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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-CV-1067-REB-CBS

WILLIAM R. CADORNA,

Plaintiff,

v.

THE CITY & COUNTY OF DENVER, COLORADO,
a municipal corporation,

Defendant.

REPORTER'S TRANSCRIPT
TRIAL TO A JURY OF 8 - VOLUME VIII

Proceedings before the HONORABLE ROBERT E. BLACKBURN,
Judge, United States District Court for the District of
Colorado, commencing at 8:20 a.m., on the 29th day of June,
2006, in Courtroom A701, Alfred A. Arraj United States
Courthouse, 901 19th Street, Denver, Colorado.

APPEARANCES

MARK E. BRENNAN, 7394 South Downing Circle West,
Centennial, Colorado, appearing for Plaintiff.

Suzanne M. Claar, Official Reporter
901 19th Street
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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

APPEARANCES (Continued)

JACK M. WESOKY, CHRISTOPHER M.A. LUJAN, Denver City
Attorney's Office, Civil Litigation, Claims Department, 201 West
Colfax, #1108, Denver, Colorado, appearing for Defendant.

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P R O C E E D I N G S

(Proceedings resumed at 8:20 a.m.)

THE COURT: Good morning, and thank you. Please be seated.

Thank you. We convene in open court on the record outside the presence and hearing of the jury to conduct a formal charging, that is jury instruction conference, noting the appearances of the parties, their representatives and counsel.

As I indicated, at 7:45 a.m. I made available to both parties the court's proposed instructions and verdict forms, save a corrected version of the initial Verdict Form B and a proposed optional Verdict Form B.

Counsel, we are going to consider these instructions and verdict forms one at a time, until or unless the court entertains argument as to a specific proposed instruction or verdict form. You may remain seated as you indicate whether you have objection or not. Hopefully that will save wear and tear on your knees and other body parts.

Therefore, directing your attention to Instruction No. 1, any objection by plaintiff?

MR. BRENNAN: Forgive me, your Honor. No.

THE COURT: By defendant?

MR. WESOKY: None, your Honor.

THE COURT: Approved.

Instruction No. 2, any objection by plaintiff?

1 MR. BRENNAN: No, sir.

2 THE COURT: By defendant?

3 MR. WESOKY: No, your Honor.

4 THE COURT: Approved.

5 Instruction No. 3, any objection by plaintiff?

6 MR. BRENNAN: Yes, your Honor. Should I stand?

7 THE COURT: At this point, yes. Your objection.

8 MR. BRENNAN: The objection is that in the second
9 paragraph it says it makes it unlawful for an employer to
10 discharge or otherwise discriminate against an employee. This,
11 of course, is true, but I think it would be helpful and clarify
12 the nature of the claims if it specifically would refer to a
13 failure to reinstate an employee after termination on the basis
14 of his age.

15 THE COURT: An employer to discharge, fail to
16 reinstate, comma, or otherwise discriminate an employee?

17 MR. BRENNAN: That would be acceptable to the
18 plaintiff, your Honor.

19 THE COURT: Is that proposed amendment acceptable to
20 the defendant, assuming that you tracked the colloquy between
21 the court and Mr. Brennan. Instruction No. 3, paragraph 2, line
22 1, proposal is after the word "discharge" to insert a comma,
23 failed to reinstate, comma, and then continue with the balance
24 of paragraph 2.

25 MR. WESOKY: Fine, your Honor.

1 THE COURT: Very well. Instruction No. 3 as amended as
2 proposed by the plaintiff and the court is approved.

3 Instruction No. 4, any objection by plaintiff?

4 MR. BRENNAN: No, your Honor.

5 THE COURT: By defendant?

6 MR. WESOKY: None, your Honor.

7 THE COURT: Approved.

8 Instruction No. 5, any objection by plaintiff?

9 MR. BRENNAN: No, your Honor.

10 THE COURT: And you may remain seated.

11 MR. BRENNAN: Oh, I am sorry.

12 THE COURT: Or stand, as you choose.

13 MR. BRENNAN: It's now force of habit, I am afraid.

14 After my first failure to do so, I have not forgotten.

15 THE COURT: Any objection by defendant to Instruction
16 No. 5?

17 MR. WESOKY: No, your Honor.

18 THE COURT: Approved.

19 Instruction No. 6, any objection by plaintiff?

20 MR. BRENNAN: No, sir.

21 THE COURT: By defendant?

22 MR. WESOKY: None, your Honor.

23 THE COURT: Approved.

24 Instruction No. 7, any objection by plaintiff?

25 MR. BRENNAN: No, your Honor.

1 THE COURT: Defendant?

2 MR. WESOKY: No, your Honor.

3 THE COURT: Approved.

4 Instruction No. 8, any objection by plaintiff?

5 MR. BRENNAN: No, your Honor.

6 THE COURT: By defendant?

7 MR. WESOKY: No, your Honor.

8 THE COURT: Approved.

9 Instruction No. 9, any objection by plaintiff?

10 MR. BRENNAN: No, sir.

11 THE COURT: By defendant?

12 MR. WESOKY: No, your Honor.

13 THE COURT: Approved.

14 Instruction No. 10, any objection by plaintiff?

15 MR. BRENNAN: No, sir.

16 THE COURT: By defendant?

17 MR. WESOKY: No, your Honor.

18 THE COURT: Approved.

19 Instruction No. 11, any objection by plaintiff?

20 MR. BRENNAN: No, sir.

21 THE COURT: By defendant?

22 MR. WESOKY: No, your Honor.

23 THE COURT: Approved.

24 Instruction No. 12, any objection by plaintiff?

25 MR. BRENNAN: No, sir.

1 THE COURT: By defendant?

2 MR. WESOKY: No, your Honor.

3 THE COURT: Approved.

4 Instruction No. 13, any objection by plaintiff?

5 MR. BRENNAN: No, sir.

6 THE COURT: By defendant?

7 MR. WESOKY: Your Honor, we would just like to preserve
8 our objection to the admission of some of the individuals as
9 experts. Other than that --

10 THE COURT: With those objections of record and
11 preserved, Instruction No. 13 is approved.

12 MR. WESOKY: Thank you, your Honor.

13 THE COURT: You are welcome.

14 Instruction No. 14, any objection by plaintiff?

15 MR. BRENNAN: No, sir.

16 THE COURT: By defendant?

17 MR. WESOKY: No, your Honor.

18 THE COURT: Approved.

19 And I will tell you that with respect to Instruction
20 No. 14, which I have essentially already read to the jury during
21 the course of the trial, I simply intend to read the
22 introductory paragraph, remind the jury that I have read these
23 stipulations of fact to them during the course of the trial, and
24 then require them to again read the stipulations as contained in
25 Instruction No. 14 without again rereading it.

1 Any objection by plaintiff?

2 MR. BRENNAN: No, sir.

3 THE COURT: By defendant?

4 MR. WESOKY: No, your Honor.

5 THE COURT: That protocol is approved.

6 Instruction No. 15, aside from cross-referencing yet to
7 be done, any objection by plaintiff?

8 MR. BRENNAN: No, sir.

9 THE COURT: By defendant?

10 MR. WESOKY: No, your Honor.

11 THE COURT: Approved.

12 Instruction No. 16, again for incomplete
13 cross-referencing, any objection by plaintiff?

14 MR. BRENNAN: No, sir.

15 THE COURT: By defendant?

16 MR. WESOKY: Pardon me, your Honor. No.

17 THE COURT: Approved.

18 Instruction No. 17, any objection by plaintiff?

19 MR. BRENNAN: No, sir.

20 THE COURT: By defendant?

21 MR. WESOKY: No, your Honor.

22 THE COURT: Approved.

23 Instruction No. 18, other than incomplete
24 cross-referencing, any objection by plaintiff?

25 MR. BRENNAN: Yes, your Honor.

1 THE COURT: Your objection, please.

2 MR. BRENNAN: Forgive me if it is a little lengthy.

3 First, the line at the end of the first paragraph --
4 well, that entire sentence, defendant has offered such reasons
5 by stating the terminated plaintiff because he stole a cookbook
6 and that they refused to reinstate him or grant him benefits
7 beyond the date of his retirement because state law precluded it
8 from doing so.

9 I would request that the last phrase, because state law
10 precluded it from so doing, excuse me, be restated so that it
11 does not imply to the jury that state law in fact does preclude
12 the city from reinstating plaintiff.

13 I believe a modification might be in order would be --

14 THE COURT: And by stating that.

15 MR. BRENNAN: Refused to reinstate or grant him
16 benefits beyond the date of his retirement.

17 THE COURT: And by stating that state law --

18 MR. BRENNAN: In reliance upon --

19 THE COURT: It looks to me --

20 MR. BRENNAN: State law it asserts precluded him from
21 doing so. Language along that line that makes it clear that is
22 what they allege, but that may not be the conclusion of the
23 court.

24 THE COURT: No, it is. I see the problem, and I think
25 it's a point well taken. I don't want an instruction that can

1 be -- that is ambiguous, that is it can be read by the jury to
2 require them to conclude that state law precluded the defendant
3 from reinstating the plaintiff.

4 Lets try this. It begins, as defendant has offered
5 such reasons by stating that it terminated because, and after
6 the Safeway grocery store, and by stating that defendant refused
7 to reinstate him or grant him benefits beyond the date of his
8 retirement because state law precluded defendant from so doing.

9 MR. BRENNAN: I think that would be an acceptable
10 reformulation, your Honor.

11 THE COURT: Thank you.

12 MR. BRENNAN: I do have additional objections with
13 respect to No. 18.

14 THE COURT: Lets take this one.

15 MR. BRENNAN: Oh, I am sorry. Forgive me.

16 THE COURT: Objections as to paragraph 1, the court has
17 proposed an amendment in response to the plaintiff's objection.
18 Response by the defendant?

19 MR. WESOKY: With respect to the addition, your Honor,
20 no objection. Defendant would, however, offer that it has
21 produced evidence that a related reason for the failure to
22 reinstate was the disability of the plaintiff, and we would
23 respectfully request an addition to that sentence to reflect
24 that as well.

25 THE COURT: Well, let me take the plaintiff's

1 objections first, and then I will take the defendant's
2 objections, if I could.

3 MR. WESOKY: I am sorry, your Honor. I thought you
4 were referring to that paragraph.

5 THE COURT: Tentatively paragraph 1, Instruction No.
6 18, as modified by the court in response to the plaintiff's
7 objection is tentatively approved.

8 Additional objections to Instruction No. 18 by the
9 plaintiff, Mr. Brennan?

10 MR. BRENNAN: Your Honor, I believe that the second
11 paragraph is too ortatory in the direction of the defendant by
12 beginning, you must find in favor of defendant unless.

13 I would like to propose a reformulation of the first
14 sentence as follows. Strike, you must find in favor of
15 defendant unless, and begin it with, if plaintiff proves by a
16 preponderance of the evidence that defendant's stated reasons
17 were not the true reasons for its decision, but only a pretext
18 or excuse for discrimination against plaintiff because of his
19 age, comma, you must find in favor of plaintiff, period.

20 I believe the second sentence is acceptable and
21 consistent with prevailing case law.

22 I do have further objections, but we will stick to that
23 paragraph for now, I think.

24 THE COURT: Again, Instruction No. 18, paragraph 2,
25 response by defendant to plaintiff's discrete objection.

1 MR. WESOKY: With respect to that objection, your
2 Honor, defendant believes this accurately states what the law
3 is, and would accurately instruct the jury that unless plaintiff
4 proves pretext, then the verdict must be for the defendant, and
5 then it goes on to advise that if it does find pretext, it may
6 but not necessarily find for the plaintiff. I think this
7 accurately states what the law is in this area.

8 THE COURT: Thank you. The plaintiff's objection is
9 respectfully overruled. Paragraph 2 as proposed by the court is
10 tentatively approved.

11 Additional objections by plaintiff to Instruction No.
12 18.

13 MR. BRENNAN: Your Honor, I believe that the third
14 paragraph, although it is consistent with some dicta or comment
15 in cases in stating, you may not question defendant's business
16 judgment, may mislead the jury on the question of what its
17 obligations are.

18 It would be the plaintiff's intention that the very
19 purpose for being here is the question of the plaintiff's
20 business -- or, excuse me, the defendant's business judgment,
21 and this may mislead the jury into believing it does not have
22 the right to examine the judgments that were made and reach a
23 conclusion as to the motives therefor.

24 I think if they were going to include a statement to
25 that effect, which I assume the court feels is important in

1 fulfillment of its obligations to both parties, that it would be
2 helpful to more clearly define just what is meant by the
3 defendant's business judgment, and to clarify the point that
4 when you say you may not question defendant's business judgment,
5 that does not mean you may not reach a conclusion different from
6 theirs based upon the -- this is a difficult thing to
7 articulate, but I am sure you catch my drift.

8 If there was some way to reformulate this so that they
9 understand what is meant by defendant's business judgment, and a
10 distinction between business judgment and discriminatory
11 employment decision, I think we can satisfy that concern about
12 that language. It's probably incumbent upon me to propose a
13 change, but I am at a loss to dictate one right off of the top
14 of my head right now.

15 THE COURT: Instruction 18, paragraph 3, plaintiff's
16 discrete objection.

17 MR. WESOKY: Thank you, your Honor.

18 The language as stated is a correct statement of the
19 law. Defendant would submit that case law recognizes even more
20 stringent standards than have been articulated by the court in
21 its instruction, but I will save that for the defendant's
22 objections.

23 THE COURT: Very well.

24 MR. WESOKY: Your Honor, so with respect to as it
25 stands now, it is a correct and appropriate statement of what

1 the law is.

2 THE COURT: The plaintiff's objection to paragraph 3 of
3 Instruction No. 18 is respectfully overruled, the court finding
4 this to be a complete and balanced statement of the law that is
5 not confusing or misleading to the jury.

6 Mr. Brennan, further objections to Instruction No. 18?

7 MR. BRENNAN: No, your Honor. That was probably
8 enough.

9 THE COURT: Thank you.

10 Objections to Instruction No. 18 by the defendant,
11 Mr. Wesoky.

12 MR. WESOKY: Thank you, your Honor.

13 To revisit what I mentioned a few minutes ago with
14 respect to paragraph 1, the last sentence, the disability
15 application and finding that plaintiff was disabled from being a
16 firefighter was also raised by the evidence in this case, your
17 Honor.

18 THE COURT: Do you have proposed language?

19 MR. WESOKY: Because state law precluded it from doing
20 so, or because plaintiff was disabled from being a firefighter
21 or physically unfit to be a firefighter.

22 THE COURT: Well, in my view that would have to be
23 preceded after, from so doing. We are in the last line of the
24 first paragraph of Instruction No. 18, and by stating, so it's
25 clear that this is simply the position of the defendant, and

1 does not ambiguously communicate to the jury that they must
2 accept the reason.

3 MR. WESOKY: I did not intend to make that as a
4 suggestion but merely to instruct the jury that that was an
5 additional basis.

6 THE COURT: Response by the plaintiff, Mr. Brennan?

7 MR. BRENNAN: We would object on the basis that it's
8 inconsistent with prevailing law on the question of whether a
9 party is judicially estopped because of disability retirement
10 from asserting its rights under the discrimination act.

11 *Cleveland v. Policy Management Systems*. Particularly a matter
12 about which we exchanged briefs previously, and on which the
13 court is well informed.

14 I believe the jury will be mistakenly led to believe
15 that it is entitled, because my client took a disability
16 retirement, to refuse to find that his retirement was
17 involuntary or that he was discriminatorily denied reinstatement
18 simply because he took a disability retirement, and that
19 judicial estoppel would in effect be argument for the defendant
20 in an instruction of that kind, and I sense judicial estoppel on
21 these facts is not warranted. The instructions must not include
22 any presentation that we are estopped from pursuing our claims
23 on that basis.

