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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AARON JENSEN,

Plaintiff - Appellant/Cross-Appellee,

v.

WEST JORDAN CITY, a Utah municipal corporation,

Defendant - Appellee/
Cross-Appellant,

and

ROBERT SHOBER, in his official capacity,

Defendant - Appellee.

Nos. 17-4173 & 17-4181

AARON JENSEN,

Plaintiff - Appellee,

v.

WEST JORDAN CITY, a Utah municipal corporation,

Defendant - Appellant,

and

ROBERT SHOBER, in his official capacity,

No. 17-4196

Defendant.

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:12-CV-00736-DAK)

April Hollingsworth, Hollingsworth Law Office, LLC, Salt Lake City, Utah, for Appellant/Cross-Appellee.

Dani N. Cepernich, Snow, Christensen & Martineau, Salt Lake City, Utah (Nathan R. Skeen and Maralyn M. English, Snow, Christensen & Martineau, Salt Lake City, Utah; Paul Dodd, West Jordan, Utah, with her on the briefs), for Appellees/Cross-Appellant

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Before **BRISCOE**, **MORITZ**, and **EID**, Circuit Judges.

EID, Circuit Judge.

Plaintiff-appellant Aaron Jensen sued defendant-appellees West Jordan City and Robert Shober for Title VII retaliation, First Amendment retaliation, malicious prosecution, and breach of contract. At trial, the jury returned a verdict in favor of Jensen on all his claims and awarded $2.77 million in damages. The jury did not properly fill out the verdict form, however, so the district court instructed the jury to correct its error. When the jury returned the corrected verdict, it had apportioned most of the damages to Jensen's Title VII claim. Because the district court concluded that Title VII's statutory damages cap applied, the court reduced the total amount of the award to $344,000. Both parties appealed. They raise nine issues on appeal, but we conclude that none of them warrants reversal and affirm.

I. Factual Background

From 1996 to 2009, Jensen worked as a police officer for West Jordan City ("West Jordan"). S.A. at 923, 1553–57. On April 29, 2009, he voluntarily resigned as part of a settlement agreement with West Jordan. *See* S.A. at 1553–57. At the time of Jensen's resignation, his relationship with West Jordan had become strained. Jensen believed that he had been sexually harassed by superiors, and he complained of harassment on multiple occasions in 2008, the last being in September 2008. *See* S.A. at 945. That month, West Jordan opened an Internal Affairs ("IA") investigation into Jensen due to a concern that Jensen was not properly filling out his reports. *See* S.A. at 698, 1135.

The following month, in October 2008, West Jordan placed Jensen on administrative leave. *See* S.A. at 661, 702. On January 8, 2009, while he was still on administrative leave, Jensen filed a discrimination charge with the Utah Anti-Discrimination and Labor Division and the Equal Employment Opportunity Commission ("EEOC"). *See* S.A. at 960–61. Shortly thereafter, Jensen entered a settlement agreement with West Jordan. Under the agreement, Jensen received $80,000 in exchange for the resolution of his discrimination charges and his resignation from West Jordan. *See* S.A. at 1553–57, 1564–66; A. at 198. Jensen and West Jordan signed the settlement documents on April 29, 2009. The documents included the Settlement Agreement and the Negotiated Settlement Agreement. *See* A. at 198. The Utah Anti-Discrimination and Labor Division signed the Settlement Agreement but not the Negotiated Settlement Agreement. *See id.*

West Jordan's IA investigation had continued during Jensen's administrative leave. On November 17, 2008, West Jordan transferred the case to the Utah Attorney General's office. *See* A. at 197. The AG's office found what it believed to be evidence of criminal activity by Jensen and, pursuant to an existing agreement with the Salt Lake County District Attorney's Office, sent the case to the Salt Lake County DA. *See* S.A. at 1414–17. The DA eventually decided to prosecute the case. *See* S.A. at 670, 898–900. Although the Salt Lake County DA prosecuted the case, West Jordan's City Attorney, Jeff Robinson, attended events associated with Jensen's criminal case and offered to help draft documents. A. at 441.

On the day Jensen resigned, two of his co-workers, Reed Motzkus and Burdette Shumway, cleaned out his office and discovered an envelope containing heroin balloons and copies of two driver's licenses, all of which had been obtained during a traffic stop. A. at 198; *see also* S.A. at 477–78, 1494. After hearing about Motzkus and Shumway's discovery, Lieutenant Shober began "looking to find out where [the drugs] came from." S.A. at 737–38. Lt. Shober was Jensen's supervisor as well as one of the individuals against whom Jensen had complained. *See* S.A. at 945. Shober admitted that he had been "frustrated" by Jensen's complaints of sexual harassment. *See* S.A. at 699–700; *see also* A. at 197.

As part of Shober's investigation, he contacted the two individuals from whom the drugs had been seized. A. at 199. Through these discussions, Lt. Shober learned that Jensen had also taken money from these individuals, but West Jordan had no record of this. A. at 199; *see also* S.A. at 778–85. Lt. Shober communicated this

information to Captain Gary Cox, who, in turn, gave it to the DA. A. at 199; *see also* S.A. at 784–85. Shober also spoke with Police Chief Ken McGuire "about the information that came to [him]" regarding the criminal allegations against Jensen. S.A. at 745.

Additionally, on April 24, 2008, while Jensen was still working for West Jordan, he returned "$583 in cash to the legal counsel of an individual who was booked into jail." A. at 199. But "$1,239 was documented as being taken from [this individual] and given to Mr. Jensen for handling." *Id.*; *see also* S.A. at 1514–35. When the incarcerated individual asked for the rest of his money, Lt. Shober could not locate it, leaving West Jordan to cover the balance. *See* S.A. at 1514. At the direction of Chief McGuire, Shober reported this information to Captain Cox, A. at 728, and West Jordan ultimately forwarded this evidence to the DA. *See* A. at 199; *see also* S.A. at 731–32.

Jensen was arrested on May 6, 2010, and charged with two counts of misusing public money and one count of distribution of or arranging to distribute a controlled substance. *See* S.A. at 1490–94. Following a preliminary hearing in December 2010, the trial judge dismissed two of the three charges with prejudice after finding a lack of probable cause. *See* A. at 200. Despite this finding, the court concluded that the state had not brought the charges in bad faith. *Id.* Subsequently, the Salt Lake DA's office transferred the case to the Davis County DA's office. *See id.* The Davis County DA dismissed the remaining charge with prejudice on April 4, 2013. *See id.*

Between the time of his resignation and his arrest, Jensen had secured a new job. A. at 201; *see also* S.A. at 413–15. However, his new employer terminated him a few days after his arrest. A. at 201; *see also* S.A. at 981. Since then, Jensen has lost his marriage and his house. *See* S.A. at 1014–16, 1023–24. He has battled depression and anxiety. *See id.* And he alleges that he has been unable to get another job as a police officer.

II. Procedural History

In March 2011, Jensen filed a second EEOC charge of discrimination. A. at 200. In this charge, Jensen alleged that West Jordan retaliated against him for the earlier EEOC charge by fabricating the evidence of misconduct that led to his arrest. *Id.* After the EEOC issued a notice of rights, Jensen filed this lawsuit. A. at 200–01. The complaint asserted causes of action against West Jordan and, in their official capacities, Dan Gallagher, Lt. Shober, and Does 1–10. A. at 55.[1]

The district court entered a stipulated scheduling order on October 23, 2014. A. at 93–96. The order indicated that the last date to file a motion to amend pleadings was February 16, 2015, and that the last date to file a motion to add additional parties had already passed. A. at 94. On February 15, 2015, Jensen filed a motion to amend his complaint. A. at 99. The magistrate judge recommended granting the motion generally but denying it to the extent that it sought to add new parties (since that deadline had passed). Relevant here, Jensen objected to the

[1] Jensen's amended complaint dropped the claims against Gallagher and Does 1–10. *See* A. at 152.

magistrate's recommendation "denying Mr. Jensen leave to add" Lt. Shober in his individual capacity. A. at 173. Over Jensen's objections, the district court adopted the magistrate's recommendation. A. at 178–79.

On May 15, 2017 (less than a month before trial), Jensen filed another motion to amend the complaint and add Lt. Shober in his individual capacity. *See* A. at 227. The district court denied the motion. Additionally, the district court granted the defendants' motion to dismiss the claims against Lt. Shober in his official capacity. *See* A. at 254–55.

The case was tried before a jury in June 2017. *See* A. at 40–43. Prior to trial, both parties submitted proposed verdict forms. A. at 271, 279. Jensen's proposed form did not provide spaces for the jury to allocate damages among the remaining claims (at this point, the remaining claims were Title VII retaliation, First Amendment retaliation and malicious prosecution under § 1983, and breach of contract). A. at 279–81. By contrast, West Jordan's proposed verdict form included spaces for the jury to allocate specific damages to each claim. A. at 278.

Jensen objected to West Jordan's proposed verdict form because he thought there was no meaningful way for the jury to allocate damages among his claims. *See* A. at 295, 1073–74. He asserted that all the damages flowed from the same injury—that is, the alleged retaliatory fabrication of evidence. *See id.* The district court ultimately used a verdict form of its own design that had spaces for claim-specific damages but gave the jury an option to indicate if it thought the damages were indivisible. *See* A. at 345–50, 1080.

Jensen's counsel took issue with the option to allocate damages in the court's verdict form. In closing, she suggested to the jury that its total damages award "should apply for each of the causes of action, because [she didn't] see the damages as being different for each cause of action." A. at 1140.

When the jury returned its initial verdict in Jensen's favor on all counts, it awarded Jensen $2.77 million in damages, but it reported that each specific claim resulted in zero damages. A. at 1204–08.[2] West Jordan's counsel objected to the verdict—contending that it was "inconsistent [] because there are zero damages for each of the claims, so the total should be zero, not what it is." A. at 1209. West Jordan also emphasized that if it "prevailed on an issue on appeal," there would be no way of knowing which damages were associated with that issue. A. at 1210.

Agreeing with West Jordan that the verdict was problematic, the district court instructed the jury that "[w]e need you to go back and allocate, as best you can, the [total damages award] for the various claims as best you can do that." A. at 1211. When the jury returned, it had allocated the majority of the damages to the Title VII claim—specifically, $1,000,400 in economic damages and $1,740,000 in non-economic damages. A. at 1211–12. The jury allocated the remainder of the original award ($34,000) to the other claims. A. at 1211–13.

Subsequently, West Jordan filed a motion to reduce the damages award. It argued that the Title VII award was subject to Title VII's $300,000 damages cap. In

[2] The total award consisted of $1,024,400 in economic damages and $1,750,000 in non-economic damages.

opposition to West Jordan's motion, and in support of his own proposed judgment, Jensen submitted a declaration from the jury foreperson, Gerrit Dirkmaat, but the district court did not consider Dirkmaat's declaration.[3] The district court agreed with West Jordan that the award was subject to Title VII's damages cap. Consequently, it entered judgment in the amount of $334,000 ($300,000 for the Title VII damages plus $34,000 for the remaining damages) on July 5, 2017. *See* A. at 365.

West Jordan also filed a renewed motion for judgment as a matter of law and a motion for new trial or remittitur. *See* S.A. at 147, 205. Relevant here, West Jordan contended that the verdict was excessive, Jensen's Title VII claim was untimely, the damages award was speculative, and the settlement documents did not constitute a single agreement. *See id.* Jensen filed a motion to alter or amend the judgment. *See* A. at 364. The district court denied all these motions. *See* A. at 426–77.

Finally, Jensen filed a motion for attorney's fees that the district court granted in part and denied in part. It awarded fees but did not give all of Jensen's attorneys the rates they requested. Specifically, April Hollingsworth requested $350 per hour, but the court awarded her $285 per hour. And Brenda Beaton requested $300 per hour for the majority of her work (she submitted a declaration stating that her hourly

[3] West Jordan objected to this declaration under Federal Rule of Evidence 606(b), which generally prohibits courts from considering a juror's statements made during deliberations in a proceeding concerning the validity of the verdict. *See* A. at 370–73. The district court did not rule on the objection, but rather considered "the amounts written on the Special Verdict Form . . . to represent the intention of the jury." A. at 429 n.1. The court also stated that it would not "alter the amounts or the allocations on the Special Verdict Form based on a declaration from the jury foreperson." *Id.*

rate was originally $225 but had increased to $300 in early 2015), but the court awarded her $225 per hour.

Challenging the court's attorney's fees determinations, Jensen filed a supplemental motion for fees that contained additional information. The court denied this motion stating that it had "explained in its previous order the reasons why these billable rates were adjusted and [would] therefore not revisit whether these reductions were reasonable." A. at 506.

This case represents three appeals consolidated into one. The consolidated appeal raises the following issues: (1) the district court's denials of Jensen's motions to amend his complaint; (2) the district court's apportionment instructions, its decision to reduce the jury's award, and its related denial of Jensen's motion to alter or amend the judgment; and (3) the district court's decision to reduce Hollingsworth's and Beaton's hourly rates. Jensen appealed these issues in case numbers 17-4173 and 17-4196. The appeal also includes issues mentioned above related to the district court's denial of West Jordan's renewed motion for judgment as a matter of law. West Jordan raised these issues in its cross appeal (case number 17-4181).

III. Discussion

The parties raise several issues on appeal. We consider them in the following order: whether the district court abused its discretion by giving the challenged jury instructions; whether Title VII's statutory damages cap applies to Jensen's Title VII award; whether the district court abused its discretion when it lowered two of

Jensen's attorney's hourly rates; whether the district court abused its discretion by twice refusing to allow Jensen to add Lt. Shober in his individual capacity; whether the jury's award was excessive; whether the district court erred by denying West Jordan's renewed motion for judgment as a matter of law; and whether the two settlement documents constituted a single agreement.

A. The Court's Jury Instruction Regarding Apportionment

"We review the district court's decision about whether to give a particular instruction for abuse of discretion," and "we review de novo whether, as a whole, the district court's jury instructions correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable principles." *Martinez v. Caterpillar, Inc.*, 572 F.3d 1129, 1132 (10th Cir.2009). "[W]e read and evaluate the instructions in light of the entire record." *United States v. Sorensen*, 801 F.3d 1217, 1229 (10th Cir. 2015). The jury instructions "need not be flawless," *id.*, but we must be satisfied that "the jury was [not] misled in any way." *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1155 (10th Cir. 2012). "We will reverse only in those cases where [we have] a substantial doubt whether the jury was fairly guided in its deliberations." *Sorensen*, 801 F.3d at 1236 (quotations omitted) (alteration in original).[4]

[4] The dissent argues that we apply the wrong standard because we fail to recognize the distinction between preverdict and postverdict jury instructions. But the dissent admits that "[our] analysis captures the same two steps" as its proposed framework. Dissent at 7.

The district court's instructions regarding apportionment did not mislead the jury about the governing law. "Where a single injury gives rise to more than one claim for relief, a plaintiff may recover his damages under any claim, but he may recover them only once." *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1261–62 (10th Cir. 1988) (*overruled on other grounds as recognized by Anixter v. Home–Stake Prod. Co.*, 77 F.3d 1215, 1231 (10th Cir. 1996)); *Mason v. Oklahoma Tpk. Auth.*, 115 F.3d 1442, 1459 (10th Cir. 1997) (*overruled on other grounds by TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011) ("[D]ouble recovery is precluded when alternative theories seeking the same relief are pled and tried together.")). Damages "are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm." Restatement (Second) of Torts § 433A (1965); *Fox v. Ford Motor Co.*, 575 F.2d 774, 787 (10th Cir. 1978). "Damages for any other harm cannot be apportioned among two or more causes." Restatement (Second) of Torts § 433A (1965). In other words, a jury should apportion damages where there is a reasonable basis for doing so but the jury cannot be required to apportion damages where the injury is indivisible. *Id.*; *see O'Neill v. Krzeminski*, 839 F.2d 9, 12 (2d Cir. 1988) ("Normally, a jury need not allocate compensatory damages . . . .").

Whether damages are "capable of apportionment among two or more causes is a question of law" for the court to decide. Restatement (Second) of Torts § 434 (1965) (comment d). But "once it is determined that the harm is capable of being apportioned,

the actual apportionment of the damages among the various causes is a question of fact, which is to be determined by the jury." *Id.*

We conclude, after reviewing the district court's instructions as a whole, that the jury was not misled when the court instructed it to "allocate, as best [it could], the [total damages award] for the various claims." The district court instructed the jury to "justly, fairly, and adequately compensate" Jensen for the damage that he suffered, A. at 309, 310, but cautioned that it "must not award compensatory damages more than once for the same injury," A. at 309. The district court further instructed the jury on the elements of each claim and told the jury the types of damages that could be awarded. A. at 317–40.

The district court also allowed Jensen's counsel to argue in closing that the jury could determine the apportionment of the damages among Jensen's claims. *See* A. at 1139–43. Jensen's counsel advised the jury that its total damages award "should apply for each of the causes of action, because [she didn't] see the damages as being different for each cause of action." A. at 1140. She also informed the jury that they would be "asked what amount of [each claim's] damages is different from the damages assessed in the prior claims" and she "suggest[ed] for each one of those questions that [the jury] just put a zero to maintain a consistent figure across each of the claims." A. at 1141.

Furthermore, the verdict form allowed the jury to follow the instructions of Jensen's counsel and decide how damages should be apportioned among each of Jensen's claims. For example, on question fourteen, the verdict form provided a space for the jury to indicate the amount of damages that resulted from Jensen's

breach of contract claims. On question fifteen, however, the verdict form provided a space for the jury to indicate the amount of those damages that were "different than and in addition to" the damages resulting from the other claims.[5] If the jury indicated that the damages for breach of contract were not "different than and in addition to" the damages for the other claims, then those damages would not be apportioned specifically to Jensen's breach of contract claims. Thus, the jury was able to decide the manner of apportionment by indicating whether any claim's damages were "different than or in addition to" the damages associated with any other claim.[6]

[5] Questions fourteen and fifteen from the verdict form are reproduced here.

> 14. What is the amount of damages, if any, Mr. Jensen proved by a preponderance of the evidence that Mr. Jensen suffered as a result of the West Jordan City's breach of the settlement agreement, the negotiated settlement agreement, or the covenant of good faith and fair dealing?
>
> 15. What is the amount of damages, if any, you find Mr. Jensen incurred as a result of West Jordan City's breach of the settlement agreement, the negotiated settlement agreement, or the covenant of good faith and fair dealing that are different than and in addition to the damages you found in Questions 2, 5, and 8 above?"

A. at 349.

[6] In Jensen's reply brief, he argues that we should consider the jury foreperson's affidavit as evidence that the district court's jury instruction subverted the will of the jury. However, because Jensen failed to make this argument in his opening brief, we decline to consider it. *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief."). Although Jensen mentioned the affidavit in his "Statement of the Case" section, he never argued that we should consider it as evidence of the district court's error. *See Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1133 n.4 (10th Cir. 2004) ("Scattered statements in the appellant's brief are not enough to preserve an issue for appeal.").

When viewing the district court's jury instructions as a whole, we do not have "a substantial doubt [as to] whether the jury was fairly guided in its deliberations." *Sorensen*, 801 F.3d at 1236. Therefore, we do not find legal error in the district court's instructions regarding apportionment.

Additionally, the district court did not abuse its discretion by issuing the particular instruction that the jury should "allocate, as best [it] can, the [total damages awards] for the various claims." First, whether damages are "capable of apportionment among two or more causes is a question of law" for the court to decide. Restatement (Second) of Torts § 434 (1965) (comment d). Here, apportionment was appropriate because there was a reasonable basis for dividing Jensen's injury among his claims. Generally, damages are to be apportioned among claims where "(a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm." Restatement (Second) of Torts § 433A (1965). Jensen pursued claims against West Jordan for Title VII retaliation, § 1983 retaliation and malicious prosecution, and breach of contract. Each claim required proof of different elements, and certain damages sought by Jensen could not be recovered under each of his claims. For example, Jensen's breach of contract claims did not allow recovery for emotional distress. Additionally, his Title VII claim did not allow recovery for harms that occurred more than 300 days before he filed his claim with the EEOC. This prevented recovery under Title VII for damages stemming from both Jensen's arrest as well as the criminal

investigation against him. Accordingly, a reasonable basis for apportionment existed.

Second, the district court acted within its discretion by instructing the jury to amend its initial verdict because the verdict contained inconsistencies that could have created "a potential appeal problem." A. at 1210. The initial verdict awarded Jensen $2.77 million in total damages but it reported that each specific claim resulted in no damages. A. at 1209. Thus, the verdict form did not consistently state whether the total damages should have been zero or $2.77 million. Additionally, if West Jordan prevailed on an aspect of its appeal that concerned only certain claims, there would be no way of knowing which damages were associated with those claims. *See* A. at 1210; *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1229 (10th Cir. 1996) ("Generally, where a jury has returned a general verdict and one theory of liability upon which the verdict may have rested was erroneous, the verdict cannot stand because one cannot determine whether the jury relied on the improper ground.").

In sum, the district court did not abuse its discretion by issuing the particular instruction that the jury should "allocate, as best [it] can, the [total damages award]," and, when the instructions are read as a whole, the jury was not misled as to the governing law. Therefore, the district court's jury instructions regarding apportionment were not erroneous.

B. Title VII's Statutory Damages Cap

It is unclear what standard of review applies to the district court's Title VII statutory-damages-cap determination. *Nelson v. Rehab. Enters. of N. E. Wyo.*, 124

F.3d 217 (10th Cir. 1997) (Table) ("[W]e have found no cases indicating what standard of review to apply in such a case . . . ."). This uncertainty is not problematic because the district court's determination would pass under any standard of review.

The Title VII damages cap applies to Jensen's damages award. Neither party disputes that the non-economic damages award of $1,740,000 is subject to the cap. Additionally, the economic damages award of $1,000,400 is an award of lost future earnings that is subject to the cap.

Title VII's damages cap limits recovery to $300,000 against employers who have more than 500 employees. 42 U.S.C. § 1981a(b)(3)(D). But the cap applies only to remedies that were not available under the pre-1991 version of the Civil Rights Act. 42 U.S.C. § 1981a(b)(3) (listing "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses" as remedies limited by the cap). Relevant here, front pay is a remedy that was available under the pre-1991 version of the Civil Rights Act, but lost future earnings are not. *See Williams v. Pharmacia, Inc.*, 137 F.3d 944, 952 (7th Cir. 1998) (classifying lost future earning capacity as "a nonpecuniary injury" added to Title VII in the 1991 Civil Rights Act).

The district court properly characterized Jensen's economic damages award as lost future earnings. The jury "awarded Mr. Jensen" this amount because of his "inability to go back to being a police officer following his arrest." A. at 429. By claiming that he can no longer work as a police officer, Jensen is effectively claiming that West Jordan "narrowed the range of economic opportunities available to him . . .

[and] caused a diminution in his ability to earn a living." A. at 433 (alteration in original) (quoting *Williams*, 137 F.3d at 952). As the district court noted, this is the essence of a lost future earnings award. *See Williams*, 137 F.3d at 952.

Additionally, the district court correctly concluded that lost future earnings are subject to Title VII's damages cap because lost future earnings are closely analogous to common law torts that were not available under the pre-1991 version of the statute. *See id.* Specifically, the district court reasoned that lost future earnings are analogous to "injury to professional standing" and "injury to character and reputation." *See id.* The EEOC has stated that both "injury to professional standing" and "injury to character and reputation" are "other nonpecuniary losses" subject to Title VII's cap. *Id.*; *see* 42 U.S.C. § 1981a(b)(3) (stating that "other nonpecuniary losses" are subject to the cap). The similarity between lost future earnings and these torts led the Seventh Circuit to conclude that lost future earnings were also "a nonpecuniary injury" added to Title VII in the 1991 Civil Rights Act. *See Williams*, 137 F.3d at 952. Because of the similarity between lost future earnings and common law torts that were not available under the pre-1991 version of the statute, we agree with the Seventh Circuit's analysis in *Williams* and conclude that Jensen's lost future earnings award falls within the category of "other nonpecuniary losses." Thus, the district court correctly concluded that Jensen's Title VII award is subject to Title VII's damages cap.

C. Attorney's Fees

In a Title VII discrimination action, the prevailing party may recover "reasonable" attorney's fees. 42 U.S.C. § 1988(b). "[T]he burden is on the fee applicant to produce satisfactory evidence . . . that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). "The quality of the lawyer's performance in the case should also be considered." *Case v. Unified Sch. Dist. No. 233, Johnson Cty., Kan.*, 157 F.3d 1243, 1257 (10th Cir. 1998).

We review the reasonableness of the district court's attorney's fees award for abuse of discretion. *Robinson v. City of Edmond*, 160 F.3d 1275, 1280 (10th Cir. 1998). An abuse of discretion occurs when a trial court's decision is "arbitrary, capricious, whimsical, or manifestly unreasonable." *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1152 (10th Cir. 2012). Under this standard, "a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.*

Here, the district court did not abuse its discretion by reducing the hourly rate for two of Jensen's attorneys, April Hollingsworth and Brenda Beaton. The district court considered the evidence submitted by Hollingsworth and Beaton but decided that their requested rates were too high. A. at 466–67.

Hollingsworth submitted declarations from Lois Baar and Christina Jepson to support her requested rate of $350 per hour. *Id.* The district court considered these declarations but concluded that Hollingsworth was entitled to only $285 per hour because the best indicator of her rate was the rates charged by Erik Strindberg and Lauren Skolnick, two attorneys who assisted Hollingsworth with Jensen's case. *Id.* Although both Baar and Jepson declared that Hollingsworth's requested rate of $350 was "within the average community standards for hourly rates for attorneys of her experience and skill in employment law in Utah," A. at 758, 760, the district court decided that a rate of $285 per hour "best reflect[ed] the rate charged by attorneys in the community with reasonably comparable skill, experience, and reputation to Ms. Hollingsworth," A. at 467.

The district court noted that Strindberg and Skolnick—who charged $300 and $275 per hour respectively—operated a practice similar to Hollingsworth's and were more experienced. A. at 466. While Hollingsworth graduated law school in 1996, Strindberg graduated in 1983 and Skolnick graduated in 1995. *Id.* In fact, Hollingsworth began practicing employment law at their firm, Strindberg & Skolnick, LLC. A. at 652. Additionally, the district court stated that "the conduct of Mr. Jensen's attorney was far from the epitome of professionalism." A. at 462; *see Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1200–01 (10th Cir. 1986) ("We customarily defer to the District Court's [fees award] because an appellate court is not well suited to assess the course of litigation and the quality of counsel.").

Because the district court determined Hollingsworth's hourly rate by relying on the rates charged by two more-experienced attorneys who operated a practice similar to Hollingsworth's, the district court did not abuse its discretion.

As for Beaton, the court considered her experience as well. It found that although Beaton "is an experienced attorney," she "is relatively inexperienced in civil rights and employment law." A. at 467. Accordingly, the court concluded that her original rate of $225 per hour was appropriate but that she had "not provided sufficient evidence to justify an increase in [her] rate to $300 in the middle of this litigation." *Id.* We do not see an abuse of discretion in this determination. Rather, the district court carefully considered the evidence before it and awarded reasonable fees.

We also note that the district court properly refused to consider the evidence in Jensen's supplemental motion for attorney's fees. We agree with West Jordan that this was in essence a motion for reconsideration, and Jensen has failed to show how this motion satisfied any of the established grounds for reconsideration. Accordingly, we conclude that the district court did not abuse its discretion by refusing to consider the additional evidence presented in the supplemental motion for attorney's fees. *See Servants of Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir. 2000) ("We review the district court's denial of a . . . motion [for reconsideration] for abuse of discretion.").

D. Denial of Leave to Amend

We review a district court's denial of leave to amend the complaint for abuse of discretion. *Minter v. Prime Equipment Co.*, 451 F.3d 1196, 1204 (10th Cir. 2006). Federal Rule of Civil Procedure 15(a) provides that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). "Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." *Frank v. U.S. W., Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993).

The district court did not abuse its discretion by denying both of Jensen's motions to amend his complaint by adding Lt. Shober in his individual capacity. Jensen filed his first motion to amend two and a half years into the litigation after the district court's amended scheduling order had already stated that the time for adding additional parties had passed.[7] This qualified as an undue delay under the circumstances of this case.

As for Jensen's second motion to amend, it was filed a month before trial was scheduled to begin when the parties were three and a half years into the litigation. This also qualified as an undue delay. Moreover, had the district court granted

[7] Jensen highlights that as soon as Hollingsworth was retained as counsel she sought to add Lt. Shober in his individual capacity. *See* Aplt. Br. at 40–41. He implies that the delay was due to previous counsel's bad lawyering. We do not see how this is relevant. Poor lawyering might be grounds for a malpractice claim against prior counsel, but it is not grounds for leave to amend. *Cf.* Fed. R. Civ. P. 15(a).

Jensen's motion at that time, the defendants would have been prejudiced. Consequently, the district court did not abuse its discretion by denying either of Jensen's motions for leave to amend.

E. Whether the Verdict was Excessive

West Jordan contends that the district court's damages awards were excessive as an alternative to its previous arguments that the district court did not err by either issuing the challenged jury instruction or applying Title VII's damages cap. Aple. Br. at 30 ("Even if the district court erred in instructing the jury to apportion damages or reducing the damages consistent with Title VII's damages caps, this Court should still affirm . . . [because] the jury's finding of damages was excessive and unsupported."). Because we agree with West Jordan's previous arguments that the district court did not err by issuing the challenged jury instruction or applying Title VII's damages cap, we need not consider West Jordan's alternative argument that the damages awards were excessive.

F. The Motion for Judgment as a Matter of Law

We review de novo the district court's denial of West Jordan's renewed motion for judgment as a matter of law. *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1546 (10th Cir. 1996). In doing so, we apply the same standards used by the district court. That is, "[w]e must affirm if, viewing the record in the light most favorable to [the non-moving party], there is evidence upon which the jury could properly return a verdict for [the non-moving party]." *Id.* "We do not weigh

the evidence, pass on the credibility of the witnesses, or substitute our conclusions for that of the jury." *Id.*

West Jordan argues that there was insufficient evidence for the jury to properly return a verdict for Jensen on three issues: (1) the timeliness of Jensen's Title VII claim; (2) the presence of a policy or regulation sufficient to support municipal liability; and (3) the existence of causation sufficient to support the damages award. We address each of these issues below.

i. The Timeliness of Jensen's Title VII Claim

"In states with a state agency that has authority over employment discrimination claims . . . employees have up to 300 days to file an EEOC charge if they first file a charge with the state agency. A claim not filed within these statutory limits is time barred." *Daniels v. United Parcel Serv., Inc.*, 701 F.3d 620, 628 (10th Cir. 2012) (citations omitted). "Compliance with the 300–day filing requirement . . . is a condition precedent to suit that functions like a statute of limitations and is subject to waiver, estoppel, and equitable tolling." *Million v. Frank*, 47 F.3d 385, 389 (10th Cir. 1995). "[E]ach retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice [and a plaintiff] can only file a charge to cover discrete acts that occurred within [300 days of his filing]." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002) (quotations omitted). The claim accrues when "a reasonable employee would have known of the employer's" retaliatory action. *Almond v. Unified Sch. Dist. No. 501*, 665 F.3d 1174, 1177 (10th Cir. 2011).

West Jordan contends that Jensen's Title VII claim was untimely because the only adverse employment actions that Jensen identified during the 300-day filing window were that West Jordan provided discovery information to the AG and DA, West Jordan complied with subpoenas, and West Jordan offered to draft a motion in limine. We disagree. The district court concluded that there was sufficient evidence presented at trial for the jury to find that during the 300-day window, "[West Jordan] employees knowingly provided false information or knowingly withheld exculpatory information at the preliminary hearing." A. at 437. West Jordan has not given us any reason to overturn this finding. Thus, viewing the evidence in the light most favorable to Jensen, we agree with the district court that there was sufficient evidence that Jensen's Title VII claim was timely.

West Jordan further argues that Jensen's Title VII claim was untimely because any unlawful retaliatory action taken by West Jordan within the 300-day window was a natural effect and consequence of the main retaliatory action—the filing of the criminal case—which occurred outside the 300-day window. *See* Aple. Br. at 46. We disagree.

As support for its argument, West Jordan points us to *Delaware State College v. Ricks*, 449 U.S. 250 (1980). In *Ricks*, the plaintiff, a college professor, contended that he was discriminatorily denied tenure. *See id.* at 255. But he did not file his EEOC charge quickly enough. *See id.* at 254. When the issue came up in court, he asserted that his termination should be viewed as a discrete discriminatory act and that his EEOC charge was timely when viewed against that act. *See id.* at 254–56.

The Supreme Court disagreed: "It appears that termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure." *Id.* at 257–58. "[Consequently,] the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks." *Id.* at 258. "That is so even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id.*

Here, the jury could have found that during the 300-day filing window, West Jordan knowingly provided false information and/or intentionally withheld exculpatory evidence. Unlike the firing in *Ricks*, knowingly providing false information and/or intentionally withholding exculpatory evidence is not a "delayed, but inevitable[] consequence of" filing a criminal case against someone. *See id.* at 257. Therefore, we agree with the district court and conclude that, viewing the evidence in the light most favorable to Jensen, there was a sufficient basis for the jury to find that Jensen's Title VII claim was not time barred.

ii. The Presence of a Policy or Custom Sufficient to Support Municipal Liability

"A municipality may not be held liable under § 1983 solely because its employees inflicted injury on the plaintiff." *Bryson v. City of Oklahoma City*, 627 F.3d 784, 788 (10th Cir. 2010) (quotations omitted). "Rather, to establish municipal liability, a plaintiff must show 1) the existence of a municipal policy or custom, and 2) that there is a direct causal link between the policy or custom and the injury

alleged." *Id*. Importantly, "a municipal policy" includes "not only policy statements, ordinances, and regulations but [also] the individual decisions of city officials who have 'final policy making authority.'" *David v. City and Cty. of Denver*, 101 F.3d 1344, 1357 (10th Cir. 1996) (citation omitted). Municipal policy also includes instances where the "authorized policymakers approve a subordinate's decision and the basis for it." *Moss v. Kopp*, 559 F.3d 1155, 1169 (10th Cir. 2009). In other words, "their ratification will be chargeable to the municipality." *Id.* Similarly, a custom is a practice that is so "continuing, persistent, and widespread" that it has "the force of law." *Carney v. City and Cty. of Denver*, 534 F.3d 1269, 1274 (10th Cir. 2008). Custom can be established by "a series of decisions by a subordinate official . . . of which the supervisor must have been aware." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988); *Mitchell v. City & Cty. of Denver*, 112 F. App'x 662, 672 (10th Cir. 2004) (unpublished).

West Jordan contends that Jensen did not provide evidence of a policy or custom to support the jury's imposition of municipal liability. *See* Aple. Br. at 49. At trial, "the jury was instructed that the City manager, the Chief of Police, and the City Attorney of [West Jordan] all have final policy making authority." A. at 439–40. Neither party has challenged this instruction. Accordingly, municipal liability hinges on whether any of these three individuals ratified a policy or were aware of a series of decisions from subordinates that was sufficiently prevalent to establish a custom. The district court concluded that "the jury was presented with a legally

sufficient evidentiary basis to find municipal liability against [West Jordan]" based on the conduct of the City Attorney, Jeff Robinson. A. at 441.

The district court's explanation of this decision is helpful:

> Evidence was presented at trial, which the jury apparently found to be credible, suggesting that [West Jordan's] City Attorney, Jeff Robinson, showed unusual interest in Mr. Jensen's criminal case. Mr. Robinson's interest in the case was especially unusual because the case was being prosecuted by Salt Lake County and not by [West Jordan]. Some evidence was also presented that Mr. Robinson attended events associated with Mr. Jensen's criminal case, even though his attendance at the events was not necessary, and that he even offered to help draft documents for the case. Because the jury found that [West Jordan] employees decided to knowingly provide false information or knowingly withhold exculpatory information, or both, at a preliminary hearing, the jury could have also reasonably found through the evidence presented that Mr. Robinson must have been aware of this decision, even if the decision was formulated or initiated by other [West Jordan] employees. Because the jury apparently found that Mr. Robinson was aware of the [West Jordan] employees' decision, Mr [sic] Robinson can realistically be deemed to have adopted a policy authorizing the decision. Therefore, the court concludes that the jury was presented with a legally sufficient evidentiary basis to find municipal liability against [West Jordan].

A. at 440–41.

While this is a close issue, when we view the evidence in the light most favorable to Jensen, we agree with the district court's conclusion—there was enough evidence for the jury to find that the City Attorney "adopted a policy authorizing the decision" to either "knowingly provide false information or knowingly withhold exculpatory information." *See, e.g.*, S.A. at 657–82 (Direct Examination of Robinson).

Additionally, there was sufficient evidence that West Jordan's Chief of Police, Ken McGuire, ratified the retaliatory actions of Lieutenant Shober because McGuire

knew of Shober's actions as well as the basis for them. Lt. Shober testified that he was frustrated by Jensen's sexual harassment claims and had communicated his frustration to Chief McGuire. He also testified that he began "looking to find out where [the drugs that were found in Jensen's office] came from," even though the officer who found them had identified the drugs as "found property" and marked them for destruction. S.A. at 737–38. To find out where the drugs came from, Shober contacted the two individuals from whom the drugs had been seized. A. at 199. He then wrote a "supplemental narrative" about the information that he had uncovered. S.A. at 743. Shober gave this information to Captain Cox with the "assumption" that Cox would pass it along to the district attorney's office. S.A. at 744. Shober further testified that he spoke with Chief McGuire "about the information that came to [him]" regarding the criminal allegations against Jensen. S.A. at 745.

