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LOS ANGELES SUPERIOR COURT

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8 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

11 **DAVID COPPEDGE**, an individual;

12 Plaintiff,

13 vs.

14 **JET PROPULSION LABORATORY**, form
15 unknown; **CALIFORNIA INSTITUTE OF**
16 **TECHNOLOGY**, form unknown;
17 **GREGORY CHIN**, an Individual; **CLARK**
18 **A. BURGESS**, an Individual; **KEVIN**
19 **KLENK**, an Individual; and **Does 1** through
20 **25**, inclusive,

21 Defendants.

Case No. BC435600

PLAINTIFF DAVID COPPEDGE'S
OPPOSITION TO DEFENDANT
CALIFORNIA INSTITUTE OF
TECHNOLOGY'S MOTION FOR
SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION OF ISSUES;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF

[Pl.'s Resp. to Sep. Stat. of Undisp. Mat.
Facts; Pl.'s Sep.Stat. of Add. Disp. & Undisp.
Mat. Facts; Obj. to Evid.; Decl. of W. Becker,
Jr.; Decl. of D. Coppedge; Decl. of D. De-
Wolfe; Decl. of L.Ball; Appdx. Of Fed. And
Non-Calif. Cases; Exhibits; Not. Of Ldg't;
and [Prop'd] Order Re: Obj. To Evid. filed
concurrently herewith]

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1 **I. INTRODUCTION**

2 JPL has no rule against discussing religious or political subjects, and certainly none
3 against discussing science-related questions, in the workplace. JPL singled out David Coppedge
4 for his discussing Intelligent Design and/or Christian ideas, reprimanded him, investigated him,
5 demoted him, downgraded him, and fired him. Given JPL's open discussion policy, the question
6 is: *why?*

7 California law holds that summary judgment must be denied if the opposing plaintiff has suffi-
8 cient evidence, taken alone, to establish his cause of action. Plaintiff Coppedge, with a strong
9 documented 14-year performance history, was suddenly reprimanded for talking about his "reli-
10 gion," investigated for "harassing" coworkers because of casual discussions about religion or
11 perceived religion, and then demoted. When Coppedge filed a religious discrimination com-
12 plaint to challenge the decision, his supervisors intentionally arranged for negative feedback to
13 downgrade his annual performance report, and based largely upon that, fired him. That evidence
14 supports the inferences of: (1) employment discrimination based upon religion and perceived re-
15 ligious; and (2) retaliation for filing a legitimate discrimination challenge to his demotion. Taken
16 as a whole, the evidence supports Coppedge's causes of action; summary judgment should there-
17 fore be denied.

16 **II. SUMMARY OF FACTS**

17 Plaintiff David Coppedge ("Coppedge") was hired by Defendant JPL in September 1996,
18 as a System Administrator ("SA") through a contract with an outside agency and as a full-time
19 employee in January 2003. ¶¶ 1-2. ¹ He served on the program for fourteen years, longer than
20 any other SA. ¶ 2. The SA's duties involved the technical management and maintenance of al-
21 most all of the computers and networks supporting the ground systems of the world-renowned
22 mission. ¶ 5.

23 His line supervisor, Clark A. Burgess ("Burgess") named Coppedge the "Team Lead" of
24 the SAs in 2000, a post he held until 2009. ¶ 4. Being Team Lead conferred considerable prestige
25 because of the worldwide fame of the Cassini mission, and it carried additional leadership, ad-
26 ministrative, and liaison duties. ¶ 6.

27 ¹ All citations contained within the Summary of Facts correspond to the applicable paragraph number in Plaintiff's
28 Separate Statement of Additional Disputed Material Facts.

1 JPL's work includes exploring the origins of astronomical entities and life in the uni-
2 verse. ¶ 15. Coppedge thought his JPL coworkers would be interested in intelligent design ("ID")
3 (*id.*), a scientific viewpoint that presents challenges to current origin science orthodoxy.
4 Coppedge sometimes discussed ID with JPL coworkers. ¶ 18.

5 Coppedge, a lifelong practicing Christian, sometimes discussed religious ideas with JPL
6 coworkers as well. ¶¶ 13, 16. Coppedge engaged in such discussions only if the other person
7 was willing, and generally with co-workers who had divulged to Coppedge that they too were
8 Christian. ¶ 14. In his 12 years at JPL, Coppedge received only favorable performance reviews
9 until after he filed this lawsuit in April 2010. ¶ 135.

10 On occasion, Coppedge lent non-religious DVDs about ID to coworkers. ¶ 19. These na-
11 tionally-distributed DVDs were noteworthy because they were produced by Illustra Media on
12 whose board Coppedge serves. ¶ 15. Coppedge kept a log of persons to whom he had lent DVDs
13 so as to avoid bothering coworkers who said they were not interested. ¶ 20. Less often,
14 Coppedge lent some DVDs with Christian themes to fellow employees whom he thought were
15 Christians also. ¶ 22. Prior to March 2, 2009, Coppedge was unaware of any complaints from
16 anyone about his lending the DVDs. ¶ 24.

17 On March 2, 2009, in response to a complaint from a JPL employee, Greg Chin, the of-
18 fice manager, angrily accused Coppedge of "pushing" his "religious" views concerning ID on
19 co-workers and demanded he stop. ¶ 25. From the outset, Chin was hostile and argumentative,
20 and in fact Chin exaggerated the number "complaints." ¶¶ 25, 28, 29, 67. Although Coppedge
21 does not believe that ID presents a religious viewpoint, Chin perceived it that way and repeatedly
22 told Coppedge so. ¶ 26.

23 During the encounter, Chin did not want to hear Coppedge's positions or responses. ¶
24 28. Chin warned Coppedge of consequences, implying possible termination, if Coppedge dis-
25 cussed religion or politics again in the workplace. ¶ 27. When Coppedge suggested he felt Chin
26 was harassing him or creating a hostile work environment, Chin essentially dared Coppedge to
27 report the incident to Human Resources ("HR") and then walked out. ¶¶ 28, 31, 40, 45, 51, 53.