24 THE COURT: The court will take this objection under
25 advisement.

1 Any further objections to Instruction No. 18 by the
2 defendant?

3 MR. WESOKY: Thank you, your Honor.

4 With respect to the next-to-the-last paragraph,
5 defendant believes that the law well established in this and
6 other circuits is that the motivating reason is not converted
7 into pretext merely because of the benefit of hindsight it
8 turned out to be poor business judgment.

9 I understand the court has used the phrase "poor
10 business judgment", but I think it might be appropriate to add
11 something about with the benefit of hindsight.

12 And I think the -- again, the well-established law is
13 that the reasons are not turned into pretext -- let me rephrase
14 that, Judge. That the pretext is not shown simply because the
15 reasons were not wise, were not fair or were incorrect. I think
16 those words have been well established as the law for
17 determining pretext with respect to a business judgment, and
18 language of that should be added to the paragraph 3 of the
19 instruction.

20 THE COURT: Presuming plaintiff's objection, the
21 defendant's objection is overruled. The court again finds that
22 the language here adequately states the apposite law, is not
23 confusing, and is not limited. All else is for final argument
24 in the context of this instruction.

25 Instruction No. 19, any objection by plaintiff?

1 MR. BRENNAN: Yes, your Honor.

2 First, it's our contention, and has been, that under
3 the supremacy clause of the United States Constitution, the --
4 any state law that could be contended to have justified refusal
5 to reinstate my client because he was over the age of 50 is
6 necessarily void in this context and cannot be used to foreclose
7 my client's reinstatement, could not have been used lawfully by
8 the city through the hearing officer and commission to refuse to
9 reinstate my client because federal law, in the form of the Age
10 Discrimination in Employment Act, permits such an exclusion only
11 in reliance upon a mandatory retirement age authorized by
12 Section 623(j) of the Age Discrimination in Employment Act.

13 The mandatory retirement age for Denver firefighters
14 being 65, that exclusion or exemption was not satisfied in this
15 case because my client had not reached that point.

16 Because those were the only circumstances under which
17 federal law would permit them to refuse to reinstate my client
18 in reliance upon his age, this instruction is not consistent
19 with prevailing constitutional doctrine under the supremacy
20 clause. Citations were offered in our motions for entry of
21 judgment previously. I need not rehearse them here. I am sure
22 a concept the court understands very well.

23 I think also the great danger of this instruction,
24 although I understand it is offered and proposed in good faith
25 by the court as a way of clarifying a basis of the city's

1 decision actually may put the jury in the decision of being --
2 construing something it is not qualified to construe for the
3 purpose of determining whether discrimination did or did not
4 occur.

5 I believe that is the province of the court, and under
6 prevailing constitutional doctrine, the court must simply tell
7 them that is not a defense because of the supremacy clause.
8 That the reliance upon a state statute in violation of federal
9 law is not a defense. Because of the supremacy clause of the
10 United States Constitution.

11 I think that the city's purpose in offering this was a
12 good-faith effort to defendant's position, but I think it was
13 also its hope that it would accomplish just that, the confusion
14 of the jury as to its obligations. These are lay people. They
15 have no competence to construe this statute. They could be
16 misled -- the difficulty here is we have ambiguity in the
17 statute itself as to whether reexamine means reinstatement. All
18 it says, it shall not be reexamined. It does not say, shall not
19 be reinstated.

20 The difficulty here is that it also deals with the
21 situation in which the problem they were attempting to forestall
22 was that of a fire department with respect to old hire
23 firefighters mandatorily attempting to force someone to submit
24 to reexamination for the possibility of reinstatement once they
25 have taken a disability retirement.

1 This was the most proper construction of this in light
2 of federal law that was in existence at the time of this passage
3 is that its only intention was to provide additional protection
4 that went above and beyond the protections afforded by federal
5 law in addressing an issue not squarely addressed by federal
6 law, which is the question of whether you can force or compel a
7 firefighter to return to work against his will, once he has
8 taken a disability retirement.

9 The construction relied upon by the city for quite
10 sometime has been in derogation of federal law. The only
11 reasonable assumption concerning the construction of the statute
12 is that it was enacted in light of federal law and state law,
13 and any construction to the contrary violates the supremacy
14 clause, violates the reasonable rules of statutory construction.

15 Needless to say, I cannot imagine that I should be put
16 in a position where I have to argue that to the jury for their
17 edification. I think there is serious danger of confusion, and
18 in the event of an adverse finding, a serious problem of
19 determining whether this instruction may have been the source of
20 the adverse finding, even though all the instructions otherwise
21 complied with the standards set forth in cases such as *Townsend*
22 *v. Lumbermens Mutual*, 294 F.3d 1232, and a variety of other
23 Tenth Circuit doctrine as set forth in *Royal Maccabees Life*, 393
24 F.3d 1175, and I could go on, *Whittington v. Nordam Group*, 429
25 F.3d 986. A variety of Tenth Circuit cases which set forth in

1 great detail in cases with which this court I am sure is more
2 familiar than I am.

3 Those are the standards in this circuit, and I think
4 they are the ones that should be followed. This one will
5 mislead the jury. Thank you.

6 THE COURT: Thank you. Response by the defendant.

7 MR. WESOKY: Thank you, your Honor.

8 In light of the defenses raised by the defendant, these
9 instructions of the statute are necessary for the jury to see
10 upon what the hearing officer relied. They merely set forth the
11 statutory language. They in no way suggest any result, and with
12 regard to the first part of the argument on the supremacy
13 clause, I think your Honor has ruled that that's the law of this
14 case.

15 Thank you. And we would ask that the court tender
16 these instructions.

17 THE COURT: Vis-a-vis Instruction No. 19, the
18 plaintiff's objection is sustained for the reasons stated,
19 arguments advanced and authorities cited by him.

20 The court in good faith, as noted by plaintiff's
21 counsel, was attempting somehow to provide the jury with some
22 information about a statutory scheme which much of which has
23 been made during the trial. But Instruction No. 19 is not the
24 appropriate vehicle by which to accomplish that. That does not
25 necessarily preclude argument, final argument by counsel,

1 describing at least in general terms that on which Judge
2 Criswell or the Civil Service Commission may have relied in the
3 formulation of their respective decisions.

4 Those are relevant both to pretext and ultimately to a
5 determination of willful discrimination should the jury reach
6 that consideration in its solemn deliberations.

7 Instruction No. 19 is rejected, will not be included by
8 the court in its charge to the jury.

9 Instruction No. 20, any objection by plaintiff?

10 MR. BRENNAN: None here, your Honor.

11 THE COURT: By defendant?

12 MR. WESOKY: None, your Honor.

13 THE COURT: Approved, and I am going to use the numbers
14 as they appear. Obviously this will become Instruction No. 19
15 after appropriate renumbering.

16 Instruction No. 21, any objection by plaintiff?

17 MR. BRENNAN: Yes.

18 At the risk of seeming to nitpick, I would request
19 modification of the second sentence so that it does not again --
20 and I know there was no intention to mislead the jury on the
21 part of the court, and I don't mean to suggest that, but I find
22 from plaintiff's perspective that this sentence may mislead the
23 jury into thinking that almost anything goes under the
24 discrimination statutes.

25 I think that it should be beefed up so that it makes

1 clear that an employer may terminate or refuse to reinstate an
2 employee only for lawful nondiscriminatory reasons that are not
3 in violation of federal discrimination statutes, or words to
4 that effect.

5 In other words, to reverse the implication so that it
6 does not imply on behalf of defendant that it had a broad range
7 of options that are constrained only by a narrow set of
8 standards, but instead, that it is only entitled to terminate or
9 refuse to reinstate an employee for lawful nondiscriminatory
10 reasons.

11 I think that is a correct statement of the law, and
12 does not present the danger of misleading the jury into
13 believing that their role is very limited with respect to
14 reviewing the defendant's actions.

15 Thank you.

16 THE COURT: Response by defendant.

17 MR. WESOKY: Your Honor, yes.

18 With respect to the sentence and that instruction
19 sentence No. 2, this does fairly set forth what the law is, and
20 related to my comments with respect to the previous pretext
21 instruction.

22 It states that an employer may terminate or refuse to
23 reinstate an employee for any other non-discriminatory reason,
24 and that's what this jury is being asked to find, age
25 discriminatory reason, not whether the termination was good, bad

1 or indifferent, or may have not been appropriate as found by the
2 Civil Service Commission.

3 The portion of the instruction that plaintiff would
4 tender would confuse the jury into believing that once the Civil
5 Service Commission found that the termination should be
6 overturned, it was *ipso facto* unlawful, and therefore a
7 discriminatory termination.

8 Therefore, we would urge the court to adopt this
9 instruction as written.

10 THE COURT: Plaintiff's objection is respectfully
11 overruled. Essentially for the reasons stated and arguments
12 advanced by defendant in response to the objection.

13 Instruction No. 21 is approved.

14 Instruction No. 22, any objection by plaintiff?

15 MR. BRENNAN: Yes, your Honor.

16 I think that this instruction relies upon standards
17 that have been enunciated with respect to situations in which a
18 constructive discharge is alleged in the form of a forced
19 retirement in the face of threatened disciplinary action,
20 reduction in force, or some other adverse employment action that
21 the employee wishes to avoid.

22 It is only in that context that the cases that we have
23 cited *ad nauseam* at this point in a variety of proceedings, such
24 as *Emerson v. Widenall* and others, recognizes the possibility of
25 voluntariness of retirement that forecloses an allegation of

1 unlawful termination. It is well established in those same
2 cases, *Artisan v. Heckler*, the one the court quoted with some
3 approval, at least in denying summary judgment, makes quite
4 clear that -- and states explicitly -- that unlawful discharge
5 forecloses a finding of subsequent voluntary retirement because
6 by stipulation the city cannot dispute, and has presented no
7 evidence to contradict that my client applied for retirement
8 subsequent to his dismissal, the only correct instruction in
9 this area would be to the effect that the defendant contends
10 plaintiff's retirement was voluntary.

11 You are hereby instructed, however, that retired -- if
12 you find that retirement did occur after termination, which
13 is -- well, heck, they don't even have to make a finding on
14 that, that's been settled -- the law essentially is that
15 retirement after unlawful dismissal, particularly discriminatory
16 dismissal, if you find that, although they are not required to
17 find the original termination was discriminatory, is inherently
18 coerced. That is the prevailing doctrine and the law.

19 Had this -- they are not entitled to a presumption in a
20 case of termination followed by dismissal. That presumption
21 only applies in reviewing constructive discharge, analogous to
22 the situation in which someone is simply alleging that he was
23 constructively discharged and did not voluntarily resign. There
24 the courts apply the presumption of voluntariness in
25 resignation. It can be rebutted.

1 They do not, however, apply a presumption of lawful
2 termination unless and until either the plaintiff has failed to
3 establish a *prima facie* case of unlawful or discriminatory
4 termination, or the plaintiff has established, through a showing
5 of pretext or direct evidence, that the termination was
6 discriminatory, notwithstanding the legitimate business
7 justification offered.

8 This will impose a burden that is not consistent with
9 prevailing law on this subject, I am afraid.

10 THE COURT: Thank you.

11 Response by defendant.

12 MR. WESOKY: Thank you, your Honor.

13 And again, without citing the case law that your Honor
14 has been cited to several times. As to plaintiff's objections,
15 plaintiff again wants to insert that the mere termination, which
16 turned out to be incorrect according to Civil Service
17 Commission, ends the inquiry as to voluntariness. It does
18 not -- there has to be coercive conduct, as this instruction
19 explains.

20 To give the instruction offered by the plaintiff or the
21 addition would foreclose that inquiry into whether there were
22 factors imposed by the employer as the law requires, factors
23 imposed by the employer as set forth I think in *Parker v. The*
24 *Board of Regents*, a Tenth Circuit case, was there time pressure,
25 was there alternatives, and so forth.

1 Merely focusing on the reversal of the termination
2 forecloses the inquiry into those factors which under the law
3 the finder of fact must engage in order to rebut the presumption
4 of voluntariness.

5 THE COURT: Does the defendant have any other
6 objections in its own right to Instruction No. 22?

7 MR. WESOKY: Yes, your Honor. If I may.

8 The law has stated that a plaintiff finding himself in
9 an economically stressful situation is not evidence of coercion
10 or duress. And plaintiff -- and the evidence here from the
11 plaintiff was that was the case.

12 We would respectfully request an addition to the
13 instruction setting forth that proposition.

14 Defendant also thinks it may be advisable to add, to
15 assist the jury in its deliberations, as to what type of conduct
16 might be coercive, such as whether the plaintiff had an
17 opportunity to select his retirement date, whether plaintiff had
18 a time to choose and so forth, again relying on *Parker v. The*
19 *Board of Regents*.

20 Thank you, your Honor.

21 THE COURT: Thank you. The court overrules the
22 defendant's objections, takes under advisement the plaintiff's
23 objections and defendant's response thereto.

24 Instruction No. 23, any objection by plaintiff?

25 MR. BRENNAN: With respect, your Honor, I think that it

1 may impose too high a standard for a finding of willfulness. It
2 is not necessary that the jury make a finding that -- well,
3 forgive me. I wonder if we might break up the sentences a
4 little.

5 Obviously, this is generally an excellent summary of
6 the law, but I think it may cause them to believe by its nature
7 that willfulness equals deliberately, intentionally and
8 knowingly discharging plaintiff and/or refusing to reinstate him
9 because of his age.

10 All that is required in order to establish willfulness
11 under a long line of cases with which you are probably familiar,
12 *TWA v. Thurston* I think was one of the first going back to my
13 early days, is that the defendant was aware that age
14 discrimination is unlawful, and then -- and that results in a
15 finding of willfulness following from its finding that it did
16 intentionally discriminate otherwise.

17 I think in the way it's stated, although I understand
18 it perfectly well, the jury might get the idea they have to
19 find -- in order to find willfulness, they have to kind of find
20 it was deliberate, intentional, almost with reckless disregard,
21 which is not quite the standard for willfulness, as I understand
22 it.

23 THE COURT: Response by defense.

24 MR. WESOKY: Simply, your Honor, this instruction sets
25 forth the applicable law. I think it's based on the pattern

1 instruction, if I am not mistaken, your Honor. We would state
2 that it is an appropriate instruction and sets forth the
3 necessary elements for willfulness finding.

4 THE COURT: Plaintiff's objection and defendant's
5 response vis-a-vis Instruction No. 23 is taken under advisement.

6 Taking up Instruction No. 24.

7 Any objection by plaintiffs?

8 MR. BRENNAN: None here, your Honor.

9 THE COURT: Objection by defense?

10 MR. WESOKY: No objection, your Honor.

11 THE COURT: Approved.

12 Instruction No. 25, any objection by plaintiff?

13 MR. BRENNAN: I am sorry, your Honor. I was skipping
14 ahead. No.

15 THE COURT: By defendant?

16 MR. WESOKY: No, your Honor.

17 THE COURT: Instruction No. 25 approved.

18 Instruction No. 26, any objection by plaintiff?

19 MR. BRENNAN: No objection, your Honor.

20 THE COURT: By defendant?

21 MR. WESOKY: No, your Honor.

22 THE COURT: Approved.

23 Instruction No. 27, any objection by plaintiff?

24 MR. BRENNAN: No, your Honor.

25 THE COURT: By defendant?

1 MR. WESOKY: Yes, your Honor.

2 If the court please, defendant believes the law with
3 respect to ADEA damages is that a plaintiff cannot recover for
4 pain, suffering, stress, so on and so forth, as set forth in the
5 third paragraph.

6 Your Honor, for that proposition defendant would rely
7 on the statute, 29 U.S.C. Section 211, 216, 217 and 626, and a
8 variety of cases from various circuits, including *Vasquez v.*
9 *Eastern Airlines*, 579 F.2d 107, First Circuit, 1978, *Haskell v.*
10 *Cayman Corp.*, 743 F.2d 113, at 121, Second Circuit, 1984 case,
11 *Rogers v. Exxon Research and Engineering*, 550 F.2d 834 at 841,
12 Third Circuit case from 1977. There are other cases if the
13 court would like me to add those.

