-14, ECF No. 169-2.) This factor also weighs against granting a new trial.

First, the verdict itself indicates that the jury did not find Mr. Morris fully, if at all, credible. Ms. Bird claims that the West Valley Defendants’ closing argument had the prejudicial effect of forcing the jury to either side with Mr. Morris, “a patriot and war hero,” or Ms. Bird. (Reply 2, ECF No. 173; see also Mot. 5, 10, ECF No. 169.) The parties stipulated that for purposes of establishing municipal liability this case, Mr. Morris was the final decision maker in Ms. Bird’s termination, and accordingly, the Court instructed the jury that it “must consider Mr. Morris’s motivation in terminating Ms. Bird in making decisions about West Valley City’s liability.” (Jury Instructions, Instruction No. 11, ECF No. 160.) At trial, Mr. Morris unequivocally testified that leaks to the press and

played no role in his decision to terminate Ms. Bird's employment. (3/15/18 Trial Tr. 48:8–58:1, App. 5.) However, the jury found that Ms. Bird proved by a preponderance of the evidence that West Valley City's belief that she leaked information to the press regarding Andrea the cat was a "substantial or motivating factor" in its decision to terminate her. (Special Verdict Form, ¶¶ 2, 3, ECF No. 166); see Trant v. Oklahoma, 754 F.3d 1158, 1166 (10th Cir. 2014) (stating that to prove a First Amendment retaliation claim, "the employee must show that the speech was a 'substantial factor or a motivating factor in a detrimental employment decision.'" (quoting Brammer–Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1203 (10th Cir. 2007))). Thus the jury's decision reflects that they did not find Mr. Morris's testimony credible. Therefore any arguably improper attempts to bolster or vouch for his credibility did not work, as the jury expressly disagreed with Mr. Morris's statements about his motive. Similarly, while a judge's overruling of an objection can make an error worse, Whittenburg, 561 F.3d at 1132, in this case the jury did not allow argument to drive its factual determinations concerning Mr. Morris's credibility.

The jury then went on to find that the West Valley City proved its defense by a preponderance of the evidence—that it would have terminated Ms. Bird regardless of the Andrea the cat incident. (Special Verdict Form, ¶ 4, ECF No. 166); see Trant, 754 F.3d t 1167 (stating that "if the employee establishes that his or her protected speech was a motivating factor in the adverse employment decision, 'the burden then shifts to the defendant, who must show by a preponderance of the evidence it would have reached the same employment decision in the absence of the protected activity' "

(quoting Cragg v. City of Osawatomie, 143 F.3d 1343, 1346 (10th Cir.1998))). The trial record contains ample evidence concerning Ms. Bird’s performance at West Valley City, including problems with her communication and management style, and her contentious relationship with and insubordinate conduct toward her supervisor Mr. Davis, much of which predates the October 2011 leaks to the press concerning Andrea the cat. (See, e.g., 3/13/18 Trial Tr. (Bird Testimony) 3:6–21:4, App. 3; 3/14/18 Trial Tr. (Davis Testimony) 7:7–31:12, App. 4; 3/14/18 Trial Tr. (George Testimony)<sup>5</sup> 31:19–59:2, App. 4; 3/15/18 Trial Tr. (Morris Testimony) 14:20–32:8, 32:25–53:8, App. 5.) Thus a reasonable jury could have and ultimately did conclude that West Valley would have fired Ms. Bird in the absence of any belief that she leaked information concerning Andrea the cat to the press.

Further, the Court recognizes that this case is, as Ms. Bird argues, a “close case” and that improper vouching may prove more damaging in close cases turning on the credibility of witnesses. However, as explained above, the arguably improper attempts to bolster or vouch for Mr. Morris’s credibility during closing arguments did not unfairly prejudice Ms. Bird because the jury’s verdict reflects that it did not find Mr. Morris credible. Accordingly, the close nature of this case does not weigh in favor of granting a new trial.

Second, Ms. Bird’s counsel had an opportunity to address—and did in fact address—the remarks that West Valley Defendants’ counsel made concerning Mr. Morris’s credibility during her rebuttal argument. (3/16/18 Trial Tr. 40:9–25, App. 6.)

---

<sup>5</sup> Shirlayne George served as the human resources manager at West Valley City.

She argued that while “[c]ounsel talked about that Mr. Morris wouldn’t lie about these motivations,” the recordings offered during trial “show both Mr. Davis’s and Mr. Morris’s motivations. That they were concerned about the negative information that was in the press.” (Id.) That Ms. Bird’s counsel had the opportunity to respond to the arguments West Valley Defendants’ counsel made during his closing argument concerning Mr. Morris’s veracity lessens any prejudicial impact those comments may have had on the jury. Cf. Gilster, 747 F.3d at 1011 (finding prejudice greater where counsel made improper comments “at the end of rebuttal closing argument, when they would have the greatest emotional impact on the jury, and when opposing counsel would have no opportunity to respond”). Thus this factor too weighs against granting a new trial.

\*\*\*

Importantly, the Tenth Circuit indicated that its decision to grant a new trial in Whittenburg was “not based on any of these factors singly, but rather their combination after considering the argument as a whole.” 561 F.3d at 1133. There, the court found that “the confluence of these three factors—the extensiveness of the improper remarks, the absence of any meaningful curative action, and the size of the verdict” required a new trial. Id.


Here, as addressed in detail above, the three factors weigh against a new trial. The improper and arguably improper remarks of West Valley Defendants’ counsel during closing arguments lasted only a few minutes, the Court instructed the jury on multiple occasions that attorney arguments are not evidence, and there is no indication that these arguments clearly influenced the verdict or obviously prejudiced Ms. Bird.

Thus the conduct at issue in this case falls well below the level needed to order a new trial. See Spahr, 686 F. Supp. 2d at 1224 (finding that even where “closing arguments in a few instances crossed the sometimes fuzzy line between proper and improper[,] . . . as a whole, the court is confident that the closing fell considerably and decisively short of the level of impropriety that would merit a new trial.”) Accordingly, the Court finds a new trial unwarranted.

### **CONCLUSION**

For the foregoing reasons, the Court DENIES Ms. Bird’s Motion for New Trial.

DATED this 28th day of March, 2019.

  
\_\_\_\_\_  
EVELYN J. FURSE  
United States Magistrate Judge

# APPENDIX 1





FW: Case 2:12-cv-00903-EJF Bird v. West Valley City et al  
Stanley Preston

to:

'utdecf\_furse@utd.uscourts.gov', Lindsey\_Pagel@utd.uscourts.gov  
03/06/2018 10:00 AM

Cc:

"HollingsworthLaw (april@aprilhollingsworthlaw.com)", Kass Harstad, xerniafortson,  
"Bryan M. Scott", Brandon Crowther

Hide Details

From: Stanley Preston <sjp@prestonandscott.com> Sort List...

To: "utdecf\_furse@utd.uscourts.gov" <utdecf\_furse@utd.uscourts.gov>,  
"Lindsey\_Pagel@utd.uscourts.gov" <Lindsey\_Pagel@utd.uscourts.gov>

Cc: "HollingsworthLaw (april@aprilhollingsworthlaw.com)"

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Brandon Crowther <btc@prestonandscott.com>

History: This message has been forwarded.

Judge Furse,

As the Court requested, the parties have now conferred about witnesses and the amount of time the parties will need to present their cases-in-chief. The parties have agreed that we will need to have extended trial days until 4:00 p.m. each day, including Tuesday, if that can be arranged. If we are done by 4:00 pm on Tuesday, that will allow me to make my other commitment that evening. Regards, Stan

Stanley J. Preston  
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## APPENDIX 2

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

In re: )  
)  
KAREN BIRD, )  
)  
Plaintiff, )  
)  
vs. ) Case No.  
) 2:12-CV-903EJF  
WEST VALLEY CITY, a )  
political subdivision )  
of the State of Utah, )  
KELLY DAVIS, in his )  
official and )  
individual )  
capacities, )  
)  
Defendants. )  
----- )

BEFORE THE HONORABLE EVELYN J. FURSE

March 12, 2018

Partial Transcript  
Excerpts from Trial

Laura W. Robinson, RPR, FCRR, CSR, CP  
351 South West Temple  
8.430 U.S. Courthouse  
Salt Lake City, Utah 84101  
(801)328-4800

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Salt Lake City, Utah 84111

1 **Salt Lake City, Utah March 12, 2018**

2 (Whereupon, preceding portion of the trial  
3 were not transcribed.)

4 THE COURT: All right. So I am -- welcome  
00:00:02 5 back. I am going to read to you a number of  
6 preliminary instructions to give you some orientation  
7 about what you're going to hear and the rules you  
8 need to follow. And then following that, we will  
9 take a half hour break and you can grab some lunch.  
00:00:19 10 Then we will come back and we will hear opening  
11 statements at that time.

12 So preliminary instruction number one is  
13 members of the jury, we are about to begin the trial  
14 of this case. You have heard some details about this  
00:00:34 15 case during the process of jury selection. Before  
16 the trial begins, however, there are certain  
17 instructions I will give you to better understand  
18 what will be presented to you and how you should  
19 conduct yourself during the trial. These remarks are  
00:00:49 20 an introduction only and are not evidence in the  
21 case. I will give you some instructions now and some  
22 later. You are required to consider and follow all  
23 of my instructions. Keep an open mind throughout the  
24 trial.

00:01:05 25 At the end of the trial you will discuss the

1 evidence and reach a verdict as a group. During the  
2 trial, you will hear me use a few terms that you may  
3 not have heard before. Let me briefly explain some  
4 of the most common to you.

00:01:20

5 You will sometimes hear me refer to counsel.  
6 Counsel is another way of saying lawyer or attorney.  
7 I will sometimes refer to myself as the court.

00:01:37

8 I will now give you some preliminary  
9 instructions to guide your participation in the  
10 trial. First I will explain the nature of the case  
11 then I will explain what your duties are as jurors  
12 and how the trial will proceed. At the conclusion of  
13 the evidence I will give you more detailed  
14 instructions on the required proof and how you should  
15 proceed to reach a verdict.

00:01:54

16 This case is a civil case. A party who  
17 brings a lawsuit in a civil case is called a  
18 plaintiff. In this action the plaintiff is Karen  
19 Bird. The party against whom a civil lawsuit is  
20 brought is called the defendant. In this action, the  
21 defendants are West Valley City which I or the  
22 parties may refer to as the City, and Kelly Davis is  
23 also a defendant. I or the parties may also  
24 sometimes refer to them collectively as the  
25 defendants.

00:02:24

1 To help you understand what you will see and  
2 hear, I will now explain the background of the case.

3 Karen Bird worked as a manager of the West  
4 Valley City Animal Shelter until her termination in  
5 November 2011. She worked directly for defendant  
6 Kelly Davis, the shelter's director of operations,  
7 who worked for Layne Morris, the director of West  
8 Valley City's Community Preservation Department.

9 On November 29th, 2011, Mr. Morris terminated  
10 Ms. Bird. Ms. Bird brought this lawsuit against West  
11 Valley City and Mr. Davis alleging that her  
12 termination was motivated by their belief that she  
13 was the source of leaks to the media about the animal  
14 shelter in violation of her First Amendment Right to  
15 free speech. West Valley City and Mr. Davis claim  
16 that Ms. Bird was terminated for legitimate reasons  
17 specifically for being insubordinate, discourteous,  
18 and uncooperative.

19 Preliminary instruction number two. Your duty  
20 is to find from the evidence what the facts are. You  
21 and you alone are the judges of the facts. You will  
22 then have to apply those -- apply to those facts the  
23 law as the court instructs you. You must follow that  
24 law whether you agree with it or not. Nothing that  
25 the court may say or do during the course of the

1 trial is intended to indicate nor should be taken by  
2 you as any indication of what your verdict should be.  
3 Justice through trial by jury must always depend on  
4 the willingness of each individual juror to seek the  
5 truth as to the facts from the same evidence  
6 presented to all of the jurors and to arrive at a  
7 verdict by applying the same rules of law as given in  
8 the instructions of the court.

9           Generally speaking -- or preliminary  
10 instruction number three. Generally speaking, two  
11 types of evidence from which a jury may properly find  
12 the truth as to the facts of the case exist. One is  
13 direct evidence, such as testimony of an eyewitness.  
14 The other is indirect or circumstantial evidence  
15 which is proof of a chain of circumstances pointing  
16 to the existence or nonexistence of certain facts.  
17 The law makes no distinction between the weight to be  
18 given to either direct or circumstantial evidence but  
19 simply requires that the jury find the facts in  
20 accordance with the preponderance of the evidence in  
21 the case both direct and circumstantial. You may  
22 consider both direct and circumstantial evidence.  
23 Direct evidence is the testimony of one who asserts  
24 actual knowledge of a fact such as an eyewitness.  
25 Circumstantial evidence is proof of a chain of facts



1 or circumstances indicating the existence or  
2 nonexistence of a particular fact, or the occurrence  
3 or nonoccurrence of a particular event.

00:05:39 4 For example, if someone walked into the  
5 courtroom wearing a raincoat covered with drops of  
6 water and carrying a wet umbrella, that would be  
7 circumstantial evidence from which you could conclude  
8 that it was raining.

00:05:54 9 Preliminary instruction number four. The  
10 evidence from which you will find the facts will  
11 consist of sworn testimony of witnesses, documents,  
12 and other things received into the record as  
13 exhibits, any facts the lawyers agree or stipulate  
14 to, and any applicable presumptions outlined by the  
00:06:12 15 court.

16 Certain things are not evidence and you must  
17 not consider them. I will list them for you now.  
18 Statements, arguments, and questions by lawyers are  
19 not evidence. When, however, the attorneys on both  
00:06:27 20 sides stipulate and agree as to the existence of a  
21 fact, the jury must, unless otherwise instructed,  
22 accept that stipulation and regard that fact as  
23 conclusively proved. Objections to questions are not  
24 evidence. Lawyers have an obligation to their  
00:06:44 25 clients to make an objection when they think opposing

1 counsel has offered improper evidence under the rules  
2 of evidence. Neither the objection nor the court's  
3 ruling on it should influence you. If the court  
4 sustains the objection, ignore the question. If the  
5 question is overruled, treat the answer like any  
6 other. If the court instructs you that some item of  
7 evidence is received for a limited purpose only, you  
8 must only consider that evidence for that limited  
9 purpose.

10           Testimony that the court has excluded or told  
11 you to disregard is not evidence and you must not  
12 consider it. Anything you may have seen or heard  
13 outside of this courtroom is not evidence and you  
14 must disregard it. You are not to consider -- or  
15 sorry. You are to consider only the evidence in this  
16 case. However, in your consideration of the  
17 evidence, you are not limited to the bald statements  
18 of the witnesses. On the contrary, you may draw from  
19 the facts that you find have been proved such  
20 reasonable inferences as seem justified in light of  
21 your experience. An inference is a deduction or  
22 conclusion that reason and commonsense would lead you  
23 to draw from the facts that are established by the  
24 evidence in the case.

25           Preliminary instruction number five. This is

1 a civil case. The plaintiff has the burden of  
2 proving its case by what is called the preponderance  
3 of the evidence. That means Ms. Bird has to prove --  
4 has to produce evidence which considered in the light  
00:08:30 5 of all of the facts leads you to believe that what  
6 Ms. Bird claims is more likely true than not. To put  
7 it differently, if you were to put Ms. Bird's and the  
8 City and Mr. Davis's evidence on opposite sides of  
9 the scales, Ms. Bird would have to make the scales  
00:08:48 10 tip toward her side. If Ms. Bird fails to meet this  
11 burden, the verdict must be for the City and  
12 Mr. Davis.

13 A preponderance of the evidence is not alone  
14 determined by the number of witnesses, nor the amount  
00:09:03 15 of testimony or documentary evidence, but rather by  
16 the convincing character of the testimony and other  
17 evidence and the inferences reasonably drawn  
18 therefrom weighted by the impartial minds of the  
19 jury.

20 (Whereupon, the trial proceeded but was  
21 not transcribed.)  
22  
23  
24  
25

1 **REPORTER'S CERTIFICATE**

2  
3 I, Laura W. Robinson, Certified Shorthand  
4 Reporter, Registered Professional Reporter and Notary  
5 Public within and for the County of Salt Lake, State  
6 of Utah, do hereby certify:

7 That the foregoing proceedings were taken  
8 before me at the time and place set forth herein and  
9 were taken down by me in shorthand and thereafter  
10 transcribed into typewriting under my direction and  
11 supervision;

12 That the foregoing pages contain a true and  
13 correct transcription of my said shorthand notes so  
14 taken.

15 In witness whereof I have subscribed my name  
16 this 12th day of March, 2019.

17  
18 -----

19 Laura W. Robinson  
20 RPR, FCRR, CSR, CP  
21  
22  
23  
24  
25

# APPENDIX 3

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

In re: )  
)  
KAREN BIRD, )  
)  
Plaintiff, )  
)  
vs. ) Case No.  
) 2:12-CV-903EJF  
WEST VALLEY CITY, a )  
political subdivision )  
of the State of Utah, )  
KELLY DAVIS, in his )  
official and )  
individual )  
capacities, )  
)  
Defendants. )  
----- )

BEFORE THE HONORABLE EVELYN J. FURSE

March 13, 2018

Partial Transcript  
Excerpts from Trial

Laura W. Robinson, RPR, FCRR, CSR, CP  
351 South West Temple  
8.430 U.S. Courthouse  
Salt Lake City, Utah 84101  
(801)328-4800

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1                   **Salt Lake City, Utah, March 13, 2018**

2                   (Whereupon, the trial was held. Portions  
3                   were not transcribed.)

4                   (The following is an excerpt of Karen Bird's  
5                   cross-examination by Mr. Preston.)

6                   Q.     (By Mr. Preston) Do you remember an  
7                   investigation being done among employees at the  
8                   shelter by Shirlayne George in 2005?

9                   A.     Yes.

00:00:09 10                  Q.     And you remember reading that, don't you,  
11                  and thinking that you had reason to improve. Do you  
12                  recall that?

13                  MS. HOLLINGSWORTH: Objection. Your Honor,  
14                  relevance.

00:00:16 15                  THE COURT: Sustained. Or sorry, overruled.  
16                  Go ahead.

17                  Q.     (By Mr. Preston) Did you hear the question?

18                  A.     Could you repeat it?

19                  Q.     Yes, certainly. You had an opportunity to  
00:00:28 20                  review that investigation and when you read it you  
21                  knew there were -- you needed to improve?

22                  A.     I had been a manager for about three years  
23                  at that time so yes.

24                  Q.     All right. And, um, when you read the  
00:00:45 25                  negative comments that were there, you took that



1 as --

2 MS. HOLLINGSWORTH: Objection. Assumes facts  
3 not in evidence.

4 THE COURT: Um --

00:00:52

5 MR. PRESTON: Could I just ask the question  
6 and then -- could I complete the question before the  
7 objection is made.

8 THE COURT: Okay. Go ahead and complete the  
9 question.

00:01:00

10 Q. (By Mr. Preston) Thank you. When you read  
11 the 2005 investigation, you understood that you were  
12 having problems as a manager, did you not?

13 A. I felt I needed -- that there was areas of  
14 improvement.

00:01:19

15 Q. And you were having problems with the  
16 employees that you supervised?

17 A. No, I don't feel so.

18 Q. Do you remember giving a deposition in this  
19 case?

00:01:27

20 A. Uh-huh (affirmative), yes.

21 MR. PRESTON: Your Honor, I would publish the  
22 deposition of Karen Bird.

23 THE COURT: Okay.

00:02:02

24 Q. (By Mr. Preston) Is this a transcript of  
25 the deposition you gave on January 8, 2014?

1 A. It says so on the front, yes.

2 Q. All right. And you know you were placed  
3 under oath when you gave that deposition?

4 A. Yes.

00:02:14

5 Q. Is that correct?

6 A. Yes.

7 Q. And would you agree with me that your memory  
8 was probably better when this was given than it is  
9 today about the events in question?

00:02:24

10 A. In 2014 is when I gave this. So, um, my  
11 memory does -- I have a good long term and just that  
12 immediate recall is sometimes hard for me.

13 Q. Okay. Well, let me direct you to Page 59,  
14 if you would, of your deposition. And I would like  
15 you to go to Line 11 of Page 59. Tell me when you're  
16 there.

00:02:49

17 A. I'm there.

18 Q. Okay. Would you follow along and make sure  
19 I read this accurately. Question, I'm asking about  
20 your performance as a manager and your relationship  
21 with the employees that you supervised. Based upon  
22 your review of this, and I'll represent we were  
23 looking at the 2005 investigation, did you believe it  
24 was an indication that you were having problems with  
25 the employees you supervised? And what was your

00:03:19

1 answer?

2 A. Here it says yes.

3 Q. All right. That was your testimony in 2014,  
4 correct?

00:03:29

5 A. Yes.

6 Q. All right. Um, did you think you were  
7 negative about the employees at the shelter  
8 generally?

00:03:43

9 A. Did I think I was negative about the  
10 employees?

11 Q. Yeah. Did you have a negative attitude  
12 about the employees at the shelter?

13 A. No.

00:03:53

14 Q. Um, let me hand you what has been marked as  
15 Defendant's Exhibit 98. This is a two-page excerpt  
16 from typewritten journal entries that you prepared.  
17 Do you recognize it?

18 A. Yes.

00:04:16

19 MR. PRESTON: Your Honor, I would move the  
20 admission of Defendant's Exhibit 98.

21 THE COURT: Any objection?

22 MS. HOLLINGSWORTH: No objection.

23 THE COURT: It is admitted.

00:04:26

24 (Whereupon, Defendant's Exhibit 98  
25 was received into evidence.)

1 Q. (By Mr. Preston) Can you bring that up,  
2 please. Okay. I want to read through some of this  
3 with you. It's dated January 23, 2008. You say,  
4 what a great year it is turning out to be again, in  
5 caps, exclamation, exclamation. Let me state the  
6 issues so far this year. Suzie needs a platelet  
7 transfusion or she will die. She called sick again  
8 today. Chris's medication that she has been on for  
9 five years is the wrong kind. She calls in sick  
10 constantly. Chris is late more days than not.  
11 Nate's going blind again. Then you talk about the  
12 kennels. And you go down, Kelly hired a 53-year old  
13 inexperienced man as the new officer. Skipping down,  
14 Denise, an officer, calls in sick all the time. She  
15 never does her work right, according to others, and  
16 is late every day. And then you list three or four  
17 things that are good. And then you state, I wish I  
18 could add more to this but I can't. I'll try but no  
19 promises. Then the next entry is several months  
20 later, August 15, 2008. A lot has happened of course  
21 -- of the course of the months. David quit,  
22 exclamation point. Were you happy about him  
23 quitting?

24 A. I didn't really have any opinion about it.  
25 He quit.

1 Q. Why did you put an exclamation point behind  
2 it?

3 A. I don't know.

00:06:13

4 Q. Kelly hired Issai. I'm not sure -- how do  
5 you pronounce Issai?

6 A. Issai.

00:06:29

7 Q. Thank you, paren Spanish, close paren. And  
8 Tom, and the other guy Steve, well not much good to  
9 say about him. He doesn't know how to age an animal.  
10 Everything he brings in is either feral or three  
11 years old. Tom is a child. He is too immature to  
12 handle an officer position.

00:06:45

13 Skipping down three lines. As always, Suzie  
14 is out again. This time she had to have her  
15 gallbladder removed.

00:07:01

16 And then we'll skip down to the last  
17 paragraph. On Tuesday morning Chris called in with a  
18 migraine headache in roll call. Denice said  
19 something about how stress contributes to them and  
20 Kelly made a comment that at some point we need to be  
21 responsible for ourselves. I took that as he was  
22 saying that it's our own fault for getting the  
23 migraines. Kathy said that she doesn't get them, I  
24 told her you don't work in the office either. She  
25 said she worked in the code office. I blew her off

00:07:17

1 at that point. So the very next day when Chris came  
2 back in, her and Kelly were talking about her  
3 migraine and how about bad it was and Kelly told her  
4 that he knows that she couldn't do anything about it  
00:07:35 5 and that controlling stress isn't as easy to do.  
6 Talk about speaking out of your ass, exclamation  
7 point. Nate has been on light duty periodically due  
8 to his side and then his back. He is still going  
9 blind but for the moment he has his contacts right  
00:07:53 10 now. He was without driving privileges for a few  
11 months because of eye surgery and then because his  
12 contacts weren't ready. And then he hurt his back.  
13 But when you talk to him it seems pretty gloom and  
14 doom about his health. He is going to be blind and  
00:08:09 15 paraplegic before too long.

16 I see throughout this you're talking about  
17 people's health issues and it appears to me that you  
18 were rather impatient and critical of people's health  
19 issues. Would you agree with me?

00:08:24 20 A. There was a time at the shelter we had a  
21 total of 53 days the entire year of being full  
22 staffed because of people being out sick or positions  
23 not filled and it was stressful.

24 Q. Okay, I understand that but my question is,  
00:08:39 25 were you impatient with people's health issues and

1 because it was creating a workload problem for you?

2 A. I was stressed about it.

3 Q. Um, you appear critical about it in this,  
4 wouldn't you agree with me?

00:08:51

5 A. I appear impatient or stressed about it like  
6 I said.

7 Q. But you didn't think you were being critical  
8 of these folks?

9 (Whereupon, the trial continued but was  
10 not transcribed.)

11 (Whereupon, the following is an excerpt  
12 of Karen Bird's cross-examination by  
13 Mr. Preston.)

00:37:25

14 Q. (By Mr. Preston) Okay. We'll talk about  
15 that. You understood, did you not, from the  
16 performance evaluation and from whatever,  
17 conversations with Layne Morris, you knew your job  
18 was in jeopardy at that point in time, did you not?

00:37:44

19 A. I didn't think I was -- it was in jeopardy  
20 at that time. I felt that I had a bad eval and  
21 because I had given Ed his eval and Kelly said well  
22 let's do yours now.

00:38:18

23 Q. All right. Well, let's look at the  
24 Memorandum of Understanding. Handing you what has  
25 been marked as Defendant's Exhibit 73.

1 MS. HOLLINGSWORTH: This is already in the  
2 record as Exhibit 28.

3 MR. PRESTON: Well, your exhibit has  
4 additional documents on it. I want mine in because  
5 it's just the Memorandum of Understanding.

6 THE COURT: Okay. So I take it there is no  
7 objection then?

8 MS. HOLLINGSWORTH: No objection.

9 THE COURT: All right. We'll go ahead and  
10 admit that.

11 (Whereupon, Defendant's Exhibit 73  
12 was received into evidence.)

13 Q. (By Mr. Preston) This document is dated  
14 December 21, 2010, and this is the Memorandum of  
15 Understanding that Kelly wrote to you, correct?

16 A. Yes.

17 Q. All right. Let's go through this. "Dear  
18 Karen, over two years ago the Animal Services  
19 Division was faced with multiple issues that could  
20 have seriously affected the morale, efficiency,  
21 professionalism, image, and viability of its  
22 existence. As a result of this situation, a  
23 personnel investigation was begun. And at the  
24 conclusion of the investigation, a decision was made  
25 to provide training for the entire division and



1 address the perception of lack of leadership. A  
2 training session was conducted by human resource  
3 director Paul Isaac where Paul specifically addressed  
4 a team oriented topic.

00:39:41

5 Layne Morris, the director of the department,  
6 decided that reorganization was necessary to bring  
7 more accountability to management and for management  
8 to address those internal behaviors that were  
9 affecting negatively upon the organization. As a

00:39:59

10 result of the re-organization, I was re-assigned and  
11 tasked with focusing more on the Animal Services  
12 Division and relieved of my duties as it related to  
13 Code Enforcement. The direction given me was to  
14 begin solving the administration's concerns and  
15 directing the organization in a more positive  
16 direction."

00:40:18

17 So he is explaining here, is he not, what  
18 happened which led two years ago in 2008 to him  
19 coming out to the shelter and focusing on the animal  
20 shelter. Do you recall those events?

00:40:32

21 A. Paul coming out to the shelter?

22 Q. Kelly.

23 A. Oh, Kelly. Yes.

24 Q. Okay. Do you recall Paul coming out, having  
25 this meeting?

00:40:43

1 A. No.

2 Q. You don't recall that?

3 A. No.

4 Q. All right. Going down to the fourth

00:40:57

5 paragraph. Within that time period you and I have  
6 had discussions where your views were expressed and  
7 our differences of opinions were aired. Decisions  
8 were ultimately made as a result of yours and others  
9 input. However, your implementation of those  
10 decisions lacked the appropriate support.

00:41:14

11 Consequently, the message sent by you to your  
12 staff undermined my authority. Specifically, when it  
13 came to the cleaning protocol and the level of  
14 priority placed on cleaning you were less than  
15 supportive. Consequently, I was forced with putting  
16 in writing a daily operation schedule outlining those  
17 priorities I expected you and your staff to meet.

00:41:32

18 When working with the volunteer program, your actions  
19 and attitude was you didn't have the time to spend  
20 training and doing those things that would welcome  
21 the volunteers' efforts. My decision to lessen your  
22 involvement in the hiring process was met with  
23 resentment and what I believe to be a bias against  
24 those individuals that were hired when you were not  
25 involved.

00:41:51

00:42:08

1           When our shelter was under fire from animal  
2 rights groups regarding the carbon monoxide chamber,  
3 you being a member of management, I was surprised to  
4 find that your public feelings on the subject were  
5 not in line with what both Taylorsville and West  
6 Valley leadership had decided in regards to its use.

7           To this day you remain defiant even to the  
8 point where you have expressed to other staff members  
9 that you would not use the chamber yourself and in  
10 effect poisoned those staff members to decide for  
11 them as required in policy. As a manager of people,  
12 emphasis should be towards efficiency within the  
13 operation with compassion for those individuals  
14 tasked with the necessary job of euthanasia. The  
15 chamber is efficient, feasible, and humane to both  
16 operator and animal. For some reason you refuse to  
17 accept that.

18           So he is going through specific things here,  
19 is he not, where he felt you have been undermining  
20 his authority and resisting the direction he wants  
21 the shelter to go in. And you were on notice of  
22 these, correct?

23           A. This was on my desk, yes. I didn't have an  
24 opportunity to discuss this with him.

25           Q. Are you sure you didn't have an opportunity

1 to discuss this with him?