28 The complaint apparently triggering Chin's outburst arose after Coppedge lent Margaret
Weisenfelder (digital librarian) a totally non-religious ID video entitled "Unlocking the Mystery
of Life." ¶¶ 37, 110. Weisenfelder had complained to Chin on March 2. *Id.*

1 Coppedge memorialized the encounter with Chin in an e-mail sent to Chin the following
2 day, March 3. ¶ 25. Coppedge advised Chin that he respected Chin's authority and would abide
3 by his directives. ¶ 31. Coppedge further advised that his purpose in sending the e-mail was to
4 establish an accurate record of what was actually said between them, and to offer Chin an oppor-
5 tunity to correct any errors or omissions in Coppedge's version of the facts. Chin neither re-
6 sponded to nor rebutted the e-mail.² ¶ 25.

7 After Chin's outburst, Coppedge contacted JPL's chief ethics officer for a neutral opinion
8 concerning whether Chin's conduct was improper. ¶ 35. Meanwhile, Chin apparently sought to
9 preempt Coppedge's report by himself reporting the incident to HR. ¶ 36. Chin told HR, Bur-
10 gess, and Chin's supervisors that Coppedge had accused him of creating a hostile work environ-
11 ment. *Id.* Chin did not inform HR alone, but spread his report in a manner that circulated in the
12 workplace. *Id.* Chin stated he reported the incident to prompt an investigation into his own con-
13 duct – *not* into Coppedge's conduct or any complaints about Coppedge. *Id.*

14 HR, however, conducted an investigation instead into Coppedge's conduct. ¶ 45. HR
15 gathered information aimed at supporting a claim against Coppedge. *Id.* HR did not make efforts
16 to gather information that might have contradicted the accusation. *Id.*

17 Nevertheless, Coppedge's long-time supervisor, Burgess, gave a favorable interview
18 overall to HR, indicating Burgess had not felt any "harassment" from Coppedge. ¶ 58. Similar-
19 ly, Scott Edgington, a Cassini mission scientist, recalled a spirited conversation with Coppedge
20 about Proposition 8 but said Coppedge, whom he described as "personal, reasonable" and a "nice
21 guy," had not harassed him. ¶ 94.

22 HR did not afford Coppedge an opportunity to respond to statements or accusations HR
23 obtained in the investigation. ¶ 116. HR apparently produced no written report of investigation
24 but informed JPL management orally of its findings. ¶ 117.

25 On April 13, 2009, JPL managers Burgess (the Group Supervisor) and Kevin Klenk (the
26 Section Manager) met with Coppedge, conveyed HR's conclusions, gave Coppedge a written
27 warning, stripped Coppedge of his Team Lead position, and said they would not tell his col-
28 leagues and coworkers the real reason for their personnel action against him. ¶ 127.

² A person's non-response to an oral or written statement, where a response would be expected, constitutes an adop-
tion of the statement as an admission. Evid. Code § 1221.

1 Neither Burgess, nor Klenk, nor the written warning document supplied facts showing
2 how Coppedge violated JPL's "Unlawful Harassment" policy. ¶ 120, 123, 124. That policy de-
3 fines "harassment" as "the creation of a hostile or intimidating environment in which verbal or
4 physical conduct, because of its severity and/or persistence, is likely to interfere significantly
5 with an individual's work." ¶ 120. JPL never informed Coppedge of facts showing he had been
6 "hostile or intimidating," or the "severity or persistence" of some hostile or intimidating act had
interfered with coworkers' work for JPL. ¶¶ 123-124.

7 Coppedge filed the instant lawsuit on April 14, 2010, naming JPL, Burgess, and others as
8 defendants. ¶ 132. Burgess, a named defendant, continued to serve as Coppedge's supervisor. In
9 preparation of Coppedge's annual performance review ("ECAP"), selected individuals to provide
10 negative input about Coppedge. ¶ 138.

11 When Coppedge was removed as Team Lead, Nick Patel ("Patel") was named to replace
12 him. ¶ 127. In May 2010, around the time that JPL attorneys' were meeting with Burgess and
13 other management personnel regarding this pending lawsuit, Patel began accusing Coppedge of
14 using work time for personal business. ¶ 139. In the nine years that Coppedge had been Team
15 Lead, Patel never once accused another SA of wrongful conduct. ¶ Patel even went so far as to
16 report the accusation to Burgess, who called Coppedge into his office to discuss Patel's accusa-
tion. ¶ 139.

17 Neither Burgess nor Patel had any evidence that Coppedge had done anything improper
18 or had failed to complete his assignments. ¶ 139. Nevertheless, Burgess invited Patel to com-
19 ment on Coppedge's 2010 annual performance review. *Id.* Coppedge was the only SA Patel had
20 ever been invited to comment upon in an ECAP. *Id.* By inviting Patel to comment on Coppedge
21 at a time when Burgess was named as a Defendant in this case, Coppedge was assured of receiv-
22 ing a negative performance review, which could serve justify laying Coppedge off in the upcom-
ing downsizing. *Id.*

23 In the Spring of 2010, the Cassini program was preparing to lay off two SAs. However,
24 attrition made it possible to avoid laying off any of the existing team members, including
25 Coppedge, the most senior SA. Also in the Spring, two individuals who would not assume man-
26 agement positions over Coppedge until October met in private with JPL's attorneys to discuss
27 the lawsuit. Those same two individuals would become responsible for determining layoffs. By
28 manipulating the layoff criteria, they placed Coppedge near the bottom of performance, and he

1 was terminated in January 2011. In April 2011, Coppedge filed his second amended complaint
2 adding the claims based upon the termination. ¶

3 **III. SUMMARY JUDGMENT CANNOT BE GRANTED IF EVIDENCE SUPPORTS**
4 **NONMOVING PARTY PLAINTIFF'S CAUSES OF ACTION**

5 Defendant's Motion for Summary Judgment ("Defendant's Motion") must be denied for
6 every cause of action upon which Plaintiff Coppedge offers sufficient evidence to establish the
7 prima facie case. "[I]f a plaintiff in response to a defendant's summary judgment request demon-
8 strates the existence of a triable dispute with 'specific facts' [] by making a prima facie showing
9 of the merit of the complaint, the motion must be denied. There is to be no weighing of evi-
10 dence." *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 880 (internal citation omitted).

