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United States District Court
for the Southern District of California

RASEAN JOHNSON, an individual,)	
)	No. 17cv0410
Plaintiff,)	
)	May 23, 2019
v.)	
)	San Diego, California
CITY OF SAN DIEGO,)	
)	
Defendants.)	
)	

JURY TRIAL DAY 3 AFTERNOON SESSION
BEFORE THE HONORABLE M. JAMES LORENZ
United States District Judge

APPEARANCES:

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1 Case: JOHNSON v. CITY OF SAN DIEGO
2 Date: May 23, 2019

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1 San Diego, California, May 23, 2019

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3 (Proceedings held in the presence of the jury panel.)

4 THE COURT: Okay.

02:25 5 MS. ADEMA: The City would call Darrin Schwabe.

6 THE COURT: Is this the last witness for the benefit
7 of the jury?

8 MS. ADEMA: Yes, it is, Your Honor.

9 DARRIN SCHWABE,

02:25 10 DEFENDANTS' WITNESS, SWORN

11 THE CLERK: would you state and spell your full name
12 for the record.

13 THE WITNESS: Darrin Schwabe, D-A-R-R-I-N,
14 S-C-H-W-A-B-E.

02:25 15 DIRECT EXAMINATION

16 BY MS. ADEMA:

17 Q. Good afternoon, Mr. Schwabe.

18 A. Good afternoon.

19 Q. Where are you currently employed?

02:25 20 A. The City of San Diego Human Resources Department.

21 Q. And what is your position?

22 A. Deputy director.

23 Q. And how long have you worked for the City of San Diego?

24 A. I began with the City of San Diego 21 years ago, although
02:26 25 there was a period of time that I worked for the San Diego

1 County Water Authority. Most recently, I've been with the City
2 of San Diego for the past approximately six and a half years.

3 Q. And would you describe the positions that you've held in
4 chronological order, moving forward, in the Human Resources
02:26 5 Department?

6 A. Sure. When I returned back to the City with the Human
7 Resources Department, I began as a senior manager with the
8 Citizens' Review Board on police practices. I then became a
9 human resources officer. I was then a deputy director, and for
02:27 10 a very short period, I was the interim director of the
11 department, and then again, most recently, currently deputy
12 director.

13 Q. And in your work in human resources for the City of
14 San Diego, do you work with the City's recognized employee
02:27 15 organizations?

16 A. I do.

17 Q. And does that mean the City's unions?

18 A. That's correct.

19 Q. And what is the largest union of City workers?

02:27 20 A. That would be MEA, Municipal Employees Association.

21 Q. And you heard the testimony of Kelly Cruz earlier. Is she
22 a senior labor representative for the MEA?

23 A. Correct.

24 Q. And would you describe the interactions between the City's
02:27 25 Human Resources Department and the MEA in general?

1 A. Sure. We have regular interaction with all of the
2 recognized employee organizations. There's a -- various
3 different topics that we could work with them on. It could be
4 anything from just ensuring that employees are in a comfortable
02:28 5 work environment, such as if an elevator in one of our
6 buildings go down, we might contact the organizations to inform
7 them to ensure that they're aware in case we need to find
8 alternative accommodations for employees.

9 It could include working with them on meet-and-confer
02:28 10 processes in accordance with the Meyers-Milias-Brown Act,
11 working in good faith to find agreements with respect to
12 meet-and-confer negotiations. We might work with them on
13 grievances to help resolve those and various other matters that
14 they might bring to our attention where they're representing
02:28 15 their members and/or employees who may not be a member to
16 ensure that we're in communication with their desired needs.

17 Q. Would you just describe briefly your educational
18 background?

19 A. Sure. I graduated from San Diego State University with a
02:29 20 bachelor degree in public administration with an emphasis in
21 personnel management. And I am certified as an International
22 Public Management Association Senior Human Resources
23 Professional.

24 Q. Are you aware of a grievance being filed by the MEA on
02:29 25 behalf of Rasean Johnson in September of 2015?

1 A. Yes.

2 Q. And who actually submitted the grievance to the Human
3 Resources Department?

02:30 4 A. I believe it was on behalf of MEA or on behalf of the
5 employee from MEA, but I don't immediately recall directly who
6 it came from to our department.

7 Q. And was that grievance subsequently investigated by the
8 Human Resources Department?

9 A. Portions of it were, correct.

02:30 10 Q. And without getting into the details, can you sort of
11 categorize the portions that were investigated by the Human
12 Resources Department?

13 MR. CADIEUX: Objection, Your Honor. Motion in
14 limine. Also relevance.

02:30 15 MS. ADEMA: I think I can rephrase, Your Honor.

16 THE COURT: Okay.

17 BY MS. ADEMA:

18 Q. Were allegations of, you know, religious activities in the
19 workplace referred to the EEIO office for investigation?

02:30 20 A. That's correct.

21 Q. And were there other grievances also raised in the
22 grievance that were investigated by the HR office that were not
23 related to EEIO matters?

24 A. Yes, areas not under a protected classification remained
02:31 25 with the Human Resources Department for investigation.

1 Q. And so there were -- just generally, describe what took
2 place in terms of when that investigation by the HR department
3 started and finished?

02:31 4 A. I don't know the time frames offhand, but I can say that a
5 fact-finding panel was convened as soon as possible. Not all
6 fact-finding panels are handled within the Human Resources
7 Department, but we felt that this one in particular warranted
8 that attention, and it was headed by one of our senior human
9 resources officers, and that panel of, I believe, three
02:32 10 individuals conducted an investigation with respect to those
11 areas, again, of the grievance, not under EEO.

12 Q. Did you have communications in January of 2016 with
13 Kelly Cruz regarding the grievance?

14 A. I did, yes.

02:32 15 Q. And did Ms. Cruz ask for reassignment of Mr. Johnson?

16 A. That was mentioned.

17 Q. Okay. Would you just describe the nature of the
18 conversations you had in January of 2016 with Ms. Cruz?

19 MR. CADIEUX: Calls for narrative.

02:33 20 THE COURT: Yes, please. Just try to formulate it so
21 it won't be a dialogue.

22 BY MS. ADEMA:

23 Q. What was discussed between you and Ms. Cruz in January of
24 2016 about a reassignment for Mr. Johnson?

02:33 25 A. Ms. Cruz did request a reassignment and suggested also that

1 Mr. Johnson ultimately should be moved, in their opinion. When
2 I say "their," I mean MEA and the employee. I assumed Kelly
3 was speaking on the employee's behalf. And so initially we
4 reviewed and discussed the idea of moving him under a different
02:33 5 supervisor.

6 Q. And this is in January of 2016, correct?

7 A. That's correct.

8 Q. And did Ms. Cruz convey to you why she was making the
9 request at that time in January of 2016?

02:34 10 A. She did. She said that the employee felt that he was
11 working in an uncomfortable working environment and wanted to
12 be transferred under a different supervisor that wasn't the
13 individual identified in the grievance.

14 Q. At that time did the -- had the HR department concluded its
02:34 15 fact finding and investigation of the non-EEO grievance?

16 A. Yes, it had.

17 Q. And did Ms. Cruz -- was she seeking some remedy at that
18 time?

19 MR. CADIEUX: Leading, vague and ambiguous.

02:34 20 BY MS. ADEMA:

21 Q. Was she seeking a remedy from the City at that time?

22 A. She was seeking to transfer him under a different
23 supervisor.

24 Q. And as far as what Ms. Cruz -- what did she say about
02:35 25 Mr. Johnson feeling uncomfortable in the work environment?

1 A. She had --

2 Q. Just specific things that she said that weren't related to
3 the contents of the grievance.

4 A. Over time, I don't know if the discussion fully happened in
02:35 5 January, but things that were brought to my attention that she
6 suggested were of continued concern where the employee felt
7 slighted in the workplace. For example, it was identified or
8 suggested that there might have been instances where the
9 employee said good morning to the deputy director, and that was
02:35 10 not reciprocated. And at some point the email for the listing
11 of the employee as a supervisor was brought to my attention,
12 and, additionally, the concern of the employee working possibly
13 outside of their classification.

14 Q. Was the complaint about work outside of the job
02:36 15 classification a non-EEO portion of the grievance that was
16 contained in the September grievance?

17 A. That's correct.

18 Q. You mentioned Ms. Cruz bringing to your attention an email.
19 Is that the email that we've seen in the case that's been
02:36 20 referred to as Exhibit 19? Just to make sure, I'll go ahead
21 and ask that that be pulled up.

22 THE CLERK: Do you want this published to the jury?

23 MS. ADEMA: Yes, please.

24 THE WITNESS: Yes, that's correct.

25

1 BY MS. ADEMA:

2 Q. And did Ms. Cruz provide you actually with the email?

3 A. Not that I recall, no.

02:38 4 Q. She mentioned to you that there was a concern about this
5 email?