2 A. I don't remember discussing the Memorandum  
3 of Understanding with him.

4 Q. Okay. If Kelly Davis were to testify  
5 otherwise, would you say he is not telling the truth?

6 A. His memory could be different than mine.

7 Q. But whether you had the discussion or not,  
8 this had to put you on notice of issues of

9 insubordination regarding cleaning, regarding the

10 volunteer program, regarding your resistance and

11 defiance with respect to the euthanasia policy, your

12 poisoning the well to other employees. You were

13 aware of these things back on December, late

14 December 2010 and he gave you notice of them in this

15 memo of understanding, did he not?

16 A. He gave me this at the end of 2010, the  
17 first of 2011, yes.

18 Q. Let's look at the second to the last  
19 paragraph. As I reflect upon the entire operation

20 and its ability to perform successfully as a team,

21 I'm troubled that one of my managers is having

22 difficulty accepting direction and implementing that

23 direction with the proper spirit that will promote

24 team building. There is a level of trust that is

25 necessary between employee and supervisor and

1 vice-versa. The same if not greater trust should be  
2 present with managers and their supervisor. I am  
3 sorry to say that I have lost the trust in your  
4 ability to administer the philosophy and vision of  
5 this organization. That is what he wrote then,  
6 correct?

7 A. That is what he wrote.

8 Q. So when your boss tells you that he has lost  
9 trust in you and that you're being insubordinate, you  
10 have to recognize that your job is in jeopardy, don't  
11 you?

12 A. He didn't tell me I was being insubordinate.  
13 He said he lost trust in the ability to administer  
14 the philosophy and vision.

15 Q. Do you mean to tell me that when he tells  
16 you that you're undermining his authority, when you  
17 are resisting the directions he is giving you, he  
18 didn't tell you that you were insubordinate?

19 A. No.

20 Q. Okay. Let's look at your 2010 Performance  
21 Evaluation. I know it is already in but I want to  
22 just have the single evaluation as an exhibit. It is  
23 Defendant's Exhibit 72.

24 THE COURT: Any objection?

25 MS. HOLLINGSWORTH: No objection.

1 THE COURT: We'll admit that.

2 (Whereupon, Defendant's Exhibit 72  
3 was received into evidence.)

00:46:26

4 Q. (By Mr. Preston) This is your 2000 --  
5 December 11, 2010 performance review, correct?

6 A. Yes.

7 Q. And if you look at the paragraph that begins  
8 Karen J, J is your middle initial; is that right?

9 A. Yes.

00:46:42

10 Q. Karen J. has been slow to adapt to some  
11 changes in her job or the work environment. Karen  
12 has difficulty accepting my role and responsibility  
13 as director since the re-organization. She  
14 frequently needs help in balancing competing demands  
15 on her time. Karen fails to recognize certain  
16 priorities that are important to her supervisor and  
17 focuses more on those job duties that are of a  
18 priority to her. She tends to not accept feedback or  
19 criticism as well as she could. Sometimes Karen J.  
20 encounters difficulties in adjusting her approach or  
21 method to best fit different situations. So you  
22 recall receiving that, correct?

00:46:57

00:47:15

23 A. Yes.

00:47:28

24 Q. Go to the top of the next page, second  
25 sentence. Karen has had difficulty either

1 understanding direction given or chooses not to  
2 follow the direction given. Specific topics that  
3 demonstrate this are cleaning protocol, euthanasia  
4 policy, personnel evaluation, volunteer program.

00:47:48

5 Then he states, I have noticed some improvement in  
6 those areas recently.

7 So you were aware that he was critical of you  
8 for not following his direction. You see that?

9 A. I can read what he wrote, yes.

00:48:06

10 Q. And you didn't think he was telling you that  
11 you were being insubordinate?

12 A. No.

00:48:26

13 Q. Okay. Go to the next paragraph, second  
14 sentence. However, she could do more to provide an  
15 environment that encourages open communication so  
16 that her subordinates feel free to discuss work  
17 problems. Feedback from her fellow employees has  
18 been she speaks down to them and walks away when  
19 employees respond. When conflicts arise, she

00:48:45

20 sometimes loses her objectivity. Karen J.  
21 occasionally allows herself to express emotions in  
22 ways which are not helpful. Did you feel you had --  
23 you needed to improve in some of these areas? Did  
24 you answer? I'm sorry, what?

00:49:22

25 A. Did I feel that I was what?

1 Q. Did you feel, based upon what's set forth in  
2 Performance Evaluation Exhibit 72, that you were  
3 being put on notice of things that you needed to  
4 improve on?

00:49:39

5 A. It was in my evaluation. It does say I need  
6 to improve in these areas, yes.

7 Q. Okay. Did you try to improve in them?

8 A. I believe I always tried to improve.

00:50:03

9 Q. Okay. You get this Performance Evaluation,  
10 you get the Memo of Understanding. Layne Morris  
11 tells you that he was ready to fire you. Kelly said  
12 he wanted to give you one more chance, gets you these  
13 documents. You knew at this point your job was in  
14 jeopardy, did you not?

00:50:17

15 A. I knew that Kelly wasn't happy with me.

16 Q. Let's look at Page 145 of your deposition.  
17 Actually go to 144, bottom of the page, line 19?

18 A. 144 line 19?

19 Q. Yes.

00:50:49

20 A. Okay.

21 Q. It says Exhibit 6 was marked. And I  
22 represent this is the Memorandum of Understanding.  
23 Did Kelly give this to you at or about the same time  
24 that he discussed the evaluation with you? You say  
25 yes. And on Page 145 I go on and I read from this

00:51:03



1 and I said beginning on Line 19, after reading part  
2 of the Memorandum of Understanding to you, now you  
3 knew at that point that your job was probably in  
4 jeopardy, did you not? And you answered, I felt that  
5 it was.

6 So Ms. Bird, you have told the jury how much  
7 you loved this job. If you loved it so much, why  
8 didn't you try to improve your relationship with  
9 Kelly Davis?

10 A. I did try to improve it and it improved in  
11 2011.

12 Q. Isn't it true that in 2011 it got to the  
13 point where you couldn't even stand to look at him?

14 A. After the list, yeah. When he threw the  
15 list back across the table at me, yes.

16 Q. Okay. Jon Andrus said he wadded it up and  
17 threw it in your face, you just said he threw it back  
18 at you. When you testified earlier, you said he slid  
19 it across the table to you. Which was it?

20 A. He was here (indicating) and when they gave  
21 it to him he slid it across the table to me.

22 Q. So he didn't throw it at you, did he?

23 A. He slid it across.

24 Q. Did he throw it at you, Ms. Bird?

25 A. No, he did not. He slid it.

1 Q. Did he wad it up and throw it in your face?

2 A. It didn't hit me in the face, no.

3 Q. Did he wad it up?

4 A. Not that I remember.

5 (Whereupon, the trial continued but was  
6 not transcribed.)

7 (Whereupon, the following excerpt  
8 occurred at the end of the trial day  
9 after the jury had been excused.)

03:35:53 10 THE COURT: And you may step down and you all  
11 may be seated.

12 All right. So Ms. Hollingsworth, do you have  
13 a general estimate on timeframes for the remainder of  
14 your case?

03:36:09 15 MS. HOLLINGSWORTH: Right. So for our -- for  
16 our case, depending on how long cross is, um, and I  
17 don't know if Mr. Preston or whoever is planning on  
18 doing their putting on their case at the same time  
19 because we're using the same witnesses, but for just  
03:37:35 20 what we need if we were allowed to just go through  
21 everybody tomorrow I think we would be done tomorrow.  
22 But like I said --

23 THE COURT: By the end of the day tomorrow?

24 MS. HOLLINGSWORTH: Right.

03:37:43 25 MR. PRESTON: That is without me asking any

1 questions?

2 THE COURT: Right.

3 MR. PRESTON: Is that what you're saying?

4 MS. HOLLINGSWORTH: Right.

03:37:49

5 MR. PRESTON: So that means that she is not

6 going to finish her case until midday or later

7 Thursday. I obviously have some cross-examination.

8 She has 12 witnesses and she has done five and barely

9 started with the sixth, that leaves basically seven

03:38:06

10 witnesses to go.

11 I mean she has gone five and a half hours,

12 5 hours 10 minutes. I have used 2 hours 35 minutes.

13 So I mean I think she has to really move her case

14 along at this point if we're going to try to get done

03:38:28

15 in four days.

16 THE COURT: Let me just ask you. So at this

17 point in your case, sorry, you have got -- that is

18 why okay so you -- you have got -- you have got

19 Mr. Davis on the stand now. You have four other

03:38:49

20 witnesses identified as will call. Do you still

21 anticipate calling all four of them?

22 MS. HOLLINGSWORTH: Well, we were just talking

23 about one of them that we conceivably may not but we

24 want to -- we need to talk about that. At the

03:39:02

25 moment, yes.

1 MR. PRESTON: There are six others, not four  
2 others.

3 THE COURT: Well, there are four other will  
4 calls and there are two other may calls. I was going  
03:39:11 5 to ask -- I'm asking about the will call first.

6 MS. HOLLINGSWORTH: Right now we are still  
7 planning on calling all of the witnesses on our list.

8 THE COURT: So the will and the may?

9 MS. HOLLINGSWORTH: Right. The last -- three  
03:39:22 10 of them will be very short, Wayne Paul, Tess Hartwell  
11 and Jay Breisch. So there is --

12 THE COURT: Okay. So by very short, less than  
13 a half hour each?

14 MS. HARSTAD: Yes, for sure.

03:39:36 15 THE COURT: So more like 15 minutes each?

16 MS. HOLLINGSWORTH: Right.

17 THE COURT: Okay.

18 MS. HOLLINGSWORTH: So -- and the -- and these  
19 main witnesses that are still coming up, so obviously  
03:39:48 20 Kelly Davis, Shirlayne George, Layne Morris and Paul  
21 Isaac are also defendants' witnesses.

22 THE COURT: Right.

23 MS. HOLLINGSWORTH: But he is not a main -- he  
24 will be short.

03:40:01 25 THE COURT: And then your -- and then after

1 that you only have one other witness who would not be  
2 included on that list; is that correct?

3 MR. PRESTON: Two.

03:40:16

4 THE COURT: You have two other witnesses,  
5 okay. Yeah, I see. Um, okay. So we -- the problem  
6 as I see it is we have had -- we have had the jury  
7 here for four days. We have had delay although we  
8 haven't talked about it I have submitted the court's  
9 jury instructions back to you which do show that any  
10 punitive damage award would need to be held -- would  
11 need to be -- that there would need to be evidence on  
12 that held after a deliberation from the jury.

03:40:42

13 And I am out of town all of next week so there  
14 is no possibility for me to run into next week. Um,  
15 as I understand it, um, Mr. Preston also has  
16 obligations. Do you have obligations on Friday as  
17 well, I'm trying to remember?

03:41:02

18 MR. PRESTON: Um, I settled that case. I will  
19 still probably have to appear in front of Judge  
20 Jenkins but hopefully it won't be very long.

03:41:16

21 THE COURT: Okay. All right. So right now  
22 our jurors are not planning on being here on Friday.  
23 So we need to do our best to get through as much as  
24 possible tomorrow because we will need to do --  
25 obviously there will be time for closings, time for

03:41:33

1 jury instruction. How much time, if you have an  
2 estimate now at this point, about closing argument.

3 MS. HOLLINGSWORTH: Probably an hour.

4 THE COURT: Probably an hour. Okay. And

03:41:50

5 Mr. Preston, do you have any thoughts on that? I  
6 realize you haven't --

7 MR. PRESTON: I would say 45 minutes to an  
8 hour.

9 THE COURT: Okay. All right. So I guess what

03:42:09

10 I would ask you to do is if you can tonight to take  
11 -- to go through and see if there is any way you can  
12 tighten up your -- your direct exams on any of the  
13 folks that you're going to be calling so that we can  
14 move through as quickly as possible tomorrow. All  
15 right.

03:42:26

16 Any other concerns about witnesses, order of  
17 witnesses, time, things of that nature?

18 MR. PRESTON: No, Your Honor.

19 (Whereupon, the trial continued but was  
20 not transcribed.)

21

22

23

24

25

1 **REPORTER'S CERTIFICATE**

2  
3 I, Laura W. Robinson, Certified Shorthand  
4 Reporter, Registered Professional Reporter and Notary  
5 Public within and for the County of Salt Lake, State  
6 of Utah, do hereby certify:

7 That the foregoing proceedings were taken  
8 before me at the time and place set forth herein and  
9 were taken down by me in shorthand and thereafter  
10 transcribed into typewriting under my direction and  
11 supervision;

12 That the foregoing pages contain a true and  
13 correct transcription of my said shorthand notes so  
14 taken.

15 In witness whereof I have subscribed my name  
16 this 12th day of March, 2019.

17  
18 -----

19 Laura W. Robinson

20 RPR, FCRR, CSR, CP  
21  
22  
23  
24  
25

## APPENDIX 4



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

In re:	)	
	)	
KAREN BIRD,	)	
	)	
Plaintiff,	)	
	)	Case No. 2:12-CV-903EJF
vs.	)	
	)	
WEST VALLEY CITY, a	)	
political subdivision of	)	
the State of Utah, KELLY	)	
DAVIS, in his official	)	
and individual	)	
capacities,	)	
	)	
Defendants.	)	
_____	)	

BEFORE THE HONORABLE EVELYN J. FURSE

March 14, 2018

Partial Transcript  
Excerpts from Trial

Laura W. Robinson, RPR, FCRR, CSR, CP  
351 South West Temple  
8.430 U.S. Courthouse  
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1                   **Salt Lake City, Utah, March 14, 2018**

2                   (Whereupon, the trial was held but was not  
3                   transcribed.)

4                   (Whereupon, the following is an excerpt of  
5                   a discussion held out of the presence of the  
6                   jury between the Court and counsel for both  
7                   parties.)

8                   THE COURT: Okay. And then timing-wise, I am  
9                   becoming concerned because tomorrow we have a six and  
00:00:09 10                  a half hour day, if you take out the breaks. We will  
11                  have an hour each for closing arguments, probably an  
12                  hour of reading in the jury instructions, that takes  
13                  us down to three and a half hours tomorrow. We have  
14                  approximately four and a half hours left today.

00:00:27 15                  MS. HOLLINGSWORTH: Okay. We expect to wrap  
16                  up today. The only potential issue would be if our  
17                  final witness, Jay Breisch, may have to come first  
18                  thing in the morning. But we have eliminated one of  
19                  our witnesses, well, two of our witnesses actually.  
00:00:42 20                  We have agreed with counsel that a couple of exhibits  
21                  will -- they have agreed that they can be admitted.  
22                  We were bringing Tess Hartwell just to introduce a  
23                  couple of exhibits so we're not going to use her or  
24                  Paul Isaac. So remaining --

00:01:04 25                  THE COURT: But you're still going to need to

1 call Paul?

2 MR. PRESTON: Yes, absolutely. This is the  
3 problem, Your Honor. Kelly Davis is our witness, he  
4 is my defendant. She has taken an hour-and-a-half  
00:01:15 5 with him, she is going to go another hour with him  
6 that is two and a half hours. What does that leave  
7 me? He is my witness. I need to put my case on. If  
8 I take anywhere near the time she is taking with my  
9 witnesses, this trial is not going to end on  
00:01:28 10 Thursday.

11 THE COURT: Yes. Um, and yeah, I -- and so my  
12 thought was to try and do an hour divide between the  
13 parties at this point, dividing the length of time  
14 and then it is up to you how you want to use them as  
00:01:44 15 far as which witness. But so with the three and a  
16 half hours from tomorrow, the four and a half hours  
17 from today, that's -- that's eight hours. So -- and  
18 given -- and then, um, the time -- let's see so --

19 MR. PRESTON: Your Honor, the problem is she  
00:02:09 20 has already taken seven hours and I have taken two  
21 and a half hours.

22 THE COURT: Right.

23 MR. PRESTON: So now we're going to divide it  
24 evenly.

00:02:16 25 THE COURT: No, I did not say evenly.

1 MR. PRESTON: Okay. That is what I thought  
2 you said.

3 THE COURT: Give me a minute. I did not say  
4 evenly. So we have got eight hours to divide up and  
5 um --

6 MS. HOLLINGSWORTH: Your Honor, I want to  
7 point out that we have the burden of proof and these  
8 are effectively our witnesses. They're using the  
9 same witnesses. So, um, if -- and I have offered  
10 Mr. Preston the opportunity if he wants to put on his  
11 direct at the same -- when he -- when I am done with  
12 Mr. Davis, for instance, but he hasn't answered me on  
13 that. So I don't know if that's what he intends or  
14 not.

15 THE COURT: Okay. Um, I still think it makes  
16 sense to divide up the hours because I think that  
17 the -- there is a significant risk that Mr. Preston  
18 ends up with, you know, two hours to put his case on  
19 which is clearly unfair.

20 So what I would say is that the plaintiff  
21 should plan to have their case finished within three  
22 hours. Now obviously, three hours of your time, so  
23 how you're using the time. That is not if  
24 Mr. Preston -- that does not include Mr. Preston's  
25 cross-examination or direct examination depending how

1 he wants to use it so.

2 MS. HOLLINGSWORTH: Okay.

3 MS. HARSTAD: Your Honor, can I ask a  
4 clarifying question? So I understand that you intend  
5 to do punitive damages afterwards?

00:03:56

6 THE COURT: Right.

7 MS. HARSTAD: Can we put on more testimony at  
8 that stage?

9 THE COURT: We would, um, you would -- yes.

00:04:03

10 MS. HARSTAD: So we can recall witnesses for  
11 punitive damage purposes at that stage?

12 THE COURT: Correct.

13 MS. HARSTAD: Okay.

14 THE COURT: I take it there is no objection to  
15 that since that was your idea?

00:04:11

16 MR. PRESTON: That's absolutely correct, Your  
17 Honor.

18 THE COURT: Okay. So three hours of time left  
19 for plaintiffs, and then that would leave defendants  
20 five hours of time to put on their case. And  
21 obviously there is no obligation that you use all  
22 three hours. Anything else we need to cover before  
23 we bring the jury back in?

00:04:24

24 MR. PRESTON: No, Your Honor.

00:04:36

25 MS. HOLLINGSWORTH: No.

1 THE COURT: Okay. Thank you.

2 (Whereupon, the trial continued but was  
3 not transcribed.)

4 (Whereupon, the following is an excerpt  
5 of the cross-examination of Kelly Davis  
6 by Mr. Preston.)

7 Q. (By Mr. Preston) Okay. Um, you were handed  
8 Exhibit 71, I think that is in evidence. Do we have  
9 our copy of it that I can provide to the court.

00:46:42

10 THE COURT: It is.

11 MR. PRESTON: So here is Exhibit 71 which I  
12 understand is now admitted, Your Honor.

13 THE COURT: It is.

00:46:56

14 Q. (By Mr. Preston) This is the log that you  
15 prepared starting in June of 2010. Would you read  
16 the first entry, first paragraph?

00:47:15

17 A. Because of various difficulties in  
18 communication with Karen regarding decisions that  
19 have been made operationally, and after sitting down  
20 with Layne, Layne Morris, expressing my concerns with  
21 Karen where I felt she was actively trying to  
22 undermine my authority, I felt it necessary to sit  
23 Karen down and clarify each of our roles as managers.

00:47:35

24 Q. Then you go on to state that you discussed  
25 with her a series of topics, correct?

1 A. Right.

2 Q. And the first one has been covered, the fact  
3 that Ed Trimble had complained that Karen had told  
4 him not to use the chamber?

00:47:47

5 A. Yes.

6 Q. So you discussed that with her, she denied  
7 that. That was the end of that, correct?

8 MS. HOLLINGSWORTH: Objection, leading.

9 THE WITNESS: Yes.

00:47:55

10 MR. PRESTON: Your Honor, this is background.  
11 It has been covered.

12 THE COURT: Okay. If you could keep it short.

13 MR. PRESTON: Yeah. When it is substantive, I  
14 make sure I don't lead, Your Honor.

00:48:04

15 THE COURT: Okay.

16 Q. (By Mr. Preston) What was the next topic  
17 that you discussed with her?

18 A. Disgruntled staff.

19 Q. And what was that about?

00:48:13

20 A. Three particular employees had come in and  
21 complained to me about the frustration they were  
22 having about Karen's approachability. They felt that  
23 she was hard -- they had a hard time explaining  
24 things to her, that she was curt, that her responses  
00:48:35 25 to them were short, and also that in their opinion



1 that Karen was favoring a particular employee.

2 Q. Who was that employee?

3 A. Tess.

4 Q. Hartwell?

00:48:51 5 A. Hartwell, yes.

6 Q. Did you receive complaints like that on  
7 other occasions?

8 A. Yes. Those kinds of complaints employees  
9 would make from time to time about favoritism or they  
00:49:04 10 felt like they were being treated unfairly or this  
11 person likes me better than that person, so to speak.

12 Q. Okay. The next topic is clinic time change.  
13 What did you discuss with Ms. Bird about that issue?

14 A. I had been -- we ran a clinic at the rear of  
00:49:29 15 our shelter every Wednesday, I'm not sure -- or no,  
16 every Monday. And that clinic was run by a vet, a  
17 licensed veterinarian and two of my staff people, a  
18 clerk and -- no, maybe it was just one of my staff  
19 because the veterinarian would bring in his own  
00:49:52 20 assistant.

21 So, um, I had those individuals, the  
22 veterinarian as well as my staff member come to me  
23 and ask if we could move the clinic date from a  
24 Monday to a Wednesday because Mondays were very  
00:50:15 25 difficult for not only the vet but also for the staff

1 that we -- that was helping at the clinic. It  
2 shortened up our front clerk help. So I reviewed  
3 that with Karen and asked her -- asked her what she  
4 felt about that, how did she feel about the fact that  
5 there has been a request to move it to Wednesday.  
6 And I had -- I asked her what is your input? And her  
7 only input to me was we have always done it on Monday  
8 why can't we keep it on Monday. And I didn't feel  
9 like that that was a good enough reason to change it  
10 or not change it. So I decided to go ahead and  
11 change it to meet the -- the veterinarian's schedule  
12 as well as try to lessen the burden on my staff on  
13 Mondays.

14 Q. All right. And your last sentence, would  
15 you read the last sentence of that paragraph, or last  
16 two sentences?

17 A. Okay. Um, I decided to change the --

18 Q. Beginning with "Karen was visibly"?

19 A. "Karen was visibly upset that I made that  
20 decision. Her facial expression to me at the time I  
21 informed her was of disgust and apathy."

22 Q. And the next topic you discussed with her  
23 was her role and your role. Is that -- is that the  
24 next item there?

25 A. Yes. Yes.

1 Q. Okay. Let me read this and follow along and  
2 make sure I have read it correctly. "Karen has had  
3 difficulty recognizing each of our roles since she  
4 returned to work after her traffic accident. Karen  
00:51:52 5 was out for over five months on short-term disability  
6 and then light duty. During her absence, I was  
7 responsible for the day-to-day operations and overall  
8 efficiency of the entire division. Decisions were  
9 made during this time that changed some procedures.  
00:52:08 10 When Karen returned, she had some difficulty  
11 accepting her limited responsibility. I felt Karen  
12 was not supporting my decisions on various situations  
13 with personnel or operational issues."

14 You go on to say, "we discussed specifics about  
00:52:24 15 her focus and job duties." You wrote out the  
16 expectations you had of her that needed to be  
17 addressed each day and her responsibility for  
18 ensuring that they get done. And you asked her to be  
19 more accessible and demonstrate a willingness to  
00:52:42 20 listen to employee concerns. Is that what you did  
21 with her?

22 A. Yes.

23 Q. And then the last sentence of that entry  
24 was, "the message I gave Karen was I encourage  
00:52:52 25 communication between myself and her but will not

1 tolerate division. She would do herself a favor if  
2 she became more of a team player than just a conduit  
3 for dissension."

4 A. Yes.

00:53:04

5 Q. And those were concerns you had in 2010?

6 A. Absolutely, yes.

00:53:27

7 Q. Okay. Let's go to the third page, Bird  
8 0404. There is a June 28, 2010 entry. And you have  
9 a person named Torrie, and do you remember the issue  
10 with Torrie that you were concerned about, a new  
11 volunteer?

12 A. Yes.

13 Q. What was that issue?

00:53:36

14 A. She came into my office, she sought me out,  
15 and came into my office to talk to me about her  
16 volunteering. She had just been volunteering there  
17 for a few days, I think it was two to three days.  
18 And I was surprised to hear that she was upset about  
19 the way she was being treated.

00:53:59

20 Q. And what was her complaint?

00:54:18

21 A. I wanted her to be candid with me, I wanted  
22 her to explain it because I wanted to know specifics  
23 regarding it because I felt it was important to have  
24 these volunteers in there helping us. And she said  
25 she was being treated as though she was not needed

1 there, was not wanted.

2 Q. All right. And the second paragraph begins,  
3 "I have been concerned", if you would follow along,  
4 "I have been concerned in the past with other  
5 volunteers that this may be happening. I'm now  
6 documenting situations and will specifically address  
7 this concern with Karen. She is the manager and if  
8 she is not willing to make this program work, then  
9 she is the problem and not the solution." Did you  
10 have that discussion with Karen?

11 A. I certainly did on many occasions.

12 Q. This was an ongoing --

13 A. More than one occasion.

14 Q. Was it a one time deal or an ongoing issue?

15 A. Torrie's complaint was an issue that I had  
16 heard in private -- in previous concerns. So this  
17 was not the first time that I had heard a volunteer  
18 or had a volunteer come in and express the fact that  
19 they felt like they were not wanted or that there was  
20 no time spent with them explaining things. So this  
21 was not the first time that it had happened.

22 Q. All right. Would you go to the next page,  
23 this is July 27, 2010, second paragraph, take a  
24 moment and read that if you would.

25 A. Okay.

1 Q. Do you remember that incident with the pit  
2 bull?

3 A. I do, yes.

00:56:33

4 Q. And you have testified before about the  
5 policy that a paramount issue was safety of the  
6 technician, correct?

7 A. Yes, or the employee conducting the  
8 euthanasia.

00:56:50

9 Q. Okay. Was this an example? I mean what --  
10 how did you deal with this issue here?

11 A. Once it was brought to my attention, um,  
12 when you say how did I deal with it what do you mean?  
13 I am not sure what you mean.

00:57:07

14 Q. Did you have any discussions with Karen  
15 about the fact that the employees needed to have  
16 choice?

00:57:19

17 A. Oh, absolutely. As a matter of fact, I  
18 wanted to hear what Karen had to say in regards to  
19 that because right now at that point I only had  
20 Nate's side of the story and so I wanted to hear what  
21 Karen had to say in regards to it. And so we  
22 discussed the fact that safety was an issue with  
23 regards to the reason why this particular animal, the  
24 decision was made by Nate to do it that way instead  
25 of the other.

00:57:39

1 Q. All right.

2 A. And I confirmed that.

3 Q. And you confirmed that with Karen that the  
4 employee had that choice?

00:57:46

5 A. Absolutely, yes.

6 Q. And then on July 28th, 2010, it says that  
7 you were approached by Russ Cramer and Kathy Harris  
8 about a volunteer named Michelle. Is that Michelle  
9 Johnson that we have talked about?

00:58:02

10 A. Yes.

11 Q. And it says in the third sentence, Kathy  
12 says she has been told by Michelle on a couple of  
13 occasions to do things. Skipping down a sentence,  
14 Russ informed me about an instance where Michelle was  
15 rude to his mother when they were here visiting and  
16 Russ's wife overheard Michelle speaking poorly of  
17 Russ regarding a euthanasia incident. And you say  
18 you referred Russ to Karen and you were interested to  
19 see how Karen would handle that?

00:58:35

20 A. Yes.

21 Q. How did Karen handle it, do you recall?

22 A. I don't recall how she handled it.

23 Q. All right. August 25th, 2010, the bottom of  
24 the next Page 0406 you were -- you indicate that you  
25 had asked Karen to provide a list of activities. Do

00:59:05

1 you see that?

2 A. Yeah. My request was basically to provide  
3 me with a list of those activities that we are  
4 involved in as a shelter, outside activities, because  
00:59:26 5 I was going to be presenting in the Taylorsville City  
6 Council meeting and I wanted to be able to show them  
7 or tell them what we were doing as a shelter in  
8 efforts of adoptions, going out there and doing the  
9 activities that we were doing to make adoptions more  
00:59:49 10 involved.

11 Q. And when you went back to Karen and asked  
12 her if it was done, what did she say?

13 A. Well, when I first asked her if she had got  
14 it done she hadn't. She said she hadn't had time or  
01:00:02 15 didn't -- had some reason -- she said -- well let me  
16 read it.

17 Q. Okay.

18 A. She did not have it done yet and she had  
19 other things that she was doing and would try to get  
01:00:17 20 to it. And that's when I informed her that it was  
21 important because I needed it at the Taylorsville  
22 meeting and it's not only that I needed it that  
23 night, Taylorsville needed the information prior to  
24 the meeting so that they could put it on the agenda.  
01:00:35 25 And so that's when I informed her I said I need that



1 quickly, that needs to be a number one priority.

2 Q. All right. So throughout this -- we're not  
3 going to take the time to read all of these or go  
4 through them all, but were there a number of concerns  
5 you had about Karen's performance as documented here?

6 A. Yes. Yes.

7 Q. And, for example, if you go to 0409, the  
8 last own entry on October 4, 2010, it looks like  
9 you're talking about the volunteer issue again with  
10 Karen?

11 A. Yeah. I, like I said, I just had come back  
12 from vacation. I was approached by three different  
13 volunteers complaining to me about how they were  
14 being treated which was surprising to me because  
15 those three volunteers were pretty satisfied when I  
16 left. I mean they felt they had even told me on a  
17 couple of occasions that they loved it and we like  
18 what we're doing.

19 And so I asked them tell me what's going on,  
20 be specific, let me know what's going on. I don't  
21 want to just approach Karen on a nonspecific issue  
22 just that you were rude. I want to know what it is.  
23 And one of them said that Karen would not speak to  
24 her, didn't show her any respect. She said that she  
25 yells and is accusatory to her, she is rude and her

1 instructions -- with her instructions and did not  
2 take the time to either explain or discuss what she  
3 wants done. And her perception of Karen's response  
4 to her, her perception was that Karen had no patience  
5 with those who were either volunteers or not  
6 full-time employees.