11 **IV. EVIDENCE SUPPORTS COPPEDGE'S CLAIM FOR RELIGIOUS**
12 **DISCRIMINATION UNDER FEHA**

13 Defendant's Motion contends Coppedge lacks a prima facie religious discrimination
14 claim. Under California law, "[t]he specific elements of a prima facie case may vary depending
15 on the particular facts." *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 355. "Proof of discrimi-
16 nation in the workplace is not determined by a set or rigid standard. Generally, a plaintiff must
17 provide evidence that (1) he was a member of a protected class, (2) he was qualified for the posi-
18 tion he sought or was performing competently in the position he held, (3) he suffered an adverse
19 employment action, such as termination, demotion, or denial of an available job, and (4) some
20 other circumstance suggests discriminatory motive." *Id.*

21 Defendant's Motion does not challenge the elements (1) and (2) and thus concedes them.
22 On element (3), Defendant's Motion on page 9 concedes that the layoff of Coppedge did consti-
23 tute an adverse employment action. At least two other adverse employment actions were im-
24 posed upon Coppedge: being demoted from Team Lead, and being given undeserved low per-
25 formance ratings.

26 **A. Coppedge Suffered Adverse Employment Actions.**

27 Under the Fair Employment and Housing Act (FEHA), an adverse employment action is
28 one that materially affects the terms, conditions, or privileges of employment, and includes "ad-
verse treatment that is reasonably likely to impair a reasonable employee's job performance or
prospects for advancement or promotion." *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th
1028, 1054-1055, *quoted and followed in Malais v. Los Angeles City Fire Dept.* (2007) 150

1 Cal.App.4th 350, 357. An adverse employment action is a job change that is “materially ad-
2 verse,” and could consist of, *inter alia*, “a demotion evidenced by a decrease in wage or salary, a
3 less distinguished title, a material loss of benefits, significantly diminished material responsibili-
4 ties, or other indices ... unique to a particular situation.” *Kassner v. 2nd Avenue Delicatessen Inc.*
5 (2d Cir. 2007) 496 F.3d 229, 238 (emphasis added; quotation and citation omitted).³ Transfers
6 of job duties and undeserved performance ratings, if proven, would constitute “adverse employ-
ment decisions.” *Yartsoff v. Thomas* (9th Cir. 1987) 809 F.2d 1371, 1376.

7 All of these precedents apply here. Coppedge’s demotion from Team Lead, while not in-
8 volving a pay cut, nevertheless was reasonably likely to impair his prospects for advancement or
9 promotion. His responsibilities were significantly diminished and reduced in prominence and
10 scope, as he no longer would be conducting team meetings, overseeing and coordinating task as-
11 signments, interacting with internal IT “customers,” supporting the team members’ training and
12 morale needs, and providing regular team status reports. ¶¶ 6, 128. Being stripped of the title of
13 Team Lead in the celebrated Cassini space exploration project was a humiliation far more sub-
14 stantial than it might be in a private company away from public view. *See Pennsylvania State*
15 *Police v. Suders* (2004) 542 U.S. 129, 134 (noting a “humiliating demotion” would constitute an
adverse employment action).

16 Similarly, when Burgess selected people to provide negative input into Coppedge’s annu-
17 al performance evaluation and a downgraded performance evaluation resulted, those actions
18 would have impaired Coppedge’s career prospects. On any and all of these facts, Coppedge suf-
fered adverse employment actions.

19 **B. Direct and Pretext Evidence Provides the Inference of Discrimination.**

20 Defendant’s Motion at page 10 urges that JPL took its actions against Coppedge because
21 of Coppedge’s “conduct,” not because of the “content” of Coppedge’s conversations or DVDs.
22 Defendant spotlights a material issue of fact that requires denial of summary judgment.

23 The focused issue is: “*why* did JPL take these actions?” The issue is clearly one of men-
24 tal state, of intention. As a matter of law, whether an act is deliberate, i.e. intentional, is an issue
25 of mental state that is nearly always a question of fact. *See Hailey v. California Physicians’ Ser-*
26 *vice* (2007) 158 Cal.App.4th 452, 472.

27 ³ California courts look to federal precedents for guidance in employment discrimination cases. *Guiz*, *supra*, 24
28 Cal.4th at p. 354.

1 **C. Chin's March 2 Statements To Coppedge Addressed Conversations About**
2 **Coppedge's Religious Views, Not About The Mere Fact Conversations Took**
3 **Place.**

4 Defendant argues that Chin's telling Coppedge not to discuss religion and politics had
5 nothing to do with the content of Coppedge's views about religion or politics. Defendant argues
6 that the written warning issued to Coppedge concerning the "harassment" policy, and the demotion
7 from Team Lead, had nothing to do with the content of Coppedge's discussions with
8 coworkers. Defendant contends it "had no issue with people discussing religion and politics so
9 long as it was not disruptive." (Def. Motion, at 11 (citing evidence).)

10 But Defendant's self-serving assertions do not end the matter; rather, they create ques-
11 tions of fact precluding summary judgment. The "other circumstance[s] suggest[ing] discrimina-
12 tory motive," *Guz, supra*, 24 Cal.4th at p. 355, appear here to show animus against Coppedge's
13 religion and religious beliefs as he had expressed them. The circumstances combine Defendant's
14 statements and dissembling.