14 The ADEA damages, compensatory damages, are limited to
15 back pay, your Honor. And we think this section instructing
16 damages otherwise is not appropriate.

17 Thank you.

18 THE COURT: Response by plaintiff.

19 MR. BRENNAN: Well, briefly, naturally the plaintiff
20 would contend that the remedial purposes of the act are best
21 served by the granting of compensatory damages above and beyond
22 back pay and liquidated damages, but I am at a loss at this
23 particular time to cite authority to that effect.

24 THE COURT: The defendant's objection to Instruction
25 No. 27 is taken under advisement.

1 Instruction No. 28, any objection by plaintiff?

2 MR. BRENNAN: I am sorry, your Honor. If I may have
3 just a moment.

4 THE COURT: You may. Thank you.

5 MR. BRENNAN: No objection.

6 THE COURT: By defendant?

7 MR. WESOKY: No, your Honor.

8 THE COURT: Approved.

9 Instruction No. 29, objection by plaintiff?

10 MR. BRENNAN: Your Honor, I think it's important to
11 include in the mitigation instruction a proviso, as was
12 discussed at some point in trial, on the question of mitigation,
13 to the effect that the same or similar employment is all that he
14 is required to seek, and that they should make a determination
15 as to whether defendant has proved that the same or similar
16 employment was available within the immediate job market, so
17 forth and so on.

18 I think that the courts have clearly recognized the
19 duty of mitigation. It does not extend to any kind of
20 employment. It should only be considered in light of the
21 probability of the plaintiff being able to obtain the same or
22 similar employment elsewhere.

23 THE COURT: Response by the defendant.

24 MR. WESOKY: Thank you, your Honor.

25 I believe that is covered in the second full paragraph

1 of the instruction. I would add, if the court please, that the
2 word "substantially" is too great a burden and should be limited
3 to "similar" employment. I know that's not the court's
4 protocol, but as long as we are addressing that, I took the
5 opportunity to do so.

6 THE COURT: Very well.

7 Both objections, plaintiff and defendant, to
8 Instruction No. 29 are respectfully overruled.

9 Instruction No. 29 as proposed by the court is
10 approved.

11 Instruction No. 30.

12 Any objection by plaintiff?

13 MR. BRENNAN: No, sir.

14 THE COURT: By defendant?

15 MR. WESOKY: No, your Honor.

16 THE COURT: Approved.

17 Instruction No. 31, any objection by plaintiff?

18 MR. BRENNAN: No, sir.

19 THE COURT: By defendant?

20 MR. WESOKY: No, your Honor.

21 THE COURT: Approved.

22 Instruction No. 32, any objection by plaintiff?

23 MR. BRENNAN: No, sir.

24 THE COURT: By defendant?

25 MR. WESOKY: No, your Honor.

1 THE COURT: Approved.

2 Instruction No. 33, any objection by plaintiff?

3 MR. BRENNAN: No, sir.

4 THE COURT: By defendant?

5 MR. WESOKY: Likewise, your Honor. No objection.

6 THE COURT: Approved.

7 Verdict Form A, discrimination on the basis of age,
8 termination of employment.

9 Any objection by plaintiff?

10 MR. BRENNAN: Your Honor, may I have just a brief
11 period in which to review that? I am afraid I didn't get a
12 chance to do so.

13 THE COURT: Thank you. You may.

14 Any objection by defendant?

15 MR. WESOKY: Your Honor, yes. To dovetail with my
16 prior objection on compensatory damages. Without elucidating
17 further, your Honor is aware of that.

18 THE COURT: And certainly if I sustain your objection
19 on compensatory damages other than back pay, that *ipso facto*
20 will constrain an appropriate revision and redaction of Verdict
21 Form A.

22 MR. WESOKY: Right. That's precisely what I meant to
23 say, your Honor. Thank you.

24 THE COURT: Any other objection?

25 MR. WESOKY: With respect to form A, none other than

1 the compensatory damage piece.

2 THE COURT: Thank you.

3 MR. BRENNAN: Your Honor, if I may. If I have read it
4 correctly, it does not call for the jury to indicate whether it
5 has found that any discrimination, either in termination or
6 refusal to reinstate, was willful.

7 THE COURT: It's the last question. Perhaps you are
8 not there yet.

9 MR. BRENNAN: Forgive me.

10 THE COURT: That was certainly the intent of the court.
11 Question No. 6 on page 3.

12 MR. BRENNAN: I am very sorry.

13 THE COURT: There is a discrete and special
14 interrogatory.

15 MR. BRENNAN: Yes, sir. I understand. Got it. I just
16 thought it was an oversight. Thank you. I am sorry. Otherwise
17 it's acceptable to us.

18 THE COURT: Subject to the court's ruling on the
19 defendant's objection focusing on the propriety of compensatory
20 damages for an ADEA claim other than back pay, Verdict Form A is
21 approved.

22 MR. BRENNAN: May I -- it is correct to assume, is it
23 not, that the court will reserve to itself a determination of
24 whether front pay is an equitable remedy is warranted?

25 THE COURT: It is. I take the position that is a

1 remedy for the court.

2 MR. BRENNAN: I understand. I thought so. But I
3 thought I just better check.

4 THE COURT: Now, really, I have presented with you with
5 an initial Verdict Form B. If you discard that because it has
6 typographical errors. Then there is a Verdict Form B and a
7 second Verdict Form B, and the only difference between those
8 verdict forms is to delineate and provide special
9 interrogatories both on the issue of non-back pay compensatory
10 damages and back pay as compensatory damages. I am aware of the
11 defendant's position with respect to the issue of an award of
12 damages other than back pay.

13 If an award of compensatory damages other than back pay
14 in the context of plaintiff's claims is appropriate, then I
15 would propose that we use the second version of Verdict Form B
16 because it has discrete interrogatories with respect to those
17 two types of damage, but your position, Mr. Brennan.

18 MR. BRENNAN: I believe that would be the better
19 approach.

20 THE COURT: Thank you.

21 Mr. Wesoky, your position.

22 MR. WESOKY: Excuse me, your Honor. I am having
23 difficulty in discerning the difference between the two second
24 forms B.

25 THE COURT: The initial proposed Verdict Form B, of

1 course, consisted of three pages.

2 MR. WESOKY: Right. That's out. We understand that.

3 THE COURT: There is a corrected version of Verdict
4 Form B, but it addresses typographical errors only.

5 MR. WESOKY: Oh, I am sorry.

6 THE COURT: But I really am asking you to focus now on
7 the second version which consists of four pages, so if you
8 quickly examine the footer, that's your key.

9 MR. WESOKY: My confusion came when I was looking at
10 both forms B. I thought there was a substantive difference.

11 MR. BRENNAN: Your Honor, I am afraid all of my form Bs
12 have three pages. I wonder if it's possible --

13 MR. LUJAN: Here you go, Mark.

14 MR. BRENNAN: Thank you, Chris. Thanks.

15 THE COURT: Counsel, thank you.

16 MR. WESOKY: Your Honor, defendant has no objection,
17 other than as stated by the court.

18 THE COURT: Very well. Then again, contingent on the
19 court's ruling vis-a-vis the defendant's objection on the proper
20 instruction concerning damages, the four-page version of Verdict
21 Form B is tentatively approved.

22 MR. BRENNAN: I would only ask that the line for the
23 answer be made much longer if you would, your Honor.

24 THE COURT: Now, consistent with my practice standards
25 that required you to submit all proposed jury instructions and

1 verdict forms in a timely fashion, and with the exception of
2 only instructions, the need for which arose unexpectedly during
3 the course of trial, let me inquire of the parties.

4 Mr. Brennan, does the plaintiff have any other jury
5 instructions or verdict forms to tender for consideration?

6 MR. BRENNAN: None at this time, your Honor. I wonder
7 if we might be provided with an opportunity to prepare a brief
8 instruction with respect to the supremacy clause under the
9 United States Constitution and their obligation to take it into
10 account, or a modification of the age discrimination instruction
11 to that effect.

12 THE COURT: Well, time permitting, and time is growing
13 short, the court is not going to summarily foreclose that, but
14 the problem with instructing them on the supremacy clause has
15 many of the same perils as instructing them on the statutory
16 scheme, and I am not sure whether we are taking one step forward
17 but then reversing course two steps. I am not.

18 MR. BRENNAN: If I may, could I reflect on that and let
19 the court know if I think we want to go forward on that basis?

20 THE COURT: You may. Thank you.

21 Again, with that same preface and introduction tethered
22 to the court's requirements prefaced in its standard practice,
23 does the defendant have additional instructions or verdict forms
24 to tender?

25 MR. WESOKY: No, your Honor.

1 THE COURT: The court is now in recess for the time
2 sufficient to resolve the unresolved objections by the parties
3 to various jury instructions and verdict forms.

4 We are in recess.

5 (Recess at 9:10 a.m., until 10:20 a.m.)

6 THE COURT: Again, good morning, and thank you. And
7 again please be seated.

8 We again convene on the record in open court, again
9 deliberately outside the presence and hearing of all jurors who
10 remain in a temporary state and status of recess vis-a-vis these
11 trial proceedings, to conclude our jury instruction and charging
12 conference.

13 The Clerk of the Court has delivered to counsel the
14 court's 32 approved jury instructions and Verdict Forms A and B.

15 Digressing to original Instruction No. 18, I say
16 original, because some of the orders and actions taken by the
17 court, whether stipulated or not, have affected the numbering of
18 the subsequent and final jury instructions.

19 Concerning original Jury Instruction No. 18, the
20 defendant's objection is overruled.

21 Concerning original Instruction No. 22, the plaintiff's
22 objection is granted in part, and as a result, the court has
23 excised from original Instruction No. 22 the -- that portion of
24 the second paragraph that speaks to a presumption.

25 With respect to original Instruction No. 23, the

1 plaintiff's objection is overruled.

2 With respect to Instruction No. 26, as it ripples in
3 its effect on the verdict forms, the defendant's objection
4 concerning the appropriate type of compensatory damages, being
5 limited to back pay, is sustained.

6 During the charging conference, I approved certain
7 instructions and verdict forms tentatively. Either to which the
8 parties stipulated or about which there was no objection. I
9 have carefully considered all other instructions and verdict
10 forms. I have carefully considered objections to the
11 instructions and verdict forms. I have carefully considered all
12 reasons stated, arguments advanced, and authorities cited by the
13 parties during the charging conferences, and on previous
14 occasions, giving them the benefit of all relevant argument and
15 authority.

16 I have, of course, considered whether proposed and
17 tendered instructions and verdict forms were filed in the time
18 and manner required by my own practice standards, REB Civil
19 Practice Standard V.B.4.

20 Having engaged in that comprehensive analysis, I find
21 and conclude as follows: That the court's final Instructions 1
22 through 32 and Verdict Forms A and B as a whole are supported by
23 the evidence, and that they properly, plainly, and accurately
24 instruct the jury on every issue presented.

25 That the court's proposed -- not proposed -- but final

1 instructions and verdict forms are not repetitive, redundant or
2 superfluous, and do not unduly emphasize any single issue or
3 evidentiary excerpt, and do not contain improper or incomplete
4 statements of the law.

5 That the court's instructions and verdict forms as now
6 presented to the parties are not likely to confuse or distract
7 the jury, nor are they likely to unreasonably and unnecessarily
8 extenuate or vitiate a required statement of the law.

9 That the instructions and verdict forms now of the
10 court are designed and organized to provide this jury with a
11 complete and coherent method and basis by which to discharge
12 their solemn duties in this case.

13 That concerning any proposed or tendered instructions
14 and verdict forms which I have considered and rejected, I
15 approve, adopt and incorporate all reasons stated, arguments
16 advanced and authorities cited by the party opposing that
17 instruction or verdict form, which has been rejected.

18 Therefore, it is ordered as follows: Instructions 1
19 through 32 and Verdict Forms A and B are approved for inclusion
20 in this court's charge to this jury, and that all other proposed
21 and tendered jury instructions and verdict forms are
22 respectfully rejected.

23 Done in open court effective forthwith.

24 Counsel, please note that I do not require the reporter
25 to make a record as the court reads the instructions and verdict

1 forms for the jury. Copies of the jury instructions and verdict
2 forms will be provided by the court to each juror, in addition
3 to the original instructions and verdict forms.

4 As I read the instructions and verdict forms to the
5 jury, may I make those amendments which may be necessary as a
6 result of typographical, clerical or syntactical error, and also
7 thereafter, may I authorize and direct the Clerk of the Court to
8 amend any affected instruction or verdict form to coincide with
9 its proper reading by the court.

10 Any objection by plaintiff?

11 MR. BRENNAN: No, sir.

12 THE COURT: Or by defendant?

13 MR. WESOKY: No, your Honor.

14 THE COURT: It is my practice in those circumstances,
15 hopefully limited in this case, to call to the attention of all
16 parties in interest, including the jurors, the mistake or the
17 error, ask that they correct it holographically, and pledge to
18 supply them with an amended instruction or verdict form as soon
19 as practicable.

20 Counsel, pursuant to the court's Trial Preparation
21 Conference Order, final argument shall be limited to 45 minutes
22 total for each side. This limitation will be strictly enforced
23 after this lengthy trial.

24 Please keep your own time. The plaintiff may reserve
25 time for rebuttal, and Mr. Brennan, if you intend to do and know

1 the amount of time you wish to reserve for rebuttal, if you will
2 communicate that to the court, we will assist you in preserving
3 that time, and the way in which we will do that, when you have
4 one minute remaining in that phase of the closing argument,
5 Mrs. Kramer will call that to your attention, fully with the
6 expectation that you make the necessary transition to be
7 concluded in the time provided by the court.

8 Gentlemen, this will be strictly enforced. At the end
9 of the time allocated, your argument will be terminated, so
10 please plan accordingly and take the steps necessary now to
11 eschew any chagrin or embarrassment that might occur by such an
12 occurrence.

13 Also, if you have any questions or concerns about the
14 evidence that has been properly admitted in the trial of this
15 case, you must confer and confirm that evidence with
16 Mrs. Kramer.

17 Very well. We shall be in momentary recess for the
18 time necessary to finish copying these jury instructions and
19 verdict forms for this jury, and for the time necessary for them
20 to be shown into open court.

21 So please stay tuned. We are in recess.

22 (Recess at 10:25 a.m., until 10:40 a.m.)

23 THE COURT: Good morning, please. Thank you and please
24 be seated.

25 Again, ladies and gentlemen, all of us involved in the

1 trial of this important case continue to appreciate your
2 patience and your indulgence.

3 Again, I can represent, without condition or
4 qualification, while you have been waiting, we have been
5 working. We have completed all of the prodigious business that
6 we must as a matter of law and are prepared to resume these
7 trial proceedings together.

8 Without further ado, madam clerk, if you will tender to
9 each of our jurors the court's Instructions 1 through 32 and
10 Verdict Forms A and B. These copies are for you, ladies and
11 gentlemen. As you receive them, I exhort you to write your name
12 on them, please.

13 Ladies and gentlemen, I will now read to you the
14 instructions on the law applicable to this case. After I have
15 instructed you on the law, and after the plaintiff has made his
16 initial closing argument, we shall recess, and then following
17 that recess, the defendant will be provided an opportunity, of
18 course, to make its closing argument, followed by which we shall
19 have the benefit of the plaintiff's concluding closing argument
20 by way of response or rebuttal.

21 Each of you will have copies of these jury instructions
22 and verdict forms. Additionally, you will be required, of
23 course, to take with you for your further reading, review, and
24 consideration, the original jury instructions and verdict forms.