01:02:37  
7 Q. If you had to summarize the issues where you  
8 felt you were having or Karen was resisting what you  
9 wanted done, what are the ones that come to mind to  
10 you?

01:03:01  
11 A. Um, well obviously the volunteer program.  
12 That was a very valuable and important program that I  
13 felt was something that we needed to, we as managers,  
14 needed to make sure that was successful. Um, the  
01:03:19  
15 cleaning procedures, those procedures that we --  
16 since we're in new shelter I had put down certain  
17 parameters, certain priorities, and we needed to meet  
18 those priorities such as having a certain portion of  
19 the shelter where the public enters, that portion of  
01:03:39  
20 the shelter needed to be clean and ready for the  
21 public when we opened the doors at 10:00.

01:03:53  
22 Q. Okay. Let me -- let me stop you here  
23 because I want to delve into each of these and I see  
24 we're past the noon hour, Your Honor. Do you want to  
25 break now?

1 THE COURT: If you're good, we can -- the food  
2 is here, right?

3 THE CLERK: Yes.

01:03:59

4 THE COURT: We can break now if this is a good  
5 time.

6 MR. PRESTON: Why don't we do that now and  
7 then we'll pick this up.

8 THE COURT: Okay, we'll do that.

9 THE CLERK: All rise for the jury.

01:04:06

10 THE COURT: I would just remind you all not to  
11 discuss the case during your lunch break and we'll  
12 see you back here in a half hour.

13 (Whereupon, the jury left the courtroom.)

14 (Whereupon, the following is a portion of

01:04:16

15 Cross-Examination of Kelly Davis by

16 Mr. Preston.)

17 THE COURT: And Mr. Davis I will remind you  
18 you are under oath and Mr. Preston you may continue.

19 MR. PRESTON: Thank you, Your Honor.

01:44:56

20 Q. (By Mr. Preston) Kelly, when we broke you

21 had mentioned two areas where you were concerned

22 about Ms. Bird's attitude and your instructions. The

23 first was the cleaning. I wanted to explore that a

24 little bit. You said you wanted the office or the

01:45:18

25 shelters cleaned by 10:00 a.m. Why was that important

1 to you?

2 A. Well, I wanted the first -- the part of the  
3 shelter that was open to the public and cleaned by  
4 10:00 a.m. and it was important to me because we  
01:45:31 5 wanted to be in a good situation with the public so  
6 that the animals were presented in a nice fashion  
7 instead of a dirty messy shelter. I wanted that  
8 shelter clean so that when the public had access to  
9 it they would see the environment and it was a  
01:45:53 10 receptive environment for the public.

11 Q. All right. And what was Ms. Bird's response  
12 when you discussed this issue with her. Well, this  
13 was not just a one time issue. This was an issue  
14 that we discussed for a number of days and months  
01:46:10 15 basically because we had moved into the shelter in  
16 2007, and we were working through the process of  
17 making sure that we have that public area clean by a  
18 certain time. And so we had to progressively figure  
19 out how that was going to be done with the staff that  
01:46:29 20 we had. So overtime, um, we weren't getting it done  
21 it just wasn't happening. So I was conversing with  
22 Karen about we need to get it done by 10, what can we  
23 -- what are you going to do to try to make that  
24 happen. I was getting responses like, well we need  
01:46:48 25 more staff, we don't have the time to be able to do

1 that. I was even coming in and, excuse me I thought  
2 you were going to say something. I was even coming  
3 in and viewing videotapes because we have video  
4 throughout the shelter, and I was even watching  
5 videotapes because my shelter techs started at  
6 5:00 in the morning. And that was a reason why we  
7 wanted our shelter techs coming in at five was so  
8 they had that head start in the public areas.

9 Well, I was seeing video of my shelter tech  
10 never even entering the public area for cleaning, the  
11 cat area, until 7:00 in the morning. So there was  
12 two hours that this tech was somewhere in the  
13 building. And that was addressed with Karen. Karen,  
14 emphasize with your techs that that is where they  
15 need to start and do their work is in the public  
16 areas of the shelter so that we're completely done by  
17 10:00.

18 We not only had the cats, we had the community  
19 cat rooms. We had the adoption dog areas and we had  
20 the regular dog kennels. So there was a lot to be  
21 done in that five hours before the public entered.  
22 And those conversations overtime just seemed to not  
23 happen. I mean it just wasn't getting done.

24 Q. I think you may have misspoke. You said we  
25 moved into the new shelter in 2007?

1 A. In the new shelter?

2 Q. That is what you said. Did you mean 2009  
3 moving into the new shelter?

01:48:28

4 A. It could be. I thought it was September of  
5 2007 could it have been -- it was 2009, you're right.  
6 Because I moved out to the old shelter in 2007.  
7 You're right.

01:48:43

8 Q. Okay. So did this problem persist  
9 throughout the period of time that Ms. Bird was the  
10 shelter manager?

01:48:58

11 A. It continued. I mean it wasn't an every day  
12 thing there were some days we were successful other  
13 days we weren't, but there was more often than not  
14 that particular issue was not being -- was not being  
15 addressed in the spirit that I felt it should be, in  
16 the importance that I -- that I tried to place on it.

01:49:19

17 Q. Okay. The second category you mentioned was  
18 the volunteers and I think you said training them.  
19 What was Ms. Bird's response when you talked to her  
20 about training the volunteers properly?

01:49:34

21 A. And again those are not like one time  
22 instances, this is over time. Um, Karen's response  
23 to me was well, I don't have the time, um, I am doing  
24 other things and my employees don't have the time to  
25 do it, my staff or her staff doesn't have the time to

1 do it. Um, we need more people. And I tried to  
2 convince her that that is not going to happen. I  
3 mean we're not going to increase our staff so we have  
4 got to find ways to make sure that we utilize our  
01:49:53 5 volunteers in -- to the best way possible. And if  
6 they need that training which they do, they need to  
7 be oriented to the job, then we need to take that  
8 time to do it. Whether Karen did it or whether  
9 somebody within her staff did it, it needed to -- it  
01:50:13 10 needed to be done.

11 Q. Did you have budgetary limitations on how  
12 much staff you could hire?

13 A. Oh absolutely. I had no control over the  
14 hiring aspect of it. I couldn't just fill a position  
01:50:26 15 without that position being authorized by the City.

16 Q. Okay. Let me direct your attention to  
17 Exhibit 73 which Ms. Hollingsworth discussed with  
18 you. This is the Memorandum of Understanding. I am  
19 going to direct your attention to a portion of that  
01:50:55 20 on the second page that was not read to you or  
21 pointed out to you regarding the euthanasia process  
22 and the chamber. If you go down six lines there is a  
23 sentence that begins, "to this day." Do you see  
24 that?

01:51:15 25 A. Yes.

1 Q. Okay. This is Bird 0401. "To this day you  
2 remain defiant even to the point where you have  
3 expressed to other staff members that you would not  
4 use the chamber yourself and in effect poisoned those  
01:51:30 5 staff members to decide for them as required in  
6 policy." Um, what -- why was that a concern for you?

7 A. Well, it was disrupting the organization.  
8 Obviously the employees themselves that felt like  
9 they were being intimidated were now unable basically  
01:51:52 10 to have their option. They felt like they would be  
11 retaliated against or would -- there would be  
12 pressure placed on them if Karen, the supervisor,  
13 would give them -- give them bad looks and, you know,  
14 treat her -- treat them improperly because of their  
01:52:14 15 use. So it caused problem in that area.

16 Q. Did you receive complaints from any officers  
17 that were under Nate Beckstead about this issue?

18 A. Yeah. All of the officers realized that  
19 that was a tool for them. And so yeah, I had  
01:52:29 20 complaints from officers that were saying well, you  
21 know, she is looking at me this way or she will be  
22 pissed off or whatever it may be and -- if I use it.  
23 So, yes, I had those kinds of complaints.

24 Q. You heard Ms. Bird testify yesterday about  
01:52:47 25 using I think she called it a squeeze gate if you're



1 using injection with a ferocious animal. Was a  
2 squeeze gate in the new animal shelter?

3 A. No. That was in the old shelter.

01:53:03

4 Q. All right. So if you had a ferocious  
5 animal, what was the choice that the employees could  
6 use to euthanize that animal?

01:53:24

7 A. Well, because of the policy, the only  
8 options that they had was either injection or carbon  
9 monoxide unless it was a vicious animal. So they had  
10 that third choice to make a decision as to which one  
11 they were to use. And so if it was a vicious animal,  
12 then they could choose on how they wanted to  
13 euthanize that animal.

01:53:40

14 Q. If they wanted to inject it, what would it  
15 require?

16 A. It would require more help obviously or it  
17 would require a potential injury, place them in a  
18 potential hazardous environment.

01:54:01

19 Q. Okay. Did you have concerns about animals  
20 being carried out into the front of the shelter?

01:54:22

21 A. Well, my concern of that was one, it was a  
22 directive from City that we wouldn't have animals  
23 wondering around in the front of the shelter in the  
24 public area where the lobby is. But -- but so -- but  
25 we did, there was the fact that when we adopted an

1 animal, that animal was brought, after the adoption  
2 process was completed, the paperwork was done and the  
3 payment was made, then the animal was brought out to  
4 that owner at that time which was in the lobby. And  
5 then they would walk out the front door.

6 That was an appropriate time for an animal to  
7 be in the lobby. But it wasn't an appropriate time  
8 to have animals out from the kennel just in the lobby  
9 area either wandering around or being with -- up  
10 there with the clerks.

11 Q. Was that a topic of discussion with Karen?

12 A. Yes. That was not only a topic with me, but  
13 she was very well aware of that requirement that the  
14 City had made when we were building the shelter.

15 Q. Did you receive employee complaints about  
16 Karen and how she was treating them?

17 A. Treating them individually or personally.

18 Q. Yes?

19 A. Yes. I would get complaints from various  
20 employees that they felt like she was rude to them or  
21 she, you know, would walk away from them and didn't  
22 listen to them, you know, felt like they were  
23 worthless. Those kinds of things.

24 Q. Do you remember any of the employees who  
25 complained?

1           A.    He -- well I know Sandra Bayne complained  
2 about it. Wes complained about it. Um, Ed Trimble  
3 complained about it. Um, that's what comes to mind  
4 right now.

01:56:07

5           Q.    All right. We won't have you go through all  
6 your notes. But did there come a time when  
7 Mr. Morris approached you about initiating  
8 disciplinary action against Karen because of  
9 insubordination issues?

01:56:26

10          A.    Layne come to me about that?

11          Q.    Yeah?

12          A.    No. He has never -- he never confronted me  
13 about input in regards to insubordination or  
14 anything.

01:56:37

15          Q.    Okay. Didn't he at the end of 2010 didn't  
16 you and didn't he talk to you about getting --  
17 releasing her at that point in time?

18          A.    Well, yeah. Back then when he said well he  
19 wanted to fire her for insubordination, he mentioned  
20 it back then in 2010.

01:56:55

21          Q.    I wasn't talking about 2011 I wanted to  
22 direct your attention to the incident in 2010?

23          A.    Okay, I'm sorry.

24          Q.    I wasn't very clear with that. Sorry. So  
25 what did you tell him when he approached you about

01:57:08

1 that?

2 A. Well, at that time I -- I told him I wanted  
3 to think about it. I wanted to -- because frankly it  
4 was something that I didn't expect him to say. So I  
01:57:27 5 said well let me think about it. And so I, you know,  
6 I did. I thought about it but I don't know how long  
7 it was, a day or two or whatever it may have been,  
8 but then I came back with the -- with the suggestion  
9 and the recommendation that let me take time to sit  
01:57:45 10 down with her, draft a memorandum that explains  
11 everything up to this point, get her so that she is  
12 understanding where we are right now this time in our  
13 lives in the shelter, and how we got there, and then  
14 I want to be able to provide her with an evaluation  
01:58:12 15 so that she is aware of it, and then observe her for  
16 the next year and see how things progress because I  
17 don't want -- I wanted her to -- I wanted her to  
18 change and I wanted her to know exactly what the  
19 issues were so that that opportunity would present  
01:58:32 20 itself with her.

21 Q. Okay. If you would turn to Page 0412 of  
22 your log Exhibit 71 which should be still up there?

23 A. Okay.

24 Q. There is an entry December 7, 2010?

01:58:52 25 A. Okay.

1 Q. Does this describe what in more detail what  
2 you have just told us about?

3 A. 2007.

01:59:31

4 Q. Maybe I -- I think I directed you to the  
5 right page. But down to 2013, it's on that page.

6 A. That's not what we were just discussing.

7 Q. Right. You say after much thought and  
8 consideration I spoke with Layne and --

9 A. Right.

01:59:45

10 Q. -- and Layne agreed with this suggestion; is  
11 that right?

12 A. Yeah. Yeah. That is when I had discussed  
13 with him after thinking this over that this is the  
14 direction that I would like to go first and he  
15 accepted that.

02:00:00

16 Q. Okay. And then Exhibit 72 is that the  
17 performance evaluation you gave her and discussed  
18 with her?

19 A. Yeah. That is -- yes, that's the one.

02:00:17

20 Q. And you have the Memorandum of  
21 Understanding. Did you discuss that with her as  
22 well?

23 A. Yes, I did.

02:00:29

24 Q. Now, there was some questioning about having  
25 documentation. Why did you require your supervisors

1 and/or yourself to have documentation if you're  
2 grading someone below a "meets expectations"?

02:00:50 3 A. Well, it is a way to help them as a manager  
4 and supervisor to be able to document it on an  
5 evaluation. In other words, it helps remind them of  
6 those situations that you're evaluating them on. And  
7 in some instances you had documentation that covered  
8 the evaluation. Other instances you did. If you  
9 did, you -- you transposed those concerns on the  
02:01:11 10 evaluation. And if you didn't, then you didn't have  
11 any concerns in the evaluation.

12 Q. All right.

13 A. So it was more of an administrative tool for  
14 the supervisor to assist them in filling out the  
02:01:27 15 evaluations since we only do one a year.

16 Q. All right. So you said this is an  
17 administrative aid to the supervisor, it is meant to  
18 be shown to the employee necessarily?

19 A. No, it is -- it is for the supervisors. It  
02:01:42 20 is a tool for the supervisor to help them put an  
21 evaluation together.

22 Q. Okay. And you mentioned you did have back  
23 up documentation because of the log you prepared; is  
24 that correct?

02:01:56 25 A. Yeah, my documentation for this was the log,

1 yes.

2 Q. But in addition to the log, you also gave  
3 Ms. Bird a Memorandum of Understanding?

4 A. Yeah, in addition.

02:02:06

5 MS. HOLLINGSWORTH: Objection, leading.

6 THE COURT: Sustained.

7 Q. (By Mr. Preston) Did you give her a  
8 Memorandum of Understanding?

02:02:13

9 A. Yes, I did. I provided her with that  
10 Memorandum of Understanding which began before the  
11 evaluation period too. It was to bring her up to  
12 where we were basically.

13 (Whereupon, the trial continued but was  
14 not transcribed.)

15 (Whereupon, the following is excerpts of  
16 the Direct Examination by Mr. Preston  
17 of Shirlayne George.)

18 MR. PRESTON: All right.

05:06:29

19 Q. (By Mr. Preston) Do you recognize  
20 Defendant's Exhibit 70?

21 A. Yes, I do.

22 Q. What is it?

23 A. It's my notes to the investigation on the  
24 animal shelter.

05:06:37

25 Q. All right. And when was that done?

1 A. Um, in 2005.

2 Q. All right. And do you remember what  
3 prompted you to go out there?

05:06:51

4 A. I was having lots of -- several complaints  
5 from employees and so I went out to the shelter to  
6 take a look for myself to see what was going on.

7 Q. Okay. And how would you characterize this?  
8 Was this your first real investigation out at the  
9 animal shelter?

05:07:06

10 A. It was.

11 Q. Did that provide any sort of background for  
12 you and if so, what was it?

05:07:21

13 A. Well, it was a starting focal point, um, for  
14 issues that went -- continued to go on in the  
15 shelter. It was a good basis for me since I  
16 continued to get complaints over the next several  
17 years.

05:07:43

18 Q. Did this investigation in any way provide  
19 you with a background or context to understand things  
20 that were going on?

21 A. It did. Because the things that I got in  
22 that initial investigation seemed to continue  
23 throughout the years.

05:07:55

24 Q. Okay. And did you provide this to anyone  
25 when it was done?



1           A.    I did.  At this point I think it would have  
2 gone to Paul.

3           Q.    And if you will look at the last page, the  
4 last paragraph, do you address something to Paul  
5 there?

05:08:10

6           A.    Yes.

7           MS. HARSTAD:  Your Honor, I am -- this has all  
8 been very leading so I'm going to object to leading.

9           THE COURT:  Okay.  If you could modify your  
10 questions going forward.

05:08:21

11           MR. PRESTON:  Your Honor, it would be nice if  
12 she thinks I ask a leading question if she would  
13 object to it then so I can determine whether I think  
14 it is leading.  It's not appropriate for her to say  
15 all of those questions are leading.

05:08:33

16           THE COURT:  Well, okay.  I am --

17           MR. PRESTON:  And so I will be careful --

18           THE COURT:  Thank you.

19           MR. PRESTON:  -- going on.  Your Honor, we

05:08:42

20 would move the admission of Defendant's Exhibit 70  
21 based on the testimony of Ms. George to -- not for  
22 the truth thereof but what her perceptions were going  
23 forward based on what -- based on her investigation.

24           MS. HARSTAD:  And I object to the admission.

05:08:58

25 I would like a sidebar.

1 THE COURT: Okay. We can have a sidebar.

2 (Whereupon, a sidebar conference was held.)

3 MS. HARSTAD: Your Honor, the 2009  
4 investigation has the -- has who said what. The 2011  
05:09:22 5 those notes that I admitted says who says what. We  
6 don't know out of the 2005 investigation, we don't  
7 know who was interviewed, how many employees were  
8 there. There is nothing -- there is nothing saying  
9 who was interviewed or who said what at all.

05:09:36 10 And so I think it absolutely is hearsay. It  
11 doesn't follow the exception because we don't know  
12 who said anything and I don't -- it lacks indicia of  
13 any reliability whatsoever.

14 MR. PRESTON: Well, it is clearly a business  
05:09:49 15 record. This is what she does. She goes out and  
16 does investigations. So I think it is an exception  
17 to the hearsay any way. But this is her starting  
18 point. This is the context she used and reviewed  
19 things. So when she is criticized for not doing  
05:10:02 20 something with Tess Hartwell, there is reason for  
21 that. She goes back and she has all this other  
22 information. This is passed up the line. This is  
23 institutional knowledge that the City has as to  
24 problems that Ms. Bird had out at the City.

05:10:17 25 We are testifying why we terminated her. This

1 is part of what people rely upon. It is information  
2 dating back to 2005, the entire employment history.  
3 Whether it is true or not it is what the City had and  
4 what they relied on.

05:10:31

5 MS. HARSTAD: And I mean, so did the -- the  
6 thing is that I can't cross-examine anything in here  
7 because it is not associated with anybody.

8 MR. PRESTON: You could ask her if she  
9 recalls.

05:10:42

10 THE COURT: That's right. So okay, um, I need  
11 you if -- to get this exhibit in I need you to lay  
12 the business record exception foundation for this  
13 document which I don't think -- you have laid it  
14 generally but not particularly for this document just  
15 yet. So if you can do that, then the hearsay within  
16 the document, um, I will allow that in but not for  
17 the truth of the matter and we will -- I will  
18 instruct the jury on -- that the interim doesn't come  
19 in for the truth of the matter and because we have  
20 had this instruction on a couple of things I think it  
21 is something that we should probably include in  
22 instructions to the jury for when they go into  
23 deliberation about what that means when something is  
24 not for the truth of the matter.

05:11:32

25 MR. PRESTON: Okay.

1 THE COURT: Thank you.

2 (Whereupon, the sidebar conference concluded.)

3 Q. (By Mr. Preston) Ms. George, in your  
4 position as the Human Resource Manager, do you do  
05:11:55 5 investigations as part of your duties and  
6 responsibilities?

7 A. Yes, I do.

8 Q. And do you take notes of those  
9 investigations?

05:12:02 10 A. Yes.

11 Q. What do you do with those notes? Do you  
12 type them up?

13 A. I type them up and give them to the  
14 supervisor or to the Human Resource Director or both.

05:12:16 15 Q. And this is what you -- and this is -- would  
16 you call this a primary duty you have as a human  
17 resource manager?

18 A. Yes.

19 Q. And are these notes stored within the  
05:12:26 20 business records of West Valley City?

21 A. If it is a formal investigation, yes.

22 Q. And this was a formal investigation --

23 A. Yes, it was.

24 Q. -- in 2005? And so did the City maintain  
05:12:35 25 this record in this particular investigation in its

1 records of work done by Human Resources?

2 A. Yes.

3 Q. In the normal course of its business?

4 A. Yes.

05:12:47

5 MR. PRESTON: I would move the admission, Your  
6 Honor, at this time as a business record.

7 MS. HARSTAD: I do have one voir dire  
8 question, Your Honor.

9 THE COURT: I'll allow that.

05:12:55

10 MS. HARSTAD: Can I just do it from here?

11 THE COURT: You can.

12 **VOIR DIRE EXAMINATION**

13 BY MS. HARSTAD:

05:13:02

14 Q. So Ms. George it says on here it is  
15 August 1st to August 4th of 2005. Do you know how  
16 long thereafter you did that investigation? How long  
17 thereafter you actually typed up these notes?

18 A. It would have been right away.

19 MS. HARSTAD: Okay. No further questions.

05:13:15

20 THE COURT: Okay, thank you. There has been a  
21 previous objection to this exhibit. That is noted  
22 and I will admit the exhibit over the objection.

23 (Whereupon, Defendant's Exhibit 70  
24 was received into evidence.)

05:13:26

25 //

1 **CONTINUED DIRECT EXAMINATION**

2 BY MR. PRESTON:

3 Q. Okay. I want to ask you about some of the  
4 notes that you took here. First let me direct you to  
05:13:33 5 the last page. What did you write in your note to  
6 Paul in the last paragraph. Could you read that?

7 A. Paul, Tess --

8 Q. Yes, go ahead.

9 A. "Paul, Tess is ruthless. She is protecting  
05:13:46 10 Karen as if she were her young. I did not even  
11 include some of the things she said about others  
12 because it was obvious she was trying to discredit  
13 those that don't seem to be on Karen's perceived  
14 favorite list. There is no doubt in my mind that she  
05:14:01 15 has her favorites, but I do agree that most of the  
16 problems out there are just because they are under a  
17 lot of pressure and working in conditions that most  
18 would not put up with. If you have any questions,  
19 call me. And if I don't answer I will be accessing  
05:14:14 20 my messages."

21 Q. And you can use this document to refresh  
22 your recollection, but did you get a number of  
23 complaints about Tess being treated differently  
24 because she was one of Karen's favorites?

05:14:28 25 A. Yes, I did.

1 Q. And did you receive complaints about Karen's  
2 ability as a manager?

3 THE COURT: I just want to make clear, I  
4 should instruct for the jury, that I -- that the  
05:14:41 5 document I have admitted as a business record there  
6 are statements inside of it that are made by people  
7 who are not in the courtroom and so I am allowing the  
8 document to be considered but it's not for the truth  
9 of the matter asserted it is to show the state -- the  
05:15:01 10 perception of Ms. George and where she then  
11 proceeded. And Ms. Harstad did you --

12 MS. HARSTAD: I want to object to the question  
13 as leading.

14 THE COURT: Okay. If you --

05:15:13 15 MR. PRESTON: I will ask it this way. I will  
16 withdraw it and ask it another way. I was trying to  
17 move this along.

18 Q. (By Mr. Preston) Did you form concerns about  
19 Karen Bird's management style based on this  
05:15:25 20 investigation?

21 A. Yes, I did.

22 Q. What were those concerns?

23 A. Concerns that she had anger issues, concerns  
24 that she treated the employees, some of them,  
05:15:40 25 unfairly. But because it was my first investigation

1 I didn't feel -- well it wasn't for me to determine  
2 whether it needed to go further than it did. That  
3 was up to her supervisor. But it did -- it did cause  
4 me to have concerns.

05:15:59

5 Q. All right. And following this  
6 investigation, did you continue to get complaints  
7 about Karen Bird in her management style?

8 A. Yes, I did.

05:16:16

9 Q. I want to talk just briefly about  
10 Plaintiff's Exhibit 4 which was the 2009  
11 investigation and that will be in the binder there if  
12 you want to look at that for a moment.

13 A. Okay.

05:16:39

14 Q. So I want you to tell me, you have touched  
15 upon this, but I want you to tell me what -- tell me  
16 about your meeting with Mr. Davis. You said he  
17 became emotional. What took place there when you  
18 reported this to him?

05:16:57

19 A. I was very straightforward with Kelly. Um,  
20 and told him the things that I felt that he needed to  
21 work on. I told him that if his actions didn't  
22 change that I felt like as a human resource manager  
23 that he could be terminated if not severely  
24 disciplined and that he had to make changes or there  
25 was going to be some severe consequences. And we

05:17:16



1 talked about some of the things that his employees  
2 were saying that he was doing, um, and he was very --  
3 very humble about it and said that he wanted to  
4 change and I did see a change in Kelly. Was he a  
05:17:33 5 perfect supervisor? No, but I have worked with lots  
6 of supervisors and there is no such thing as a  
7 perfect supervisor but he tried. I counselled Karen  
8 and I never got -- I never saw an effort for her to  
9 make those kinds of changes.

05:17:52 10 Q. Did you spend quite a bit of time counseling  
11 with Karen in her relationship with Kelly?

12 A. Not -- I tried to but I never felt like she  
13 was receptive to it.

14 Q. Okay. Did you think that you had held Kelly  
05:18:12 15 responsible for his conduct with the meeting you held  
16 with him?

17 A. I felt like -- I felt like there were  
18 changes.

19 Q. Well, so you talked about his problem you  
05:18:28 20 say that you thought he improved. What do you base  
21 that on?

22 A. I got fewer complaints.

23 Q. And you talk about doing an investigation in  
24 2011?

05:18:38 25 A. Yes.

1 Q. All right. I want to go through that in  
2 detail with you. So let's look at that exhibit,  
3 Plaintiff's Exhibit 34. I want to lay the  
4 foundation. You look -- you have seen Exhibit 34 it  
5 is in the binder there. This is the e-mail on  
6 October 24. And once you received this, did you  
7 contact Karen and if so what did you say?

8 A. I asked her if she wanted me to do a formal  
9 investigation. I told her what it would entail, that  
10 I would have to talk to all of the employees and she  
11 said yes.

12 Q. Okay. Then if you look at Plaintiff's  
13 Exhibit 35, is that the formal complaint that you  
14 received?

15 A. Yes.

16 Q. And did you in connection with that you have  
17 mentioned a CD. What was the CD she gave you?

18 A. Okay. There were two CDs. There was the  
19 one that she did in my office where we talked about  
20 the cat, and then there was the one that she did in  
21 Kelly's office. So I think this one was the one that  
22 she did in my office where we talked about the cat.

23 Q. Well, look at Defendant's Exhibit 78.  
24 I'll -- I think I will hand it up here. Do you  
25 remember you talked about an e-mail you sent and you

1 said it was dealing with the CD?

2 A. Okay. That was the one in my office with  
3 the cat.

05:20:19

4 Q. Well, didn't she tell you and give you a CD  
5 of a meeting she had with Kelly where she told you it  
6 was -- it showed how belittling and bullying he was  
7 of her?

8 A. Yes.

05:20:32

9 Q. Okay. And you told her you would listen to  
10 it; is that right?

11 A. Okay, yeah. I'm a little foggy here.

05:20:50

12 Q. All right. So lets's see what you said in  
13 your e-mail. This is Defendant's Exhibit 78 and it  
14 has already been admitted. Sorry. I know I promised  
15 you that I would get right back with you, but I have  
16 had a hard time making connections with the right  
17 people and it has taken me a while for me to listen  
18 to the CD you provided. I have looked at the

05:21:02

19 information you have left with me and I have now  
20 listened to the CD. What did she tell you the CD was  
21 going to do? I'll stop there and ask you that  
22 question?

23 A. That it was going to show that Kelly was  
24 belittling her.

05:21:13

25 Q. Was it a long audio recording?

1 A. Yes.

2 Q. And did you listen to the whole thing?

3 A. Yes, I did.

4 Q. And what opinion did you form after you  
5 listened to it?

05:21:22

6 A. That Kelly was trying to counsel her not  
7 belittle her. That he was trying to help her.

8 Q. Did it cause you concern that you're  
9 listening to this CD, Karen is telling you it's an  
10 example of how much she is being bullied and  
11 belittled and you don't see that? What conclusions  
12 do you draw from that?

05:21:40

13 A. I was very concerned about that because at  
14 that point I had a hard time wondering how I could  
15 help Karen because -- because it seemed like she  
16 didn't -- she didn't want to accept any help. It  
17 seemed like she had reached a point where there was  
18 nothing else that we could do to help her. Um,  
19 I even -- even in the e-mail where I had said to her  
20 let me help you with your communication, that led to  
21 nowhere. And so it was just like I was hitting my  
22 head against a wall. I just didn't know what to do  
23 to help her any more.

05:21:55

05:22:25

24 THE COURT: Mr. Preston, I appreciate you are  
25 trying to speed us along, but if you could ask

05:22:41

1 open-ended questions that would be helpful.

2 MR. PRESTON: All right.

3 Q. (By Mr. Preston) So did you -- you mentioned  
4 that you had a meeting with her I think it's on  
05:23:03 5 November 3, 2011. You were played a portion of that.  
6 I want to play another portion of that that is our  
7 Exhibit 93 which is already in the record. And I  
8 have a transcript that will be on the screen there  
9 you could -- actually I'll just given you a copy  
05:23:19 10 here.

11 So let me hand you this before they start  
12 playing this. Tell me if you remember this.

13 (Whereupon, the video was played  
14 for the jury.)

05:26:09 15 Q. (By Mr. Preston) I'll take that back. Do  
16 you recall that conversation with her now that you  
17 have heard it?