15 At the March 2 incident, Chin told Coppedge to stop "pushing" his religion. ¶ 25. *Chin*
16 *did not say* "stop talking about religious ideas altogether." (See Def. Motion, at 10.) A reasona-
17 ble person could conclude that Chin wanted Coppedge to stop advocating Christian religious
18 ideas, since Coppedge's "religion" was well known to be Christian and the only one he would be
19 "pushing." ¶¶ 17, 72. Both Chin and Vetter felt that Coppedge was trying to convert them to his
20 religious beliefs. ¶¶ 66 (Chin) and 79 (Vetter). If that conclusion is possible – and it is the most
21 likely explanation – then Chin's statement shows it was the *content* that Chin sought to squelch.
22 Defendant may disagree and can say so to a jury – but Defendant's argument cannot support
23 summary judgment.

24 **1. JPL HR'S Investigation, Apparently Without Precedent, Focused Upon**
25 **Coppedge's Casual Workplace Conversations About Intelligent Design, Which**
26 **Was Characterized As Religion, And About His Christian Religion.**

27 The inference of religious discrimination under section 12940, subdivision (l), follows
28 when evidence shows: (1) the employee sincerely held a religious belief; (2) the employer was
29 aware of that belief; and (3) the belief conflicted with an employment requirement. *California*
30 *Fair Employment and Housing Com'n v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004,
31 1011. All three elements are met here.

11/12/11

1 Under elements (1) and (2), it was widely known that Coppedge sincerely held his Chris-
2 tian religious values, views and beliefs. ¶¶ 17, 66, 79. As for element (3), JPL apparently im-
3 posed an “employment requirement” upon Coppedge that he not discuss his religious views or
4 his views about ID that Chin and others considered religious. Record evidence shows this im-
5 plicit requirement: (1) Chin’s March 2 reprimanding Coppedge for talking about his religion; (2)
6 the HR investigation eliciting comments from coworkers that focused on Coppedge talking about
7 his religion or what they perceived as his religion; and (3) JPL’s non-showing that it ever inves-
8 tigated or reprimanded an employee for talking about religious or religion-related ideas in the
9 workplace.

10 Notably, Chin and others presumed ID is religious doctrine. ¶ 26. This presumption is
11 common among critics of ID who call it religion. ¶ 9. Discrimination based upon an erroneously
12 perceived characteristic can still be actionable discrimination. *See Delaney v. Superior Fast*
13 *Freight* (1993) 14 Cal.App.4th 590, 596 (1993) (“employer policies against those believed to
14 [fall within the category] are outlawed as fostering an atmosphere in which [such] workers would
15 be compelled not just to forego seeking equal rights but also to hide their [targeted characteris-
16 tic]”); *see also Estate of Amos ex rel. Amos v. City of Page, Arizona* (9th Cir. 2001) 257 F.3d
17 1086, 1094 (“alleged discrimination is no less malevolent because it was based upon an errone-
18 ous assumption [about plaintiff’s category]”).

19 **2. 3. JPL HR’s Investigation Was Inadequate and Inappropriate Under The Cir-**
20 **cumstances.**

21 Two seminal precedents, *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th
22 93, and *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, describe the standards for an ap-
23 propriate investigation conducted by an employer before imposing an adverse employment ac-
24 tion such as termination. To prevail on summary judgment here, JPL must show on undisputed
25 evidence that as a matter of law: (1) JPL acted with “good faith” in making its termination deci-
26 sion; (2) JPL’s investigation was “appropriate under the circumstances;” and (3) JPL had reason-
27 able grounds for believing Coppedge engaged in the alleged misconduct, i.e., harassment under
28 JPL’s policy. *Silva, supra*, 65 Cal.App.4th at p. 264, *following Cotran, supra*, 17 Cal.4th at p.
109. Ordinarily, all three issues “are triable to a jury.” *Id.*

JPL cannot show all three elements on undisputed evidence. Element (2) is highly dis-
puted by expert testimony, which is useful to evaluate whether an employer’s investigation is

1 adequate. See *Silva, supra*, at p. 387 (noting plaintiff could have offered expert testimony on in-
2 vestigation adequacy).

3 Under *Silva, supra*, 65 Cal.App.4th at pp. 272-273, in an appropriate investigation: (a) an
4 uninvolved human resources representative investigates the charges; (b) complaints are investi-
5 gated promptly; (c) interviews are memorialized in writing; (d) important witnesses provide their
6 written statements; (e) relevant, open-ended, nonleading questions are asked; (f) facts, rather
7 than opinions or suppositions, are obtained; (g) witnesses get the opportunity to clarify, correct
8 or challenge information provided by other witnesses who give contrary statements; (h) the ac-
9 cused is given an additional opportunity to respond to statements made by others.

10 Plaintiff's expert, Lawrence Ball, testified JPL's investigation was inappropriate because
11 Ms. Huntley, JPL's investigator:

12 (1) failed to determine the threshold question as to whether ID is religion in order to un-
13 derstand Chin's statements to Coppedge that "ID is religion" and his order to stop "push-
14 ing" his religion; (2) failed to question the integrity of the accusations leveled against
15 Coppedge by his complaining coworkers; and (3) gave weight to subjective and bare
16 claims of feeling "uncomfortable" while giving no weight to the evidence showing that
17 Coppedge had not acted in any objectively improper manner; (4) ignored Coppedge's
18 claims of a hostile work environment, civil rights violations and harassment; (5) failed to
19 interview favorable witnesses who could have disputed a perceived "pattern" of bad be-
20 havior; and (6) failed to return to Coppedge to allow him to correct or contradict prejudi-
21 cial statements made by Weisenfelder, Edgington, Vetter and Chin.

22 Ball Decl. ¶ 13, 4:12-5:6.

23 Element (3) under *Cotran* and *Silva* is disputed as discussed immediately below: JPL's
24 conclusion that Coppedge violated JPL's harassment policy is unsupportable.