25 And even though you have copies and will have the

1 originals, as I read the instructions and verdict forms to you,
2 please pay close attention. In fact, I encourage you that you
3 follow along on your own packet of instructions and verdict
4 forms.

5 If I find typographical or clerical errors in the
6 instructions or the verdict forms as I read them to you, I will
7 attempt to call those errors to your attention for tentative
8 correction, and thereafter I will provide you with corrected or
9 amended copies as soon as practicable.

10 Additionally, if there are discrepancies or
11 inconsistencies between the original jury instructions and
12 verdict forms, and your copies of those same instructions and
13 verdict forms, you, of course, must rely on the originals.

14 Now, please do not return your copy of the instructions
15 and verdict forms at the conclusion of the trial. These are for
16 you to do with as you choose and may.

17 Please, of course, do not mark or deface the original
18 jury instructions or any of the trial exhibits which will be
19 made available to you for the purpose of your solemn
20 deliberations.

21 Now, you must never, of course, be concerned with or
22 affected by the appearance or the format of the instructions and
23 verdict forms, including any differences in style of print, in
24 size of print or font.

25 Very well. Ladies and gentlemen, with those

1 preliminary matters, I read you the instructions on the law and
2 verdict forms applicable in the trial of this case.

3 (The jury instructions were read to the jury by the court,
4 but were not reported herein pursuant to order of the court.)

5 THE COURT: Ladies and gentlemen, those are the
6 instructions and verdict forms approved by this court for your
7 consideration and use during your solemn deliberations.

8 Very well. The attorneys will now present closing
9 arguments, commencing with counsel for the plaintiff, after
10 which we shall declare our noon recess, to be followed by
11 closing argument by counsel for the defendant, and then
12 concluding with rebuttal or responsive closing argument by the
13 plaintiff.

14 I remind you, like opening statements, closing
15 arguments by counsel are not evidence and should not be
16 considered as such by you.

17 Very well. If the plaintiff is prepared to make his
18 closing argument, Mr. Brennan, he may.

19 MR. BRENNAN: Your Honor, thank you very much.

20 THE COURT: You are welcome.

21 CLOSING ARGUMENT

22 MR. BRENNAN: And thank you all so very much, ladies
23 and gentlemen of the jury. I deeply appreciate your great
24 patience and attentiveness that you have displayed throughout
25 this proceeding, notwithstanding my at times somewhat annoying

1 habit of covering the same ground more than once.

2 I hope that you will understand that for the plaintiff,
3 for his wife and for myself, we come to the end of a very long
4 road in an effort to secure simple justice for my client, when
5 we have failed to achieve it elsewhere.

6 Perhaps you have heard of places such as St. Laurent
7 sur-Mer, or Cobiél sur-Mer, L'Orange, Ste.-Mère-Eglise. These
8 are all little towns in a country called France, of which none
9 of us might have heard but for the acts of some true heroes.

10 It has been my privilege in recent years to be allowed
11 to travel there to these places I had read about as a child, and
12 I longed to see, and to recognize just what a tremendous act of
13 heroism many of our fathers' generation undertook when they
14 liberated France from Nazi Germany and freeing all of Europe
15 from Nazi Germany. We don't often, I think, contemplate just
16 how significant an accomplishment that was.

17 Likewise, some of our sons and daughters may be in Iraq
18 now attempting to accomplish much the same thing, in some ways
19 under much more difficult circumstances.

20 Their deaths, however tragic or heroic or seemingly
21 pointless they may seem to us now, will one day, when people of
22 the country of Iraq have achieved the same freedom that this
23 country gave to France sixty years ago, to be viewed by our
24 grandchildren as equally heroic and worthwhile, I believe.

25 All we ask in our lives is that we reach a point that,

1 as I develop more and more gray hair, and less and less of it,
2 at the same time I think about this once in a while; all we ask
3 is something very simple, which is that as we reach the end of
4 our lives, we can look back with pride on what we have
5 accomplished, whether it has been noticed by the world or not,
6 and whatever it may have been.

7 Whether it may have been to have saved the lives of
8 others, and thus fulfilled the injunction we have heard, that
9 there is no greater love than a man may have for another than
10 that he shall die for his brother.

11 For some of us it may simply be the opportunity to
12 secure justice for our fellow man for time to time. For others,
13 it may have been simply to have worked hard in a career to
14 support our families so that our children might have
15 opportunities that we ourselves did not.

16 I am sure all of us have been beneficiaries of that in
17 some way or another. All Bill Cadorna ever wanted to be was a
18 hero of a special kind, a firefighter. Someone who was prepared
19 to give his life for his brother man, if necessary. Someone
20 willing to endure danger few of us would approach willingly,
21 knowing the risk, but nevertheless undertaking that risk because
22 it was felt that was his obligation as a man, as a human being
23 on earth, placed on this earth for some purpose other than to
24 simply occupy a little space and consume a little oxygen.
25 That's what this case is really all about; the measure of a

1 man's life.

2 I would say to you this. The measure of my client's
3 life was taken by the City of Denver and found wanting on the
4 basis of the thinnest of possible pretexts, and for reasons
5 unrelated to whether he deserved to be rewarded for his work on
6 behalf of the people of the City & County of Denver for 27 years
7 as a loyal firefighter, with such a dramatic and shameful, I
8 would submit, destruction of his name, his reputation, and his
9 career.

10 They have put my client in a position in which he comes
11 to the end of his life, not able to take great pride and joy in
12 the work that he did on behalf of the people of the City &
13 County of Denver, but instead, to live his life in the shadows
14 and in shame because for all the world knows he is a thief.

15 He still does not have his job as a firefighter back.
16 The City & County of Denver have these guardians of the
17 resources of the City & County of Denver in fulfillment of their
18 alleged fiduciary duty for the citizens of the City & County of
19 Denver, worked tooth and nail year after year through every
20 possible means to prevent him from getting back what they stole
21 from him.

22 They do so on the basis that the honor and integrity of
23 the department depends upon their keeping him from coming back
24 lest he sully their ranks, and yet as you have seen from the
25 evidence in this case, a theft was committed here, but not of a

1 cookbook.

2 All of the evidence presented to you shows my client
3 was given permission to take the cookbook by Safeway clerk Kevin
4 McKee, and he did so. In retrospect, would my client gladly
5 have paid for a new one had he recognized the implications for
6 his career? You may be assured he would. Nevertheless, he
7 acted in good faith in believing the store clerk had authority
8 to give him permission to take another cookbook to replace one
9 he had lost, and he did so.

10 All he asks is that someone finally recognize that in
11 that action, which Kevin McKee himself has admitted occurred,
12 and which all of the witnesses for the city could only say was
13 verified by my client walking out of the store after having been
14 given the cookbook, and thus it was not shoplifting, is that
15 someone finally recognized, someone who could be dependent on to
16 issue a fair and reasonable judgment in this case at last, that
17 what he did may not have been the smartest thing in the world to
18 do, but it was not illegal and was not cause for depriving him
19 of the dignity and honor that he enjoyed for so long as a
20 firefighter.

21 You are called upon to make that judgment, not because
22 my client just can't settle for the fair outcome that he
23 received previously, but precisely because he has yet to receive
24 a fair outcome.

25 In this case, the city, through its decision-making

1 officials, the Civil Service Commission, hearing officer John
2 Criswell, and the Civil Service Commission, have found that he
3 did not in fact commit the theft that he was accused of
4 committing, based on evidence not unlike that which you have
5 heard in this case.

6 You are not really called upon to decide whether my
7 client is a thief, but instead to decide whether the actions of
8 the city in terminating my client on the basis of an allegation
9 of theft were invented as a pretext, a false excuse for
10 terminating him because of his age, and were later used as the
11 basis for refusing to reinstate him on account of his age.

12 You are called upon in this case to recognize certain
13 facts which the court has read to you in stipulations and which
14 are placed before you that indicate that my client did not in
15 fact apply for retirement until after his involuntary
16 termination.

17 There is no dispute about that fact. The city has
18 attempted to persuade you otherwise, but it is bound by the
19 stipulations into which it has entered, as well as by the
20 evidence.

21 Joe Hart is a good guy. I think you would all agree.
22 You watched him testify, and he seems on the face of it to be a
23 nice fellow. He has a good smile. He can't be such a bad guy
24 else he wouldn't be an assistant Fire Chief.

25 Joe Hart nevertheless, for reasons that remain unclear,

1 took it upon myself to drive my client from his position as a
2 firefighter on the basis of an allegation of shoplifting he knew
3 to be false.

4 You will recall, and the evidence will show, that Joe
5 Hart prepared a written statement dated December 8th, 2002, on
6 the first page of which he indicated that my client could not
7 have been given permission to take the cookbook in question for
8 the reason that the clerk in question was not working on the day
9 in question. And that was the basis upon which Joe Hart
10 recommended dismissal of my client.

11 That was not true. For as the evidence has plainly
12 shown, Kevin McKee did give permission. Kevin McKee's statement
13 so indicates. Michael Brown's deposition testimony leaves no
14 dispute about it.

15 You will recall Michael Brown testifying that on the
16 morning of December 8, 2002, when Joseph Hart came to the
17 Safeway store to interview him and asked him to file a charge of
18 theft against my client, Kevin McKee told Michael Brown that he
19 had given permission to my client to take a cookbook.

20 This was not a case of simple confusion. This was not
21 a case of honest belief that a crime had occurred. This was a
22 case of Joe Hart going to Safeway and soliciting Safeway's
23 cooperation in a deliberate and well-planned plot to steal my
24 client's career from him. To steal in effect his life from him.

25 You are called upon to decide which is worse, taking a

1 cookbook given to you by a Safeway clerk, or going to such
2 enormous lengths as you have witnessed the City of Denver is
3 willing to go in this case to steal a man's life. Simply
4 because he has reached the point where he can be replaced by
5 someone who will do his job for half as much money.

6 I don't think it's all that complicated. Don't forget
7 that on the third page of this document, Joe Hart acknowledged
8 that he himself, even while he was requesting that my client be
9 prosecuted and terminated for theft, that he had been given a
10 copy of the very same cookbook by Safeway store manager Michael
11 Brown and was not required to pay for it.

12 Yet, we know that Mike -- that Joe Hart never requested
13 that he be charged with theft of a cookbook, even though in
14 circumstances almost identical to those upon which they have
15 justified the termination of my client for some three or four
16 years now, the city accepted a free concession from Safeway
17 without paying for it on the basis of the store manager saying,
18 don't worry about it, I know where to find you; not it, you.
19 The implication being, you are a chief of the fire department,
20 you are a good guy, Safeway loves you guys because you spend a
21 lot of money in our stores. My goodness, besides that you are
22 firefighters.

23 Remember this is just a year and some months after
24 September 11th at a time when firefighters in our society were
25 held up on an even higher pedestal than they were before, and it

1 was very high to begin with, and for good reason. For good
2 reason. They are the guys who run in when everybody else is
3 running out. Without them, our civilization could not exist.
4 Just as was true of the 9,387 men lying beneath beautiful marble
5 headstones in Cobiell sur-Mer, in France. Without firefighters,
6 our civilization could not exist.

7 Now, you will recall, as Michael Brown verified in his
8 statement, that he had within his possession evidence that
9 verified my client's story that he had lost another cookbook in
10 the store. Michael Brown came up with his idea of what had
11 happened, but you will recall the testimony under
12 cross-examination of Michael Brown in his video deposition and
13 elsewhere, established without any doubt that his speculation as
14 to what had happened could well have been wrong, and that there
15 was another very reasonable explanation for what had happened,
16 which was very consistent with what my client said in the
17 beginning, which was the book had been resold after being placed
18 back on the shelf, somebody realized that it had somebody else's
19 name in it, brought it back to the store eventually when they
20 remembered to do so, or perhaps having opened it just prior to
21 Christmas to make a recipe or give it to someone as a gift and
22 said, oh, my, goodness, this isn't mine. I better take it back.
23 And it was in the vein that it came to the store manager's
24 attention.

25 Now, of course, I will expect you will hear from the

1 city that Safeway is not a defendant here. Well, I think you
2 have heard enough testimony to prove beyond any reasonable
3 doubt, not just by a preponderance, that at the point at which
4 Joe Hart enlisted Safeway's help in prosecuting my client by
5 soliciting a criminal complaint against him for a crime it knew
6 already he had not committed.

7 Safeway store manager Michael Brown embarked on a
8 course of conduct that was designed to assist the City of Denver
9 in prosecution of my client.

10 I think it will also occur to you that Michael Brown,
11 once having filed the criminal complaint against my client as a
12 manager for Safeway, realized if he had made a mistake, he
13 himself could be in trouble because Safeway would inevitably be
14 sued for malicious prosecution. He therefore had an incentive
15 himself to put the best face on the situation and make it sound
16 as though all of the evidence proved my client was somehow
17 dishonest and had come back into the store with another copy of
18 the cookbook, being clever enough to realize if it turned up, it
19 would verify his story.

20 That's the least reasonable explanation of what
21 happened. The more reasonable explanation is, as they have
22 testified, the store clerk, seeing it somewhere in the store
23 where it shouldn't be, picked it up off a meat counter or
24 wherever it was, and took it back to where it belonged on the
25 store shelf, since evidently it had not been sold and still had

1 a sticker on it, and somebody took it off the shelf without
2 reading the first page, which is entirely possible, said, oh, I
3 have been waiting for that a long time, just like Bill had.

4 If you look at the cookbook, there is a letter from
5 Wellington Webb at the very beginning saying, this is the
6 official cookbook of the City & County of Denver, please buy it.
7 My client did so. It changed his life. What a dangerous day
8 that was for him.

9 Now, Safeway did something very wrong. They concealed
10 evidence that tended to corroborate my client's story. Why is
11 the city responsible for that? Safeway did something else
12 wrong. Safeway lied under oath in a criminal trial where the
13 city attorney's office was trying to convict my client of a
14 crime he did not commit to support its pretext for terminating
15 him, which was theft.

16 If they could convict him of theft, they wouldn't have
17 any worries. Because he wouldn't stand a chance, their having
18 proven beyond a reasonable doubt he was a thief, of getting his
19 job back from the Civil Service Commission appeal that was then
20 pending. They had a huge incentive to try to convict him. So
21 much so that when they failed the first time on May 7, 2003,
22 they scheduled it for trial again in June.

23 Think about the resources the City & County of Denver
24 was utilizing to convict my client of a crime they knew already
25 he had not committed, based on what Michael Brown had told Joe

1 Hart. Think of what resources were wasted because Safeway, in
2 its effort to assist the city attorney's office in prosecuting
3 my client, lied about the book having been found. Think about
4 what good guardians of the resources of the City & County of
5 Denver, the city attorney's office, and the Denver Fire
6 Department really are.

7 Now, why is the city responsible for what Safeway did?
8 The reason is that because they needed to support their pretext
9 for terminating, and then refusing to reinstate my client, after
10 he was found not to have been discharged, they absolutely had to
11 get a conviction. They couldn't get one without Michael Brown's
12 help. When they found out Michael Brown had committed the
13 felony of perjury in an effort to assist them, they took no
14 action.

15 The stipulations, I believe, include a statement by the
16 city acknowledging that notwithstanding its understanding of the
17 commission of an extremely serious crime, a crime that strikes
18 at the heart of our system of justice, a crime that is as
19 subversive as any crime you can possibly imagine of our
20 civilization, because our civilization depends upon the system
21 in which you are participating right now, else we would be
22 little different from Iraq. They did nothing.

23 They have made us listen to witness after witness say
24 this is all about the honor and integrity of the Denver Fire
25 Department. And by implication, the honor and integrity of the

1 City & County of Denver. These are the representatives of the
2 honor and integrity of the City & County of Denver, and upon
3 learning of the commission of a felony crime in the course of an
4 effort to convict my client of a crime he did not commit, what
5 did they do? Absolutely nothing.