18 A. Yes, I do.

19 Q. What was the concerns, if any, that you had  
05:26:26 20 having heard her say that?

21 A. As a Human Resource Manager it broke my  
22 heart because I didn't know what else I could do to  
23 help her. I felt like Kelly was making efforts to  
24 change and I didn't feel like she was. I didn't know  
05:26:42 25 what else to do for her.

1 Q. Did she ever offer any resolution to you?

2 A. No.

3 Q. As a Human Resource Manager, is it healthy  
4 to have this sort of relationship between a  
05:26:57 5 department -- a director of a division and the  
6 manager under you, is that healthy or unhealthy?

7 THE COURT: If you could rephrase in an  
8 open-ended question, please.

9 Q. (By Mr. Preston) Is this the sort of  
05:27:09 10 relationship that you would like?

11 THE COURT: Mr. Preston, open-ended questions,  
12 please.

13 Q. (By Mr. Preston) What sort of relationship  
14 would you like a supervisor to have?

05:27:20 15 A. They have got to be able to communicate  
16 together. They have got to -- so that is something  
17 that reflects on their staff. Um, supervisors like  
18 that can't have an effective relationship with their  
19 staff if they can't communicate together and work  
05:27:41 20 together. It just doesn't work.

21 Q. So how do you deal with it if there is that  
22 situation?

23 A. You try and work with them. You try and get  
24 them help. Um, we hold classes, we brought in -- we  
05:27:58 25 brought in the Employee Assistance Program and had

1 them hold classes for the entire staff for the entire  
2 division. I believe that they did a class on  
3 communication.

4 Q. This was in the past?

05:28:14

5 A. In the past, uh-huh. So there are things  
6 that we could do to try and help.

7 Q. Right. You have been shown the handwritten  
8 exhibits or notes you took of the 2014 or November  
9 14, 2011 investigation. I am going to hand you now  
10 what has been marked as Defendant's Exhibit 76 and  
11 ask you if you recognize those?

05:28:48

12 A. Yes, I do.

13 Q. What are they?

14 A. Those are my notes that I typed up after my  
15 investigation of the shelter staff.

05:29:08

16 Q. Okay. So --

17 A. Supervisory staff, excuse me.

18 Q. Is this the investigation that you wanted to  
19 look at the entire shelter and all of the  
20 supervisors?

05:29:20

21 A. Yes, it is.

22 Q. Why did you want to do that?

23 A. Because of what was going on because I had  
24 been getting complaints from so many of the employees  
25 that I wanted to just get an overall picture so that

05:29:33

1 I could have a good idea of what was going on out  
2 there so that I could be fair.

3 Q. And did you type these notes up as part of  
4 your duties as the Human Resource Manager?

05:29:51

5 A. I did immediately following the  
6 investigation.

7 Q. And do you remember who you gave the  
8 investigation to?

9 A. Layne Morris.

05:29:58

10 Q. Layne Morris. Had you had any discussion  
11 with him about conducting this investigation or  
12 informed him about it?

13 A. Yes. I told him I was going to do the  
14 investigation.

05:30:08

15 Q. What was his response to you?

16 A. He was grateful. I mean he knew there were  
17 issues out there and he felt the same way that I did,  
18 that it would be a good idea to get to the bottom of  
19 it.

05:30:18

20 Q. Did you approach this with a preconceived  
21 idea as to what you would find?

22 A. No. No. I tried to be very open-minded.  
23 Um, as a Human Resource Manager you have to do that.

05:30:34

24 Q. Were you surprised at what you discovered  
25 when you did the investigation?



1 A. Not really.

2 Q. What were the conclusions that you formed at  
3 the end of the investigation?

05:30:52

4 A. That the issues with Karen were severe to  
5 the point that I didn't know if they could be fixed.  
6 Um, that there were still issues with both Kelly and  
7 Nathan, the other two supervisors, but that they were  
8 not as severe as the ones that we were having, I  
9 felt, with Karen.

05:31:11

10 Q. Did what you found out there in this  
11 investigation did that cause you to form any  
12 perception about how Kelly Davis was doing?

13 A. I felt like he was doing better.

14 Q. Why did you reach that conclusion?

05:31:29

15 A. Because there were fewer complaints in this  
16 investigation about him.

17 Q. Who received the most complaints in this  
18 investigation?

19 A. Karen Bird.

05:31:41

20 Q. Was it a large disparity or a small  
21 disparity?

22 A. It was large.

23 Q. Let's go through the investigation.

05:31:51

24 MR. PRESTON: Your Honor, I would move the  
25 admission of Defendant's Exhibit 76.

1 MS. HARSTAD: No objection.

2 THE COURT: We'll admit that.

3 (Whereupon, Defendant's Exhibit 76  
4 was received into evidence.)

05:31:57

5 Q. (By Mr. Preston) All right. You say that  
6 in this third sentence, I summarized the comments due  
7 to the fact that they were all about the same. Do  
8 you see that?

9 A. Yes.

05:32:16

10 Q. And let's go to the second point here where  
11 it says, was extremely harsh, really mean to Ed  
12 Trimble, Steve Hulse. What is that referencing?

13 A. They were both issues I believe that  
14 happened in roll call. They were both complaining  
15 about things that happened in roll call where Karen  
16 had yelled at them in roll call.

05:32:34

17 Q. Okay. You state in the next line, roll call  
18 is very uncomfortable due to the tension between  
19 Kelly and Karen. They tend to antagonize each other.  
20 Do you see that?

05:32:52

21 A. Yes.

22 Q. And then you state she, who is the she you  
23 are referring to?

24 A. Karen.

05:32:59

25 Q. Wants to save animals by doing what is best

1 for them, does not follow protocol. Was that a  
2 complaint that you had received?

3 A. Yes, it was.

4 Q. Skipping down, Karen's tone of voice is  
05:33:13 5 usually very abrasive. I'm always afraid when I do  
6 anything because if she does not like it everybody  
7 knows about it?

8 A. Yes.

9 Q. The next one, Karen hates the gas chamber.  
05:33:25 10 Whenever I have to put an animal down I go to Kelly  
11 to get the key because I do not like the way she  
12 makes me feel bad for using it. Did employees inform  
13 you of that?

14 A. Several employees.

05:33:36 15 Q. Several employees?

16 A. Yes.

17 Q. And another one, we all walk on egg shells  
18 when talking about our using the gas chamber because  
19 of her reaction. The next comment, she was heard  
05:33:50 20 telling her employees not to work with the officers,  
21 yet she expected the officers to help her out when  
22 she needs it. Do you remember that comment?

23 A. Yes.

24 Q. Does she supervise the officers?

05:34:02 25 A. No, she did not.

1 Q. Those are the Animal Control Officers in  
2 uniform that go out into the City?

3 A. Yes. Yes.

05:34:12

4 Q. Does that give you any concerns that these  
5 sort of comments are being made by a supervisor?

6 A. Definitely.

7 Q. Why?

05:34:32

8 A. Well, because it's insubordinate. And when  
9 they hear -- when employees hear a supervisor talking  
10 like that, um, then it just causes contention.

11 Q. Okay. The next one, she belittles staff in  
12 roll call calling them by name and pointing out their  
13 mistakes. Is that another comment made?

05:34:53

14 A. Yeah. That would be in regards -- along  
15 with the Ed Trimble and Steve Hulse issue.

16 Q. All right. One employee mentioned Karen and  
17 Tess talking bad about Kelly in front of the staff  
18 while waiting for him to show up for roll call. It  
19 was inappropriate and uncomfortable.

05:35:10

20 Do you have concerns about a manager of the  
21 shelter engaging in that conduct?

22 A. Yeah. There again, yeah, insubordination  
23 and conduct.

05:35:23

24 Q. Next point, when Kelly's office was changed  
25 to the shelter, Karen's personality changed, paren

1 more argumentative, close paren?

2 A. Yeah. I think things got worse when they  
3 had offices in the same building.

05:35:38

4 Q. Then states, Karen claims that Kelly yells  
5 at her using a very loud tone of voice. Only one  
6 employee claims that they have witnessed that kind of  
7 behavior. Do you know who that was?

8 A. I don't remember.

9 Q. You don't recall if it was Tess?

05:35:50

10 A. I would have to go back to my handwritten  
11 notes.

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

05:36:06

13 Third paragraph, third point down. Karen has two  
14 employees that have not had the euthanasia training  
15 doing euthanasia on a weekly basis. This person  
16 brought up the liability issue to the shelter and the  
17 City. Do you know if that was a violation of policy  
18 to have untrained employees doing euthanasia?

05:36:24

19 A. I -- I can't say for sure that it was but  
20 I'm pretty positive that it was. It was a great  
21 concern.

05:36:38

22 Q. Skip down to the paragraph that begins,  
23 Karen is letting the rescue groups take animals that  
24 could be adopted through the city. This action takes  
25 money away from the city shelter. Next one, Karen is

1 hard to work with because you never know from  
2 day-to-day what her mood will be.

3 A. That was also an issue that came up in the  
4 2005 investigation.

05:36:53

5 Q. Next, the volunteers are under-supervised --  
6 are under-supervised and asked to do things that they  
7 have not been trained to do or sensitive things that  
8 should be done by an employee. Is that a complaint  
9 you heard?

05:37:06

10 A. Yes.

11 Q. Skipping down, Karen has been known to load  
12 up the euthanasia schedule on the days the officers  
13 are scheduled to put the animals down. Next, she  
14 extends the time pit bulls are kept. Actual  
15 knowledge of some being kept for longer than six  
16 months. Is that a complaint you heard?

05:37:24

17 A. Yeah. Employees felt like she liked the pit  
18 bulls the best so she wouldn't put them down.

19 Q. Another paragraph we were told by Jake  
20 Arslanian, who is Jake Arslanian?

05:37:37

21 A. He was the facilities manager for the entire  
22 City.

23 Q. Okay. That animals were not allowed in the  
24 lobby of the shelter. Kelly has tried to reinforce  
25 this but Karen and Tess take them in, quote, just to

05:37:48

1 piss Kelly off, close quote.

2 A. Several employees told me that same thing.  
3 I called Jake myself and asked him if that was  
4 actually a policy that he had made for that building  
05:38:02 5 and he told me yes, it was.

6 Q. Skip down. Karen has belittled me in front  
7 of others for the tiniest of mistakes. At one point  
8 she said to me, quote, you ought to think about if  
9 you should stay or not, close quote. This was all  
05:38:22 10 over an issue of her techs not updating the I.D.  
11 cards on the kennels and a kitten was put down that  
12 should not have been. I got yelled at over something  
13 that was not my fault.

14 Skipping down, everyone always leaves roll call  
05:38:39 15 in a bad mood because of the interaction between  
16 Kelly and Karen. Next one, I was belittled in roll  
17 call by Karen because I scan all animals for chips  
18 and she thought it was unnecessary.

19 Next, there is definitely a division between  
05:38:54 20 the officers and the techs. I feel that it is all  
21 because of the bad attitudes of Kelly and Karen.  
22 Next, I think that the communication problem between  
23 Kelly and Karen stems from the fact that she gives  
24 him no input, does not support him, and does not make  
05:39:10 25 an attempt to communicate.

1           The last one on the bottom of that page,  
2 Karen comes into roll call in a defensive mood. Do  
3 you see that?

4           A. Yes.

05:39:24

5           Q. Let's go to the next page. Kelly asked  
6 Karen to give him a memo stating what supplies she  
7 needed for the shelter. She gave him a typed list  
8 and was upset because he would not accept it because  
9 it was not in memo format. She argued with him in  
10 front of the staff. He finally told her that they  
11 would discuss it after roll call.

05:39:42

12           Next, Karen has been heard many times saying  
13 nothing in the chamber. She does not like it. Next,  
14 she is aggressive and demeaning to her staff. She is  
15 hard to talk to because she is always so defensive.  
16 She is never happy and it shows on her face. This  
17 brings the whole staff down. Did you accurately type  
18 these up from the notes and the comments that were  
19 made to you.

05:39:58

20           A. Yes, I did.

05:40:14

21           Q. If we go to the next page, these are the  
22 comments that you took regarding Kelly and Nate. Are  
23 there less comments for them?

24           A. Yes, there are.

05:40:29

25           Q. Looking down on the fourth one that says,



1 Kelly's temper has subsided immensely in the last two  
2 years. Is that your perception?

3 A. Yes, it is. Can I -- can I clarify that?

4 Q. Yes.

05:40:56

5 A. Um, that was a -- that was not my  
6 perception. That was a comment that was made by an  
7 employee.

8 Q. Right. But did you have a perception that  
9 he had changed?

05:41:08

10 A. Yes, I did.

11 Q. That's what I was asking. Thank you for  
12 clarifying that.

13 A. Okay.

05:41:23

14 Q. Did Layne consult you regarding what  
15 discipline he would impose?

16 A. No, he did not.

17 Q. Who had the responsibility to make that  
18 decision under the way the City is organized?

19 A. Layne did.

05:41:34

20 Q. Did you see through this history you've had  
21 with the animal shelter that there was any similarity  
22 between Kelly and Karen's management styles?

23 A. I thought it was very similar.

24 Q. In what way?

05:41:57

25 A. They both had -- I called it gruff

1 personalities. Um, they didn't have real good  
2 communication skills, so similar -- similar those  
3 were kind of the big ones that kind of jumped out at  
4 me.

05:42:22

5 Q. What was any difference if there was any  
6 between Karen and Kelly?

7 A. Well, like I said before, when I -- when I  
8 tried to help them, Kelly at one point welcomed that,  
9 whereas I never felt like Karen did.

05:42:46

10 Q. How would you evaluate their efforts to  
11 change their management styles?

12 A. Kelly welcomed the help. When I suggested  
13 that we bring in the Employee Assistance Program he  
14 really welcomed that. When I suggested that we sit  
15 down and talk about things that he could do to  
16 change, he really welcomed that. So he was just more  
17 receptive to getting help.

05:43:05

18 Q. How was Karen in that regard?

19 A. I never -- I never -- she never took the  
20 opportunity to let me help her. We talked a lot, um,  
21 but there was never -- when I tried to help her she  
22 was always very defensive, always jumps to place  
23 blame instead of okay, what can I do to make things  
24 better. So I had a hard time trying to help her.

05:43:22

05:43:51

25 Q. Did you ever get any reports about Kelly

1 being insubordinate?

2 A. No, not that I recall.

3 MR. PRESTON: Your Honor, if I might have a  
4 moment, I think I'm about done.

05:44:03

5 THE COURT: Sure.

6 (Brief pause in proceedings.)

7 MR. PRESTON: Those are all of the questions I  
8 have, Your Honor.

9 THE COURT: All right. Cross?

10 (Whereupon, the trial continued but was  
11 not transcribed.)

12 (Whereupon, the follow excerpt contains  
13 discussion between the court and counsel  
14 at the end of the day.)

07:22:45

15 THE COURT: You said Exhibit 4.

16 MR. PRESTON: I'm sorry, instruction four.

17 Sorry. And you know it's frustrating to me we have  
18 spent 35 minutes on ratification which I think is  
19 something that is clearly we shouldn't even waste our  
20 time on. And this is critical to our case. We have

07:22:57

21 the Supreme Court, they're instructing in their case  
22 law what it means to be in the absence of a belief  
23 particularly where there is mixed motives. And  
24 they're very clear on the fact that there could be  
25 some retaliatory animus. And the jury is not going

07:23:16

1 to be -- that is not going to be put to the jury and  
2 that is the law.

3 THE COURT: I beg to differ. I think it is  
4 very clear that we say even if you find that there is  
07:23:29 5 a -- that this is a substantial motive. We have a  
6 separate instruction which say if they prove that  
7 they had a basis to fire her in the absence of that  
8 motive, then they're not liable. I will let you  
9 argue that.

07:23:44 10 MR. PRESTON: I want to argue that.

11 THE COURT: So let's come back then tomorrow  
12 morning. If we had from 7:30 to 8:30, does that give  
13 you enough time to put that on the record.

14 MR. CROWTHER: The doors downstairs don't open  
07:23:58 15 until 7:30 so we wouldn't be up here --

16 THE COURT: At 7:30. So shortly after that.

17 MR. CROWTHER: I was just making the court  
18 aware.

19 THE COURT: I appreciate that. I would not  
07:24:08 20 have known. So if we -- if you could all -- so shall  
21 we say 7:45?

22 MR. PRESTON: Yes.

23 THE COURT: Does that give you enough time and  
24 with an opportunity --

07:24:18 25 MR. PRESTON: Everything yes. Sure. And I

1 get to put my key witness on, my whole case rests on.  
2 Judge, you know I'm very frustrated with how this  
3 trial has gone and I'm sorry if it is showing. But I  
4 got two hours today, they got four. They have  
07:24:33 5 25 minutes left total examination from them. They're  
6 going to use that 25 minutes and then they're going  
7 to expect that they can cross-examine my witnesses.

8 I mean right now they have used twice as many  
9 hours in front of this jury questioning than I have  
07:24:50 10 had. It is simply not fair. And that has got to be  
11 on the record at some point.

12 THE COURT: I do understand that.

13 MR. PRESTON: They have the choice on what  
14 they want to emphasize.

07:25:01 15 THE COURT: Okay. I -- I have thoughts about  
16 how to address that in order to -- in order to be  
17 fair to your -- to you and your client.

18 MR. PRESTON: I mean I rushed through  
19 Shirlyne George tonight and I forgot to get in a key  
07:25:18 20 exhibit with her and she has gone back to St. George  
21 because I was rushing to get it in and I forgot.

22 THE COURT: Well, that -- I'm not -- I'm going  
23 to take responsibility for that.

24 MR. PRESTON: But that's what happens when I  
07:25:31 25 feel I have to rush through something.

1 THE COURT: And I understand that. But our  
2 court reporter has an appointment that she has to get  
3 to.

07:25:41

4 MR. PRESTON: So we need to get out of there  
5 then. We don't want to keep Laura waiting.

07:25:56

6 THE COURT: Right. So 7:45 tomorrow morning.  
7 We will address this jury instruction issue. And I  
8 will tell you both, I would tell plaintiffs you need  
9 to be prepared to finish your case in the time that  
10 you have left and we will talk about timing before we  
11 start the day and what we might need to do to address  
12 this issue.

13 MS. HOLLINGSWORTH: Okay. Okay, yup. So what  
14 is the court's calculation of our time?

07:26:12

15 THE COURT: How much time? Right it is the --  
16 I don't have -- I don't have it up. So we have  
17 38 minutes left for the plaintiffs.

18 MS. HOLLINGSWORTH: So did you -- did the  
19 court count my redirect against our time?

07:26:49

20 THE COURT: We did because the time has been  
21 counted for defendants when they have been crossing  
22 as well.

23 MS. HOLLINGSWORTH: Okay.

07:27:02

24 MR. PRESTON: By my record, it is 9 hours and  
25 32 minutes for them and 4 hours and 30 minutes for

1 me. So that is five more hours they have had.

2 MS. HOLLINGSWORTH: Your Honor, but we have  
3 and they have like two witnesses left so --

07:27:18

4 MR. PRESTON: Well, I have four witnesses  
5 maybe five.

6 THE COURT: Right. And I mean there is  
7 obviously there is no way that I can -- we can't talk  
8 about this now. We have to get the court reporter  
9 out. We'll talk about it tomorrow. Thank you.

07:27:29

10 We'll be in recess.

11 (Whereupon, the hearing concluded  
12 at 6:28 p.m.)

13

14

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1 **REPORTER'S CERTIFICATE**

2  
3 I, Laura W. Robinson, Certified Shorthand  
4 Reporter, Registered Professional Reporter and Notary  
5 Public within and for the County of Salt Lake, State  
6 of Utah, do hereby certify:

7 That the foregoing proceedings were taken  
8 before me at the time and place set forth herein and  
9 were taken down by me in shorthand and thereafter  
10 transcribed into typewriting under my direction and  
11 supervision;

12 That the foregoing pages contain a true and  
13 correct transcription of my said shorthand notes so  
14 taken.

15 In witness whereof I have subscribed my name  
16 this 13th day of March, 2019.

17  
18 -----

19 Laura W. Robinson

20 RPR, FCRR, CSR, CP  
21  
22  
23  
24  
25



# APPENDIX 5

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

In re:	)	
	)	
KAREN BIRD,	)	
	)	
Plaintiff,	)	
	)	Case No. 2:12-CV-903EJF
vs.	)	
	)	
WEST VALLEY CITY, a	)	
political subdivision of	)	
the State of Utah, KELLY	)	
DAVIS, in his official	)	
and individual	)	
capacities,	)	
	)	
Defendants.	)	
_____	)	

BEFORE THE HONORABLE EVELYN J. FURSE

March 15, 2018

Partial Transcript  
Excerpts from Trial

Laura W. Robinson, RPR, FCRR, CSR, CP  
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1                   **Salt Lake City, Utah March 15, 2018**

2                   (Whereupon, the trial was held but was  
3                   not transcribed.)

4                   (Whereupon, the following is an excerpt  
5                   with counsel regarding a timing issue.)

6                   MS. HOLLINGSWORTH: And Your Honor, we have  
7                   been talking about this and we haven't really  
8                   discussed it, um, and we haven't addressed this with  
9                   opposing counsel, but I would like to just throw it  
00:00:09 10                  out there would it be possible to ask the jury if  
11                  they would be okay coming for closing arguments in  
12                  the morning?

13                  THE COURT: Yes, it would be okay to ask that.

14                  MS. HOLLINGSWORTH: Okay.

00:00:21 15                  MS. FORTSON: Take the victory dance.

16                  THE COURT: Yes, it would be okay to ask that.  
17                  Um, would -- I did want to talk about timing, um,  
18                  do -- do we need to ask Mr. Preston to come back or  
19                  are we okay --

00:00:34 20                  MR. CROWTHER: I mean I talked to Mr. Preston  
21                  about this. Our big concern is we do not want the  
22                  jury to feel like this is our fault. It is our case  
23                  that is going to be dragging it into the next day,  
24                  but that's because of how long the plaintiffs have  
00:00:46 25                  taken on their case. And if the jury feels like

1 we're the ones keeping them in overtime, I'm not sure  
2 they will react favorably.

3 THE COURT: Do you have a proposal as to how  
4 you would like me to prevent that?

00:00:58

5 MR. CROWTHER: We might have to wait for  
6 Mr. Preston on that one. I can express his concern,  
7 I'm not sure I can express his proposal.

00:01:09

8 THE COURT: Not sure if you can tell me how to  
9 fix it. Okay. All right. Well, so this -- I'll  
10 tell you as I was thinking about it last night, even  
11 just looking at -- so with the times that we gave  
12 yesterday for each side, um, plaintiff had 38 minutes  
13 remaining, defendant has three hours and 4 minutes  
14 remaining -- and actually here is Mr. Preston now so  
15 I'll restate.

00:01:35

16 We just started talking about timing. And,  
17 um, Ms. Hollingsworth asked if we could ask the jury  
18 if they would be -- if they would be able to come  
19 back tomorrow morning for closing -- for closing  
20 arguments and I said yes and that's -- that is in my  
21 contemplation. And then I did hear the concerns  
22 obviously about that not reflecting on you folks.  
23 I'm open to your suggestions about how to prevent  
24 that, if there is a way in which I present it in  
25 order to prevent that or something I would like to

00:02:14

1 hear about that.

2 MR. PRESTON: So what if they can't?

3 THE COURT: Um, well, I guess -- I think they  
4 anticipate that that might be where this is going. I  
00:02:29 5 think they recognize that you haven't had a chance to  
6 put on your case yet and it is Thursday morning. And  
7 I do think that --

8 MR. PRESTON: What about today as far as time  
9 restrictions?

00:02:47 10 THE COURT: Right. So that is what I was  
11 going to get to. That's just where I was. So right  
12 now where we are is plaintiff with 38 minutes  
13 remaining, defendant with 184 minutes remaining which  
14 would be about three hours and four minutes. What I  
00:03:09 15 -- and as noted, well, I guess it wasn't quite noted,  
16 it was started to be but my -- while I can put  
17 constraints on plaintiff's ability or timeframes I  
18 certainly think I would be crossing over in to due  
19 process if I didn't give plaintiff the opportunity to  
00:03:30 20 cross-examine a witness.

21 So I don't think I can do that and with  
22 38 minutes remaining and you yet to call your  
23 witnesses I think that is unlikely. So my theory --  
24 my theory is that plaintiffs will have 38 minutes to  
00:03:48 25 finish their case today. You can begin your case and

1 what I would like is to have the witnesses finished  
2 by the end of today so that tomorrow morning we can  
3 come in and do jury instructions and closing  
4 arguments and send the jury to deliberate. And then  
00:04:04 5 as far as restrictions on cross-examination, that  
6 plaintiff's cross-examination of any witnesses be  
7 limited to no more than half the time spent on  
8 direct.

9 MR. PRESTON: You know I think with the  
00:04:27 10 restrictions you have talked about, I'm -- I think we  
11 could still get it done today.

12 THE COURT: With instructions and closing  
13 argument?

14 MR. PRESTON: Um, yeah. I mean we're ready to  
00:04:38 15 do it all. I mean I think we ought to try and do it.  
16 I think you can ask them, but I think we ought to try  
17 to do it.

18 THE COURT: I'm happy to try and do it. You  
19 know what you're putting on better than I do. So  
00:04:49 20 that is why I don't know where you're --

21 MR. PRESTON: Right. But you know make a  
22 decision they have 38 minutes until they rest right  
23 so that is direct and redirect.

24 MR. CROWTHER: The court said 32, I think.

00:05:08 25 MS. HOLLINGSWORTH: Your Honor, if -- if

1 counsel is telling us after saying all this time they  
2 have got five witnesses to put on and it is going to  
3 take so long which frankly I knew all along they're  
4 using the same witnesses so that's just not correct.

00:05:23

5 We have the burden of proof. My client has waited  
6 six years for this trial and we should be entitled to  
7 put on our entire case. And if they can do this  
8 today, they're saying that they don't have that much  
9 left, can I please have more than 38 minutes for the

00:05:40

10 remaining two witnesses? We're only going to put on  
11 Layne Morris who was the decision maker, and one  
12 final volunteer who will be short. But I would, you  
13 know I was telling my volunteer last night, okay, I  
14 have got maybe eight minutes. It is kind of

00:05:57

15 impossible to really adequately address those final  
16 witnesses and I am just asking for another half hour.

17 THE COURT: Okay. So you would like to  
18 have --

00:06:13

19 MR. PRESTON: There is no we'll finish. It is  
20 going to be tight now as it is. But there is no way  
21 to do it if you give her more time. I mean she has  
22 made decisions all the way along how much time she  
23 spends and that -- and just -- and I think I see this  
24 all the time. It's well, I don't care what the

00:06:32

25 plaintiff's have to do the judge will give me more



1 time and that's what they do and they just monopolize  
2 the time.

3 THE COURT: Well, so I would like to -- I  
4 would like to put on the record that we -- it is the  
00:06:46 5 parties who tell the court how long is needed for  
6 trial. The court was told it would be four days. We  
7 talked about this when we came here on the pretrial  
8 that it was -- that that was going to be tight but  
9 that the parties thought we could do it if we did  
00:07:04 10 full days. So we extended from doing an 8:30 to 2:00  
11 schedule to an 8:30 to 4:00. That increased by there  
12 is a break that gets added when you increase it to  
13 that so that increased by an hour and 45 minutes the  
14 time every day.

00:07:21 15 Last night we stayed an extra hour. We got  
16 the jury -- we got the jury selected and seated about  
17 as quickly as I think you can. So you have have had  
18 all of the time that you told me would be needed for  
19 the entire case. That's a problem. I mean it's your  
00:07:43 20 case. I don't know what that is. I can only go on  
21 the representations of counsel.

22 When we asked the jury to stay late, counsel  
23 is right it does -- there is this idea that the last  
24 person has made them stay. There is also the  
00:07:58 25 potential that you may want to call a rebuttal

1 witness. Then that's more time. These concern me.  
2 We start -- we talked about on Wednesday morning when  
3 we came or sorry it was Thursday -- or Tuesday night  
4 we talked about we have got to tighten this up, we  
5 have to get this to them.

6 So we have -- we have that issue. Um, then we  
7 came in yesterday morning and by the time we got to I  
8 think it was our 11:00 break, we were still not  
9 through a significant amount. And so we then put  
10 time limits in place. And I understand your thoughts  
11 that you have your case to put on, but it has been  
12 your case. You have had the opportunity to do  
13 everything that you wanted to do. We have given  
14 warnings about time, um, and I do think there is  
15 concern about it going over.

16 MS. HOLLINGSWORTH: Your Honor, I am happy to  
17 take the blame. You can tell the jury it's my fault,  
18 that's fine.

19 THE COURT: Okay. So how would you propose I  
20 do that?

21 MS. HOLLINGSWORTH: That plaintiff  
22 underestimated how long it would take to put on her  
23 case. Plaintiff's attorney. You can put it on me.

24 THE COURT: Okay. Mr. Preston, what are your  
25 thoughts about my asking the jury if that -- about

1 their ability to go into Friday morning and saying  
2 plaintiff's attorney has underestimated the time it  
3 would take on her case. We anticipate being able to  
4 finish witnesses today, but we will need to go into  
00:10:11 5 tomorrow morning to do closing arguments and jury  
6 instructions are you available if we do it in that  
7 fashion and then plaintiff only would get an  
8 additional half hour so it would be she would have  
9 one hour and 8 minutes to rest her case.

00:10:30 10 MR. PRESTON: Well, I am -- it is not my first  
11 choice to go on tomorrow, but I think that the court  
12 -- I understand the position the court is in so I'll  
13 agree to that. I really don't think they should get  
14 an extra half hour. They chose yesterday and they  
00:10:48 15 took two-thirds of the time yesterday. It went on  
16 and on. And as I said, I had a witness who had to go  
17 back to St. George, I had to put her on, I rushed  
18 through it, made the jury stay. I mean it's just not  
19 fair to me. And so I think she should do it in the  
00:11:05 20 38 minutes to make sure we get done. So I think you  
21 should see how it goes.

00:11:37 22 THE COURT: Okay. So you're -- so I think,  
23 um, I'm inclined to allow the extra half hour so then  
24 as far as talking to the jury about tomorrow, is it  
25 your preference to instruct them about the need for

1 tomorrow why that has happened only once it becomes  
2 obvious that that is what we need to do? Or would  
3 you do it, if I'm going to give the extra half, do  
4 that this morning?