25 **3. JPL HR's Conclusion That Coppedge Engaged In "Harassment" Under Its Poli-
26 cy Lacked Factual Support And Thus Shows Discrimination.**

27 JPL's "Unlawful Harassment" policy tracks California law of harassment. See ¶¶ 120,
28 124.(JPL Policy states: "Harassment is the creation of a hostile or intimidating environment in
which verbal or physical conduct, because of its severity and/or persistence, is likely to interfere
significantly with an individual's work.") "[H]arassment focuses on situations in which the social
environment of the workplace becomes intolerable because the harassment (whether verbal,
physical, or visual) communicates an offensive message to the harassed employee." *Roby v.
McKesson Corp.* (2009) 47 Cal.4th 686, 706. "[H]arassment cannot be occasional, isolated, spo-
radic, or trivial ... [it must be] a concerted pattern of harassment of a repeated, routine or a gener-

1 alized nature.” *Aguilar, supra*, 21 Cal.4th at p. 131 (internal quotations and citations omit-
2 ted).” That is, when the harassing conduct is not severe in the extreme, more than a few isolated
3 incidents must have occurred to prove a claim based on working conditions.” *Lyle v. Warner*
4 *Brothers Television Productions* (2006) 38 Cal.4th 264, 284.

5 Defendant’s Motion does not and cannot show Coppedge engaged in anything approach-
6 ing “harassment” as JPL and California law define the term. Significantly, Defendant’s Motion
7 takes pains to restate that Defendant “had no issue with people discussing religion and politics”
8 and “political speech is permissible at JPL,” so long as the discussions are “not disruptive.” (Def.
9 Motion, at 11, 14.) To find Coppedge had harassed coworkers, JPL had to find “severe or perva-
10 sive” harassment that disrupted the workplace. The most Defendant’s Motion can show, based
11 upon the evidence, is that some people “felt uncomfortable” with Coppedge. (Def. Motion, at
12 11.)

13 Interestingly, too, Defendant’s Motion notes and the record evidence shows that some
14 people in the JPL workplace were “not offended” by the same sorts of conversations that De-
15 fendant claims amounted to harassment. Def. Motion, 11:18-19 (“While Coppedge discussed
16 these topics with Conner, she was not offended; in fact, she bought one of his DVDs about
17 ID.”); ¶ 20 (not offensive to Burgess, Weisenfelder or Vetter). So which was it: Coppedge har-
18 assed people by discussing ID, religious ideas, and Proposition 8? Or Coppedge had conversa-
19 tions with people on these subjects that did not even offend them? The answers do not present a
20 question of law for summary judgment; they present triable questions of material fact.

21 **4. Defendant’s Pretextual Statements And Arguments Present Additional Evidence**
22 **Of Discrimination.**

23 Evidence showing Defendant JPL’s dissembling, untrue, or conflicting, or unbelievable
24 statements about its reasons for demoting and firing Coppedge is evidence supporting the infer-
25 ence of discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.* (2001) 530 U.S. 133, 134
26 (“In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the ex-
27 planation that the employer is dissembling to cover up a discriminatory purpose.”) The evidence
28 of pretext is developed where this brief establishes Coppedge’s retaliation cause of action, *infra*.

V. EVIDENCE SUPPORTS COPPEDGE’S CLAIM OF RETALIATION

Govt. Code § 12940 prohibits JPL from retaliating against Coppedge for complaining of
employment discrimination against him. Gov. Code, § 12940, subd. (h). “[I]n order to establish a

1 prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a
 2 'protected activity,' (2) the employer subjected the employee to an adverse employment action,
 3 and (3) a causal link existed between the protected activity and the employer's action." *Yanowitz*
 4 *v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042. If the plaintiff establishes a prima facie case
 5 of retaliation, the defendant must articulate a legitimate, nonretaliatory explanation for its acts.
 6 The plaintiff then may join the issues for trial by showing the defendant's proffered explanation
 7 is merely a pretext for the illegal conduct. *Flait v. North American Watch Corp.* (1992) 3
 8 Cal.App.4th 467, 476.

9 The evidence here establishes all elements necessary to create a retaliation claim ripe for
 10 jury decision. Under element (1) of the prima facie case, Coppedge indisputably "engaged in a
 11 protected activity" by filing his religious discrimination complaint. Section 12940 subd. (h) ex-
 12 pressly makes filing a complaint for discrimination a "protected activity."

13 On element (2) of the prima facie case, even Defendant JPL concedes Coppedge suffered
 14 an adverse employment action when he was laid off. (Def. Motion, 15:23-24.) He also suffered
 15 adverse employment action (a) when JPL carried out an inadequate and one-sided investigation
 16 of charges of harassment resulting in his demotion and disparagement, (b) by being demoted
 17 from Team Lead, a position Coppedge had held for nine years in which he was given significant-
 18 ly added responsibilities and which distinguished him as a leader among his colleagues, and (c)
 19 by giving Coppedge undeserved low performance ratings. Ball Decl., ¶ 11, 3:19-27; ¶ 17, 6:22-
 20 24. On element (3), the evidence shows a causal link between Coppedge's filing the complaint
 21 and his being laid off. To defeat summary judgment, Coppedge needs only show evidence to
 22 raise a jury question about the causal connection. Among the evidence allowing the inference of
 23 causation is:

<u>Record Citation</u>	<u>Evidence</u>	<u>Probative of Causal Link</u>
¶ 132	On April 14, 2010, Coppedge filed his religious discrimination complaint challenging the demotion.	Coppedge's protected activity.
¶¶ 132, 138	Coppedge's supervisor, Burgess was a named defendant.	Burgess knew about the protected activity and was an adverse party.
¶¶ 137, 138, 138	Burgess subsequently selected individuals to give negative input into Coppedge's the annual performance report (ECAP). Coppedge had never had a negative performance evaluation until	Burgess developed information designed to damage Coppedge's career and set up Coppedge to lose the lawsuit or to be terminated for trumped up "performance" reasons.