6 Instead, they sat back and continued to fight tooth and
7 nail to this very day to prevent my client from regaining his
8 employment.

9 MR. WESOKY: Your Honor, with due respect, I hate to
10 object during a closing argument, but the implication of the
11 city attorney's office is improper, your Honor, and I object.

12 THE COURT: Well, I am going to admonish all counsel
13 not to make personal their argument as to any counsel currently
14 involved in this trial.

15 Very well. Mr. Brennan, you may continue and resume
16 your closing argument.

17 MR. BRENNAN: Thank you, your Honor. I did not mean to
18 cast aspersion upon Mr. Wesoky individually. To the extent I
19 seemed to do so, I apologize.

20 Now, they are responsible because they took the
21 position -- the City & County of Denver did, including the Civil
22 Service Commission ultimately, that my client, although he did
23 not commit the theft, nevertheless deserves to be treated as
24 though he had. And that he should suffer a penalty adding up to
25 hundreds of thousands of dollars in lost earnings and retirement

1 benefits, even though they knew he did not commit the theft
2 because they had failed to convict him, and given the
3 constitutional presumption of innocence until proven guilty,
4 they had failed to convict him. On that basis, they should have
5 said, Bill, we want you to come back to work.

6 Remember, they had the ability to say, lets hold off,
7 lets do more investigation, or lets wait and see what happened
8 in the criminal case before we make a decision as to this man's
9 guilt or innocence, but they couldn't wait.

10 Remember, they had the ability to use highly-trained
11 investigators from the Denver Police Department, if they wished,
12 although they had them in the Human Resources Bureau of the fire
13 department as well, to find out exactly what happened.

14 If they had any problems with what Kevin McKee said
15 versus my client or what any witnesses said, or if there might
16 have been other witnesses who had knowledge, all they had to do
17 was send one of their dozens and dozens of professional
18 investigators out from the Department of Public Safety, police
19 or fire department, to interview those witnesses, take
20 tape-recorded statements, transcribe them, sit down and look at
21 them and say, okay, is there a conflict, or is there
22 corroboration. That is, does Kevin McKee support Mr. Cadorna or
23 does he prove him to be a liar.

24 All they had as of January 2nd was evidence that Kevin
25 McKee agreed with my client. All they had -- you recall those

1 four little statements that Joe Hart took -- all they had was
2 Kevin McKee's statement, yeah, I talked to Bill about a cookbook
3 and in effect I know you can fire me so I am a little afraid to
4 come right out and admit it but, yeah, I let him take the
5 cookbook.

6 Then they had three statements from firefighters saying
7 exactly this. Remember, Frank Hoffman said, I saw him walk out
8 of the store with a cookbook. Gil Lettig, the other guy who is
9 shopping with him in the store, says, I don't know whether he
10 took it out of the store or back in. I did see him in the store
11 with it. Russ Dobson said, I saw him walk out of the store with
12 the cookbook. Well, if he had been given permission to take the
13 cookbook, of course they saw him walk out with it.

14 If he had not been given permission and he intended to
15 steal it, one assumes they would not have seen it because he
16 would have hidden it in his sweatshirt or done something else.

17 It's a big book, but it's not that big, and my client
18 is a barrel-chested fellow, you might say, extremely strong, and
19 I think it goes without saying if he actually wanted to steal
20 it, he could have. The question is why?

21 It's a \$20 cookbook. Nothing of great value. He has a
22 big collection of cookbooks. Why not pay for it just like he
23 did every other cookbook he ever owned? They have never been
24 able to answer that question. They have presented no evidence
25 indicating that he had any motive to take it. They just say,

1 take our word for it he did, even though all the evidence shows
2 he did not. That doesn't pass.

3 What about after his termination. You recall the
4 evidence in the record is that he applied for this age and
5 service retirement first, was approved. His application was
6 completed March 13th, 2003. Well, my goodness, two-and-a-half
7 months, more or less, after he was fired. No dispute about
8 that.

9 The hearing officer for the City & County of Denver, of
10 course understood and realized that because that was the only
11 evidence in front of him in the hearing, and that's why he said
12 in paragraph D of the issues, assuming the hearing officer
13 determines that the evidence fails to sustain the charges made
14 against Cadorna, what is the appropriate remedial order that the
15 hearing officer should enter, considering that, after his
16 dismissal, Cadorna applied for and received a pension based upon
17 his age and years of service, for which he later substituted a
18 pension based upon an alleged disability. Understand, the
19 hearing officer knew quite well my client retired after his
20 retirement.

21 You will remember later in his decision at page 21 the
22 hearing officer said -- and you will have to excuse me, I think
23 we are missing the second page -- down at the bottom, there is a
24 sentence that says, I also conclude that in passing upon a
25 disciplinary action before -- imposed before, and on page 22,

1 and please take a look at it when you have a chance, before a
2 member's retirement. That is in passing upon a retirement after
3 dismissal, I lack the authority to reinstate Mr. Cadorna.

4 Understand and realize that the hearing officer, though
5 he is a pretty smart guy and he knows the law fairly well, made
6 a big mistake because in response to an argument from the City &
7 County of Denver, he concluded that even though they failed to
8 prove what they contended all along, which is my client is a
9 thief, my client should nevertheless not get his job back, and
10 the reason that he should not get his job back is he took a
11 retirement after his unlawful dismissal. Remember, the hearing
12 officer said, this guy didn't commit the crime.

13 The city, knowing it couldn't prove he committed the
14 crime, said, well, now, wait a minute, okay, lets try to think
15 of another reason we can keep this guy away, because we don't
16 want to admit we made a mistake. We don't want to admit we
17 suborned perjury. We don't want to admit we have taken
18 advantage of false evidence from the beginning as an excuse for
19 terminating this man for reasons that are unlawful, so we have
20 to come up with a new reason why he can't get his job back. Why
21 he should in effect suffer a \$365,000 fine for something he
22 didn't do.

23 THE COURTROOM DEPUTY: Counsel, you have one minute.

24 MR. BRENNAN: One minute? Thank you, ma'am.

25 Nevertheless, the Civil Service Commission of the City

1 & County of Denver decided that they were going to come up with
2 a new reason, which was because the hearing officer in one
3 section of his decision mistakenly said Mr. Cadorna applied
4 prior to dismissal, which was a complete mistake and
5 inconsistent with all the evidence, we are going to seize upon
6 that as grounds for saying because he applied for retirement
7 prior to dismissal, he cannot be reinstated because, after all,
8 if he had applied for retirement prior to dismissal, that means
9 he retired prior to dismissal, that means he could not have been
10 fired, therefore he has no basis for appeal.

11 Well, this is news to us. It was news to the city
12 because everybody in the hearing before the hearing officer,
13 including the hearing officer, understood the real facts were he
14 applied for retirement after dismissal. They nevertheless
15 refused to consider his appeal, and affirmed the hearing
16 officer's unlawful decision that he could not be reinstated
17 because he was over fifty.

18 The consequence is we had to come here and ask you,
19 ladies and gentlemen of the jury, to say, sorry, the City &
20 County of Denver in the form of its hearing officer, Civil
21 Service Commission, and city attorney's office evidently have
22 not read the Age Discrimination in Employment statute and do not
23 realize you cannot refuse to reinstate someone because he is
24 over fifty.

25 We don't care what state law says because federal law

1 is supreme under the United States Constitution. The result?
2 My client has been put in a position where as Ida Roberts, their
3 own witness, has testified he has lost a tremendous amount of
4 money.

5 Mind you, we have not come in and asked for the sun,
6 the moon and the stars. My client is a firefighter, not a
7 gambler. He is a man who has only wanted what he has got coming
8 to him, nothing more, nothing less. He just wants to be put
9 somehow back where he was in December of 2002, as though this
10 had never happened. That's all he asked, ladies and gentlemen.

11 THE COURT: Counsel, excuse me. You may slow down.
12 You have more than the one minute. The original time was not
13 computed correctly.

14 MRS. CADORNA: Thank you.

15 THE COURT: You have until 11:53, and thus have six
16 minutes remaining in your main statement.

17 MR. BRENNAN: Thank you very much, your Honor. I was a
18 little perplexed, but I was not about to challenge Mrs. Kramer,
19 lest I be beaten about the ears.

20 Now, of course I don't necessarily have to take up the
21 whole six minutes, and I know you have been waiting a long time.
22 These are important facts so allow me a little more time, if you
23 will.

24 The hearing officer -- I will backtrack a little bit --
25 don't be tempted into thinking that the hearing officer somehow

1 is the better authority than you on what the law requires.

2 Under our system of government, the most powerful
3 people in this country are, at least according to the
4 Constitution, something in which I think all of you believe as
5 strongly as I, are the people sitting in that box this morning.
6 Believe it or not. It's not the people sitting on the Supreme
7 Court. It's not the President of the United States. It is you.
8 Our entire constitutional system was premised on that because
9 our founding fathers realized that absent the right to jury by
10 one's peers, one would always be subject to the kinds of abuses
11 to which one is subject, even in a kingdom as apparently
12 democratic as Great Britain in 1776.

13 If you go, as I have, to the Tower of London, the end
14 of the tour by the Beefeaters takes you to the little chapel
15 where those about to be executed were allowed pray.

16 They discovered when they had to rebuild the foundation
17 that there were some 1200 skeletons of people who had been
18 murdered in the night by the king's troops, and buried without
19 comment or even trial or public spectacle.

20 That was the world in which our forefathers, who came
21 to this country, lived, and that is why they gave you the
22 ultimate power to decide, not the hearing officer for the Civil
23 Service Commission, because otherwise there is no possibility of
24 justice so long as those who have all the wealth and power at
25 their disposal have the only say on what is lawful and proper.

1 The hearing officer said Mr. Cadorna cannot have his
2 job back because he is over fifty. He said that. Read the
3 decision. You will see that. The Age Discrimination in
4 Employment Act prohibits that.

5 His purported reliance upon a state statute does not
6 excuse it because federal law is paramount. That is why we are
7 in this court because this court has the ultimate say, not a
8 state court, not the hearing officer, on what the law of the
9 land truly is.

10 And the law of the land is you cannot refuse to
11 reinstate somebody because of his age. Do not be misled. The
12 Civil Service Commission, in coming up with the pretext that he
13 retired prior to dismissal, seized upon what it knew to be
14 false. The highest policy-making body and official, and that's
15 in the stipulations for the City & County of Denver, the Civil
16 Service Commission, deliberately relied upon what it knew to be
17 false, which was a misstatement of facts which was contradicted
18 by the two statements of fact I have recited here; that my
19 client applied for retirement before dismissal. That's a false
20 reason. There was no evidence in the record of any kind to
21 support it. Your stipulations will also tell you that.

22 That is a classic pretext for discrimination. They
23 have relied upon something that is not just false, but something
24 they knew to be false from the beginning.

25 Once having been given permission by the Civil Service

1 Commission to run with it, the city attorney's office has
2 attempted to obstruct my client's efforts to seek justice by
3 continuing with the argument that he retired prior to dismissal,
4 notwithstanding their complete inability to prove that to be
5 so --

6 MR. WESOKY: Your Honor, I must object.

7 MR. BRENNAN: -- through evidence in the record. These
8 are the damages --

9 MR. WESOKY: Your Honor, I must object.

10 MR. BRENNAN: These are the damages, ladies and
11 gentlemen. That's all my client has, and that is that he be
12 given back what he lost, nothing more, nothing less.

13 THE COURT: Mr. Brennan, excuse me.

14 MR. BRENNAN: Thank you.

15 THE COURT: Mr. Wesoky.

16 MR. WESOKY: Again, I must object to the interjection
17 of the city attorney's office in this matter.

18 Thank you, your Honor.

19 THE COURT: Very well.

20 Mr. Brennan, where were you? Had you completed this
21 phase of your argument?

22 MR. BRENNAN: Well, I thought I heard time was up.

23 THE COURT: You did not. You have two minutes
24 remaining in your 35 minutes.

25 MR. BRENNAN: Very well. Thank you.

1 I am sorry, ladies and gentlemen, but lets just look
2 over this for a minute. This is the city's explanation.
3 Remember, my client testified he didn't voluntarily retire.
4 This is the city's version. They put that in there because
5 that's what they want you to believe.

6 He didn't voluntarily retire because they held a gun to
7 his head, as he testified. He had no choice. Put yourself in
8 his position. Ask yourself, if I were employed by the City &
9 County of Denver making of \$60,000 a year as a firefighter. I
10 am sending my kids to college, and suddenly my family income has
11 been cut pretty much in half, what am I going to do? Am I going
12 to sit back and wait until June 2006 on the hope that a jury,
13 wonderful people like you, is going to give me my job back, or I
14 will get my back pay to help my family to survive? No.

15 The only choice he had was to take advantage of
16 whatever income he had, particularly because he didn't stand a
17 chance of getting a job as a firefighter and having been fired
18 by the Denver Fire Department for being a thief.

19 They said he didn't bother to mitigate. What is he
20 supposed to do? Apply for a job as a firefighter? That's the
21 only thing he had ever done since getting out of the Army and
22 coming home from Viet Nam. That's what he knew how to do.
23 That's what he loved to do, and that's what he does best. And
24 that's what everybody has said he did very well.

25 Jerome Fleming, you remember him? He said, Billy is a

1 heck of a good firefighter. Great at medical emergencies.
2 Obviously the kind of guy he likes to work with.

3 Give him a chance to get his dignity and honor back,
4 ladies and gentlemen. Put him back on the job. Tell the City &
5 County of Denver they can't do this to their employees because
6 if you say what they did here was acceptable, there is not a
7 retirement-eligible employee in the City & County of Denver who
8 will not be vulnerable to exactly the same thing.

9 All they have to do is make up a case, fire him, force
10 him to retire, and then say, wait a minute, you retired, you
11 can't come back. Talk about Catch-22. If there ever were a
12 Catch-22, it's what they did to my client.

13 Please give him back what he has asked, and don't
14 forget those additional amounts he told you about in testimony.
15 They forgot to put in the vacation/sick pay. They forgot to put
16 in a little extra in his DROP account.

17 If you put him there, then you will have put him back
18 to where he was in December 7th of 2002. We have a chance to
19 put the genie back in the bottle here before it starts praying
20 on others in the City & County of Denver. Thank you very much.

21 THE COURT: Counsel, thank you.

22 Very well. A propitious time for us to take and
23 declare our traditional noon recess in the context of these
24 trial proceedings.

25 I will ask that we all return and report for further

1 duty and service in this case at one o'clock p.m., as measured
2 by the courtroom clock, our official chronometer.

3 Ladies and gentlemen, once again please leave and store
4 your note-taking materials across the hall in your suite, and of
5 course, be ever mindful, especially now, of the important rules
6 that even now continue your conduct and deportment as trial
7 jurors in this case.

8 We are in recess as concerns this trial until one
9 o'clock p.m.

10 (Lunch recess at 12:00 p.m., until 1:05 p.m.)

11 THE COURT: Good afternoon, ladies and gentlemen.
12 Thank you. Please be seated.

13 Very well. Once again as I survey the courtroom those
14 show should and must be present are in fact present and
15 presumably prepared to proceed.

16 Very well. Accordingly, if the defendant is prepared
17 to make its closing argument, it may. Mr. Wesoky.

18 MR. WESOKY: Thank you very much, your Honor.

19 THE COURT: You are welcome.

20 CLOSING ARGUMENT

21 MR. WESOKY: Thank you, your Honor. If the court
22 please.

23 THE COURT: You are welcome.

24 MR. WESOKY: Members of the jury, thank you very much
25 for your two weeks of attention to this case. All the parties

1 present appreciate it. We know it's not what you would like to
2 be doing, but we thank you. We thank you very much for doing
3 your civic duty.

4 If it were not for you, these proceedings could never
5 go forward, and justice might never be done.

6 This case, ladies and gentlemen, is an age
7 discrimination case. That's what this case is about. His Honor
8 instructed you that this was an age discrimination case, and his
9 Honor told you the elements that needed to be proven for this
10 age discrimination case.