00:11:55

5 MR. PRESTON: Do it this morning.

6 THE COURT: Okay.

7 MR. PRESTON: That's fine.

8 THE COURT: Okay.

00:12:19

9 MS. HOLLINGSWORTH: Your Honor, just one more  
10 thing. In addition to blaming it on me, and I am  
11 fully willing to take that, but I would also ask for  
12 a curative instruction that it is not to be construed  
13 against Ms. Bird herself.

00:12:37

14 THE COURT: I mean there is no world in which  
15 they are allowed to consider, you know, the  
16 statements of counsel or the acts of counsel against  
17 the client and we have that instruction.

18 MS. HOLLINGSWORTH: Okay.

00:12:59

19 THE COURT: Okay. All right. We haven't had  
20 a chance to talk about verdict form yet and we do  
21 need to do that. Um, let's see how the morning goes.  
22 I might be asking you all if you can bring your lunch  
23 in the courtroom to talk about verdict form if it  
24 looks like we're getting close. All right. Let's go  
00:13:23 25 ahead and bring the jury in.

1 THE CLERK: All rise for the jury.

2 (Whereupon, the jury returned to  
3 the courtroom.)

00:16:30

4 THE COURT: Good morning. Before we get  
5 started with testimony this morning, I would like to  
6 ask you folks about your schedules. We are on what  
7 was the scheduled last day for the trial, the fourth  
8 day. Um, plaintiff's counsel has underestimated the  
9 length of time it would take to put on her case and  
10 so we are not sure we're going to be able to finish  
11 up today. We are going to try, but we're not sure  
12 that we're going to be able to do that.

00:16:54

13 There is a chance if we can't get finished  
14 with everything to get the deliberation to you today  
15 that we would need to come back tomorrow morning and  
16 in the morning we would finish with testimony today  
17 and then in the morning have the instructions read to  
18 you, hear closing arguments, and then you would  
19 deliberate at the close of that. Does that pose a  
20 hardship for any of you? Okay.

00:17:10

00:17:28

21 JUROR #6: As long as I get notice. I gave my  
22 work until today so as long as I know for tomorrow  
23 I'm fine.

24 THE COURT: Yes, we can do that.

00:17:42

25 JUROR #12: Same here.

1 JUROR #11: Yes.

2 THE COURT: We can -- we will do that for  
3 everyone so that you all have it whether you need it  
4 or not. We will make sure that you have that. Thank  
00:17:52 5 you very much for your willingness and ability to be  
6 flexible. We appreciate that. All right. And with  
7 that we will get started. Ms. Hollingsworth, if you  
8 could call your --

9 (Whereupon, the trial continued but was  
10 not transcribed.)

11 (Whereupon, the following is an excerpt  
12 of Layne Morris's examination  
13 by Mr. Preston.)

14 Q. (By Mr. Preston) And Kelly's responsibility  
01:33:08 15 with his skill set?

16 A. That was Kelly's skill set. And in addition  
17 to running a division which he had an extensive  
18 experience at the police department, he also had a  
19 level of professionalism gained through experience so  
01:33:26 20 that he was able to explain to people no, you know,  
21 you can't do this, or you can't do that and hold  
22 people accountable in ways that he was used to doing  
23 that could get those people to be able to perform as  
24 a team and do so professionally where it would cut  
01:33:45 25 down on some of the little complaints that had gone

1 to HR during that time.

2 Q. I forgot to ask you one question about your  
3 military experience. What rank did you obtain?

4 A. I retired as a sergeant first class.

01:34:00

5 Q. So you were a noncommissioned officer?

6 A. That's the only way to go.

7 MR. PRESTON: Your Honor, would this be a  
8 convenient time to stop, to break for our morning  
9 break?

01:34:10

10 THE COURT: Do we have our stuff here? We  
11 actually don't have our treats for the jury here yet.

12 MR. PRESTON: I thought after an  
13 hour-and-a-half we were -- a recommendation but that  
14 is fine, I am happy to go forward.

15 (Whereupon, the trial continued but  
16 was not transcribed.)

17 (Whereupon, the following excerpt is  
18 a portion of Layne Morris's trial  
19 testimony.)

01:36:22

20 Q. (By Mr. Preston) Okay. So do you remember a  
21 time when -- let me ask this question. When the new  
22 -- when the division was moving into this new  
23 shelter, did that create any challenges for the  
24 division?

01:36:36

25 A. Yes. It was -- there was a lot of growth in

1 the division. We were hiring people. The end result  
2 was the Code Enforcement Animal Services Division  
3 prior to splitting had a total of like eight people  
4 and, um, and the Animal Services Division alone went  
01:36:56 5 from that up to double that. I think right now we  
6 have got, I don't know, 18 people in the Animal  
7 Services Division so we were hiring officers, hiring  
8 shelter personnel to run the -- run the shelter  
9 itself so there was all kinds of change that of  
01:37:13 10 necessity had to occur.

11 Q. Do you recall that Karen Bird was off work  
12 for several months with an auto accident, do you  
13 recall that event?

14 A. Yes. It was an -- it was a tragic, a tragic  
01:37:29 15 accident and we all felt badly for Karen.

16 Q. When she came back, did you notice any  
17 tension between her and Kelly?

18 A. Yes. I think that tension had started  
19 before, prior to her accident, but it was certainly  
01:37:48 20 exacerbated by -- after her accident or increased or  
21 the level was accelerated after the accident.

22 Q. Okay. And tell me about what you perceived  
23 that tension to be?

24 A. Well, my perception was based on just visits  
01:38:07 25 from Karen and visits from Kelly. And so, you know,



1 after the accident, Karen would come over about, I  
2 don't know, starting out maybe once every six months  
3 and just generally complain that she didn't like  
4 working for Kelly, he didn't listen to her, he  
01:38:22 5 treated her ideas as if they were not good ideas and  
6 didn't -- didn't follow any of his suggestions -- or  
7 her suggestions, and she was just generally unhappy  
8 with his leadership of the shelter and any of the  
9 changes that he continued to make there.

01:38:41 10 So those -- those visits with Karen were, you  
11 know, started out at six months and by the time I  
12 ended up holding the hearing, we were down to, you  
13 know, every week or biweekly visits from Karen to  
14 complain about Kelly and the things that had gone on.

01:39:04 15 Q. So what did you do to try to remedy this  
16 tension?

17 A. Well, you know, these two had history  
18 before -- before I got there. They had worked  
19 together successfully as a team for like eight years.

01:39:15 20 And so as I said, um, I looked at Karen as a high  
21 performer and part of the management team. And so  
22 when, you know, when Karen would come over and just  
23 make these complaints about Kelly, um, I would  
24 explain to Karen because most of the things she would  
01:39:36 25 complain about are things that Kelly and I had

1 discussed as him being my direct report. And so he  
2 and I had made a decision on that and he would tell  
3 me, um, what Karen thought about it and sometimes we  
4 agreed, sometimes we didn't. And so my observations  
01:39:54 5 were based on my interactions directly with Karen.  
6 And would then go to Kelly and say hey Kelly, you  
7 know, just FYI Karen came over to me see me and we  
8 talked about these couple of issues, she gave me some  
9 information I didn't know, what do you think about  
01:40:10 10 this and then we would make a decision.

11 And that -- frankly as that relationship  
12 started to deteriorate, and Karen's visits to my  
13 office became more frequent, at one point I said to  
14 Kelly, Kelly, whether or not Karen is right or wrong  
01:40:33 15 about any particular issue, she doesn't feel like you  
16 listen to her and give her any acknowledgment to  
17 knowing what she is talking about and she doesn't  
18 feel like she is part of your management team. And  
19 it is part of your job to make her feel as if she is  
01:40:51 20 part of your management team. So you need to work on  
21 that. And to Kelly's credit he did try and work on  
22 that. Um, I observed that firsthand.

23 So during this time, I would meet with Kelly  
24 individually, I would meet with Karen individually, I  
01:41:09 25 would meet with them both together. At one point I

1 met together with both of them. And as this  
2 situation continued to deteriorate and I told them  
3 both, guys this is -- this -- I need you both -- we  
4 have to get this job done and Kelly you need to  
01:41:30 5 listen to Karen. Karen, you need to do what Kelly  
6 tells you to do and he is the boss, he needs to take  
7 input from you and you need to give him input. And  
8 despite -- regardless of the fact whether he never  
9 accepts anything you have to say, it is still your  
01:41:48 10 responsibility to provide him that input so he can  
11 make a good decision. And I'm very happy if you guys  
12 can't come up with a decision yourself and you want  
13 to come run it by me, I'm happy to sit down and be  
14 the tiebreaker or whatever it takes. But my problem  
01:42:05 15 was that this manager and subordinate relationship  
16 was deteriorating for whatever reason, and the only  
17 one who appeared to be trying to salvage it or make  
18 it work was Kelly. And all I got from Karen was the  
19 complaints that I don't -- I don't, you know, I don't  
01:42:30 20 like Kelly, Kelly doesn't like me, and he wants to  
21 fire me. And at one point after I had told Kelly,  
22 Kelly this has gone far enough, we need to have -- we  
23 need to have -- I need to do a disciplinary hearing  
24 with Karen but I want you to be on board with that,  
01:42:45 25 he said okay, I'll go home and think about it. And

1 it was over the weekend and he came back on Monday  
2 and said I just I don't want to -- I don't want to go  
3 that far yet. And it wasn't I think the next day  
4 Karen was in my office complaining about Kelly's  
5 behavior again.

01:43:03

6 And I finally bluntly said to Karen, Karen you  
7 need to understand here I just told Kelly that we've  
8 got to fire you last week and he came back and said I  
9 don't want to do that. So I understand you think

01:43:20

10 Kelly doesn't like you and he wants to be all that,  
11 but Kelly has just been your biggest benefactor here  
12 over the last week because if it was up to me, if I  
13 had to work with you on a daily basis under the

01:43:36

14 conditions that you're both describing to me, um,  
15 when I have you both in my office and you can't even  
16 speak to Kelly, you can't even look at Kelly Davis,  
17 the loathing is so strong coming from you, that it  
18 is -- it is clear that this relationship is

01:43:59

19 completely broken and we can't run a division where  
20 frankly people are being forced to choose. Do I  
21 support the big boss Kelly Davis or do I support the  
22 littler boss Karen. And people were at a point where  
23 they all felt like they had to make that decision and  
24 people were treading between those two land mines of

01:44:16

25 how do I keep Karen happy but not let Kelly know that

1 I'm not doing what Kelly said to do. And so it was  
2 an untenable -- it was literally and I should have  
3 frankly I should have taken action about a year and a  
4 half earlier, um, but it was Kelly's division. I was  
01:44:34 5 trying to -- you know his management style is his  
6 management style. If he wants to try and make a  
7 division work with this conflict where people are in  
8 open conflict, well I'll let that go for a little  
9 while. But at some point, you know, it is my  
01:44:54 10 department and I'm going to make sure that division  
11 runs like it's supposed to. And we quickly got to  
12 that point by 2011 where when Kelly declined to fire  
13 Karen that it was very quickly after that where I --  
14 I made the decision myself and, you know, frankly I  
01:45:14 15 didn't at that point I didn't care what Kelly wanted  
16 to do. I had to make a decision.

17 Q. So you're talking about the ultimate  
18 termination in November of 2011 at this point?

19 A. Right.

01:45:25 20 Q. So to be clear, you're describing a process  
21 that just did it continue to deteriorate and get  
22 worse and worse?

23 A. It did. It got -- we would try, we would  
24 meet together and we would talk about an issue. And,  
01:45:42 25 you know, 2000 -- whatever 2009, 2010 they could at

1 least be in the same room and discuss their different  
2 perspectives. Um, but by 2011, like I said, she  
3 couldn't even stand to be in the same room as Kelly  
4 and he is her boss. And frankly, I was, you know, I  
01:46:04 5 mean I guess I'm a military guy and chain of command  
6 is important, but I don't -- I don't think that is  
7 asking too much in any organization to say, you know,  
8 when your boss finally tells you you're going to do  
9 this, then you need to jump on board and make it  
01:46:21 10 happen.

11 Q. Why is chain of command important to you?

12 A. Well, you know, I don't necessarily think it  
13 is any more important to me than it is to anybody  
14 else.

01:46:32 15 Q. Okay.

16 A. But certainly I see the evidence on a daily  
17 basis in any -- in all of the organizations I have  
18 been a part of, that we have got to have that  
19 continuity from where the rubber meets the road, that  
01:46:49 20 shelter technician, those animal services officers  
21 all the way up to me, that we're all on the same  
22 page. That's how you get an efficient and well run  
23 organization where people understand their role and  
24 they're happy to operate with that role and be  
01:47:06 25 successful. And until Kelly physically moved out to

1 the shelter, um, I thought that was Karen.

2 Q. Okay. The event where you suggested that  
3 you thought it was time -- first time to do some  
4 disciplinary action towards Karen and you described  
01:47:32 5 how you went to Kelly and he wanted to think about  
6 it, do you remember the day of that?

7 A. I don't, sorry.

8 Q. I think the record reflects it was the end  
9 of December of 2009?

01:47:44 10 A. Um --

11 Q. I'm sorry, 2010. I apologize. Are you --  
12 did Kelly say that he -- that he wanted to give her  
13 another chance?

14 A. He did. He did. He said let me -- I want  
01:48:07 15 to try a couple of things, um, and I think that was  
16 the -- where he -- where he -- wanted to try and get  
17 on the same page with Karen and I think he asked her  
18 to write down, you know, take some time and write  
19 down what you think your job description is.

01:48:23 20 I mean he tried -- he tried to do a couple of  
21 things to engage Karen in a constructive way that  
22 they could have something to discuss, to resolve this  
23 whatever this was between them so that they could --  
24 they could be successful like they had been for about  
01:48:46 25 eight years or something.

1 Q. All right. Do you recall him doing a  
2 memorandum of understanding and a performance  
3 evaluation to assist her in knowing what she needed  
4 to do? Did you ever see those documents?

01:49:01

5 A. I -- I saw -- I saw them. I'm pretty vague  
6 on it.

7 Q. Sure. When you sat down, we actually have a  
8 recording by the way of a meeting where you  
9 informed --

01:49:17

10 A. I had no idea about all these recordings.

11 Q. Karen never told you she was recording all  
12 these conversations?

13 A. No. Never.

01:49:30

14 Q. When you had this discussion I believe it  
15 was January 12 or 13 of 2011, so it was right after  
16 that performance review, how did she respond when  
17 you're putting her on notice that, you know, there  
18 are problems, you were considering disciplinary  
19 action, Kelly essentially saved her job, what was her  
20 response to that?

01:49:50

21 A. You know, I am -- I was always from day --  
22 from 2009 I was always looking for Karen for  
23 something along the lines of hey, I know he's my boss  
24 and I need to -- I need to do what he says and I need  
25 to work with him and I can do better at this. And I

01:50:09



1 just never got anything other than Kelly Davis is the  
2 problem and it is -- you know I felt like she was  
3 telling me it is your job to provide me with a  
4 supervisor that's acceptable to me. And, you know, I  
01:50:26 5 wish we all had that. But my current boss is great,  
6 I just want to say that.

7 But -- but, you know, it -- it's not -- it's  
8 not -- it's not always possible. So I told both of  
9 them look frankly I don't really care if you guys  
01:50:42 10 don't like it each other, you're not best buddies,  
11 but you have to get along and we need to be  
12 professional about this. And Karen, you need to --  
13 you need to do what Kelly says. And Kelly, you know,  
14 you need to make Karen feel like she is part of the  
01:50:57 15 team. And I always felt Kelly, any time I had those  
16 conversations with him, would make an effort to reach  
17 out to Karen to find -- try and find ways to  
18 compromise with her that would make her feel as  
19 though the things that she wanted to do mattered and  
01:51:18 20 try and do them. Many of the things that Karen  
21 wanted to do were just not possible for a variety of  
22 reasons and to try and explain that to her. So I  
23 always got that from Kelly that he was trying. And I  
24 never, right up until the end, even when I gave Karen  
01:51:36 25 that disciplinary notice, and she said you know I

1 just listened to this I didn't realize it was being  
2 recorded either, but I said, you know, that this  
3 is -- this is broken and I am going to -- I'm going  
4 to do -- I'm going to act. And she said well I just  
01:51:55 5 don't, you know, feel like he ever listens to me and  
6 he is trying to make me feel like he is the boss and  
7 I said well, he is the boss. And she said well, I  
8 know, but well there is no -- there is no but there.  
9 He is the boss and you might not like it. Typically  
01:52:14 10 when people have had enough of their boss, they quit  
11 and go get a job where they do like the boss. But  
12 Karen's attitude seemed to be, this is just my  
13 perspective, that she felt like because she loved  
14 animals the most, that anything she wanted to do was  
01:52:32 15 right and anything else that somebody else wanted to  
16 do was secondary to that, and we all needed to just  
17 get on board. And like I said, um, we need people  
18 like that, I want people I'm always looking for  
19 people like that, but they need to be able to  
01:52:47 20 understand the parameters that we're operating under.

21 Q. So if you recall in towards the end just  
22 prior to the decision being made by you to terminate  
23 her, getting a CD from Shirlyne George? Does that  
24 ring a bell with you?

01:53:05 25 A. Yes.

1 Q. Tell me about that?

2 A. Well I -- when I -- when I decided that I  
3 was going to -- I was going to conduct the -- do a  
4 pre-disciplinary hearing I called HR, that is the --  
01:53:18 5 that is the policy, you know. You need to coordinate  
6 those things. So I called HR and said hey, I need to  
7 do a disciplinary hearing for Karen Bird and  
8 Shirlayne George said to me, you know she made a  
9 complaint, formal complaint here a couple of days ago  
01:53:34 10 about Kelly Davis. And I said no, I didn't know  
11 that. She said yes, she has a recording she has  
12 surreptitiously made of Kelly Davis that she says is  
13 evidence of Kelly's misbehavior and harsh and rude  
14 treatment of her. And so at that point I said well,  
01:53:54 15 great, I would love if it is possible for me to hear  
16 that. You know, you HR you got to do whatever it is  
17 you do in these investigations, but I would love to  
18 hear that if that's possible. And Shirlayne said  
19 sure, I'll make you a copy of it. And so I wanted to  
01:54:10 20 use that because that was going to help me in my  
21 hearing with Karen. I wanted to hear her side of it.  
22 Um, I had never heard Kelly speak in that manner to  
23 Karen and so if there was, you know, regardless of  
24 how she obtained it, if there was that hard evidence  
01:54:29 25 that Kelly was behaving that way, then that would

1 certainly be a factor in my decision on what to do.

2 So I got that CD and listened to the whole

3 thing. And frankly by the time I was done with it, I

4 wanted to go pat Kelly on the back and say, wow, you

01:54:49

5 are a man of patience and I'm very impressed

6 especially since you didn't know you were even being

7 taped. But to me it was -- it was hard evidence not

8 only of Kelly Davis's patience and attempt to work

9 with Karen, but the fact that Karen viewed that as

01:55:15

10 evidence of what a terrible person Kelly was, was

11 indicative to me of how far off base Karen was and

12 her perspective of how the world ought to work was

13 just really out of whack.

14 Q. Let me show you what has been marked and

01:55:37

15 entered as Exhibit 78. Are my exhibits over here?

16 This is an e-mail that Ms. George wrote to Karen Bird

17 on November 9th, 2011. Take a moment and just read

18 that, it's a short e-mail and it's already an

19 exhibit.

01:56:58

20 A. Okay.

21 Q. Did you -- do you see that Ms. George says

22 here that --

23 MS. HOLLINGSWORTH: Your Honor, I just object

24 to this questioning because he hasn't established

01:57:07

25 this witness has any personal knowledge of the

1 e-mail.

2 MR. PRESTON: Well, we have already seen it.  
3 I won't comment.

01:57:20

4 THE COURT: Okay. Um, let's go ahead and I'll  
5 wait for -- at this point I don't see a problem.

6 MR. PRESTON: All right.

7 Q. (By Mr. Preston) What I'm asking you this  
8 for, Mr. Morris, is I wanted to -- did you talk to  
9 Shirlayne and get her opinion about that as well?

01:57:34

10 A. About the --

11 Q. The CD?

12 A. No.

01:57:46

13 Q. Okay. Were you aware that she sent this  
14 e-mail. What I want to know is she states in here  
15 that I've determined you have not been placed in a  
16 hostile work environment. Are there problems? Yes.  
17 Skipping down, I listened to the recording. I felt  
18 as though he was really trying to help you. Did you  
19 share a similar or a different view of that CD than  
20 Ms. George expresses in this e-mail?

01:58:10

21 A. No, I didn't. I mean I probably didn't put  
22 it in that nicely. It was a long -- it was a long  
23 meeting and yeah, frankly as a manager by the time it  
24 was over I was frustrated. You know, I -- I didn't  
25 have -- I guess I don't have the patience that Kelly

01:58:31

1 does under -- under those circumstances because I  
2 wouldn't have handled it quite that gently.

3 Q. Were you aware of an investigation in 2009  
4 into Kelly Davis and anger management issues raised  
5 against him?

01:58:48

6 A. I believe so.

7 Q. Ms. George testified that you were given a  
8 copy of that investigation. Do you recall receiving  
9 it?

01:58:58

10 A. Yes.

11 Q. What was -- had you ever seen Mr. Davis act  
12 in an angry or yelling or unprofessional manner?

13 A. No.

14 Q. Did you trust that investigation?

01:59:14

15 A. At that point I didn't. I didn't. I  
16 remember seeing that investigation and it was fairly  
17 dramatic I guess. And, um, at that point I felt like  
18 that division was pretty strongly split and so there  
19 was lots of I guess drama going on. So, you know, if

01:59:41

20 I remember right the -- the -- I think Shirlyne had  
21 -- the conclusion she came to -- had come to was that  
22 Kelly had an issue with his temper and he lost it and  
23 he had lost it on occasion and spoken loudly or more  
24 loudly than he should have. And so I -- I took that  
25 with a grain of salt I guess is the best way to say

02:00:05

1 it. I mean Kelly is an ex-police officer so, you  
2 know, he is not a wilting personality, you know, he  
3 is a strong personality and so he had to get his  
4 point across. I'm sure he speaks -- his voice tends  
02:00:28 5 to get elevated. I have the same problem myself.  
6 And so I would not characterize that as a man who is  
7 on the verge of losing his temper or behaving  
8 inappropriately, but yeah sometimes we all need to  
9 get a hold of ourselves and say all right maybe I was  
02:00:46 10 a little too strong with -- or spoke a little bit I  
11 didn't need to get to -- reach that decibel level.

12 Q. Okay. You said that there was a split in  
13 the division in your perception. What did you mean  
14 by that?

02:01:00 15 A. Well, like I -- well the employees were  
16 really essentially forced to decide who am I going to  
17 make happy today? Kelly or Karen. Because Kelly is  
18 telling me one thing in our staff meeting, our daily  
19 staff meeting, here is what is going on, you know, I  
02:01:17 20 want this guy assigned to do that. Animal services  
21 there is -- because there are, you know, animals have  
22 got to get fed and so it is one of the only divisions  
23 where you show up and you might be the office clerk  
24 but since somebody was sick that day you end up  
02:01:32 25 having to clean kennels. Or if you are an Animal

1 Services Officer and you're used to being out on the  
2 road, maybe you have got to come in and cover for a  
3 clerk. So there is a daily briefing that goes on  
4 there to kind of get organized for the day. And so  
02:01:47 5 when you have got Kelly making decisions based on who  
6 is there and what we're going to do today and who  
7 needs to do what and how they need to do it, and when  
8 that meeting is over and employees go their own way  
9 and now it is just them and Karen and Karen is  
02:02:03 10 telling them well no, we need to do -- I want you to  
11 do this instead. Now an employee is forced to chose  
12 all right well, you know, I got Karen right here  
13 telling me one thing, and I know that's different  
14 than what Kelly wants me to do, but, you know, I  
02:02:19 15 don't want -- I don't want to get in trouble with  
16 either one of them so how do I -- how do I -- I've  
17 got to pick a side. And the people that had more  
18 interaction with Karen picked Karen. And the people  
19 that had more interaction with Kelly I think picked  
02:02:33 20 Kelly.

21 Q. Is that healthy for the division?

22 A. No, obviously you can't run a -- you can't  
23 run a division based on two people where one refuses  
24 to recognize the legitimacy of the other one as the  
02:02:47 25 -- as the boss. And so it was literally tearing that



1 division apart. And so, um, when people are asked by  
2 HR, you know, their opinion of what's going on, um,  
3 you get a wide swing in what people think.

02:03:08

4 Some people think Karen is the most terrible  
5 person on earth, and some people think Kelly. And I  
6 think it was much closer to the middle. So I took  
7 that investigation with a little bit of a grain of  
8 salt.

02:03:21

9 MR. PRESTON: Your Honor, would now be a  
10 convenient time?

11 THE COURT: It would be.

12 THE CLERK: If the jury could rise. Or sorry,  
13 if we could all rise for the jury.

14 (Whereupon, the jury left the courtroom.)

02:03:30

15 THE COURT: The jury can rise, too. We'll  
16 have a 15-minute break.

17 MR. PRESTON: Thank you, Your Honor.

18 THE COURT: Thank you.

19 (Recess.)

20 (Whereupon, the trial continued but  
21 was not transcribed.)

22 (Whereupon, the following excerpt is  
23 a portion of Examination of Layne Morris  
24 by Mr. Preston.)

03:02:19

25 Q. (By Mr. Preston) You will see the last

1 statement on this says someone writes back, "West  
2 Valley sure likes to murder." Are those the sorts of  
3 comments that you would get when these statements  
4 would go out?

03:02:34

5 A. Exactly.

6 Q. Anybody ever suggest that you use the  
7 chamber on yourself?

8 A. Probably.

03:02:54

9 Q. So in this meeting, what did you observe  
10 about the way Kelly and Karen interacted on  
11 October 31, the meeting that you had?

03:03:10

12 A. That was when I -- that was when I realized  
13 that this was a completely broken relationship. I  
14 mean I really had been operating too long in my  
15 opinion in hindsight but I had been operating on the  
16 -- on the premise that these two had gotten along  
17 famously for, you know, eight years, and that  
18 whatever was -- whatever was occurring now they would  
19 get over it and get back to operating efficiently  
20 like they had been.

03:03:27

21 So this was the meeting when I realized,  
22 looking back that Karen had gone just over the last  
23 six months from someone who could at least comment  
24 and in a civilized way comment or address Kelly or  
25 talk to him in my presence. She, in that meeting,

03:03:49

1 she literally she couldn't even look him in the eye,  
2 she refused to look, even glance his direction. She  
3 would look at me and talk at me and talked over him.  
4 But I mean the -- like I said it before, the loathing  
03:04:09 5 was so strong that it was obvious to me that this is  
6 not going to get better, this is one of those ugly  
7 divorces, and Kelly is trying and Karen is not  
8 trying. And I really didn't think I had much choice.

9 Q. Okay. So the next day did you talk to Karen  
03:04:29 10 about that after your meeting with Karen and  
11 Michelle. Do you remember that?

12 A. I believe so.

13 Q. Okay. This would be a November 1 meeting.  
14 Let me hand you what has been marked as Exhibit 92.  
03:04:42 15 It is a brief clip. There is a transcript here.

16 A. It's another recording.

17 Q. Yes, it's another recording that was made  
18 and. This is just a clip from it but you will see a  
19 transcript right here (indicating) and we'll ask  
03:04:58 20 Mr. Crowther if you will play that for us and you can  
21 follow along.

22 (Whereupon, the video was played  
23 for the jury.)

24 (Whereupon, the trial continued but  
25 was not transcribed.)

1 (Whereupon, the following is an excerpt  
2 of examination of Layne Morris by  
3 Mr. Preston.)

04:17:46

4 Q. (By Mr. Preston) Thank you. Mr. Morris  
5 when we broke, when I last had you on the stand, we  
6 were just talking about the November 1 meeting and  
7 there had been the clip played about you telling  
8 Karen that you didn't know how this was going to work  
9 out, that they were -- that their planets were  
10 different, were in separate orbits. Do you recall  
11 that testimony?

04:18:07

12 A. I do.

13 Q. Now, did you meet with her again on  
14 November 9th?

04:18:18

15 A. Would that have been my pre-disciplinary  
16 meeting or --

17 Q. No, it was before that. Do you remember  
18 having a meeting with her talking about whether or  
19 not her relationship was broken with Kelly?

04:18:35

20 A. Right.

21 Q. Okay. We have, again, a recording of this  
22 conversation. What do you recall -- why were you  
23 meeting with her on that occasion, November 9th, if  
24 you recall? We can pull the recording out if you  
25 don't.

04:18:52

1           A.    I'm sorry I don't remember.  So this would  
2 have been after we had had the conversation where I  
3 had remarked to her that it appeared to me to be  
4 irretrievably broken?

04:19:06

5           Q.    No, this would be that conversation.

6           A.    Okay.

7           Q.    Tell me about that conversation?

8           A.    I think it was -- this was my informing  
9 Karen that I was going to take disciplinary action.

04:19:26

10          Is that what we're talking about?

11          Q.    Yes.  Yeah, November 9th.  So from  
12 November 1, okay you had the meeting on October 31,  
13 you observed how they were, you talked to her about  
14 that the next day after the meeting with Michelle.

04:19:42

15                    What was your thought process leading up to  
16 November 9th when you informed her about a  
17 disciplinary process?

18          A.    That was really I think it solidified it in  
19 my mind was based on that prior meeting where, as I  
20 said, she couldn't even interact with Mr. Davis in  
21 any -- in any way.

04:19:59

22          Q.    Okay.  And you mentioned that there was  
23 something about the relationship being broken.  Did  
24 you have that discussion with Karen?

04:20:12

25          A.    Yeah, I believe she has got a recording of

1 that. I think I told her, Karen, it appears to me  
2 just from our meeting the other day that this is  
3 irretrievably -- it's broken. You can't do it.  
4 Kelly can't do it. This relationship is not going to  
5 -- not going to work any longer. And if I remember  
6 right, she agreed and said yeah, you're right, it is  
7 broken.

8 Q. Did she -- she didn't deny that it was  
9 broken?

10 A. No.

11 Q. Let me hand you what's been marked as  
12 Exhibit 94. This is an audio clip of a meeting on  
13 November 9th. It's a short clip. The meeting isn't  
14 all that long and the document is already in so you  
15 can follow along in the transcript and Brandon if you  
16 would please play that.