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1		after filing his lawsuit.	
2	¶ 139	After Coppedge's complaint was filed, the Team Lead selected after Coppedge's demotion from the position, Mr. Patel, accused Coppedge of carrying on personal business during work time – a charge never before suggested against Coppedge.	Hand-picked replacement of Coppedge generates new and unprecedented "complaint" about Coppedge's alleged job misconduct, thus building a "case" against Coppedge. Patel's accusation shows supervisors were closely watching Coppedge, which supports the inference of retaliation.
3			
4			
5			
6	¶¶ 136, 139	Patel reported his suspicions about Coppedge's use of work hours for personal matters to Burgess even though there was no evidence of impropriety. Patel then was selected by Burgess to provide input to Coppedge's ECAP even though Burgess knew Patel had issues with Coppedge and Burgess was named as a Defendant in this lawsuit.	Shows special efforts Defendant made to build a "case" against Coppedge by any plausible means.
7			
8			
9			
10			
11	¶¶ 134, 147, 148, 149	Individuals responsible for evaluating layoff candidates in the Summer 2010 met privately with JPL attorneys in the Spring of 2010 to be briefed on the lawsuit.	Shows a "scheme," forward-planning. Only by briefing Conner and Van Why on the lawsuit beginning in Q1 2010 could they strategize to develop plausible rationales for selecting Coppedge for termination in Q4 2010. Conner/Van Why had no other purpose for attending the private briefing in Q1.
12			
13			
14			
15			
16	¶¶ 140, 141, 142, 143, 144	Conner hired two new SAs in October 2010 months after she had been advised of the need to terminate two SAs.	Shows plan to "pad" SA team with favored employees so that disfavored employees could be terminated when attrition had already reduced the SA team to the budgetary level expected to be in place.
17			
18			
19			
20	¶ 149	Coppedge received the resulting downgraded ECAP, the first negative ECAP in his 14 year career.	Shows a key step taken to position Coppedge for layoff, and that the ECAP was unprecedented.
21	¶¶ 141, 142	Defendant JPL management expected layoffs before ranking Coppedge low.	The layoff gave management "cover" for its retaliation.
22	¶ 137, 149	Coppedge was the most senior SA with the most experience. He had never been given a poor performance evaluation until after he filed the lawsuit.	Coppedge was not an otherwise logical target for layoff.
23			
24			
25	¶¶ 148, 149	Layoff criteria were largely non qualitative and subjective.	Non qualitative and subjective evaluation criteria help conceal underlying discriminatory animus and motivations.
26	¶¶ 134, 149	The layoff criterion "conduct" referred to abiding by rules and policies; Coppedge	Silent discriminatory downgrade quite possible based upon pending complaint
27			
28			

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1		was ranked favorably, even though Burgess, Conner and Van Why had all attended a meeting pertaining to this lawsuit in April/May 2010 and (especially Burgess) knew about the written and oral warnings given to Coppedge and his demotion.	and issue of disfavored workplace conversations.
5	¶ 149	In the layoff criterion "performance," three out of four of its defined elements were <i>purely subjective</i> ; Coppedge was ranked lowest.	Using the three purely subject elements of the criterion, "interpersonal effectiveness," "ownership of performance," and "commitment to improvement," Defendant could downgrade Coppedge for concealed reasons.
9	¶ 149	Defendant ranked Coppedge as one of the bottom two employees and laid him off on January 24, 2011.	Termination was engineered and carried out in retaliation for filing the discrimination lawsuit against Defendant JPL and the individual managers.

11

12 Plaintiff's expert, Larry Ball, has testified that this evidence raises a rationale inference

13 that Coppedge's termination was not based on any objective criteria, such as a documented record

14 of poor job performance, but was the product of suspicious behind-the-scenes activity occurring

15 after Coppedge had already filed his lawsuit. ¶ 150. Coppedge's termination was a response

16 to his having challenged the disciplinary actions taken against him, and not due to relevant criteria

17 JPL would have evaluated in reducing its workforce because (1) the temporal proximity between

18 the filing of the lawsuit and Coppedge's termination was suspiciously close in time; (2)

19 Coppedge's transitional supervisors who would become responsible for determining that he

20 would be laid off in late 2010 suspiciously attended an attorney-client confidential meeting concerning

21 this lawsuit several months before they assumed their supervisorial positions; (3) the hiring

22 of two new personnel to Coppedge's team in October 2010 conveniently provided management

23 with an excuse to terminate Coppedge in January 2011 in conformity with the number of

24 reductions contemplated as early as April/May 2010; (4) Coppedge had no documented critical

25 record of his job performance over a career span of 14 years until after he filed this lawsuit in

26 2010; (5) criticisms in Coppedge's 2010 performance evaluation were made by individuals with

27 motives for wanting Coppedge terminated, and in one case, accusations of misuse of business

28 time by Coppedge were manufactured by a named defendant in this case and the person he had

appointed to replace Coppedge in a position the defendant had demoted him from; (6) subjective

criteria was used to rank employees who were under consideration to be part of the reduction in

1 force; and (7) the list of employees considered for lay off was “padded” to include favored em-
2 ployees that were not even part of the group designated for staff reductions. *Id.* These multiple
3 factors raise serious questions concerning JPL’s true reason for terminating Coppedge. *Id.*

4 The FEHA aims to prevent employers from deterring employees’ good faith discrimina-
5 tion complaints. *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455. Only after
6 Coppedge challenged Chin’s outburst and filed his discrimination complaint did JPL start to
7 build its “case” against him. The unfavorable ECAP is itself actionable here, given that JPL used
8 that evaluation as a basis to detrimentally alter the terms and conditions of the recipient’s em-
9 ployment, i.e., to fire him. *See Akers, supra*; see Pl.’s Sep.Stat. ¶ 135 (“The employee’s person-
10 nel file contains the only documented record of job performance at JPL. The ECAP process (an-
11 nual performance evaluations) complies with JPL’s policy for keeping written records of job per-
12 formance. They are kept in the employee’s personnel file indefinitely.”)