11 That's most interesting because as I counted during
12 plaintiff's closing argument, age was mentioned twice. And why
13 was age mentioned twice? Because age was not present in the
14 decision-making process which you heard explicated from the
15 witness stand.

16 Why was age not present? The simple reasons came right
17 from that witness stand. It came from Tracy Howard, the Manager
18 of Safety, who was over sixty years old. It came from Rod
19 Juniel, the former Fire Chief, who was over fifty years of age.
20 It came from Chief Sestrich, who is approximately fifty years of
21 age, from Joe Hart, who is about fifty years of age, and from
22 the plaintiff, who is about fifty years of age. It defies logic
23 that people of an age group over fifty would discriminate
24 against a member of their own age group. It doesn't make sense.

25 Also, you will remember the testimony from the witness

1 stand, plaintiff never once complained that he was the victim of
2 age discrimination. Not once during his tenure at Station 27
3 when he was so picked on by Frank Howard -- I am sorry -- Frank
4 Hoffman. Not once did he say, this is because I am fifty, this
5 is because I am old. It was only because, according to
6 plaintiff, Frank Hoffman was vindictive and didn't like him.

7 The only complaint plaintiff ever made of age
8 discrimination came back in 1999 when he was at Station 25,
9 against people, strangers to this proceeding, a Captain Helmsley
10 and a Chief Marons. You heard plaintiff testify that his claim
11 back in 1999 had nothing to do with Chief Hart, Chief Juniell,
12 Tracy Howard or anybody involved in this case.

13 There was no evidence at all to support any claim of
14 age discrimination here. What plaintiff would have you believe
15 is this. That Joe Hart, an Assistant Chief of the Denver Fire
16 Department, came up with this scheme, this cooked-up idea, to
17 get rid of plaintiff, to get rid of plaintiff because he was
18 older, not to get rid of plaintiff because he didn't like him,
19 not to get rid of plaintiff because he couldn't stand him, but
20 to get rid of plaintiff because of his age.

21 And as his Honor instructed you, in order for plaintiff
22 to prevail on this case, he must prove to you -- must prove to
23 you -- that age was the factor; but for plaintiff's age, he
24 would not have been fired.

25 There is simply no evidence to support that. No

1 evidence of ageist comments. No evidence that plaintiff was
2 treated differently because of his age. He was treated the same
3 as Frank Hoffman, maybe even a little better when Frank got a
4 written reprimand and plaintiff a verbal, but then again
5 Mr. Hoffman was in the same age group, so where is the
6 difference in treatment? Doesn't exist. You heard no evidence
7 of it.

8 You heard Jerome Fleming testify. According to
9 plaintiff, Jerome Fleming was a terrific guy, man of integrity.
10 He did not mention anything about any picking on plaintiff
11 because of his age. Age is a stranger. Age was a stranger in
12 Station 27, and age was a stranger to the decision to terminate
13 the plaintiff.

14 Let's examine what Joe Hart did. He got a statement
15 from Frank Hoffman. The plaintiff left the store with a
16 cookbook when they got an emergency call, and that's what it
17 was, an emergency call, with a cookbook in his hand.

18 Lt. Hoffman thought that strange, so he told his chief.
19 Plaintiff would say, well, that was stupid. Mr. Hoffman should
20 have directly talked to Mr. Cadorna. But you heard Mr. Hoffman
21 testify, given the history between them, he felt it more
22 appropriate, indeed advisable, to talk directly to his chief,
23 and let the chief handle it, lest there be some confusion or
24 some accusation by plaintiff that Hoffman was making things up.

25 Hoffman did the right thing. Joe Hart took that

1 information and immediately tried to get to the bottom of it.
2 He talked to the firefighters involved, asked them to make
3 statements. He went to Safeway to try to find out the facts.
4 He talked to the very clerk who plaintiff claimed gave him
5 permission to take the cookbook.

6 Now, we are not here to relitigate that issue, but
7 there is one thing that is missing from this case. One
8 important witness. Kevin McKee. Where is Kevin? He wasn't
9 here.

10 Plaintiff could certainly have produced him to say,
11 yes, I gave Bill permission to take the cookbook, but he didn't.
12 Instead, what you have is Kevin McKee's statement, Exhibit
13 No. 1.

14 That statement says that Mr. Cadorna came and said
15 something about an exchange. Kind of an innocuous statement.
16 He had purchased a cookbook and had to make an exchange. I have
17 great respect for Bill Cadorna because he is a firefighter.
18 Nothing in here about, oh, I gave Mr. Cadorna permission to take
19 the cookbook.

20 So Chief Hart had reasonable grounds to believe
21 something was amiss. What did he do? He called his superior,
22 Chief Sestrich. Chief Sestrich says, if there is a chance of
23 criminal activity, we need to get the police involved. And
24 that's what was done.

25 Chief Hart didn't cook up this scheme to rid the fire

1 department of plaintiff. He was doing what he was authorized to
2 do. You heard testimony, oh, transcribed statements weren't
3 taken, oh, video recordings weren't taken, but you also heard
4 from Officer Jones from that witness stand and from Dave Schuetz
5 from that witness stand that field statements, written
6 statements, are perfectly fine. Exactly what Chief Hart did.

7 What did Chief Hart do next? He did the best he could.
8 He wrote up his memorandum, which you saw. I believe it's
9 Exhibit No. 15. Moved it up the chain of command. At that
10 point he was out of the process. Completely gone from the
11 process.

12 You will recall, Tracy Howard didn't talk to him.
13 Chief Juniel didn't talk to him. Nobody talked to him. At that
14 point he was gone out of the process. All he did was draft the
15 first draft of a Contemplation of Discipline letter. That was
16 refined and served on the plaintiff. That was served on
17 December 13th of 2002.

18 Plaintiff appeared on the 31st, pursuant to that
19 Contemplation of Discipline letter, and Chief Juniel, not
20 wishing to be prejudiced by other statements, not wishing to
21 have a pre-disposition to the matter, went to the
22 pre-disciplinary hearing and said, Mr. Cadorna, tell me what you
23 have to say, and I will listen, and he did.

24 Mr. Cadorna knew the reason he was there. He knew the
25 facts upon which the discipline, if it was going to happen, was

1 going to be based, and he responded.

2 Chief Juniel then being fair, looked at the other
3 evidence, and he determined, without the aid of Joe Hart,
4 without the aid of Frank Hoffman, that in his opinion, plaintiff
5 took the cookbook from Kevin McKee without permission, thus
6 sullyng the reputation of firefighters of the Denver Fire
7 Department.

8 He was so concerned about the allegations that you will
9 recall that in the pre-disciplinary meeting he said to
10 Mr. Cadorna, these are serious allegations, and they were. And
11 Chief Juniel acted on that.

12 Chief Juniel recommended termination to Tracy Howard.
13 Tracy Howard, the Manager of Safety, looked at the documents,
14 considered the evidence and decided, yes, I will approve and
15 affirm Chief Juniel's recommendation, which he did.

16 Now, plaintiff would have you believe that all of this
17 was somehow a pretext, a coverup for age discrimination, a
18 coverup for the fire department to rid itself of Mr. Cadorna,
19 not because they didn't like him, not because they thought he
20 was a bad guy, but because of his age.

21 That defies logic. Recall the testimony of Tracy
22 Howard. Recall he said, we passed the DROP program to retain
23 our older inexperienced workers. The city wanted to keep older
24 workers, not rid itself of them. And here plaintiff comes to
25 you and asks you to find that Joe Hart somehow cooked up this

1 scheme and pedalled his influence to Rod Juniel and Tracy
2 Howard, and they, acting for age discrimination reasons,
3 terminated the plaintiff.

4 Simply didn't happen. You may not agree with the
5 reasons for the termination. You may find them unwise. Indeed
6 unfair. You may find the investigation done was not what you
7 would have done. But that's not the issue.

8 This is an age discrimination case. Was the actions of
9 the Denver Fire Department, the Manager of Safety, done for the
10 purpose of discriminating against plaintiff solely on the basis
11 of his age.

12 Plaintiff would have you believe that because the city
13 could save a few thousand dollars in salary by getting rid of
14 plaintiff, and hiring a younger firefighter, that aha, there is
15 pretext, that's what they were doing, saving money.

16 The money saved is tiny given the budget of the fire
17 department. You recall Tracy Howard saying the budget of the
18 fire department was \$75 million. What would have been the net
19 savings to the city by replacing plaintiff with a younger
20 firefighter? 20,000, \$30,000 a year? Maybe. And then only for
21 a couple of years because you heard Tracy Howard say, they
22 advance pretty quickly through the ranks and become a
23 Firefighter 1, as plaintiff was, after four years.

24 To argue and contend that budget savings was the reason
25 for plaintiff's termination, again defies logic, and you folks,

1 as the judge instructed you, don't leave your common sense at
2 the courthouse door when you walk in, and plaintiff's claim that
3 he was terminated to save a few bucks on a \$75 million budget is
4 nonsense.

5 Plaintiff also claimed and asked you to not let this
6 happen to plaintiff because every older worker would then be in
7 danger of some cooked-up scheme to get rid of him or her to save
8 a few dollars.

9 There was not one shred of evidence that that happened
10 to anybody else. Again, the evidence was opposite. Tracy
11 Howard reinstated the DROP plan to retain our older workers,
12 our valuable experienced older workers.

13 Interestingly, plaintiff appealed his termination to
14 the Civil Service Commission. Final policy maker according to
15 plaintiff, and we don't disagree. They overturned the
16 termination. So how could there be age discrimination in the
17 termination when he wasn't terminated? The Civil Service
18 Commission handed him his job back. Yes, the Manager of Safety
19 did not prove by a preponderance of the evidence that plaintiff
20 had taken the cookbook from Safeway.

21 Now, plaintiff is claiming, oh, I didn't get my job
22 back, I didn't get everything I was entitled to because of age
23 discrimination. But wait. What happened? What happened was
24 plaintiff elected to retire.

25 You will recall that on February the 14th, 2003,

1 plaintiff came to the offices of the Denver Fire Department.
2 There was no evidence that any fire official said, Mr. Cadorna,
3 retire or else. Mr. Cadorna, retire or you will be sorry.
4 Mr. Cadorna, retire or we are going to get you. You better
5 retire. There was no coercion from his employer.

6 You will recall from plaintiff's opening statement that
7 Chief Sestrich had a keen interest in plaintiff's retirement.
8 That statement was not evidence. Instead, the evidence you
9 heard was only that Chief Sestrich talked to plaintiff once
10 about the 3rd of March in 2003 about dates. Nothing
11 threatening, nothing coercive at all.

12 On February 14th, before Chief Sestrich even talked to
13 the plaintiff, he came in to the Denver Fire Department, filled
14 out not one, not two, not three, not four, not five, not six
15 documents, but at least seven different documents relating to
16 his retirement.

17 He filled out Exhibit No. 30. Petition to be retired
18 and placed on an active list of the fire department. And his
19 disability would be for the rest of his life.

20 Nobody told him to do that. Nobody coerced him to
21 doing that. He did it on his own. He filled this document out
22 along with many others.

23 Take a look at the exhibit book you will have in your
24 deliberating room. He filled out Exhibit 31, Exhibit 34,
25 Exhibits 117, 118, 119, 120 and 121. All on February the 14th.

1 Mr. Cadorna obviously read them. Mr. Cadorna is a smart man.
2 He understood them. There is no evidence whatsoever that he
3 didn't understand what he was doing. He took this action on his
4 own.

5 Further evidence that it was voluntary and not coerced
6 is the fact that he could have stopped the process at any time
7 before March 13th, but he didn't. You will recall that he had a
8 disability physical set up for April the 1st. You will recall
9 he was notified of that on February the 25th by Karen McNeil in
10 the administrative offices of the Denver Fire Department.

11 Karen McNeil didn't hear that Mr. Cadorna had changed
12 his mind because he didn't. Mr. Cadorna had thought this
13 through. He was under no time pressure. He had plenty of time
14 to think about it. He made his choice.

15 From February 25th to April the 1st, awaiting the
16 disability retirement physical, he could have changed his mind
17 but he didn't. He went to the doctor, got his physical, and was
18 declared disabled from being a firefighter.

19 Unfortunately, plaintiff made a mistake in filling out
20 some of the paperwork. His petition for age and service
21 retirement. He got a call that he needed to come in and redo it
22 because of a glitch. He came in a month later on March the
23 13th. Again, plenty of time to reconsider. But he didn't.

24 And during that period of time, he had representation
25 from a union lawyer, Mr. Valentine. He could have contacted his

1 union representative or contacted other counsel if he didn't
2 know what he was doing. He didn't. He simply chose on his own
3 to come in and retire. A voluntary act. Without threat,
4 without coercion.

5 Plaintiff will have you believe, however, that his mere
6 financial status, that he didn't have a regular paycheck for a
7 month, was coercion. Coercion has to come from the employer not
8 from the need of money.

9 Plaintiff argued to you that there was a gun at the
10 back of his head. There was not. Plaintiff could have found
11 temporary employment. He worked at Lowe's and Home Depot. He
12 could have done that. He was a skilled EMT, emergency medical
13 tech, he could have done that. But he did not.

14 Moreover, you will recall that plaintiff had the right
15 to have a hearing on his appeal of his termination within 30
16 days, within 30 days of his appeal. But he opted not to. He
17 continued that hearing from the date it was originally set, the
18 27th of May, to July 15th. Continued it again to August, and
19 then continued it again until October. Plaintiff could have had
20 a quick determination. He simply elected not to.

21 Now, let's take a look at what the Civil Service
22 Commission hearing officer did and the Civil Service Commission.
23 In order for plaintiff to recover again, he must prove age
24 discrimination. That but for his age, he would have been
25 reinstated and would have had his job.

1 Please take a look at Exhibit No. 63. That is the
2 decision of the hearing officer. In that decision, which you
3 will have in your deliberating room, it says in the last
4 paragraph, in any event, I certainly have no authority to order
5 a member who has been determined to be physically unfit to
6 perform the duties of a fireman to be placed back on active
7 duty.

8 Quite logical. Makes quite a bit of sense.
9 Plaintiff's own act of seeking and receiving a voluntary
10 disability retirement tied the hands of the hearing officer. I
11 can't reinstate him. He took a disability retirement.

12 The hearing officer also noted, I am bound by state
13 law, and indeed he was. Is that a pretext for age
14 discrimination? Was it something that was done to cover up the
15 dastardly motives of the Civil Service Commission to keep
16 Mr. Cadorna from getting a job back? Was it a sham? Was it
17 something they dreamed up to cover up their ill motive of
18 discrimination on the basis of plaintiff's age because he was
19 over 40?

20 Again, that doesn't make logical sense. Of course not.
21 It was not a pretext for age discrimination. And that's what
22 plaintiff must show. Not that it's a coverup for a bad
23 decision. Not that it's a coverup because we didn't like this
24 guy and wanted him out. It has to be a coverup for age
25 discrimination. And age was simply not a factor here.

1 Consider December the 10th of 2002. On that day, you
2 heard from Rob Brady that he talked to the plaintiff, and the
3 plaintiff said, I'm going to retire.

4 Why did plaintiff say that? Well, let's look at the
5 facts. He was under threat of discipline for driving a fire
6 department rig with a suspended license resulting from a DUI
7 charge. That was set for December 10th. Plaintiff didn't show
8 up on that day. Plaintiff knew he may be in trouble for the
9 Safeway matter, so he was thinking about retiring, which just
10 goes to show you that he was thinking about this and plotting
11 and planning his retirement for some time.

12 Why did plaintiff retire? Why? The evidence is clear.
13 He wanted to. He wanted to for reason he articulated; I needed
14 the money. He wanted to retire. He did not face any time
15 pressure from the city, no coercion, no, as the plaintiff said,
16 gun at his head. He had thought about retiring and decided that
17 now was the time.