Based on Shober's testimony, the jury could have reasonably concluded that he investigated the drugs found in Jensen's office more aggressively due to his frustration with Jensen's sexual harassment allegations. Furthermore, Shober had communicated his frustration with Jensen's claims to Chief McGuire, spoken with Chief McGuire about the information he discovered in his investigation of Jensen, and reported information to Captain Cox at Chief McGuire's direction. Consequently, there was sufficient evidence for the jury to conclude that Chief McGuire knew of Shober's retaliatory "actions, as well as the basis for these actions." *Bryson*, 627 F.3d at 790.

In sum, viewing the evidence in the light most favorable to Jensen, we agree with the district court's conclusion that there was a legally sufficient basis for the jury to find that Jensen's injury was caused by West Jordan's custom or policy.

iii. The Reliability of the Jury's Damages Award

Typically, to recover damages, the plaintiff must "show 'that the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346–47 (2013) (citation omitted). Relatedly, "[d]amages will not be awarded when the evidence surrounding them is uncertain or speculative." *Boehm v. Fox*, 473 F.2d 445, 448 (10th Cir. 1973). For injuries that "are of such character as to require skilled and professional persons to determine the cause and extent [of those injuries, they] must be proved by the testimony of medical experts." *Franklin v. Shelton*, 250 F.2d 92, 97 (10th Cir. 1957). But "a lay witness is competent to testify concerning those physical injuries and conditions which are susceptible to observation by an ordinary person." *Id.*

West Jordan contends that both the economic and non-economic damage awards were speculative. Regarding economic damages, West Jordan's argument rests on the fact that Jensen never offered evidence of specific available positions or evidence that Jensen would have been qualified for those positions. This argument overlooks the fact that "Jensen's claim for lost retirement benefits is based on a general harm to his reputation that prevented him from being able to get any Utah police officer position in the future." A. at 455. Accordingly, "Mr. Jensen did not have to present evidence of a specific job that he lost due to the retaliation." *Id.*

And, as discussed above, "[s]ufficient evidence was presented at trial that the damage to Mr. Jensen's reputation harmed his future prospects of becoming a police officer in Utah." *Id.*

As for non-economic damages, West Jordan contends that there was insufficient evidence to establish proximate causation because psychological injuries are not "susceptible to observation by an ordinary person," and thus, should have been established through expert testimony. *See* Aple. Br. at 54. West Jordan contends that Jensen could not have established these injuries through his expert, because Jensen's expert was not qualified to testify as to causation. *See id.* at 55. According to West Jordan, Jensen's expert "could not testify on the issue of causation because determining the cause of Mr. Jensen's psychological problems was not a necessary part of her therapy." *Id.* (referencing *Starling v. Union Pac. R. Co.*, 203 F.R.D. 468, 478–79 (D. Kan. 2001), and another district court case for support).

Even if we assume that West Jordan is correct, this argument still fails because it focuses exclusively on Jensen's psychological injuries. While "some evidence of Mr. Jensen's officially diagnosed psychological injuries, such as depression, was presented at trial, Mr. Jensen's psychological injuries were not the primary injuries discussed at trial related to Mr. Jensen's non-economic damages." A. at 450. Indeed, "[e]vidence of several other injuries, which are more susceptible to observation by an ordinary person, was presented at trial." *Id.* The jury learned of Jensen's "inability to get a job in the field that he desired; the loss of Mr. Jensen's marriage; the loss of association with Mr. Jensen's friends, who Mr. Jensen referred

to as family; the loss of Mr. Jensen's house; and the damage to Mr. Jensen's reputation in the law-enforcement community." *Id.*; *see also* S.A. at 1014–16, 1023–24. Thus, even if we exclude all of Jensen's psychological injuries from our evaluation of this issue, the district court correctly determined that there was still "a sufficient evidentiary basis . . . to sustain the jury's award of non-economic damages to Mr. Jensen." A. at 450.

G. The Settlement Documents

Whether two documents constitute a single contractual agreement is a question of law. *See Uhrhahn Constr. & Design, Inc. v. Hopkins*, 179 P.3d 808, 813 (Utah App. 2008) ("Whether a contract exists between parties is a question of law[.]" (alteration in original) (citation omitted)). Generally, for one contract to incorporate the terms of another, "the reference must be clear and unequivocal." *Hous. Auth. of Cty. of Salt Lake v. Snyder*, 44 P.3d 724, 729 (Utah 2002). But,

> where two or more instruments are executed by the same parties contemporaneously, or at different times in the course of the same transaction, and concern the same subject matter, they will be read and construed together so far as determining the respective rights and interests of the parties, although they do not in terms refer to each other.

Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266, 271 (Utah 1972), disapproved of on other grounds by *Tangren Family Tr. v. Tangren*, 182 P.3d 326 (Utah 2008).

West Jordan contends that the Settlement Agreement and the Negotiated Settlement Agreement are two separate contracts and the district court erred in concluding that they constitute one agreement. West Jordan has raised this issue because if the agreements are evaluated separately, it believes it can show that it did

not violate the Settlement Agreement. *See* Reply Br. at 22–23. If West Jordan can establish that it is the prevailing party on the issue of whether it violated the Settlement Agreement, then it believes it can recover some of its own attorney's fees. *See id.* In any event, we conclude that the district court correctly determined that the two contracts constitute one agreement.

The Utah Supreme Court's test from *Bullfrog* is satisfied here: West Jordan and Jensen were parties to both the Settlement Agreement and the Negotiated Settlement Agreement; they entered into the agreements on the same day; and both agreements were entered into for the same purpose. The only thing that might lead us to conclude otherwise is that that the Utah Anti-Discrimination and Labor Division was a party to one of the agreements but not the other. We, however, agree with the district court that this lone fact is insufficient to overcome the other reasons for treating these two contracts as one agreement.[8] *See Bullfrog*, 501 P.2d at 271.

IV. Conclusion

For these reasons, we conclude that the district court did not commit any reversible error and AFFIRM.

[8] West Jordan has waived its argument, raised for the first time in this appeal in its reply brief, that the Settlement Agreement should be evaluated separately because it contains an integration clause. *See* Reply Br. at 23.

Jensen v. West Jordan City, Nos. 17-4173, 17-4181, 17-4196

MORITZ, Circuit Judge, dissenting:

I would find that the district court's postverdict instruction requiring the jury to allocate damages was legally inaccurate and substantially risked improperly influencing the jury. Because the proper remedy for such an error is to remand for a new trial, I respectfully dissent to the majority's decision affirming the verdict.

The majority concludes in section III.A that even though the jury issued a verdict that did *not* apportion damages, the district court's postverdict instruction *requiring* apportionment (and reducing the verdict from $2,774,400 to $344,000) was permissible. In reaching its flawed conclusion, the majority reasons that the jury somehow understood from the preverdict instructions that it could disregard the court's specific postverdict direction and choose not to allocate damages. But the record contains no support for that reasoning. The preverdict instructions said nothing about allocation, nor did the preverdict instructions suggest that the jury could disregard the court's direct postverdict instruction. Moreover, the majority does not discuss any of our precedent on postverdict instructions or recognize the substantial risk of coerciveness posed by such instructions. Thus, I would conclude that although the district court did not abuse its discretion in deciding to issue a postverdict instruction, the content of that postverdict instruction was erroneous. And because the appropriate remedy for an erroneous and prejudicial instruction is to remand and order a new trial, I would order a new trial.

Although I would remand for a new trial, I note that I also disagree with the majority's decision in section III.C to reduce the hourly attorney-fee rate for April

Hollingsworth. I would find that the district court abused its discretion when it reduced Hollingsworth's rate because the record does not support its rationale for doing so.

I. Jury Instructions

Unlike the majority, I have a "substantial doubt" as to whether the district court's postverdict instruction "fairly guided" the jury's deliberations. *United States v. Mullins*, 4 F.3d 898, 900 (10th Cir. 1993). I therefore conclude that the postverdict instruction improperly required the jury to allocate Jensen's damages among the various claims, and I would remand for a new trial.

Before reaching its initial verdict, the jury never received instructions on allocating damages among the claims. Rather, during closing arguments, Jensen's counsel suggested that Jensen's damages could *not* be fairly divided between each claim. And she further suggested that instead, the total amount of damages "should apply for each of the causes of action" because she "[did not] see the damages as being different for each cause of action." App. vol. 5, 1140. According to Jensen's counsel, the damages were different only insofar as some damages were economic and others were noneconomic. After arguing that the damages should not be allocated between the claims, Jensen's counsel discussed how the jury should complete the verdict form. She suggested that the jury first calculate the total amount of economic and noneconomic damages and then assign those total amounts to every individual claim. In other words, if the jury awarded a total amount of $1.1 million in economic damages, the jury should assign $1.1 million to every claim that required economic damages. Jensen's counsel then explained that the jury would be asked to state whether the damages for each claim were different

than the damages assigned to the prior claim. And she suggested that the jury "just put a zero [in response to those questions] to maintain a consistent figure across each of the [individual] claims." *Id.* at 1141.

After closing arguments, the district court provided written jury instructions—and those instructions did not require the jury to allocate damages to each claim. Instead, the written instructions simply cautioned against double recovery, stating that the jury "must not award compensatory damages more than once for the same injury." App. vol. 2, 309. The jury also received the written verdict form. And like the written instructions, the verdict form did not require allocation. Instead, the verdict form asked the jury to note whether the damages assigned to an individual claim were "different than and in addition to" the damages assigned to any preceding claim. *Id.* at 347. To better convey the construction of the verdict form, questions two, five, and six are reproduced here[1]:

> 2. What is the amount of damages, if any, Mr. Jensen proved by a preponderance of the evidence that Mr. Jensen suffered as a result of the Title VII retaliation?
> TITLE VII DAMAGES (ECONOMIC): $_____
> TITLE VII DAMAGES (NON[]ECONOMIC): $_____
> . . .
>
> 5. What is the amount of damages, if any, Mr. Jensen proved by a preponderance of the evidence that Mr. Jensen suffered as a result of the malicious prosecution?
> MALICIOUS PROSECUTION DAMAGES (ECONOMIC): $_____
> MALICIOUS PROSECUTION DAMAGES (NON[]ECONOMIC): $____
>
> 6. What is the amount of damages, if any, you find Mr. Jensen suffered as a result of the malicious prosecution that is different than and in addition to the damages you found in Question 2 above?

[1] I also attach as an appendix a copy of the verdict form that the jury completed and submitted after receiving the district court's postverdict instructions on allocation.

Id. at 346–47. Thus, the jury could either assign unique amounts to each claim that were "different from and in addition to" the amounts assigned to the previous claims, or the jury could assign the same lump-sum amount to every claim. *Id.* Finally, the verdict form left space at the end for the jury to calculate the total, lump-sum amounts of economic and noneconomic damages. Those questions stated:

> 16. For only the claims for which you answered "Yes" to Question Nos. 1, 4, 7, 10, 11, 12, and/or 13, what is the total amount of damages, other than damages for pain and suffering, Mr. Jensen has proven that he suffered that was caused by West Jordan City's conduct?
> TOTAL DAMAGES (ECONOMIC): $_____
>
> 17. For only the claims for which you answered "Yes" to Question Nos. 1, 4, and/or 7, what is the total amount of damages for pain and suffering that Mr. Jensen has proven that he suffered that was caused by West Jordan City's conduct?
> TOTAL DAMAGES (NON[]ECONOMIC): $_____

Id. at 350. And so, with Jensen's arguments in mind and the written instructions and verdict form in hand, the jury deliberated.

After deliberations, the jury issued a verdict that awarded zero dollars for each individual claim. Meaning, for questions two, five, and six reproduced above, the jury assigned zero dollars—instead of following Jensen's counsel's suggestion and assigning zero dollars to the questions asking about damages that were "different from and in addition to" damages for other claims, such as question six. *Id.* at 347. But regarding total damages, the jury awarded a lump-sum amount of $1,024,400 for Jensen's economic damages in response to question 16 and another lump-sum amount of $1,750,000 for Jensen's noneconomic damages in response to question 17.

During a subsequent postverdict conference with the court, West Jordan City (West Jordan) requested a postverdict instruction on allocating damages, asserting that the verdict was inconsistent because the jury awarded zero dollars on each individual claim yet awarded total damages of $2,774,400 for Jensen's economic and noneconomic claims. But Jensen's counsel argued that the verdict clearly showed that the jury did not want to allocate damages, and she requested that the court simply ask the jury to clarify the basis for its award. The district court followed West Jordan's suggestion, issuing the following instruction on allocation:

> *We need you to go back and allocate, as best you can, the totals you have arrived* at in the answers to Numbers 16[, the total amount of economic damages,] and 17[, the total amount of noneconomic damages,] for the various claims as best you can do that. So we'll send you back to deliberate on that.

App. vol. 5, 1211 (emphasis added). Not surprisingly, the jury reconvened and did exactly what the court's postverdict instruction directed it to do—it awarded the same total amount of economic and noneconomic damages, but it allocated those totals among each claim. Instead of assigning zero dollars for each claim, the jury assigned unique amounts. For example, in response to question two, the jury assigned $1,000,400 in economic damages and $1,740,000 in noneconomic damages to the Title VII claim. The jury then assigned $4,000 in economic damages and $5,000 in noneconomic damages for the malicious-prosecution claim (question five), and it also stated that those $9,000 in malicious-prosecution damages were "different than and in addition to" the Title VII damages (question six). App. vol. 2, 347. The jury took the same approach on questions 8 and 14 relating to Jensen's § 1983 and breach of contract claims. *See id.* at 347–48

(awarding $4,000 in economic damages and $5,000 in noneconomic damages for § 1983 claim and then stating all § 1983 damages were "different than and in addition to" previous damages); *id.* at 349 (awarding $4,000 for each breach of contract claim and then stating all contract damages were "different than and in addition to" previous damages). But at the end of the verdict form, the jury awarded the same total amounts for Jensen's economic and noneconomic damages, awarding $1,024,400 for Jensen's economic damages (question 16) and another lump-sum amount of $1,750,000 for Jensen's noneconomic damages (question 17).

The resulting allocation had the effect of significantly reducing Jensen's recovery. That's because Title VII limits a plaintiff's recovery to $300,000 when a plaintiff sues employers with more than 500 employees. 42 U.S.C. § 1981a(b)(3)(D). And as the majority notes, this damages cap applies here. Maj. op. 16. And as a result, Jensen's final award for all his claims was $344,000, rather than the approximately $2.77 million awarded by the jury.

On appeal, Jensen argues that the postverdict instruction improperly required the jury to allocate damages. I agree.

A. Framework for Evaluating Postverdict Instructions

In evaluating Jensen's challenge, neither the parties nor the majority rely on our caselaw considering the propriety of postverdict instructions. And perhaps that is because postverdict instructions are rare and therefore the caselaw guiding this issue is scant. But cases in our circuit suggest a straightforward, two-step framework for evaluating postverdict instructions. First, we consider whether a postverdict instruction is necessary.

See Unit Drilling Co. v. Enron Oil & Gas Co., 108 F.3d 1186, 1191 (10th Cir. 1997) (stating that district courts should determine whether verdict is ambiguous in order to determine whether instructions to clarify are necessary); *Resolution Tr. Corp. v. Stone*, 998 F.2d 1534, 1547 (10th Cir. 1993) (approving postverdict questioning where verdict was ambiguous). Second, we consider whether the given instruction was proper. *See Resolution Tr. Corp.*, 998 F.2d at 1548 (analyzing whether postverdict questions were proper after determining verdict was ambiguous).

Although the majority does not expressly recognize this framework, its analysis captures the same two steps. *See* Maj. op. 11–15 (evaluating content of postverdict instruction as proper), 16 (concluding district court properly issued postverdict instruction because initial verdict was inconsistent). And like the majority, I too evaluate the postverdict instruction by analyzing both parts of the two-step framework.

1. A postverdict instruction was necessary to resolve an inconsistency.

At step one, district courts can issue postverdict instructions or ask questions when a verdict is ambiguous. *See Unit Drilling Co.*, 108 F.3d at 1191 (approving postverdict questioning and instructions to clarify ambiguous verdict). But these instructions must be used with caution because postverdict instructions pose a substantial risk of improperly influencing the jury. *See Resolution Tr. Corp.*, 998 F.2d at 1548 (noting postverdict questions are proper only in "limited instances"); *Perricone v. Kan. City S. Ry. Co.*, 704 F.2d 1376, 1378 (5th Cir. 1983) ("There is a substantial risk that such a supplemental instruction given immediately to the jury on its return is coercive."); *Bonner v. Guccione*,

178 F.3d 581, 590–91 (2d Cir. 1999) (approving *Perricone* and noting that postverdict instructions "risk that the jury will infer that the judge is conveying her unhappiness with the verdict"). Here, as the majority recognizes, the initial verdict was ambiguous because the zero-dollar amounts assigned to the individual claims do not correspond to the jury's total damages award of more than $2.7 million dollars. Thus, I would conclude, consistent with the majority, that the district court did not abuse its discretion by issuing a postverdict instruction. *See Martinez*, 572 F.3d at 1132.

2. The district court's postverdict instruction substantially risked improperly influencing the jury.

Because I agree that the district court did not abuse its discretion in deciding to issue a postverdict instruction, I next consider step two: whether the given instruction was proper. And I evaluate the content of the postverdict instructions de novo. *See id.* At this juncture, I depart from the majority. And I do so because the majority fails to recognize any distinction between postverdict and preverdict instructions, much less consider the unique and substantially coercive effect posed by postverdict instructions. Instead, the majority treats the postverdict instruction as if it were a preverdict instruction and elides any discussion of the relevant caselaw and context that should guide our analysis.

The majority first suggests that the postverdict instruction "regarding apportionment" was proper because it "did not mislead the jury about governing law." Maj. op. 11. I strongly disagree for three reasons. First, the postverdict instruction was not an instruction "regarding apportionment." *Id.* It did not, for example, explain what apportionment is or when it is appropriate. Instead, the postverdict instruction *directed*

the jury to *reconsider the verdict it had already rendered and apportion its damage totals*.

Second, the postverdict instruction could not have fairly guided the jury about governing law because the postverdict instruction did not accurately state the governing law. According to the majority, the postverdict instruction accurately stated the law because damages can be allocated among claims. But even if we assume the postverdict instruction accurately conveyed this general proposition, the instruction is materially incomplete. As the majority recognizes, although juries *can* allocate damages, *they are not required to do so* "where the injury is indivisible." Maj. op. 12 (relying on Restatement (Second) of Torts § 433A (1965) and *O'Neill v. Krzeminski*, 839 F.2d 9, 12 (2d Cir. 1988)). And here, as Jensen argues, the jury could have determined that Jensen's injuries were indivisible. But rather than instructing the jury to clarify whether the lump-sum amounts resulted from every claim or from specific claims, the district court ordered the jury to allocate damages among the claims. By taking this discretion away from the jury, the postverdict instruction failed to accurately state the governing law.

Third, this incomplete postverdict instruction was not neutrally phrased because it impermissibly favored West Jordan. It is evident that West Jordan stood to benefit more from allocated damages than Jensen. For example, during the bench conference that occurred immediately before the postverdict instruction, West Jordan asked the court to instruct the jury to allocate damages while Jensen asked the court to simply clarify the basis for its damages, presumably because both parties understood that allocating damages among each claim could trigger the Title VII damages cap. In light of these

competing interests, the court's postverdict instruction should have given the jury the choice between allocated or unallocated damages. But instead of providing a neutral instruction that permitted the jury this choice, the court improperly favored West Jordan by requiring allocation. *See Perricone*, 704 F.2d at 1378 (noting that postverdict instructions should neutrally state the law); *cf. Darks v. Mullin*, 327 F.3d 1001, 1014 (10th Cir. 2003) (noting that preverdict supplemental instructions should be "neutrally phrased").

The majority first attempts to rationalize the inaccurate and one-sided postverdict instruction by suggesting that, when considering the "entire record" and the instructions "as a whole" the jury was not misled. Maj. op. 11 (first quoting) (quoting *United States v. Sorensen*, 801 F.3d 1217, 1229 (10th Cir. 2015)), 14 (second quoting). Specifically, the majority suggests that because the preverdict instructions did not require allocation, the jury was not compelled to allocate damages, even though the postverdict instruction explicitly directed the jury to do so. *See id.* at 11–15. As an initial matter, it is not apparent to me how preverdict instructions that say nothing about allocation can cure a coercive and legally inaccurate postverdict instruction requiring the jury to allocate damages. And the majority cites no cases supporting its result. *See* Maj. op. 11–12, 14–16 (relying only on cases considering preverdict instructions). But in any event, an accurate and thorough review of the "entire record" and the instructions "as a whole" must include the *context* in which this specific postverdict instruction arose. Here, before deliberating, Jensen's counsel told the jury in closing argument *not* to allocate damages, and the written instructions received by the jury did not instruct on allocation. After deliberations,

the jury returned an unallocated damages award. Almost immediately thereafter, the court instructed the jury to reconvene and allocate damages. And after a "short recess," the jury did exactly what it was told in that final, single instruction—it returned a revised verdict that allocated damages. App. vol. 5, 1211.

Thus, contrary to the majority's characterization, even if the jury could theoretically choose not to allocate damages, the choice was just that—theoretical. In actuality, the postverdict instruction compelled the jury to allocate damages. The court told them "[w]e need you to go back and allocate," and it gave the jury no option to do otherwise. App. vol., 5, 1211. In this regard, this case presents a substantial risk that the postverdict instructions were inherently coercive, misleading the jury regarding its options for awarding damages. *See Perricone*, 704 F.2d at 1378 (determining that postverdict instruction describing impact of finding contributory negligence of plaintiff to be greater than 50 percent was inappropriate because "[i]t contains the risk that the jury may conclude that it is being told its finding of 70 percent contributory negligence was unsound"). And I note that even a lesser risk would require a remand under the majority's standard. Specifically, the majority suggests that for a postverdict instruction to be permissible, "we must be satisfied that '*the jury was [not] misled in any way*.'" Maj. op. 11 (alteration in original) (emphasis added) (quoting *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1155 (10th Cir. 2012)). Thus, the majority is incorrect to suggest that

a review of the entire record and the instructions as a whole permits a conclusion that the jury was not required to allocate damages.[2]

The majority also attempts to rationalize the inaccuracy and one-sidedness of the instruction by explaining that "there was a reasonable basis for dividing Jensen's injury among his claims." Maj. op. 15. But even assuming such basis exists, the majority again misses the mark. That it was possible for the jury to allocate damages does not mean that it was proper to require that the jury do so. The jury should have had the choice to award either allocated or unallocated damages. The postverdict instruction removed this choice.[3]

[2] The majority also implies that the jury always intended to apportion damages and that this intent is relevant to our analysis. *See* Maj. op. 13–14 (explaining that the verdict form enabled the jury to apportion damages if it wanted to). But to the extent that the majority is suggesting that the postverdict instruction was proper because the jury likely intended to award unallocated damages, the majority is misguided. The jury's intent (or rather, a reviewing court's impression of the jury's intent) has no bearing on whether the content of the postverdict instruction was impermissibly coercive. And I am not aware of any caselaw suggesting that an appellate court can affirm a legally erroneous postverdict instruction by speculating as to the jury's intent. Moreover, even if we could speculate regarding the jury's intent, it seems far more likely that the jury did *not* intend to allocate damages in its initial verdict. Rather, it appears that the jury intended to follow Jensen's counsel's suggestion that it award a single amount on each claim and put a zero in the space provided to make it clear the total damages were the same on each count. The jury could certainly have failed to understand that they needed to repeat the total damage award on each individual claim. But this disagreement regarding the jury's intent simply underscores why, given an ambiguous verdict, this court should not speculate as to the jury's intended result.

[3] It is worth noting that even if, as the majority suggests, there was a reasonable basis for allocating damages, the jury's ultimate allocation following the postverdict instruction appears unsupported. Neither Jensen nor West Jordan suggested the allocation that the jury submitted. And it is not evident why, for example, Jensen's noneconomic recovery for malicious prosecution would amount to $5,000 while the recovery for a Title VII retaliatory discharge would amount to $1.74 million when both the malicious prosecution and the retaliatory discharge led to similar injuries.

Because the district court issued a coercive and legally inaccurate instruction, I am left with "substantial doubt" as to whether the jury was "fairly guided." *Mullins*, 4 F.3d at 900. I would therefore reverse the jury's verdict and consider the appropriate remedy. Typically, when a jury instruction is so erroneous that we must remand the case to the district court, we order a new trial. *See United States v. Benford*, 875 F.3d 1007, 1021 (10th Cir. 2017). And cases like *Unit Drilling* and *Resolution Trust* suggest that a new trial is likewise the proper remedy for an erroneous postverdict instruction that fails to remedy an ambiguous verdict. *See Unit Drilling Co.*, 108 F.3d at 1191, 1193 (ordering new trial where district court failed to clarify ambiguous verdict); *Resolution Tr. Corp.*, 998 F.2d at 1548 (noting that ambiguous verdict is remedied by either postverdict instruction or new trial).

Notably, however, neither party requests a new trial on this issue.[4] Instead, Jensen requests that we interpret the initial verdict as properly awarding a lump-sum and reinstate that verdict whereas West Jordan argues that the latter verdict should stand. But because I would find that the initial verdict was ambiguous and the postverdict instruction failed to correct that ambiguity, I would also find that neither of the parties' suggested remedies are appropriate here. Although this situation is somewhat unique, I find guidance in our caselaw, which suggests that we can order a new trial even if the

[4]I note that Jensen did request that we reverse the district court's order denying him leave to amend his complaint to bring claims against Lieutenant Shober in his individual capacity. And as part of that request, Jensen asked that we order a separate trial against Shober. Additionally, in the below proceedings, West Jordan filed a motion for a new trial as to all claims; however, West Jordan does not appeal the court's order denying that motion.

parties do not request or want a new trial. *See Fischer Imaging Corp. v. Gen. Electric*, 187 F.3d 1165, 1167 (10th Cir. 1999) (ordering new trial even though plaintiff did not request new trial); *Hartnett v. Brown & Bigelow*, 394 F.2d 438, 441–42 (10th Cir. 1968) (ordering new trial to remedy inconsistent verdict and declining request to dispose of case without ordering new trial). Accordingly, I would reverse and remand for a new trial.

II. Attorney Fees

Although I would ultimately dispose of this appeal by ordering a new trial, I nevertheless address my disagreement with the majority's conclusion in section III.C that the district court did not abuse its discretion in reducing Hollingsworth's hourly rate. I would conclude that the court clearly erred—first by relying on reasons unsupported by the record to reject fee affidavits submitted by Hollingsworth, and second, by choosing an hourly rate that neither party suggested was in line with the prevailing rate in the community for similar services.

Consistent with the majority, I review the reasonableness of the district court's fee award for an abuse of discretion. *Robinson v. City of Edmond*, 160 F.3d 1275, 1280 (10th Cir. 1998). Under this standard, "a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Somerlott v. Cherokee Nation Distrib., Inc.*, 686 F.3d 1144, 1152 (10th Cir. 2012) (quoting *Wright ex rel. Tr. Co. of Kan. v. Abbott Labs., Inc.*, 259 F.3d 1226, 1235 (10th Cir. 2001)). Importantly, the district court's finding can be clearly erroneous even if it has some support. *See United States v. De Jesus Cruz-Mendez*, 467 F.3d 1260, 1265 (10th

Cir. 2006) ("A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (quoting *United States. v. De la Cruz-Tapia,* 162 F.3d 1275, 1277 (10th Cir. 1998))).

As the district court acknowledged, reasonable rates are "in line with *those prevailing in the community for similar services* by lawyers of reasonably comparable skill, experience, and reputation." App. vol. 2, 466 (emphasis added) (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)). To demonstrate that her hourly rate was reasonable, Hollingsworth submitted the declarations of Lois Baar and Christina Jepson. Both Baar and Jepson testified that Hollingsworth's hourly rate was a reasonable rate for the relevant community. But the district court summarily rejected both declarations.

The district court's rejection of Baar's declaration is contradicted by the record. When analyzing Baar's declaration, the district court accepted West Jordan's argument and disregarded Baar's testimony because she "worked primarily as a mediator in recent years and has had little opportunity to examine attorney rates." *Id.* But Baar's declaration flatly contradicts this conclusion. Baar mediates employment disputes, and she declared that her mediation practice (in addition to her more than 30 years of practice as a litigator) familiarized her with statewide rates for employment attorneys. And more specifically, she stated that she has mediated cases for Hollingsworth and is therefore familiar with her expertise and experience. Thus, the district court's rationale for rejecting Baar's declaration is contradicted by the record.

The district court's rejection of Jepson's declaration is equally unfounded. Jepson testified that her experience as an employment attorney, her position as the chair of her firm's employment practice, and her former position as a board member of the Labor and Employment Law Section of the Utah State Bar familiarized her with market rates. She then declared that based on that experience as well as her personal knowledge of Hollingsworth's abilities, Hollingsworth's rate is reasonable. The district court again accepted West Jordan's argument that it should give no weight to this experience. And it concluded that Jepson is not comparable to Hollingsworth because Jepson graduated first in her class, clerked for two federal judges, practices as a defense lawyer for large corporations, and works for a more expensive firm. But the district court provided no basis in law or fact for concluding that Jepson's personal achievements undermine her testimony on reasonable community rates. If anything, Jepson's credentials should strengthen her credibility on reasonable rates for the relevant community. Yet, the district court disregarded Jepson's testimony.

Rather than crediting the Baar and Jepson declarations, the district court compared Hollingsworth's rate to the rates of two attorneys who helped Hollingsworth rehearse her case to a jury focus group. One of the focus-group attorneys charged $300 per hour and the other charged $275 per hour. And together, those attorneys devoted approximately 33.5 hours to preparing for the focus group, conducting the focus group, and analyzing the result of the focus group. In its reasonable-fee analysis, the district court determined that Hollingsworth's rate should be reduced to $285 per hour, to reflect an amount between the rates of the focus-group attorneys. Although I do not suggest that such rates

would never provide a proper basis for awarding attorney fees, I would find that the record does not support doing so here. Specifically, the focus-group attorneys did not represent their rates as prevailing community rates or suggest that their services, which amounted to 33.5 hours of work, were similar to the extensive litigation services performed by Hollingsworth, who acted as lead counsel throughout a two-week jury trial and billed a total of 534 hours. *See Blum*, 465 at 895 n.11. And notably, the district court did not conclude or even suggest as much. Rather, the rates it relied on were simply the rates stated in the focus-group invoice. Even West Jordan failed to provide any evidence that those rates were community rates for similar services. Instead, West Jordan simply equated the skill, education, and experience of the focus-group attorneys to Hollingsworth, and the district court followed suit.

Moreover, the district court did not explain why these focus-group rates should receive more weight than the rates proposed by Baar and Jepson, who specifically testified as to prevailing community rates. Instead, the district court summarily concluded that "*[t]he court agrees with WJC that, based on the evidence provided by Mr. Jensen in this case*, a rate of $285 per billable hour is [reasonable]."App. vol 2, 467 (emphasis added).

Likewise, the majority approves the reduced rate and concludes that the focus-group attorneys were comparable to Hollingsworth in skill and experience. But simply comparing Hollingsworth to the focus-group attorneys does not satisfy *Blum*'s requirement that courts analyze reasonable rates according to comparable attorneys

providing similar services. *Id.*[5] And rather than confronting the evidentiary and analytical pitfalls described above, the majority attempts to bolster its conclusion by noting that the district court described Hollingsworth's conduct as "far from the epitome of professionalism." Maj. op. 20 (quoting App. vol. 2, 462). But although professionalism may be an aspect of Hollingsworth's performance that the district court could properly evaluate, the majority cites the professionalism comment out of context. The comment came in the context of the court's remarks on West Jordan's motion for a new trial, where the court specifically noted that Hollingsworth "push[ed] the limits of pre[]trial rulings" and may have "raised implications and arguments during questioning and in closing arguments." R. vol. 2, 462. Significantly, the district court did not reiterate or even allude to Hollingsworth's professionalism when analyzing Jensen's motion for attorney fees. Thus, even if professionalism is properly considered as part of the reasonable-fee analysis, the record does not support the majority's assumption that the professionalism comment underscored the district court's fee analysis.

[5] Even if it were proper to compare Hollingsworth to the focus-group attorneys, the majority's ultimate conclusion is illogical. The majority, adopting the rationale of the district court, explains that Hollingsworth is comparable to the focus-group attorneys because she once worked for those attorneys and because those attorneys graduated from law school in 1985 and 1995 while Hollingsworth graduated in 1996. But rather than awarding Hollingsworth a rate below that of these two attorneys, the district court chose a rate between their rates. Moreover, the district court, and, by extension, the majority, equates the attorneys' years in practice to the attorneys' experience. But an attorney's law school graduation date says little about that attorney's skill or relevant experience—yet another reason why the district court's analysis is arbitrary and unsupported.

In the absence of a new trial, I would remand the determination of Hollingsworth's fees to the district court to reconsider Hollingsworth's rate in light of the affidavits proffered by Jensen—affidavits the court rejected for reasons not supported by the record or not relevant to the court's analysis.

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

AARON JENSEN, Plaintiff, v. WEST JORDAN CITY, a Utah municipal corporation, Defendant.	**JUDGMENT** Case No. 2:12-cv-00736 Judge Dale A. Kimball

This action was tried by a jury from June 12-21, 2017, the Honorable Dale A. Kimball presiding. In accordance with the rulings of the court, the verdict entered by a jury, and the applicable statutory cap (42 U.S.C. § 1981a(b)(3)), **IT IS ORDERED AND ADJUDGED THAT** judgment be and hereby is entered comprised of the following:

1. Aaron Jensen recover from West Jordan City the amount of Three Hundred Thousand Dollars ($300,000), pursuant to 42 U.S.C. § 1981a(b)(3), on his Title VII claim.
2. Aaron Jensen recover from West Jordan City the amounts of Four Thousand Dollars ($4,000) in economic damages and Five Thousand Dollars ($5,000) in non-economic damages on his Section 1983 claim for malicious prosecution.
3. Aaron Jensen recover from West Jordan City the amounts of Four Thousand Dollars ($4,000) in economic damages and Five Thousand Dollars ($5,000) in non-economic damages on his Section 1983 claim for free speech retaliation.

4. Aaron Jensen recover from West Jordan City the amount of Four Thousand Dollars ($4,000) in damages on his claim for breach of the settlement agreement.

5. Aaron Jensen recover from West Jordan City the amount of Four Thousand Dollars ($4,000) in damages on his claim for breach of the covenant of good faith and fair dealing in the settlement agreement.

6. Aaron Jensen recover from West Jordan City the amount of Four Thousand Dollars ($4,000) in damages on his claim for breach of the negotiated settlement agreement.

7. Aaron Jensen recover from West Jordan City the amount of Four Thousand Dollars ($4,000) in damages on his claim for breach of the covenant of good faith and fair dealing in the negotiated settlement agreement.

8. Aaron Jensen is also entitled to reasonable costs and attorney's fees, to be submitted to the court pursuant to DUCivR 54-2 and Federal Rule of Civil Procedure 54(d).

9. Judgment is entered in favor of West Jordan City on all other claims asserted in the complaints, as amended, filed in this case.

Based on the foregoing, **IT IS ORDERED AND ADJUDGED THAT** Aaron Jensen recover from West Jordan City the amount of $334,000 plus costs and attorney's fees to be submitted to the court pursuant to DUCivR 54-2 and Federal Rule of Civil Procedure 54(d).

DATED this 5th day of July, 2017.

BY THE COURT

Dale A. Kimball

The Honorable Dale A. Kimball

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

AARON JENSEN,

Plaintiff,

vs.

WEST JORDAN CITY, a Utah municipal corporation,

Defendant.

MEMORANDUM DECISION AND ORDER

Case No. 2:12-CV-736-DAK

Judge Dale A. Kimball

This matter is before the court on Defendant West Jordan City's ("WJC's") Motion for Judgment as a Matter of Law, Motion for Reduction of Damages, Renewed Motion for Judgment as a Matter of Law, and Motion for New Trial or Remittitur and on Plaintiff Aaron Jensen's Motion to Alter or Amend the Judgment and Motion for Attorneys' Fees. The motions have been fully briefed. The court concludes that a hearing would not significantly aid its determination of the motions. Accordingly, the court issues the following Memorandum Decision and Order based on the written submissions of the parties and the law and facts relevant to the pending motions.

DISCUSSION

The court will first address WJC's Motion for Reduction of Damages and Mr. Jensen's Motion to Alter or Amend Judgment in order to establish the proper amount for the judgment in this case. The court will then address WJC's Motion for Judgment as a Matter of Law and Renewed Motion for Judgment as a Matter of Law to establish whether and what portions of the judgment should stand. Finally, the court will address Mr. Jensen's Motion for Attorneys' Fees.

WJC'S MOTION FOR REDUCTION OF DAMAGES

At the conclusion of the trial in this case, the jury completed its deliberations and returned a verdict in favor of Mr. Jensen in the amount of $2,774,400. Although the jury initially failed to allocate the damages among the different causes of action, the jury, following the court's order, eventually allocated the damages to the different causes of action. In allocating the damages, the jury found that Mr. Jensen suffered $2,740,400 in damages as a result of WJC's violation of Title VII and that those damages are separate and distinct from the damages awarded to Mr. Jensen by the jury for Mr. Jensen's other malicious prosecution, retaliation, and breach of contract claims.