6 A. Correct.

7 Q. Other than this email, was there any other documentation or
8 detailed information that Ms. Cruz provided you that
9 Ms. -- Mr. Johnson's role as imaging department supervisor had
02:38 10 been taken away in February of 2016?

11 A. No.

12 Q. Now, in January of 2016 when you spoke with -- or Ms. Cruz
13 approached you about a reassignment for Mr. Johnson, what
14 efforts did you make to respond to that?

02:38 15 A. Ms. Cruz and I were in continual communication regularly
16 over the telephone, and initially two options of supervision
17 were offered. I believe it was Ms. Mendoza and Ms. Tatum. And
18 subsequent to that, there was another option provided for the
19 employee to move under the section of George Biagi, the other
02:39 20 deputy director in the department, if interested.

21 Q. So there's been testimony that the move for Mr. Johnson to
22 report to Ms. Mendoza occurred in about late January of 2016.
23 What time frame did the topic of Mr. Johnson reporting to
24 Mr. Biagi arise?

02:39 25 A. I don't know exactly. I know Ms. Cruz testified it was a

1 few weeks later. I wouldn't necessarily argue that at this
2 point. I don't have the dates in front of me, but I know that
3 it was offered subsequent to the initial offer, the two
4 supervisors within the same section.

02:39 5 Q. Do you have a recollection of it being prior to the
6 conclusion of the EEIO office's investigation of its complaint?

7 A. That's correct.

8 Q. Did you have any understanding from Ms. Cruz or any other
9 information communicated to you personally that the
02:40 10 situation -- the reporting relationship with Ms. Mendoza was
11 not going to Mr. Johnson's satisfaction?

12 A. No.

13 Q. Did you receive any report that Ms. Beale was interfering
14 with the supervision by Ms. Mendoza of Mr. Johnson?

02:40 15 A. No.

16 Q. Well, after working with Ms. Cruz for the reassignment of
17 Ms. Mendoza to Mr. Johnson, did you continue to communicate
18 with Ms. Cruz about the possibility of Mr. Johnson moving to
19 another department?

02:41 20 A. Yes, Ms. Cruz and I had ongoing conversations, mostly via
21 the telephone, with respect to his preference to move to a
22 different department, and we did keep in touch, but the Human
23 Resources Department wasn't prepared to recommend to make such
24 a move at that point in time with, quite frankly, the concern
02:41 25 of retaliation. We felt that Ms. Maland, after the conclusion

1 of the original fact finding, was taking sincere, earnest
2 efforts to improve the workplace and make it, I believe that
3 she said, as neutral and comfortable as possible. And that
4 included trainings in addition to the other items that she
02:42 5 mentioned. So we didn't want to overreact and immediately move
6 the employee if it wasn't necessary, and we felt that
7 Ms. Maland was taking, again, sincere efforts to make it the
8 best workplace that she could.

9 And then, alternatively, we had also offered the employee
02:42 10 the alternative option to go to the different section, should
11 he choose to, providing another, again, alternative to having
12 to move to a different department.

13 Q. So you mentioned concerns of retaliation. Did you have
14 concerns from December of 2015 until the time that Mr. Johnson
02:43 15 left the City clerk's office that he was, in fact, being
16 retaliated against?

17 A. No, I was actually, in fact, concerned that we didn't want
18 the perception we were retaliating against him by moving him to
19 a different department, and that's initially why we didn't want
02:43 20 to move forward with that plan. And additionally -- we knew in
21 the Human Resources Department that Ms. Maland, again, was
22 taking sincere efforts --

23 MR. CADIEUX: Nonresponsive, Your Honor.

24 THE COURT: Sustained. Part of it was, but now he's
02:43 25 going on.

1 BY MS. ADEMA:

2 Q. Okay. So was it after the EEIO investigation was concluded
3 in late March 2016 that there was, again, discussion about
4 Mr. Johnson going to another department?

02:44 5 A. Yes, those discussions continued.

6 Q. Okay. And at that time, did -- can you describe, you know,
7 what the communications were during April of 2016 regarding
8 transferring to another department?

9 A. Again, it was continued preference from MEA, from what we
02:44 10 understand on behalf of the employee, as Ms. Cruz had
11 explained, to move the employee to a different department, even
12 after all of our efforts, and Ms. Maland's efforts within the
13 department. So we at that point in time, with the approval of
14 my director, Judy von Kalinowski, chose to support MEA's
02:44 15 request as all of the other, again, options were not accepted
16 at that time. So we supported their request, again, to go
17 ahead and move him to a different department.

18 Q. And what concrete steps did you do to make that happen?

19 A. I worked internally with my other colleagues to identify
02:45 20 vacancies in the City, in and around the City, and I also asked
21 for Mr. Johnson's resume to identify his qualifications to
22 match to a potential position. There was one in particular in
23 the Public Utilities Department that was identified to me by a
24 colleague that they knew was actively being recruited for
02:45 25 because that was another point of interest that we needed to

1 take, was whether or not the departments were filling the
2 vacancies due to budgetary constraints or other reasons. So I
3 reached out to Ms. Cruz to let her know that there was one
4 position in particular, it just happened to be the first one
02:46 5 that we came across that we knew was actively being recruited,
6 and referred that to her to share with Mr. Johnson to see if
7 that was a position of interest for them.

8 Q. Was there a time constraint placed on their decision?

9 A. There was not.

02:46 10 Q. And what information do you recall communicating to
11 Ms. Cruz about the type of job it was?

12 A. I know that it was actively being recruited, so I don't
13 know if I specifically had the details of the position, but I
14 did share with her where the position was, it was in PUD, and
02:46 15 that who the program manager was that was recruiting for it,
16 and the option was provided for Ms. Cruz and Mr. Johnson to
17 speak with that program manager to learn more about the
18 position.

19 Q. Do you have any knowledge of Mr. Johnson or Ms. Cruz
02:47 20 contacting the program manager?

21 A. It's my understanding that at least one, if not both, of
22 them had reached out to discuss that position with the Public
23 Utilities Department with that program manager, yes.

24 Q. And do you have an understanding that Mr. Johnson went to
02:47 25 the physical location to see where the position was located?

1 MR. CADIEUX: Foundation.

2 THE COURT: Sustained.

3 BY MS. ADEMA:

02:47 4 Q. And when you say you spoke with your colleague in the
5 program department -- or the PUD, tell me who it was that you
6 spoke to in terms of your colleague?

7 A. Well, I spoke to my colleague in the Human Resources
8 Department, Colleen Brazil, who was another human resources
9 officer at the time. She was the liaison for the Public
02:48 10 Utilities Department, and that's, hence, the reason she was
11 aware of the vacancy and knew the program manager and reached
12 out to them. So she was the one who directly spoke with the
13 Public Utilities Department.

14 Q. So based on the information that you got from Ms. Brazil,
02:48 15 you passed on the program manager's information to Ms. Cruz to
16 follow up on?

17 A. That's correct.

18 Q. And you didn't require her to respond to the offer made for
19 Mr. Johnson to transfer by any particular deadline, correct?

02:48 20 A. No, I did not.

21 Q. And Ms. Cruz did, in fact, get back to you and communicate
22 that Mr. Johnson would accept the position. Is that correct?

23 A. Yes, I believe she initially had said that they would like
24 to think about it, and I did not give a time frame, and she
02:49 25 then subsequently got back to me and said that they would like

1 to accept the position.

2 Q. Did she tell you that she believed that Mr. Johnson had no
3 other choice but to accept that position?

4 MR. CADIEUX: Hearsay, leading.

02:49 5 THE COURT: Sustained.

6 BY MS. ADEMA:

7 Q. Would you have continued to work with Mr. Johnson to find
8 another vacant position if he didn't want the position at PUD?

9 A. Absolutely.

02:49 10 Q. After Mr. Johnson transferred to PUD, did Ms. Cruz contact
11 you and tell you he was unhappy and he wanted to look for
12 something else?

13 MR. CADIEUX: Hearsay, leading.

14 MS. ADEMA: I'm just asking his state of mind.

02:50 15 THE COURT: well, you can rephrase it. You actually
16 are answering the question basically by your question. Just
17 rephrase.

18 MS. ADEMA: Let me try again.

19 THE COURT: Go ahead.

02:50 20 BY MS. ADEMA:

21 Q. Did you have notice after Mr. Johnson transferred to PUD
22 that he was dissatisfied with the position?

23 A. No.

24 Q. We heard some testimony earlier -- you were present -- of
02:50 25 Mr. Barclay. Do you recall that?

1 A. Yes.

2 Q. He spoke about the City's EEIO policy, correct?

3 A. Correct.

02:51 4 Q. And what's the role of the Human Resources Department in
5 the preparation of the EEIO policy?

6 A. We're one of many departments that review the policy on an
7 annual basis before it's delivered each fiscal year beginning
8 in July to all City employees.