17 (Whereupon, the Audio Clip 94 was played  
18 for the jury.)

19 Q. (By Mr. Preston) Did she ever explain what  
20 those perspectives were, that you recall?

21 A. Not in this meeting but I knew what her --  
22 what her perspective was.

23 Q. And how did you know that?

24 A. Because we had been talking about it for at  
25 least a year at varying -- varying frequencies and

1 intensities.

2 Q. And what did you understand her perspective  
3 was?

4 A. Well, her perspective was that Kelly was a  
5 bad manager and she didn't like to work with him and  
6 he didn't do things the way she wanted them done or  
7 thought was her -- it was her right to do them how  
8 she wanted to do them. I mean there was a whole  
9 litany of issues where she just didn't -- she just  
10 chaffed at his leadership in general, the way he  
11 directed and the way he approached her and the things  
12 that he wanted her to do or not to do. And she just  
13 didn't like it and thought it needed to change.

14 Q. Did she ever suggest to you how it should  
15 change?

16 A. Um, no. No, not that I -- that I recollect.  
17 It was more just that Kelly is wrong.

18 Q. Did she ever recognize that she might be at  
19 fault here somehow?

20 A. No, which was one of the troubling things to  
21 me. I mean if you are going to -- if you're going to  
22 level allegations that your supervisor should be  
23 fired or terminated or you can't work with him and  
24 you need somebody you can work with, um, there ought  
25 to be some of that that you could sit down and talk

1 about and we can kind of reason these things out and  
2 a willingness to say look I recognize that I'm --  
3 that I'm the subordinate here and, um, his decisions,  
4 even though I might not agree with them, I'll  
04:23:46 5 implement what he wants me to do but I don't like it.  
6 And I sure appreciate a second set of eyes on it.  
7 And we didn't get that very often.

8 Q. Did you, sitting here today, I know it has  
9 been a long time ago you have a lot of  
04:24:01 10 responsibilities, but can you think of some of the  
11 instances where you felt she was being resistant to  
12 him or not doing the things that he wanted done?

13 A. Sure. Things like personnel schedules, um,  
14 care of the animals, feeding schedules, what you can  
04:24:19 15 afford to purchase for the animals. Simple things  
16 like do we spend some money on buying toys for the  
17 dogs to play with in the kennels or do we spend it on  
18 blankets for the dogs in the kennels or better food.  
19 Do we buy wet food versus dry food? I mean just a  
04:24:38 20 what I would say is purely an opinion based --  
21 opinion based decisions where there is -- there is  
22 not necessarily a right or a wrong answer, it is all  
23 of us got together and here's what after taking input  
24 from everybody we decided that we needed to do.

04:24:57 25 Q. Okay. So once you had made the -- informed



1 her of a disciplinary process, did you come to find  
2 out that Ms. George was, in fact you may have  
3 mentioned this earlier in your testimony, that she  
4 was conducting an investigation at the shelter?

04:25:14

5 A. Right. Right. I, um, prior to having that  
6 I needed to check in with HR and legal just to let  
7 them know what I was -- what my intentions were, what  
8 I was doing. And when I called Shirlayne to tell her  
9 Shirlayne said oh, you know that Karen made a formal  
10 complaint, I think is how she put it, about Kelly, I  
11 think it was about Kelly not just that shelter, about  
12 Kelly specifically here, you know, a couple of days  
13 ago or something.

04:25:33

14 Q. And did she -- what did she tell you she was  
15 doing in response to that?

04:25:46

16 A. She said I'm going to do -- I told Karen  
17 that I would do an investigation and it wouldn't just  
18 be Kelly, it would be -- I was going to -- I was  
19 going to really talk to everybody at the animal  
20 shelter and get their opinion of it. And I think at  
21 that point is when she told me that as part of  
22 Karen's complaint, Karen had submitted this long --  
23 this recording that she had secretly taped of a  
24 conversation between her and Kelly that she said was  
25 demonstrable of Kelly's abuse towards her.

04:26:15

1 Q. Okay. And did she conduct that  
2 investigation?

3 A. She did.

4 Q. And did she provide you with a copy of that?

04:26:28

5 A. She did.

6 Q. Let me hand you what has been marked as  
7 exhibit -- Exhibit 76. It's already in evidence.

8 Do you recognize that as the investigation  
9 that Ms. George did?

04:26:45

10 A. It looks like it.

11 Q. Okay. So when you read through this, you  
12 might take a moment just to look at it and let me  
13 give you just a few minutes to glance through it.  
14 And if there is anything that comes to mind that was  
15 significant to you, would you please let us know.

04:27:13

16 A. Well, and I think I mentioned before, that  
17 the -- the things being referred to are -- are --  
18 they're either, um, it's evident going through this  
19 that everybody out there in the -- at the shelter was  
20 taking a side, you know. There was no -- there was  
21 no neutral -- no neutrality there. Um, and to me  
22 that was a -- I have seen other -- other  
23 investigations before and typically you have a whole  
24 bunch of people that are pretty neutral, don't care  
25 one way or another, and some people are then pretty

04:28:04

1 vociferous about it and others are one way and the  
2 others are the other way. So this was kind of  
3 striking that it was so clearly divided.

04:28:20 4 Q. Do you remember recalling against whom most  
5 of the complaints were levelled?

6 A. Um, most of them were about Karen.

04:28:39 7 Q. And did -- so when you saw that, what did --  
8 what did you take away from it? What were the  
9 conclusions you drew or how did it affect this  
10 process that you're going through as trying to decide  
11 what discipline, if any, you will institute?

04:28:57 12 A. Well, I mean from my own experience with --  
13 with Karen and Kelly, that was for me the  
14 decision-making or the decider that I needed to take  
15 disciplinary action against Karen. That was based on  
16 me.

04:29:15 17 In this investigation many of these items I  
18 kind of heard about from other employees, but, um,  
19 not in any kind of specificity. I mean I knew that  
20 the place was tearing itself apart because I got that  
21 on a near weekly basis from both Karen and Kelly. So  
22 when I saw this and how human resources their  
23 investigations kind of identified Karen as a huge  
24 part of the problem, that simply gave me a reason to  
04:29:40 25 say well I better include this as part of my

1 disciplinary action with Karen. So I included that,  
2 some of these items that I thought were legitimate  
3 and worth talking about with Karen.

04:29:58

4 Q. And you have already been shown your -- your  
5 pre-disciplinary letter where you identified five  
6 potential policy violations. Do you recall that?

7 A. I do.

8 Q. And so following up with this then did you  
9 have a pre-disciplinary meeting with Ms. Bird?

04:30:18

10 A. I did. From the investigation and my  
11 personal experience with Ms. Bird is how I came up  
12 with the notice of the pre-disciplinary hearing.

04:30:39

13 There was -- there was things in the HR investigation  
14 that I frankly just dismissed either because I  
15 thought it was hopelessly biased one way or another  
16 and I didn't consider it. I forget what the word is  
17 but legit, I guess.

18 Q. So how long was this pre-disciplinary  
19 meeting with Karen Bird, do you remember?

04:30:59

20 A. Um, I bet it was -- I bet it was an hour.  
21 I'm sure there is a recording of it out there  
22 somewhere.

04:31:11

23 Q. There is. I think it goes like an hour and  
24 40 minutes, something like that. Does that sound  
25 about right?

1 A. Sure.

2 Q. And what was the purpose of this meeting?

3 A. The purpose of this meeting is for Karen to  
4 explain her side of the story, so to speak, to give  
04:31:26 5 me mitigating factors that will help me make a  
6 decision on what to do in her case. I had a lot of  
7 options, it doesn't have be to termination, it could  
8 be any -- a whole bunch of different types of  
9 discipline. And so it was my chance to get her side  
04:31:45 10 of it regarding all of these allegations I listed in  
11 there. And if I remember right, we went through  
12 Shirlayne's investigation just point by point and I  
13 wanted to get her comment on everything that was  
14 listed there just to help me out to where she was  
04:32:03 15 coming from.

16 Q. Had you formed a decision, made a decision  
17 as to whether termination would be prior to this  
18 pre-disciplinary hearing?

19 A. No.

04:32:16 20 Q. And I think your letter says -- your notice  
21 says that you were going to hold it on November 21.  
22 But from the termination letter it says that the  
23 meeting actually took place on November 22. So it  
24 was about six days after you had delivered this  
04:32:34 25 pre-disciplinary notice to her that you met with her.

1 So what was your take away from that meeting with  
2 Karen, after you heard what she had to say about it?

3 A. I didn't -- I didn't feel that there was  
4 again any way that she could co-exist in Animal  
04:32:59 5 Services with Kelly and she never took any kind of  
6 ownership of any of the problems in Animal Services  
7 or her role in them. It was just a complete denial  
8 that there was any issue with her at all. It was all  
9 Kelly, it was all Kelly's fault. And if -- if it  
04:33:22 10 wasn't for Kelly everything would be great. And if  
11 we could just go, you know, back to that situation  
12 where it was just her it would be wonderful. Um, you  
13 know, it has been a few years I haven't -- I haven't  
14 listened to that recording so I -- I'm kind of going  
04:33:39 15 from my memory, but I did not hear any mitigating  
16 factors that I thought gave me any room to say let's  
17 continue this situation with Karen as an employee.

18 Q. Did she offer to change in the meeting?

19 A. Not that I remember.

04:34:03 20 Q. Did she -- well, in this courtroom she has  
21 testified under oath that she did not do anything  
22 wrong in her employment. Would you agree with that?

23 A. I would not agree with that.

24 Q. Why wouldn't you agree with that?

04:34:20 25 A. Because of my personal experience with

1 Karen. You know I think I have said people have  
2 asked me well give me an example of her  
3 insubordination. In my opinion she was in a state of  
4 insubordination for a couple of years frankly, and it  
04:34:40 5 was really simply a matter of how much do you want to  
6 tolerate. And Kelly's tolerance for that  
7 insubordination went beyond what mine was.

8 So yeah, that was my -- that was my -- that  
9 was my problem in a nutshell. It was -- this is a  
04:35:02 10 situation where one employee is just continually  
11 insubordinate in her attitude, in her words, in her  
12 actions, everything that I observed. And even though  
13 she has a lot of great qualities, loves those animals  
14 and we need that, you know, that doesn't -- that  
04:35:20 15 doesn't give you the right to just ignore your boss  
16 or deliberately try and undermine him.

17 Q. Okay. So who made the decision to terminate  
18 Karen Bird?

19 A. I did.

04:35:36 20 Q. Did you consult with Kelly Davis about it?

21 A. I didn't. I mean at that point I was  
22 frankly probably I was irritated with Kelly, um,  
23 because this should have happened probably a year  
24 earlier in my opinion. And so, you know, I had been  
04:35:53 25 working with Kelly to try and get him to the point

1 where he could -- where he could be on board with me  
2 disciplining Karen. I don't need his permission to  
3 discipline Karen, but I wanted his acknowledgment and  
4 support that it needed to be done. And until it  
04:36:10 5 finally just got to the point with that earlier  
6 meeting we just talked about where I no longer cared  
7 what Kelly thought about the situation and I was  
8 going to -- I was going to fix my department.

9 Q. So you believe that Karen Bird was given  
04:36:27 10 opportunities to correct her behaviors and her  
11 deficiencies?

12 A. Karen Bird was given too many opportunities  
13 frankly.

14 Q. So did Kelly Davis participate in any way  
04:36:41 15 personally in this decision to terminate?

16 A. No. I am not -- I am not even sure how  
17 Kelly found out about it. I mean I -- I discussed  
18 some of my options with Human Resources and legal and  
19 probably the City manager, but Kelly wasn't involved  
04:37:07 20 in those discussions at all.

21 Q. Did he recommend that you terminate her?

22 A. I don't think Kelly ever recommended. One  
23 time he -- he was vocal about he wanted to work with  
24 her some more. Um, I don't ever remember Kelly  
04:37:28 25 saying to me, other than that one time where I said I



1 think we need to discipline her he said all right  
2 well let me think about it. And that was on a  
3 Friday. And Monday he came back and said no, I want  
4 to -- I -- let me try a couple of things. But I  
04:37:44 5 don't ever remember Kelly saying to me I think we  
6 need to discipline her, I think you need to  
7 discipline her.

8 Q. Okay. So sitting here today in front of the  
9 jury, please articulate for the jury what was the  
04:38:02 10 motivation, your reason, for terminating her at this  
11 point?

12 A. It was almost solely I think in my -- in the  
13 big long list that Shirlyne had and the list that I  
14 included that things that I would consider, the only  
04:38:18 15 thing I found was her insubordination. And as part  
16 of that, probably being -- not being nice to people.

17 But the only thing that I had personal  
18 experience with and frankly the only thing that  
19 mattered to me is do I have a functioning team over  
04:38:38 20 there. And by Kelly and Karen's admittance that it  
21 was a non -- it was broken and neither one of them  
22 had a solution as to -- as to how to fix it, and so,  
23 um, I had to fix it. And I was happy -- I was happy  
24 to fix it. I knew that something needed to be done  
04:38:59 25 long before I actually did something as far as the

1 discipline. But the only reason Karen Bird was  
2 terminated was because of that insubordination, that  
3 just -- that just complete refusal to acknowledge  
4 that there was any problem on her part and that she  
04:39:15 5 had a, from her perspective, she had a manager that  
6 she didn't like and she seemed to think that we owed  
7 her a manager that she liked. And there was some  
8 perfect situation out there that she was going to  
9 continue to agitate for until she got. And, you  
04:39:35 10 know, you just can't do that.

11 Q. What role did your personal observations of  
12 the interactions of them together play in your  
13 reaching this decision?

14 A. Well, like I said it was a -- it was a  
04:39:48 15 gradual thing over -- we're talking about over a year  
16 where it starts out back in 2009 where Karen had  
17 expressed this fear that she was going to be fired  
18 because I didn't need her or want her there. Or  
19 Kelly didn't need her or want her there. At that  
04:40:06 20 point, you know, we could all three sit down as the  
21 management team of Animal Services and make decisions  
22 and accomplish things. So we went from that  
23 situation all the way to the point where to get them  
24 in the same room together was difficult. And when  
04:40:22 25 they were in the same room together, Karen was unable

1 to function with Kelly in any way at all and barely  
2 with me in trying to probably because she was  
3 recording our conversations is why she was reluctant  
4 to say anything, but it was difficult to get her to  
04:40:40 5 make a statement, to give us her opinion, to tell us  
6 what she -- what she thought should happen.

7 And so it was -- it was tough to have any kind  
8 of a communication with somebody who has that kind of  
9 I guess underlying motive going on and they're second  
04:41:02 10 guessing everything they want to say or should or  
11 shouldn't say. And so it made it very difficult to  
12 even figure out what Karen wanted other than she  
13 wanted something to change and it just wasn't her.

14 Q. Let me hand you two letters. Start with  
04:41:25 15 Plaintiff's Exhibit 16. It's already in the record.

16 This is a letter you wrote to Karen Bird dated  
17 November 30th, 2011, informing her of the  
18 termination. Do you recall this letter?

19 A. I do.

04:41:49 20 Q. Here is where you say, "thank you for  
21 attending the disciplinary hearing last Tuesday,  
22 November 22, 2011." And then in the second  
23 paragraph, "after careful consideration of our  
24 discussion and your input, it is my decision to  
04:42:02 25 terminate your employment for cause with West Valley

1 City effective November 29, 2011." You don't specify  
2 what the cause was there, do you?

3 A. No.

4 Q. So let me hand you what was -- what is  
04:42:21 5 marked as Plaintiff's Exhibit 19. And is this a  
6 subsequent letter you wrote to Karen?

7 A. Yes.

8 Q. It is dated December 12, 2011 and you state  
9 in the second paragraph here, "as per the voicemail I  
04:42:52 10 left you on November 29th, 2011," and you informed  
11 her of the decision. Did you try to call her to tell  
12 her personally what the decision was?

13 A. Yeah. I think at first I tried to meet with  
14 her and couldn't -- couldn't -- I mean you know you  
04:43:09 15 never want to terminate somebody over the phone but  
16 we couldn't get a hold of her if I remember right.  
17 And so I couldn't have a meeting. So, um, I think I  
18 left her several voicemails and didn't hear back from  
19 her. And so finally I didn't feel like I had any  
04:43:26 20 choice but to do it by voicemail because she wasn't  
21 answering the phone.

22 Q. Okay. And here you do say -- state, "due to  
23 insubordination and failure to be courteous or  
24 cooperative with the public or fellow employees."  
04:43:42 25 And you state that "the termination is effective

1 November 29, 2011." Were those the sustained grounds  
2 in the five listed in your pre-disciplinary letter  
3 that you sustained?

4 MS. HOLLINGSWORTH: Objection, leading.

04:43:55 5 THE COURT: Sustained.

6 Q. (By Mr. Preston) Mr. Morris, what were the  
7 two grounds you used. I mean you know we can -- we  
8 have got to at least do this when this is  
9 substantive, Your Honor. I am trying to move this  
04:44:14 10 along.

11 A. To terminate due to insubordination and  
12 failure to be courteous or cooperative with the  
13 public or a fellow employees. I think I wrote the  
14 second one because, just moving this along here, I  
04:44:26 15 wrote the second one because I wrote the first one  
16 and I think somebody in legal or HR reviewed it and  
17 said no, you've got to put -- you've have to put the  
18 specific things you found there and so I re-wrote the  
19 letter.

04:44:36 20 Q. Okay. So you listed five policy violations?

21 A. In the pre-disciplinary letter.

22 Q. And how many did you sustain?

23 A. Um, really one. I think it reads as two,  
24 insubordination and failure to be courteous or  
04:44:52 25 cooperative with the public or fellow employees. But

1     yeah, those -- the insubordination which in my mind  
2     included that failure to be courteous because she was  
3     not courteous with Kelly.

4             Q.    Do you feel the termination was justified?

04:45:15

5             A.    Entirely and overdue.

6             Q.    Are you being honest with the court and the  
7     jury telling them this was the reason?

8             A.    I am.

04:45:35

9             Q.    Now, in this case, Ms. Bird is claiming that  
10    the decision to terminate her was based on a desire  
11    to retaliate against her because you believed she was  
12    passing on information about the shelter to the  
13    press.  What is your response to that?

04:45:53

14            A.    Um, I guess I would say two things.  I  
15    didn't believe that.  I certainly didn't know it, I  
16    didn't even believe it, number one.

04:46:09

17                    And number two, you know, frankly we got  
18    enough bad press all on our own we didn't need any  
19    more help.  It wasn't a matter of if things at that  
20    point were going to get any better in that immediate  
21    situation, to terminate somebody based on that would  
22    be would be silly.

23            Q.    Is that something that you would do?

04:46:30

24            A.    No.  We needed to take our licks on the  
25    failed euthanasia of Andrea the Cat and I was happy

1 to stand up and say yeah, we screwed that up, um, and  
2 I didn't blame any of our people for any of the  
3 negative publicity surrounding that event. Um, when  
4 that -- when that -- when that publicity changed to  
04:46:55 5 out of control wild and crazy things like we reviewed  
6 earlier, that's when I knew I had to -- I had to fix  
7 that. That was a problem that needed to be -- needed  
8 to be fixed. And so I took the action that I thought  
9 was necessary to fix it.

04:47:10 10 And frankly, it did. After I had had the  
11 meeting with Karen and Michelle kind of put that shot  
12 across the bow that this had to stop, I don't  
13 recollect that being a further issue where we had  
14 people making these wild accusations.

04:47:28 15 Q. So was your decision based in any way on  
16 retaliation because of anything Karen Bird was  
17 stating?

18 MS. HOLLINGSWORTH: Objection.

19 THE COURT: Sustained.

04:47:38 20 Q. (By Mr. Preston) Was -- Well, I stated  
21 the statement here that you -- the allegation is that  
22 she was the victim of free speech retaliation. What  
23 is your response to that?

04:48:03 24 A. My response to that is that there was no  
25 retaliation, there was nothing to retaliate against.

1 There is no secrets, you know. Nobody has a security  
2 clearance at the shelter. We don't have secrets.  
3 So, um, when bad things happen and we have made a  
4 mistake we need to own up to that and say yup, here  
04:48:23 5 is where we went wrong and we need to fix that. But  
6 nobody leaked anything. It's just a terrible word.  
7 No, it is not -- there is nothing leaked. Um, did we  
8 have some communication that was hurting us,  
9 absolutely. And we need to get that communication  
04:48:44 10 where it's helping us, where it's positive. The  
11 animal shelter we need to focus on the positives  
12 we're doing there. And so my only -- my concern  
13 there I know Kelly and I don't blame him because  
14 Kelly was getting drug through the mud in the press  
04:48:59 15 as if he was the embodiment of all evil at the  
16 shelter and loved to kill every -- I mean that is not  
17 good for the City to -- to have that reputation that  
18 they have an employee who is out there, you know,  
19 killing everything that he possibly can any time they  
04:49:14 20 have. So I needed to stop that. But my -- my  
21 efforts in doing that was not to find somebody who  
22 was doing it deliberately, I was thoroughly  
23 unconvinced that someone was doing it deliberately.

24 Now some of those that were crazy enough makes  
04:49:31 25 you start to wonder especially when given the --



1 given the circumstances, but that was not my focus to  
2 find, you know, somebody who had done something wrong  
3 and punish them. My focus and I think it is in the  
4 -- in the recorded meeting, is that I'm just  
5 interested in how we can fix this as a team to get  
6 ourselves on a better standing with the public. And  
7 so to say that I fired Karen based on that is -- is  
8 deeply troubling to me.

04:49:49 9 Q. When you joined the Army did you make an  
10 oath?

11 A. I did.

12 Q. What was that oath?

13 A. To obey -- uphold the Constitution against  
14 all enemies foreign and domestic.

04:50:25 15 Q. Do you believe in the Constitution?

16 A. I do.

17 Q. Would you knowingly violate anyone's rights  
18 under the Constitution?

19 MS. HOLLINGSWORTH: Objection, leading.

04:50:34 20 Q. (By Mr. Preston) Would you violate rights  
21 under the Constitution?

22 A. I would not. And that was a consideration.  
23 I am not an attorney. I know that there are limits  
24 on people's right to free speech and I think I say  
04:50:48 25 that over and over again that I -- I'm not trying to

1 dictate to people how they should feel and what they  
2 should say but it needs to be the truth and we need  
3 to uphold the truth in this matter. And that's --  
4 that's important to have people feel that they can --  
04:51:09 5 that they can speak the truth. But, um, but we ought  
6 to be able to find a way to do that that is  
7 beneficial to both parties, the City, the Division  
8 and the person. And whether they are a volunteer or  
9 an employee, um, I think that responsibility is the  
04:51:26 10 same.

11 Q. Did you blame Karen Bird for these false  
12 statements that were being -- that you were  
13 receiving?

14 A. I did not. And if I had to take a stab at  
04:51:38 15 it I would have thought it was Michelle, the  
16 volunteer. But again, it wasn't really my focus of  
17 trying to fix the problem. I was trying to fix the  
18 problem not go backwards, we're trying to go forward.  
19 We just all had been through a traumatic event, and,  
04:51:56 20 you know, we got to get -- let's get past this and  
21 get back on track and move forward not spend the  
22 next, you know, how ever many days, months, and weeks  
23 trying to count up scores and find people to punish  
24 or to blame. I was happy to take the blame for that.  
04:52:16 25 It was my Division and it was screwed up on my watch

1 and I accept that.

2 Q. These negative calls, were they disruptive  
3 to the Animal Services Division?

4 MS. HOLLINGSWORTH: Objection, leading.

04:52:31

5 THE COURT: Sustained.

6 Q. (By Mr. Preston) When you received all  
7 these calls, how did that impact the division?

04:52:47

8 A. It stresses everyone out. I mean all these  
9 employees, I mean they have got to go home every  
10 night and hear from their family, their extended  
11 family, their friends. Oh, you work at the shelter?

04:53:02

12 How many kittens did you strangle today? No one -- I  
13 mean these people work at the shelter because they  
14 love animals and they want to -- they want to help  
15 them and assist them. And it's -- it's so unfair to  
16 them to be painted with that brush that they don't  
17 care, that they're callus murderers or that anybody  
18 that works there is. And so, yeah, it's horrible for  
19 moral, it's horrible for those interpersonal

04:53:22

20 relationships especially if people think that these  
21 are coming from inside the shelter. Now everyone is  
22 even further afraid to even interact with each other  
23 because they don't know, you know, who the problem is  
24 or who is saying what. It's a -- it's just -- it was

04:53:38

25 a terrible situation and that was what needed to get

1 fixed, not -- not finding out who said what, where or  
2 who told, you know, four and five phone calls down  
3 the line how it got translated out. We just had to  
4 come up with a way to be able to communicate amongst  
04:53:55 5 ourselves and especially with all of the various  
6 partners we have out there in the community in ways  
7 that portray us in a positive light and make people  
8 want to help us and want to work with us. A rescue  
9 agency doesn't want to come and help you out if they  
04:54:12 10 think you're killing all of the animals for no  
11 reason.

12 (Whereupon, the trial continued but was  
13 not transcribed.)

14 (Whereupon, the following excerpt is  
15 a sidebar conference between counsel  
16 and the court.)

17 MR. PRESTON: Could I have a quick sidebar  
18 with the court?

19 THE COURT: Sure.

04:58:49 20 MR. PRESTON: So are the time limits are in  
21 place now.

22 THE COURT: Um, so yes. Yes. I would be  
23 happy to hear from both of you on this particular  
24 one. The witness is you calling in your case in  
04:59:03 25 chief. The time limit is going to be the time that

1 you use. Since this was Ms. Hollingsworth -- since  
2 this one -- since Ms. Hollingsworth called this  
3 witness, um, I would be interested in hearing both  
4 your thoughts on how long for cross. Do you have an  
04:59:29 5 estimate on how long you think you need?

6 MS. HOLLINGSWORTH: Um, and my guess is half  
7 an hour but I never am quite right on that.

8 MR. PRESTON: Well, I understood she had --  
9 you gave her an extra half an hour but all of that is  
04:59:49 10 gone though.

11 THE COURT: Right. I did give her the extra  
12 half hour and that is gone. And so, um, but we  
13 talked about this issue of the -- of the  
14 cross-examination. If I -- if I don't allow counsel  
05:00:04 15 to cross a witness I think we run into a problem. So  
16 do you have a recommendation on a timeframe and I  
17 will say, um, I would ask you to keep careful track  
18 that you are crossing.

19 MS. HOLLINGSWORTH: Okay. Only new evidence.

05:00:22 20 MR. PRESTON: I'll go with whatever the judge  
21 decides. It would be nice if we could let the jury  
22 out a little early today, I guess that's my only  
23 point since we're bringing them back. We have three  
24 witnesses to call.

05:00:46 25 THE COURT: Okay. I am going to -- I am going

1 to go with -- limit the cross to half an hour.

2 MR. PRESTON: Thank you, Your Honor. Three --

3 THE COURT: Three more to go?

4 MR. PRESTON: We have three witnesses.

05:01:04

5 (Whereupon, the sidebar conference concluded.)

6 (Whereupon, the trial continued but was  
7 not transcribed.)

8 (Whereupon, the following is an excerpt  
9 regarding timing held during examination  
10 of Layne Morris and where plaintiff  
11 and defendant rest their cases and  
12 argument on motion.)

13 Q. (By Ms. Hollingsworth) I'm asking what the  
14 reasons were that you were going to do a Loudermill?

05:36:21

15 A. Because I was going to discipline her.

16 Q. Why were you going to discipline her?

17 A. Because it needed to be done. She needed  
18 discipline. I'm not sure how to answer that. I had  
19 made a decision that this was a situation that needed

05:36:39

20 discipline. I just had been to a meeting with her  
21 where she was unable, unwilling, or whatever to even  
22 function as a -- as a -- as an involved human being  
23 let alone the shelter manager in our -- in our  
24 discussion and come to any kind of meaningful

05:37:00

25 resolution where I felt she was an activity

1 participate instead of a reluctant I don't want to be  
2 here participant. And yeah, and that is the point  
3 where I told her in that follow-up meeting it is --  
4 it is pretty clear this isn't working and it is not  
5 going to work.

05:37:17  
6 Q. And would you turn quickly to Exhibit 69,  
7 Your Honor.

8 MR. PRESTON: Your Honor, I am going to  
9 object. This is a -- we're past --

05:37:24  
10 THE COURT: I think we're close to -- I think  
11 we're at the point to finish on this witness.

12 MS. HOLLINGSWORTH: Okay. Um, can I have one  
13 more question?

14 THE COURT: One more question with no follow  
05:37:36  
15 up.

16 MS. HOLLINGSWORTH: Okay.

17 Q. (By Ms. Hollingsworth) Um, you talked with  
18 Mr. Preston about all of the false allegations that  
19 were out there?

05:37:45  
20 A. Yes.

21 Q. So if there were false allegations out  
22 there, why -- why didn't you just -- why didn't the  
23 City just issue a press release to straighten out the  
24 facts?

05:37:56  
25 A. I think we did multiple. We -- it was not

1 just -- this wasn't just Layne against the world. I  
2 mean the City, like I said, this was kind of front  
3 and center for the whole city. So yeah, we had our  
4 people working on that around the clock. You know,  
05:38:15 5 they would go onto the website, and, you know, we're  
6 looking for all of the terrible comments people would  
7 leave and react to those. So I was not alone in  
8 trying to fix this problem. I was trying to fix this  
9 problem with my people. But there certainly were  
05:38:33 10 other people engaged in trying to turn this ship  
11 around, so to speak.

12 MS. HOLLINGSWORTH: Okay.

13 THE COURT: Thank you. Mr. Preston, how much  
14 time do you anticipate needing for redirect?

05:38:45 15 MR. PRESTON: I just have a couple of  
16 questions.

17 THE COURT: Wonderful. We'll go ahead with  
18 that then.

19 MR. PRESTON: Thank you, Your Honor.

05:38:50 20 **REDIRECT EXAMINATION**

21 BY MR. PRESTON:

22 Q. Mr. Morris, you were directed to your  
23 testimony at the Employee Appeals Board Hearing and a  
24 snippet was read. I wanted to get a more complete  
05:39:10 25 response. Do you still have that Employee Appeals



1 Board Hearing in front of you?

2 A. Yeah. And I messed up the pages though.

3 Q. We'll be back at pages 319, 320?

4 A. Okay.

05:39:26

5 Q. And there was questioning about in the  
6 middle starting on Line 12 about whether Karen was  
7 disseminating negative information about the City.