After the verdict but before the court entered the judgment, WJC filed a Motion for Reduction of Damages asking the court to apply the statutory cap on damages in Title VII cases found in 42 U.S.C. § 1981a(b)(3) to the entire amount that the jury allocated to the Title VII claim. Because WJC had over 500 employees for twenty or more calendar weeks for the years during and preceding the events in question in this case, WJC requested the court to apply the cap of $300,000 to the Title VII damages. *See* 42 U.S.C. § 1981a(b)(3)(D) ("The sum of the amount of compensatory damages that may be awarded . . . for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section shall not exceed [$300,000]."). WJC also filed a proposed judgment reflecting the application of the statutory cap.

Although Mr. Jensen did not respond directly to WJC's motion, Mr. Jensen did file a Proposed Judgment asking the court to enter a judgment for the entire $2,740,400, which Mr. Jensen argues reflects the jury's decision and intent. In support of his argument, Mr. Jensen

attached a declaration from the jury foreperson in this case, which Mr. Jensen argues speaks to the jury's intent.

Although the court did not directly rule on WJC's Motion for Reduction of Damages, the court entered a Judgment that applied Title VII's statutory cap to the entire amount that the Jury allocated to Mr. Jensen's Title VII claim. Applying the statutory cap in that manner, the court entered a total judgment of $334,000 plus costs and attorney's fees in favor of Mr. Jensen. Therefore, the court GRANTED the Motion for Reduction of Damages when the court entered a Judgment that applied the statutory cap in the manner requested by WJC.

MR. JENSEN'S MOTION TO ALTER OR AMEND THE JUDGMENT

"A rule 59(e) motion to alter or amend the judgment should be granted only 'to correct manifest errors of law or to present newly discovered evidence.'" *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997) (citations omitted); *see also* Fed. R. Civ. P. 59(e) (allowing for a motion to alter or amend judgment if it is filed "no later than 28 days after the entry of the judgment"). "A manifest error of law is 'the wholesale disregard, misapplication, or failure to recognize controlling precedent.'" *Susinka v. United States*, 19 F. Supp. 3d 829, 834 (N.D. Ill. 2014) (quoting *Oto v. Metro Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000)).

Mr. Jensen moved to alter or amend the judgment in this case because he argues that the Judgment contains a "manifest error of law." Specifically, Mr. Jensen argues that Title VII's statutory cap should not apply to the economic damages that the jury awarded to Mr. Jensen for WJC's violation of Title VII because, according to Mr. Jensen, the statutory cap does not apply to economic damages from discrimination, including back pay, front pay, and benefits.

Mr. Jensen is correct that the statutory cap does not apply to all damages awarded in Title VII cases. Under Section 706(g) of the Civil Rights Act of 1964, a court that determines a

plaintiff is entitled to a remedy for a defendants violations of Title VII can "enjoin the [defendant] from engaging in such unlawful employment practice, and order such affirmative action as my be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . ., or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5. Applying that language, courts have found that applicable plaintiffs "traditionally have been entitled to such remedies as injunctions, reinstatement, backpay, lost benefits, and attorney's fees under § 706(g) of the Civil Rights Act of 1964." *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 847-48 (2001). In 1991, Congress expanded the remedies available under Title VII to include "compensatory and punitive damages . . . in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964." 42 U.S.C. § 1981a(a)(1). However, Congress also placed caps on the "amount of compensatory damages awarded . . . for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages." 42 U.S.C. § 1981a(b)(3). In other words, if a specific remedy was "a type of relief authorized under § 706(g), it is excluded from the meaning of compensatory damages under § 1981a," and the statutory cap does not apply to it. *Pollard*, 532 U.S. at 853.

In this case, the jury awarded Mr. Jensen as damages for his Title VII retaliation claim $1,740,000 in non-economic damages, which both sides agree is subject to the statutory cap,[1] and $1,000,400 in economic damages, which the jury awarded Mr. Jensen for lost retirement benefits caused by Mr. Jensen's inability to go back to being a police officer following his arrest.

[1] Although Mr. Jensen agrees that Title VII's statutory cap should generally apply to non-economic damages, Mr. Jensen also argues that the jury intended to allocate the damages such that Mr. Jensen would receive the entire amount awarded on the Special Verdict Form, and Mr. Jensen provided a declaration from the jury foreperson to support that argument. However, the court considers the amounts written on the Special Verdict Form and allocated to the different causes of action to represent the intention of the jury, and the court is not going to alter the amounts or the allocations on the Special Verdict Form based on a declaration from the jury foreperson.

When Mr. Jensen voluntarily resigned from his position at WJC pursuant to a settlement agreement, Mr. Jensen still needed to complete 7 ½ years of service as a police officer in Utah in order to receive his retirement benefits through the Utah Retirement Systems ("URS") program. Therefore, the question before the court is whether the jury's award to Mr. Jensen of his lost retirement benefits was a type of remedy that courts were authorized to award under § 706(g) of Title VII to prevailing plaintiffs in post-employment retaliation cases.

Mr. Jensen simply argues that, under Section 706(g) of the Civil Rights Act of 1964, prevailing plaintiffs were "entitled to such remedies as injunctions, reinstatement, back pay, lost benefits, and attorney's fees." *Pollard,* 532 U.S. at 847. Because prevailing plaintiffs were entitled to the remedy of lost benefits and because the economic damages in this case were awarded to Mr. Jensen for his lost retirement benefits, Mr. Jensen argues that the jury's award of $1,000,400 in economic damages for his lost retirement benefits should not be subject to Title VII's statutory cap.

The court agrees that some lost benefits were available as a remedy under Section 706(g) of the Civil Rights Act of 1964. *See, e.g.*, *Rosen v. Pub. Serv. Elec. & Gas Co.,* 477 F.2d 90, 96 (3d Cir. 1973) (compensating early retirees "for the losses they sustained and are sustaining due to the discriminatory reduction in the amount of pension on account of service" and increasing "the retirement credit" for other male employees); *Walker v. Ford Motor Co.,* 684 F.2d 1355, 1364-65 (11th Cir. 1982) (adopting the rule that "compensatory and punitive damages are unavailable in Title VII suits" but recognizing that "the compensatory damages ban does not include concomitants of employment such as fringe benefits, pension benefits, or other lost work benefits" and that "a district court order restoring such lost benefits is in the nature of an injunction and falls within the equitable relief provisions of [Section 706(g)]"). The courts that

awarded damages for lost benefits under Section 706(g) often described those awards as being part of a complete award of backpay. *See, e.g.*, *Noel v. New York State Office of Mental Health Cent, New York Psychiatric Ctr.*, 697 F.3d 209, 213 (2d Cir. 2012) (defining back pay as "an amount equal to the wages the employee would have earned from the date of discharge to the date of reinstatement, along with lost fringe benefits such as vacation pay and pension benefits" (quoting *United States v. Burke*, 504 U.S. 229, 239 (1992), superseded by statute on other grounds); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 626-27 (6th Cir. 1983) ("Backpay awards should completely redress the economic injury the claimant has suffered as a result of discrimination. A claimant, therefore, should receive the salary, including any raises, which he would have received but for discrimination. Sick leave, vacation pay, pension benefits and other fringe benefits the claimant would have received but for discrimination should also be awarded." (citations omitted)); *Meadows v. Ford Motor Co.*, 510 F.2d 939, 948 (6th Cir. 1975) ("If eligibility and discriminatory refusal are established, then back pay should be fully awarded, including compensation for fringe benefits then enjoyed by employees."); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 263 (5th Cir. 1974) ("[T]he ingredients of back pay should include more than 'straight salary.' Interest, overtime, shift differentials, and fringe benefits such as vacation and sick pay are among the items which should be included in back pay. Adjustment to the pension plan for members of the class who retired during this time should also be considered on remand."); *Sorrells v. Veterans Admin.*, 576 F. Supp. 1254, 1267 (S.D. Ohio 1983) (reinstating plaintiff to his position, ordering that he be provided with back pay, and granting plaintiff "retroactive seniority, sick leave, vacation pay, pension benefits and other fringe benefits in such fashion as though his employment . . . continued uninterrupted from [the date of the retaliatory discharge] until plaintiff's return to duty"). In other words, lost benefits were

available as a remedy under Section 706(g) of the Civil Rights Act of 1964, but those awards of lost benefits were considered to be a part of a complete award of backpay. As such, the remedy for lost benefits under Section 706(g) was used to restore the benefits of the former employer to the former employee for the period of time between the discriminatory termination until the entry of judgment by the court. Similarly, courts would restore the benefits of the former employer to the former employee under Section 706(g) for the period of time between judgment and reinstatement, or in lieu of reinstatement, as part of front pay awards. *See, e.g.*, *Pollard*, 532 U.S. at 853 ("[B]ackpay awards made for the period between the date of judgment and the date of reinstatement, which today are called front pay awards under Title VII, were authorized under § 706(g).").

However, just because some lost benefits is some forms were available as remedies under Section 706(g) of the Civil Rights Act of 1964, it does not necessarily follow that all lost benefits in all forms were similarly available. The lost retirement benefits awarded to Mr. Jensen by the jury in this case are different than typical lost benefits awarded to plaintiffs under Section 706(g). For example, because Mr. Jensen voluntarily resigned from his position at WJC, his claim for retirement benefits is not a claim that he is entitled to restoration of WJC's benefits in the form of back pay or front pay. Instead, Mr. Jensen claims that he is entitled to the benefits of future employment with a police department in Utah other than WJC, which he was not able to obtain due to the retaliatory conduct of WJC. Specifically, Mr. Jensen argues that WJC's retaliatory conduct led to his arrest and criminal prosecution, which damaged his record and reputation and prevented him from obtaining work as a police office at another police department.

Because of the unique nature of Mr. Jensen's claim for retirement benefits, the jury's award to Mr. Jensen of $1,000,400 in economic damages for lost retirement benefits is more

similar to an award for lost future earnings than it is to an award for front pay or back pay. An award for lost future earnings is given to compensate a plaintiff for "injuries [that] have narrowed the range of economic opportunities available to him . . . [and] caused a diminution in his ability to earn a living." *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 952 (7th Cir. 1998). Such an award "is a common-law tort remedy" and is analogous to an "'injury to professional standing' and to 'injury to character and reputation,' both of which have been identified by the Equal Employment Opportunity Commission as examples of nonpecuniary losses compensable under the 1991 Act." *Id.* Based on this reasoning, the Court of Appeals for the Seventh Circuit has concluded that awards for lost earning capacity fall within the category of "other nonpecuniary losses" and are among "[t]he broad compensatory remedies added to Title VII in the 1991 Civil Rights Act." *Id.* at 952-53; *see also Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 771 (7th Cir. 2006) (recognizing front pay as an equitable remedy and lost future earnings as a legal remedy).

Because the jury's award to Mr. Jensen of his lost retirement benefits in this case is comparable to an award for lost future earnings, the court concludes that the award falls within the category of "other nonpecuniary losses," which only became available in Title VII cases after the passage of the 1991 Civil Rights Act. Therefore, the court concludes that the award is subject to Title VII's statutory cap. Accordingly, Mr. Jensen's Motion to Alter or Amend the Judgment is denied.

WJC'S MOTION/RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

On June 19, 2017, after Mr. Jensen completed the presentation of his evidence at trial, WJC filed a Motion for Judgment as a Matter of Law under Federal Rule of Civil Procedure 50(a). The court did not decide the motion at that time. When "the court does not grant a motion

for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." Fed. R. Civ. P. 50(b). On July 19, 2017, after the jury was discharged and judgment was entered in this case, WJC filed a Renewed Motion for Judgment as a Matter of Law under Federal Rule of Civil Procedure 50(b).

"The standard in determining whether [a Rule 50(b) motion] should be granted is not whether there is literally no evidence to support the party opposing the motion, but whether there is evidence upon which the jury could properly find a verdict for that party." *Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470, 1478 (10th Cir. 1990). In other words, a court "must enter judgment as a matter of law in favor of the moving party if there is no legally sufficient evidentiary basis with respect to a claim or defense under the controlling law." *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1546-47 (10th Cir. 1996).

In its motions, WJC presents nine different reasons why the court should enter judgment in its favor as a matter of law. The court will address each of those arguments below.

Timeliness of Title VII Claim

Title VII claims, such as the claims filed by Mr. Jensen, have a statutory limit of 300 days from the time that an employee or former employee knows of a retaliatory adverse action until the employee or former employee files a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") or the "state agency that has authority over employment discrimination claims." *Benton v. Town of S. Fork Police Dep't*, 553 F. App'x 772, 779 (10th Cir. 2014) (internal quotation marks and citation omitted). "A claim not filed within these statutory limits is time barred." *Id.* A Title VII claim accrues when " a reasonable employee would have known of the employer's decision." *Id.* (internal quotation marks and citation

omitted). "But . . . an employee who discovers, or should have discovered, the *injury* (the adverse employment decision) need not be aware of the unlawful *discriminatory intent* behind that act for the limitations clock to start running." *Id.* (internal quotation marks and citation omitted). "Each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice and [the plaintiff] can only file a charge to cover discrete acts that occurred within 300 days of his filing." *Id.* (internal quotation marks, brackets, and citation omitted).

Although this time limit may be tolled in certain circumstances, "[i]n [the Tenth] circuit, a Title VII time limit will be tolled *only* if there has been active deception of the claimant regarding procedural requirements." *Jarrett v. US Sprint Commc'ns Co.*, 22 F.3d 256, 260 (10th Cir. 1994). In this case, Mr. Jensen concedes that he offered no evidence to support the requisite standard for tolling.

The evidence presented at trial demonstrated that Mr. Jensen was aware before signing the settlement agreement on April 29, 2009, that both a criminal investigation and a Police Officer Standards and Training ("P.O.S.T.") investigation were ongoing and could not be stopped by WJC. Mr. Jensen was then arrested on May 6, 2010, received discovery information in the criminal case by May 17, 2010, and shared information about WJC's involvement in the criminal investigation and prosecution with Dr. Soderquist, his treating physician, on May 26, 2010. All of this occurred more than 300 days before Mr. Jensen filed his Charge of Discrimination with the EEOC and the Utah Labor Commission on March 28, 2011, four days after he signed it. Therefore, Mr. Jensen is time barred from recovering for any of these discrete acts that may qualify as materially adverse actions.

However, at trial, Mr. Jensen argued that WJC did take materially adverse actions within the statutory limit of 300 days before he filed his Charge of Discrimination. Specifically, Mr. Jensen points to WJC's response to discovery requests, WJC employees' appearance and testimony during the preliminary hearing, and a possible offer by WJC's City Attorney, Jeff Robinson, to assist in drafting a motion in limine in Mr. Jensen's criminal trial. WJC argues that none of these actions by WJC constitute materially adverse actions for purposes of Title VII. On the Special Verdict Form, the jury was asked to provide a date on which Mr. Jensen first had knowledge that WJC had taken a materially adverse action against him and to provide a separate date for each adverse action. The jury only provided one date, November 9, 2010, which corresponds with WJC's response to a discovery request.

For purposes of a retaliation claim under Title VII, a materially adverse action encompasses "those acts that carry a 'significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects,'" unless the impact on future employment prospects is "*de minimis*." *Hillig v. Rumsfeld*, 381 F.3d 1028, 1032-33 (10th Cir. 2004). Courts "liberally define[] the phrase 'adverse employment action' . . . [and] take a case-by-case approach, examining the unique factors relevant to the situation at hand." *Sanchez v. Denver Public Schools*, 164 F.3d 527, 531 (10th Cir. 1998). Using this definition, the Tenth Circuit has found that "the filing of false criminal charges constituted an 'adverse employment action' because such an act causes 'harm to future employment prospects.'" *Hillig*, 381 F.3d at 1032 (quoting *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986-87 (10th Cir. 1996)). Applying a similar standard, the Seventh Circuit has held "that listing [a former employee's] name in publicly available SEC filings (and referring to her complaint as 'meritless') constituted a materially

adverse employment action." *Greengrass v. International Monetary Systems Ltd.*, 776 F.3d 481, 485 (7th Cir. 2015).

Even under this liberal definition for adverse action, the court cannot see how a defendant responding to discovery requests or a City Attorney offering to assist in drafting a motion in limine could cause more than *de minimis* harm to someone's future employment prospects, especially considering that neither of those actions is necessarily public. However, if a defendant knowingly provided false or fabricated testimony or knowingly failed to provide exculpatory information at a public preliminary hearing that led to a judge's decision to bind over criminal charges against a plaintiff, that action could cause more than *de minimis* damage to an individual's reputation and harm to the individual's future employment prospects. Given the unique factors relevant to the situation in this case, the harm to Mr. Jensen's reputation and future employment prospects is even more pronounced given the fact that his employment prospects were with police departments, which are more likely to recognize and care about the difference between charges being filed and charged being bound over by a judge.

Therefore, the question before the court is whether there is a legally sufficient evidentiary basis to support the claim that WJC employees knowingly provided false information or knowingly withheld exculpatory information at the preliminary hearing. The court concludes that a legally sufficient evidentiary basis does exist to support that claim. First, the court notes that, in order for the jury to reach its finding that WJC is liable on Mr. Jensen's Section 1983 claim for malicious prosecution, the jury needed to find that employees of WJC either knowingly provided false information or knowingly withheld exculpatory information, or both, at the preliminary hearing. Although conflicting evidence was presented at trial, the jury apparently assigned credibility to the evidence suggesting that WJC officers provided false information about the

amount of money given to Mr. Jensen by another officer, that WJC officers provided false information about when and how drugs appeared in Mr. Jensen's office, and that WJC withheld information related to Mr. Jensen's work schedule around the time of the booking of money into evidence. Therefore, although reasonable minds could differ as to the weight and credibility of evidence on both sides of the issue, the court concludes that there was sufficient evidence at trial for the jury to properly find that WJC took a materially adverse action against Mr. Jensen within the 300-day statutory limit for Title VII retaliation claims.

"But For" Causation

WJC also argues that Mr. Jensen did not present sufficient evidence from which a reasonable jury could find that Mr. Jensen's sexual harassment complaint was the "but for" cause of WJC's materially adverse actions. The but-for causation standard applies to three of Mr. Jensen's claims: Title VII retaliation, breach of the Negotiated Settlement Agreement, and Section 1983 retaliation under the First Amendment. To establish liability under Title VII, "an employee [must] demonstrate that, but for her protected activity, she would not have faced the alleged adverse employment action." *Bennett v. Windstream Commc'ns, Inc.*, 792 F.3d 1261, 1269 (10th Cir. 2015). Because the Negotiated Settlement Agreement requires WJC to comply with Title VII and also has its own non-retaliation provision, the same but-for standard applies to Mr. Jensen's claims for breach of the Negotiated Settlement Agreement. Finally, the "Supreme Court [has] held that the causation required in a First Amendment retaliatory prosecution claim connecting a retaliatory motive to the adverse action taken by the defendant is but-for causation, without which the adverse action would not have been taken." *McBeth v. Himes*, 598 F.3d 708, 717 (10th Cir. 2010) (internal quotation marks and citation omitted).

WJC argues that Mr. Jensen did not establish that WJC would not have cooperated in the manner it did had Mr. Jensen not previously made a sexual harassment complaint. However, the court does not agree that there is no legally sufficient evidentiary basis for the jury to have concluded, as it did, that WJC would not have taken the adverse actions against Mr. Jensen had Mr. Jensen not previously made a sexual harassment complaint. As stated in the Jury Instructions, the jury had the right to rely on indirect evidence to find that WJC employees would not have acted the way they did in the absence of Mr. Jensen's sexual harassment complaint. Evidence was presented at trial that some of WJC's officers were upset about being named in Mr. Jensen's sexual harassment complaint and that those same officers were instrumental in providing evidence against Mr. Jensen during the early stages of the internal investigation. Other evidence presented at trial suggested that Mr. Jensen may have been treated more harshly during the investigation than other officers who had committed similar violations. Therefore, the court concludes that a legally sufficient evidentiary basis existed for the jury to conclude that WJC employees would not have committed adverse actions against Mr. Jensen in the absence of Mr. Jensen's sexual harassment complaint.

Municipal Liability

"[M]unicipalities may be held liable on § 1983 claims only if a municipal policy or custom causes a violation of federal law." *David v. City & Cty. of Denver*, 101 F.3d 1344, 1357 (10th Cir. 1996). An action can be shown to be a policy of a municipality if the act is committed by a city official who has "final policymaking authority," *Id.* (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion)), or if "the authorized policymakers approve a subordinate's decision and the basis for it," *Moss v. Kopp*, 559 F.3d 1155, 1168-69 (10th Cir. 2009). In this case, the jury was instructed that the City Manager, the Chief of Police,

and the City Attorney of WJC all have final policymaking authority. A custom of a municipality is "an act that, although not formally approved by an appropriate decision maker, has such widespread practice as to have the force of law." *Carney v. City & Cty. of Denver,* 534 F.3d 1269, 1274 (10th Cir. 2008) (citation omitted). To establish a custom, a plaintiff must prove that there was a "continuing, persistent, and widespread" practice by the defendant, which is usually shown by offering "evidence suggesting that similarly situated individuals were mistreated by the municipality in a similar way." *Id.* (citations omitted). But "proof of a single incident of unconstitutional activity is ordinarily not sufficient to impose municipal liability." *Moss,* 559 F.3d at 1168-69. A plaintiff may also establish a custom with evidence of "a series of decisions by a subordinate official of which the supervisor must have been aware." *Mitchell v. City & Cty. of Denver*, 112 Fed. App'x 662 672 (10th Cir. 2004) (citing *City of St. Louis v. Praprotnik,* 485 U.S. 112, 130 (1988)). In such a case, "the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower-ranking official." *Praprotnik,* 485 U.S. at 130. However, the knowledge attributed to the supervisor has to be more than simply a "mere failure to investigate the basis of a subordinate's discretionary decision." *Id.*

WJC argues that Mr. Jensen failed to establish any constitutional violation or act by a WJC employee with final policymaking authority or to establish a custom of unconstitutional conduct by WJC. Specifically, WJC argues that Mr. Jensen has failed to present any evidence that any of WJC's final policymakers took the actions that Mr. Jensen alleges violated his constitutional rights or that WJC had a widespread practice of unconstitutional conduct.

Evidence was presented at trial, which the jury apparently found to be credible, suggesting that WJC's City Attorney, Jeff Robinson, showed unusual interest in Mr. Jensen's criminal case. Mr. Robinson's interest in the case was especially unusual because the case was

being prosecuted by Salt Lake County and not by WJC. Some evidence was also presented that Mr. Robinson attended events associated with Mr. Jensen's criminal case, even though his attendance at the events was not necessary, and that he even offered to help draft documents for the case. Because the jury found that WJC employees decided to knowingly provide false information or knowingly withhold exculpatory information, or both, at a preliminary hearing, the jury could have also reasonably found through the evidence presented that Mr. Robinson must have been aware of this decision, even if the decision was formulated or initiated by other WJC employees. Because the jury apparently found that Mr. Robinson was aware of the WJC employees' decision, Mr Robinson can realistically be deemed to have adopted a policy authorizing the decision. Therefore, the court concludes that the jury was presented with a legally sufficient evidentiary basis to find municipal liability against WJC.

Malice

"In the Tenth Circuit, state law provides the starting point for a § 1983 claim of malicious prosecution." *Chase v. Cedar City Corp.*, No. 2:05-CV-293, 2006 WL 2623934, at *7 (D. Utah Sept. 13, 2006) (citation omitted). "Under Utah law, there are four elements to a malicious prosecution claim, all of which must be proven: '(1) A criminal proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the accused; (3) absence of probable cause for the proceeding; (4) "malice," or a primary purpose other than that of bringing an offender to justice.'" *Id.* (quoting *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 843 (Utah Ct. App. 1987)). "[A] party simply cannot report a suspected crime in good faith while at the same time meeting this malice requirement." *Magistro v. Day,* 2010 UT App 397, 2010 WL 5550448, at *1, n.1 (unpublished).

WJC argues that Mr. Jensen failed to provide sufficient evidence from which a reasonable jury could find in his favor on the fourth element requiring malice. Specifically, WJC argues that Mr. Jensen's speculation that WJC cooperated with the Salt Lake County District Attorney's Office investigation primarily to get back at Mr. Jensen for filing a sexual harassment claim, and not for the primary purpose of bringing Mr. Jensen to justice, is insufficient to establish the malice element. However, as already described above, evidence was presented at trial, beyond Mr. Jensen's speculation, from which a jury could reasonably conclude that WJC's primary motivation was other than brining Mr. Jensen to justice. Such evidence includes testimony that some WJC employees were angry with Mr. Jensen for filing the sexual harassment complaint, that some WJC employees pursued the investigation of Mr. Jensen more vigorously than they would have pursued an investigation into other officers who had committed similar offences, and that WJC's City Attorney showed unusual interest in the outcome of Mr. Jensen's criminal case. Therefore, the court concludes that a sufficient evidentiary basis existed for the jury to reasonably conclude that WJC acted out of malice.

Lack of Probable Cause

In order for Mr. Jensen to succeed on both his § 1983 malicious prosecution claim and his § 1983 First Amendment retaliation claim based on the criminal charges brought against him, Mr. Jensen had to establish a lack of probable cause for the criminal charges. Where, as here, a plaintiff is basing the lack of probable cause on the defendant providing false information or withholding exculpatory information that would have negated the probable cause, the court engages in a five-step inquiry.

> First, the court determines in there is a question of fact as to whether particular items of evidence were fabricated; second, the court eliminates those items from consideration in its probable cause analysis; third, the court determines whether exculpatory evidence was improperly excluded from consideration; fourth, the

> court includes any such evidence in its analysis; fifth, the court determines whether probable cause still exists after factoring in all exclusions and additions.

Miller v. Arbogast, 445 Fed. App'x 116, 119-20 (10th Cir. 2011). "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *Buck v. City of Albuquerque*, 549 F.3d 1269, 1281 (10th Cir. 2008).

WJC argues that Mr. Jensen did not present any credible evidence at trial that WJC intentionally or with reckless disregard fabricated evidence. According to WJC, Mr. Jensen only identified the following two alleged, intentional omissions: that WJC did not provide copies of his October 2007 timecards to the Salt Lake County District Attorney's Office before his arrest and that WJC did not inform the Salt Lake County District Attorney's Office that Mr. Jensen offered to take a polygraph test. But WJC argues that no reasonable jury could conclude that these omissions were intentional or material, and WJC argues that the information was presented during the preliminary hearing, where the judge found probable cause for Count 2. WJC further argues that, because all of the information was presented at the preliminary hearing, the finding of probable cause by the judge breaks the chain of causation for Mr. Jensen's malicious prosecution claim. *See Taylor v. Meacham*, 82 F.3d 1556, 1564 (10th Cir. 1996). Finally, WJC argues that any other information relied on by Mr. Jensen is not sufficient to negate probable cause, especially when compared to the evidence supporting probable cause.

As mentioned above, sufficient evidence was presented at trial, which the jury apparently found credible, suggesting that WJC officers may have provided false information about the amount of money given to Mr. Jensen by another officer, that WJC officers provided false information about when and how drugs appeared in Mr. Jensen's office, and that WJC withheld information related to Mr. Jensen's work schedule around the time of the booking of money into

evidence. The court concludes that the jury could have reasonably relied on that evidence to negate the probable cause that was found to exist at the preliminary hearing.

Contractual Obligations

To settle the underlying discrimination claims in this case, Mr. Jensen and WJC signed two different documents: a Settlement Agreement and a Negotiated Settlement Agreement. The Settlement Agreement was signed by Mr. Jensen and WJC on April 29, 2009. The Negotiated Settlement Agreement was between Mr. Jensen, WJC, and the Utah Anti-Discrimination and Labor Division ("UALD"). Mr. Jensen and WJC signed the Negotiated Settlement Agreement on April 29, 2009, but the UALD did not sign the Negotiated Settlement Agreement until May 14, 2009. Mr. Jensen argues that the Settlement Agreement and the Negotiated Settlement Agreement constitute one contract, but WJC argues that the two documents are separate contracts. Determining whether the two agreements constitute one or two contracts is a question of law for the court. *See, e.g., Uhrhahn Const. & Design, Inc. v. Hopkins*, 2008 UT App 41, ¶ 11, 179 P.3d 808. The question was presented by the parties during the jury instruction conference, but the court reserved ruling on the question at that time. But the court did submit a separate question for each of the documents to the jury.

Mr. Jensen argues that the two contracts are the same because the Settlement Agreement references the Negotiated Settlement Agreement. However, WJC argues that the two documents are separate contracts because, although the Settlement Agreement does reference the Negotiated Settlement Agreement, the Settlement Agreement does not incorporate the terms of the Negotiated Settlement Agreement. *See Housing Auth. of Cty. of Salt Lake v. Snyder*, 44 P.3d 724, 729 (Utah 2002) ("[T]he terms of another document cannot be incorporated by reference without

specific language. . . . [T]he reference must be clear and unequivocal." (internal quotation marks and citation omitted)).

Under Utah law, "where two or more instruments are executed by the same parties contemporaneously, or at different times in the course of the same transaction, and concern the same subject matter, they will be read and construed together so far as determining the respective rights and interests of the parties, although they do not in terms refer to each other." *Bullfrog Marina, Inc. v. Lentz*, 501 P.2d 266, 270-71 (Utah 1972) *disapproved of on other grounds by Tangren Family Tr. v. Tangren*, 182 P.3d 326 (Utah 2008). Several other courts apply a similar standard to determine whether multiple agreements should be legally construed as a single contract. *See, e.g.*, *Joy v. City of St. Louis*, 138 U.S. 1, 38 (1891) (finding that multiple agreements "constituted a single transaction, relating to the same subject-matter, and should be construed together in such a way as to carry into effect the intention of the parties, in view of their situation at the time and of the subject-matter of the instruments."); *Dakota Gasification Co. v. Natural Gas Pipeline Co.*, 964 F.2d 732, 734-35 (8th Cir. 1992) ("Thus, as a rule of law, [multiple contracts] should be read together [if] they represent successive steps which were taken to accomplish a single purpose. This rule of interpretation applies even though the parties executing the contracts differ, as long as the several contracts were known to all the parties and were delivered at the same time to accomplish an agreed purpose." (internal quotations marks and citations omitted)); *Bob Smith Auto. Grp., Inc. v. Ally Fin. Inc.*, No. 1655 SEPT. TERM 2014, 2016 WL 3613402, at *7 (Md. Ct. Spec. App. July 6, 2016) (recognizing the "general rule" that "in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same contracting parties for the same purpose, and in the course of the same transaction will be considered and construed together, since they are, in the eyes of the law, one

contract or instrument." (citations omitted)); *see also* Restatement (Second) of Contracts § 202(2) (1981) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.").

Courts consider factors such as the following to determine whether two documents should be construed as one contract: whether the parties are the same, whether the agreements are "mutually dependent," whether the agreements refer to each other, and whether the agreements serve the same purposes. *See, e.g.*, *Arciniaga v. Gen. Motors Corp.*, 460 F.3d 231, 237 (2d Cir. 2006). Courts may also consider whether the agreements were "executed in close temporal proximity" to each other. *See, e.g.*, *Halliburton Co. v. KBR, Inc.*, 446 S.W.3d 551, 563-64 (Tex App. 2014) (concluding that two agreements "must be harmonized and construed together as one contract" because the agreements are "between the same parties, signed five days apart, [and] are facets of the same transaction entered into for [a] unitary purpose").

In this case, both the Settlement Agreement and the Negotiated Settlement Agreement included WJC and Mr. Jensen as parties, the Settlement Agreement references the Negotiated Settlement Agreement, WJC and Mr. Jensen signed both agreements on the same day, and WJC and Mr. Jensen entered into both agreements for the same purpose of settling Mr. Jensen's discrimination claims against WJC. Although the Negotiated Settlement Agreement also included UALD as a party and neither agreement incorporated the terms of the other, these minor factors are not sufficient to outweigh the factors in favor of construing the documents as one contract. Therefore, the court concludes that the Settlement Agreement and the Negotiated Settlement Agreement should be construed as one contract as a matter of law.

WJC is only arguing that it is entitled to a directed verdict that is did not breach the neutral-reference provision of the Settlement Agreement. WJC is not arguing that it is entitled to

a directed verdict that it did not breach the non-retaliation provision of the Negotiated Settlement Agreement. Because the court concludes that the agreements should be construed as one contract, the court concludes that evidence exists upon which the jury can properly rely that WJC breached the contract and the associated covenant of good faith and fair dealing with Mr. Jensen.

Factual Cause

WJC argues that Mr. Jensen failed to establish that WJC is the factual cause of his damages or, in other words, WJC argues that Mr. Jensen would have suffered the same damages regardless of whether WJC actually acted wrongfully towards Mr. Jensen following the settlement. "In the usual course, [the] standard [for proving damages] requires the plaintiff to show that the harm would not have occurred in the absence of –that is, but for—the defendant's conduct." *Univ. of Texas Sw. Med. Ctr. V. Nassar*, 133 S. Ct. 2517, 2525 (2013).

WJC's primary argument is that Mr. Jensen did not present sufficient evidence to establish that the wrongful actions of WJC cause Mr. Jensen's unemployment during the year between his voluntary resignation from WJC and his eventual arrest. WJC thinks this year is significant because Mr. Gary Couillard, Mr. Jensen's damages expert, based at least one of his estimations of damages on that assumption that Mr. Jensen would secure another job in law enforcement by June 1, 2009, just over a month after his resignation on April 29, 2009.

While the court sees some merit to WJC's arguments, the court also recognizes that the jury's award of damages was not dependent on the jury relying on the fact that Mr. Jensen would have secured another law enforcement job by June 1, 2009. As described above, the 1991 amendments to Title VII allow a jury to award damages to a plaintiff for future pecuniary losses and other nonpecuniary losses, among other things. Under these amendments, courts have allowed plaintiffs to recover damages for lost future earnings, which is very similar to Mr.

Jensen's damages for lost future benefits. Because the jury could award Mr. Jensen damages for lost future benefits, the jury could have reasonably concluded that WJC's wrongful actions prevented Mr. Jensen from securing another law enforcement job at any point after his arrest and that his total lost retirement benefits was the proper award of damages for that wrongful conduct. Because a legally sufficient evidentiary basis exists for such a conclusion by the jury, the court concludes that WJC is not entitled to judgment as a matter of law on the issue of establishing the factual cause for Mr. Jensen's damages.

Lack of Foundation for Expert Assumption

WJC also argues that Mr. Jensen cannot recover for lost retirement benefits because Mr. Jensen failed to lay the proper foundation for the assumptions underlying the testimony of Mr. Couillard. "Damages will not be awarded when the evidence surrounding them is uncertain or speculative." *Boehm v. Fox*, 473 F.2d 445, 448 (10th Cir. 1973).

WJC argues that Mr. Jensen's damages award for lost retirement benefits is based on the assumption that Mr. Jensen was unable to complete 7 ½ years of additional service as a Utah law enforcement officer, but Mr. Jensen did not offer any evidence from which a reasonable jury could find that, but for WJC's conduct, Mr. Jensen would have completed the additional 7 ½ years of service. WJC specifically points to testimony that Mr. Jensen did not apply for any police jobs since leaving WJC, even after his charges were expunged, and that he has not attended the P.O.S.T. academy since his resignation.

In addition to the evidence highlighted by WJC, other evidence was presented at trial related to Mr. Jensen's ability to obtain additional employment as a law enforcement officer. For example, several officers testified that Mr. Jensen was one of the best sergeants that they had ever worked with, and Troy Rawlings, the Davis County Attorney, testified that he talked with

Mr. Jensen about finding him a law enforcement job in his city but that no openings were available. The jury could have also reasonably inferred that it would have been a waste of time for Mr. Jensen to apply for a law enforcement position when he had criminal charges pending and when the status of his P.O.S.T. certification was in question. Mr. Jensen even testified to that effect. Therefore, the court concludes that some evidentiary basis exists for the jury to have concluded, as it did, that, but for WJC's conduct, Mr. Jensen could have obtained another law enforcement position and completed an additional 7 ½ years of service.

Proximate Cause of Psychological Injuries

"It is uniformly held that where injuries complained of are of such character as to require skilled and professional persons to determine the cause and extent thereof, they must be proved by the testimony of medical experts." *Franklin v. Shelton*, 250 F.2d 92, 97 (10th Cir. 1957); *see also Tweed v. Bertram*, No. 2:02-CV-161, 2004 WL 6043280, at *2 (D. Utah Apr. 20, 2004) (unpublished) ("[T]he rule expressed several years ago by the Tenth Circuit in *Franklin* . . . is still the controlling law."). Injuries are of a character to require professional persons to determine the cause and extent if the injuries are not "susceptible to observation by an ordinary person" and are "of a nature requiring competent medical testimony to establish their cause, and their cause could not by laymen be definitely attributed to the accident, absent medical testimony to that effect." *Franklin*, 250 F.2d at 97-98. If a treating physician is called as a witness, the treating physician can only opine on causation "to the limited extent that opinions about the cause of an injury are a necessary part of a patient's treatment." *Starling v. Union Pac. R. Co.*, 203 F.R.D. 468, 478-79 (D. Kan. 2001).

WJC claims that, as a matter of law, the in-trial testimony of Dr. Soderquist, Mr. Jensen's treating physician, regarding the cause of Mr. Jensen's psychological injuries was inadmissible

because the testimony went "beyond the care and treatment of" Mr. Jensen. *Goeken v. Wal-Mart Stores, Inc.*, No. 99-4191-SAC, 2001 WL 1159751, at *2 (D. Kan. Aug. 16, 2001). Because the portion of Dr. Soderquist's testimony regarding causation was inadmissible, WJC argues that Mr. Jensen did not offer any evidence to show that WJC's conduct after April 29, 2009, was the proximate cause of Mr. Jensen's psychological injuries.