02:51 9 MS. ADEMA: And if we could display Exhibit 38 that's
10 been admitted, please.

11 BY MS. ADEMA:

12 Q. And Exhibit 38 is dated July 1, 2015. Is that correct?

13 A. Correct.

02:51 14 Q. Now, is there language in this policy as to the
15 relationship between the federal laws on discrimination and
16 City policy?

17 A. Sorry, can you repeat the question?

18 Q. Does this policy address the distinction between violations
19 of City policy and violations of the law?

02:52 20 MR. CADIEUX: Relevance, 352. Sorry, wrong court.

21 THE COURT: Yeah, I don't understand the question, to
22 be honest. Rephrase. I mean, for a different reason. The
23 judge doesn't understand the question.

24 BY MS. ADEMA:

02:52 25 Q. Is it your understanding that it was determined that Sheila

1 Beale had violated City policy?

2 A. As a result of the fact finding that was completed by human
3 resources, yes.

02:52

4 Q. And what about as a result of the investigation by the EEIO
5 office?

6 MR. CADIEUX: Foundation.

7 THE COURT: No, rephrase the question. It kind of all
8 relates to the two questions earlier, and it's getting
9 convoluted.

02:53

10 BY MS. ADEMA:

11 Q. Let's talk about the HR fact finding.

12 Was there any violation of the City's equal employment
13 policy, EEO policy, as a result of the fact finding done by HR?

14 A. No.

02:53

15 MR. CADIEUX: Misleading.

16 THE COURT: Overruled. You can go into why, if you
17 want to.

18 BY MS. ADEMA:

19 Q. One more question, and I'll turn the witness to plaintiffs.

02:54

20 Why didn't you talk to Mr. Johnson directly about the
21 transfer to PUD that he requested?

22 A. It's customary for human resources to work with the
23 recognized employee organization for a couple of different
24 reasons. There is Meyers-Milias-Brown Act, which requires us
02:54 25 whenever there's working condition impacts to communicate with

1 the recognized employee organization.

2 Additionally, whenever there is an employee representative
3 who's working with an employee, it's always the expectation and
4 understanding that human resources will work directly with the
02:55 5 employee organization without going to the employee directly.
6 If we did go to the employee directly, that could potentially
7 be a per violation, and so it's, again, customary that we work
8 directly with their representative.

9 Q. And have you worked with Ms. Cruz frequently during your
02:55 10 time at the City's HR department?

11 A. Yes, very.

12 Q. And do you believe you have a good and professional working
13 relationship with Ms. Cruz?

14 A. I do.

02:55 15 MS. ADEMA: Thank you.

16 BY MS. ADEMA:

17 Q. You heard Ms. Maland's testimony that you talked to her
18 about communications during the period that the grievance was
19 being investigated. Is that correct?

02:56 20 A. Correct.

21 Q. And did you tell her not to speak with Mr. Johnson at all?

22 A. I did not. I just informed her that --

23 THE COURT: Wait a minute. Now you're going on. You
24 answered the question. If you want to follow up, go ahead.

25

1 BY MS. ADEMA:

2 Q. What is it that you spoke with Ms. Maland about?

3 A. Sorry. So yes, I informed Ms. Maland that it would be best
4 not to speak with him regarding the grievance, just to be more
02:56 5 neutral and allow us to work with his employee representative,
6 but not to speak with him at all.

7 MS. ADEMA: Thank you.

8 THE COURT: Okay.

9 CROSS-EXAMINATION

02:56 10 BY MR. CADIEUX:

11 Q. Hello again, Mr. Schwabe. You held a lot of positions in
12 the HR department. I want to focus you in on the 2015 to 2016
13 time frame. Were you at that time serving as deputy director?

14 A. I was not.

02:57 15 Q. What role did you have during that time?

16 A. I was a human resources officer, also known as a program
17 manager in the City. I was a liaison for various departments
18 within the City providing them human resources support.

19 Q. Okay. And at the time Judy von Kalinowski was the director
02:57 20 of that department. Is that correct?

21 A. Correct.

22 Q. Ultimately, she was your boss?

23 A. Correct. I apologize. She was the director. She was the
24 boss of the department, I guess, but she wasn't my immediate
02:57 25 supervisor or boss, just to clarify.

1 Q. Was that Karen DeCrescenzo?

2 A. Yes.

3 Q. And Karen DeCrescenzo reported to Judy von Kalinowski?

4 A. Correct.

02:57 5 Q. Gotcha. Mr. Schwabe, I understand this is your last week
6 as an employee of the City of San Diego?

7 A. Actually, no, it's not. Next week will be.

8 Q. Next week. My apologies.

9 Now, I understand you're going to go work for the City of
02:58 10 Carlsbad, correct?

11 A. That's correct.

12 Q. Okay. And that's also where the former City HR director,
13 Judy von Kalinowski, is working?

14 A. Yes.

02:58 15 Q. You kept in touch with her?

16 A. Yeah, I wouldn't say on a regular basis, but we kept in
17 touch.

18 Q. And did she help you get your position in Carlsbad?

19 A. I don't think so. I believe it was on my own merit.

02:58 20 Q. Sure, and I didn't mean to diminish any of that, but you
21 talked to her about applying for the job up there?

22 A. I asked her about the position when I found out that it was
23 open, but I didn't talk to her directly about getting the
24 position.

02:58 25 Q. Do you know whether she's going to be your supervisor up

1 there too?

2 A. That's correct.

3 MS. ADEMA: Objection. Relevance, Your Honor.

4 MR. CADIEUX: Goes to credibility and bias.

02:58 5 THE COURT: Overruled.

6 BY MR. CADIEUX:

7 Q. I'm sorry. I missed your answer, sir.

8 A. Oh, I said that's correct.

9 Q. Okay. Thank you.

02:59 10 Mr. Schwabe, did you review anything in preparing for your
11 testimony today?

12 A. Yeah, I reviewed notes -- sorry.

13 Q. I'll just ask you. We'll probably move quicker that way.

14 Did you review any of the -- any notes you had regarding
02:59 15 conversations with Kelly Cruz?

16 A. Yes.

17 Q. Okay. Did you -- you heard Kelly testify she had looked
18 through a stack about three inches thick. Is that similar to
19 your prep for today?

02:59 20 A. I didn't measure them, but it probably wasn't quite three
21 inches maybe.

22 Q. Okay. But lots of notes.

23 You also met with Mr. Schaefer and Ms. Adema to prepare for
24 your testimony, correct?

02:59 25 A. I've spoken with them.

1 Q. How many times did you meet with them to prepare for your
2 testimony here today?

3 A. I don't know if I would categorize it as preparing for my
4 testimony today, but I've spoken with them about the case
03:00 5 probably at least two or three times.

6 Q. Okay. You mentioned some conversations with Kelly Cruz in
7 January of 2016 about a change in Mr. Johnson's supervisor,
8 right?

9 A. Correct.

03:00 10 Q. Okay. And you were speaking with Ms. Cruz because she was
11 Mr. Johnson's MEA representative, she was advocating for him,
12 correct?

13 A. Correct.

14 Q. And you were the City's representative in its HR department
03:00 15 advocating for the City?

16 A. Correct.

17 Q. Okay. The City is essentially your client in that
18 exchange, right?

19 A. Yes.

03:00 20 Q. Okay. You heard that Ms. Cruz -- you heard Ms. Cruz
21 testify that in that January 2016 time frame, she had spoken
22 with Judy von Kalinowski and requested that Deputy Director
23 Beale be removed as supervisor of that department. Was that
24 something that Ms. von Kalinowski shared with you?

03:01 25 A. No.

1 Q. You also heard Ms. Cruz testify that the City is an
2 independent department in that Ms. von Kalinowski told her she
3 didn't have the authority to remove Deputy Director Beale?

4 MS. ADEMA: Objection. I believe that misstates. He
03:01 5 was referring to the City as an independent department.

6 BY MR. CADIEUX:

7 Q. Sorry. Let me ask it a better way.

8 Is the clerk's office considered an independent department
9 such that HR cannot tell Elizabeth Maland what type of
03:01 10 personnel changes to make in that clerk's office?

11 A. We can guide Ms. Maland and provide recommendations.

12 Q. Okay. But you don't have the authority to grant -- for
13 example, Ms. Cruz testified that she asked Deputy Director
14 Beale to be removed. She testified that Judy von Kalinowski
03:02 15 told her she didn't have the authority to do that. Is that
16 consistent with your understanding about what HR has the power
17 to do regarding the independent clerk's office?

18 A. Yes.

19 Q. And we heard Mr. Barclay testify that Elizabeth Maland is
03:02 20 the one that decides what, if anything, to do in response to an
21 EEO investigation outcome. Is that correct?

22 A. Ultimately, she has the authority to make that decision.

23 Q. But then you told her not to talk to Mr. Johnson about this
24 situation, correct?

03:02 25 A. Again, for purposes of the grievance.