18 Let's take a look, if you will, at plaintiff's conduct
19 after his termination. What did he do? He appealed that, but
20 he put it off. In the meantime, he didn't bother to look for
21 any kind of work. And even after his Civil Service Commission
22 appeal ended in his favor, he still didn't look for a job
23 because I still bear the scarlet A -- in this case T -- of being
24 a thief, but that was untrue. He wasn't a thief.

25 He, for whatever reason, simply did not want to find

1 work, or for some idiosyncratic reason, he just couldn't do it.
2 He certainly had the ability, he had the skills. He was an EMT,
3 as I told you. Why not look for that kind of work?

4 You heard Rod Juniel testify from the witness stand.
5 Rod Juniel was a former Fire Chief. He took plaintiff's conduct
6 very seriously. Why? Because this kind of action, taking a
7 cookbook, be it by guile, or be it by thievery, was
8 inappropriate.

9 He considered it serious, and he looked at plaintiff to
10 set an example. What organization in this country doesn't
11 expect their experienced workers to set an example? That
12 disappointed the chief. And he acted accordingly. Not because
13 of plaintiff's age. Clearly, he had a good-faith belief that
14 what he was doing was right for the department.

15 Why would the fire department want to get rid of the
16 older firefighter when they had in place a system to retain
17 them? It just doesn't make any sense.

18 Now, it's important in this case to step back and
19 consider what the testimony is and what people say happened.
20 Let's take a look at what happened at Safeway.

21 Plaintiff went in to do some grocery shopping. He says
22 he talked to Kevin McKee about getting a cookbook. Let's say he
23 got that cookbook. He was walking around. He told you that.
24 Shopping, looking at the book. He got an alarm. An emergency
25 call. What did he do? Radio in one hand, cookbook in the

1 other, push the buggy up to the front of the store, told Kevin
2 McKee, hold our groceries, we will be back. Oh, Kevin, can I
3 have this cookbook? Oh, sure, Bill.

4 So on his way to an emergency call, on his way to a
5 fire alarm, Mr. Cadorna wants you to believe that he asked for
6 permission to take a cookbook. I have never heard of a
7 firefighter say, grab your cookbook, boys, let's go fight a
8 fire. It doesn't make sense.

9 The last thing Mr. Cadorna says he did on the way to
10 the emergency call was ask to take a cookbook out of the store
11 so he could read it on his way to the emergency call.

12 That, too, defies logic and common sense, and that
13 should give you a clue as to plaintiff's believability. It's
14 not there. It just isn't there. Which is why the chief of the
15 fire department, and the manager, chose not to believe the
16 plaintiff's statements. They just did not make sense.

17 Finally, plaintiff says, I will get a receipt. I shop
18 at Safeway, I spend 50 to \$60 there usually on my debit card. I
19 will research and get the bank to find it and I will come up
20 with a receipt. He didn't come up with a receipt to show the
21 chief on December the 31st, he didn't come up with a receipt on
22 the criminal trial to December 7th, he didn't come up with a
23 receipt for his Civil Service Commission hearing in 2003,
24 October and November, and he still hasn't come up with a
25 receipt, any proof to show that he bought this book in November,

1 as he said he did.

2 Plaintiff's claims, his statements, are unbelievable.
3 This is an age discrimination case. This case is not about
4 whether you think the fire department or the City & County of
5 Denver was wise, fair, correct, nice, polite, wrong, should have
6 done something different or should have done something else.
7 This case is about whether what the City & County of Denver did
8 was because plaintiff -- was because of plaintiff's age.

9 There is simply no evidence to show that -- no evidence
10 to show that the actions of plaintiff -- that the actions that
11 the city took were in any way connected with plaintiff's age, or
12 as plaintiff claims, a coverup to hide the illegal motive of age
13 discrimination.

14 Age was not a party to any decision. At best,
15 plaintiff can say, Chief Hart cooked up a scheme because of
16 plaintiff's age. But Chief Hart wasn't involved in the process
17 other than to do an investigation and forward it. And to say
18 that Chief Hart acted because of plaintiff's age, cooked up this
19 scheme to get plaintiff fired because of his age likewise defies
20 logic.

21 Putting all this together, what plaintiff would have
22 you believe is that Chief Hart cooked up a scheme to get rid of
23 plaintiff because of his age by saying he shoplifted a cookbook.
24 That Chief Juniel is a party to that scheme, said, oh, yeah, I
25 can get rid of Mr. Cadorna if I say I believe he took a

1 cookbook, because I want to get rid of him because he is older,
2 even though he is my age. The same with Tracy Howard, oh, yeah,
3 I can get rid of Bill Cadorna because he is older, and I can
4 save 25 cents. And the Civil Service Commission, and the Civil
5 Service Commission hearing officer thought the same thing.
6 Let's develop this pretext so we can get rid of one firefighter
7 because of his age.

8 Please, ladies and gentlemen of the jury, consider that
9 argument, consider that as the picture that plaintiff is trying
10 to paint for you. It simply doesn't make sense to argue and
11 contend to you that all these people cooked up all these
12 different schemes, if you will, to get rid of plaintiff because
13 of his age simply doesn't compute. It doesn't make logical
14 sense. It doesn't make sense fiscally because the city wanted
15 to retain its older workers.

16 Do not lose sight that this is an age discrimination
17 case. And that age had to be the motivating factor in the
18 decisions of the city. But for plaintiff's age, he wouldn't
19 have been terminated. But for plaintiff's age, he would have
20 been reinstated, and don't forget, the intervening action of
21 plaintiff, his voluntary retirement without coercion, without
22 threat by the city.

23 At the close of your deliberations, the city would ask
24 you to return a verdict simply stating that plaintiff has not
25 proved age discrimination. Discrimination which he must prove

1 to get your verdict. Plaintiff has not proven that, and indeed
2 with these facts cannot prove it.

3 Thank you very much.

4 THE COURT: Counsel, thank you.

5 Very well. Rebuttal closing argument now by the
6 plaintiff. Mr. Brennan.

7 MR. BRENNAN: May it please the court.

8 THE COURT: Thank you.

9 REBUTTAL ARGUMENT

10 MR. BRENNAN: Well, I am afraid in some ways this is
11 beginning to sound like the Madhatter's tea party, and I mean no
12 disrespect to the court, but it seems that every time the city
13 is presented with facts it doesn't like, it changes into another
14 reality where you might find the Cheshire cat sitting on a
15 toadstool, or a caterpillar smoking a hookah.

16 I can scarcely believe my ears. They fire my client on
17 the basis of the contention that he was a thief. Now, having
18 failed to prove that he was a thief before the Civil Service
19 Commission, now being confronted with the facts showing beyond
20 any reasonable doubt he did not commit the theft of which he was
21 accused, and most importantly, that city officials knew it well
22 before they terminated him, Joe Hart knew, said nothing to
23 anyone supposedly, except he put in his report that Kevin McKee
24 had verified giving my client permission to take the cookbook,
25 you may recall, and you may recall that all of their officials

1 testified, that is Tracy Howard and Rod Juniell, testified that
2 they reviewed all the documentation.

3 They had Joe Hart's report saying that Kevin McKee
4 verified to give my client permission. They had Kevin McKee's
5 statement, such as it was, verifying he gave my client
6 permission. They had statements of three firefighters verifying
7 that they all saw Bill walk out of the store with a cookbook in
8 his hand, verifying that he must not have shoplifted it.

9 All the evidence they had showed he was not a thief.
10 Nevertheless, they fired him. They own, and will forever after
11 own, the reason they adopted for firing my client.

12 The law is once they have taken ownership of that
13 reason, if they cannot sustain it, you are entitled as a jury to
14 conclude under the Age Discrimination in Employment Act that the
15 real reason was age.

16 Now they say, oh, that couldn't possibly be so because
17 all the decision makers were in the protected age group
18 themselves. Excuse me. Let's think about it for a minute. The
19 real question is, how do they treat older employees versus
20 younger ones.

21 You have heard -- and their own testimony is
22 verified -- there is no reason they could not have waited until
23 the outcome of the criminal proceedings to decide what action to
24 take. There was no reason they could not rely upon the
25 constitutional presumption of innocence until proven guilty to

1 guide them in their thinking, but they instead presumed guilt
2 before proven innocent, even though their own evidence indicated
3 plenty of reason to think he was innocent.

4 Now, let's contrast their treatment of my client well
5 into the protected age group with their treatment of others,
6 including a gentleman named Stan Ford, a 36-year-old white man
7 who was --

8 MR. WESOKY: Your Honor, I object.

9 MR. BRENNAN: -- charged with automatic weapons sale.

10 THE COURT: Just a moment.

11 MR. WESOKY: That evidence was limited to substantive
12 due process, which is no longer a claim in this case. I object.

13 THE COURT: Mr. Brennan, that is correct, and the
14 objection is sustained.

15 But you may continue your closing argument in some
16 other vein, focusing on some other evidence.

17 MR. BRENNAN: Very well.

18 In that event, the evidence has demonstrated through
19 cross-examination of their witnesses that they had another
20 choice to make, and chose not to follow it.

21 The other choice was, if in fact they viewed him as a
22 brother firefighter, to let due process take its course in the
23 criminal courts, and from that make the determination fairly and
24 with plenty of deliberation as to what the proper consequences
25 should be if he were found guilty. They did not want to risk

1 the possibility he would be found innocent. The reason they did
2 not want to risk that possibility was that they knew he was.
3 Because Kevin McKee's statement said so. Even Chief Hart's
4 statement said so.

5 They nevertheless, in the Contemplation of Disciplinary
6 Action they gave him, portrayed him as a thief. Remember, it is
7 so important to remember they didn't give him Kevin McKee's
8 statement. They didn't give him the statements of the other
9 firefighters. They gave him no information he could have used
10 to defend himself.

11 This was a situation in which he was put on trial by
12 the fire department without knowing the evidence against him, or
13 more importantly, without knowing the evidence in his favor.

14 All of the evidence was in his favor, but they
15 deliberately ignored it or concealed it. You heard *ad nauseam*,
16 I mean just till we were all blue in the face, over and over
17 again, all their officials say a better investigation was going
18 to be done. A better investigation would have included
19 reconciling any possible concerns about whether a witness is
20 telling the truth or not or where there were points of confusion
21 by interviewing them on tape, getting an exact record of what
22 they said, and comparing them. They elected not to in this
23 case, even though they had done so in many others.

24 The reason they elected not to, ladies and gentlemen,
25 was not because they lacked the ability. My goodness, we heard

1 over and over again they have unlimited resources at their
2 disposal. Any time they choose to use them. They only choose
3 to use them when they think it will help them. This is a large
4 abusive bureaucracy that only uses the resources at its disposal
5 to accomplish the goals of its management.

6 It did not conduct a fair investigation, because it
7 knew a fair investigation would exonerate my client. The city
8 attorney's office never sent anybody out to the Safeway store to
9 interview witnesses before the criminal trial to take proper
10 statements. Instead, they chose to go to trial and try to
11 convict my client on the basis of evidence that ultimately
12 proved to be deliberately and willfully false.

13 Their concern for the honor and integrity of the legal
14 process, and the honor and integrity, such as it, with the City
15 & County of Denver was such that when a witness admitted in
16 writing that he had committed perjury and obstruction of justice
17 in an effort to secure the conviction of my client, even though
18 he had not committed the crime of which he was accused, they did
19 absolutely nothing. Do not accept for a moment that the City &
20 County of Denver cares one whit about the law, the truth, honor
21 or integrity.

22 The only thing it cares about is accomplishing whatever
23 goal it sets out to accomplish. You have got to send them a
24 message that this cannot be tolerated. If you fail to do so,
25 you will expose every employee of the City & County of Denver to

1 the same abuse. And at that point they will have accomplished
2 the goal they had sought to accomplish throughout these years of
3 legal proceedings, which is to send a message, you are at our
4 mercy.

5 Do not let them do that by finding in their favor. Age
6 was a factor because the reasons they have given are false. You
7 have been instructed if the reasons they have given are false,
8 you may find in our favor. That's with respect to the
9 termination decision.

10 Let's not forget, the biggest problem here is that,
11 even after we proved before the Denver Civil Service Commission,
12 part of the City & County of Denver, that my client was not a
13 thief, they refused to give him any relief. He was, in essence,
14 in the same position he would have been in had he actually
15 committed the crime.

16 If there is no remedy, then they have gotten away with
17 it. When they said he could not have his job back, hearing
18 officer Criswell said it was because he was over fifty. If my
19 client had been 45 and taken a disability retirement, Criswell
20 could not have done that. Criswell is an experienced judge. He
21 knows the law. He is not a stupid man. The reason he did that
22 was he wanted to uphold the city's determination, and that's the
23 only way he could think of doing it.

24 Funny thing, though, this long-time judge forgot all
25 about the U.S. Constitution which says the supreme law of the

1 land is federal law and not state law, and any state law in
2 conflict with federal law is void.

3 The Supreme Court of the United States says so, and has
4 for a very long time. The Age Discrimination in Employment Act
5 is what you are called upon to enforce, and it does not anywhere
6 in its language permit a private or municipal employer to refuse
7 to reinstate someone because he is over the age of 50. Quite
8 the contrary. It explicitly prohibits any such discrimination.

9 You must enforce it. If you fail to do so, you are
10 going to fail in your duty. If you fail in your duty, then we
11 might as well have wasted the last two weeks on something else
12 entirely.

13 You have devoted so much time and energy to this that I
14 ask you to show great respect for this great temple of the law
15 in which we stand, and to stand up for the laws of the United
16 States of America and say this will not stand. If the Congress
17 of the United States of America representing the people of the
18 United States of America --

19 THE COURTROOM DEPUTY: Counsel.

20 MR. BRENNAN: -- says you may not discriminate on the
21 basis of age, then you must not. Any other result is
22 unacceptable.

23 Thank you.

24 THE COURT: Counsel, thank you.

25 MR. BRENNAN: My pleasure.

1 THE COURT: Ladies and gentlemen of the jury, the
2 evidence is in. You have been instructed by the court on the
3 law applicable to this case and trial, and you have had the
4 benefit of counsels' closing arguments.

5 Momentarily this case will be submitted to you formally
6 for your solemn deliberations.

7 I instruct you further, ladies and gentlemen, that you
8 may deliberate only while all jurors are present together in the
9 jury room, and therefore, you must suspend your deliberations
10 until and unless you are all present together in the jury room.

11 I am going to ask Mrs. Kramer and the court security
12 officer I see in the rear of the courtroom to come forward to be
13 sworn as the initial bailiffs of this jury.

14 Good afternoon.

15 THE COURT SECURITY OFFICER: Good afternoon, sir.

16 THE COURT: Would each and both of you please raise
17 your right hand to be sworn, and may I have your attention in
18 the courtroom.

19 (A court security officer and the courtroom deputy were
20 sworn.)

21 THE COURTROOM DEPUTY: I do.

22 THE COURT SECURITY OFFICER: I do, sir.

23 THE COURT: Thank you. And if you will please stand
24 by.

25 Madam clerk, you are further authorized and directed to

1 administer this oath to any other person who may be approved by
2 the court to serve as a bailiff for the jury in this trial.

3 At the bench I now make available to you the original
4 jury instructions and verdict forms, and further authorize and
5 direct you to make available to the jury as soon as practicable
6 all exhibits admitted into evidence during the course of this
7 trial.

8 THE COURTROOM DEPUTY: Yes, your Honor.

9 THE COURT: Very well.

10 Ladies and gentlemen of the jury, this case is yours.
11 You are excused to your jury deliberation suite to commence your
12 solemn deliberations. Good luck and Godspeed.

13 All rise pending the exit of this jury.

14 (Jury out at 1:57 p.m.)