Although some evidence of Mr. Jensen's officially diagnosed psychological injuries, such as depression, was presented at trial, Mr. Jensen's psychological injuries were not the primary injuries discussed at trial related to Mr. Jensen's non-economic damages. Evidence of several other injuries, which are more susceptible to observation by an ordinary person, was presented at trial. Such injuries included Mr. Jensen's inability to get a job in the field that he desired; the loss of Mr. Jensen's marriage; the loss of association with Mr. Jensen's friends, who Mr. Jensen referred to as family; the loss of Mr. Jensen's house; and the damage to Mr. Jensen's reputation in the law-enforcement community. Even excluding evidence of Mr. Jensen's psychological injuries from the evidence presented at trial, the court concludes that a sufficient evidentiary basis exists to sustain the jury's award of non-economic damages to Mr. Jensen.

WJC'S MOTION FOR NEW TRIAL

Pursuant to Federal Rule of Civil Procedure 59, "[t]he court may, on motion, grant a new trial on all or some the issues—and to any party . . . 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). A "trial judge has broad discretion" to determine whether to "set aside the jury's verdict" and grant a motion for a new trial, but the trial judge also "has the obligation or duty to ensure that justice is done." *McHargue v. Stokes Div. of Pennwalt Corp.*, 912 F.2d 394, 396 (10th Cir. 1990). A trial judge may set aside the jury's verdict "when he believes the verdict to

be against the weight of the evidence or when prejudicial error has entered the record." *Id.* A remittitur, or "a new trial if the plaintiff refuses to accept it," may also be proper "where the court believes that the judgment for damages is excessive, that is, it is against the weight of the evidence." *Holmes v. Wack*, 464 F.2d 86, 89 (10th Cir. 1972). "A finding of sufficient evidence to create a jury question under Rule 50 does not preclude a finding that the actual verdict rendered was against the weight of the evidence for purposes of Rule 59." *Cholier, Inc. v. Torch Energy Advisors, Inc.*, No. 95-6177, 1996 WL 196602, at *5 (10th Cir. Apr. 24, 1996) (unpublished). "Additionally, it is within the trial court's discretion to order a new trial on damages alone when the jury's award is speculative or excessive." *Id.*

Although a trial judge has broad discretion to order a new trial, the court should also "respect the collective wisdom of the jury" and "in most cases the judge should accept the finding of the jury, regardless of his own doubts in the matter." *Landes Const. Co. v. Royal Bank of Canada*, 833 F.2d 1365 1371 (9th Cir. 1987) (citation omitted). Although the court "need not view the evidence from the perspective most favorable to the prevailing party," the court should give "full respect to the jury's findings." *Id.* (citation omitted). After giving the jury's findings full respect, the judge should grant a new trial only if "the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 1372 (citation omitted). In determining whether to order a new trial on damages, the court should also give proper respect to the "time-honored principle" that "the determination of the quantum of damages in civil cases is a fact-finder's function" and that "[t]he trier of fact, who has the first-handed opportunity to hear the testimony and observe the demeanor of the witnesses, is clothed with a wide latitude and discretion in fixing damages pursuant to the court's instruction." *Mason*

v. Texaco, Inc., 948 F.2d 1546, 1559 (10th Cir. 1991) (quoting *Bennett v. Longacre*, 774 F.2d 1024, 1028 (10th Cir. 1985)).

In its Motion for New Trial or Remittitur, WJC argues that it is entitled to a new trial on four different grounds. The court will address each of WJC's arguments below.

Verdict against the Weight of the Evidence

WJC argues that the jury's conclusion that WJC is liable to Mr. Jensen on each of the seven claims that were submitted to the jury is against the great weight of evidence. WJC specifically argues that it was against the great weight of evidence for the jury to find that: (1) Mr. Jensen did not first know of WJC's involvement in the criminal investigation until November 9, 2010, such that his EEOC charge of discrimination was filed within 300 days of gaining this knowledge; (2) Mr. Jensen's sexual harassment complaint was the "but for" cause of any materially adverse action taken against him by WJC after April 29, 2009; (3) One or more unconstitutional acts were taken after April 29, 2009, by a WJC employee with final policymaking authority; (4) WJC engaged in an unconstitutional act that was the proximate cause of damages suffered by Mr. Jensen; (5) WJC acted with malice, meaning for a primary purpose other than bringing Mr. Jensen to justice; (6) WJC instigated and intentionally caused Mr. Jensen to be criminally charged, or that WJC knowingly misrepresented or concealed material facts after April 29, 2009; (7) There was no probable cause for Mr. Jensen's arrest and prosecution, or that WJC withheld exculpatory evidence or made false statements; (8) WJC breached the settlement agreement and the associated covenant of good faith and fair dealing; (9) WJC was the proximate cause of Mr. Jensen's damages, if any; (10) Mr. Jensen is entitled to recover for lost retirement benefits based on the opinion testimony of Gary Couillard and the

assumptions underlying his opinions; and (11) Mr. Jensen's emotional distress was caused by wrongful acts, if any, of WJC after April 29, 2009.

The court first notes that some of the jury's alleged findings that WJC argues are against the weight of evidence are not necessary findings to uphold the jury's verdict in this case. For example, WJC argues that it was against the weight of evidence for the jury to find that Mr. Jensen did not first know of WJC's involvement in the criminal investigation until November 9, 2010. However, the jury did not need to find that Mr. Jensen did not first know of WJC's involvement in the criminal investigation until November 9, 2010, for the jury to find WJC liable for retaliation under Title VII. As mentioned above, the jury found that WJC employees either provided false information or withheld exculpatory information during Mr. Jensen's preliminary hearing in his criminal case, which would qualify as a materially adverse action under the Tenth Circuit's liberal definition. Because the jury found that WJC took a materially adverse action within 300 days of Mr. Jensen filing his charge of discrimination with the EEOC, the jury did not also have to find that Mr. Jensen did not first know of WJC's involvement in the criminal investigation until November 9, 2010. Similarly, because the court concluded above that the Settlement Agreement and the Negotiated Settlement Agreement constitute one contract, the jury did not need to find that WJC independently breached the Settlement Agreement and the associated covenant of good faith and fair dealing in order to uphold the verdict that WJC is liable for breach of the contract at issue in this case. Finally, WJC argues that the weight of evidence is against finding the assumptions necessary to support Gary Couillard's testimony regarding Mr. Jensen's lost retirement benefits. WJC appears to be basing this argument on the fact that Mr. Jensen did not offer evidence of a specific police officer job that he failed to get. But, as the court explains above, in this case, Mr. Jensen's lost retirement benefits are similar to

lost future earnings, which are based on a general harm to reputation and do not require proof of loss of a specific job. *See, e.g., Williams v. Pharmacia, Inc.*, 137 F.3d 944, 954 (7th Cir. 1998) ("[A] lost future earnings award compensates the plaintiff for the diminution in expected earnings in *all* of her future jobs for as long as the reputational or other injury may be expected to affect her prospects." (emphasis added)).

In terms of the rest of the jury's findings, the court has already concluded that a legally sufficient evidentiary basis exists on each of the claims for the jury to have properly found a verdict in favor of Mr. Jensen. The court now concludes that, not only was the evidentiary basis sufficient for the jury to find a verdict in favor of Mr. Jensen, but also that the jury's verdict was not rendered against the weight of the evidence. Specifically, if WJC took a materially adverse action against Mr. Jensen, which the jury found that it did, the evidence presented at trial left little explanation for that adverse action other than Mr. Jensen's sexual harassment complaint. Therefore, the court is unable to conclude that the jury's finding that Mr. Jensen's sexual harassment complaint was the "but for" cause of WJC's materially adverse action against him was against the weight of evidence. The same can be said for the jury's finding that WJC acted with malice. In terms of whether unconstitutional acts were taken by a WJC employee with final policymaking authority, evidence was presented that Jeff Robinson, the WJC City Attorney, had an unusual interest in Mr. Jensen's criminal case, and Mr. Jensen offered indirect evidence suggesting that the unusual interest was a result of Mr. Jensen's sexual harassment complaint. WJC offered little evidence of other possible reasons for Mr. Robinson's unusual interest. Therefore, the court cannot conclude that the jury's finding that a WJC employee with final policymaking authority took unconstitutional acts, as explained in more detail above, was against the weight of evidence. Mr. Jensen also presented evidence suggesting that the damages he

suffered, including his lost retirement benefits, were proximately caused by WJC. Although WJC presented evidence at trial that Mr. Jensen was already experiencing some emotional distress prior to the alleged retaliation, sufficient evidence was presented regarding the exacerbation of Mr. Jensen's mental health issues, job instability, and marital problems that the court is unable to conclude that the jury's decision in this regard was against the weight of the evidence.

Verdict is Excessive

WJC also argues that it is entitled to a new trial on the Title VII retaliation claims because the verdict is excessive. A new trial on damages is appropriate if an award is "so excessive . . . as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial." *Barnes v. Smith,* 305 F.2d 226, 228 (10th Cir. 1962). Otherwise, "the jury's determination of the facts is considered inviolate." *Id.*

WJC's argument that the verdict is excessive focuses on the fact that Mr. Jensen did not have, apply for, or take steps to become qualified for another police officer position and that Mr. Jensen suffered from substantially similar psychological injuries before and after the alleged retaliation. However, as already mentioned, because Mr. Jensen's claim for lost retirement benefits is based on a general harm to his reputation that prevented him from being able to get any Utah police officer position in the future, Mr. Jensen did not have to present evidence of a specific job that he lost due to the retaliation. Sufficient evidence was presented at trial that the damage to Mr. Jensen's reputation harmed his future prospects of becoming a police officer in Utah. Therefore, the jury reasonably concluded that Mr. Jensen was entitled to the entire reward of his lost retirement benefits.

Similarly, although evidence was presented of Mr. Jensen's psychological, marital, and professional state prior to the alleged retaliation, evidence was also presented that Mr. Jensen's state grew significantly worse in each of those areas after the retaliation occurred. Specifically, Mr. Jensen presented evidence through his personal testimony as well as through the testimonies of his father and his therapist that he suffered significant emotional distress following the retaliation. Similarly, although Mr. Jensen had some marital difficulties prior to the retaliation, Mr. Jensen's marriage ended after the retaliation. Finally, although Mr. Jensen had some difficulty finding and keeping a job before the retaliation occurred, Mr. Jensen had found a job that he enjoyed and was performing well in, which he lost due to his arrest related to the malicious prosecution in this case. Therefore, the jury was presented with sufficient evidence to reasonably conclude that Mr. Jensen suffered damages as a result of WJC's conduct. Furthermore, the court concludes that the jury's award of $1,740,000 in non-economic damages as a result of the Title VII retaliation was not excessive to compensate Mr. Jensen for the exacerbation of his psychological injuries, his lost marriage, his lost employment, and the harm to his reputation.

Inadmissible Evidence, Improper Jury Instructions, and Exclusion of Relevant Evidence

WJC also argues that it is entitled to a new trial because of errors in the admission of evidence. Specifically, WJC argues that inadmissible evidence was introduced, that the court gave improper jury instructions, and that relevant evidence was excluded. "If error is found in the admission of evidence, [the court should] set aside a jury verdict only if the error prejudicially affects a substantial right of a party." *Sanjuan v. IBP, Inc.*, 160 F.3d 1291, 1296 (10th Cir. 1998). "Evidence admitted in error can only be prejudicial 'if it can be reasonably

concluded that with or without such evidence, there would have been a contrary result.'" *Id.* (citation omitted).

WJC first argues that irrelevant and substantially prejudicial character and hearsay evidence regarding Captain Gallagher should have been excluded. Although "Fed. R. Evid. 404(b) generally excludes evidence of other acts for the purpose of proving a person acted similarly on other occasions," the Tenth Circuit has "modified this general rule somewhat in the context of employee discharge cases requiring proof of discriminatory intent." *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 776 (10th Cir. 1999). "The testimony of other employees about their treatment by the defendant employer is relevant to the issue of the employer's discriminatory intent if the testimony establishes a pattern of retaliatory behavior or tends to discredit the employer's assertion of legitimate motives." *Id.* However, regardless of whether the evidence regarding Captain Gallagher was admissible in this case, the court concludes that the evidence was not prejudicial. Specifically, the court concludes that the jury would not have reached a contrary result even if the evidence was excluded because the retaliation claims in this case hinged on actions of WJC employees other than Mr. Gallagher.

WJC next points to multiple instances in which it claims that Mr. Jensen was allowed to introduce inadmissible hearsay and opinion testimony. In terms of hearsay statements, WJC specifically points to Lieutenant Rees's testimony that he told the Salt Lake County District Attorney's Office investigator that the criminal investigation into Mr. Jensen was not legitimate and that the facts were being manipulated, to Mr. Jensen's testimony about WJC's response to David Kwant's criminal conduct, and to Mr. Jensen's references to alibi documents not produced during discovery. The Federal Rules of Evidence define hearsay as "a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offered in

evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). Therefore, "[s]tatements offered for the effect on the listener . . . are generally not hearsay." *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1434 (10th Cir. 1993). Based on this reasoning, the court concludes that Lieutenant Rees's statement and Mr. Jensen's references to alibi documents do not qualify as hearsay because they were offered to show their effect on the listeners, specifically the effect of the statements on Salt Lake County and Mr. Rawlings's decisions regarding Mr. Jensen's criminal case, and not for the truth of the matters asserted. In terms of Mr. Jensen's statements regarding Mr. Kwant, the court ruled before trial that Mr. Jensen could only testify as to the allegations of Mr. Kwant of which he had personal knowledge. Mr. Jensen's testimony largely complied with that ruling, although it required WJC to object several times during that portion of Mr. Jensen's testimony.

In terms of opinion testimony, WJC argues that the opinion testimonies of Brenda Beaton and Dr. Jean Soderquist were inadmissible because Ms. Beaton was never designated as an expert and Dr. Soderquist was not retained as an expert but still testified about the cause of Mr. Jensen's injuries, even though that was not a necessary component of her treatment. During her testimony, Ms. Beaton generally her opinions based on what she perceived during her experience as an attorney. But a lay witness may give "testimony in the form of an opinion" as long as it is, among other things, limited to testimony that is "rationally based on the witness's perception." Fed. R. Evid. 701. The court concludes that Ms. Beaton's testimony was proper for a lay witness and did not cross the line into testimony "based on scientific, technical, or other specialized knowledge," which is reserved for expert witnesses. *Id.* Dr. Soderquist did not testify specifically as to what caused Mr. Jensen's mental health conditions, although she testified about her observations and about what Mr. Jensen said caused him the most emotional pain. The jury drew

reasonable inferences from that testimony and other evidence to conclude that some of Mr. Jensen's emotional pain was caused by WJC, and the jury awarded damages based on those reasonable inferences. Finally, WJC argues that Gary Couillard should not have been allowed to offer previously undisclosed opinion testimony about whether Mr. Jensen could qualify for the "Rule 20" retirement. However, the court allowed WJC to provide an expert, Brad Townsend, who disputed Mr. Couillard's claim. Therefore, the court concludes that none of the testimony that WJC argues was inadmissible hearsay or opinion testimony was admitted in error.

WJC also argues that the court should have completely excluded the testimonies of Troy Rawlings and Sim Gill because, according to WJC, they lacked any personal knowledge as to any disputed issues of fact. The court considered the arguments regarding whether Mr. Rawlings and Mr. Gill's testimonies should be excluded in their entirety before trial because WJC made those arguments in pre-trial motions. At that time, the court ruled that the testimonies should be allowed, but the court placed restrictions on those testimonies to alleviate the concerns raised by WJC. The court reminded Mr. Jensen of those restrictions before Mr. Rawlings testified. The court's conclusion about those testimonies has not changed. The testimonies were relevant to explain why Mr. Jensen's criminal prosecution was transferred from Salt Lake County to Davis County and why the charges against Mr. Jensen were dismissed and later expunged. The testimonies largely stayed within the restrictions that the court placed on them, and the court concludes that the testimonies were not admitted in error.

WJC next argues that the jury was erroneously instructed regarding pre-settlement conduct and a custom of the city. Specifically, WJC argues that the court erroneously instructed the jury that they could consider pre-settlement conduct, but not pre-settlement claims, despite the release and covenant not to sue that was included as part of the settlement agreement. The

release and covenant not to sue applied to all obligations, debts, claims, demands, controversies, lawsuits, costs, fees, commissions, expenses, further performance, and liabilities, and, by its terms, it was supposed to receive the broadest possible interpretation. Even giving the language the broadest interpretation, the court concluded that each of terms that the release and covenant to sue applied to was characterized by the attachment of liability of one kind or another. Therefore, the court concluded that conduct that does not create any form of liability did not fall within the terms of the release and covenant, and the court instructed the jury to that effect. The court's conclusion on the interpretation of the release and covenant has not changed, so the court concludes that its instruction to the jury was not erroneous. Regarding the jury instruction defining a custom of the city, WJC does not argue that the instruction was incorrect but instead argues that the instruction was unnecessary because, according to WJC, no evidence was presented at trial that WJC had a custom of violating the rights of individuals like Mr. Jensen. Mr. Jensen requested that the jury instructions on custom remain because his position was that this particular prosecution was so widespread that it could be considered a custom. The court did not consider Mr. Jensen's position to be entirely frivolous, so the court allowed the instruction to remain. The court does not consider the decision to send the instruction to the jury to be reversible error where the instruction was correct and where the jury had the opportunity to determine whether the evidence was sufficient to meet the terms of the instruction.

WJC also argues that the court erred by not allowing evidence regarding Mr. Jensen's relationship with his former attorney, Brenda Beaton. The court considered whether to allow that evidence pursuant to a pre-trial motion, and the court determined that the evidence would be substantially more prejudicial than probative. During the trial, the court determined that Mr.

Jensen did not sufficiently raise the issue to allow testimony about the relationship to be admitted. The court does not consider either of those decisions to amount to prejudicial error.

Finally, WJC argues that its substantial rights were affected by the introduction of improper evidence and the erroneous jury instructions. Because the court does not consider any evidence to be admitted in error or any jury instructions to be erroneous, it does not need to address whether the decisions affected the substantial rights of WJC. The court concludes that WJC is not entitled to a new trial based on any introduction of improper evidence or erroneous jury instructions.

Conduct of Counsel

WJC's final argument is that it is entitled to a new trial on all claims based on the conduct of Mr. Jensen's counsel. "[R]epeated attempts to prejudice the jury by introducing irrelevant evidence and making inflammatory statements may require a court to order a new trial in order to prevent prejudice to the opposing party." *Moody v. Ford Motor Co.*, 506 F. Supp. 2d 823, 847 (N.D. Okla. 2007). In addition to repeated attempts to prejudice the jury, "[i]mproper or intemperate argument by counsel in summation may necessitate a new trial where it tends to arouse undue passion or prejudice on the part of the jury, thereby depriving the opposing party of a fair trial." *Mileski v. Long Island R. Co.*, 499 F.2d 1169, 1171 (2d Cir. 1974). To determine whether a counsel's conduct was prejudicial, the court should consider "the totality of the circumstances, including the nature of the comments, their frequency, their possible relevance to the real issue before the jury, the manner in which the parties and the court treated the comments, the strength of the case (e.g., whether it is a close case), and the verdict itself." *Cadorna v. City and County of Denver*, 245 F.R.D. 490, 491 (D. Colo. 2007). In order to justify a new trial, "the flavor of misconduct [must] sufficiently permeate an entire proceeding to provide conviction that

the jury was influenced by passion and prejudice in reaching its verdict." *Cox v. Wilson*, No. 15-CV-0128-WJM-NYW, 2017 WL 1632506, at *3 (D. Colo. May 2, 2017).

Although the conduct of Mr. Jensen's attorney was far from the epitome of professionalism, the court does not consider the conduct of Mr. Jensen's attorney to have risen to the level required to justify a new trial. Mr. Jensen's attorney did push the limits of pre-trial rulings by the court, but Mr. Jensen's attorney did not completely defy court orders and would generally obey orders of the court during the trial when they were given. WJC also argues that Mr. Jensen's counsel raised implications and arguments during questioning and in closing arguments. But WJC objected almost each time that occurred, and the objections were generally sustained. The court concludes that, given the totality of the circumstances, none of the conduct identified by WJC deprived WJC of a fair trial. Therefore, the court concludes that WJC is not entitled to a new trial based on the conduct of Mr. Jensen's attorney.

MR. JENSEN'S MOTION FOR ATTORNEYS' FEES

On July 19, 2017, after the entry of judgment in this case, Mr. Jensen filed a Motion for Attorneys' Fees pursuant to 42 U.S.C. § 1988. Section 1988 provides that "[i]n any action or proceeding to enforce a provision of sections . . . 1983 . . . [or] title VI of the Civil Rights Act of 1964 . . ., the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). Under § 1988, "a prevailing plaintiff should recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* at 433. "The party seeking an award of fees should

submit evidence supporting the hours worked and rates claimed" and should "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." *Id.* at 433-34.

As noted by Mr. Jensen in his motion, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." *Id.* at 435. In the Tenth Circuit, a court views such an enhancement "with caution," and the court only allows such an enhancement when "the attorney for the prevailing party was confronted with a real risk of not prevailing" and when, "absent an enhancement, the plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market." *Homeward Bound, Inc. v. Hisson Mem'l Ctr.*, 963 F.2d 1352, 1360 (10th Cir. 1992) (internal quotation marks and citations omitted). When a plaintiff does obtain excellent results at trial, "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit" because "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Hensley*, 461 U.S. at 435. "The result is what matters." *Id.*

Based on these standards, Mr. Jensen requests a total award of $394,560.42 in attorneys' fees plus an enhancement of 25% for achieving an excellent result at trial. Specifically, Mr. Jensen is requesting an award of attorneys's fees for the 534 hours that April Hollingsworth billed at $350 per billable hour for a total of $186,900; for the approximately 497.4 hours that Ashley Leonard billed at $150 per billable hour and the approximately 62 hours that she billed at $175 per billable hour for a total of $85,452.97[2]; for the 268.5 hours that Tyler Hubbard billed at

[2] The Motion for Attorneys' Fees filed by Mr. Jensen does not give an amount of hours billed by Ms. Leonard, and it states that Ms. Leonard's billing rate was $150 per billable hour for the entire time she worked on this case.

$125 per billable hour for a total of $33,562.50; for the 33.5 hours that Strindberg & Scholnick, LLC billed for a focus group at rates ranging from $300 per billable hour for the most experienced attorney to $115 per billable hour for the paralegal with 10 years of experience; and for the 83.3 hours that Brenda Beaton billed at $225 per billable hour and the 208.3 hours that she billed at $300 per billable hour, along with some time billed by her legal assistant and some costs, for a total of $81,941.20. WJC opposes several aspects of Mr. Jensen's request for attorneys' fees on several grounds.

As an initial matter, Mr. Jensen is basing his request for a 25% enhancement entirely on his exceptional success at trial. Mr. Jensen has not suggested or provided any evidence, beyond a conclusory statement, that he faced substantial difficulties in finding counsel in the local market. Indeed, Mr. Jensen had multiple attorneys representing him at different stages of this litigation. Because Mr. Jensen has not provided any evidence of substantial difficulty in finding counsel, the court concludes that Mr. Jensen has not demonstrated that he is entitled to an enhancement in his attorneys' fees in this case.

Compensability of Focus Groups

WJC's first argument is that "focus group" billing is not compensable. In support of its argument, WJC cites to a case from this District in which the court "share[d] the skepticism expressed by the Third Circuit . . . concerning the compensability of moot court rehearsals of oral appellate arguments, particularly as to the fees charged by moot court consultants who have not entered an appearance as counsel for a party before this court or the court of appeals." *Flying J Inc. v. Comdata Network, Inc.*, No. 196-CV-66-BSJ, 2007 WL 3550342, at *23 (D. Utah Nov. 15, 2007). The standard for determining compensability of attorneys' fees for rehearsing for oral

However, after reviewing the number of hours worked by Ms. Leonard on this case, the court discovered that Ms. Leonard changed her billing rate in April 2016 from $150 per billable hour to $175 per billable hour.

argument or trial laid out by the Third Circuit is, not that such costs are never compensable, but that the prevailing party should only be compensated "for hours reasonably spent in the argument and its preparation, but not for excessive hours, or hours spent in learning or excessively rehearsing appellate advocacy." *Maldonado v. Houstoun*, 256 F.3d 181, 187 (3d Cir. 2001). The court agrees that excessive time rehearsing for oral argument or trial should not be compensated, but the court does not find the amount of time spent in focus-group preparation for trial in this case to be excessive. *See Moon v. Gab Kwon*, No. Civ. 11810 (GEL), 2002 WL 31512816, at *6 (S.D.N.Y. Nov. 8, 2002) ("[L]aw firms often use mooting to prepare even the most experienced litigators for trials and oral arguments, and would be ill-advised to allow their attorneys to 'perform' in court unrehearsed; indeed, lawyers have been known to rehearse entire trials before mock juries, for similar reasons. Such time is appropriately billed to clients.").

In this case, Mr. Jensen enlisted the services of another law firm, which never entered an appearance in this case, to conduct a focus group and provide related consulting services for this case. Between three attorneys and a paralegal, the firm billed a total of 33.5 hours to conduct a focus group for a two-week trial. In addition to that time, a legal intern for Mr. Jensen billed an additional 9.6 hours. The court considers the time spent conducting the focus group to be reasonable and concludes that the time spent conducting the focus group should not be deducted from the award of attorneys' fees for Mr. Jensen's attorneys in this case.

Rates for Mr. Jensen's Attorneys

"The establishment of hourly rates in awarding attorneys' fees is within the discretion of the trial judge who is familiar with the case and the prevailing rates in the area." *Lucero v. City of Trinidad*, 815 F.2d 1384, 1385 (10th Cir. 1987) (citation omitted). The prevailing party has the burden "to produce satisfactory evidence—in addition to the attorney's own affidavits—that the

requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). Therefore, "[t]he first step in setting a rate of compensation for the hours reasonably expended is to determine what lawyers of comparable skill and experience practicing in the area in which the litigation occurs would charge for their time." *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983). "The attorney's years of experience is an important factor in fixing rates." *David C. v. Leavitt*, 900 F. Supp. 1547, 1555 (D. Utah 1995).

WJC objects to the hourly rates that Mr. Jensen requested for April Hollingsworth, Brendan Beaton, and Tyler Hubbard. Ms. Hollingsworth, who graduated from law school in 1996 and started practicing employment law in 2002, requested a rate of $350 per billable hour, and she provided two declarations, one from Lois Baar and one from Christina Jepson, in support of that rate. But WJC argues that Ms. Baar has worked primarily as a mediator in recent years and has had little opportunity to examine attorney rates and that Ms. Jepson is not comparable to Ms. Hollingsworth in terms of skill, experience, and reputation because Ms. Jepson graduated first in her class from the University of Utah Law School, clerked at both the Tenth Circuit and the United States District Court for the District of Utah, is a defense lawyer for large corporations and other businesses, and works for one of the most expensive law firms in Utah. According to WJC, the better comparison for an hourly rate is with the attorneys that Mr. Jensen hired to perform a focus group. The focus-group billing shows a rate of $300 per billable hour for Erik Strindberg, who graduated from law school in 1983, and a rate of $275 per billable hour for Lauren Skolnick, who graduated from law school in 1995. Therefore, WJC argues that Ms. Hollingsworth's rate for this case should be reduced to no more than $285 per billable hour.

The court agrees with WJC that, based on the evidence provided by Mr. Jensen in this case, a rate of $285 per billable hour is the rate that best reflects the rate charged by attorneys in the community with reasonably comparable skill, experience, and reputation to Ms. Hollingsworth.

WJC also argues that the rate requested by Ms. Beaton is too high for an attorney who is not experienced in civil rights and employment law. Ms. Beaton requests $225 per billable hour for time she billed before she appeared in this litigation on April 15, 2015. For work that Ms. Beaton billed after that date, Ms. Beaton requests a rate of $300 per billable hour. Mr. Jensen does not provide any evidence to support either of those rates for Ms. Beaton. WJC requests that the court reduce the rate to $150 per billable hour in light of Ms. Beaton's inexperience in the relevant area of law.

Although Ms. Beaton is relatively inexperienced in civil rights and employment law, Ms. Beaton is an experienced attorney, and she did work with Mr. Jensen for several years before this case was filed and, therefore, had an in-depth knowledge of many of the facts relevant to this case. Therefore, the court concludes that a rate of $225 per billable hour is a reasonable rate for an attorney of Ms. Beaton's experience and skill and is consistent with other fees charged by similar attorneys in the relevant community. But the court also concludes that Mr. Jensen has not provided sufficient evidence to justify an increase in Ms. Beaton's rate to $300 in the middle of this litigation. Therefore, the court concludes that $225 per billable hour is a reasonable rate for the entirety of Ms. Beaton's compensable time in this case.

Finally, WJC argues that a rate of $125 per billable hour for Mr. Hubbard, who has only finished his first year of law school, is too high. Although Mr. Jensen did not provide any evidence to support that rate for a law student, WJC points to the rate of $150 per billable hour

for Ashley Leonard, a licensed attorney, and the rate of $115 per billable hour for Camille Marx, a paralegal for Strindberg & Skolnick with about 10 years of experience, as support for the argument that $75 per billable hour would be a reasonable rate for Mr. Hubbard.

The court agrees that a rate of $125 per billable hour is too high for Mr. Hubbard. Based on the fact that Mr. Hubbard has only finished one year of law school, that he performed some tasks that could have been performed by a paralegal, and that he has little experience even performing those tasks, the court concludes that $100 per billable hour is a reasonable rate for Mr. Hubbard.

Reduction in Ms. Beaton's Hours

The prevailing party in a case "bear[s] the burden 'to prove and establish the reasonableness of each dollar, each hour, above zero.'" *David C. v. Leavitt*, 900 F. Supp. 1547, 1555 (D. Utah 1995) (quoting *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1210 (10th Cir. 1986)). "[T]he first step in calculating fee awards is to determine the number of hours reasonably spent by counsel for the party seeking the fees." *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983). "The district court must determine not just the actual hours expended by counsel, by which of those hours were reasonably expended in the litigation." *Id.* Although plaintiff's counsel "is not required to record in great detail how each minute of his time was expended," plaintiff's counsel should at least "identify the general subject matter of his time expenditures." *Hensley*, 461 U.S. at 437 n.12. "When examining the adequacy of an attorney's billing entries, we are primarily concerned with the district court's ability to evaluate the propriety of the fee request based on the specific billing entries." *Flitton v. Primary Residential Mortg., Inc.*, 614 F.3d 1173, 1178 (10th Cir. 2010).

WJC provides two major arguments that some of Ms. Beaton's hours are non-compensable. First, WJC argues that all of Ms. Beaton's time before she entered this litigation on April 14, 2015, and after she withdrew from this litigation on June 6, 2017, is not compensable. Ms. Beaton is requesting $19,404.10 in attorneys' fees for the 83.2 hours, along with some time billed by her legal assistant and some costs, that she billed before she entered this litigation and $5,640.00 in attorneys' fees for the 18.8 hours that she billed after she withdrew from this litigation.[3] Second, WJC argues that Ms. Beaton's remaining time should be reduced by a minimum of 80% because Ms. Beaton's billing entries are so vague that they do not give sufficient information to determine whether her time was actually spent on this case.

First, the court agrees that Ms. Beaton should not be awarded attorneys' fees for time she spent on this litigation after withdrawing as Mr. Jensen's attorney. Within a week of withdrawing as Mr. Jensen's attorney in this case, Ms. Beaton was testifying as a witness at Mr. Jensen's trial. Although she included the time she spent in court testifying as a witness as part of her billing records, the court concludes that Ms. Beaton should not be awarded attorneys' fees for time she spent as a witness in this case. Ms. Beaton's descriptions in her billing entries are also so vague that the court is unable to determine whether the time was spent by Ms. Beaton preparing to testify as a witness or whether the time was spent on matters related to her work as an attorney on the case. Ms. Beaton also attempts to bill for time spent on telephone calls to and from her client after Mr. Jensen was no longer her client. For these reasons, the court agrees that Ms. Beaton's attorneys' fees should be reduced by $5,640.00.

Second, the court does not agree that any hours an attorney spends before entering an appearance in a litigation are automatically non-compensable. For example, in an employment

[3] WJC's Opposition to the Motion for Attorneys' Fees identifies $4,470.00 as the amount billed by Ms. Hollingsworth after June 6, 2017, but the court's calculations put the amount at $5,640.00.

retaliation case such as this one, an attorney could spend time consulting with the plaintiff, discussing the facts of the case with others, reviewing relevant documents, investigating other facts, making claims to agencies such as the EEOC and the UALD, and drafting a complaint all before entering an appearance or even before filing a complaint. Despite occurring before entering an appearance, many, if not all, of these hours could be considered hours reasonably expended in the litigation.

The difficulty in this case is that Ms. Beaton's billing descriptions are so vague that it is difficult for the court to determine whether the hours were expended in this litigation. This is especially problematic in this case because Ms. Beaton also represented Mr. Jensen in his underlying criminal case, in relation to his DUI charges, and in domestic and child custody issues. Ms. Beaton's invoices that she submitted to the court have a field labeled "Regarding" and another field labeled "Case No." that could have been used to provide helpful information to the court in determining whether the hours on the invoices were expended in this litigation, but Ms. Beaton failed to put any information in either of those fields on any of her invoices. Therefore, the court is left with only Ms. Beaton's vague descriptions to try to determine what hours are properly compensable in this litigation. For example, a large number of entries say nothing more than "Email from client," "Telephone call to client," or the similarly vague "Office visit." Nothing in those descriptions provides the court with sufficient information to determine whether the time was spent on this litigation. However, some of Ms. Beaton's descriptions are sufficiently clear to determine that the time she spent was related to this litigation and should be compensated.

Ms. Beaton is requesting $19,404.10 in attorneys' fees for the 83.2 hours, along with some time billed by her legal assistant and some costs, she spent on this litigation from October

18, 2010, until she entered her appearance on April 14, 2015. In general, the court does not consider the hours or the amount of attorneys' fees expended by Ms. Beaton during this time to be unreasonable for this type of a case. However, Ms. Beaton did not meet her burden of providing the court with sufficient information to determine that all of the hours were expended on this litigation. Therefore, the court is going to reduce Ms. Beaton's award for time spent before she entered an appearance by 50% from $19,404.10 to $9,702.05.

Finally, the court agrees that Ms. Beaton did not meet her burden of providing sufficient information in her billing entries for the court to determine whether all of her time while listed as Mr. Jensen's attorney on this case was spent on this litigation. Between the time of entering an appearance in this case and withdrawing as Mr. Jensen's attorney, Ms. Beaton billed 189.6 hours and a total of $58,067.10 in attorneys' fees. In general, the court does not consider that to be an unreasonable amount of hours or attorneys' fees for this type of a case. However, because Ms. Beaton failed to provide sufficient information in her billing entries, the court is going to reduce the amount billed by 20% from $58,067.10 to $46,453.68.

Before entering an appearance, Ms. Beaton billed 1.2 hours at a rate of $300 per billable hour. Because the court determined above that Ms. Beaton's rate should be $225 per billable hour, the court adjusts her award of $9,702.05 to $9,657.05. While listed as Mr. Jensen's attorney in this case, Ms. Beaton billed all but 1.3 hours at a rate of $300 per billable hour. After taking into account fees and time billed for Ms. Beaton's legal assistant, the court adjusts Ms. Beaton's award from $46,453.68 to $34,638.60. Therefore, Ms. Beaton's total award, before taking into account adjustments described below, should be $44,295.65.

Other Non-Compensable Items

In addition to the arguments already discussed above, WJC lists several other items that it deems to be non-compensable. Specifically, WJC argues that Mr. Jensen's attorneys should not be fully compensated, or compensated at all, for administrative and other non-attorney fee items; background research; time spent with unused witnesses; excessive or incorrect billing; time related to a dispute with Salt Lake County; duplicative billing; block billing with at least one non-compensable item; and time spent on motions that were withdrawn, declared moot, denied against Mr. Jensen, granted in favor of WJC, or granted in part and denied in part.

The court generally agrees that Mr. Jensen's attorneys should not be compensated for administrative or other non-attorney fee items. Therefore, Ms. Leonard's hours should be reduced by 0.9 and Ms. Beaton's hours should be reduced by 0.1 for tasks such as efiling, emailing deposition transcripts, and unspecified telephone calls to clients[4]; and Ms. Beaton's fee award should be reduced by $62.70 for non-attorney fees such as postage and parking.[5]

WJC also opposes awarding attorneys' fees to Mr. Jensen's attorneys for background research. In general, "time spent reading background cases, civil rights reporters, and other materials designed to familiarize the attorney with this area of the law . . . would be absorbed in a private firm's general overhead and for which the firm would not bill a client." *Ramos v. Lamm*, 713 F.2d 546, 554 (10th Cir. 1983). The prevailing party bears the burden of providing enough information in a billing entry for the court to be able "to evaluate the propriety of the fee request." *Flitton v. Primary Residential Mortg., Inc.*, 614 F.3d 1173, 1178 (10th Cir. 2010). In

[4] WJC asked that Ms. Leonard's hours be reduced by 2.3 and Ms. Beaton's by 0.6, but the court does not agree that tasks such as drafting subpoenas or noticing depositions qualify as purely administrative tasks, and several of the administrative tasks identified on Ms. Beaton's billing statements were billed at a rate of $0.00.