1 Q. So how is Ms. Maland supposed to make a determination about
2 what is proper to do in her department if she's not allowed to
3 talk to the person who made the allegations about those
4 allegations?

03:03 5 A. Well, first, let me just clarify that when you say that
6 she's not allowed to, again, it's our recommendation. We can't
7 direct Ms. Maland what to do.

8 But then to answer your question, it would be via
9 communication from the Human Resources Department with the
03:03 10 Municipal Employees Organization. Kelly, as you mentioned
11 earlier, is his advocate and representative.

12 Q. Okay. And you had those conversations with Ms. Cruz in
13 January 2016 where she told you that Mr. Johnson felt as though
14 Ms. Beale was not treating him properly, correct?

03:03 15 A. Yes.

16 Q. And I think you had used the word that it was an
17 uncomfortable environment and that Mr. Johnson felt he was
18 being slighted. Are those the words Ms. Cruz used or did she
19 say it was a hostile work environment and Mr. Johnson was being
03:03 20 retaliated against?

21 A. I don't recall her exact words, but I know she did use the
22 term "retaliated."

23 Q. What did you do about it when Ms. Cruz told you that
24 Mr. Johnson felt like he was being retaliated?

03:04 25 A. I spoke to Ms. Cruz to ask her to identify, as we normally

1 would, what the concerns were and what the perceived
2 retaliation was and get clearer definition from her.

3 Q. Okay. Did you speak with Ms. Beale?

4 A. No.

03:04

5 Q. There's nothing about the independence of the clerk's
6 office that would prohibit you from calling in an employee from
7 the clerk's office, like Ms. Beale, to have a discussion with
8 her about the EEO policy and what is and is not allowed under
9 that policy, correct?

03:04

10 A. I could call her in to talk to her.

11 Q. You didn't do that?

12 A. Not Ms. Beale.

13 Q. Or Mr. Johnson?

14 A. Or Mr. Johnson, but Ms. Maland, I did.

03:04

15 Q. What did you tell Ms. Maland about the retaliation?

16 A. I told Ms. Maland about the concerns that Ms. Cruz shared
17 with me about the email and about the perception of being
18 slighted, and she assured me that the email was, and I don't
19 recall exactly, was either an error or an oversight, but that,
20 in fact, he was still the supervisor. And as far as being
21 slighted, that she would talk to Ms. Beale about that just to
22 ensure that that perception of being slighted doesn't occur.

03:05

23 Ms. Maland wasn't aware of that actually happening, but she
24 said that she would speak with Ms. Beale about it.

03:05

25 Q. Did you have any follow-up -- because we heard Ms. Beale

1 testify that Ms. Maland never spoke to her about any of those
2 topics, and the first time she had seen that auto response was
3 at her deposition in this case. Did you do any follow-up to
4 see whether Ms. Maland had actually followed through on what
03:06 5 she told you she was going to do?

6 A. Ms. Maland is a highly appointed official at the City of
7 San Diego, and I trusted that she would.

8 Q. Okay. That goes into that -- the procedures that
9 Mr. Barclay was talking about, right, the process being
03:06 10 investigation is done, and then it's a trust system, trusting
11 the department is going to take appropriate action. That's the
12 same thing with HR and the clerk's office, right, you're
13 trusting Ms. Maland to do what is appropriate?

14 A. Yes.

03:06 15 Q. After Ms. Cruz told you that Mr. Johnson was reporting to
16 her he was suffering retaliation, did you contact
17 Harold Barclay or anyone from EEIO to let them know?

18 A. I did not.

19 Q. Do you know whether Ms. von Kalinowski did?

03:06 20 A. I am not aware.

21 Q. Isn't that part of your responsibilities as a -- as the HR
22 officer, to notify the EEIO if an employee reports that they've
23 been retaliated against?

24 A. There's a number of different ways to report concerns, and
03:07 25 since it came to human resources and we were working on a

1 separate grievance, we handled it from that perspective. From
2 what I heard earlier, Mr. Johnson was given alternative avenues
3 to report concerns through the EEO process.

4 Q. Right, but you had -- you had knowledge, right, from
03:07 5 Ms. Cruz, that in January 2016, Mr. Johnson felt like he was
6 being retaliated against. When the grievance came in in
7 September 2015, you forwarded possible violation -- allegations
8 of violations of that EEO policy to the EEIO. How come you
9 didn't do the same thing in January 2016 when Ms. Cruz told you
03:07 10 Ms. Beale's violating EEO policy by retaliating against
11 Mr. Johnson?

12 A. When we use the term "retaliation," again, I identified or
13 clarified with Ms. Cruz exactly what the concerns were, and
14 what was brought to my attention, again, the email, again, was,
03:08 15 from what I understand, an oversight or an error, and the
16 slighting of not saying good morning isn't necessarily
17 something that would rise to the level of retaliation under the
18 law. So there was no finding of retaliation upon my review, so
19 I didn't feel it was necessary to have to report it to EEO,
03:08 20 and, again, they were conducting their own investigation.

21 Q. Did you do any independent investigation of those concerns
22 of retaliation other than speaking to Ms. Maland?

23 A. No, I believe she had understanding of the email.

24 Q. Great. I'd like to show you Exhibit 1, and we'll start at
03:08 25 page 10.

1 MR. CADIEUX: If we could blow up Section 6.4.2. I'm
2 sorry. Let's do 6.4.3.

3 BY MR. CADIEUX:

4 Q. I had asked Mr. Barclay about this policy, and he told me
03:09 5 this was not his policy that applies to the EEIO office. Does
6 this policy apply to complaints about EEO policy violations
7 that are presented to the HR department?

8 A. Yes, if we were to investigate them, but again, in this
9 case, we were not.

03:09 10 Q. Okay. This policy and procedure was never followed up
11 because there was never an investigation into the complaints by
12 Ms. Cruz in January of 2016, correct?

13 A. I apologize. Originally when I was speaking of following
14 the EEIO policy, that was for the grievance that was submitted
03:10 15 which identified concerns of protected classes which was
16 referred to EEO. There was no concern of a protected class
17 brought to my attention, so this particular policy would not
18 apply.

19 Q. Doesn't the EEO policy cover retaliation for reporting
03:10 20 violations of the protected class that you were just speaking
21 of?

22 A. True.

23 Q. So if Mr. Johnson was being retaliated against by Ms. Beale
24 in January of 2016, isn't that an EEO policy issue?

03:10 25 A. If you look at it that way, then yes, and I did do my due

1 diligence by reaching out to Ms. Maland.

2 Q. Okay. Let's look at the next page. Let me ask you another
3 question, and then we'll go to page 13, just so you're
4 prepared.

03:11 5 Mr. Barclay had testified that he requires a written -- or
6 that there's a form that the City maintains that if an employee
7 feels they're being retaliated against, they need to submit
8 that form to the EEO office to initiate an investigation. Are
9 you aware of that form?

03:11 10 A. Yes.

11 Q. Okay. Could we look at page 13 in this exhibit? Is this
12 the form?

13 A. Because I don't work with it regularly, I would say yes, I
14 believe it is.

03:11 15 Q. Okay. Now, Mr. Johnson originally filed his 2015,
16 September 2015, grievance with the HR department, correct?

17 A. Correct.

18 Q. Okay. And then HR transferred that EEO portion of that
19 grievance to the -- Mr. Barclay's department, the EEIO,

03:12 20 correct?

21 A. Correct. I didn't handle it, but that's my understanding.

22 Q. Do you know whether this form was filled out by the
23 HR department and sent to Mr. Barclay's department to initiate
24 that grievance?

03:12 25 A. I don't, but that's also not necessary.

1 Q. You expected that if Mr. Barclay is given information about
2 an employee being discriminated, harassed, or retaliated
3 against, that his office is going to open an investigation even
4 if this form isn't included, correct?

03:12 5 A. If a complaint is referred to their office, then yes.

6 Q. And you didn't fill out one of these forms after Ms. Cruz
7 told you the concerns of January 2016, correct?

8 A. Correct.

9 Q. You had discussed a few options the City provided
03:13 10 Mr. Johnson during the pendency of the investigation into a
11 September 5th grievance. I think you had mentioned one was
12 reassigning him a different supervisor, which ultimately turned
13 out to be Elena Mendoza?

14 A. Correct.

03:13 15 Q. And then the second option came several weeks later, if he
16 wanted to transfer to a different division under George Biagi,
17 correct?

18 A. Correct.

19 Q. Is there -- are you aware of any writing in which that
03:13 20 offer was conveyed to either Ms. Cruz or Mr. Johnson?

21 A. As mentioned, we had regular phone conversations, so I'm
22 not immediately aware of it in writing, but I know that, again,
23 we spoke regularly, and it was offered.

24 Q. Okay. And when you looked through all of the materials in
03:14 25 preparing for your testimony today, you don't recall seeing any

1 emails or letters or anything else saying hey, here's an
2 option, Mr. Johnson can report to Mr. Biagi, correct?