13 Coppedge’s being closely watched, adversely rated and then fired, while his discrimina-
14 tion complaint was pending, creates a triable issue of fact. On parallel facts, the *Yartzoff* prece-
15 dent shows why summary judgment must be denied here. In *Yartzoff, supra*, 809 F.2d 1371,
16 summary judgment on plaintiff’s retaliation claim was reversed where: (1) the supervisors knew
17 of the pending discrimination claim; (2) plaintiff had previously received favorable ratings but
18 after filing the claim received undeserved lowered performance ratings; (3) the supervisors close-
19 ly watched plaintiff during that period; and (4) the plaintiff did suffer an adverse employment
20 action. *Id.*, 809 F.2d at pp. 1376-1377.

21 In cases like *Yartzoff* and Coppedge’s, “the plaintiff’s initial evidence, combined with
22 effective cross-examination of the defendant, will suffice to discredit the defendant’s explana-
23 tion,” i.e., show pretext and therefore allow the inference of discriminatory intent. *Yartzoff, su-*
24 *pra*, 809 F.2d at 1377 (citation omitted). There are too many “why” questions to grant summary
25 judgment here.

26 **VI. DEFENDANT’S RATIONALE SHOWS PRETEXT IN DEMOTION AND**
27 **FIRING.**

28 The April 13 meeting and the written warning informed Coppedge that HR had found he
had violated JPL’s “Unlawful Harassment” policy. ¶ 124. Yet there is nothing anywhere close to
evidence showing Coppedge had engaged in “harassment” that was “severe,” “persistent” or dis-
rupted coworker productivity, which are the crucial criteria for finding harassment under the pol-

1 icy. ¶ 120; Ball Decl. ¶ 27, 11:19-12:4 and ¶ 32, 14:10-22. So, reprimanding Coppedge for talk-
2 ing about his religious ideas by calling it “harassment,” when there is no actual evidence to sup-
3 port finding “harassment,” creates the issue of *pretext*.

4 Defendant’s testimony – saying that Coppedge was penalized for his “conduct,” not the
5 “content” – actually works against Defendant in another way: a jury may well disbelieve that tes-
6 timony. “The factfinder’s disbelief of the reasons put forward by the defendant (particularly if
7 disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the
8 prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant’s
9 proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimina-
10 tion.” *Reeves v. Sanderson Plumbing Prods., Inc.* (2001) 530 U.S. 133, 147 (internal quotation
11 and citation omitted); see *Lindsey v. SLT Los Angeles, LLC* (9th Cir. 2006) 447 F.3d 1138, 1149
12 (reversing summary judgment, holding “the proper procedure ... is to set before the factfinder the
13 task of analyzing the entire record [to] evaluate the credibility of the reasons proffered, the pos-
14 sibility of other non-discriminatory reasons, and the ultimate likelihood that the main motive was
15 discriminatory” (citing *Reeves, supra*)); *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th
16 805, 824 (quoting *Reeves, supra*).

17 Misleadingly, Defendant’s Motion at page 13 asserts “[n]o inference of discrimination
18 arises when the decisionmaker is in the same protected category as the plaintiff.” Both cases De-
19 fendant quotes, and the U.S. Supreme Court, expressly state that same-category discrimination
20 *does* occur and can be actionable. *Oncala v. Sundowner Offshore Services, Inc.* (1998) 523 U.S.
21 75, 78 (“Because of the many facets of human motivation, it would be unwise to presume as a
22 matter of law that human beings of one definable group will not discriminate against other mem-
23 bers of their group” (citation omitted)).

24 **VII. DEFENDANT’S LAYOFF DECISION RELIES LARGELY UPON SUBJECTIVE
25 AND UNQUANTIFIED CRITERIA, WHICH FREQUENTLY CAMOUFLAGE A
26 DISCRIMINATORY INTENT OR PRETEXT ISSUE, THUS PRESENTING A
27 TRIABLE ISSUE OF FACT.**

28 A layoff based upon subjective criteria, following the employee’s bringing a discrimina-
tion claim, creates questions of intent and pretext. See *Hicks v. KNTV Television, Inc.* (2008) 160
Cal.App.4th 994, 1005 (“subjective evaluations may lend themselves to discriminatory abuse and
should, therefore, be closely scrutinized”); *Bergene v. Salt River Project Agr. Imp. and Power*

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1 *Dist.* (9th Cir. 2001) 272 F.3d 1136, 1142 (subjective criteria evidence of pretext). In *Sandell v.*
2 *Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 315, the employer's sudden downgrade of the
3 employee on chiefly subjective criteria, presented an issue of intent and pretext. *Id.* (“[Noting]
4 Listug’s complaints about Sandell’s performance were often subjective, one could reasonably
5 infer that these complaints, and the negative performance evaluation, were themselves motivated
6 by discriminatory animus.”)

7 In *Garrett v. Hewlett-Packard Co.* (10th Cir. 2002) 305 F.3d 1210, the court examined
8 where the employer both (a) relied on subjective evaluation methods, and (b) failed to show ob-
9 jective reasons why the plaintiff was ranked lower than colleagues. The *Garrett* plaintiff alleged
10 discrimination and retaliation after his involvement in diversity issues was followed by succes-
11 sive downgrades and negative evaluations. *Id.* at pp.1217-1218. The *Garrett* employer defended
12 its downgrading and negative evaluations of the plaintiff by pointing to the relatively higher per-
13 formance of other employees. The Tenth Circuit, however, observed the employer “offered vir-
14 tually no evidence to support its characterization of its ranking system ...[and] no set of objective
15 criteria by which employees are differentiated.” *Id.*, at p. 1218.

16 Here, Defendant’s Motion and the layoff documents do not show why Coppedge some-
17 how deserved the lower or lowest rankings in the layoff criteria. (See Van Why Decl., Exh. A
18 and B.) One criterion, “performance,” looks like it is objective but three out four of its compo-
19 nents are subjective. (See *Id.*, Exh. B.) The “conduct” criterion is defined by reference to adher-
20 ence to rules and practices, but the layoff documents give no reason to rank Coppedge lowest,
21 thus suggesting a hidden agenda. (*Id.*, Exh. A and B.)