[5] WJC asks the court to reduce Ms. Beaton's fees by $73.65, but the court does not agree that time spent by a legal assistant preparing deposition exhibits qualifies as a non-compensable cost. The court's calculations also include cost items during the period of time before Ms. Beaton entered an appearance because the court concluded above that fees during that period were compensable.

terms of background research, the prevailing party has the burden of providing enough information in a billing entry for the court to evaluate whether the research was conducted to familiarize the attorney with an area of the law or whether the research was related to the application of legal principles to the specific facts of the case before the court. WJC identifies twelve entries that it argues are not specific enough to show that they are anything more than just background research. The court only agrees with WJC on four of the twelve entries. Specifically, the court agrees that "Research re depositions," "Research on privileges," and two entries labeled "Hearsay research" do not provide enough information for the court to determine that the attorney was performing more than just background research. However, other entries identified by WJC, including "Final policymaker research" and "Police reports as hearsay," are sufficient for the court to determine that the research was related to the application of legal principles to the specific facts of the case before the court. Therefore, the court concludes that only 4.5 hours should be deducted from Ms. Leonard's billable hours and 2.3 hours should be deducted from Mr. Hubbard's billable hours. The court also notes that the entries above suggest that attorneys and staff with the lower billable hours were performing the research tasks at issue in this case, which should generally be encouraged by courts and opposing counsel.

The court also agrees that Ms. Leonard's billing of 4.3 hours for a motion to extend fact discovery that was unopposed is excessive in the absence of a more detailed description and should be reduced to 0.6 hours. In terms of incorrect billing, Ms. Hollingsworth billed 7.5 hours for a phone call with Ms. Beaton, but Ms. Beaton only billed 0.7 hours for the same phone call. Therefore, Ms. Hollingsworth's billing should be reduced by 6.8 hours.

WJC also opposes award attorneys' fees to Mr. Jensen's attorneys for duplicative or non-essential billing, and WJC identifies five situations where it believes such billing occurred.

Although the court agrees that attorneys' fees should not be awarded for duplicative or non-essential billing, the court does not agree that all of the situations identified by WJC qualify as duplicative or non-essential billing. WJC first seeks deductions for time Ms. Leonard spent to "Put together initial disclosures" and to edit discovery responses and draft supplemental responses because the initial disclosures had already been filed and because the discovery responses were only changed and not supplemented. However, a new attorney on a case spending time reviewing and editing initial disclosures and discovery responses is not duplicative or excessive time, even if the billing entries were not phrased as precisely as they might have been. WJC also seeks to exclude time spent by Ms. Beaton traveling to and reviewing discovery documents at the Davis County Attorney's Office because Ms. Leonard was also present to review the same documents and because the documents were copied and sent to the parties. However, attorneys may reasonably decide to view actual documents to ensure that all relevant documents were copied and sent, and having two attorneys conduct the document review in this case was not unreasonably duplicative in this case considering the document review was coupled with a meeting with Troy Rawlings, the Davis County Attorney. WJC would also like to deduct time billed by Mr. Hubbard for attending a motion hearing because Ms. Hollingsworth and Ms. Beaton were also in attendance. However, the court does not consider it excessive to have a staff member attend a hearing with the attorneys, especially when the staff member likely performed a significant amount of research related to the issues being discussed at the hearing. But the court does agree that the final situation identified by WJC did involve duplicative billing. WJC notes that all three of Mr. Jensen's lawyers attended and billed for Mr. Rawlings' deposition, even though Mr. Rawlings had his own lawyer in attendance who handled objections and brought documents. WJC argues that Ms. Beaton's attendance to represent Mr. Jensen was all that was

required, and the court agrees. Therefore, Ms. Hollingsworth's 10 hours and Ms. Leonard's 10 hours related to attendance at Mr. Rawlings's deposition should be deducted.

However, the court does not agree that Mr. Jensen's attorneys should not be awarded fees for time spent on motions that were withdrawn, declared moot, denied against Mr. Jensen, granted in favor of WJC, or granted in part and denied in part. In determining a reasonable fee award, a court should first calculate "the so-called 'lodestar amount' of a fee" by taking "the product of the number of attorney hours 'reasonably expended' and a 'reasonable hourly rate.'" *Robinson v. Edmond*, 160 F.3d 1275, 1281 (10th Cir. 1998). The court should then consider "two additional questions": "(1) whether the plaintiff's successful and unsuccessful claims were related; and (2) whether the plaintiff's overall level of success justifies a fee award based on the hours expended by plaintiff's counsel." *Flitton v. Primary Residential Mortg., Inc.*, 614 F.3d 1173, 1176-77 (10th Cir. 2010). "In the context of fee awards, [the Tenth Circuit has] held that claims are related if they are based on a common core of facts or are based on related legal theories." *Jane L. v. Bangerter*, 61 F.3d 1505, 1512 (10th Cir. 1995). "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435. "Normally this will encompass all hours reasonably expended on the litigation, . . . [and] the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Id.*

In this case, WJC requests that the court go through this litigation motion by motion and reduce attorneys' fees based on the full or partial success or failure of each motion. The court declines to take this approach. Although WJC prevailed on some of Mr. Jensen's claims at the summary-judgment stage of this litigation, all of Mr. Jensen's claims were related because they were all based on a common core of facts, and many of Mr. Jensen's unsuccessful claims were

also based on related legal theories. In addition to all of the claims being related, Mr. Jensen achieved a high level of success at trial, which the court concludes justifies a fee award based on the hours expended by Mr. Jensen's attorneys. For similar reasons, the court denies WJC's request to deduct time from the attorneys' fees related to information and witnesses that were not used at trial.

WJC also argues that Mr. Jensen should not receive attorneys' fees related to motions in which Magistrate Judge Dustin B. Pead declined to award fees to either party. However, Magistrate Judge Pead was basing his decision not to award fees on Federal Rule of Civil Procedure 37(a)(5)(C) and was not making a determination as to whether the court should award fees to Mr. Jensen as the prevailing party on his claims at trial. Therefore, the court concludes that awarding Mr. Jensen attorneys' fees for time spent on those motions is not inconsistent with Magistrate Judge Pead's decisions, and the court declines to reduce the award of attorneys' fees for those motions.

Applying all of the adjustments described above, the court awards the following in attorneys' fees to Mr. Jensen's attorneys: $147,402 for Ms. Hollingsworth; $44,210.45 for Ms. Beaton; $82,887.97 for Ms. Leonard; $26,620 for Mr. Hubbard; and $6,403.75 for Strindberg & Scholnick, LLC. Therefore, the court awards Mr. Jensen a total of $307,524.17 in attorneys' fees.

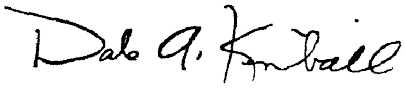
CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that WJC's Motion for Reduction of Damages [Docket No. 345] is GRANTED, Mr. Jensen's Motion to Alter or Amend the Judgment [Docket No. 349] is DENIED, WJC's Motion for Judgment as a Matter of Law [Docket No. 331] is DENIED, WJC's Renewed Motion for Judgment as a Matter of Law

[Docket No. 363] is DENIED, WJC's Motion for a New Trial [Docket No. 378] is DENIED, and Mr. Jensen's Motion for Attorneys' Fees [Docket No. 366] is GRANTED in part and DENIED in part.

DATED this 13th day of October, 2017.

BY THE COURT:



DALE A. KIMBALL
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

September 29, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AARON JENSEN,

Plaintiff - Appellant/Cross-Appellee,

v.

WEST JORDAN CITY, a Utah municipal corporation,

Defendant - Appellee/Cross-Appellant,

and

ROBERT SHOBER, in his official capacity,

Defendant - Appellee.

Nos. 17-4173 & 17-4181
(D.C. No. 2:12-CV-00736-DAK)
(D. Utah)

AARON JENSEN,

Plaintiff - Appellant,

v.

WEST JORDAN CITY, a Utah municipal corporation,

Defendant - Appellee,

and

ROBERT SHOBER, in his official capacity,

Defendant.

No. 17-4196
(D.C. No. 2:12-CV-00736-DAK)
(D. Utah)

ORDER

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

THE COURT: The problem with the easel is he has to get down and get away from the microphone. So you really have to speak up if you get away from the mike.

THE WITNESS: I will be able to explain everything. I don't see the easel.

THE CLERK: I think you need to put something up on the screen.

MS. HOLLINGSWORTH: He can't just draw --

THE WITNESS: We can go on.

DIRECT EXAMINATION

BY MS. HOLLINGSWORTH

Q. You can use the easel there.

Mr. Couillard, what is your expertise?

A. I am a certified public accountant.

Q. What is your expertise within accounting?

A. I am what is referred to as a forensic accountant.

Q. What is a forensic accountant?

A. A forensic accountant is a certified public accountant who measures values and damages for the purposes of rendering an opinion typically in court, but sometimes we prepare a report and we testify in a deposition versus a trial.

Q. Are you a licensed C.P.A.?

A. I am licensed both in Utah and North Carolina where I reside.

Q. Are you licensed in good standing?
A. I have been licensed my entire career in good standing.
Q. What is your education?
A. I have a bachelor's degree in accounting and finance from the University of Wisconsin in Madison.
Q. After you graduated what is your work experience?
A. I have always worked as a forensic accountant. I started in college working for two different professors who had me doing special projects. I started testifying when I was in college. I worked on a project involving storing nuclear fuel for a power plant. It is something that I have always enjoyed doing and it is what I have based my career on is analyzing special situations and working on reports and testifying.
Q. I am glad somebody enjoys that.
When were you retained in this case?
A. It would have been June of 2015.
Q. What were you asked to do?
A. I initially was asked to look at the case in a very, very broad view and determine what the damage components might be under various loss scenarios. Then I was asked to focus specifically on what the loss was to Mr. Jensen from failing to complete 7.5 years as a police officer, and what the loss was to his pension plan, his retirement plan as a police officer.

Q. What is the significance of 7.5?
A. 7.5 years was the amount of time Mr. Jensen needed to retire early as a police officer. After he completed 7.5 years he would have had a total of 20 years of service as a police officer and he would have been eligible to receive 50 percent of his salary, his ending salary each year for the remainder of his life, beginning effective as of the date that he completed 20 years of service.
Q. Have you worked on cases similar to this?
A. Well, in general any case involving loss of benefits or loss of earnings -- they are fairly common. I have worked on over 1,000 individual cases, not counting class action cases. In class action cases we can work on 700, 800 cases at a time, but with individual cases I have worked on over 1,000 in my career. I have been doing this a long time.

In terms of police officers or public safety people, I regularly do cases involving public safety personnel. I maybe have ten such cases right now, eight of them here in Utah, that involve public safety personnel with similar pension plans as what Mr. Jensen had.
Q. Have you been paid in full in this case?
A. I have been paid in full including appearing here, and I have also been paid for my travel expenses to be here today.
Q. Will you be paid any more or less depending on the

outcome of the case?
A. No. I am paid just by the hour regardless of the outcome of the case. When I leave, frequently I don't know what happens in a case.
Q. Do you personally know Mr. Jensen?
A. I met him for the first time a few minutes ago.
Q. Have you spoken to him on the phone?
A. I interviewed him in June of 2015 for about 45 minutes. I interviewed him again in September or October of 2016, and that was for approximately 20, 25 minutes just to get an update.
Q. Let's talk about the retirement plan. What type of retirement plan was Mr. Jensen working under?
A. Mr. Jensen was a member of the Utah Retirement System and it is abbreviated as U.R.S. U.R.S. consists of a number of different retirement plans, what is called both defined benefit plans and defined contribution plans. Mr. Jensen had what is called a tier one defined benefit retirement plan for public safety officers.
Q. What is a defined benefit plan?
A. A defined benefit plan used to be called the traditional retirement plan. It has been around forever. It started during the Colonial times. It was the only type of retirement plan prior to 1978. If you had a retirement plan prior to 1978 you had a defined benefit plan.

A defined benefit plan pays the individual a guaranteed amount per month when they retire. You're guaranteed the amount, no matter what the stock market does, no matter what happens to the economy, you get a guarantee that your employer will pay that amount each month for the remainder of your life. That is a defined benefit retirement plan.

Q. Is that different from a defined contribution retirement plan?

A. Right. After 1978 there was a huge change. Defined benefit plans have just about disappeared now. What took their place is what is called a defined contribution plan. What employers did is they realized that a defined benefit plan created an uncertain obligation for them. Nobody really is certain how long people were going to live, and they were not certain how much money to set aside so that they would have enough money to pay the pensions, so there was always the uncertainty of do we have enough money to pay all of the retired people?

So what companies and the government started doing is they went to what is called a defined contribution. A defined contribution is exactly as the name implies. It is a one-time contribution. The employer contributes to the employee's retirement plan at a fixed amount. Sometimes it is a matching amount. Two-thirds of the defined contribution plans require the employee to contribute, but

the employer knows exactly what his obligation is. He makes a contribution and that is the end of it. The employer has no future obligation.

The employee takes that contribution and they invest in the stock market. If the stock market goes down, the employer has no responsibility to compensate the employee for that loss. It is on the employee to invest the money. It is wonderful for the employer, but it puts a burden on the employee.

What has happened is that most retirement plans now are defined contribution. Very, very few are defined benefits. There has not been a new defined benefit plan for private industry since 1990 that I know of.

Q. What kind of plan did Mr. Jensen have?

A. He has the golden one. He had a defined benefit plan that guaranteed him a fixed benefit when he retired.

Q. Were there certain tiers?

A. Tiers? Let me get some water.

Q. Was his called a tier one defined benefit plan?

A. The Utah Retirement System has many different defined benefit plans. For public safety officers they have two, the tier one and the tier two. I think that is what you are referring to.

Q. Right. What is a tier one public --

A. There is a tier one and a tier two. Mr. Jensen had a

tier one. A tier one refers to when a police officer was hired.

If you're hired after July of 2011 you're in a tier two plan. The tier two plan is just a watered down version of a tier one plan. Mr. Jensen is on the tier one plan, which is a defined benefit plan that says after 20 years of work, you're eligible to get 50 percent of your ending three-year salary. So you take your highest three years, and you take 50 percent of that, and you divide that by 12 months and that determines your monthly benefit, and you get that monthly benefit each year with a cost of living adjustment for the remainder of your life even if you start another job.

So you can go work for someone else and you're guaranteed -- in Mr. Jensen's case, right now he would be getting $3,500 a month approximately, 35 to 36, depending exactly on when he retired, each month had he completed the seven and a half years to complete his 20 years of service under tier one.

Q. So at the time that he left West Jordan on April 29th, 2009, how many years of service did he have?

A. I will give you the exact number. It is like 12.446, but for purposes of talking here, I'm going to say that he had 12.5 years. It is very close to 12.5. That is the amount of service he had accumulated prior to leaving West

Jordan.

Q. What U.R.S. benefits had he earned for those 12 and a half years of service?

A. The way a defined benefit pension plan works is you are not eligible to receive those benefits until you reach certain benchmarks. If you have 20 years of service you can collect your benefits immediately. Immediately.

What happens if you only have 12.5 years? Well, you have to wait until you're age 60 under the tier one program before you can start collecting benefits if you have less than 20 years of service. Mr. Jensen would have had more than ten years but less than 20 and he could have started collecting benefits at age 60. Mr. Jensen could have collected his early benefits at age 42 had he earned his seven and a half years of additional service after he left West Jordan.

Q. And he would receive those benefits for the rest of his life?

A. Each month guaranteed by the taxpayers of the State of Utah for the remainder of his life.

Q. What is the total value of the U.R.S. defined benefit payments that he would receive?

MR. SKEEN: Objection, vague as to date. There are two calculations based on dates in the report.

THE COURT: Yes. You need to separate them.

BY MS. HOLLINGSWORTH
Q. Starting at age 60 to age -- what would be the end of his expected life?
A. I need to look it up. I don't remember offhand.
MR. SKEEN: I object to the extent it is not in his report and not disclosed.
THE COURT: Well, is it in your report?
THE WITNESS: Yes.
THE COURT: He is looking at his report.
MR. SKEEN: Which report are we looking at?
THE WITNESS: The July report.
MS. HOLLINGSWORTH: That is Exhibit 19.
MR. SKEEN: Exhibit 19 is the November report.
MS. HOLLINGSWORTH: Sorry. You are right. It is the November one.
THE WITNESS: May I answer?
BY MS. HOLLINGSWORTH
Q. Yes.
A. Mr. Jensen had a life expectancy of 78.2 years. That is the average life expectancy for someone of his age at the time that he left West Jordan. 78.2 would be the ending date that I calculated that he would have received benefits.
Q. And that would be from 60 to 78?
A. Yes. That is what he is actually going to receive benefits for based on 12 and a half years of service. So

when he is 60, he is going to start receiving benefits. According to the U.R.S. criteria he will start receiving benefits based on 12 and a half years of service and he will receive those benefits until age 78.2.

Q. What is the value of that amount?

A. I'm going to turn to the exhibit. So November 28, 2016, and I am turning to table 1 --

MS. HOLLINGSWORTH: I would like to admit that table so that the jury can see it.

MR. SKEEN: No objection, Your Honor.

THE COURT: What are we admitting?

MS. HOLLINGSWORTH: Table 1 of Exhibit 19.

THE COURT: Table 1 of Exhibit 19 is received into evidence.

MR. SKEEN: I think I need to make an objection about this table. The table contains information regarding opinions he is no longer going to offer and I don't think the table is proper to show to the jury.

THE COURT: I thought you said no objection?

MR. SKEEN: No, I said objection. Sorry about that.

THE COURT: I thought he was in the midst of offering opinions that related to this table?

MR. SKEEN: First of all, I don't think it is in evidence and it shouldn't go into evidence and, second of

all, I think this table includes information that we filed a motion on previously that there were representations made about opinions that Mr. Couillard is no longer going to offer.

THE COURT: About what?

MR. SKEEN: Opinions that Mr. Couillard is no longer going to offer. Would you like us to approach to explain this in more detail?

THE COURT: Usually we don't put these in evidence. They explain their opinions and then when you are arguing later, you put them on an easel or something.

MS. HOLLINGSWORTH: Okay. Wouldn't it be easier for the jury to follow it --

THE COURT: No, it wouldn't be easier to admit a bunch of stuff, some of which he is no longer relying on.

MS. HOLLINGSWORTH: I was just talking about the table.

BY MS. HOLLINGSWORTH

Q. If you can just talk about --

MR. SKEEN: Objection on the table, because the table includes categories of damages that Mr. Couillard is no longer going to testify to.

THE COURT: Well, I assume if he is no longer going to testify to them that you won't ask him about them.

MS. HOLLINGSWORTH: I don't know what he is

talking about honestly.

MR. SKEEN: Would you like me to approach?

THE COURT: Yes.

(WHEREUPON, a bench conference was begun.)

MR. SKEEN: Table one includes --

THE COURT: That is right here, right?

MR. SKEEN: That is right there, yes. You have it right there.

THE COURT: I do.

MR. SKEEN: So you have all of these different categories of potential damages and these are damages that do not apply and are included, and I think it is prejudicial to show the different categories of damages that he is admittedly not here to do. If they want to use the table for a demonstrative exhibit, they should have provided one based only on the --

MS. HOLLINGSWORTH: I just said we wouldn't provide it and I would just let him talk about it.

MR. SKEEN: I object to the table being used.

THE COURT: Well --

MR. SKEEN: I'm sorry about that if I misunderstood.

THE COURT: I said the table was not coming in once I understood that part of it contained stuff that he is not going to be talking about.

MR. SKEEN: I misunderstood.

(WHEREUPON, the bench conference was concluded.)

BY MS. HOLLINGSWORTH

Q. Let's talk about the table.

THE COURT: Or parts thereof.

MS. HOLLINGSWORTH: Let me back up and ask a few more questions.

BY MS. HOLLINGSWORTH

Q. Does the tier one benefit plan that Mr. Jensen was on, does it provide for early retirement?

A. Yes.

Q. Explain the rule of 20.

A. The rule of 20 is a rule of early retirement for tier one public safety officers that provides for early retirement after an officer completes 20 years of service. After 20 years of service, each year of service earns 2.5-percent credit times the officer's ending salary. So after 20 years times 2.5 percent, that is 50 percent, the officer earns 50 percent of his average three-year salary when he retires, and he receives that each year thereafter until the end of his life expectancy. That is the rule of 20.

Q. So Mr. Jensen needed 7.5 more years to get to the 20 that you're talking about, right?

A. Right. Correct.

Q. Had he completed those 7.5 years, how much would he have received in retirement benefits?

MR. SKEEN: Vague as to time again.

THE COURT: Excuse me?

MR. SKEEN: Vague as to time.

THE COURT: Are you considering his life expectancy and then reduced to present value? What are you asking him?

MS. HOLLINGSWORTH: If he had completed the 7.5 years, how much would he receive over, say, 20 years?

MR. SKEEN: No foundation has been laid for that yet as far as the date that he would have resumed working.

MS. HOLLINGSWORTH: Well, it is a hypothetical. Had he completed the 7.5 years, how much then would he receive?

THE COURT: Do you mean a year or total?

BY MS. HOLLINGSWORTH

Q. Well, let me ask you both.

A. Okay. I am going to refer to table GRCA-3 which shows each month from the date that the retirement benefit begins, and it shows both the actual amount of the retirement benefit and the present value amount. I am going to turn to the first page of Exhibit GRCA-3. At age 60 Mr. Jensen will begin receiving a check for $1,900. $1,910.

Q. Let me make sure I understand. Is that what he will

receive at 60 right now?
A. Yes. That is based on what he has actually earned based on 12.5 years of service.
Q. Okay.
A. $1,910. In terms of today's dollars, factoring in interest rates, because we're talking about what is going to happen in 2035, and in terms of today's dollars that is worth $1,050.
Q. Okay.
A. So when I total up all of the present values for what he is actually going to receive, the total present value for his actual retirement benefit that he is going to receive is $210,621. That is the present value of all of the benefits that he is actually going to receive based on 12.5 years of service. That is assuming that he does not complete the 7.5 years for the rule of 20.
Q. Okay. Had he gotten to the 20 years or if he gets to 20 years, what would the difference be?
MR. SKEEN: Objection.
BY MR. SKEEN
Q. I am sorry. What would the amount be?
MR. SKEEN: Objection. The objection I have, Your Honor, is are we assuming that he would not have stopped working at any point in time? Because I think the opinion has changed based on when Mr. Jensen would have resumed

working as a police officer?

THE COURT: Well, he can explain that.

THE WITNESS: Mr. Jensen had a window for going to complete his rule of 20. I have shown on Exhibit GRCA-3 two different examples that result in Mr. Jensen completing his rule of 20 on a date of either December 1st, 2016 or December 1st of 2017.

BY MS. HOLLINGSWORTH

Q. Let me just stop you for a second.

MS. HOLLINGSWORTH: I would like to admit the table that he is talking about now, the GRCA-3 table so that the jury can look at it.

MR. SKEEN: Again, I object. This is hearsay. It should not go into evidence. As a demonstrative and just the table itself, no objection.

THE COURT: The table, that is what you're trying to --

MS. HOLLINGSWORTH: Yes.

MR. SKEEN: Not to go into evidence, but to be used as a demonstrative today, yes, no objection.

THE COURT: You're trying to get it into evidence and he said it should be limited to a demonstrative. That is the way they are usually used here.

MS. HOLLINGSWORTH: Okay. That is fine.

THE COURT: You can use it as a demonstrative

exhibit. You can put it up while he is talking about it.

BY MS. HOLLINGSWORTH

Q. When you flip to the different pages that you want us to look at, tell me and I can do it from here. If you want us to look at different pages on this table, tell me which page and I will get it up on the screen.

A. All right. I'm on the very last page of GRCA-3, the year 2053 when Mr. Jensen is age 78.2. On that page I total the present value amounts. The total of the benefits that Mr. Jensen would have received based on the actual amounts for the 12.5 years of service that he had earned at West Jordan, those benefits total $210,621. They are in the far right-hand column.

I did two other scenarios that assume Mr. Jensen had this huge economic incentive to go back to work as a police officer and complete 7.5 years of service so that he could retire early as a police officer under the rule of 20. As of now or as of the end of next year, he would be collecting approximately $3,500, $3,600 a month in retirement benefits each month until the end of his life expectancy.

The present value of those retirement benefits total $1,311,714 or $1,285,324. The difference between them is a one-year delay in collecting early retirement benefits. I assumed that there was a one-year delay in Mr. Jensen finding employment as a police officer.

Under the first scenario I assumed he would find employment in June of 2009, and I believe he ended his employment with West Jordan in April, and I assumed he would find employment in June, and if it took an additional year, then his present value of the benefits he would receive under the rule of 20 would be the lower amount, the $1,285,324. That is in comparison to what he is actually going to receive of only 210,621, because he did not complete the rule of 20, and he is not going to be immediately receiving his benefits. He is going to have to wait until he is age 60.

Q. Did you calculate the difference?

A. Yes. On table one the difference is 1,101,093 for the larger amount, and 1,074,000 --

MR. SKEEN: Your Honor, this shouldn't be shown to the jury right now, what is on the screen. That is what we just objected to.

THE COURT: Yes. That one we didn't admit because it contains stuff that --

MS. HOLLINGSWORTH: Can I just show these lines that you should be able to see on your screen which show the numbers?

THE COURT: You can show those numbers.

MR. SKEEN: I request that you scroll down a little bit further to where there are the numbers on it.

There are a couple columns -- down. Two more rows. There you go.

MS. HOLLINGSWORTH: Okay.

MR. SKEEN: I am sorry. One more row.

THE COURT: One more.

THE WITNESS: What I show on this -- it disappeared. There it is. I show a comparison of what he is actually going to receive, the 210,621, and in comparison to what he would have received had he completed the rule of 20, 1,311,714. I take the difference between those two and said had he completed 7.5 years of additional service as a police officer he would have received this additional pension benefit. It would have come in the form of approximately $40,000 a year in retirement benefits beginning immediately as of the date of retirement of either 12-1, 2016 or 12-1, 2017.

In addition, Mr. Jensen would have earned whatever salary he would have earned as a police officer during that time period.

BY MS. HOLLINGSWORTH

Q. How old was Mr. Jensen on April 29th, 2009?

A. I need to look. I forget. I think he was 33. I am going to double-check. I am just guessing. I'm sorry.

Q. That is correct.

A. That is correct?

Q. Yes. He would have then been in his early forties if he would have completed the 7.5 years of service?
A. I'm sorry?
Q. Then he would have been in his early forties when he completed his 7.5 years?
A. Right. Approximately 42 or so.
Q. Do you know how old he is now?
A. I think he just had a birthday in June. I think he is 46.
Q. That is not correct.
A. I don't know.
Q. Do you know if Mr. Jensen was aware of the early retirement?
A. I have worked on 100 cases involving public safety officers and I have never met one that didn't know the rule of 20 date. They might as well get a tattoo of it. It is so important to them. When I first interviewed Mr. Jensen it is one of the first things we talked about is his rule of 20 date. It was a very, very big factor for police officers. It no longer exists. It has been done away with, but at the time it was a very big deal.
Q. When was it done away with?
A. It was done away with in --
MR. SKEEN: I don't think this was in the report anywhere.

THE COURT: Excuse me?

MR. SKEEN: I don't think this was in any of the reports that we have been given. It is not a disclosed opinion.

THE COURT: Well, he has already testified about it actually when he started out.

MS. HOLLINGSWORTH: Right.

MR. SKEEN: But the question was when did it end. I think that we would like to stop it right now because these are not opinions in the report.

MS. HOLLINGSWORTH: Your Honor --

THE COURT: It does not have anything to do with your case, does it?

MS. HOLLINGSWORTH: Well, sure.

Let me ask him this.

BY MS. HOLLINGSWORTH

Q. Do you know if Mr. Jensen is still eligible for retirement under the rule of 20 plan, even if --

MR. SKEEN: Same objection, Your Honor.

THE COURT: You can answer that question.

THE WITNESS: I can answer that question?

THE COURT: Yes, he is still eligible or, no, he is not.

THE WITNESS: He would not be eligible now for the rule of 20.

BY MS. HOLLINGSWORTH

Q. Why?

MR. SKEEN: Same objection, not disclosed.

THE COURT: Overruled.

THE WITNESS: Because the rule of 20 -- the state legislature did away with the rule of 20 in July of 2011.

BY MS. HOLLINGSWORTH

Q. You're saying that even if he want back to work now for a state entity, he wouldn't be under the rule of 20 retirement plan?

A. No.

MR. SKEEN: Same objection, not a disclosed opinion.

THE COURT: I will let him answer that, which he already did.

MS. HOLLINGSWORTH: That's all that I have.

THE COURT: Mr. Skeen, you may cross-examine.

CROSS-EXAMINATION

BY MR. SKEEN

Q. Mr. Couillard, I want to give you the opportunity to clarify one of your opinions you gave earlier. You said that there were two scenarios, right, to calculations in this case?

A. Could you speak up a little bit, please?

Q. Yes. You have given two calculations based on the

assumption that Mr. Jensen would complete 20 years of service, correct, two calculations you have given?

A. I was not given any calculations. I have done --

THE COURT: Two calculations that you have given.

THE WITNESS: That I have given, yes, and I would say that there are possibly three depending on how you count.

BY MR. SKEEN

Q. The first one that you gave -- if you want to turn to page 4 of your November report, maybe that will help you out. You testified a minute ago that you assumed Mr. Jensen would begin working again for the first calculation in June of 2009. Isn't it true that your first assumption was that he never stopped working in April of 2009? Isn't that what it says in your report for the first assumption or calculation? Had Mr. Jensen been allowed to complete 7.5 years of additional law enforcement without interference --

A. Without interference, yes.

Q. That is assuming that he never resigned essentially, right?

A. That is not how the calculation on table three is shown. If you look at table three he retires in December, and if you go back seven and a half years he begins work in June of 2009.

Q. It says he retires -- the first assumption is that he

retires on December 1st of 2016.
A. Correct.
Q. So back me up six months from December 1st.
A. End of May.
Q. You have December 1st, so November, October, September, August, July and June, correct?
A. Correct.
Q. But it is 7.5, so seven years before that?
A. Okay.
Q. Okay. But your opinion here in your report is that he continuously worked, correct, without interference? That is the assumption?
A. Yes.
Q. You don't know if that in fact happened? You're assuming this, that he would have been able to continue to work without interference?
A. That was one of the ends of the parameters that I looked at, yes.
Q. When you say without interference -- you're assuming that the interference is something -- well, let me ask you this. You're assuming that the interference was wrongful interference by West Jordan City, correct?
A. I am not testifying about the interference. That is beyond the scope of my testimony.
Q. But you're assuming that, correct?

A. I'm assuming there was interference.
Q. If there was no interference, then the first assumption here that he began working again in June of 2009, that first calculation wouldn't be applicable here; isn't that right?
A. If there was no interference?
Q. Correct.
A. If there was no interference then there are no damages.
Q. Okay. Your second assumption is the same, correct?
A. Right. If Mr. Jensen was not interfered with in any way or shape or form, then my damage calculation does not apply.
Q. You would agree that at the time Mr. Jensen resigned in April of 2009 that he was not entitled to this 20-year benefit, correct? He was not entitled to the million dollars that you're testifying about today at that time?
A. No. He only had 12.5 years of service at that time.
Q. So he would have to get a new job as a police officer and complete seven and a half more years of service?
A. Correct.
Q. Let's go to the last page of table GRCA-3.
A. Okay.
Q. There is a difference between --
MS. HOLLINGSWORTH: We can put that one up on the screen.
MR. SKEEN: Go ahead. Thank you.

BY MR. SKEEN

Q. There is a difference between your first figure, assuming that he continued without interference, and the second figure, assuming there was a one-year delay; isn't that correct?

A. I am not certain which numbers you are referring to.

Q. I am sorry. The totals at the very bottom.

A. Right.

Q. The present value totals. Aren't those present value totals?

A. Correct.

Q. The 1.3 and some odd million and the 1.285 million?

A. Correct.

Q. The benefit gets smaller over time; isn't that correct? The longer the delay the present value gets smaller; isn't that right?

A. It gets smaller but at the same time the benefit itself increases. So the monthly benefit increases. As he works longer or works later in life. The monthly benefit increases, but because of the delay the present value decreases.

Q. You testified a minute ago that you spoke to Mr. Jensen and he told you that he was very aware of his retirement benefit and the incentive to complete 20 years of service; isn't that right?

A. He was aware of the rule of 20.
Q. So there was an incentive for him to complete seven and a half more years of service?
A. A huge incentive.
Q. A huge incentive. That incentive existed on the date that he retired, right?
A. Yes.
Q. And would exist one year from the date he retired; isn't that correct?
A. It would still exist one year after he retired.
Q. And it is true that sometimes people have large financial incentives to do certain things, but they choose not to do them; isn't that true?
A. That can happen, yes.
Q. And sometimes people make choices that eliminate the possibility of obtaining the return at the end, right?
A. I'm sorry?
Q. My question was sometimes people make choices that go against their financial incentives? That is pretty obvious, right?
A. It does happen.
Q. It does happen.
You testified earlier that you were being paid for your testimony today. How much are you being paid?
A. I am being paid --

MS. HOLLINGSWORTH: Objection, relevance.

THE COURT: It is standard --

THE WITNESS: I charge an hourly rate for my services, and my rate went up in January of this year, but I'm still charging at my old rate because I began this case earlier. I have worked about 12 hours on this case in total, including my time today, and I am charging 350 an hour.

BY MR. SKEEN

Q. How much have you been paid to this point?

A. Including all of my transportation, et cetera, I was paid $9,100.

Q. How long have you been offering services as an expert witness in lawsuits and litigation?

A. Well, as I said, I began testifying on rates of return right after I graduated from college. So I was working as a forensic accountant early on in my career. This is the only type of work I have ever done.

Q. What percentage of cases do you take on behalf of plaintiffs and what percentage do you take on behalf of defendants?

A. Well, it varies depending on the case. I always like to represent the side that has the most information if I have a choice. So in commercial litigation it just depends on which side has the most information. If it is defending

a company, I prefer to represent the company because they tend to have the most information. If it is in an action that involves the ownership of a company, I want to represent the side that has the information about the company. In an action that involves for instance --

Q. I know you're going on and explaining this, but my question was do you know the percentage that you --

A. I don't. I don't keep track of it.

Q. You have provided a C.V., a testimony history, haven't you?

A. Yes.

Q. Turn to that in your report. I think it is in your addendum and also in your original.

It is appendix C, correct?

A. Excuse me?

Q. You're to appendix C now?

A. Yes.

MS. HOLLINGSWORTH: Your Honor, I am just going to object to relevance.

THE COURT: Again, it is a standard question of an expert.

BY MR. SKEEN

Q. Are these the cases you have testified in since 2008, since April 8th of 2008?

A. Not exactly. This only goes up to 2015 when I

submitted this report.
Q. So in this document here, do you know how many cases there are in there or how many instances that you testified in that are reported?
A. I have not tallied them up.
Q. I counted 40.
A. All right.
Q. Does that sound about right to you?
A. That looks to be approximately correct.
Q. In how many of these cases did you testify on behalf of the plaintiff?
A. I can't remember what I did last year. I don't keep track.
Q. Can you name one of these cases that you testified on behalf of a defendant?
A. As I said, I don't keep track.
Q. You were retained by Jonathan Thorne in 2015. Were you testifying on behalf of a plaintiff or a defendant?
A. As I said, I can't remember what I did even last week practically. I work on so many cases that I forget them as soon as I finish.
Q. You can't name one of these cases that you testified on behalf of a defendant?
A. I would have to look them up on the computer.
Q. When you testified for Jordan Kendall in 2010, was that

on behalf of a plaintiff or a defendant?
A. Jordan Kendall? Which firm is he with? I don't recall.
Q. What about Jeff Eisenberg?
A. Jeff Eisenberg. I know his firm, Eisenberg Gilchrist. They do plaintiffs' cases and that would have been for a plaintiff.
Q. Do you know if Jordan is in the same firm?
A. I think he is, but I don't recall.
MR. SKEEN: No further questions.
THE COURT: Thank you.
Any redirect?

REDIRECT EXAMINATION

BY MS. HOLLINGSWORTH
Q. Just a couple, Mr. Couillard.
Did you make any assumptions about the noneconomic reasons that Mr. Jensen didn't complete the rule of 20?
A. I focused on the economic reasons. I am a numbers person. I never met Mr. Jensen before this. I read some of the documents, but I don't have the information that you have heard in this case about what happened. I don't have any personal knowledge about what happened. I focused on the economic justification Mr. Jensen had to complete his seven and a half years as a police officer. He had a million dollar incentive to go back and complete his seven

and a half years as a police officer. I know nothing else about the case in any detail.

Q. As an accountant what was the economy doing in 2009 and 2010?

MR. SKEEN: That is not in the report, Your Honor. This is going beyond the scope. She is supposed to provide a --

THE COURT: It is. Sustained.

MS. HOLLINGSWORTH: Okay. No further questions.

THE COURT: Thank you.

Any recross?

MR. SKEEN: No. Thank you, Your Honor.

THE COURT: Thank you and you may step down. You can be excused, I assume.

May this witness be excused, counsel?

MS. HOLLINGSWORTH: Yes.

THE COURT: You may call your next witness.

MS. HOLLINGSWORTH: Travis Peterson.

THE COURT: Come forward and be sworn, please, right up here in front of the clerk of the court.

TRAVIS PETERSON

Having been duly sworn, was examined

and testified as follows:

THE WITNESS: Travis Peterson, P-e-t-e-r-s-o-n.