3 A. Correct.

4 Q. Okay. In my profession, we're always very careful about
03:14 5 everything, and we send offers in writing. Is that something
6 that you do routinely as well?

7 A. Because we communicate with the employee organization so
8 frequently over the telephone, and we have a good, trusting
9 relationship, not everything is put in writing. It just really
03:14 10 depends on case by case, what is.

11 Q. Okay. You had also talked a little bit about an HR
12 investigation into some parts of the grievance that weren't
13 referred to Mr. Barclay's office.

14 A. Correct.

03:14 15 Q. The result of that investigation also found violations by
16 Ms. Beale, correct?

17 A. Correct.

18 Q. You had mentioned that it was Mr. Johnson's preference that
19 after the EEO findings came out and the investigation was
03:15 20 concluded in March, that it was Mr. Johnson's preference to
21 transfer out of the clerk's office, correct?

22 A. It was my understanding that it was his preference via
23 Kelly Cruz even earlier than that.

24 Q. Okay. It was his preference as opposed to what?

03:15 25 A. As opposed to -- I guess I don't understand the question.

1 Q. Sure. So to your understanding, Mr. Johnson was preferring
2 to transfer. What was his other option?

3 A. To stay with Ms. Mendoza, which we understand was fine with
4 Ms. Mendoza as his supervisor, there were no complaints about
03:15 5 her, or to go to the other section or division in the
6 department under George Biagi, which would have no linear
7 connection to Sheila Beale.

8 Q. And both of those options were offered before the
9 investigation concluded, correct?

03:16 10 A. The EEO investigation?

11 Q. Yes.

12 A. Yes.

13 Q. Okay. After the EEO investigation concluded in March, what
14 other remedies, if any, did you offer Kelly Cruz that would
03:16 15 have allowed Mr. Johnson to stay in that clerk's office?

16 A. We felt the remedies already offered were suitable.

17 Q. It's true that you never told Ms. Cruz that appropriate
18 disciplinary action, a confidential disciplinary action, would
19 be taken against Ms. Beale, correct?

03:16 20 A. Because it was a personnel action, that's not something
21 that we would release outside of our office.

22 Q. Okay. It's not common practice to tell an employee we've
23 investigated, we've confirmed your allegations are true, and
24 we're going to take appropriate disciplinary action, but we
03:17 25 can't tell you what that is?

1 A. No, it's normal to identify that they've been
2 substantiated.

3 Q. So what reassurances does the employee get that as a result
4 of them making their complaint, anything is going to improve
03:17 5 for them?

6 A. Well, working with the employee's -- sorry, the employee
7 organization, they know the process, and I'm sure that they
8 would be informing the employee that since there were findings,
9 that the department would take some type of appropriate action.

03:17 10 And I believe Ms. Maland had already even demonstrated that
11 there were actions being taken, such as trainings that were
12 being offered in the department, so I think she was being very
13 responsive to the situation.

14 Q. Okay. Just so I'm clear, after the EEO investigation
03:18 15 concluded, there were no additional options presented to
16 Mr. Johnson besides the two that had already been offered back
17 in January or February, right?

18 A. Those offers were still on the table, and no.

19 Q. No additional offers?

03:18 20 A. No other options were asked for, so no.

21 Q. Okay. After you found out about the auto response from
22 Ms. Beale in February of 2016 listing Elena Mendoza in
23 Mr. Johnson's position as imaging supervisor, why didn't you
24 just call up Ms. Beale and tell her to clarify that Mr. Johnson
03:18 25 was still imaging supervisor? wouldn't that have cleared up

1 the confusion?

2 A. Because she was the subject of the grievance, I wanted to
3 speak with Ms. Maland first to ensure that I had clear
4 communication at that level and not to interfere with the
03:19 5 grievance or the investigation. And if there was a
6 determination that that needed to occur, then I would work with
7 Ms. Maland to do that. I also didn't want to undermine
8 Ms. Maland, sorry.

9 Q. Okay. Again, you didn't do anything to follow up to see
03:19 10 whether Ms. Maland actually spoke to Ms. Beale at all, correct?

11 A. Well, about the email, I believe if that was, in fact, an
12 error and oversight, that -- and it didn't happen again, there
13 was no reason that I understood to have follow-up conversation
14 because it wasn't an ongoing matter because he was still the
03:19 15 supervisor.

16 Q. When Mr. Johnson was told that he had the option of
17 transfer to the Public Utilities Department, you didn't tell
18 him that he'd be working in an office that smelled like human
19 waste, did you?

03:19 20 A. I didn't tell him that, but I didn't know if that would be
21 the case or if it even was.

22 MR. CADIEUX: Okay. No further questions.

23 REDIRECT EXAMINATION

24 BY MS. ADEMA:

03:20 25 Q. I just have a few follow-up questions.

1 I believe you testified that -- well, let me just back up.
2 I'm not really sure I understand the testimony as to what
3 Ms. Cruz was specifically claiming in terms of retaliation in
4 early 2016. was she claiming there was retaliation that fell
03:20 5 within the EEIO policy based on the complaint of discrimination
6 that had been incorporated?

7 A. No.

8 MS. ADEMA: Thank you.

9 THE COURT: Okay. Thank you, sir.

03:21 10 THE WITNESS: Thank you.

11 THE COURT: All right. Does the defense rest?

12 All right, ladies and gentlemen, both sides have rested,
13 and it's before 3:30. So I'm going to let you go. We will
14 have jury instructions tomorrow morning and then final
03:21 15 argument, and that should all be completed in the early
16 morning, and after that, you will then go into the jury room to
17 deliberate.

18 So with that, I'm going to excuse you, but again, please,
19 it's critical, don't discuss this with anybody, your family,
03:22 20 anyone, particularly now you know all the facts. If you have
21 any relatives similar to my wife, if I start telling her
22 anything, it's as if she's a witness. So please don't discuss
23 it. We don't want to get you caught up with any outside
24 information.

03:22 25 So with that, if you'd leave your pads here, and return

1 again -- I'm trying to think. why don't you come in about 9:30
2 because we may be having some stuff we have to go over on the
3 jury instructions, and it's still early enough in the morning,
4 I don't want to have you sitting out there if we are going over
03:22 5 materials. so come in at 9:30. Thank you for your attention.

6 (Proceedings held outside the presence of the jury panel.)

7 THE COURT: I'll tell you, as far as jury
8 instructions, I have a packet that my law clerk will provide to
9 you of the instructions I believe would be appropriate. I
03:23 10 guess I could leave it up to you. Do you want to do that
11 tomorrow starting at a quarter to 8:00 or do you want to get
12 that out of the way now?

13 MR. CADIEUX: Your Honor, I'm fine to stay here and
14 discuss now if that -- if that's what the City would like, but
03:24 15 I'll leave it up --

16 THE COURT: Let me approach it this way: I can't do
17 it in a vacuum, so maybe Lindsey could have David bring the
18 stuff out and bring mine out too.

19 This is off the top of my head, but there were some
03:24 20 objections to the jury instructions, but if I recall correctly,
21 I've excluded this one about jurors asking questions because it
22 wasn't appropriate, and I don't do that anyway, and then there
23 was some questions about liability.

24 MR. CADIEUX: Agency.

03:24 25 THE COURT: Yeah, I don't think those apply. So I

1 basically excluded all of those because I think those don't
2 apply.

3 The only one that's an issue, I think, is the issue
4 regarding materiality and of which you have both disagreed
03:25 5 with. We have prepared an instruction I think is appropriate
6 that encompasses the Supreme Court case, which is important,
7 trying to balance. I'll let you look at it. I think that's
8 probably going to be Instruction 19. You need to look at it,
9 and then if we need to tweak it, I'm open to doing that. I
03:25 10 kind of think that it looks good the way we concocted it. But
11 you may have some differences, and I'm very willing to go over
12 them with you and, if it's appropriate, to make changes, we'll
13 do it. But at least there's a working copy to go with.

14 MR. VANDERPOOL: Are we on the record now?

03:26 15 THE COURT: I think so. I hope so.

16 MR. VANDERPOOL: Okay. Could I escort Mr. Johnson and
17 his wife out?

18 THE COURT: Sure.

19 MR. VANDERPOOL: Thank you, Your Honor.

03:27 20 THE COURT: Again, I've struck the vicarious liability
21 instructions.

22 MR. CADIEUX: Might I make a quick record on that
23 point?

24 THE COURT: Sure.

03:27 25 MR. CADIEUX: The reason we were offering those is

1 because we have in this case a number of different actors. We
2 have Deputy Director Beale, who took sort of the alleged direct
3 retaliatory acts, and then we also have the City that, in our
4 opinion, ratified those acts and then continued them through
03:27 5 the transfer.