8 Did you think Karen was. And skipping down to

9 Line 24, you state, "so it could very well be an

05:39:47

10 inadvertent comment that anyone makes. It could be  
11 Kelly. It could be -- it could be me in the way I  
12 deal with people." And then the question is asked on

13 Line 12. "Okay, let me ask you again, did you

14 believe that that information was coming from Karen?

05:40:03

15 Answer, I thought it was a possibility it was coming  
16 from Karen or Kelly or a number of employees.

17 Question, okay, is that one of the basis for her

18 termination?" What was your answer?

19 A. No.

05:40:16

20 Q. Do you stand by that today?

21 A. I do.

22 MR. PRESTON: Thank you, Your Honor. That's  
23 all I have.

24 THE COURT: All right. Um, Ms. Hollingsworth,

05:40:25

25 do you rest?

1 MS. HOLLINGSWORTH: Yes.

2 THE COURT: Okay. In that case if we could  
3 stand for the jury we'll take a break now.

4 (Whereupon, the jury left the courtroom.)

05:41:02

5 THE COURT: You may be seated and you may be  
6 excused, Mr. Morris. Thank you.

7 THE WITNESS: Thanks.

8 THE COURT: Mr. Preston, did you want to make  
9 a motion.

05:41:14

10 MR. PRESTON: I did, Your Honor. Defendants  
11 at this point, now that the plaintiff has rested,  
12 move for judgment as a matter of law on this entire  
13 case for a variety of reasons which I can articulate  
14 now or later at the court's convenience.

05:41:31

15 THE COURT: I think it would be helpful if I  
16 could have a brief summary now and hear a more  
17 complete argument later but just so that I can have  
18 that in mind.

19 MR. PRESTON: Thank you, Your Honor.

05:41:50

20 First, Your Honor, under the first element of  
21 the *Garcetti-Pickering*, with respect to the Andrea  
22 the Cat statement the testimony is undisputed that --  
23 I don't know how much detail you want I can get going  
24 and I will talk too much, I'm sorry, but Andrea the  
05:42:10 25 Cat we think fails under the first element because it

1 is done with authorization. And both Ms. Bird  
2 admitted that and so did Mr. Morris and it's on the  
3 recordings. He knew it was going to get out. It  
4 gets out and he was fine with that. So -- she --  
05:42:29 5 that was part of her duty to talk to vets, talk to  
6 rescue groups. She admitted it was part of her  
7 duties. And so this is done in the official  
8 performance of her duties at the direction and with  
9 the authorization of the department head. So it is  
05:42:45 10 not protected speech. And the Andrea the Cat should  
11 be taken from the jury.

12 With respect to the what I have always  
13 considered based on the summary judgment motion and  
14 the complaint, the complaint was framed entirely in  
05:43:01 15 terms of leaks to the press. The jury instructions  
16 we got leaks to the press. And the example given and  
17 the only evidence of it in the record is the  
18 October 26th really should be 27th entry of Mr. Davis  
19 about the false information. Now, there has been  
05:43:23 20 lots of oral testimony building upon that.

21 That testimony about mass execution and about  
22 failing to starve all those things is false  
23 information. It was disruptive. The employer has  
24 the right to try to prevent false information as it  
05:43:43 25 is disruptive to the City and its operations from

1 being spread. And so that is the third element. And  
2 when you -- when you weigh the protected speech, the  
3 assumed or believed speech, false statements are not  
4 entitled to any protection under the First Amendment.

05:44:09

5 The City certainly has the right to -- in the  
6 balancing the court has to do we think it fails the  
7 third test. And I submit that is really the only  
8 other argument. And I understand while I was out  
9 this morning they have now put forward an amorphous  
10 statement about, what was it, some statements of the  
11 use of the gas chamber and her speech to the people  
12 she worked with and issues about the AVMA and the  
13 rescues. Well, what's -- this has never been part of  
14 the case what she is saying about the gas chamber.

05:44:25

05:44:52

15 If she is talking about statements in public  
16 hearings, well nobody believes she was doing that.  
17 There is no evidence she was doing that and which  
18 ones are we talking about. I'm very troubled if that  
19 is going to be an issue that goes forward.

05:45:08

20 So I submit, Your Honor, that as to the -- I  
21 think no reasonable jury can conclude that Mr. Morris  
22 believed that she was the source of this which was  
23 the first prong that they would have to establish  
24 under the fourth factor. No reasonable jury can  
25 conclude that it was a substantial or motivating

05:45:30

1 factor. But even if they did, no reasonable jury  
2 could conclude that the City would not have fired her  
3 in the absence of any such belief that she was the  
4 one passing this information on.

05:45:49 5 And regardless, this is a case of overwhelming  
6 evidence of a valid reason to terminate. It's built  
7 up on a head for many months, it comes to a head at  
8 around the same time as all of these events, but  
9 that's when Mr. Morris is meeting with Ms. Bird, he  
05:46:07 10 sees this relationship is completely gone and he  
11 feels now finally he has to step in and stop it.

12 If you have a supervisor, a manager, who  
13 refuses to engage with, work with her supervisor, who  
14 loathes him and can't even look him in the eye, which  
05:46:25 15 she herself admits repeatedly she could not, that's a  
16 legitimate reason to get rid of her when you have had  
17 an ongoing dialogue with her and she has done nothing  
18 to change it. So I don't think -- I think there is a  
19 legitimate reason to do this. And on that basis, the  
05:46:44 20 decision must be upheld. If you just articulate that  
21 also so I don't mess it up.

22 MR. CROWTHER: No problem. So for their third  
23 basis that she actually spoke against the gas  
24 chamber, that is an actual speech by plaintiff and  
05:47:04 25 yesterday they represented to us and the court

1 they're only pursuing a belief of I guess statements  
2 that she didn't make. So that would be a complete  
3 change of theory of claim and we would be dealing  
4 with something entirely new.

05:47:16

5 MR. PRESTON: That is not really fair to us.  
6 So that, I'm sure, is a lot more than you wanted. I  
7 apologize.

8 THE COURT: That is helpful. If I could just  
9 ask Ms. Pagel did they have their snacks?

05:47:33

10 THE CLERK: Yes.

11 THE COURT: All right. So I -- I obviously  
12 will want to hear from defendant and I would like to  
13 hear more, but I think in the interest of finishing,  
14 we'll go -- I'll take -- we'll take -- hear argument  
15 on this later. We'll go ahead with your case. And  
16 how long -- how long have we had them out? Why don't  
17 we take a 10 minute break ourselves and come back.

05:47:47

18 MR. PRESTON: Your Honor, could I just say I  
19 apologize for speaking over the court and when I was  
20 saying I hope the court didn't think I was  
21 instructing the court to be quiet. I was trying to  
22 tell my client to because he was speaking over you  
23 and then I end up speaking over you. So I am very  
24 sorry.

05:48:11

05:48:22

25 THE COURT: Thank you. I appreciate that.

1 (Recess.)

2 MR. PRESTON: Your Honor, I had not  
3 anticipated this at all but we feel very good how  
4 this ended. I've talked to my client at length and I  
06:05:36 5 don't think -- I think to take another couple of  
6 hours to put these last three witnesses on will be,  
7 if anything, cumulative. So we're willing -- we are  
8 going to rest when the jury comes in without calling  
9 any more witnesses.

06:05:47 10 THE COURT: All right.

11 MR. PRESTON: So that might give us some time  
12 to do the jury instructions without staying up until  
13 midnight again tonight.

14 THE COURT: I think it might.

06:06:00 15 MR. PRESTON: But having an opportunity, I  
16 mean if you want to do that, hold them and do it, I  
17 mean if you want to do closings I'll do closings  
18 right now, too, whatever you prefer to do.

19 THE COURT: I would like to -- I mean we have  
06:06:11 20 I think between the jury and the parties we have all  
21 invested substantial time. I would like to make sure  
22 the jury instructions are good. And so I think it is  
23 best to let them go for the day, let us make sure we  
24 get a good set, and get all of the objections  
06:06:25 25 whatever they are on the record, and, um, then have a

1 nice clean morning with --

2 MR. PRESTON: What time will we be coming  
3 back? Do you want us here 8:00?

4 THE COURT: 8:30. In the morning?

06:06:39

5 MR. PRESTON: Yeah.

6 THE COURT: Unless there are other  
7 recommendations.

8 MR. PRESTON: Whatever you want.

9 THE COURT: Let's do 8:30 tomorrow morning.

06:06:47

10 Okay. So in that case, let's get the jury back in  
11 and we'll let them know that they can leave for the  
12 day.

13 MS. HOLLINGSWORTH: Your Honor, can I tell the  
14 jury that I judged it right after all?

06:07:17

15 THE COURT: I do not think so. I do not think  
16 that would be a good idea.

17 MS. FORTSON: She had to ask. She had to ask.

18 THE COURT: I understand.

19 THE CLERK: All rise for the jury.

06:09:08

20 (Whereupon, the jury returned to  
21 the courtroom.)

22 (Whereupon, the trial continued but  
23 was not transcribed.)

24

25



**REPORTER'S CERTIFICATE**

I, Laura W. Robinson, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public within and for the County of Salt Lake, State of Utah, do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

In witness whereof I have subscribed my name this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

\_\_\_\_\_

Laura W. Robinson  
RPR, FCRR, CSR, CP

# APPENDIX 6

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF UTAH  
 CENTRAL DIVISION

In re:	)	
	)	
KAREN BIRD,	)	
	)	
Plaintiff,	)	
	)	Case No. 2:12-CV-903EJF
vs.	)	
	)	
WEST VALLEY CITY, a	)	
political subdivision of	)	
the State of Utah, KELLY	)	
DAVIS, in his official	)	
and individual	)	
capacities,	)	
	)	
Defendants.	)	
_____	)	

BEFORE THE HONORABLE EVELYN J. FURSE

March 16, 2018

Partial Transcript  
 Excerpts from Trial

Laura W. Robinson, RPR, FCRR, CSR, CP  
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 Salt Lake City, Utah 84101  
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1                   **Salt Lake City, Utah, March 16, 2018**

2                                   **\* \* \* \* \***

3                   (Whereupon, the trial was held but not  
4                   transcribed.)

5                   (Whereupon, the following is a trial  
6                   excerpt dealing with final jury  
7                   instructions.)

8                   THE CLERK: All rise for the jury.

9                   (Whereupon, the jury returned to the  
10                   courtroom.)

00:02:17 11                   THE COURT: All right. Welcome back. We have  
12                   given you all a copy of the jury instructions and I'm  
13                   going to be reading those into the record, reading  
14                   those to you and into the record shortly. You're  
00:02:33 15                   welcome to follow along. You don't have to follow  
16                   along, it's up to you. It is just there for your --  
17                   you should listen to me no matter what, but you don't  
18                   have to follow along on the written instructions.  
19                   And it's just if that's easier for you.

00:02:49 20                   And then one other housekeeping matter. I had  
21                   on two of the exhibits that you're going to -- you're  
22                   going to get all of the exhibits that have been  
23                   introduced with you back in the jury room. On two of  
24                   those during the trial I had ruled that you should  
00:03:07 25                   only -- that you should not consider them for the

1 truth of the matter. We have discussed that further  
2 and I have now ruled that you can consider all of the  
3 exhibits for the truth of the matter. So you don't  
4 need to worry about which those were but those were  
5 Exhibits 4 and 70 you can consider them just as any  
6 other exhibits.

7 All right. So with that, I will read you the  
8 jury instructions. Instruction number one, now that  
9 you have heard the evidence and are about to hear the  
10 argument, my duty is to give you the instructions of  
11 the court concerning the law applicable to this case.  
12 Your duty as jurors is to follow the law as stated in  
13 the instructions of the court and to apply the rules  
14 of law to the facts as you find them from the  
15 evidence in this case. You are not to single out one  
16 instruction alone as stating the law but must  
17 consider all -- consider the instructions as a whole.  
18 Neither are you to concern yourself with the wisdom  
19 of any rule of law stated by the court regardless of  
20 any opinion you may have as to what the law is or  
21 ought to be. You would violate your sworn duty as  
22 judges of the facts to base a verdict upon any thing  
23 but the law as I instruct you and the evidence in  
24 this case.

25 You should not take anything I say in these

1 instructions as an indication that I have any opinion  
2 about the facts of the case or what that opinion is.  
3 My function is not to determine the facts. That  
4 function is yours as jurors. Justice through trial  
5 by jury depends on the willingness of each individual  
6 juror to seek the truth as to the facts from the same  
7 evidence presented to all of the jurors and to arrive  
8 at a verdict by applying the same rules of law as  
9 given in these instructions. You must perform this  
10 duty without bias or prejudice as to any party. Our  
11 system of law does not permit jurors to allow  
12 sympathy, prejudice, or public opinion to influence  
13 their verdict. Both the parties and the public  
14 expect that you will carefully and impartially  
15 consider all of the evidence in the case, follow the  
16 law as stated by the court, and reach a just verdict  
17 regardless of the circumstances.

18 Instruction number two. The evidence in this  
19 case consists of the sworn testimony of the  
20 witnesses, all exhibits received in evidence, all  
21 facts that may have been admitted or stipulated, and  
22 the applicable presumptions that will be stated in  
23 these instructions. Statements and arguments of  
24 counsel are not in -- are not evidence in this case.  
25 When, however, the attorneys on both sides stipulate

1 or agree as to the existence of a fact, the jury  
2 must, unless otherwise instructed, accept that  
3 stipulation and regard that fact as conclusively  
4 proved.

00:06:18

5 During the course of trial, counsel has the  
6 duty to make objections when needed. You should not  
7 consider or be influenced by the fact that counsel  
8 objected to something. You must entirely disregard  
9 any evidence to which counsel objected and the court  
10 sustained the objection and any evidence that the  
11 court ordered stricken.

00:06:39

12 Do not try to do any research or make any  
13 investigation about the case on your own. You must  
14 not try to get information from any source other than  
15 what you saw and heard in the courtroom.

00:06:54

16 It's natural to want to investigate a case  
17 but you may not use any printed or electronic sources  
18 to get information about this case or the issues  
19 involved. This includes the internet, reference  
20 books or dictionaries, newspapers, magazines,  
21 television, radio, computers, Blackberries, I-Phones,  
22 smart phones, PDAs or any social media or electronic  
23 device. You may not do any personal investigation.  
24 This includes visiting any of the places involved in  
25 this case, using internet maps or Google Earth,

00:07:34



1 talking to possible witnesses or creating your own  
2 experiments or re-enactments. You must entirely  
3 disregard anything you may have seen or heard outside  
4 of this courtroom because it is not evidence. You  
5 may consider only the evidence in this case.

00:07:52  
6 However, in your consideration of the evidence you  
7 are not limited to the bald statements of the  
8 witnesses. On the contrary, you may draw reasonable  
9 inferences from the facts that you find have been  
10 proved such as seem justified in light of your  
11 experience. Any inference is -- sorry, any inference  
12 is a deduction or -- sorry, let me try that again.  
13 An inference is a deduction or conclusion that reason  
14 and commonsense would lead you to draw from the facts  
15 that are established by the evidence in the case.

00:08:07  
16 (Whereupon, the trial continued but was not  
17 transcribed.)

18 (Whereupon, the following is West Valley's  
19 closing argument and rebuttal closing.)

02:04:06  
20 THE COURT: And Mr. Preston, you may proceed.

21 MR. PRESTON: Thank you, Your Honor. May it  
22 please the court and Ms. Hollingsworth and counsel.  
23 On behalf of my clients, I want to thank you for the  
24 close attention you have paid throughout this  
02:04:20  
25 process. This is a very important case to both sides

1 and so we appreciate it, you taking the time to be  
2 here.

3 I have a few moments where I can tell you how  
4 I think the pieces of the mosaic fit together and I'm  
02:04:39 5 going to start again with three key points. They're  
6 the same three key points that I talked about in my  
7 opening, I have kind of reversed the order because  
8 that's how you'll deal with them on the special  
9 verdict form.

02:04:51 10 First, Layne Morris's decision to terminate  
11 Karen Bird was not based on free speech retaliation.  
12 And I'll explain in detail why I believe the facts  
13 show that. Second, Mr. Morris had legitimate  
14 appropriate reasons to terminate Ms. Bird,  
02:05:20 15 insubordination being the primary concern in his  
16 mind. And third, Kelly Davis did not participate --  
17 personally participate in the termination decision.

18 So, um, let's talk about the free speech  
19 retaliatory firing. Ms. Bird claims she was fired  
02:05:40 20 based on a belief, not that she actually did it, but  
21 a belief that she leaked two pieces of information to  
22 the press. First is the Andrea the cat incident; and  
23 second, is the allegation that Kelly Davis ordered a  
24 mass execution at the shelter in late October  
02:06:03 25 of 2011. Those are the two free speech issues at

1 issue here. It's not -- it has nothing to do with  
2 the AVMA guidelines and regulations on the carbon  
3 monoxide chamber, it has nothing to do with her  
4 statements at work to people about the gas chamber,  
5 as they frame it. These are the two statements and  
6 you saw that in the court's jury instruction number  
7 11.

8 In this case, Ms. Bird alleges West Valley  
9 City deprived her of her rights under the First  
10 Amendment to the Constitution when it allegedly  
11 terminated her employment because it believed she  
12 leaked information to the press about one, Andrea the  
13 cat, and two, a mass execution at the animal shelter  
14 allegedly ordered by Mr. Davis. That is what your  
15 focus needs to be. That's what she has to prove that  
16 that was the reason that the city fired her in  
17 accordance with the instructions that the court will  
18 give you.

19 I want to deal with the second alleged free  
20 speech statement, the mass execution first. The  
21 first question you will be asked in the special  
22 verdict form that you have to answer questions on is  
23 did Mr. Davis order a mass execution in October 2011.  
24 So is that a -- is this statement that was allegedly  
25 passed onto the press a true statement or a false

1 statement that Mr. Davis ordered this.

2 So let's look at some of the evidence on that.

3 You recall the phone call from the reporter came in  
4 the morning of October 27th, the day before there was

02:07:52

5 this roll call meeting. And what took place in that  
6 roll call meeting, if you look at Exhibit 71, page

7 419, that is the key date in the log, and Mr. Davis  
8 explains what happened that day. And he states that

9 they had a number of animals, he goes through what

02:08:16

10 his normal questioning is. He said it was the second  
11 highest animals since moving into the new facility.

12 Said we need to get it down to a reasonable number.

13 He doesn't say we need to do that by a mass

14 execution. He asks -- talks to Ms. Bird about the

02:08:35

15 due out list. So that's where they each week this

16 committee goes over the animals, tries to determine

17 how long they have been there, what are the chances

18 of adoption, how is the animal doing, and they

19 discuss that. And she goes through eventually and

02:08:52

20 talks about a number of dogs that are on that. And

21 she gives explanations which he finds reasonable and

22 accepts. Two border collies, some labs, and thinks

23 there are chances to move them. Great. They're not

24 moved to the euthanasia list. He asks her for the

02:09:11

25 list. Karen Bird puts together the euthanasia list.

1 The final euthanasia list generated by Karen, and  
2 approved by Karen, was a total of eight cats and one  
3 dog. Two of the cats on the list were for time/space  
4 reasons, the remainder were either feral or sick.

02:09:33

5 The one dog on the list was for time/space.

6 This is the normal process they go through.  
7 Layne Morris, you heard him testify, that this would  
8 be an accumulation. This isn't a daily number but an  
9 accumulation of a week or two animals that are being  
10 euthanized. So what do you find absent in there? No  
11 reference to a mass execution. We're talking about  
12 nine animals out of 156. Karen puts together the  
13 list. The animals she doesn't want on the list are  
14 removed from the list. And that's the list that is  
15 approved.

02:09:49

02:10:12

16 So Karen Bird claims he says that all the  
17 time, refers to a mass execution of animals. Now,  
18 Ms. Bird has taped hours and hours and hours and  
19 hours of conversations. What about this key roll  
20 call meeting? Where is that tape where he allegedly  
21 said "I order a mass execution"? That tape doesn't  
22 exist. Ms. Bird says oh, the recording didn't work  
23 that day. How convenient. You know Kelly wants to  
24 save these animals, you could see that from how he  
25 dealt with this, he was trying to save animals. He

02:10:34

02:11:05

1 wasn't just killing them right and left as some  
2 people have alleged here. The other evidence they  
3 have for this is what Michelle Johnson said, the  
4 volunteer. And you will recall I submit that  
02:11:20 5 Ms. Johnson is not a credible witness. She made  
6 false statements to Mr. Morris. We do have that  
7 recording. That's Exhibit 52 at the five minute  
8 forty-two second to the six minute twenty-seven  
9 section of that Exhibit 52. And could we have --  
02:11:47 10 switch this to Brandon and let him play that little  
11 clip for us.

12 (Whereupon, Exhibit 52 was played for the  
13 jury.)

14 MR. PRESTON: It's not something that I'm  
02:12:51 15 saying, these are not facts coming from me. Go back  
16 to my slide. So she told Layne Morris she was not  
17 spreading this information. And then we showed you  
18 Defendant's Exhibit 100 which was a post she did on  
19 October 26. And this blows up, it is a little tough  
02:13:14 20 to read, but "the big man says bring down the numbers  
21 now. He wants them dead today." That was what she  
22 was saying. So she is not a credible witness. Do  
23 you remember I also said that, you know, this is  
24 available for the public? She says oh, no, it is  
02:13:29 25 private. Only my friends can see it. I said well,

1 do you know Brandon Crowther? Oh, yeah, he is a  
2 friend of mine, he works in a rescue shelter. And I  
3 said, well, let me induce you to Brandon Crowther,  
4 he's my partner in this firm. I mean she had an  
5 answer and then when I said that oh, I must have put  
6 it on public then. You know, I just submit she is  
7 not a credible witness on this point. And how does  
8 she say she heard it? I was walking down the hall  
9 and I just overheard Mr. Davis say loudly I want a  
10 mass execution that day. Again, I'll leave it to you  
11 to decide who was telling the truth in this.

12 And finally, Mr. Morris and Mr. Davis both  
13 assert it is a false statement. He never ordered  
14 that. And there was no mass execution. There were  
15 only nine animals accumulated over an extensive  
16 period of time, a week maybe two weeks, that were --  
17 that were put down that day. So that is not a true  
18 statement. So is it false? Yes. The next question  
19 that you need to think about with respect to the mass  
20 execution is did Layne Morris believe Karen leaked  
21 this statement to the press? That's what you have to  
22 have proven to you by a preponderance of the evidence  
23 that Layne Morris believed that she leaked -- that  
24 Karen Bird leaked that information to the press. And  
25 when you look at what Mr. Morris said, he said I

1 wasn't spending time investigating who said these  
2 things, that wasn't my concern. His concern was,  
3 what he wanted to stop, was false information going  
4 out. He didn't say it was Karen. He never formed  
5 any opinion on that. He was very adamant about that  
6 point. What he said, remember he said what he thinks  
7 could have happened, he doesn't think it is malicious  
8 it could be innocent, it could come from anybody. Do  
9 you remember he mentioned the telephone game.

10 Somebody says something that gets passed on and by  
11 the time you get a few down the row it becomes a very  
12 inflammatory statement. That is -- so his way to  
13 stop this is he is talking to Karen in that meeting  
14 and to Kelly in October 31 how do we -- how do we  
15 deal with this, how do we make sure as an  
16 organization the right message is being communicated  
17 to our shelter, to our volunteers, so that we don't  
18 have this problem. He said it could have been Kelly,  
19 it could have been any employee, he said it could  
20 have been me. I say something and it gets blown out  
21 of proportion. There is no evidence that Layne  
22 Morris believed it and he told you he did not believe  
23 that she was doing that. That wasn't his concern.  
24 That wasn't what he was looking at.

25 Then the question you have to ask is if so, if



1 this was a belief that he had, was it a substantial  
2 or motivating factor for the decision to terminate.  
3 And Mr. Morris adamantly denies that that had  
4 anything to do with his decision, he is the final  
02:17:09 5 decision maker, he is the one who made the decision  
6 alone as to what would happen here. And he had other  
7 reasons to terminate her, legitimate reasons, valid  
8 reasons, and we'll talk about that in a moment.

9 And let's look at the Andrea the cat  
02:17:27 10 information that got out. Does Mr. Morris believe  
11 Karen leaked this statement to the press? There was  
12 nothing to leak. You remember he said the shelter  
13 made a mistake with Andrea. He took that as his  
14 responsibility. He said, we made a mistake, I made a  
02:17:50 15 mistake and we pay the price for it. He specifically  
16 authorizes Karen to go out to the vets and to the  
17 rescues and to get that story out there because that  
18 might save that cat.

19 And if we could switch it to Brandon, and  
02:18:09 20 Brandon if you could show us Exhibit 90, just the  
21 transcript, we won't play everything. And let's go  
22 to -- let's go to the bottom of the third page.  
23 Ms. Bird talks about getting it to a rescue. Going  
24 over to the next page, they're going to get the story  
02:18:44 25 out. This is Ms. Bird talking. And then of course

1 the rescue they would probably get a story out to try  
2 to find it a home because that's how rescues get  
3 adoptions and get publicity to come in to find the  
4 homes. You get it to the vet and the rescues,  
02:19:00 5 they're going to publicize it because that gets  
6 donations for them. And Mr. Morris, I'm okay with  
7 that. We can survive that. Ms. Bird, skipping down,  
8 I just don't want it to be like I'm causing problems.  
9 Mr. Morris yeah no, I have got no problem with that  
02:19:23 10 Karen. I think that's a well deserved thing for this  
11 cat. So what was there to leak? He authorized her,  
12 tells her get it -- get the story out, talk to the  
13 vets and the rescues knowing she tells him this will  
14 become public. Rescues will get it out. And he says  
02:19:43 15 I'm fine with that. So he didn't believe she was  
16 leaking anything to the press and that's what you're  
17 asked to determine. So then the question is was that  
18 belief a substantial or motivating factor in the  
19 decision to terminate. In his mind, is that a  
02:20:04 20 substantial factor, a factor that motivates him to  
21 want to terminate her? He is the one who authorizes  
22 it. He is not firing her for that and he  
23 specifically testified on the stand that he was not.  
24 So if though you were to find that, then we  
02:20:27 25 have a defense, the employer has a defense. That's

1 set forth in jury instruction number 14. And that  
2 instruction states, "West Valley City asserts as a  
3 defense in this case that the City would have  
4 terminated Ms. Bird even in the absence of the speech  
02:20:45 5 at issue. If you find that West Valley City proved  
6 by a preponderance of the evidence that the City  
7 would have made the same decision and terminated  
8 Ms. Bird's employment, even in the absence of the  
9 speech issue, you must return a verdict for the City  
02:20:59 10 and Mr. Davis."

11 So that gets to the issue of why Layne Morris  
12 terminated Ms. Bird's employment. And he explains it  
13 in detail why he terminated her. He had been  
14 concerned about her insubordination for a long time.  
02:21:25 15 He said it was based primarily on my personal  
16 observations. When he is in these meetings in  
17 October and late October and early November, he sees  
18 that this relationship has gotten to the point where  
19 she can't even work with Mr. Davis. She can hardly  
02:21:42 20 stand to be in the room with him. She loathes him.  
21 When Mr. Davis asked her a question, she looks over  
22 to Mr. Morris and responds and has a difficult time  
23 engaging with him. He says this relationship is  
24 broken. Isn't it interesting you heard a couple of  
02:22:03 25 times Shirlyne George in her meeting with Karen Bird

1 on November 3, three days after this meeting, where  
2 Layne Morris observed this, and what does she say six  
3 times? I can't even stand to look at him. There is  
4 a personality conflict here, for whatever reason,  
02:22:27 5 that has -- it has nothing to do with a perception  
6 that she's leaking information to the press about  
7 Andrea the cat or a mass execution, they are like oil  
8 and water. Layne Morris said they're like two  
9 planets and they won't get in the same orbit. She  
02:22:48 10 even confirms to him on November 9th that the  
11 relationship is broken. He says this relationship is  
12 broken. She does not deny it, she says yes but we  
13 believe it is broken for different reasons. It is a  
14 broken relationship. It is causing division in the  
02:23:09 15 animal shelter and Mr. Morris steps in to do  
16 something about it. She could not work with Davis.  
17 She tells Ms. George the same thing that's  
18 Defendants' Exhibit 93 and as I said, she admits the  
19 relationship is broken.

02:23:32 20 You can also look at Exhibit 70. And if we  
21 could switch to Brandon, and Brandon if you could  
22 bring up Exhibit 70 and go to the third page. Now,  
23 this is the 2005 investigation that Shirlyne George  
24 did. As the court instructed at the outset today,  
02:23:56 25 you can now accept this document for the truth of the

1 matter stated therein. If you go down to the second  
2 half, you heard a lot of some testimony and  
3 allegations about Tess Hartwell and how supportive  
4 she was of Karen. These are complaints about Karen  
02:24:20 5 in her favoritism of Tess. Karen favors Tess. I  
6 have seen her reaction when people complain about  
7 her. Another statement, we are all afraid to express  
8 an opinion or complain about something or make  
9 suggestions because if Karen does not like it, we all  
02:24:36 10 pay. We just quit bringing up issues to keep the  
11 peace. Third from the bottom, Karen shows blatant  
12 favoritism. She is degrading in her talk, she  
13 questions and reprimands in front of others. I  
14 reported something that one of her favorites had done  
02:24:56 15 and Karen then had this person follow me around and  
16 critique my work. She then rode my butt for two  
17 weeks.

18 Go to the next page, Brandon, if you will.

19 Second point. I have seen Karen stomp her feet and  
02:25:13 20 clinch her fists when she gets mad to the point that  
21 her face gets all red like a 10 year old. Go down to  
22 the bottom, third from the bottom. Every one is  
23 scared of her. When she is in a bad mood you want to  
24 run and hide.

02:25:30 25 If you go to the last page, last paragraph,

1 first couple of lines there, Shirlayne reports to  
2 Paul Isaac, Tess is ruthless. She is protecting  
3 Karen as if she were her young. I did not even  
4 include some of the things that she said about others  
5 because it was obvious she was trying to discredit  
6 those that don't seem to be on Karen's perceived  
7 favorite list.