THE COURT: Go ahead, Ms. Hollingsworth.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

CENTRAL DIVISION

AARON JENSEN,)

Plaintiff,)

vs.) Case No. 2:12-CV-736-DAK

WEST JORDAN CITY, a Utah)

municipal corporation,)

Defendant.)

_____)

BEFORE THE HONORABLE DALE A. KIMBALL

June 20, 2017

Jury Trial

Jury Instruction Conference

REPORTED BY: Patti Walker, CSR, RPR, CP 801-364-5440

351 South West Temple, #8.431, Salt Lake City, Utah 84101

A P P E A R A N C E S

For Plaintiff:
April L. Hollingsworth
HOLLINGSWORTH LAW OFFICE, LLC
1115 South 900 East
Salt Lake City, Utah 84105

For Defendant:
Maralyn M. English
Nathan R. Skeen
Dani N. Cepernich
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, #1100
Salt Lake City, Utah 84111

Paul D. Dodd
8000 South Redwood Road
West Jordan, Utah 84088

SALT LAKE CITY, UTAH; TUESDAY, JUNE 20, 2017; 9:30 A.M.

PROCEEDINGS

THE COURT: We're here this morning in the matter of Aaron Jensen vs. West Jordan City, 2:12-CV-736. Plaintiff is represented by Ms. April Hollingsworth and Tyler Hubbard, a student, right?

MS. HOLLINGSWORTH: That's correct.

THE COURT: And West Jordan is represented by Ms. Maralyn English, Mr. Nathan Skeen, Paul Dodd and --

MS. CEPERNICH: Dani Cepernich.

THE COURT: We are here for the instruction conference and the special verdict form.

Let's start with the instructions. Tell me the first one anybody has a problem with.

MS. HOLLINGSWORTH: 20.

MR. SKEEN: We have one at 12, a slight revision.

THE COURT: Let me find it.

What is your difficulty, Mr. Skeen?

MR. SKEEN: The only thing we want to add is after the first sentence put after April 29, 2009.

THE COURT: Well, that raises a question. Throughout the instructions we have separated claims and conduct. My view of the law in this case is that plaintiff cannot recover for a claim that actually arose after April 29, 2009, but a claim could be based on conduct or, in

part, on conduct that occurred before.

MR. SKEEN: Is there a way -- I saw that in one of the instructions. I think it was on Title VII for retaliation. I guess our point is for that if retaliatory conduct happened prior to the settlement date, wouldn't that have been an action that could have arisen prior to the settlement, a claim that was there at that time?

THE COURT: Well, had it arisen to the level of a claim yet?

MR. SKEEN: I'm not sure what else would be necessary. If you look at the elements for Title VII, it's conduct that happens. There is nothing else in there, I don't think, that would make it be a claim later on, but not a claim at that time.

THE COURT: Does he have to know about it?

MR. SKEEN: No. Actually the Court has already ruled on that in the summary judgment ruling.

THE COURT: So your argument is at least with the retaliation claim?

MR. SKEEN: I guess we have to go through each claim we have, but for retaliation certainly, because if you retaliate, it's based on the conduct when it happens. There is no other element that requires later on in time it happened, I don't think.

THE COURT: Well, but isn't part of your

retaliation claim that the West Jordan people participated in trying to get him criminally charged?

MS. HOLLINGSWORTH: Right. I mean --

THE COURT: I mean didn't a lot of that allegedly happen after April 29th of 2009?

MR. SKEEN: That's why we need the distinction because for the conduct that allegedly happened after, that's fine. But we're saying the conduct that happened beforehand, that shouldn't be part of the action because it was released after the settlement.

THE COURT: What do you say, Curtis?

THE CLERK: I think the language in the Title VII claims is it has to be a materially adverse action, and I think there can be conduct related to a materially adverse action that could occur before April 29th that wouldn't rise to the level of the claim no action had taken place.

THE COURT: It may be related to a later claim?

MS. HOLLINGSWORTH: I agree. Obviously the rest happened after that in a lot of the important interviews. I think the conduct before the settlement is relevant because it provides the background, and his damages at issue didn't occur until after April 29th. So I mean for the purposes of talking about damages, I don't think --

MR. SKEEN: The thing I struggle with is yes, I agree the background information could be relevant, but

shouldn't be the basis for a cause of action.

THE COURT: What if there were a whole lot of evidence about planning, getting arrested or charged, or whatever, and a lot of that happened before? I think we're right. I think the claim -- the majority of the claim clearly has to be after the settlement, but prior conduct may well be relevant.

MR. SKEEN: I think it may be relevant. I just think it shouldn't be a basis because it releases all claims. We can look at it right now.

THE COURT: It releases all claims.

MR. SKEEN: Well, it releases more than that.

MR. DODD: What about the stipulated order?

MR. SKEEN: It releases all obligations, debts, claims, demands, controversies, lawsuits, costs, fees, commissions, expenses, further performance pursuant to any and all alleged written or oral agreements and all liabilities of any kind or nature whatsoever. So I think it's more than just claims.

And also it says, the last part of that --

THE COURT: I don't think it reaches conduct that may relate to claims after.

MR. SKEEN: I just don't think -- I think that the release wouldn't have much meaning if the conduct prior to the release could be used for a cause of action later, could

be part of something that's recovered for later on. And also just the last part of that paragraph, that provision says, this paragraph shall receive the broadest possible interpretation.

THE COURT: I realize it says that.

What were you going to say, Mr. Dodd?

MR. DODD: I was just trying to remember what the stipulated order was entered in this case years and years ago as to the parties stipulating to any of -- and I'm just looking for it.

MR. SKEEN: It just says claims. It says releases all claims. And number six --

THE COURT: What was your suggested sentence?

MR. SKEEN: Then just paragraph six, and the settlement also says no reservation of rights, does not reserve any issues or claims for a later breach.

So for number -- what number are we on? Is it 12? Am I looking at the wrong section? Page 12, just at the last part of that section, you may award compensatory damages only for injuries Mr. Jensen proved were caused by West Jordan City's allegedly wrongful conduct after April 29th, 2009.

MS. HOLLINGSWORTH: Your Honor, my view of this, if we're talking about damages, I mean I think it should say for injuries that Mr. Jensen proves he suffered after April

29th, 2009. I don't have a problem with that.

THE COURT: Well, he may have suffered damages that weren't caused. They have to be caused by this defendant.

MS. HOLLINGSWORTH: Right. But while we're talking about economic damages, I think we can talk about how that date relates to claims elsewhere. But for purposes of damages, I think they should just be told that they need to focus on damages he suffered after April 29th, 2009.

THE COURT: I don't have any dates in 12 yet. You're suggesting that in the second paragraph?

MS. HOLLINGSWORTH: I'm just saying I don't think the part about damages is the place to get into the conduct by West Jordan that happened before or after April 29th. So I guess my view is in here it doesn't need any kind of qualifying date.

THE COURT: Let's think about that.

All right. Let's lay 12 aside for a minute.

MS. CEPERNICH: We have the same request on number 13, to add the date in two places after Section 1983.

THE COURT: Thirteen?

MS. CEPERNICH: Yes.

THE COURT: What do you claim?

MS. CEPERNICH: In the first paragraph at the end of Title VII or Section 1983, to put again after April 29th,

2009. And then to repeat that in the second paragraph after Section 1983.

THE COURT: Well, now -- you're actually now talking about a different thing. You're talking about damages caused after April 29th, 2009, right?

MS. CEPERNICH: By West Jordan violating Title VII or Section 1983 after April 29th. It would be the conduct -- that he can recover for damages caused by conduct that occurred after April 29th, 2009.

THE COURT: That's the same question, isn't it?

MS. CEPERNICH: Right.

MS. HOLLINGSWORTH: I think it would be less confusing if it just said -- if it didn't talk about, you know, the statutes that are violated, and then just explain to the jury that he's not entitled to noneconomic damages for the contract claim.

THE COURT: What are you on?

MS. HOLLINGSWORTH: I'm on 13, that first paragraph where it talks about -- the last sentence, he doesn't establish by a preponderance of the evidence that he has experienced pain, et cetera, he cannot recover compensatory damages, and then just take out, you know, by them violating Title VII or Section 1983. Just say that was proximately caused by West Jordan City's conduct, and then just explain to the jury, you know, something to the effect

of he's not entitled to noneconomic damages associated with the breach of contract claim.

THE COURT: This is Title VII?

MS. HOLLINGSWORTH: Well, this is just generally the instruction about damages and noneconomic damages.

MR. SKEEN: My take is it already does that because it says what you can recover noneconomic damages in here for. I would just leave it, but other than that condition, that's all I have to say.

THE COURT: I'm inclined to leave it. We'll come back to that.

MR. SKEEN: So the next one we have is number 18. So some minor --

THE COURT: Eighteen?

MR. SKEEN: Eighteen.

THE COURT: Seventeen?

MR. SKEEN: Eighteen. So the third line, it says -- it uses the word concomitant. We thought that might be a little complex.

THE COURT: Concomitant?

MR. SKEEN: Concomitant, there you go. Accompanying might be a better word or a less confusing word.

Then the last line --

THE COURT: What do you want in there?

MR. SKEEN: Maybe substitute accompanying for concomitant.

THE COURT: Accompanying -- I thought everybody knew what that meant. I'm disappointed in you, Mr. Skeen. And accompanying harm, okay.

Do you have something else?

MR. SKEEN: I think we should take out the last sentence entirely. It says, as a matter of law, the filing of false criminal charges and providing negative job references qualify as materially adverse actions. I just think neither applies here. West Jordan didn't file any false criminal charges. There was no evidence they provided any negative job references.

THE COURT: Well, you claim that -- what's your claim with respect to the criminal charges?

MS. HOLLINGSWORTH: That they instigated and pursued, and supported the claims.

THE COURT: I didn't hear any evidence that they provided any kind of job references.

MS. HOLLINGSWORTH: Right, that was because he wasn't allowed to testify as to that. We weren't able to put on that evidence. I don't think we do have that evidence in.

THE COURT: We can certainly take that out. But the filing of false criminal charges would be a materially

adverse action, wouldn't it? It has to be proven.

MR. SKEEN: I think the point is, what we're saying is West Jordan City didn't file any false criminal charges. That would be Salt Lake County District Attorneys that did that.

MS. ENGLISH: If they were false.

MR. SKEEN: If they were false. Sorry.

MS. HOLLINGSWORTH: So that's why I said, you know, we're alleging it's a pursuit of the instigation of false criminal charges.

MR. SKEEN: Is there a case on this? It says as a matter of law. Is there a case on this?

THE CLERK: Yeah. The reason that wording was used is because the case law says filing false criminal charges and providing negative job references. We didn't want to go too far beyond that to say what other things were, and so we left those in there.

MR. SKEEN: Do you know if those cases were about like, you know, if it was like in this case, Salt Lake County who actually filed the charges? Was it in that context?

THE CLERK: Yes.

MR. SKEEN: So maybe that doesn't apply here.

MS. HOLLINGSWORTH: You're saying it was the same situation as here?

THE CLERK: No. It was someone who had filed.

THE COURT: Well, but she's claiming you did this in some way.

MR. SKEEN: And that's fine. I guess if there's a case saying as a matter of law, and then inserting --

THE COURT: There are cases saying if you file or instigate the filing, then it's -- I mean it's a materially adverse action. I guess we could say that. And then we could say if proven.

MR. SKEEN: Yeah.

THE COURT: And I don't have any problem with that.

MS. ENGLISH: I don't understand what you're saying as a matter of law. What would it say if it got changed?

THE COURT: As a matter of law, comma, if proven, comma, the instigation of or the filing of false criminal charges qualifies as a materially adverse action.

MR. DODD: I don't know -- tell me if I'm wrong. I thought there was a difference. Like if you're instigating the charges, like if you're the one who brings the information to them, I thought it had a further element, that the other element had to be that some of that information either had to be false or had to be, you know, fraudulent in some way. I thought there was another element

for the instigation part. I thought on the filing of it --

THE CLERK: It wasn't in the context of a materially adverse action. It was more in the context of probable cause, but along those lines, yes.

MR. DODD: It has to be proven we provided false information or something like that to get the charges.

THE COURT: The false instigation of criminal charges, how's that?

MS. HOLLINGSWORTH: What about unwarranted?

MR. DODD: False information to -- false instigation seems confusing to me. Be providing false information to instigate the filing of.

MS. HOLLINGSWORTH: The instigation of unsupported criminal charges.

MR. SKEEN: I don't know if that's what the case law says. We're saying this as a matter of law. I think maybe if the case law does say instigating false criminal charges is a materially adverse action, all we have to do is substitute instigation for filing, and then I think that makes sense.

THE COURT: The instigation of false criminal charges.

MR. SKEEN: Yeah.

THE COURT: All right. You got this?

THE CLERK: Yep. I'm on it.

THE COURT: Take out the job references. There's no evidence on that. And change -- instead of a concomitant --

MR. DODD: Can I ask one question on that before we go past it? If we say the instigation of false criminal charges, I think you could read that to say if ultimately, you know, the charges were proven to be false or, you know, at the end, but I think you have to look at it at the time that the allegation was brought. If the allegation was brought in good faith and there was no false information provided, even if subsequently the allegations proved to be false, I don't think that instigation would be as a matter of law an adverse action.

MR. SKEEN: I think it goes to the other element, the retaliatory intent, which there is another instruction on that.

THE CLERK: Just to make sure I have this correctly, are we keeping if proven in there as well?

THE COURT: Yes.

THE CLERK: As a matter of law, comma, if proven, comma, the instigation of false criminal charges qualifies as a materially adverse action.

THE COURT: Yes.

MS. CEPERNICH: We had a minor suggestion for Instruction 19.

THE COURT: Nineteen.

MS. CEPERNICH: Just changing the first word from after to if, if Mr. Jensen identifies actions.

THE COURT: I don't have any problem with that, if.

You had a problem with 20 you said, Ms. Hollingsworth?

MS. HOLLINGSWORTH: Yeah. I don't think this intent is an element of the claim. I think it's met by proving the other elements, you know, that are listed in Instruction 17.

THE COURT: I thought it was.

THE CLERK: Like the instruction says, the case law that talks about retaliatory intent talks about it as a subcategory as a but-for causation. The instruction starts, as part of proving that Mr. Jensen's protected activity was the but-for cause of West Jordan City's materially adverse action. So it's not identified as a separate element to prove, but it is talked about in the case law as part of the but-for causation.

MS. HOLLINGSWORTH: Do you have any cites?

THE CLERK: I didn't bring this one with me.

MS. CEPERNICH: We do have cases that say the Tenth Circuit requires in a Title VII claim to show that she was intentionally retaliated against by her employer.

THE COURT: That's been my understanding. I'm going to leave it. Do you want to make any more of a record?

MS. HOLLINGSWORTH: Yeah. I think the intent is -- the element of intent is met by proving the elements that are included in Instruction No. 17. Those I think have been laid out in the case law.

THE COURT: Okay. Thank you.

MR. SKEEN: We have a slight change to this one as well.

THE COURT: To 20?

MR. SKEEN: Twenty, on the third line.

THE COURT: You mean a slight suggested change.

MR. SKEEN: So just continuing, Mr. Jensen must show that West Jordan City had a retaliatory intent or motive for taking, I would suggest replacing an with the adverse --

THE COURT: Mine says the.

MR. SKEEN: I would suggest removing the and putting in an instead.

THE COURT: I don't have a problem with that to avoid implication, an adverse employment action.

I like hearing those pages turning. Where are we next?

MR. SKEEN: Twenty-three.

THE COURT: Twenty-three. Yes.

MS. CEPERNICH: So I think this goes to the same issue we discussed earlier with including the April 29th date, the distinction between conduct and claims. And our position is that the instruction as written is not entirely accurate because it allows for the consideration of conduct that occurred before April 29th, and we believe that Mr. Jensen released all claims that are based on that conduct.

THE COURT: I'm happy with this. It says the claim he couldn't have brought until after April 30th -- should that be April 29th?

MS. CEPERNICH: No. I think April 30th is correct.

THE COURT: I think that's appropriately qualified, if that conduct provides the basis for a claim.

MS. CEPERNICH: Then I guess the secondary problem we have is it's not entirely clear to the jury what claims could not have been brought until later. I don't know that a jury will be able to distinguish between conduct that could have been brought as a claim prior to that date and conduct that could not. There is nothing to instruct them on when claims accrue or anything of that nature. So the jury is left wondering what conduct it can consider under this instruction.

THE COURT: Juries are always left wondering about certain things. They send out questions and then we answer them, or try to.

I don't think that's a problem, but I will keep thinking about it.

MS. HOLLINGSWORTH: And actually, just to go back to this one, it seems to me that this should be a general instruction, not just applicable to the Title VII claim.

THE COURT: I'm not sure about that. Let's see when we get through.

MR. SKEEN: Twenty-four, we have some proposed changes.

THE COURT: You do?

MR. SKEEN: Yes. So there were two standards for -- okay. So what we think is just taking out the first two paragraphs of this one and leaving the last paragraph and making some changes to that.

MS. HOLLINGSWORTH: That's funny. I suggested taking out the last one and leaving the first two.

MR. SKEEN: So we believe that it's the active deception doctrine that applies to Title VII tolling. That doctrine doesn't require -- let's see. If you are looking at the last paragraph, it says, it doesn't require anything to do with whether Mr. Jensen was notified or had knowledge of any materially adverse action. That's something that was

raised during summary judgment briefing and the Court already ruled that notice or knowledge of the claim is not the standard.

And then for tolling, I think because it's just active deception, knowledge, again, doesn't matter there. What we would propose is taking out the first two paragraphs. I don't think it's necessary to provide all that instruction. All the jury needs to know is what they will be asked about, what's in the third paragraph, active deception.

So what we would recommend is read in you will be asked to determine whether Mr. Jensen proved by a preponderance of the evidence that he was actively deceived regarding procedural prerequisites for filing a charge of discrimination with the EEOC, and then delete the rest of that sentence. And at the end put a comma -- I'm sorry. Have I got that wrong?

THE COURT: What do you think?

MS. HOLLINGSWORTH: I would like to talk about this one.

THE COURT: Go ahead.

MS. HOLLINGSWORTH: Well, first of all, I think the first two paragraphs are the ones that should be left in because it talks about the 300 days. And I think the jury has plenty of evidence to find acts of retaliation that

occurred within the 300-day period, including, for instance, but not limited to the preliminary hearing and the testimony that was provided and the information that was provided at the preliminary hearing, which was in December. So that's well within the 300 days.

So I think the jury needs to be instructed that if they find that the conduct by West Jordan, that part of the efforts took place within the 300 days, then they should find it was timely filed.

As far as this last paragraph about him being actively deceived, first of all, I didn't understand the Court to rule at summary judgment that the knowledge part was not applicable here. But assuming that that's true, this issue about actively being deceived regarding procedural prerequisites doesn't apply because Mr. Jensen wasn't -- he wasn't even employed by them. He had totally cut ties. So there is not any way for us to prove this claim. We may as well throw out this instruction.

So if the Court --

THE COURT: What is it you can't do?

MS. HOLLINGSWORTH: Prove that he was actively deceived regarding the procedural prerequisites of his filing. And I think that comes into play in the case law where the employer says, you know, well, don't go ahead and file, we'll try and work out a deal, and then they miss

their window for filing. But here where he had no interactions with West Jordan because he was gone, there is no way to prove that.

MR. SKEEN: I agree with that. I think that's the tolling issue here is that tolling is specific to Title VII, it has to be active deception, and there's no evidence of that in this case. And the Court's ruling before was on the issue of what is time barred and what's not time barred, and the Court ruled that any discrete acts that occurred outside of the 300-day window prior to filing with the EEOC are time barred unless equitable tolling applies. We're saying that tolling doesn't apply because it's active deception, and what we saw at trial was there was no evidence of active deception.

THE COURT: Is it only active deception?

THE CLERK: Ms. Hollingsworth is right in that it arose in cases that deal with procedural requirements. But the Tenth Circuit since that time has essentially said and that's the only time tolling applies in Title VII cases. There is language, I have some here, tolling only applies in Title VII cases if there was active deception regarding the procedural requirements. They haven't limited it to those cases. There's some proof of that, so I think that is right, the only time tolling applies is in Title VII.

THE COURT: Are you telling me active deception is

the law and you can't prove that?

MS. HOLLINGSWORTH: Right, because he wasn't -- I mean West Jordan, they were in separate universes at that point. He had nothing to do with them. But that said, I believe there's plenty of acts that occurred within the 300-day period. So the jury needs to understand that if, you know, for instance, West Jordan misrepresented information at the preliminary hearing, then that would be in furtherance of this adverse action and would be actionable.

MR. SKEEN: I think we talked earlier about --

THE COURT: That's correct, isn't it, discrete further adverse action?

THE CLERK: It's correct if we are talking about each individual discrete action. But discrete actions outside that 300-day window without tolling would be time barred.

MR. SKEEN: So he had been arrested and charged by that time outside of the 300-day window. So the only acts we have are alleged misrepresentations during the hearing. It didn't change anything because the claims were dismissed five months later on. So I don't think -- by the way, it's not just any act. It has to be a materially adverse action. We talked earlier about as a matter of law instigating false charges could be that. But the charges were already brought

outside of the 300 days. The arrest made outside of the 300 days. I don't see anything that is left over that is recoverable. And this was part of our motion for judgment as a matter of law.

MS. HOLLINGSWORTH: Your Honor, I see this as not one discrete action that happened in April, May of 2010, but more of a continuing thing because it's not like he just got arrested and that was it. There were events leading up to it and there were events continuing the pursuit of criminal charges well after it, including through December of 2010 at least. So I don't think you can look at those acts in isolation.

MR. SKEEN: Can I respond?

For Title VII retaliation, the continuing act doctrine does not apply. It's only discrete acts.

THE COURT: Let's assume for a minute you're correct. Where would that leave us?

MR. SKEEN: For Title VII?

THE COURT: Yes.

MR. SKEEN: Our position is there is no Title VII claim anymore. The only reason it survived the summary judgment is because of the thought of equitable tolling, we brought that up, that the standard applies. That was in the ruling before. And what has kind of been conceded here is that if the standard does apply but there was no evidence of

what can meet that standard, active deception.

MS. HOLLINGSWORTH: Your Honor, I disagree that there can't be a continuing action in a retaliation claim.

THE COURT: Say that again.

MS. HOLLINGSWORTH: I disagree that there can't be continuing action as part of retaliation.

THE COURT: If the retaliation claim goes away, what's left?

MS. HOLLINGSWORTH: Then there would be no Title VII claim. Malicious prosecution.

THE COURT: I have got to think about this. All right. Let's assume it's still in and go on.

MS. CEPERNICH: We have a minor requested change on 25. In the element number two near the bottom, we would ask that we remove or custom, even though you can generally prove municipality liability by policy or custom, there has been no evidence of a custom here.

THE COURT: I think that's correct, isn't it, custom?

MS. HOLLINGSWORTH: Well, I think a custom, it could be a custom with respect to Mr. Jensen. There was a whole lot of people involved in this situation, and I think the definition of a custom -- where is it?

MS. CEPERNICH: So the allegations in one case against one person can't actually give rise to a custom.

You need separate things beyond what happened, so we can't rely on just the actions.

THE COURT: What do you say about custom?

THE CLERK: I mean we do define custom in a later instruction and define the standard for it. And there's -- if we decide there's no evidence, there is no use in doing it.

THE COURT: Leave it in for now.

What's your next question?

MS. CEPERNICH: Number 27. So a similar basis, there has been no evidence of a custom, so we would ask that the entire -- I think it's the third paragraph about what a custom is be taken out because there is nothing that a jury could find would establish a custom.

And then turning to the second paragraph, similarly, there has been no evidence of an actual formal policy that has been alleged to be unconstitutional. The case really turns on an allegation that acts committed by West Jordan City's final policy makers were unconstitutional. So we would ask that the first part of that second paragraph, Roman numeral I, be taken out and left with a city's policy is an act committed by a city official who has final policymaking authority.

THE COURT: Ms. Hollingsworth.

MS. HOLLINGSWORTH: I don't have a problem with

taking out number one. And as far as the custom, my view is that because of the number of people who were involved in the actions against Mr. Jensen, that they could find it was sort of a widespread practice that could qualify as a custom.

MS. CEPERNICH: We can find the cases that support it, but you can't rely on a single instance of it being litigated in this case, no matter how many people are involved, to establish a custom. You need other independent evidence of a custom.

THE COURT: Right now I'm going to leave it the way it is except the one coming out.

MS. CEPERNICH: We have a few other requested changes for this. In the last little paragraph, we would ask that it say if you do not find that West Jordan City had an official policy, again, take out custom, under which, and just continue because right now it seems to shift the burden of proof to West Jordan to prove that it does not have a policy, but really it's the burden of the plaintiff to prove that there was a policy.

THE COURT: That's true, isn't it?

MS. HOLLINGSWORTH: That's why I think it makes more sense that way.

MS. CEPERNICH: If you add do not find that West Jordan City, take out did not have, put in had an official

policy, then take out custom, and just continue on with the sentence.

THE COURT: Except I'm leaving in custom for now. Did you get that?

MS. CEPERNICH: I'm sorry, one last. This goes to the same thing that we discussed before. We would ask that in the first sentence we add after April 29th, 2009. So that's part of the same issue.

MR. SKEEN: We have 28.

THE COURT: What's wrong with 28?

MR. SKEEN: I think it sounded like we're really criticizing you.

THE COURT: I'm used to it.

MR. SKEEN: In the last -- so there's the paragraph and in the last sentence of the paragraph it says to establish this Section 1983 claim for malicious prosecution, in addition to the elements as set forth in Jury Instruction No. 30 -- I think it should be 25.

THE CLERK: That was my fault. We rearranged the order at the last minute.

MR. SKEEN: Again, number one, we propose it says, West Jordan City's actions after April 29th, 2009 caused Mr. Jensen to be arrested or prosecuted. Then after number four, West Jordan City acted with malice after April 29th, 2009.

THE COURT: Noted.

MR. SKEEN: We have some more to note.

MS. CEPERNICH: Number 29 also. So first we would propose adding in the second line, West Jordan City can still be found to have caused Mr. Jensen's arrest or prosecution if it intentionally concealed or misrepresented material facts to the government officials.

THE COURT: That's correct, isn't it? They have to have intent.

MS. HOLLINGSWORTH: I don't know that that's correct.

THE CLERK: I think that's correct, although the case law uses this language without using the word intentionally, although it may be correct that it should be intentionally.

THE COURT: Well, if the case law doesn't say it, let's leave it the way it is.

MS. CEPERNICH: I believe the case law says it's consistent with Instruction 31 that says, knowingly or with reckless disregard you provided the false information. Knowingly or with reckless disregard you omitted. But we could use that language knowingly or with reckless disregard rather than intentionally. But that is a requirement.

MS. HOLLINGSWORTH: I don't have a problem with knowingly or with reckless disregard in 29.

MS. CEPERNICH: Then --

THE COURT: Just a minute.

MS. CEPERNICH: We would propose adding after April 29th of 2009. So the same issue.

THE COURT: Noted.

MS. CEPERNICH: Then the last suggestion, we were a bit confused by -- I guess it's the last clause of that instruction, including the district of attorney and at the preliminary hearing, even if the district attorney and the court acted independently to facilitate the arrest or prosecution. There are cases that say if all of the evidence comes out at a preliminary hearing and the criminal defendant is bound over, that that breaks the chain of causation. I think this last part is somewhat confusing and also contrary to that holding if everything was revealed. So all of the omitted information was ultimately provided and any false information was discussed, that a court acting independently does, in fact, break the chain of causation.

THE COURT: Curtis.

THE CLERK: I think we addressed that in the probable cause jury instruction.

MS. CEPERNICH: To me this seems contrary to that, conflicting, a little bit confusing.

THE CLERK: I don't think it conflicts. I think it's a different standard for a different element, I think.

MS. HOLLINGSWORTH: I think there's two different -- at least two different things happening. There's the arrest, but then there's the continued prosecution. And so what happened at the preliminary hearing wouldn't even matter as far as the arrest. And I don't believe the case law supports what you're saying as far as like if it's a DA who makes a different decision -- or makes a decision based on that information, then that breaks the chain basically, because I think it was based on that Taylor vs. Meacham case. That's just not how I read that case at all.

MS. CEPERNICH: Let's be clear. Our position is if everything is revealed so that at the time somebody else independently, I think the court, for instance, at a preliminary hearing evaluates the information that was omitted and considers the allegations of other information was false, then that breaks the chain of causation. It's basically you have the modified probable cause was before somebody else, the magistrate judge, and they make that decision, that's when causation is broken.

THE COURT: Even if they concealed or misrepresented material facts?

MS. CEPERNICH: If it comes out during the probable cause hearing. So if that is considered delved into at the probable cause hearing. So there is nothing

else that was concealed or omitted.

THE COURT: So you would take out the last phrase?

MS. CEPERNICH: Exactly. After prosecution, we would just put a period.

THE COURT: You wouldn't?

THE CLERK: Again, I think that goes to element one, which is West Jordan City caused Mr. Jensen to be arrested or prosecuted. I think that you could find West Jordan City caused that, even if the Court acted independently. But then when you look at element number three as to whether there was probable cause to support his arrest or prosecution, you go through the analysis discussed here where you determine what exculpatory evidence was omitted, what false or unreliable evidence was given. And so they could find that West Jordan City caused Mr. Jensen to be arrested or prosecuted without finding West Jordan City liable because there's probable cause to support the initial arrest and prosecution by going through that analysis.

THE COURT: Do you have any problem with 31?

MS. HOLLINGSWORTH: Yes.

MS. CEPERNICH: We would add April 29th and slightly renumber so that there was one after April 29th, 2009, A, and B would take the place of one and two, but that's just a slight change. But it's been noted.

THE COURT: It has been noted.

MS. CEPERNICH: With 29, we felt that even if West Jordan City did not make the ultimate decision to arrest or prosecute covered the concern that even if Salt Lake County made the decision and the court doesn't approve it but had some role to play there, that that was covered by that first cause. It seemed redundant with the second part. And we were concerned about having someone say that the court acted independent to facilitate the arrest and prosecution because the court doesn't really play that role, it's not facilitating an arrest or prosecution. It reviews the charges that were brought.

THE COURT: Where are you?

MS. CEPERNICH: I went back to 29. I'm sorry.

THE COURT: I'm on 31.

Oh, 29. We haven't talked about that yet, have we?

MS. CEPERNICH: That's what we were discussing before we switched to 31, I think.

THE COURT: What do we get on 29?

THE CLERK: We had it as knowingly or with reckless disregard and we were discussing whether to take out the last phrase, the even if.

THE COURT: I'm leaving it in with knowingly or with reckless disregard in 30.

MS. HOLLINGSWORTH: Thirty-one is the one I would like to discuss.

THE COURT: What's your problem with 31?

MS. HOLLINGSWORTH: Several things. I don't think that the -- so, first of all, we have gotten lots of case law that talks about what the standard for probable cause is. This is a for instance. When police have obvious reason to doubt the accuracy of information reported to them, and there's reckless disregard for the truth, that negates probable cause. If a reasonable officer would have made further inquiry before effecting a warrant, or there is no probable cause.

So I think the first paragraph states what probable cause is. All the rest I think is problematic. First, in the second paragraph, it's not that a Utah State Court Judge found that probable cause existed for one of the charges, but it's the Utah State Court Judge found no probable cause for two of the charges. The bind over order, which is Exhibit 55, talks about why the one count was bound over. It doesn't necessarily mean there's probable cause. It says there is the lack of probable cause that the court found with the two counts. So I think that first sentence is inaccurate.

THE COURT: Which first sentence?

MS. HOLLINGSWORTH: The first sentence of the

second paragraph, which says a Utah State Court Judge found at a preliminary hearing that probable cause existed for one of the charges.

THE COURT: What do you think he found?

MS. HOLLINGSWORTH: He found no probable cause for two of the charges.

THE COURT: Didn't he find it for one?

MS. HOLLINGSWORTH: No. That's not how it reads. It reads that there is sufficient evidence to be bound over. But he doesn't say that's probable cause. But he specifically says there is no probable cause for two of the charges.

MS. CEPERNICH: Probable cause is the standard to be bound over. So by finding there is sufficient evidence to bind him over, the court necessarily found there was probable cause.

THE COURT: I thought they were the same. If you bind somebody over, you have found probable cause.

MS. HOLLINGSWORTH: I think it was more that he didn't find a lack of probable cause. Those are two different things. He most definitely found no probable cause for two of the charges, and I think that's what this sentence should state. And when it says in the next sentence Mr. Jensen claims his arrest and prosecution were based on false or unreliable information, it should also be

incomplete. So --

THE COURT: Well, it does say that omitted exculpatory information.

MS. HOLLINGSWORTH: And it's not just exculpatory, but I think material information. So they didn't tell anybody.

THE COURT: We can say exculpatory or material.

MS. HOLLINGSWORTH: And then on the last part, I frankly don't understand this and I don't think a jury will understand this paragraph, what you're supposed to do with it. I don't think it applies to this case because the question is would a reasonable person have relied on the evidence that was presented. So, for instance, would a reasonable person have arrested Mr. Jensen based on the statements of JM and JD on the drug charge. And if a reasonable person wouldn't have, then there is not probable cause for that claim.

And this analysis that we are asking the jury to prove I don't think fits that scenario. It doesn't make sense. I think it's kind of a mind trip.

MS. CEPERNICH: This is the test that's been outlined by the Tenth Circuit.

THE COURT: When you have exculpatory or incomplete.

MS. HOLLINGSWORTH: Well --

MS. CEPERNICH: The incomplete is the omitted information. Material did you mean? Making exculpatory or material?

THE COURT: Yes. Well, let's see.

MS. HOLLINGSWORTH: So this test is applied when there's -- when there's false or unreliable information provided. And while I think that there's certainly unreliable information here, what really the jury has to look at is in looking at the unreliable -- for instance, let's just take JD and JM as an example. If the jury looks at that and says it was not reliable, it was not prudent for Mr. Jensen to be arrested on that count based on the statements of these two heroin addicts, then that negates probable cause. I don't know how you fit that into this analysis. So West Jordan knowingly with reckless disregard for the truth provided false or unreliable information, and when that information is not considered and any such exculpatory information is considered --

THE COURT: That's argument, isn't it?

MS. HOLLINGSWORTH: Well, I just don't understand. Even my brain will not even function around this.

THE COURT: I have a hard time believing that your brain can't function around it.

MS. HOLLINGSWORTH: I can't make this analysis work with that scenario is what I'm telling you.

MS. CEPERNICH: I think the problem might be the cases really talk in terms of false or fabricated information, not unreliable. Unreliable seems to be more a challenge to whether the evidence is sufficient to establish probable cause. It's not what we have understood Mr. Jensen to be claiming here is that West Jordan included false or fabricated information in what it gave to Salt Lake County.

THE COURT: Or incomplete.

MS. CEPERNICH: The omitted is the second part, that's right. But maybe unreliable needs to be changed to fabricated. The cases talk about unreliable goes to the general probable cause question, whether the information you had was sufficient to establish probable cause. This is looking at the add things and take it out test that applies to false, fabricated or omitted information.

MS. HOLLINGSWORTH: Right. So I think that needs to be clear, that if the jury is looking at whether, for instance, omitted information would have made a difference, then you apply this. If they just find that the evidence was unreliable and nobody should have relied on it to begin with, then they can -- based on the first paragraph, they can decide there was no probable cause and they don't have to do this test at the bottom.

MS. CEPERNICH: We haven't understood the claim to be just that the information that was there didn't support

probable cause because the magistrate judge, at least one count, decided it did. We understood the claim to be that West Jordan falsified or fabricated information, or omitted exculpatory or material information. That's why we have this test. I think the first question is answered by the bind over, at least on that one count.

MS. HOLLINGSWORTH: Well, to be frank, I didn't learn until this trial that the basis for the drug charge was solely the statements of Jerzey Mitchell and Justin Dellinger.

MR. SKEEN: I'm five minutes late to this one, but the bind over order says, accordingly, the state has -- this is Plaintiff's Exhibit 55, and this is the bind over order. Accordingly, the state has met its burden of establishing probable cause that defendant committed the offense of misuse of public money as charged in Count 2.

MR. DODD: Something should be pointed out with the bind over order. She keeps saying it wasn't found with the other ones, but there was no evidence submitted on the other two because the witnesses refused to testify after Brenda Beaton warned them that they might be charged by the federal government.

THE COURT: You can argue that.

MS. HOLLINGSWORTH: That goes to the whole point, you have heroin addicts as the sole basis for the claim.

And the jury gets to decide was that a reasonable -- was that a reasonable reason to arrest Mr. Jensen on, you know, the basis of these two clowns.

THE COURT: You can argue that.

MS. HOLLINGSWORTH: Right. So I just think that if we're going to use this test at the bottom, it needs to specify in order to establish a lack of probable cause when information -- when -- let's see -- when a defendant provides false --

THE COURT: Fabricated or incomplete.

MS. HOLLINGSWORTH: Fabricated or incomplete information.

MR. SKEEN: It's not just provided. It's got to be knowingly or reckless.

THE COURT: That's the reading, isn't it?

MR. SKEEN: I think this looks good.

MS. CEPERNICH: It's not incomplete. It's that they intentionally or recklessly or knowingly omitted exculpatory or material information, which is a slightly different thing. But that's the test that applies. It's two things, false or fabricated, and then omitted exculpatory or material information. I think the instruction does a good job of outlining that test with the exception of changing unreliable to fabricated.