6 My concern is that without an instruction advising the jury
7 that Ms. Beale is for all intents and purposes the City in this
8 case, that they may decide that whatever she did is not
9 attributable to the City or that vice versa, that the -- that
03:27 10 she's personally liable and she's not. She can't be personally
11 liable under the law.

12 THE COURT: All right. Well, just a minute here.

13 MS. ADEMA: May I respond, Your Honor?

14 THE COURT: Yes.

03:28 15 MS. ADEMA: So yes, you're right, retaliation, or
16 Mr. Cadieux is right that retaliation isn't a claim that you
17 would bring personally against an employee because it's based
18 on the employer's actions in response to a complaint, and
19 really, what is at issue here is -- the big issue is whether or
03:28 20 not he was -- whether or not the transfer to Public Utilities
21 Department was an adverse employment action. And Ms. Beale
22 wasn't even involved with that, and so I really think it's
23 prejudicial to the City because the complaints that could have
24 been brought under the law personally against Ms. Beale, for
03:29 25 example, for a hostile work environment based on religion,

1 those were dismissed based on the statute of limitations. And
2 I don't think there's any, you know, misunderstanding that the
3 City works through its employees, and the employees that were
4 working through the issue here were not -- it wasn't Ms. Beale.

03:29 5 MR. CADIEUX: well --

6 THE COURT: So you're saying you approve of not
7 having --

8 MS. ADEMA: I object to the agency instructions,
9 correct.

03:29 10 THE COURT: Yeah. well, here's what I'm going to do.
11 When there is an objection, a strong objection, I take another
12 look at it, so I will look at it tonight and let you know my
13 decision.

14 Now, are you talking about -- let me ask the plaintiff, are
03:29 15 you talking about the requirement of all four of those or is
16 it --

17 MR. CADIEUX: Not necessarily, Your Honor.

18 THE COURT: well, pick the one that you want me to
19 look at.

03:29 20 MR. CADIEUX: Sure. Yeah, because, you know, again, I
21 don't think that we need to hit them over the head with this,
22 but, you know, counsel's argument kind of illustrates my point,
23 is that one of the retaliatory acts was Ms. Beale stripping his
24 supervisory duties, and I think that's going to get lost if the
03:30 25 jury thinks it's only well, what did the City do in response to

1 that? You know, Ms. Beale's direct action is essentially the
2 City's action, so let me find the couple or the one that I
3 think would be -- would make the most sense.

4 THE COURT: And I'll consider that.

03:30 5 MR. CADIEUX: Thank you, Your Honor. I really
6 appreciate that.

7 I would ask you to look back at Jury Instruction Number 26
8 proposed by the plaintiff. This is the jury instruction
9 modeled on the Ninth Circuit Civil Jury Instruction Section
03:31 10 4.10.

11 THE COURT: Okay. I'll look at Instruction Number 26
12 and that's under the -- and that's after the Ninth Circuit 410.

13 MR. CADIEUX: Correct, Your Honor.

14 THE COURT: Okay. We'll deal with that later then.

03:31 15 MR. CADIEUX: Thank you.

16 THE COURT: Then let's get through the ones that
17 I -- 19 here.

18 MR. CADIEUX: I can tell you right now, I have no
19 objection to the proposed instruction.

03:31 20 THE COURT: All right. What about the City?

21 MS. ADEMA: I have no objections either. I think it's
22 a good instruction.

23 THE COURT: Okay. Very good. I'm happy to hear that.

24 MR. CADIEUX: You weren't kidding about your brilliant
03:31 25 law clerks.

1 THE COURT: So the only issue that I have to deal with
2 and let you know tomorrow morning is the one relating to
3 Instruction 26, so that makes it easy.

03:32 4 That being said, let's go over the other instructions just
5 for the sake of the record.

6 what I generally do is just start with the jury
7 instructions. You're all probably familiar with them, and I'm
8 just going to call them like Jury Instruction 1, number 2,
9 et cetera. And you can tell me if you don't -- if you don't
03:32 10 object to them, just don't say anything, and I'll move on to
11 the next one. If you object, then we'll deal with it.

12 well, first, have you had a chance to look at it, to at
13 least be in a position to say you don't object?

14 MS. ADEMA: Yes, Your Honor.

03:32 15 THE COURT: Or object?

16 MR. CADIEUX: I'm a slow reader. Could I have one
17 more minute?

18 THE COURT: Yes, sure.

19 MR. CADIEUX: Thank you, sir. Great. Thank you,
03:33 20 Your Honor.

21 THE COURT: Okay. Again, if you agree when I say it,
22 just don't say anything, and I'll go to the next one.

23 Okay. Jury Instruction Number 1, Jury Instruction Number
24 2, Jury Instruction Number 3, Jury Instruction Number 4, Jury
03:34 25 Instruction Number 5, Jury Instruction Number 6, Jury

1 Instruction Number 7.

2 MR. CADIEUX: No objection to the content, Your Honor.
3 I would just note that "jury" is misspelled at the top.

4 THE COURT: That what?

03:34 5 MR. CADIEUX: "Jury" is misspelled at the top of that
6 instruction.

7 THE COURT: well, that won't be there, but I'm glad to
8 know it anyway. We don't -- we just have a blank sheet when
9 they go there, but it's good to know anyway.

03:34 10 All right. Jury Instruction Number 8, Number 9.

11 MR. SCHAEFER: Your Honor, Number 8.

12 MS. ADEMA: Your Honor, on 1.6, the City -- I think we
13 had actually agreed on a joint instruction that didn't refer to
14 affirmative defenses. There's no affirmative defenses.

03:35 15 THE COURT: That's right, there isn't any.

16 MS. ADEMA: Yeah.

17 THE COURT: Okay. That should come out.

18 MS. ADEMA: Yes, Your Honor.

19 THE COURT: Okay. Number 8 is gone. Thank you.

03:35 20 MS. ADEMA: well, but the burden of proof on
21 plaintiff's claims still needs to be in there, just not the
22 portion about the City -- or we had modified it and I think
23 agreed on an instruction that basically --

24 THE COURT: we could put -- do we have that one? we
03:36 25 could maybe -- we could put that back if it's both agreed to.

1 We can just strike out "affirmative defense," and we'd be all
2 right, wouldn't we?

3 MR. CADIEUX: That works for me, Your Honor.

4 MS. ADEMA: Yes, Your Honor.

03:36 5 THE COURT: Okay.

6 MS. ADEMA: It appears twice, just as a reminder
7 there.

8 THE COURT: Yes. So the instruction will be a go with
9 the exclusion of -- the elimination of two -- or affirmative
03:36 10 defenses, and one in the first line, and the second one in the
11 third line. So 8 is okay with those changes.

12 All right. 9, 10, 11, 12, 13, 14, 15. We don't have any
13 charts, do we? This is charts and summaries. We don't have
14 any of that.

03:37 15 MR. CADIEUX: Yeah. What would you -- how would you
16 classify the timelines that we both showed in our opening
17 statements?

18 THE COURT: It wasn't admitted into evidence, though,
19 were they?

03:37 20 MR. CADIEUX: No, they were not, which I think is what
21 15 is about. I think 16 is going to need to come out, though.

22 MR. SCHAEFER: Well, 15 is not received into evidence.

23 THE COURT: Well, what was it again that was shown to
24 the jury that was not put into evidence?

03:38 25 MR. CADIEUX: Both of us showed -- they were similar,

1 but slightly different timelines in our opening statements.

2 THE COURT: Timelines.

3 MS. ADEMA: And the City showed its organizational
4 chart.

03:38 5 THE COURT: That's true.

6 MS. ADEMA: I'm sorry. That is actually in.

7 MR. CADIEUX: Is it? Did you offer it?

8 THE COURT: They did.

9 THE CLERK: They did offer it.

03:38 10 THE COURT: I think there's two of them.

11 THE CLERK: They offered two yesterday, and they were
12 both admitted, and I think yours was -- which exhibit was it?
13 Was it an exhibit?

14 MR. CADIEUX: No, just demonstrative.

03:38 15 THE CLERK: Theirs was marked 156 and 157.

16 MR. CADIEUX: Gotcha.

17 THE COURT: Maybe like on Number 15, it says, "Charts
18 and summaries." Maybe the solution would be -- well, was
19 anything shown to them that was not put into evidence where
03:39 20 this would be relevant?

21 MR. CADIEUX: Just my timeline in my opening
22 statement, Your Honor.

23 THE COURT: We don't really have to say anything --

24 MR. CADIEUX: I'm fine.

03:39 25 THE COURT: -- about that. So why don't I leave 16

1 in, charts and summaries have been admitted or just we could
2 specifically put what it was, organizational chart, and what
3 was the other one?

4 MS. ADEMA: Timeline.

03:39

5 THE COURT: Certain -- what if we say, "Certain
6 timelines and organizational charts have been admitted into
7 evidence to illustrate information brought out in the trial.
8 Charts and summaries are only as good as the testimony or other
9 admitted -- that supports them," et cetera.