8           So they want to use Tess in absentia and  
9 Ms. Hollingsworth in her closing planted the seed in  
10 your mind that she didn't want to come here because  
11 she is afraid to lose her job. You heard Mr. Davis  
12 said he promoted her. She still works there. The  
13 plaintiffs subpoenaed her and they chose not to call  
14 her. So I reject her suggestion to you there is no  
15 evidence in the record that she was afraid of her job  
16 and that's why she didn't sit on the stand. She was  
17 subpoenaed, they chose not to call her. But what  
18 this does is it shows longstanding problems with  
19 Ms. Bird and her employment. This is, of course,  
20 backed up by the 2011 investigation and that's  
21 Defendants' Exhibit 75 and 76. 75 is the handwritten  
22 notes Shirlayne George did. 76 is the typewritten  
23 notes. And they contain a lot of, again, complaints  
24 against Karen. That's the bulk of the complaints.

25           Let's talk for a moment about some of the

1 defenses Ms. Bird has offered. They have said  
2 repeatedly throughout the trial that she had never  
3 had any notice that she had problems as an employee.  
4 No one put her on notice. Look at Defendants'  
02:27:38 5 Exhibit 71, Davis's log. Lots of times he documents  
6 talking to her about issues. Look at the 2010  
7 performance evaluation. A year before she is  
8 terminated, puts her on notice of things that need  
9 improvement. Look at the Memorandum of Understanding  
02:28:00 10 that Mr. Davis wrote at the same time. Puts her on  
11 notice of problems that he thinks she is undermining  
12 his authority. Then you have Mr. Davis or  
13 Mr. Morris, excuse me, talking to her in January of  
14 2011 saying, you know, Kelly really saved your job.  
02:28:22 15 I was ready to initiate discipline and he said I want  
16 to give her another chance, I want to give her an  
17 opportunity. Mr. Morris said he talked to her at  
18 length about these issues. She herself admitted that  
19 after that event she knew her job was in jeopardy.  
02:28:42 20 So to say that she didn't think she had any notice  
21 about her problems is inaccurate. And remember in  
22 the opening when Ms. Hollingsworth said if you don't  
23 remember anything else remember that she never  
24 received any discipline under the personnel file  
02:29:01 25 policy. Well, let's look at that policy for a

1 moment. This is Exhibit 2, and Brandon if you could  
2 bring that up, please, to the page. Actually, I  
3 think I have it here, just a second. I'll just bring  
4 it up here, sorry, so we can switch it back to me.

02:29:25 5 Thanks, Lindsey.

6 This is the page on the personnel policy that  
7 was shown to you as Plaintiff's Exhibit 2. This is  
8 the section I want you to look at. "Employees whose  
9 conduct constitute grounds for disciplinary action  
02:29:41 10 are subject to one or more of the following." Now,  
11 it doesn't say you have to go through these  
12 progressively. You can do one and jump to four. You  
13 can go straight to four depending on the  
14 circumstances. But look at number one. Informal  
02:29:57 15 warning. That is a form of disciplinary action.  
16 What does that consist of? An oral or informal  
17 written warning. So an oral warning is discipline  
18 that is documented by the department. These things  
19 are documented and kept by the department.

02:30:17 20 She received numerous warnings and  
21 discussions that go on for a long period of time. So  
22 to say that she has no notice, I mean you have heard  
23 these gentlemen testify they worked and worked with  
24 her. You heard Shirlayne testify she counseled her  
02:30:37 25 frequently about these issues, what she needed to do,



1 what she could do, what Kelly needed to do. Layne  
2 says I talked to them separately, I had them both in  
3 my office. I talked to them continually and it  
4 increased and increased over time. And yet she says  
5 I had no idea there were problems.

6 Now what I warned you at the outset that they  
7 would try to shift the focus to Kelly Davis. Well  
8 Kelly Davis had problems too, he didn't get  
9 terminated. It is an apples to oranges comparison  
10 for several reasons. Yes, the 2009 investigation  
11 created significant concerns about his anger  
12 management and Shirlayne George sat down with him and  
13 told him -- warned him if it continued his job was in  
14 jeopardy. He said he was humble, he received her  
15 advice, and he said I'm going to work on it. And he  
16 did work on it as shown by the 2011 investigation,  
17 two years later, there were not these complaints.  
18 Shirlayne George said he was trying to do better.  
19 Layne Morris said he improved. He was given another  
20 chance and he improved. He was receptive to her  
21 counsel. The difference is Karen, she may change for  
22 a little while, but she didn't fundamentally change  
23 even though she had notice of these insubordination  
24 issues. That is the key difference and it's backed  
25 up by this CD that Ms. Bird gave to Shirlayne George

1 in November, early November of 2003. She said here  
2 is a tape I have of a meeting on October 12th, 2011 a  
3 few weeks earlier. Listen to it. It shows just how  
4 mean and belittling and bullying Mr. Davis is for me.  
02:32:40 5 Shirlayne listens to an hour of this. She says Karen  
6 he is just trying to help you. He is pointing out  
7 things you need to do. She has this perception  
8 that's why she can't stand him. Anything he says she  
9 just tunes out. You can't have a manager doing that  
02:32:58 10 to her supervisor. It just cannot continue. As  
11 Layne Morris said it continued too long. But this is  
12 interesting. They have that recording. Did they  
13 introduce it into this court? You can bet if there  
14 was anything on that recording that showed Kelly  
02:33:23 15 Davis was bullying, intimidating, harassing, abusing  
16 Karen Bird you would have heard it. Did they play it  
17 for you? Did they play a moment of it? No. Now  
18 think of this. Karen Bird recorded hours and hours  
19 and hours and hours of recordings. Roll call  
02:33:50 20 meetings, one after the other. You have got a tiny  
21 fraction of the hours and hours of recordings she  
22 made. Have they played from this huge library a  
23 single snippet of a single recording where Kelly  
24 Davis was belittling or bullying? She is complaining  
02:34:14 25 about it daily. You haven't heard a single recording

1 that shows that. This was a critical moment for  
2 Shirlayne George and Layne Morris. Layne Morris says  
3 oh, she has a recording of what he has done. Great,  
4 I want to hear it. I want to see if there is  
5 something to this. I haven't seen him be that way,  
6 but if there is something there and you can bet she  
7 is recording it secretly, probably hoping she can get  
8 something over the months, he said let me hear it.  
9 There is nothing there. That shows he is trying to  
10 help her. You have to take what Karen Bird says with  
11 a grain of salt, maybe more than a grain. Her  
12 perception is such that it doesn't correspond to  
13 reality. I don't know why but this is, I think, a  
14 fundamental problem with her case. She is claiming  
15 throughout months that Kelly is rude to her and  
16 belittles her. She wants him gone. Kelly saves her  
17 job. I want to give her another chance, continues to  
18 work with her. On October 12th, 2011, Shirlayne  
19 George, Layne Morris listened to that, yeah he is  
20 trying to work with you, he is trying to help her.  
21 Even then he is trying to help her. That has nothing  
22 to do with free speech. This is two people at  
23 loggerheads and one of them is trying to communicate,  
24 is willing to change, and the other one even in this  
25 courtroom says I did nothing wrong. I was never

02:34:34

02:34:55

02:35:27

02:35:51

02:36:12

1 insubordinate. That is not an accurate picture. But  
2 again, that has nothing to do with free speech. But  
3 the focus is oh, it is Kelly Davis, he is just mean,  
4 aggressive, angry guy. Where is the recording? They  
5 claim Ms. Bird was a model employee.

02:36:44

6 Ms. Hollingsworth in her opening said she is the type  
7 of employee we should all aspire to be. You might  
8 ask yourself if you would want her as a co-worker or  
9 your supervisor or your subordinate. She undermines

02:37:11

10 Kelly Davis, she secretly records conversations  
11 without telling anybody, even her own co-workers.

12 She admits she is doing it at least at the end for  
13 litigation purposes. That tells you a lot about

14 Ms. Bird. She refuses to work with her supervisor.

02:37:36

15 She claims she does nothing wrong. Claims that she  
16 is never subordinate. She never recognizes her

17 problems. Now this is very important. Layne Morris  
18 spent all this time counseling with her. So did

19 Shirlayne George. Shirlayne George said it was like

02:37:56

20 butting my head against the wall trying to work with

21 her. I would say well try this, do this. Let's try

22 to solve this this way. No. The only way to solve

23 this, according to Ms. Bird, was to get rid of Kelly

24 Davis and get me a supervisor I liked or make me the

02:38:14

25 supervisor. That's what's going on here. Layne

1 Morris has these meetings with her November 1,  
2 November 9, November 22nd in the pre-disciplinary  
3 hearing. I asked him, how did she respond to being  
4 told there is all these problems? He said she never  
02:38:30 5 once recognized she was the problem or said she loved  
6 this job like she says and I'm sure she did, she  
7 loves the animals, nobody is questioning that. But  
8 why didn't she then say when she knew her job is in  
9 jeopardy 11 months before give me another chance.  
02:38:52 10 Why didn't she say to Mr. Morris, you know, I'm  
11 really sorry for everything that has happened. I'm  
12 going to turn over a new leaf. I'm going to change.  
13 He doesn't make a decision until he has met with her,  
14 until he has got the investigation, until he has  
02:39:09 15 listened to the take and until he has heard her  
16 story. When you start a disciplinary process that  
17 doesn't mean that you have determined as Ms.  
18 Hollingsworth said that you're going to discipline  
19 someone. I don't care what Paul Isaac said. Paul  
02:39:23 20 Isaac is not the guy who makes the decision. Layne  
21 Morris is. And Layne Morris said I feel there is  
22 something wrong. I'm going to start a disciplinary  
23 process because that means I will get material and I  
24 can evaluate it. Based on my personal observation,  
02:39:41 25 this is not working. I got to do something. So get

1 me the information. Great, you're doing an  
2 investigation, Ms. George, I want to see it. Oh, you  
3 have a CD? Let me listen to it. I want to hear what  
4 Ms. Bird has to say. And only then, when he has all  
02:39:58 5 of that information, does he at the end of November  
6 does he make the decision one to discipline and two  
7 to terminate. That is due process. Throughout any  
8 point in that process Ms. Bird had the opportunity of  
9 saying give me another chance, I'm going to do X, Y  
02:40:16 10 and Z. She never does it. We all feel badly for  
11 her. But ladies and gentlemen, you get the chance,  
12 you have the opportunity and sometimes there are  
13 consequences to your actions. Nobody wants to fire  
14 her. She was a star employee. She had great  
02:40:38 15 attributes. Ms. Hollingsworth said well, I even got  
16 Mr. Morris to say she was a star employee.  
17 Mr. Morris said that absolutely, I thought she was a  
18 star. He was a big supporter. She comes -- Karen  
19 comes to Layne in -- when the new building they move  
02:40:58 20 into it, she says is my job in jeopardy? Of course  
21 not, Karen, we need you. We need you at this  
22 shelter. Even at the end he is telling them in that  
23 November 9th meeting, actually it's the November 1st  
24 meeting, hey, I need both of you folks there. How do  
02:41:17 25 I resolve this? That's what Shirlyne George asked

1 on November 3rd? How can I resolve this Karen? How  
2 can we make this work? I can't even stand to look at  
3 his face. I can't even stand to look at his face.  
4 How do we resolve it? I don't know what resolution  
02:41:35 5 there is. Why not say ask him to do this, this, and  
6 this, I'll do this, this, and this. Give me a chance  
7 to solve -- to salvage this. She does none of that.  
8 Him or me, that's what she put Layne Morris into a  
9 position of. I can't work with him, I refuse to work  
02:41:58 10 with him, I can't stand him. What are you supposed  
11 to do? You can't let this continue. And their whole  
12 claim rests on the fact that it took place while  
13 these other events are going on and so that was the  
14 reason she was terminated. Free speech. She never  
02:42:22 15 said I will do better. The drama ceased when she was  
16 gone.

17 So let me show you an exhibit that we  
18 stipulated to. Exhibit 40. Brandon, if you could  
19 bring that one up and we'll switch the panel to him.  
02:42:39 20 This is Susie Ternoois, a letter she wrote to  
21 Shirlayne George when Shirlayne George was doing this  
22 later investigation December for the Workforce  
23 Services. Do you remember she said which  
24 investigation are you talking about? So this is like  
02:42:58 25 the second one. This is a pretty interesting letter

1 about her concerns about Karen Bird. At the very  
2 bottom it says, I have to add that since Karen has  
3 been gone, rest staff has all changed. It is working  
4 more as a team. And that tension that had been there  
5 between the officers and the shelter sides is getting  
6 better.

7 Kelly Davis testified we have to get the  
8 cleaning done, we have to do this by 10 a.m. But  
9 Ms. Bird says it can't be done, I need more staff.

10 Do you remember when they played her -- or they  
11 showed him his testimony at the EAB hearing? He said  
12 all those excuses that it can't be done, I can't do  
13 it were gone the. The problem ceased once Karen was  
14 done because the rest of the people fell in line and  
15 did what Kelly wanted. She resisted that. These are  
16 the tensions that were building up. If I can go back  
17 to my screen, please.

18 The third point I wanted to make is Kelly  
19 Davis did not participate in the decision. Kelly  
20 Davis hired her, he promoted her, he allowed her to  
21 be insubordinate for years. He saved her job and  
22 gave her a second chance. The old saying no good  
23 deed goes unpunished now he has been a defendant for  
24 six years.

25 They are seeking punitive damages for



1 malicious conduct against Kelly Davis. That's what  
2 Ms. Hollingsworth has asked you to do. He wasn't  
3 even involved in the decision because Layne Morris  
4 said I've got to step in and fix this. He never even  
02:45:09 5 contacted Kelly, got input from him. He testified  
6 Kelly never recommended I terminate her. They want  
7 to say that Kelly was upset, he wanted to stop these  
8 leaks. Well, who wouldn't when your name is being  
9 plastered through out the community as being somebody  
02:45:25 10 who is killing animals right and left with no regard  
11 for them. But Kelly doesn't make the decision.  
12 Layne does. And he's the one who initiates it and  
13 who follows it through and he doesn't make the  
14 decision until November 22nd.

02:45:47 15 Jon Andus. I think the first and the last  
16 witnesses you heard in this case are appropriate  
17 bookends. Jon Andus was a volunteer. He was -- you  
18 saw how combative and defensive he was on the stand.  
19 I think you saw how he embellishes the truth.

02:46:10 20 Perfect example, we're in this meeting and Kelly  
21 wants a list of items to be purchased and Karen  
22 writes it and slides it to him. And according to Jon  
23 Andus, Kelly Davis wadded that up and threw it at her  
24 face. And you saw what Ms. Bird said happened. He  
02:46:32 25 slid it back across the table. Jon Andus is not a

1 credible witness. He has some agenda here, he is  
2 going after somebody. But several times he told us  
3 oh, I have nothing against Kelly Davis. Me thinks he  
4 protests too much as Shakespeare would say.

02:46:57

5 What was Kelly Davis's explanation of this? I  
6 told the employees I needed it in a memo which lists  
7 the items to be purchased, I needed it prioritized,  
8 and I needed the amounts so I could determine when  
9 the request comes to me whether I would have the

02:47:14

10 funds to purchase. That is what a responsible  
11 manager who is trying to live within his budget does.

12 They make it sound like he is just some bully. He  
13 was doing what he should be doing. But again, this  
14 gets perceived as something that it was not. Jon

02:47:38

15 Andus said that in his EAB hearing he says, do you  
16 know why she was terminated? Oh yes, I do. And he  
17 says, Kelly told me she was the mole and that's why  
18 she is being terminated. That is November 10th.

02:47:58

19 Kelly knows nothing about it. Is it credible to you  
20 that a police officer of 20 plus years service who  
21 has been a manager for years, who has been an officer  
22 rising to the rank of lieutenant, would go to a  
23 volunteer and talk about the personnel managers --  
24 problems of one of his subordinates. You don't do

02:48:16

25 that. You don't spread information like that. Kelly

1 Davis absolutely denies it. He did not make that  
2 statement. But on the stand, Mr. Andus doubles down.  
3 So not only did he say that, but then later in this  
4 day now none of this is in the Post-It Note that he  
02:48:36 5 posted that he testified that he tried to put  
6 everything in so he wouldn't forget it, but later in  
7 the day he hears Kelly Davis say I'm going to do  
8 everything I can to get rid of her. So six years  
9 later suddenly he comes up with another  
02:48:53 10 embellishment.

11 Not even Ms. Bird believes she was fired for  
12 her free speech issues. Remember, when I had her  
13 review her deposition, I said why did Kelly Davis  
14 want to get rid of you? He is the guy you sued, why  
02:49:20 15 did he want to get rid of you. He gave several  
16 reasons. He wanted to get rid of me because his  
17 secretary was forced to resign after I accused her of  
18 theft. Mr. Davis wanted to get rid of me because I  
19 was disagreeing with him. Mr. Davis wanted to get  
02:49:37 20 rid of me because I do not want to use the CO  
21 chamber. Another reason he wanted to get rid of me  
22 was because after my car -- while I was off work  
23 after my car accident, some of Hitler  
24 responsibilities he had to take over and do. Now  
02:49:56 25 this deposition is taken in 2014, she has heard John

1 Andus and all this stuff, not once did she say he  
2 fired me because he believed I was leaking  
3 information to the press. Not even she thinks it's a  
4 substantial or motivating factor for her termination.  
02:50:20 5 How can you find that if she doesn't think it?

6 Brandon can you bring up the special verdict  
7 form, please. I want to show you the verdict form  
8 you're going to have to fill out and talk to you for  
9 just a moment about that. So as I indicated, the  
02:50:44 10 first question you will be asked to respond to is did  
11 Kelly Davis order a mass execution at the West Valley  
12 City Animal Shelter in October 2011. I submit that  
13 allegation is false and the answer should be no.

14 Second, do you find that Karen Bird has proven  
02:51:05 15 by a preponderance of the evidence that West Valley  
16 City's belief that she leaked information to the  
17 press regarding Andrea the cat and/or a mass  
18 execution at the animal shelter allegedly ordered by  
19 Kelly Davis was a substantial or motivating factor in  
02:51:22 20 the decision to terminate her employment? I submit  
21 that for the reasons I told you that the answer  
22 should be no. If the answer is no, do not answer any  
23 remaining questions. Have the foreperson sign this  
24 form and turn it in.

02:51:42 25 If you do find it was a substantial or

1 motivating factor, you will be asked to decide which  
2 one was it or was it both of them. And then you will  
3 be asked the question on question four, this is on  
4 the second page, do you find that West Valley City  
02:51:59 5 has proven by a preponderance of the evidence that it  
6 would have terminated Karen Bird's employment in the  
7 absence of any belief that she leaked information to  
8 the press regarding these two incidents? Absolutely  
9 they had grounds to terminate her. Had nothing to do  
02:52:16 10 with this. If that answer is yes, do not answer any  
11 remaining questions and have the foreperson sign the  
12 verdict form and return it. I submit that the  
13 farthest you need to go in this special verdict form  
14 is the fourth question. And I submit it should be  
02:52:38 15 done after dealing with the second question.

16 Credibility of witnesses. For you to find  
17 that the City acting through the final decision-maker  
18 who was Layne Morris terminated her because of a free  
19 speech retaliation motive, you have to find that  
02:53:13 20 Kelly Davis was lying, that Shirlayne George was  
21 lying, and that most importantly that Layne Morris is  
22 lying to you. Layne Morris is not a man who would  
23 lie. Look at his character. He has been a public  
24 servant. He has served this country and the citizens  
02:53:36 25 of West Valley City his entire life. You don't

1 become a First Class Sergeant in the Green Berets  
2 unless you are a leader and a man of integrity.  
3 There is a movie out called *12 Strong*. It's about  
4 one group of the first special forces responders that  
02:54:02 5 was sent to Afghanistan right after 9-11.

6 MS. HOLLINGSWORTH: Your Honor, I'm going to  
7 object to improper vouching about the --

8 THE COURT: You may proceed.

9 MR. PRESTON: Thank you, Your Honor. Kelly  
02:54:18 10 Davis -- I'm sorry, I got off here. Layne Morris was  
11 one of the first responders in the Green Berets to go  
12 out there as a special forces man to go to  
13 Afghanistan. Now, he is not as tall, doesn't have as  
14 much hair, and he is not as handsome as Chris  
02:54:40 15 Hemsworth who stars in that movie, but Layne Morris  
16 is the real deal. Did you see how emotional he got  
17 when I asked him about his oath to defend the  
18 Constitution? He knows by firsthand what it is to  
19 live and fight against a country, a leadership, a  
02:55:04 20 government, that doesn't have these constitutional  
21 rights. The Taliban. And he put his life on the  
22 line doing that. But now you're asked to find that  
23 he would violate Karen Bird's Constitutional rights  
24 and he would lie in a United States Courtroom about  
02:55:25 25 it. That is not what this case -- that is not why

1 she was terminated. I'm going to play you a brief  
2 clip which shows why she was terminated.

3 (Whereupon, an audio clip was played for the  
4 jury.)

02:55:57

5 MR. PRESTON: He is just -- Kelly Davis is  
6 just trying to show me he is the boss. Layne Morris  
7 says Karen, he didn't say it rudely, he said Karen,  
8 he is the boss. I know that. That's why she was  
9 terminated. She refused to accept Kelly Davis as her  
10 boss. Thank you very much for your time and  
11 attention.

02:56:15

12 THE COURT: Ms. Hollingsworth? Do you need to  
13 switch the computers Ms. Hollingsworth or --

14 MS. HOLLINGSWORTH: No.

02:56:31

15 MR. PRESTON: Let me unplug my stuff.

16 MS. HOLLINGSWORTH: Ladies and gentlemen,  
17 Mr. Preston talked to you about a recording that  
18 Ms. Bird had presented to Ms. George that was from  
19 October 12, 2011. And on October -- from that  
20 recording on October 12th, Ms. George determined that  
21 Mr. Davis was simply trying to help Ms. Bird. So I  
22 want to ask you what happened then after

02:57:10

23 October 12th? And we have Tess Hartwell's e-mail to  
24 Ms. George saying -- as of November 1st saying

02:57:32

25 Kelly's bullying of Ms. Bird has gotten so much worse

1 in the last two weeks. And what happened was the  
2 articles came out in the newspaper about Andrea the  
3 Cat and then a reporter called Mr. Davis about a mass  
4 execution. And to the point that Mr. Morris had  
02:57:57 5 authorized the leaks to the press for -- about Andrea  
6 the Cat that simply is not correct. What he said  
7 was, you can go to the vet and you can talk to the  
8 vet and I'll accept the consequences. But he  
9 specifically said in this November 1st meeting, I  
02:58:21 10 don't have the recording up but I have the transcript  
11 from the meeting and you heard this clip where he  
12 said, and he was talking to Michelle in that  
13 November 1st meeting, he said, I explained to Karen  
14 that it's her job to make it stop. She needs to be  
02:58:35 15 telling that story like she did to Channel 4 the  
16 other day. She needs to be telling our story and  
17 defending us and giving out the good information like  
18 a loyal employee.

19 So Mr. Morris was okay when he thought the  
02:58:51 20 Andrea the Cat story through the vet might be about a  
21 miracle cat, but the debate became about the gas  
22 chamber and its effectiveness and its use by the  
23 shelter. And then there was subsequent information  
24 out of the shelter about a mass execution. And so  
02:59:13 25 the debate was not positive as Mr. Morris had hoped



1 and he clearly thought that Ms. Bird had gone beyond  
2 what he had authorized to talk to the media herself.

3 Mr. Preston said there's -- there's not --  
4 there wasn't any statements about a mass execution on  
02:59:41 5 -- in late October. We have many sources to support  
6 that although we don't and wish we had the recording  
7 of the October 24th meeting. Obviously, if we had  
8 the recording and it disproved the allegations then  
9 defense would have brought it up. Ms. Bird testified  
03:00:03 10 that recording was lost or inadvertently deleted.  
11 But what we have from that meeting was Mr. Davis's  
12 notes which reflect that he said the numbers in the  
13 shelter were high and that he needed to get them  
14 down. We have Michelle Johnson's simultaneous  
03:00:27 15 Facebook post saying the big man says we got to get  
16 the numbers down, he wants them all dead. We have  
17 Jon Andus who testified that he was in that meeting  
18 and he heard the mass execution statement made in  
19 that meeting. Not only that, he had heard it several  
03:00:45 20 times before.

21 So we have several sources that confirm what  
22 was said in that meeting not to mention the fact that  
23 a reporter called Mr. Davis on an anonymous tip and  
24 Mr. Davis's notes reflect that he didn't say that's  
03:01:03 25 not true, he said I'm concerned about how this

1 information is getting out. So there is all kinds of  
2 information to support that that's what was said.  
3 And as counsel pointed out, on your verdict form the  
4 very first question you're asked is, "did Kelly Davis  
03:01:20 5 order a mass execution in October of 2011?" And  
6 while that statement doesn't go to the liability that  
7 you are to determine, it's something that figures  
8 into what the court has to decide later.

9 Counsel talked about that Mr. Morris wouldn't  
03:01:53 10 lie about these motivations. What we have is  
11 recordings that show both Mr. Davis's and  
12 Mr. Morris's motivations. That they were concerned  
13 about the negative information that was in the press.  
14 And we have Mr. Morris's boss on November 10th  
03:02:12 15 saying, you're going to be placed on leave and we'll  
16 figure out -- we'll send you a letter about why but  
17 it -- let's just say it's because of your opposition  
18 to the gas chamber. That's a violation of policy.  
19 And he says even if I were to think that people  
03:02:31 20 crossing the road outside our building might get  
21 killed, I can't say anything about that because it  
22 would be against policy. So these officials have a  
23 really skewed view of what the First Amendment  
24 protects but it's clear from all of the evidence that  
03:02:47 25 that was their motivation.

1           Mr. Morris, when I asked him why he would  
2 recommend terminating an employee who had never been  
3 disciplined, he said what do you think that's a get  
4 out of jail free card, our disciplinary process? No,  
03:03:12 5 it's the process that the defendant uses to terminate  
6 employees or discipline employees when they're going  
7 about it for legitimate reasons. They have a process  
8 in place because that's what makes sense. And when  
9 you -- when you have an employee with problems, then  
03:03:32 10 you document those problems so that they have notice  
11 of what the problem is and so that they can improve.  
12 That never happened in this case and that's because  
13 the -- the problems that were attributed to Ms. Bird  
14 were made up after the fact to legitimize an  
03:03:51 15 illegitimate termination that they knew they needed  
16 to cover up because it was based on a violation of  
17 the First Amendment.

18           The defendant wants you to believe that a  
19 tenured employee was terminated without any  
03:04:05 20 discipline for giving away a bag of dog food with  
21 maggots in it, or maybe for cleaning protocols that  
22 weren't figured out but that Mr. Morris testified  
23 were actually figured out long before this, or maybe  
24 for her discipline of Ed Trimble who we know was gone  
03:04:25 25 for many months before the events that are at issue

1 in this case. That is simply not credible.

2           Instead we have a number of witnesses who  
3 testified as to what was going on in the shelter. We  
4 have Jon Andus to start with who might, I grant you,  
03:04:45 5 be a bit unhinged, but he had no reason to lie about  
6 what was going on at the shelter. We had Michelle  
7 Johnson to testify about the reasons she put out the  
8 Facebook post when she did. And when challenged on  
9 whether or not Mr. Davis had said do you want them  
03:05:04 10 all dead? She said yes, that is exactly what I  
11 heard.

12           We had Ms. Bird's testimony which wasn't  
13 impeached on any point. We have the fact that the  
14 defense could not put on a single witness to validate  
03:05:19 15 the concerns that they had about them, about  
16 Ms. Bird, except for Mr. Davis and Mr. Morris whose  
17 only information was through Mr. Davis.

18           We had finally Mr. Breisch, the volunteer, who  
19 had no dog in this fight but happened to have made a  
03:05:45 20 recording of Mr. Davis telling him he was not welcome  
21 as a volunteer in the shelter any more because he had  
22 exercised his First Amendment Rights. And although  
23 Mr. Davis attributed it to negative attention that a  
24 Facebook page was getting, Mr. Breisch told you he  
03:06:05 25 had just as we established 10 days earlier with his

1 girlfriend testified at City Council about the  
2 problems that the gas chamber was having.

03:06:23 3 So these are officials who did not want the  
4 truth of what they were doing getting out. So they  
5 fired everybody including volunteers but including a  
6 long-term exceptional employee of the animal shelter  
7 who volunteers referred to as Mother Earth. That is  
8 a tragedy for our entire community and I ask now that  
9 you set this right.

03:06:45 10 And I made one promise to Ms. Fortson that I  
11 would tell you something so I'm going to do that.  
12 The formatting on our PowerPoint was messed up  
13 because we had to switch I-Pads and that put it into  
14 a different program. So we do know how to hyphenate  
03:07:02 15 words. So if there was an R at the bottom of the  
16 page on November, for instance, it was due to  
17 computer problems. So thank you.

18 THE COURT: All right. Thank you very much.  
19 All right. At this time if I could have the  
03:07:21 20 Courtroom Deputy swear in the Court Security Officer.

21 THE CLERK: Please raise your right hand.  
22 (Whereupon, the Court Security Officer was  
23 given an oath.)

03:08:03 24 THE COURT: Thank you. All right. And I will  
25 instruct you to go into the jury room and begin your

1 deliberations. Would you all rise for the jury,  
2 please.

3 (Whereupon, the jury left the courtroom.)

4 (Whereupon, the trial continued but was  
5 not transcribed.)

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1 **REPORTER'S CERTIFICATE**

2  
3 I, Laura W. Robinson, Certified Shorthand  
4 Reporter, Registered Professional Reporter and Notary  
5 Public within and for the County of Salt Lake, State  
6 of Utah, do hereby certify:

7 That the foregoing proceedings were taken  
8 before me at the time and place set forth herein and  
9 were taken down by me in shorthand and thereafter  
10 transcribed into typewriting under my direction and  
11 supervision;

12 That the foregoing pages contain a true and  
13 correct transcription of my said shorthand notes so  
14 taken.

15 In witness whereof I have subscribed my name  
16 this 13th day of March, 2019.

17  
18 -----

19 Laura W. Robinson

20 RPR, FCRR, CSR, CP  
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