And then what the jury does is it takes out all of

the false and fabricated evidence and it puts in anything that was omitted, and then it applies the same standards that have been given above to decide whether under that modified set of facts there is probable cause, and that's where the jury can look and say if this information is sufficient for somebody to believe there was probable cause, just like Ms. Hollingsworth is suggesting.

MS. HOLLINGSWORTH: So I'm okay if the test at the bottom is reworded to explain that. Because it says in order to establish a lack of probable cause under these circumstances, it sounds as if you have to apply this to all of the information regarding the probable cause issue. But in reality, as Dani said, when it applies to the omitted, exculpatory information or false information, it doesn't apply to unreliable information.

THE COURT: False, fabricated or omitted. It doesn't apply to what?

MS. HOLLINGSWORTH: Unreliable information.

THE COURT: Have you got that?

THE CLERK: I understand her argument.

THE COURT: Well, they agreed on that.

MS. CEPERNICH: I think unreliable should be changed to fabricated.

THE CLERK: They want to take out unreliable and have fabricated.

THE COURT: I didn't think she disagreed with that.

MS. HOLLINGSWORTH: As long as it's also clear that if there's unreliable information that no reasonable person should have relied on, then you don't even have to do this test, you just -- then the jury can find no probable cause based on that.

THE COURT: What do you say to that?

MS. CEPERNICH: Well, the argument has been that there is false information and omitted information that defeats probable cause that otherwise exists. So if that's not what they're claiming, then you don't have to do the test. But if it is, you have to get down to that correct set of facts, and then the jury looks at the general probable cause standard that is applied above. If they don't want to go --

THE COURT: What is your disagreement?

MS. HOLLINGSWORTH: I don't think there is a disagreement except that they're saying that we have always relied on false or omitted information. I think we have relied on a lot more than that, including that the information was unreliable and the entire picture wasn't given to the defense.

MS. CEPERNICH: I think that's part of the test because it's number three. So you take out the false stuff,

you put in anything that was omitted, then you apply the general standard for probable cause. That's where the reliability part comes in. You have to get to that proper universe of facts to decide whether there is probable cause or not. So I think we agree. I guess I'm confused.

THE COURT: Do you understand?

THE CLERK: I understand. If I understand, correct me if I'm wrong, Ms. Hollingsworth wants it to be separate. So if you're relying on false information that was provided, or omitted information, then use these three steps. But if you are just looking generally that the information was unreliable, apply this general standard. She wants to have two separate instructions for two separate scenarios?

MS. HOLLINGSWORTH: Right.

THE COURT: We don't need them, do we?

MS. HOLLINGSWORTH: Well, I think you do because you look at it differently under the test. So, you know, like I said over and over again, in the case law there's, you know, statements just saying when police have an obvious reason to doubt the accuracy of information reported to them, then there's a reckless disregard for the truth that negates probable cause. So if the jury finds that the arresting officers should not have relied on the statements of a heroin addict to arrest him on the drug charges, that

negates probable cause right there.

But then there's other claims where there was omitted information. For instance, the time card that showed Mr. Jensen was off on the day he was supposed to receive the money. Then that is omitted information. Then you can apply this test that's discussed.

MS. CEPERNICH: I think maybe that is the disagreement is probable cause is not a piece of evidence by a piece of evidence evaluation, to decide whether you're relying on one piece of evidence to support probable cause. You look at all of the information that was presented and under all of that taken together is there probable cause. And that's why when there's an allegation that there's been false or omitted information, you have to go through this add in or take it out to get that universe. You can't just look at one piece and say, well, this is unreliable, so therefore no probable cause. You look at the entire set of facts that exist under the modified -- you know, the modified world, and then you apply the probable cause test. I think asking the jury to do it piecemeal is not consistent with --

MR. SKEEN: My other point was the time card issue that was brought up at the preliminary hearing. So that wasn't omitted from the information where probable cause was found. So that shouldn't break the chain of custody by the

court.

MS. HOLLINGSWORTH: Right. You can make that argument. I don't think there was evidence about it being presented. But anyway, I think for this case when there are three different counts that he was arrested on, the jury will have to look at was there probable cause for each one and will have to look at the evidence supporting each one.

In some cases the arrest is based on false or omitted information and they can apply this test. But in some cases like the drug charges, it is based on the -- Travis Peterson admitted it, based on the statements of heroin users. So in that case, I think they do have to break it down like that.

MS. CEPERNICH: What if we were to say that Mr. Jensen claims that his arrest and prosecution for certain claims was based on false or fabricated information, and then at the bottom say for the claims that Mr. Jensen argues were based on false or fabricated, or omitted information, then that ties it to that. But we have understood that to be for every claim, and maybe that's not what you're --

MS. HOLLINGSWORTH: Right. I mean as the trial played out, that's not how the evidence presented itself. I would agree with you.

THE COURT: Do you understand that?

THE CLERK: Yes. Can I review?

THE COURT: Yeah.

MS. CEPERNICH: So my thought, and people can jump in if they don't like it --

THE COURT: They don't.

MS. CEPERNICH: So the second paragraph, second sentence that Mr. Jensen claims that his arrest and prosecution, for certain claims, were based on false or fabricated information that West Jordan City provided and, then continue down, omitted exculpatory or material information, and then turning to the first sentence of that third paragraph, and I'm not sure exactly how to say it, but for the claims -- for the charges that Mr. Jensen claims false or fabricated information was provided or exculpatory or material information was omitted in order to establish a lack of probable cause for those claims, and then have that. Otherwise, the general probable cause test just applies to the universe, which I don't think you need to say the last part.

THE COURT: They have it. I hope we have it.

THE CLERK: Then I'm also going to add or material in number two and change unreliable to fabricated in number one.

MS. CEPERNICH: I think part three has the same changes to be made.

THE CLERK: Okay.

MS. HOLLINGSWORTH: Can you say that again, what you are adding?

THE CLERK: So just in these numbered parts?

MS. HOLLINGSWORTH: Yes.

THE CLERK: So number one we're changing unreliable to fabricated. Number two, after exculpatory we are adding or material. And those same changes will be made in number three, unreliable to fabricated and exculpatory or material.

MR. SKEEN: I've got an easy one, 32. Add the date April 29, 2009 after malice. So Mr. Jensen must show that West Jordan City acted with malice after April 29th, 2009.

THE COURT: Noted.

MR. SKEEN: I can do 33 too. How about that?

So under the Section 1983 retaliation claims, there were two different standards that apply. One would be to noncriminal prosecution elements and one would be to criminal prosecution elements. And we don't believe there has been any evidence of any alleged retaliation other than by attempting to instigate prosecution.

THE COURT: What about that?

MS. HOLLINGSWORTH: I was thinking about this as Mr. Peterson I think testified. Some of the things included

in the arrest warrant are policy violations. They are included in there and support for his arrest, but they are policy violations, not crimes. So I don't know how if that's considered a noncriminal prosecution for purposes of this.

MR. SKEEN: It's in the arrest warrant, which was a criminal prosecution. If you look to the complaint, when the complaint was filed, there were two allegations. One was instigating or trying to instigate criminal prosecution. The other one was making bad statements to employers. We already agreed that bad statements to employers was not in evidence in this case. So I think all that is left is the criminal prosecution elements side of it, and that's the but-for standard.

THE COURT: I think that's correct.

MS. HOLLINGSWORTH: Yeah. I mean I think that's correct. I was just --

MR. SKEEN: I think it will make it a lot easier for the jury if we are using but-for on everything instead of switching back and forth.

THE CLERK: So that would take out Jury Instructions 33, 34 and 35?

MR. SKEEN: Here's what I think. So 33, you keep it in, you keep the first paragraph in, and then insert paragraph -- or jury instruction 36 below, take out the next

two paragraphs. But, yeah, I agree.

MS. CEPERNICH: I think 34 stays.

MR. SKEEN: Thirty-four stays.

THE COURT: Thirty-four stays.

MR. SKEEN: But 35 should be out.

THE COURT: And 36 becomes the rest of 33?

MR. DODD: But 33 at the top, it says noncriminal prosecution.

MR. SKEEN: The heading would change.

Ready for some 36 changes -- proposed changes. Thirty-five is out. Yeah, so 36 --

THE COURT: Which is now going to be part of 33.

MR. SKEEN: That will now be part of 33. I think it says Jury Instruction No. 25 -- or number 30 should be 25. And then to be noted on paragraph one, after April 29, 2009.

THE COURT: Noted.

MS. CEPERNICH: Then we would propose adding -- taking the third element from number 33 and adding it as the fourth element here.

THE COURT: Well, we can't refer to 35. Let's see --

MS. CEPERNICH: No, that would need to be changed. I don't know what new number it will be.

It was 31.

THE COURT: Probable cause.

MS. CEPERNICH: I don't know if that has all been changed, but we would take that third element from 33, so Mr. Jensen suffered damages because of West Jordan City's actions, and make it the fourth element on Instruction 36.

THE COURT: I'm not understanding you. What would you do?

MS. CEPERNICH: We just add in number four, that Mr. Jensen suffered damages because of West Jordan City's actions. It's included as an element in 33, but for some reason not included in 36.

THE COURT: You don't have any problem with that, do you?

MS. HOLLINGSWORTH: No.

THE COURT: Do you understand that?

THE CLERK: I do.

THE COURT: The meaning of probable cause as set forth in --

MS. CEPERNICH: We think it's 31. It hasn't gotten --

THE CLERK: I can reference it in --

THE COURT: But-for.

MS. CEPERNICH: We have one for 37, just a slight change consistent with these. The first clause says to the extent the adverse action as taken or instigated against

Mr. Jensen was in the form of criminal prosecution. But since that's all we're talking about now, we think that comes out.

THE COURT: That's right, isn't it?

MS. HOLLINGSWORTH: I'm sorry. Catch me up.

MS. CEPERNICH: So Instruction No. 37, the first clause says to the extent the adverse actions were in the form of a criminal prosecution, that that's unnecessary.

THE COURT: That is alleged.

Thirty-eight.

MS. ENGLISH: We didn't know that she had asked for a nominal damage instruction. If she didn't want it, then we would want it out.

THE COURT: Did you ask for a nominal damage instruction?

MS. HOLLINGSWORTH: I don't know that we have any. Yeah, we have not proven nominal damages.

THE CLERK: It was somewhere in the back-and-forth.

THE COURT: I think there was.

Next problem.

MS. CEPERNICH: Thirty-eight or 39, which one are we on?

THE COURT: Thirty-nine.

MR. SKEEN: Thirty-nine has a minor thing. The

second paragraph, Mr. Jensen claims that West Jordan City breached the provision in the settlement agreement by providing negative references. I think we all talked about that already today. I don't think that should be in there anymore. There is no evidence of it.

THE COURT: There's no evidence of it.

MR. SKEEN: Also I think actually maybe this one needs to be, it says Mr. Jensen and West Jordan City entered into a settlement agreement and a negotiated settlement agreement. We've asked for a finding that there's no breach of the settlement agreement. I think the only claim that there's a breach of the settlement agreement itself was the non-neutral references. So all that's left I think now is the alleged breach of the negotiated settlement agreement was not to retaliate under Title VII.

MS. HOLLINGSWORTH: I think it's all part of the same agreement.

THE COURT: I will leave it in.

MS. HOLLINGSWORTH: I mean, I guess I would say we should just state that they entered into an agreement settling his claims. And I don't know that there has to be this instruction about the two agreements.

MR. SKEEN: It's a huge deal, because if there's no breach of the first contract, which has been alleged since day one, there's an attorneys' fees provision in that.

So if we are the prevailing party, we are entitled to our fees of the settlement agreement. So that's a big issue.

MS. HOLLINGSWORTH: They're all included in one.

MR. SKEEN: We disagree. They are not included in one. They are separate agreements.

MS. HOLLINGSWORTH: The settlement agreement references the negotiated settlement agreement. They are part of the same thing.

MR. SKEEN: The reference doesn't.

THE COURT: You can fight about this after. I'm going to leave it like it is.

MR. SKEEN: We are taking out that neutral reference as part of that, correct?

THE COURT: Yes.

MS. CEPERNICH: So changes to 40, consistent with that, the last part of it says, the parties have stipulated that both the settlement agreement and the negotiated settlement agreement constitute contracts. And because the settlement agreement, there's no alleged breach of that, we would just take that out and say that the parties have stipulated that the negotiated settlement agreement constitutes a contract.

MR. SKEEN: Just to be clear, there was an allegation, but there was no evidence of it at trial.

MS. CEPERNICH: Oh, sorry.

MS. HOLLINGSWORTH: So they want to separate this out into two?

MS. CEPERNICH: No. We want to delete one of the things that is already there.

MS. HOLLINGSWORTH: I'm sorry. I was reading the former one.

THE COURT: Does that relate to the last one?

MR. SKEEN: It does, and that's kind of our position. The last paragraph we think is accurate, the parties have stipulated that both the settlement agreement and the negotiated settlement agreement constitute contracts, not one contract. What we're saying is there was no evidence put on at trial that there was a breach of the first contract, the settlement agreement. So really all the jury should be deciding now is whether the negotiated settlement agreement was breached.

THE COURT: You say they are one?

MS. HOLLINGSWORTH: They are one.

THE COURT: We could take out the stipulation altogether and say part of the stipulated as to element number one.

MR. SKEEN: The concern we have with all of this is that we -- if they are two contracts -- I don't think the jury decides whether they are two contracts. I think that's for the Court to decide. But if the jury makes a finding

about them being one contract, or if we breached the first one, I think that may result in a potentially bad decision.

The point is just the interpretation is for the Court to decide on the contract, either one or two. If we are putting it in the hands of the jury whether there's a breach of contract without naming what the contract was, I think it's ambiguous.

MR. DODD: We both know which one he's claiming is breached.

THE COURT: How do we avoid that? The only one we have talked about is the April 30 one, right?

MR. SKEEN: No. There were two exhibits that had both of them. That's what they say in here, there's the settlement agreement and the negotiated settlement agreement.

MS. HOLLINGSWORTH: All were signed the same day.

MR. SKEEN: Not true.

MS. HOLLINGSWORTH: West Jordan and Mr. Jensen all signed those agreements the same day, on April 29th. Because the Labor Commission signed it on a different day does not make it signed by the parties on a different day.

MR. SKEEN: But it does state in the negotiated settlement agreement that it is not in effect until all three have signed, meaning it is a different contract. And there's language in the first contract saying if they

contradict each other, the first one governs. I think there is enough evidence to show there are two contracts. They are not the same.

MR. DODD: Do we have the two?

THE COURT: What do you want this -- what do you want this to say and what do you want this to say, 40?

MS. CEPERNICH: We would like that last little paragraph to say the parties have stipulated that the negotiated settlement agreement constitutes a contract between Mr. Jensen and West Jordan City. So Mr. Jensen has met his burden on element one of this claim, because the only --

THE COURT: So you want her to give up her argument that they are the same or that they are related? I mean I don't have to decide that yet, do I?

MR. SKEEN: I think you do.

MS. CEPERNICH: I think it's a legal question. The jury doesn't decide whether the two agreements are one contract or two, and the only provision in the first settlement agreement that they have alleged was breached is giving bad job references. We have already decided there's no evidence of that. So if we're right and they are two different contracts, there is no breach of the first contract claim. That's a question for the Court.

THE COURT: It's not a question for the Court

today.

MR. SKEEN: If we're going to do it that way, we have to separate the two contracts out separately.

THE COURT: I don't remember having this brought before me until this moment.

MR. SKEEN: I think we raised it in filings before trial.

THE COURT: I don't remember it.

MS. CEPERNICH: In the supplemental briefing I believe.

THE COURT: I don't have any recollection of it. So not surprisingly, I'm not going to decide it right yet.

You both agree there was a contract.

MR. SKEEN: Yes, but we agree there's two.

THE COURT: You also agree there was one.

MR. SKEEN: Yes, but there's a line for the jury to write if they breached the contract, that would be ambiguous as to say which one if we're not specifying which one we're talking about.

MR. DODD: But the claim breached on one is different than the claim breached on the other.

THE COURT: What's the difference?

MR. SKEEN: The difference is the first contract has no non-retaliation provision. The second one does.

THE COURT: Obviously then the question is we're

talking about the second one if they find a breach of retaliation.

MR. SKEEN: Correct. But the problem is if they say there is a breach of contract and we don't specify which one, there would possibly be -- there could be an argument they are entitled to fees on it. We're saying we're entitled to fees because the first contract that has a fees provision, the only one that has a fees provision, there is no evidence of breach of that contract.

So if there is not going to be a finding there were two right now or whether there's no breach of the first, I think we need to separate the two out. I don't know. I'm not sure how to solve the problem, but I think it would be a problem if we don't specify for the jury there's one line that says did they breach a contract.

MS. HOLLINGSWORTH: I see them as an integrated agreement. The main settlement agreement references the --

THE COURT: From what I can remember about them, they do seem to sort of work together.

MS. HOLLINGSWORTH: They were signed at the same time. All parties knew about all of the documents going into the settlement.

THE COURT: It's a strange way to do it this way and gives rise to future confusion.

MR. SKEEN: The second agreement, the negotiated

settlement agreement, there were no -- the only requirement in the first agreement was for them to sign that agreement, execute it, not for West Jordan to sign it. It's a separate agreement, and the agreement says it itself. The first agreement says if they contradict, this one governs. And the second one says this is not effective until UALD signs it. This is interpretation, it's not --

MS. HOLLINGSWORTH: Obviously Mr. Jensen would not have signed an agreement that did not have the non-retaliation agreement.

MS. CEPERNICH: But that's what he did.

MS. HOLLINGSWORTH: Because he understood they were all part of the same.

THE COURT: I suspect he probably did understand they were all part of the same.

MR. SKEEN: Understanding the terms of the contracts, I don't think it's ambiguous.

MS. CEPERNICH: We could just stipulate the parties have stipulated that Mr. Jensen has met his burden on element one.

THE COURT: That's what I was going to suggest. We'll have to sort it out later.

MS. CEPERNICH: The only evidence of any sort of breach is in support of their claim that it was breached by retaliation. So maybe we work that in someplace else on the

verdict form.

THE COURT: That's what we'll do now. I don't know about working it in somewhere else.

MS. CEPERNICH: I meant into the verdict form perhaps.

THE COURT: All right.

MS. HOLLINGSWORTH: I certainly think the covenant of good faith and fair dealing applies to all of the documents.

THE COURT: Anyone have a problem with 41? Forty-two? Forty-three? Forty-four?

MS. HOLLINGSWORTH: Forty-four, I don't think the every in the first sentence is correct language. It should say Mr. Jensen must make a reasonable effort.

THE COURT: I think it is a reasonable effort.

MR. SKEEN: I'm not sure.

THE COURT: Is that our stock instruction?

THE CLERK: I believe I pulled it from our stock instruction, but I can go back and check.

THE COURT: It's reasonable effort.

MS. HOLLINGSWORTH: Every reasonable effort, I mean what would that even be?

MS. CEPERNICH: What if we said must make reasonable efforts?

THE COURT: That's very good. That's what we say

in the second paragraph.

MS. HOLLINGSWORTH: Then in the second paragraph in the sentence that starts for example, I don't know that similar job is the correct word. I think it should say obtain another job.

MR. DODD: I think in this case it would because --

MR. SKEEN: It's not West Jordan City's burden to prove in this case that Mr. Jensen could have gotten another job. That's his burden. He did not have a job at the time he resigned. So if he's saying he couldn't get a job, that's mitigation, but he did have a duty to find employment.

THE COURT: Well, it doesn't have to be similar, though, does it?

MS. CEPERNICH: I don't think you can mitigate by finding a job that you are way overqualified for and then claim the damages between babysitting, for instance, and being a police officer -- you know, working part-time five hours a week and being a police officer.

MR. DODD: What I think in this case too is if he went and got another job that even paid a similar annual salary, his claim of damages in this case is based off the retirement that he was going to get as a police officer. If he had an opportunity and he was able to be a police officer

somewhere else and the jury believes he didn't make the efforts to do that, that goes to the specific damages in this type of case.

MR. SKEEN: Paul, I think that's not a mitigation issue. The mitigation is for the defendant to prove. We don't have to prove he should have gotten another job. It's his burden to prove that. So I don't think the cop job is part of mitigation.

THE COURT: How about taking out another similar job and putting other employment?

MS. HOLLINGSWORTH: That's fine.

MR. DODD: Comparable employment. I don't want to stipulate to that.

THE COURT: Other employment is what I'm going to put. If you want something else, you can argue it on the record.

Forty-five?

MS. HOLLINGSWORTH: Yes. This one doesn't make sense to me.

THE COURT: It's a stock instruction.

THE CLERK: I don't think this one is.

THE COURT: It isn't, 45? I'm looking at 46. It is not a stock instruction. What's the case law, do you know?

THE CLERK: It was provided by West Jordan City.

I didn't print it out.

MS. CEPERNICH: So we have one example of a case is Dalcour vs. Gillespie. It's an unpublished decision, 2013 WL 2903399. It says plaintiffs cannot recover for injuries that arise from lawful conduct simply because it was preceded by unlawful conduct. If he was damaged by things that were lawful, he can't recover for damages that aren't a violation of his rights.

THE COURT: Ms. Hollingsworth.

MS. HOLLINGSWORTH: This instruction just doesn't make any sense. There is no way for them to think about West Jordan has done a lot of things that are legal.

THE COURT: Even you concede that.

MS. HOLLINGSWORTH: Even I concede that. So there is not a way to distinguish a portion of damages between legal and illegal conduct.

MS. CEPERNICH: I think the jury does that all the time, they apportion damages between claims.

THE COURT: They do apportion damages between and among claims all the time. I don't know if I have ever given an instruction like this before. That would be because nobody ever asked me for it before. I'm not going to give it. You don't have a Tenth Circuit case.

MS. CEPERNICH: Not with us. We can get one.

THE COURT: It's pretty late in the day at this

point.

We are going to redo these deliberations and foreperson and communications.

Let's see. Now we need to go back to 12. This is a stock instruction. Your complaint was not putting in a date. Okay. I'm not going to put in a date.

The same with 13, is that right?

MS. CEPERNICH: Yes.

THE COURT: I'm not going to put in a date. I think we've got our dates where it matters, in my judgment.

The next note I put down was on 23, and we made changes on a bunch of others.

MS. HOLLINGSWORTH: This was one I was saying I think it should relate to all the claims, just be an explanation of, you know, the dates.

THE COURT: It does relate to all the claims, doesn't it?

MS. HOLLINGSWORTH: Yeah. So it's under the Title VII retaliation.

THE COURT: That's right. It's under that. I'm going to leave it.

Twenty-four and 25, active deception.

MS. HOLLINGSWORTH: This is the one --

THE COURT: The tolling issues, right?

MS. HOLLINGSWORTH: Right. And, Your Honor, the

fact that -- so we believe that the jury can find liability under Title VII if acts that occurred as part of the prosecution occurred within the 300 days. So responses to --

THE COURT: You disagree, though, it's active deception? And I think it is active deception, isn't it?

MS. HOLLINGSWORTH: I'm just saying that the active deception analysis doesn't apply in a case like this. I don't think any of the cases that were looking at that language were looking at a case like this where the defendant was -- I'm sorry, the plaintiff was no longer working for the entity.

THE COURT: You want me to throw out the retaliation claim?

MR. SKEEN: Yeah. Title VII -- the Tenth Circuit is clear that under Title VII the only tolling that applies is active deception when there is active deception.

THE COURT: I've never learned on these new phones how to press the do not disturb button, so we will ignore that. I was looking for it this morning. Sorry about that.

MS. CEPERNICH: It is a nice ring at least.

THE COURT: Say that again. Say it loud.

MR. SKEEN: What I was saying was that the Tenth Circuit case law is clear that the only tolling that may apply is when there's active deception of procedural

requirements. And I think it's agreed there is no evidence of that here. And for Title VII retaliation, it's not the continuing act doctrine. It's specific, discrete acts only within the 300 days.

THE COURT: But there were alleged acts within the 300 days.

MR. SKEEN: The retaliation I think in this case, it was already done by the time -- I guess the evidence that people showed up in and testified at a proceeding?

THE COURT: That's part of it, I think.

MS. HOLLINGSWORTH: That's part of it.

MR. SKEEN: But at that point the damage is already done. He had already been arrested. He had already been prosecuted. His claims were dismissed five months later.

MS. HOLLINGSWORTH: There were plenty of damages still going on at that point and there were other acts. There were responses to discovery that --

MR. SKEEN: There's no evidence they did anything retaliatory responding to discovery.

MS. HOLLINGSWORTH: They continued to participate in the prosecution by providing information in response to discovery. Jeff Robinson contacted --

MR. SKEEN: Under malicious prosecution, not retaliation.

THE COURT: It could be both.

MR. SKEEN: But I don't know there was evidence there was any retaliation within the 300 days before. I think it's the officer showing up and testifying pursuant to a subpoena. I think that's all there is.

MS. HOLLINGSWORTH: Continuing to fail to provide information, the whole picture.

MR. SKEEN: The evidence was undisputed that whenever evidence was asked for from West Jordan City, it was provided to the Salt Lake District Attorney's Office.

MS. HOLLINGSWORTH: Rob Parrish testified he didn't even know about the settlement agreement.

MR. SKEEN: How is the settlement agreement relative to retaliation at all?

MS. HOLLINGSWORTH: It provides motive as part of the picture, part of many things that weren't disclosed. A lot of the acts in furtherance of the prosecution occurred within the 300 days.

THE COURT: For now I'm leaving the retaliation claim in.

Now where does that leave us with the verdict form?

MS. HOLLINGSWORTH: Your Honor, generally, I don't see how, because the acts -- the damages were all associated with him getting arrested, and then the effects on his job

and the emotional distress, it seems like the damages are the same for every claim. So in my view we should have the damages section at the end and just ask what are the damages associated with this conduct.

MR. SKEEN: Can we go back to 24 again, Instruction 24? That's the tolling one. Did you say you are going to keep it unchanged in this? Because I think we talked earlier about how the notice and knowledge was not -- the Court has already ruled that's not part of the tolling analysis.

THE COURT: We did, didn't we?

THE CLERK: There's a distinction between knowledge that it was retaliatory and knowledge of the actual adverse action.

MR. SKEEN: I think for tolling, though, it has to be it's active deception for tolling only.

THE CLERK: Active deception for tolling, the sentence says when the 300-day time period begins to run. So it is the knowledge that materially adverse action happened.

MR. SKEEN: That's not what the Court ruled in document 186, page 11.

THE COURT: Well, the case isn't over. I can change that ruling.

MR. SKEEN: I would suggest looking at the case

law and ruling. It says, although Mr. Jensen argues that the time period for filing a charge of discrimination with the EEOC should be calculated from the time he knew about defendant's retaliatory acts, according to the terms of the statute, the time period for filing a charge of discrimination with the EEOC should be calculated from the time that the alleged unlawful employment occurred. Therefore, the Court concludes that any discrete acts that occurred outside of the 300-day window prior to filing with the EEOC are time barred unless equitable tolling applies.

THE CLERK: So what we're saying now is consistent with that except that we're saying the person has to know about the adverse action, not that it was retaliatory. There were arguments in this case that Mr. Jensen was arrested and Ms. Hollingsworth argued, well, he didn't know there was any retaliation associated with that arrest for several weeks. Well, that's irrelevant as long as he knew that he was arrested. Knowledge of that adverse action taking place begins the time period.

MR. SKEEN: So knowledge of the act, but not the retaliation?

THE CLERK: Yes. And we say that at the end of Jury Instruction 24. When the party is notified of or has knowledge of the materially adverse action, not when the party learns of the retaliatory nature of the adverse

action. We can reword it, but I think those are consistent. But when we looked back at the case law, they did mention knowledge of or notification of the actual --

MR. SKEEN: Of what happened?

THE CLERK: Yes, of what happened.

THE COURT: That's there.

Now your suggestion on the verdict form is if there's damages, they are all the same so the damages ought to be taken out of each separate one and put at the end?

MS. HOLLINGSWORTH: Right.

MS. CEPERNICH: So we would suggest putting damages at the end and having one line, but then having sub breakouts for each claim in case this case goes up on appeal and certain verdicts are reversed.

THE COURT: That's not a bad idea.

MS. CEPERNICH: We at least would know what the damages are for each one. And breach of contract, for instance, he cannot recover noneconomic damages. So it is important for the jury to go through that exercise and divide it out. They don't have to add to the total, there might be some overlap, but at least allocating how much damage was caused by each violation that they found.

MS. HOLLINGSWORTH: I don't think that there is a realistic way of allocating damages.

THE COURT: Yet they do. We ask them to do it.

It may not be realistic, but we ask them to do it all the time and somehow they do.

MS. HOLLINGSWORTH: I mean, I think --

THE COURT: They did it in -- I just had a long trial in -- this must be my year. I go a year without a trial and now it's just about the sixth or seventh week. This year was unusual. You know, I've got a hundred and something hours of trial. It was a two-week trial and it was horrible and everybody hated everybody, but they did, and there were all kinds of damage computations, and they made them and they allocated them. They did it.

MS. CEPERNICH: In our proposed verdict form, we had a total, and then we had subparagraphs that said for each different line.

THE COURT: Do you understand what they are talking about?

THE CLERK: I do.

MS. CEPERNICH: An instruction that they don't need to add up to -- if they say $10, the three breakouts don't need to add to $10. There might be overlap. At least that way we will know if one claim is reversed, how much.

THE COURT: So they should have a total.

MS. CEPERNICH: They should have a total and subtotals, but the subtotals might come out to be more because maybe the same damage came from two different

claims, so it's included twice.

THE COURT: I see.

THE CLERK: So going off of special verdict forms that we have used in the past, we decided it's best for them to answer damages immediately after they answer liability for each claim.

THE COURT: I have decided that.

THE CLERK: And we try to show the breakout. I mean as you see, for example, in question six and seven, we say, the amount of damages that he suffered as a result of malicious prosecution, but in number seven we say are any of these different and in addition to damages you found for Title VII. So that not only can we break out individual claims, we can break out what is specifically associated with that claim that is not associated with any other claims.

MS. CEPERNICH: We understood that process, but found it to be a little confusing, especially when you get to the last -- the question that references six different numbers and then ask them to add. So perhaps in this case maybe it does make more sense to have the damages all in one spot with that one total because we struggled going through, you know --

THE COURT: Here you have the breakout and the total, right?

THE CLERK: I'm not disagreeing that it's confusing.

THE COURT: When there are a bunch of claims, it is always confusing.

MS. CEPERNICH: Our thought is the simpler way to do it is to have just one total line and then sub lines, rather than having them identify the different damages, which we think is not entirely clear on first reading how you do that. And then having to go back and find all these different numbers for question number nine and question number ten, find the different numbers and add them up. If we just have the total, they wouldn't have to do that math, which seems like it might create problems.

MR. DODD: I think both sides agree that they would like to have one total at the end. At least that part we both agree on that, right?

MS. HOLLINGSWORTH: Yeah.

THE COURT: But the important person hasn't yet agreed -- the most important person in this matter. Well, I'm not. It's the jury that's probably the most important.

MS. CEPERNICH: That's what 17 and 18 are attempting to do.

THE COURT: That is what they are attempting to do.

MS. CEPERNICH: It seems like it might be a less

confusing way to do it.

THE COURT: What do you think, Curtis? Do you think that's less confusing? I don't know if it's less confusing. I really don't.

THE CLERK: I'm not sure what would be less confusing. One of the questions we had with breaking it out after a total, you have one total and then you break it out per claim, is if they don't add up and then some claims get thrown out, how much of that total --

THE COURT: We thought maybe it was better to make them add it at the end. I'm going to leave it.

Are we done?

MS. ENGLISH: No.

MR. SKEEN: So one thing just generally, I think it is helpful to add -- because there are so many different elements and different findings the jury has to make, I think the elements should be included in separate questions as we go through the different claims.

THE COURT: The elements on the verdict form?

MR. SKEEN: Right.

THE COURT: I've never done that.

MR. SKEEN: It just seems there's a lot of different elements here, so it would make it easier.

THE COURT: They are found in the instructions. That's why we do the instructions.

MR. SKEEN: It seems like the way that we have it now might -- you just ask the jury is this what you find. They may not know what they're saying is the problem we have. This way we have some --

THE COURT: I've never had -- excuse me. Go ahead.

MR. SKEEN: Sorry. I was just going to say if you want to, we can go through and just give you some specific things we would like added if we keep it in this format, but --

THE COURT: You want to make your record on that? You want the elements in, you say?

MS. CEPERNICH: Or a more complete explanation, for instance, in Question No. 1, it says did Mr. Jensen prove by a preponderance of the evidence that West Jordan City retaliated against Mr. Jensen in violation of Title VII by taking an adverse action or actions against him after April 29th, but the adverse action is only part of it. It has to be a materially adverse action. We felt like it emphasizes half of one of the elements without providing all of it. It's not just by taking an adverse action. It has to be taking a materially adverse action that it would not have taken but for his protected speech. And so having just that one aspect of an element seems to emphasize it.

THE COURT: We should put a period after Title

VII.

MS. CEPERNICH: After April 29.

THE CLERK: The reason we left that language in was that we could keep the date in.

MS. CEPERNICH: Could we say retaliated against Mr. Jensen in violation of Title VII after April 29?

THE COURT: Yes, we'll make that change. I've never put the elements in a verdict form. Have you ever persuaded anyone else to do it?

MR. DODD: Yes.

THE COURT: Who?

MR. DODD: Not in federal court. This is my first federal court case. But in the state court, I've done it on every verdict form I have had, as far as at least the questions.

THE COURT: We just don't do it over here. I will think about it for future, but I'm not going to start today.

Along those lines, what else?

MS. HOLLINGSWORTH: Your Honor, if we go down to three, obviously, you know, Mr. Jensen was notified of his arrest on May 6th of 2010, which would be outside the 300 days. But I think the jury needs to be asked where do you find that West Jordan committed acts of retaliation under Title VII within whatever 300 days is, you know, after whatever the date would be that is 300 days from the charge.

THE COURT: So we do that if we have the date.

MS. HOLLINGSWORTH: We do have the date on the charge.

MS. CEPERNICH: The jury instruction I believe said that the jury would be asked. You have to either change the jury instruction because it said that the jury was going to be asked to identify the dates of the different actions.

THE COURT: You are supposed to be clarifying in your closing arguments. You've got the verdict form.

MS. HOLLINGSWORTH: Right. I can pull up the charge.

MS. ENGLISH: You don't have the date that it was received on yours. You have the date Mr. Jensen signed it, but not the date it was submitted into evidence.

MS. HOLLINGSWORTH: Do you have a different date? The evidence is what it is at this point.

MS. ENGLISH: It was an exhibit, but we didn't put it in because we said that yours was incomplete and if you wanted a date for it, that you can use ours. But it doesn't go from the date he signs it. It goes from the date it's submitted to the EEOC or UALD.

MS. HOLLINGSWORTH: Well, you guys could have put on that evidence.

MS. ENGLISH: It's your burden to prove that we

did things wrong in the 300 days. It wasn't our burden to show.

THE COURT: Except for the change we're making on number one.

MS. CEPERNICH: I think number three should have materially adverse action. If it refers to an adverse action, it's a materially adverse action.

THE COURT: Materially. That's okay.

MS. HOLLINGSWORTH: So the --

MR. SKEEN: Wait a minute. So the jury instruction is about notice of any materially adverse action of the arrest. This one says materially adverse action -- that West Jordan City had taken the materially adverse action. Is that different?

MS. HOLLINGSWORTH: And --

THE COURT: I don't understand what you're talking about.

THE CLERK: So using the arrest as an example, on the verdict form we are saying that West Jordan City had to take the materially adverse action.

THE COURT: Well, in the instruction we talk about what, instigating?

MR. SKEEN: This says materially adverse action, but it doesn't say by who.

THE COURT: How about what is the date that

Mr. Jensen was first notified that he had suffered a material adverse action or actions against him?

MR. SKEEN: I don't think the standard is suffered. I think it's when it happens.

MS. ENGLISH: It also needs to be if any because it's presuming that element has been satisfied.

MS. HOLLINGSWORTH: That's why the date he was first notified is important. I think it's --

THE COURT: If they don't find that in number one, then they don't go to three.

MS. HOLLINGSWORTH: I think the question of when he was first notified goes to whether he was actively deceived about the procedural requirements, which I think should just be taken out. There is no evidence of -- there is no evidence of active deception. The question is did West Jordan conduct acts of retaliation within the 300 days. And we have got -- the date on the charge form is March 24th, 2011. So I think we should count back 300 days from then and ask them did West Jordan -- you know, did he show they committed acts of retaliation beyond that date.

THE COURT: Well, what's the date if we do that?

MR. SKEEN: This is narrowing things because he's only able to recover within that 300 days for Title VII. I don't know if another instruction is necessary to state that.

MS. CEPERNICH: The instruction said you will be asked to identify the date that the adverse action occurred, and the Court will decide whether or not it's timely. I think what makes the most sense, because it's a more concrete question for the jury, is what date did each action take rather than is it timely. If they take actions within that time is the most simple, concrete way to do it.

THE COURT: In number three as it is?

MS. CEPERNICH: Just adding materially, but yes.

MS. HOLLINGSWORTH: And I don't think that this adequately covers like what the evidence -- so, for instance, Jeff Robinson --

THE COURT: You can argue about the dates of each adverse action. I think this is an adverse action for these reasons.