03:40

10 So 16 with just adding in -- striking out "summaries," just
11 say -- strike out, "Charts and summaries" and just say,
12 "Certain timelines and organizational charts have been
13 admitted." How's that?

14 MR. CADIEUX: I like it.

03:40

15 THE COURT: Okay. That will be on Number 16.

16 Now, back on 15, that was not admitted. We could probably
17 say -- what again was it that we did? Your opening statement.
18 What did you put in?

19 MR. CADIEUX: The timeline of events.

03:41

20 MR. SCHAEFER: And the City's was not admitted either,
21 Your Honor, the timeline. Ours was not admitted either.

22 THE COURT: All right. Timelines. "Certain timelines
23 not admitted into evidence have been shown to you in order to
24 help explain the contents of" -- not books and records.

03:41

25 Contents of -- what would you substitute for "books, records,

1 and documents"?

2 MR. CADIEUX: I would just strike those and let it
3 say, "Explain the contents of other evidence in the case."

4 THE COURT: "Contents of other evidence in the case,"
03:42 5 which means I can strike, "Books, records, documents."
6 "Context of other evidence in the case. Charts and summaries
7 are only as good as the underlying evidence that supports them.
8 You should, therefore, only give them the weight that you think
9 the underlying evidence deserves." Does that work?

03:42 10 MR. CADIEUX: It works for me.

11 MS. ADEMA: Yes, Your Honor.

12 THE COURT: Okay. Do we have that? Certain
13 timelines, we start that way. All right. That's Number 15.
14 We've got number from 16 with the change. All right. 17.
03:42 15 Let's look at the -- this is the first I really concentrated on
16 these. You have the money that he's made. Did we put evidence
17 of this in?

18 MR. CADIEUX: We did not, Your Honor.

19 THE COURT: How are you going to deal with damages?

03:43 20 MS. ADEMA: Your Honor, any economic damages would be
21 the subject of Your Honor's --

22 THE COURT: That's right, it would be my issue.

23 MS. ADEMA: Yes, your issue.

24 THE COURT: The other -- there's a cap on the other.

03:43 25 MS. ADEMA: Yes, there is, Your Honor.

1 THE COURT: Okay. So I guess we don't have to worry
2 about it.

3 MS. ADEMA: Yeah. I mean, I don't think it's really
4 informative, you know, to the issues the jury is deciding. The
03:43 5 City doesn't have an objection to the information being in the
6 stipulation in the jury instruction. It is something that we
7 stipulated to as part of our amended pretrial order.

8 THE COURT: You mean this money and everything?

9 MS. ADEMA: Yes.

03:44 10 THE COURT: well, if you stipulate to it, it should go
11 in, but I also should instruct the jury ahead of time that it's
12 been stipulated to.

13 MS. ADEMA: Actually, Your Honor, I feel like it
14 does -- it is a distraction, when I think about it, to the fact
03:44 15 that this jury is only awarding compensatory damages. And I
16 think it's established in the record that there wasn't any
17 change in pay.

18 THE COURT: That's true. That's right.

19 MS. ADEMA: And that's really the point.

03:44 20 THE COURT: well, it seems to me the verdict form is
21 the key here, so the verdict form would spell out -- you're
22 preparing it for me, so I haven't looked at it or I haven't
23 seen it or maybe you've provided it, but I haven't seen it yet
24 if you have. It's going to say -- if you find so and so, the
03:44 25 jury can award compensatory damages. I don't know if you put

1 the cap on there or if -- put some other language,
2 "compensatory damages based on the proof," whatever you're
3 going to do.

03:45 4 MS. ADEMA: Compensatory damages, injury to
5 reputation, and so forth. We didn't put the cap in there.
6 It's my understanding that --

7 THE COURT: It doesn't matter because --

8 MS. ADEMA: -- they can't exceed it.

03:45 9 THE COURT: All right. We don't need to put the cap
10 in.

11 But the way you explain it, how you're going to have your
12 verdict form, that sounds reasonable. I'll leave this out. I
13 don't think it adds anything. It's just that I'm -- I was -- I
14 recognized and remember clearly, and it was stressed, that the
03:45 15 amount of pay that he received in the other job, his PUC job,
16 was the same as he was receiving in his clerk job and, as far
17 as we know, has never changed.

18 Okay. So I'll just -- is that okay with you? We just
19 delete that?

03:46 20 MR. CADIEUX: Yeah, that's fine, Your Honor. I don't
21 think it really matters one way or the other.

22 THE COURT: All right. 17 is deleted.

23 MR. CADIEUX: All of 17 or just 17C? Because I think
24 that two prior stipulations -- I mean, I guess they've been
03:46 25 firmly established, but I would like A to be read to the jury

1 just to confirm that --

2 THE COURT: Currently employed. I don't have any
3 problem with A and B. Let's just strike C.

4 MR. CADIEUX: Thank you.

03:46 5 THE COURT: A and B is in.

6 Okay. 18. 19 you agreed upon. 20 is a California
7 instruction. 21, the duty. Let me make sure we're not
8 inconsistent here. Any changes to 21?

9 MR. CADIEUX: No, Your Honor.

03:47 10 THE COURT: Okay. 5.1 is out. Number 22, 23, 24,
11 okay. That's clear. 25. That's not -- 25 is not for them.

12 MR. CADIEUX: Yeah, I agree, Your Honor. I think it's
13 confusing to the jury since we've not mentioned any of these.

14 THE COURT: 25 is out.

03:48 15 The verdict form, I don't know if this instruction comports
16 with your jury form that you're going to provide, the language
17 in it. If it does, fine. If it doesn't, you'll have to
18 conform it to what it does, but when will you have the verdict
19 form over?

03:49 20 MR. CADIEUX: Your Honor, I think both parties e-filed
21 those a week or so ago, but your clerk also asked us to email
22 you the word versions, right, David?

23 LAW CLERK: Yes.

24 THE COURT: Okay.

03:49 25 MR. SCHAEFER: On Number 18, there's a very important

1 instruction. If we do just have a few more minutes to look at
2 it.

3 THE COURT: Sure.

4 MS. ADEMA: It's fine with us, Your Honor.

03:50 5 THE COURT: Okay. Good. Well, then it sounds to me
6 like we're home. We'll have them for you tomorrow morning at a
7 quarter to 8:00. You'll have a chance to review them again to
8 make sure it comports with everything we've talked about today,
9 and it looks like we're ahead of the game. I didn't realize
03:50 10 we'd be able to get through this this quick. We probably won't
11 have much to deal with from quarter to 8:00 to 8:30, but even
12 so, there's usually always something. So I think we're good
13 for now then.

14 MS. ADEMA: I would -- may I just have a moment?

03:51 15 THE COURT: Sure.

16 MS. ADEMA: I'd like to renew my Rule 50 motion at
17 this time. I would like to make it in two parts. As
18 Your Honor ruled in -- on summary judgment, you found that
19 there were two triable issues of fact with respect to
03:51 20 Mr. Johnson's claim of retaliation, the first being the removal
21 of his duties or title as imaging department supervisor. I
22 think the word that Your Honor used is the "role," and I would
23 submit that the evidence is insufficient for that portion of
24 the retaliation claim to be submitted to the jury, that
03:52 25 Mr. Johnson has not established that his title or duties were

1 intentionally removed by the City as a result of protected
2 activity, meaning a complaint of discrimination in September of
3 2015.

4 THE COURT: I'll let you --

03:52 5 MS. ADEMA: And then the second action is the transfer
6 to the Public Utilities Department that occurred in April of
7 2016. In order for that to be actionable as an adverse action
8 under Title VII due to Mr. Johnson having participated in
9 protected activity by presenting a complaint of religious
03:52 10 activity in the workplace, that transfer to the Public
11 Utilities Department he claimed was forced as a result of
12 retaliation from a grievance that related to protected actions
13 of complaining about religion. There have been -- there's been
14 evidence of other contributing factors, evidence that the
03:53 15 grievance included allegations of non-EEIO protected conduct;
16 in other words, conduct that a person can complain about but
17 doesn't -- but doesn't concern a Title VII violation and so,
18 therefore, falls outside of the protections of Title VII in
19 complaining about, say, discrimination in the workplace.

03:53 20 Mr. Johnson made a two-part complaint, and it's been
21 established that the first part did not relate to
22 discrimination, and it was resolved prior to January 2016, and
23 that he then asked to be transferred from the department, and
24 there was the discussion of that, and HR accommodated him, and
03:54 25 at that time, he even talked about seeking a transfer to

1 another department entirely.