15 THE COURT: Thank you. And please be seated as we
16 proceed deliberately outside the presence and hearing of the
17 jurors who have retired to their suite to commence their solemn
18 deliberations.

19 Counsel, unless a verdict is sooner received, we shall
20 convene in open court on the record this afternoon at 4:45 p.m.
21 Please plan accordingly.

22 Please remain within ten minutes of the courtroom.
23 Counsel, while out of the courtroom, please inform Mrs. Kramer
24 of your whereabouts and provide her with the best and most
25 certain means by which you can be contacted.

1 Very well. Pending further proceedings, the court is
2 in recess concerning this case.

3 (Recess at 2:00 p.m., until 3:45 p.m.)

4 THE COURT: Thank you. And again good afternoon.
5 Please be seated. We convene outside the presence and hearing
6 of the jury to consider a note to the court in which the jury
7 has posed a question or interrogatory.

8 I have respectfully requested that Mrs. Kramer supply
9 counsel for plaintiff and defendant with that note to the court,
10 and the court's tentative and proposed response.

11 The note to the court for the record indicates, we, the
12 jury, have a question. May the jury award lawyers' fees,
13 question mark.

14 As with any question or interrogatory propounded by the
15 jury, two issues arise. The first is whether the court should
16 answer the question, and second, if so, how.

17 Let me inquire of the parties. Should the court answer
18 the question? The plaintiff, Mr. Brennan?

19 MR. BRENNAN: Yes, your Honor.

20 THE COURT: The defendant, Mr. Wesoky?

21 MR. WESOKY: Yes, sir.

22 THE COURT: How, Mr. Brennan?

23 MR. BRENNAN: Well, naturally I would like to say, by
24 all means yes, but I understand that it would not be
25 appropriate. That is the province of the court.

1 THE COURT: Do you have a position with respect to the
2 proposed response of the court?

3 MR. BRENNAN: It's perfectly acceptable.

4 THE COURT: Very well. Thank you.

5 MR. BRENNAN: Thank you.

6 THE COURT: The defendant, Mr. Wesoky?

7 MR. WESOKY: Indeed it is, your Honor.

8 THE COURT: Thank you. Then the court finds that the
9 court should respond to the jury's question in the way proposed
10 by the court. The court's answer is approved. Therefore, madam
11 clerk, you are authorized and directed to tender to the jury by
12 way of the bailiff the court's proposed response, which should
13 be appended, of course, to the note to the court.

14 THE COURTROOM DEPUTY: Yes, your Honor.

15 THE COURT: There being no further business, at least
16 for now, we again are in recess. Thank you.

17 (Recess at 3:47 p.m., until 4:55 p.m.)

18 THE COURT: Good afternoon, ladies and gentlemen.

19 Please be seated. Madam clerk, if you would escort the
20 jury into the jury box, please.

21 (Jury in at 4:55 p.m.)

22 THE COURT: The choreography was not bad, ladies and
23 gentlemen. Thank you. Please be seated.

24 Ladies and gentlemen of this jury, the bailiff has
25 informed the court that the foreperson of the jury has reported

1 that the jury has reached unanimous verdicts in this case.

2 Accordingly, would the foreperson of this jury please
3 stand and be identified. Ms. Diane Dillingham, are you the
4 foreperson of this jury, ma'am?

5 THE JUROR: I am.

6 THE COURT: To your knowledge, has indeed this jury
7 reached and returned unanimous verdicts in this case?

8 THE JUROR: Yes, your Honor.

9 THE COURT: Have you completed those verdicts, dated
10 and signed together with all other jurors those verdicts?

11 THE JUROR: We have, your Honor.

12 THE COURT: Thank you. I am going to ask the bailiff
13 to retrieve from the foreperson, Ms. Dillingham, the original
14 instructions and verdict forms, please.

15 And Ms. Dillingham, of course again you may be seated.

16 Thank you, sir. If you will deliver those matters to
17 the court at its bench. And thank you.

18 The court will now read and publish the verdicts of the
19 jury. Verdict Form A, discrimination on the basis of age,
20 termination of employment. We, the jury, present our answers to
21 questions submitted by the court to which we have all agreed.

22 One, has the plaintiff proved by a preponderance of the
23 evidence all three essential elements of his claim for age
24 discrimination in the termination of his employment as set forth
25 in Instruction No. 15? Answer: Yes.

1 Two, do you find by a preponderance of the evidence
2 that the defendant has suffered compensatory damages in the form
3 of back pay as defined in Instruction No. 26 as a result of such
4 discrimination? Answer: Yes.

5 Three, what is the total amount of compensatory damages
6 in the form of back pay as defined in Instruction No. 26 that
7 you find by the preponderance of the evidence defendant is
8 liable to pay plaintiff? Answer: \$100,000.

9 Six, if you have found that plaintiff is entitled to an
10 award of compensatory damages in response to question No. 3
11 above, do you find that plaintiff has proven by a preponderance
12 of the evidence that defendant's action in terminating him was
13 willful as that term is defined in Instruction No. 22? Answer:
14 Yes.

15 Dated the 29th day of June, 2006, ostensibly signed by
16 the foreperson and all other members of the jury.

17 Verdict Form B. Discrimination on the basis of age,
18 failure to reinstate or award benefits beyond date of
19 retirement.

20 One -- strike that. We, the jury, present our answers
21 to questions submitted by the court to which we have all agreed.

22 One, has plaintiff proved by a preponderance of the
23 evidence all three essential elements of his claim for age
24 discrimination in the failure to reinstate him or award him
25 benefits beyond the date of his retirement as set forth in

1 Instruction No. 16? Answer: Yes.

2 Two, do you find by a preponderance of the evidence
3 that the plaintiff has suffered compensatory damages in the form
4 of back pay as defined in Instruction No. 26 as a result of such
5 discrimination? Answer: Yes.

6 Three, what is the total amount of compensatory damages
7 in the form of back pay as defined in Instruction No. 26, if
8 any, that you find by the preponderance of the evidence
9 defendant is liable to pay plaintiff? Answer: \$510,571.

10 Six, if you have found that plaintiff is entitled to an
11 award of damages in response to question Nos. 3, 4 and/or 5
12 above, do you find that the plaintiff has proven by a
13 preponderance of the evidence that defendant's action in
14 refusing to reinstate him or award him benefits beyond the date
15 of his retirement was willful as that term is defined in
16 Instruction No. 22? Answer: Yes.

17 Dated this 29th day of June, 2006, again ostensibly
18 signed by the foreperson and all other members of this jury.

19 The court will now poll the jurors individually to
20 confirm the validity and unanimity of these verdicts.

21 Are these your verdicts, Mr. Russell Richardson?

22 THE JUROR: Yes.

23 THE COURT: Are these your verdicts Ms. Paulette
24 Sanchez?

25 THE JUROR: Yes.

1 THE COURT: Are these your verdicts Mr. Laurence Kelly?

2 THE JUROR: Yes.

3 THE COURT: Are these your verdicts, Ms. Diane
4 Dillingham?

5 THE JUROR: Yes.

6 THE COURT: Are these your verdicts, Mr. Fred Gibson?

7 THE WITNESS: Yes.

8 THE COURT: Are these your verdicts, Mr. Gary Martinez?

9 THE JUROR: Yes.

10 THE COURT: Are these your verdicts, Mr. Robert Meyers?

11 THE JUROR: Yes.

12 THE COURT: And are these your verdicts, Ms. Carol
13 Perrett?

14 THE JUROR: Yes.

15 THE COURT: Very well. Ladies and gentlemen, you have
16 now completed and discharged your duties as jurors in the
17 service of this case. Momentarily you will be discharged with
18 the thanks of this court.

19 The question may arise, may you discuss this case, and
20 if so, what can you say, and with whom. For your guidance and
21 edification, I instruct you further as follows: Under the local
22 rules of this court, neither the parties nor their counsel may
23 discuss this case with you.

24 However, otherwise you may say as much or as little
25 about this case, including your service and your deliberations,

1 as you choose, and with whomever you choose.

2 Importantly, if anyone persists in discussing this case
3 over your objection, or if anyone becomes critical of your
4 service as a juror in this case in any way, you should report
5 such a circumstance directly to me.

6 Very well. Once you have surrendered those
7 all-important juror badges and key cards, you are excused from
8 further duty in this case with the thanks of this court.

9 All rise for the exit of this jury. Good luck to each
10 and all of you, ladies and gentlemen.

11 (Jury out at 5:02 p.m.)

12 THE COURT: Thank you, and again please be seated.

13 On the verdicts of this jury, it is ordered as follows:
14 That judgment shall enter in favor of the plaintiff against the
15 defendant on the claims of the plaintiff as prescribed under
16 Rule 50(a).

17 That costs shall be taxed and allowed as prescribed
18 under Rule 54(d)(1) and local Rule 54.1.

19 That any claim for attorney fees and any related
20 non-taxable expenses and costs, other than costs under 28 U.S.C.
21 Section 1920, shall be initialed -- initiated, excuse me --
22 marshaled and determined under Rule 54(d)(2) and local Rule
23 54.3, and that motions seeking post-trial relief shall be
24 initiated, marshaled and determined in the time and manner
25 prescribed by apposite Rule of Civil Procedure such as Rule 50

1 or 59 and local Rule 7.1.

2 Let me take this opportunity to publicly commend those
3 of my staff who have again so ably assisted the court in the
4 trial of this case. Again, to my friend and courtroom deputy
5 clerk, Mrs. Ginny Kramer, thank you.

6 THE COURTROOM DEPUTY: Thank you, your Honor.

7 THE COURT: To my friend and real-time reporter, Mrs.
8 Suzanne Claar, thank you.

9 To my law clerk, who is unable to be present,
10 Mrs. Hazel Porter, and to my administrative assistant, Susan
11 Schmitz, thank you.

12 Very well. As concerns this case and trial, we are in
13 recess. Thank you.

14 (Proceedings concluded at 5:05 p.m.)

15 REPORTER'S CERTIFICATE

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

18 Dated at Denver, Colorado, this 19th day of September,
19 2006.

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23 _____
24 Suzanne M. Claar, CSR, RPR
25

	PLAINTIFF'S EXHIBITS (Continued)					
	Exhibit	Offered	Received	Refused	Reserved	Withdrawn
1						
2						
3	14		20			
4	15		20			
5	16		20			
6	19	180	181			
7	20		20			
8	27		20			
9	29		20			
10	30		20			
11	33		20			
12	38		20			
13	63		20			
14	78					20
15	82					20
16	83					20
17	84					20
18	85					20
19	86					20
20	87					20
21	89					20
22	92					20
23	96					20
24	100					20
25	101					20

1 PLAINTIFF'S EXHIBITS (Continued)

2 Exhibit	Offered	Received	Refused	Reserved	Withdrawn
3 114					20
4 115					20
5 122					20
6 135					20

7 DEFENDANT'S EXHIBITS

8 Exhibit	Offered	Received	Refused	Reserved	Withdrawn
9 114	231				

10 June 20, 2006

11 WITNESSES

12 Rob Brady

13 Cross-examination By Mr. Wesoky 246

14 Redirect Examination By Mr. Brennan 271

15 Recross-examination By Mr. Wesoky 308

16 Fred DeFeo

17 Direct Examination By Mr. Brennan 313

18 Cross-examination By Mr. Lujan 325

19 Redirect Examination By Mr. Brennan 330

20 Charles W. Jones

21 Direct Examination By Mr. Brennan 332

22 Cross-examination By Mr. Lujan 347

23 Redirect Examination By Mr. Brennan 351

24 Ronald Martinez

25 Direct Examination By Mr. Brennan 355

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Steven Garrod	
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PLAINTIFF'S EXHIBITS

Exhibit	Offered	Received	Refused	Reserved	Withdrawn
3	370				
7	370				
8	334	334			
25	294	294			
26	294	294			
41	406	406			
42	410				
58	318		318		

DEFENDANT'S EXHIBITS

Exhibit	Offered	Received	Refused	Reserved	Withdrawn
114					242
88	264	264			
Exhibit 114					240
MOTION IN LIMINE					243

1 June 21, 2006

2 WITNESSES

3 Steven Garrod

4 Direct Examination By Mr. Brennan 426

5 Cross-examination By Mr. Lujan 448

6 Redirect Examination By Mr. Brennan 469

7 James Sestrich

8 Direct Examination By Mr. Brennan 483

9 Cross-examination By Mr. Wesoky 506

10 Redirect Examination By Mr. Brennan 517

11 Joe Hart

12 Direct Examination By Mr. Brennan 527

13 Cross-examination By Mr. Wesoky 634

14 Redirect Examination By Mr. Brennan 662

15 Ida Roberts

16 Direct Examination By Mr. Brennan 665

17 PLAINTIFF'S EXHIBITS

18 Exhibit Offered Received Refused Reserved Withdrawn

19 17 564 564

20 34 - 40 438

21 34 - 37 438

22 39 - 40 438

23 57 668 672

24 59 681

25 60 - 62 681

1 PLAINTIFF'S EXHIBITS (Continued)

2 Exhibit	Offered	Received	Refused	Reserved	Withdrawn
3 64 - 67	681				
4 68		680			
5 69 - 70	681				
6 71	681				

7 DEFENDANT'S EXHIBITS

8 Exhibit	Offered	Received	Refused	Reserved	Withdrawn
9 21	636	636			

10 June 22, 2006

11 WITNESSES

12 Ida Roberts

13 Direct Examination By Mr. Brennan 699

14 Cross-examination By Mr. Wesoky 723

15 Redirect Examination By Mr. Brennan 738

16 William Cadorna

17 Direct Examination By Mr. Brennan 745

18 Cross-examination By Mr. Wesoky 844

19 PLAINTIFF'S EXHIBITS

20 Exhibit	Offered	Received	Refused	Reserved	Withdrawn
21 18	780	780			
22 22, p.1-2	771	772			
23 30	808				
24 41	815				
25 59			696		

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PLAINTIFF'S EXHIBITS (Continued)

Exhibit	Offered	Received	Refused	Reserved	Withdrawn
60 - 62			697		
64 - 67			697		
69 - 70			697		
71			697		

DEFENDANT'S EXHIBITS

Exhibit	Offered	Received	Refused	Reserved	Withdrawn
117	861	861			
118 - 121	863	863			
28	697		698		

June 26, 2006

WITNESSES

William Cadorna

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Recross-examination By Mr. Wesoky	1065

David Schuetz

Direct Examination By Mr. Brennan	1067
Cross-examination By Mr. Lujan	1092
Redirect Examination By Mr. Brennan	1101

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PLAINTIFF'S EXHIBITS

Exhibit	Offered	Received	Refused	Reserved	Withdrawn
2	1085				
23	1033		1034		
72	1053				1058
150	1087		1088		

DEFENDANT'S EXHIBITS

Exhibit	Offered	Received	Refused	Reserved	Withdrawn
145	897	898			
146	901		901		
28	893	893			

June 27, 2006

WITNESSES

Frank Hoffman

Direct Examination By Mr. Lujan	1208
Cross-examination By Mr. Brennan	1247
Redirect Examination By Mr. Lujan	1265

Kelly Caldwell

Direct Examination By Mr. Lujan	1268
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Redirect Examination By Mr. Lujan	1324

Tracy Howard

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8 Tracy Howard

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10	Cross-examination By Mr. Brennan	1362
11	Redirect Examination By Mr. Wesoky	1441

12 Rod Juniel

13	Direct Examination By Mr. Wesoky	1463
14	Cross-examination By Mr. Brennan	1483
15	Redirect Examination By Mr. Wesoky	1509

16 William Cadorna

17	Direct Examination By Mr. Brennan	1520
18	Cross-examination By Mr. Wesoky	1525

19 DEFENDANT'S EXHIBITS

20	Exhibit	Offered	Received	Refused	Reserved	Withdrawn
21	151	1521				
22	80	1355	1355			

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1	MOTIONS	
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