MS. HOLLINGSWORTH: Right. But can I establish the date on which it occurred, and if it occurred within 300 days. So, for instance, Jeff Robinson calling Rob Parrish, I see that as an act of retaliation in furtherance of the prosecution that would have occurred around the time of the preliminary hearing. But can I put a date on it? No. But it's well within the 300 days.

THE COURT: Well, assuming so, I think --

MS. HOLLINGSWORTH: So I think they should have to be asked to find -- do you find that acts of retaliation

within 300 days or beyond whatever date we can establish is 300 days from March 24th, 2011.

THE COURT: Well, this does that, doesn't it? I mean they have to find a date. You will provide a brilliant argument about various dates.

MS. HOLLINGSWORTH: I don't know that first notified is accurate. So, I mean, for instance --

MS. CEPERNICH: First knew.

THE COURT: It says he probably first knew. It says or had knowledge.

MS. HOLLINGSWORTH: Or had knowledge. Okay.

THE COURT: So can we take out number four? Are you saying that there is no evidence on active deception?

MS. HOLLINGSWORTH: Yes.

MS. CEPERNICH: I think that may require changing that jury instruction too.

MR. SKEEN: Can I add one thing to that, then? If there is no active deception tolling, that means the only thing recoverable is what happened within 300 days. I think number one should not have April 29th anymore. It should have whatever the 300 days back from the -- is that right?

THE COURT: Well, that doesn't matter. We can work out the dates. Now what --

MS. HOLLINGSWORTH: And, Your Honor, I just want to make clear that I don't believe that in this particular

situation -- I think that the continuing violation theory applies because this was more than just an arrest -- more than just the acts leading up to the arrest, that it then continued well into December of 2010. So I don't think that the discrete act analysis applies to this.

THE COURT: I understand you don't.

THE CLERK: May I make a comment? If we take out number four, we need to change Jury Instruction No. 24. Do we take out the entire second paragraph of Jury Instruction No. 24?

THE COURT: I don't want to go back to 24.

MS. CEPERNICH: We can take out that second paragraph and we can modify the third paragraph.

THE CLERK: I understand we have to modify the third, but we also take out the second?

THE COURT: Yes.

THE CLERK: Then modify the third, they will be asked when Mr. Jensen was notified.

MS. CEPERNICH: Uh-huh. (Affirmative)

THE COURT: Or knew.

MS. CEPERNICH: Nate pointed this out earlier, should it say notified or had knowledge of the materially adverse action or actions taken by West Jordan?

THE CLERK: I think that's right.

MS. CEPERNICH: That parallels the verdict form.

THE CLERK: It also parallels Jury Instruction No. 17. I think that's right.

THE COURT: When can you e-mail the final instructions to everyone? Can they be e-mailed today? Do they need to pick them up, or what?

THE CLERK: I can e-mail them.

MR. SKEEN: That works.

THE COURT: Do you know how to get ahold of them?

THE CLERK: Yeah.

Are we done with the verdict form?

THE COURT: I am.

MS. CEPERNICH: We had a few other things.

THE COURT: I was afraid of that. What do you have?

MS. CEPERNICH: On number five, we would suggest taking out done pursuant to a West Jordan City policy or custom because as we talked about with the instructions, there is no evidence of a formal policy or a custom.

THE COURT: I left it in the instructions.

MS. HOLLINGSWORTH: We took out policy, but left custom.

THE COURT: I said I was going to leave it. So is policy still an issue?

MS. HOLLINGSWORTH: Well, we took out the number one, remember, in that instruction that said a written

policy. I agree that there was no written policy, but a policy is also acts taken by a policymaker. So that last phrase covers that. Say done pursuant to a West Jordan custom or taken by a West Jordan City policymaker.

MS. CEPERNICH: Take out policy. We think it should say a final policymaker, not a policymaker. A final policymaker is what the instructions say.

THE COURT: Do they? All right.

MS. HOLLINGSWORTH: I don't think that's what the case law says. Just a policymaker.

THE COURT: I thought case law says policymaker. Does it say final?

THE CLERK: Either way, Your Honor, our jury instructions define who the policymakers are in this case. I mean I can make sure it's consistent with the jury instructions. They know what we've identified.

THE COURT: Anything else?

THE CLERK: Number eight, we have the same thing. We take out the word policy, I assume?

MS. CEPERNICH: Then add acts that were taken by a West Jordan City final policymaker.

THE COURT: Are we putting in final?

MS. CEPERNICH: Or however that gets consistent.

THE COURT: Custom, West Jordan City.

MS. CEPERNICH: For both five and eight, we would

ask that we add after April 29th, 2009, like in number one.

THE COURT: It is in A.

MS. CEPERNICH: We would move to rephrase it with the acts taken by the West Jordan City policymaker.

THE COURT: Talking about eight?

MS. CEPERNICH: Sorry. I'm just removing it when we remove other things. I'm sure you can work it.

MR. SKEEN: Another issue with eight, it states part of the elements, not all the elements. For example, the only retaliation left in Section 1983 is with respect to prosecution. And one of the elements for instigating prosecution is that there's no probable cause. So this I think is incomplete because --

THE COURT: That's all argument, though, in my opinion.

THE CLERK: We did change number one to take out the adverse action. So would you like number eight to similarly say or evidence that West Jordan City retaliated against Mr. Jensen after April 29th, 2009, for exercising --

THE COURT: That's okay, isn't it?

MS. HOLLINGSWORTH: Yes.

THE COURT: We take out the adverse actions or actions and we keep in pursuant to. And the date, right?

MS. CEPERNICH: I guess it was number five I was looking at is the only one that doesn't have the April 29th

date in there.

THE CLERK: Number five you said?

MS. CEPERNICH: Have it mirror one and eight with the April 29th date.

THE COURT: Prior conduct still might be relevant. It can be argued it leads up to it.

THE CLERK: You would like it to say violated his Fourth Amendment after April 29th, 2009?

MS. CEPERNICH: Work it in however it's best.

THE COURT: Anything else?

MR. SKEEN: Number nine, it should be taken out. The standard that applies, that's the substantial motivating factor standard. I don't think we have that standard anymore because all that's left for the 1983 retaliation is the prosecution basis but-for.

THE COURT: So you're saying number nine doesn't need to be in anymore?

MR. SKEEN: I think --

THE COURT: Ms. Hollingsworth.

MS. HOLLINGSWORTH: I guess I have to look at the case law on the but-for standard and see if that applies. I don't know the answer to that.

MS. CEPERNICH: We are also unsure why we would have elements again if we are going to have elements in all of them, not just one.

THE CLERK: The reason number nine came in was because the burden shifts. So that number eight Mr. Jensen has to prove, but number nine was kind of a way out of liability that West Jordan would have to prove.

MR. SKEEN: I think that's only for when there's the substantial motivating factor, not the but-for. So I get it.

MS. HOLLINGSWORTH: I just don't know if that element does not apply to the but-for.

THE CLERK: I don't know either. I would have to look at it.

THE COURT: We may take nine out.

MR. SKEEN: On 12 and 13 now we're looking at, I think that's correct is what we are arguing is there are two separate agreements, the settlement agreement and the negotiated settlement agreement. We are just saying there has been no evidence even for a jury to check yes on 12, so it shouldn't be in there.

THE COURT: I disagree because she's arguing they are one, and then I will have to decide that and I want their view about that if I have to decide it.

MR. SKEEN: So should we keep it the same way? And I have both of them right here.

THE COURT: Yes.

MS. CEPERNICH: Any indication what the breach was

or is that something we will be able to know?

THE COURT: Just argue it.

THE CLERK: The jury instruction did indicate what the different breaches were. We took one of those out. We took out the settlement agreement hopefully.

THE COURT: All right. I'm done. Are you done yet?

MR. SKEEN: Getting close.

I think 14 should be broken into two as well. There is a claim that the breach of covenant and good faith and fair dealing was for both contracts.

THE COURT: I guess we can do that. Then we have to break 15 as well?

MR. SKEEN: Yes.

THE COURT: Let's do that.

Sixteen can stay because that's different than anything else. Then the total.

Tell me how long -- who is going to do the closing -- well, I know who is going to do the closing. You're going to do it.

How long is your opening going to be?

MS. HOLLINGSWORTH: I have no idea, but I would suspect a good hour.

THE COURT: An hour ought to be enough, shouldn't it?

MS. HOLLINGSWORTH: I hope. I don't know. I haven't written it yet.

THE COURT: Do it in an hour.

Here's how I envision this. I instruct first, and then they have copies of the instructions. And I think before the first break, we can, I think, instruct. I think I can instruct in 40 or 45 minutes, then you take an hour, and then we have a break.

And then you take what?

MR. SKEEN: I think 45 to an hour.

THE COURT: Then you take what, ten or 15?

MS. HOLLINGSWORTH: Right.

THE COURT: Then they've got it. Okay.

MS. HOLLINGSWORTH: Do you want to give them a break before we start, like after the instructions?

THE COURT: No, because it's not long enough. I think that's a waste of time.

MS. HOLLINGSWORTH: Just thinking, that means they have to sit there for about three hours.

THE COURT: No. No. No. The break is after your opening part of the argument. So it's about an hour and 45 minutes, which is about what we do. See what I mean? I'm not going to sit them there for three hours.

MR. SKEEN: Two small things to bring up right now. Is this the right place to do it? There were some

statements made during opening that we think were inappropriate and they may be brought up again during closing.

THE COURT: Such as?

MR. SKEEN: A statement about how this is a case about corruption and the police are corrupt, the public is not safe. This is about public safety. This is about the damages Mr. Jensen is entitled to. There's no cumulative damage claim here.

THE COURT: Well, I think she's entitled to talk about her view of police misconduct.

MR. SKEEN: That's true, but the point is --

THE COURT: You think corruption is too strong a word?

MR. SKEEN: That was mentioned before, corruption, and I think telling the jury that part of their duty tomorrow is to make everybody else safe by giving a big verdict to Mr. Jensen I think is incorrect and I think it's wrong.

THE COURT: Ms. Hollingsworth.

MS. HOLLINGSWORTH: I don't see that. I'm trying to limit my closing.

MR. SKEEN: I just don't want to object to it while it's there. I don't think it's appropriate and there's no cumulative damages about somebody other than

Mr. Jensen. We are not here for public safety. We're here about Mr. Jensen.

MS. HOLLINGSWORTH: I can clarify.

THE COURT: Part of her claim is there was misconduct, and I think she's entitled to talk about that. You know, you get quite a bit of leeway in closing argument.

MR. SKEEN: I just think that this -- I guess this is kind of going beyond what this case is about when you're saying this is about keeping the public safe, because it's not.

Then the second part that I want to bring up is there was testimony from Mr. Jensen during trial that we think violated one of the orders from the Court about how the statements were made by somebody who was harassing him about his miscarried child. I don't think that should be brought up at all, and they are not appropriate for closing.

THE COURT: Nobody -- I don't think I was asked to rule about that.

MR. SKEEN: We asked for specific allegations of harassment -- and this case isn't even about harassment as well. I think that's very prejudicial, so I don't think it should come up in closing. It already came out. We thought it was part of a ruling. By the time it came out, it was too late to object to it.

THE COURT: The fact he made the sexual

harassment -- I mean that has to be brought out so we know what the retaliation allegedly is.

MR. SKEEN: It's the specific statement that somebody harassed him by saying something about his miscarried child.

MR. DODD: The child that died.

THE COURT: You didn't say that?

MS. HOLLINGSWORTH: No.

MR. DODD: A witness said that.

MR. SKEEN: Mr. Jensen said it.

THE COURT: He said it.

MR. SKEEN: I'm just saying I don't think it should be brought up in closing.

MS. HOLLINGSWORTH: That's not in my closing.

THE COURT: See you tomorrow at 8:30. I can hardly wait.

Do you have any questions?

MR. SKEEN: Redacted exhibits.

MR. ENGLISH: You said you had an issue with 20?

MS. HOLLINGSWORTH: Which one is 20?

MS. ENGLISH: I think it's a tax document or something.

MS. HOLLINGSWORTH: Do you want the date of the charge form for any jury instructions, the 300 days?

THE COURT: Tell them the date of the charge.

It's an exhibit, isn't it?

MS. HOLLINGSWORTH: Yes.

MR. SKEEN: The date it's signed wasn't. The date it was received, which is the date that matters, it was.

THE COURT: It's a jury question, isn't it?

MR. SKEEN: I don't know. I don't know it is.

THE COURT: What is the redaction problem?

MS. HOLLINGSWORTH: I think you all wanted -- tell me the names of -- I think maybe 24.

THE COURT: My exhibit binders are down on the bench.

MS. HOLLINGSWORTH: So I think there was a discussion on -- 24 is the actual charge form, the 2011 one. And in that he says -- in addition to talking about the arrests and the false charges, he says, additionally this employer has given inaccurate information to the media, potential employers, and current/former employers.

THE COURT: Where is that?

MS. HOLLINGSWORTH: In the charge form, like the UALD form that he filled out. And so they --

THE COURT: What did I do? Did I make some ruling?

MS. HOLLINGSWORTH: I don't know. The defense wants that stricken I believe, but I think it's not -- it's offered to show what claims he made and when he submitted

this charge in March of 2011.

MS. ENGLISH: I think this is not an issue because we did not ask for it to be redacted. So I think it's a misunderstanding. I thought she was talking about 20 and she was talking about 24.

MR. SKEEN: Ten is one that we have. It's the letter from Mr. Rawlings to Brenda Beaton, and we asked for some redactions.

THE COURT: Are you having problems agreeing on which ones?

MR. SKEEN: We got some proposed redactions last night. We wanted more than what was done. Do you mind if I show you this here?

THE COURT: No.

MR. SKEEN: So this is what Mr. Jensen has proposed, and we've proposed the highlighted version to be redacted.

THE COURT: Do you want to say anything about this?

MS. HOLLINGSWORTH: I don't have -- my redacted version is not showing up on the computer.

MR. SKEEN: We have copies right here. You can look at them.

THE COURT: Look at them. Yours is in black and theirs is in yellow.

MS. HOLLINGSWORTH: I understand your ruling about the --

THE COURT: I prefer the yellow one.

MS. HOLLINGSWORTH: Well, I don't think it's outside -- I don't think it goes --

THE COURT: Well, he tends to speak in fairly bombastic terms. That's kind of the way he is.

MS. HOLLINGSWORTH: If he felt like it would damage his credibility --

THE COURT: It probably went somewhat beyond my ruling. I don't think that was your fault. It's just the way he was. I'm ruling that the yellow is what is redacted.

MS. HOLLINGSWORTH: Okay.

THE COURT: All right. Anything else?

MS. HOLLINGSWORTH: I had a question on Y, but we can talk about it, because I think Y was not one of the exhibits.

MS. ENGLISH: We gave you redactions a couple of times and you've never gotten back to us. You needed more time.

MS. HOLLINGSWORTH: I guess now I understand, so I will look at it.

THE COURT: Thank you all. See you at 8:30 in the morning.

(Whereupon, the proceeding was concluded.)

C E R T I F I C A T E

I hereby certify that the foregoing matter is transcribed from the stenographic notes taken by me and is a true and accurate transcription of the same.

PATTI WALKER, CSR-RPR-CP DATED: 7-19-17
Official Court Reporter
351 South West Temple, #8.431
Salt Lake City, Utah 84101
801-364-5440

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

AARON JENSEN, Plaintiff, vs. WEST JORDAN CITY, a Utah municipal corporation, Defendant.	Case No. 2:12-CV-736 DAK

BEFORE THE HONORABLE DALE A. KIMBALL

DATE: JUNE 21, 2017

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

VERDICT

Reporter: REBECCA JANKE, CSR, RMR
(801) 521-7238

A P P E A R A N C E S

FOR THE PLAINTIFF: HOLLINGSWORTH LAW OFFICE, LLC
BY: APRIL L. HOLLINGSWORTH, ESQ.
1115 SOUTH 900 EAST
SALT LAKE CITY, UTAH 84105

FOR THE DEFENDANT: SNOW, CHRISTENSEN & MARTINEAU
BY: MARALYN M. ENGLISH, ESQ.
NATHAN R. SKEEN, ESQ.
10 EXCHANGE PLACE, ELEVENTH FLOOR
SALT LAKE CITY, UTAH 84145.

JUNE 21, 2017 SALT LAKE CITY, UTAH

P R O C E E D I N G S

* * *

THE COURT: Thank you for your promptness. I'm advised that the jury has reached a verdict, so we'll go get them and find out what it is.

THE CLERK: All rise for the jury.

(Whereupon the jury enters the courtroom.)

THE COURT: Who is the foreperson of the jury?

Juror Number 7: I am, Your Honor.

THE COURT: Juror Number 7. Has the jury reached a unanimous verdict?

JUROR NUMBER 7: It has.

THE COURT: Will you hand the verdict form to the Court Security Officer, please.

THE COURT: The verdict will now be published; that is, read by the clerk in open court.

THE CLERK: In the matter of Aaron Jensen vs. The City of West Jordan, case number 2:12-CV-736 DAK.

We, the members of the jury, find as to Title VII retaliation:

Question 1: Did Mr. Jensen prove by a preponderance of the evidence that West Jordan City retaliated against Mr. Jensen in violation of Title VII after April 29, 2009?

Answer: Yes.

Question 2: What is the amount of damages, if any, Mr. Jensen proved by a preponderance of the evidence that Mr. Jensen suffered as a result of the Title VII retaliation?

Title VII damages, economic, zero.

Title VII damages, non-economic, zero.

What is the date that Mr. Jensen was first notified or had knowledge that West Jordan City had taken the materially adverse action or adverse actions against him?

Answer: November 9, 2010.

As to Section 1983, malicious prosecution.

Question 4: Did Mr. Jensen prove by a preponderance of the evidence that West Jordan City violated his Fourth Amendment right to be free from malicious prosecution after April 29, 2009, through acts that were done pursuant to a West Jordan City custom or that were taken by a West Jordan City official with final policy making authority?

Answer: Yes.

Question 5: What is the amount of damages, if any, Mr. Jensen proved by a preponderance of the evidence that Mr. Jensen suffered as a result of the malicious prosecution?

Malicious prosecution damages, economic, zero.

Malicious prosecution damages, non-economic, zero.

Question 6: What is the amount of damages, if any, you find Mr. Jensen suffered as a result of the malicious prosecution that is different than and in addition to the

damages you found in question 2 above?

Malicious prosecution damages, economic, zero.

Malicious prosecution damages, non-economic, zero.

As to Section 1983, free speech retaliation.

Question 7: Did Mr. Jensen prove by a preponderance of the evidence that West Jordan City retaliated against Mr. Jensen after April 29, 2009, for exercising his First Amendment right to free speech pursuant to a West Jordan City custom or through a West Jordan City official with final policy making authority?

Answer: Yes.

Question 8: What is the amount of damages, if any, Mr. Jensen proved by a preponderance of the evidence that Mr. Jensen suffered as a result of the West Jordan City's conduct that related to Mr. Jensen's free speech?

Free speech retaliation damages, economic, zero.

Free speech retaliation damages, non-economic, zero.

Number 9: What is the amount of damages, if any, you find Mr. Jensen incurred as a result of West Jordan City's conduct that related to Mr. Jensen's free speech that is different than and in addition to the damages you found in questions 2 and 5 above?

Free speech retaliation damages, economic, zero.

Free speech retaliation damages, non-economic, zero.

As to breach of contract and breach of the covenant

of good faith and fair dealing.

Question 10: Did Mr. Jensen prove that West Jordan City breached the settlement agreement with Mr. Jensen?

Answer. Yes.

Question 11: Did Mr. Jensen prove that West Jordan City breached the covenant of good faith and fair dealing related to the settlement agreement between Mr. Jensen and West Jordan City?

Answer: Yes.

Question 12: Did Mr. Jensen prove that West Jordan City breached the negotiated settlement agreement with Mr. Jensen and the Utah Anti-discrimination Division?

Answer: Yes.

Question 13: Did Mr. Jensen prove that West Jordan City breached the covenant of good faith and fair dealing related to the negotiated settlement agreement between Mr. Jensen, West Jordan City and the Utah Anti-discrimination Division?

Answer: Yes.

Question 14: What is the amount of damages, if any, Mr. Jensen proved by a preponderance of the evidence that Mr. Jensen suffered as a result of the West Jordan City's breach of the settlement agreement, the negotiated settlement agreement or the covenant of good faith and fair dealing?

Breach damages, settlement agreement, zero.

Breach damages, settlement agreement covenant, zero.

Breach damages, negotiated settlement agreement, zero.

Breach damages, negotiated settlement covenant, zero.

Question 15: What is the amount of damages, if any, you find Mr. Jensen incurred as a result of West Jordan City's breach of the settlement agreement, the negotiated settlement agreement or the covenant of good faith and fair dealing that are different than and in addition to the damages you found in questions 2, 5 and 8 above?

Breach damages, settlement agreement, zero.

Breach damages, settlement agreement covenant, zero.

Breach damages, negotiated settlement agreement, zero.

Breach damages, negotiated settlement covenant, zero.

As to damages.

Question 16: For only the claims for which you answered yes to Questions Numbers 1, 4, 7, 10, 11, 12 and/or 13, what is the total amount of damages, other than damages for pain and suffering, Mr. Jensen has proven that he suffered that was caused by West Jordan City's conduct?

Total damages, economic, $1,024,400.

Question 17: For only the claims for which you

answered yes to Question Numbers 1, 4 and/or 7, what is the total amount of damages for pain and suffering that Mr. Jensen has proven that he suffered that was caused by West Jordan City's conduct?

Total damages, non-economic, $1,750,000.

Signed by the foreperson of the jury and dated June 21, 2017.

THE COURT: Do you want the jury polled?

MS. ENGLISH: Yes. And I think we need to talk before they are released.

THE COURT: Poll the jury.

THE CLERK: When I call your number, please give an answer to the following question: Was this and is this now your true verdict?

Juror Number 1?

JUROR NUMBER 1: Yes.

THE CLERK: Juror Number 2?

JUROR NUMBER 2: Yes.

THE CLERK: Juror Number 3?

JUROR NUMBER 3: Yes.

THE CLERK: Juror Number 4?

JUROR NUMBER 4: Yes.

THE CLERK: Juror Number 5?

JUROR NUMBER 5: Yes.

THE CLERK: Juror Number 6?

JUROR NUMBER 6: Yes.

THE CLERK: Juror Number 7?

JUROR NUMBER 7: Yes.

THE CLERK: Juror Number 8?

JUROR NUMBER 8: Yes.

THE CLERK: Juror Number 9?

JUROR NUMBER 9: Yes.

THE CLERK: Juror Number 10?

JUROR NUMBER 10: Yes.

THE CLERK: Juror Number 11?

JUROR NUMBER 11: Yes.

THE CLERK: And Juror Number 12?

JUROR NUMBER 12: Yes.

THE CLERK: So say you all?

(Jurors respond affirmatively.)

THE COURT: Okay. Hang on for a minute. Approach.

(Discussion at the bench out of the hearing of the jury among the Court and counsel.)

MS. ENGLISH: This is an inconsistent verdict because there are zero damages for each of the claims, so the total should be zero, not what it is. So there is some internal inconsistencies in the verdict.

THE COURT: That's because they misunderstood it. They thought they would total it. They obviously thought they could total it all at the end without having to

allocate. I don't know that's -- I'm not sure that's a problematic verdict. They just lumped it together and decided all the damages.

MS. ENGLISH: So if we win on our directed verdict or if we win on appeal, then how will we know what the damages are for each claim?

MS. HOLLINGSWORTH: Your Honor, as I made clear in closing, I don't think there's a realistic way to distinguish between the different claims and the damages, so I think what the jury did makes more sense than trying to allocate damages per claim.

THE COURT: What do you suggest we do?

MS. ENGLISH: May I have a minute?

THE COURT: Sure.

MR. ENGLISH: Your Honor, I think we would ask them to go back and reallocate it. Obviously some of these issues are going to go up on appeal, and there is going to be no direction what to do if we prevail on an issue on appeal. I think the only direction we would have is to allocate it.

MS. HOLLINGSWORTH: Your Honor, if anything, I think we would ask for clarification that what they intended was the damage can't be apportioned per claim, but I think that the verdict is clear as to what they intended.

THE COURT: But there is a potential appeal problem, so I'm going to send them back and tell them they need to

allocate among the claims as best they can to get to the totals on economic and non-economic damages.

MS. HOLLINGSWORTH: Can we say anything?

THE COURT: No. I'm going to say what's going to be said.

(Proceedings continued in open court.)

THE COURT: We need you to go back and allocate, as best you can, the totals you have arrived at in the answers to Numbers 16 and 17 for the various claims as best you can do that. So we'll send you back to deliberate on that.

(Whereupon the jury leaves the courtroom.)

THE COURT: I think you ought to stay here. My judgment is that this will not take very long.

MS. ENGLISH: All right. Thank you.

THE COURT: Thank you.

(Short recess.)

THE CLERK: All rise for the jury.

(Whereupon the jury enters the courtroom.)

THE COURT: Let's try it again.

Juror Number 7, has the jury reached a unanimous verdict on the allocation?

JUROR NUMBER 7: It has.

THE COURT: Would you hand that verdict form to the -- thank you.

Kim, rather than reading everything over, just read

the question number and then the damages.

THE CLERK: All right.

Question 2: Title VII damages, economic, $1,400,000 -- I'm sorry. It was Title VII.

Title VII damages, non-economic, $1,740,000.

JUROR NUMBER 7: Did we write that down incorrectly on the first one? I think you said $1,400,000. It should say $1,000,400.

THE CLERK: Your're right. I read it wrong.

THE COURT: What is it?

THE CLERK: Let me try this again.

THE COURT: This is 2, Title VII, economic?

THE CLERK: Economic damages, $1,000,400. Title VII damages, non-economic, $1,740,000.

Question 5: Malicious prosecution damages, economic, 4,000.

Malicious prosecution damages, non-economic, 5,000.

Question 6: Malicious prosecution damages, economic, $4,000.

Malicious prosecution damages, non-economic, $5,000.

Question 8: Free speech retaliation damages, economic, $4,000.

Free speech retaliation damages, non-economic, $5,000.

Question 9: Free speech retaliation damages,

economic, $4,000.

Free speech retaliation damages, non-economic, $5,000.

Question 14: Breach damages, settlement agreement, $4,000.

Breach damages, settlement agreement covenant, $4,000.

Breach damages, negotiated settlement agreement, $4,000.

Breach damages, negotiated settlement covenant, $4,000.

Question 15: Breach damages, settlement agreement, $4,000.

Breach damages, settlement agreement, covenant, $4,000.

Breach damages, negotiated settlement agreement, $4,000.

Breach damages, negotiated settlement covenant, $4,000.

THE COURT: And the total damages remain the same?

THE CLERK: The total damages remain the same.

THE COURT: And that's the total of economic and then the total damages non-economic remain the same. That's the total of those. Do you want the jury polled.

MS. HOLLINGSWORTH: No, Your Honor.

MS. ENGLISH: No. That will be fine.

THE COURT: All right. Ladies and gentlemen of the jury --

MS. HOLLINGSWORTH: Your Honor, I'd like to approach the bench now.

(Discussion among the Court and counsel out of the hearing of the jury.)

THE COURT: All right.

MS. HOLLINGSWORTH: Now they have an appealable issue because there are caps under Title VII that don't apply to the other claims, so now we have a lopsided verdict that, when they -- when they were -- just had a general verdict, which makes sense -- made sense, now we have -- we're going to have an issue about them allocating damages to Title VII that they didn't allocate to the other claims. So --

MS. ENGLISH: They made their verdict. They did the allocation. She might not like the allocation, but they did the allocation.

THE COURT: I think they have to allocate because they are different claims, and I think the verdict is the verdict. They did the allocation. They decided the totals and then they allocated.

Do you want on make anymore of a record about that?

MS. HOLLINGSWORTH: Yes. I think, in this situation, where all the conduct at issue was the same,

although fell into different legal categories and the injuries were the same, it did not make sense to allocate it per claim, which I think is why the jury did what they did on the first round. And so I think allocating it -- making them allocate it when they did not see that as appropriate the first time around is not correct.

THE COURT: Anything else?

MS. ENGLISH: No.

(Proceedings continued in open court.)

THE COURT: Ladies and gentlemen of the jury, thank you for your service. We know this isn't easy. As we said a week ago Monday, you've got families, lives, problems, jobs and commitments. Our system wouldn't work unless people like you came in and served, and we appreciate it very much. You're now excused. You don't have to talk about the case with anybody if you don't want to. You're free to if you want to. If any of you want to stay, I'll come back and talk to you briefly about the process, if you want to, but you have no obligation to stay. You have been here a long time, and if you want to leave, you can leave. Thank you very much.

MR. DODD: Your Honor, I don't know if you would allow it, but if any of the jurors did want to stay and talk to you, if they did want to stay an extra minute or two, I would love to just -- if they were kind enough, to get their

thoughts on the case, as well.

THE CLERK: They can wait for them in the hallway.

THE COURT: Yeah. If any of them come out in the hallway, they will want to talk to you. If they don't, they won't.

MR. DODD: Fair enough.

THE COURT: Thank you.

THE CLERK: Please rise.

THE COURT: You are excused.

(Whereupon the jury leaves the courtroom.)

All right. You will do what you will do. File your post-trial stuff, and I'll consider it and rule on it and so on. All right. Thank you very much.

MS. ENGLISH: Thank you, Your Honor.

MR. SKEEN: Thank you, Your Honor.

(Whereupon the proceedings were concluded.)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, REBECCA JANKE, do hereby certify that I am a Certified Court Reporter for the State of Utah;

That as such Reporter I attended the hearing of the foregoing matter on June 21, 2017, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting, and the foregoing pages numbered 1 through 16 constitute a full, true and correct record of the proceedings transcribed.

That I am not of kin to any of the parties and have no interest in the outcome of the matter;

And hereby set my hand and seal this 10th day of July, 2017.

_____

REBECCA JANKE, CSR, RPR, RMR

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

AARON JENSEN, **Plaintiff,** **v.** **CITY OF WEST JORDAN, a Utah municipal corporation,** **Defendant.**	**SPECIAL VERDICT** **Case No. 2:12-cv-736-DAK** **Judge Dale A. Kimball** **Magistrate Judge Dustin B. Pead**

MEMBERS OF THE JURY:

Please answer the following questions using the standards explained in your Jury Instructions.

TITLE VII RETALIATION

1. Did Mr. Jensen prove by a preponderance of the evidence that West Jordan City retaliated against Mr. Jensen in violation of Title VII after April 29, 2009.

ANSWER: YES X NO ____

*If you answered "No" to Question No. 1, **do not answer** Question Nos. 2 and 3, and instead skip to Question No. 4. If you answered "Yes" to Question No. 1, **answer** Question Nos. 2 and 3.*

2. What is the amount of damages, if any, Mr. Jensen proved by a preponderance of the evidence that Mr. Jensen suffered as a result of the Title VII retaliation?

TITLE VII DAMAGES (ECONOMIC): $ 1,000,400

TITLE VII DAMAGES (NON-ECONOMIC): $ 1,740,000

3. What is the date that Mr. Jensen was first notified or had knowledge that West Jordan City had taken the materially adverse action or adverse actions against him (provide a separate date for each adverse action)?

ANSWER: November 9th 2010

SECTION 1983 MALICIOUS PROSECUTION

4. Did Mr. Jensen prove by a preponderance of the evidence that West Jordan City violated his Fourth Amendment right to be free from malicious prosecution after April 29, 2009, through acts that were done pursuant to a West Jordan City custom or that were taken by a West Jordan City official with final policymaking authority?

ANSWER: YES X NO ____

*If you answered "No" to Question No. 4, **do not answer** Question Nos. 5 and 6, and instead skip to Question No. 7. If you answered "Yes" to Question No. 4, **answer** Question Nos. 5 and 6.*

5. What is the amount of damages, if any, Mr. Jensen proved by a preponderance of the evidence that Mr. Jensen suffered as a result of the malicious prosecution?

MALICIOUS PROSECUTION DAMAGES (ECONOMIC): $ 4,000

MALICIOUS PROSECUTION DAMAGES (NON-ECONOMIC): $ 5,000

6. What is the amount of damages, if any, you find Mr. Jensen suffered as a result of the malicious prosecution that is different than and in addition to the damages you found in Question 2 above?

MALICIOUS PROSECUTION DAMAGES (ECONOMIC): $ 4,000

MALICIOUS PROSECUTION DAMAGES (NON-ECONOMIC): $ 5,000

SECTION 1983 FREE SPEECH RETALIATION

7. Did Mr. Jensen prove by a preponderance of the evidence that West Jordan City retaliated against Mr. Jensen after April 29, 2009, for exercising his First Amendment right to free speech pursuant to a West Jordan City custom or through a West Jordan City official with final policymaking authority?

ANSWER: YES X NO ____

*If you answered "No" to Question No. 7, **do not answer** Question Nos. 8 and 9, and instead skip to Question No. 10. If you answered "Yes" to Question No. 7, **answer** Question Nos. 8 and 9.*

8. What is the amount of damages, if any, Mr. Jensen proved by a preponderance of the evidence that Mr. Jensen suffered as a result of the West Jordan City's conduct that related to Mr. Jensen's free speech?

FREE SPEECH RETALIATION DAMAGES (ECONOMIC): $ 4,000

FREE SPEECH RETALIATION DAMAGES (NON-ECONOMIC): $ 5,000

9. What is the amount of damages, if any, you find Mr. Jensen incurred as a result of West Jordan City's conduct that related to Mr. Jensen's free speech that is different than and in addition to the damages you found in Questions 2 and 5 above?

FREE SPEECH RETALIATION DAMAGES (ECONOMIC): $ 4,000

FREE SPEECH RETALIATION DAMAGES (NON-ECONOMIC): $ 5,000

BREACH OF CONTRACT AND BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

10. Did Mr. Jensen prove that West Jordan City breached the settlement agreement with Mr. Jensen?

ANSWER: YES X NO ____

11. Did Mr. Jensen prove that West Jordan City breached the covenant of good faith and fair dealing related to the settlement agreement between Mr. Jensen and West Jordan City?

ANSWER: YES X NO ____

12. Did Mr. Jensen prove that West Jordan City breached the negotiated settlement agreement with Mr. Jensen and the Utah Antidiscrimination Division?

ANSWER: YES X NO ____

13. Did Mr. Jensen prove that West Jordan City breached the covenant of good faith and fair dealing related to the negotiated settlement agreement between Mr. Jensen, West Jordan City, and the Utah Antidiscrimination Division?

ANSWER: YES X NO ____

If you answered "No" to all of Question Nos. 10 through 13, ***do not answer*** *Question Nos. 14 and 15, and instead skip to Question Nos. 16 and 17. If you answered "Yes" to any of Question Nos. 10 through 13,* ***answer*** *Question Nos. 14 and 15.*

14. What is the amount of damages, if any, Mr. Jensen proved by a preponderance of the evidence that Mr. Jensen suffered as a result of the West Jordan City's breach of the settlement agreement, the negotiated settlement agreement, or the covenant of good faith and fair dealing?

BREACH DAMAGES: SETTLEMENT AGREEMENT: $ 4,000

BREACH DAMAGES: SETTLEMENT AGREEMENT COVENANT: $ 4,000

BREACH DAMAGES: NEGOTIATED SETTLEMENT AGREEMENT: $ 4,000

BREACH DAMAGES: NEGOTIATED SETTLEMENT COVENANT: $ 4,000

15. What is the amount of damages, if any, you find Mr. Jensen incurred as a result of West Jordan City's breach of the settlement agreement, the negotiated settlement agreement, or the covenant of good faith and fair dealing that are different than and in addition to the damages you found in Questions 2, 5, and 8 above?

BREACH DAMAGES: SETTLEMENT AGREEMENT: $ 4,000

BREACH DAMAGES: SETTLEMENT AGREEMENT COVENANT: $ 4,000

BREACH DAMAGES: NEGOTIATED SETTLEMENT AGREEMENT: $ 4,000

BREACH DAMAGES: NEGOTIATED SETTLEMENT COVENANT: $ 4,000

DAMAGES

Only answer Questions Nos. 16 and 17 if you answered "Yes" to Question Nos. 1, 4, 7, 10, 11, 12, and/or 13.

16. For only the claims for which you answered "Yes" to Question Nos. 1, 4, 7, 10, 11, 12, and/or 13, what is the total amount of damages, other than damages for pain and suffering, Mr. Jensen has proven that he suffered that was caused by West Jordan City's conduct?

TOTAL DAMAGES (ECONOMIC): $ 1,024,400

17. For only the claims for which you answered "Yes" to Question Nos. 1, 4, and/or 7, what is the total amount of damages for pain and suffering that Mr. Jensen has proven that he suffered that was caused by West Jordan City's conduct?

TOTAL DAMAGES (NON-ECONOMIC): $ 1,750,000

Have the Foreperson sign the verdict and let the Courtroom Deputy know you have a verdict.

Gerrit Dirkmaat
SIGNATURE OF JURY FOREPERSON

6/21/17
DATE

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Constitution, Amendment XIV:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U. S. C. § 2000e— 5(g)(1) (Section 706(g) of the Civil Rights Act of 1964,as originally enacted):

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment

practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

42 U. S. C. § 1981a:

(a)RIGHT OF RECOVERY
(1)CIVIL RIGHTS

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5, 2000e–16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e–2, 2000e–3, 2000e–16], and provided that
the complaining party cannot recover under section 1981 of this title,
the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

. . .

(b)(2)EXCLUSIONS FROM COMPENSATORY DAMAGES

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5(g)].

(b)(3)LIMITATIONS

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A)

in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B)

in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C)

in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D)

in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.