2 The EEIO investigation, it's been established, was not
3 concluded until late March 2016. We submit that causation is
4 lacking between participation in a protected activity,
03:54 5 complaining about religion, and the transfer to the Public
6 Utilities Department in April of 2016, and that further
7 Mr. Johnson has not established his burden of proving that
8 there was -- that he was forced to do that. He had the option
9 to stay in the City clerk's office. He had the option to wait
03:55 10 for another job. There's no evidence that either the HR
11 department or the City clerk's office had knowledge of the
12 working conditions that he's now claiming existed in the Public
13 Utilities Department. The key -- the key element of -- the key
14 elements of plaintiff's case are covered in elements 2 and 3 of
03:55 15 the jury instruction, and we'd submit he does not have
16 sufficient evidence to proceed on either of those, that there
17 was material adverse employment action or that that particular
18 adverse employment action only occurred but for his
19 participation in complaining about religion. Thank you.

03:56 20 THE COURT: Okay.

21 MR. CADIEUX: Yeah, Your Honor, we heard a lot of
22 testimony about acts taken by Ms. Beale as a result of that
23 grievance that Mr. Johnson filed against her. We have evidence
24 that they had a good relationship prior to September when he
03:56 25 filed that grievance, and we've got a lot of evidence that that

1 relationship went south in a hurry after he filed it.

2 As far as the specific acts of retaliation, we have
3 testimony from Kelly Cruz and Rasean Johnson, himself, about
4 comments made to subordinates in December 16th of 2015 not to
03:56 5 speak with him, not to talk to him about work, not to go to him
6 with questions about the Versatile System.

7 Ms. Beale testified that Mr. Johnson was not performing a
8 number of duties that she listed in his performance evaluation
9 as of April, which, again, is more circumstantial evidence that
03:57 10 she had intended to retaliate against him and that by naming
11 Elena Mendoza as imaging supervisor in that auto response is
12 corroborating evidence of what Mr. Johnson testified to, that,
13 in fact, he had been removed as imaging section supervisor.

14 As far as the transfer goes, Mr. Barclay, I asked him what
03:57 15 was your understanding of the reason why Mr. Johnson requested
16 a transfer, and Mr. Barclay said it was because of his EEO
17 complaint he filed in September of 2015.

18 So, you know, that speaks directly to the causation element
19 that we have to prove. It was also testified to by Mr. Schwabe
03:58 20 here just a little bit ago that there were no additional
21 remedies offered after that EEO complaint was resolved and that
22 the only remedies were the two discussed during the pendency of
23 that EEO investigation.

24 We also have testimony that the City failed to follow its
03:58 25 own resolution procedures in addressing the outcome of that

1 complaint, all of which is, again, circumstantial evidence of
2 intent and, again, direct evidence of causation.

3 Obviously, plaintiff's position is that we've more than
4 established sufficient basis to put this to the jury, and, you
03:58 5 know, I think it's a little strange because the way I interpret
6 the City's argument regarding the two components of his
7 grievance is to basically say well, we retaliated against him
8 for his HR complaints, not for his EEO complaints, which,
9 again, I think is an odd argument to make, but, I think, again,
03:59 10 lends more credence to the fact that there is sufficient
11 evidence here for a jury to consider yes, Mr. Johnson was
12 materially retaliated against in his workplace by having his
13 duties stripped and by being offered no choice other than to
14 stay in a hostile environment or transfer to the PUD.

03:59 15 THE COURT: All right. Thank you. All right. well,
16 I mean, I see the City's position. I mean, but what I see in
17 this case, however, is that there is -- the plaintiffs have put
18 their finger onto a lot of it. It's circumstantial. We don't
19 have a lot of -- it's not like somebody's holding the gun in
03:59 20 their hand. There's a lot of circumstantial evidence, and
21 there's a lot of evidence, depending on what the jury -- who
22 the jury believes, and I think this is a case that who will the
23 jury believe as far as the evidence is concerned.

24 Certainly, the City has put on evidence that would somewhat
04:00 25 match their position on the Rule 50, but there's also

1 circumstantial evidence that has been put on that would
2 substantiate the allegations.

3 This is the kind of case I think should go to a jury, and
4 that's what they're here for. If it was clear-cut, I would
04:00 5 have no problem dismissing it, but it's not. There is a lot of
6 things. I won't start into some of it. I mean, certainly as
7 far as the imaging title is concerned, that's somewhat bizarre
8 when you have the email going out that -- by Beale that says
9 Mendoza is now the imaging chief, but she didn't mean it. She
04:01 10 really did it just to get -- I guess to get him off her back.
11 I don't know why she did it, but on top of it, you have -- and
12 it's a matter of who you believe. You have apparently the
13 information that was -- a lot of the information of the reasons
14 for -- the security of the reasons for the rulings is
04:01 15 confidential, but apparently, it goes all the way up to the
16 City clerk and the top dog, and then the top dog was -- it was
17 told that the top dog would tell Beale or criticize Beale or
18 give her some -- we don't know whether she did it or not.
19 Beale says no. She said yes.

04:02 20 It's a matter of -- you know, there's a lot of -- a matter
21 of who do you believe in this.

22 And the same thing goes for the issue relating to the
23 transfer to the PUC and the conditions. I don't think that the
24 defendant should necessarily be held responsible just because
04:02 25 he picks a position that he wants to go to that he needs to be

1 going into that mess.

2 Now, that standing alone isn't probably something that is
3 part of this case and from the standpoint of the main issues,
4 but it is an issue of retaliation that even if they didn't know
04:02 5 exactly that it stunk in that toilet, the question is when you
6 transfer somebody, you need to transfer them to somewhere where
7 at least the conditions are worthwhile. Now, maybe it's too
8 little of a deal to make a big deal about, but I think that's
9 up to the jury.

04:03 10 So I'm going to deny the motion at this time, but I will
11 say that you've made a good point. I think that you've made
12 some good points, and it is circumstantial evidence, a lot of
13 it, and again, it's -- you know, you obviously know the people
14 from the City, and you believe, man, they wouldn't be lying up
04:03 15 here, and of course, that's really the issue: were some of the
16 people not telling the truth? But that's up to the jury to
17 decide, so I'm going to deny your motion. Okay.

18 MS. ADEMA: Thank you, Your Honor.

19 I don't want to argue about this any further or belabor it,
04:03 20 but there were two of the things that counsel just referenced
21 in his response that I think were the subject of one of our
22 sidebars when we were excluding subject matter that was a
23 carryover from prior to when the grievance was filed, like this
24 reorganization that occurred.

04:04 25 The issue, I believe, that we clarified that when Ms. Beale

1 was talking to employees about not talking, you know, to
2 Mr. Johnson or she said that she didn't do that, but that was
3 employees that were reorganized in August of 2015 that were
4 supposed to be handling it, you know, outside of Mr. Johnson,
04:04 5 and so I'm just -- I just would like to -- I just would hate to
6 have to, you know, raise objections for issues that we've
7 discussed at sidebar during closing.

8 THE COURT: All right. Well, you might get together
9 on that because, I mean, if you have to do it, you have to do
04:04 10 it. Objections, I never -- if I hear them, I never object to
11 because that's what you've got to do in representing your
12 client. But hopefully that won't come up, and you might let
13 counsel know your concerns. It doesn't mean he'll follow them,
14 but I think it's important that at least you know and take them
04:05 15 into accord if you feel it's appropriate to do that.

16 All right. We'll see you tomorrow at a quarter to 8:00.

17 MR. CADIEUX: I have one more question, which is
18 earlier Mr. Vanderpool talked about submitting a couple
19 exhibits. Do you want to put that off till the morning?

04:05 20 THE COURT: A couple of exhibits?

21 MR. CADIEUX: Yeah, I think he had offered Exhibit 10
22 and Exhibit 56. There were objections to those by the City,
23 and so --

24 THE COURT: Did we talk about them before at all?

04:05 25 MR. CADIEUX: We did, yeah, just briefly there was the

1 objection raised -- this was at the end of our case in chief.
2 Mr. Vanderpool offered Exhibits 10 -- I don't think he got to
3 Exhibit 56 yet because there was an objection. Rather than
4 take a sidebar, we had decided to continue with the case and
04:06 5 we'd deal with it later.

6 THE COURT: why don't we deal with that tomorrow
7 morning. I can't remember, what did the City say about those?

8 MR. SCHAEFER: Your Honor, we had asked for a sidebar
9 on that on Exhibit 10. The other one, we never even said
04:06 10 anything about it.

11 THE COURT: Okay. Let's deal with that tomorrow
12 morning. Thank you.

13 THE CLERK: Also, you marked Exhibit 42, but did not
14 publish it, so if that's something that you want to leave as
04:06 15 is, that's fine. It's just not on my list as going back.

16 MR. SCHAEFER: Okay. I'll take a good look at all of
17 these.

18 THE CLERK: Thank you.

19 THE COURT: Quarter till 9:00.

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C-E-R-T-I-F-I-C-A-T-I-O-N

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated July 12, 2019, at San Diego, California.

/s/ Dana Peabody
Dana Peabody,
Registered Diplomate Reporter
Certified Realtime Reporter