22 Absent from the analysis performed for determining who was to be laid off was any con-
23 sideration of Coppedge’s prior discipline or the filing of this lawsuit. When doing a layoff anal-
24 ysis, the employer *must* consider factors suggesting a retaliatory motive; the failure to do so
25 leaves the propriety of the layoff open for a trier of fact; when evidence suggests the layoff anal-
26 ysis was deficient, *pretext* appears, and summary judgment should not be granted. See *Winarto v.*
27 *Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1284, 1285 (re-
28 versing district court that “erred by considering only the effect of [employer’s] RIF analysis and
by ignoring the evidence of [employer’s] retaliatory motive for giving [plaintiff] the poor evalua-
tion” that supported the layoff).

1 **VIII. DEFENDANT'S ADMITTED RESPONSE TO COPPEDGE'S INITIAL REPORT**
2 **OF CHIN'S HARASSING CONDUCT DEFEATS SUMMARY JUDGMENT ON**
3 **PLAINTIFF'S SIXTH CAUSE OF ACTION**

4 Coppedge has alleged JPL failed to prevent religion or perceived religion based discrimi-
5 nation against him. Defendant's Motion asserts no discrimination occurred, but concedes
6 "[e]ven if it were cognizable, Caltech would still prevail. An employer meets its obligation to
7 take reasonable steps to prevent discrimination and harassment by *implementing policies and*
8 *taking action to investigate and remedy* charges under them." (Def. Motion, at 20 (emphasis
9 added), citing precedents.) Then Defendant argues HR "conducted an investigation – not only
10 into Coppedge's concerns, but those of other employees as well." *Id.*

11 Yet JPL produced no written report that shows any investigation of Coppedge's com-
12 plaint about Chin's harassment and creation of a hostile work environment, and the evidence
13 shows that it was never considered. JPL HR interviewed witnesses mostly against Coppedge to
14 criticize Coppedge's conversations and lending DVDs in the workplace. Pl.'s Sep.Stat. §§ X-
15 XIII (findings of a feckless investigation). Did JPL "implement policies and take action to inves-
16 tigate and remedy" the harassing and hostile statements Chin launched on March 2, 2009 against
17 Coppedge? If Defendant has any such evidence, let the jury hear it and decide its truthfulness
18 and credibility.

17 **IX. EVIDENCE SHOWS DEFENDANT IMPOSED DEMOTION, RETALIATION**
18 **AND TERMINATION IN VIOLATION OF CALIFORNIA PUBLIC POLICY;**
19 **SUMMARY JUDGMENT THUS CANNOT BE GRANTED ON PLAINTIFF'S**
20 **SECOND, FOURTH, EIGHTH AND TENTH CAUSES OF ACTION**

21 The above-cited evidence shows JPL reprimanded and demoted Coppedge for speaking
22 about religion and politics in the workplace. See also Pl.'s Sep.Stat., § XIV (Coppedge's reprimand and demotion). JPL then began a program of retaliation in successive stages and ultimately
23 terminated Coppedge. *Id.*, § XV (Coppedge termination). On the politics issue, Coppedge had
24 spoken to coworkers about Proposition 8, which dealt with the legality of gay marriage. Pl.'s
25 Sep.Stat., § XII (Proposition 8 incident) and *passim*. There were disagreements with some
26 coworkers. *Id.* The conversations about Proposition 8 addressed the content of the measure as
27 well as which way the coworker was going to vote on it. *Id.*

1 These conversations, dealing with the content of a ballot measure and coworkers' upcom-
2 ing votes, constituted "political activities." Private employers are not permitted to penalize and
3 terminate employees because of their engaging in political activities. Labor Code § 1101 states
4 in full: "No employer shall make, adopt, or enforce any rule, regulation, or policy: (a) Forbid-
5 ding or preventing employees from engaging or participating in politics or from becoming can-
6 didates for public office; [or] (b) Controlling or directing, or tending to control or direct the polit-
ical activities or affiliations of employees."

7 Do conversations in the workplace about political issues constitute "political activities"
8 under Section 1101? In many cases, yes. In *Smedley v. Capps, Staples, Ward, Hastings and Dod-*
9 *son* (N.D. Cal. 1993) 820 F.Supp. 1227, a supervisor told plaintiff (a subordinate) not to discuss
10 with clients or colleagues certain subjects while at work or firm social functions, such as the sub-
11 ject of homosexuality. *Id.* at pp.1228, 1229. Later the employer terminated the plaintiff after she
12 was identified as homosexual in a publication that also linked her with the employer. *Id.* at p.
13 1230. The court indicated an employer's directions to plaintiff not to discuss that subject consti-
14 tuted forbidding or preventing an employee from participating in politics or tending to control
the political activities of an employee. *Id.* at p.1230.

15 The *Smedley* court gave examples of actionable employer conduct:

16 If, for example, *plaintiff were prevented from discussing gay rights with other employees*
17 *at firm gatherings, this might well be construed as an effort to prevent her from associat-*
18 *ing and communicating with or organizing other individuals in order to work for equal*
rights. Similarly, if plaintiff had been instructed to curtail her gay-oriented political activi-
ties outside the office, this would constitute a violation of § 1101.

19 *Id.* at p. 1230 (emphasis added). The employer's warning statements to the plaintiff, coupled
20 with the employer's firing plaintiff when she was publicly identified as homosexual, led the
21 *Smedley* court to hold that there were triable issues of fact that required a trial upon the Section
22 1101 issues. *Id.* at p. 1230.

23 Coppedge's situation falls squarely under *Smedley's* logic. Coppedge spoke to coworkers
24 about issues related to gay rights in the workplace, and was told by his supervisor not to talk
25 about his "political" views there. *Smedley* indicates that terminating a person for such conversa-
26 tions violates public policy and is actionable. *Id.* at p. 1230. *Smedley* further holds that an em-
27 ployer's statements tending to squelch political speech raise triable issues of fact. *Id.* at p. 1230.
28 Therefore, JPL's penalizing and ultimately firing Coppedge, after telling Coppedge he must

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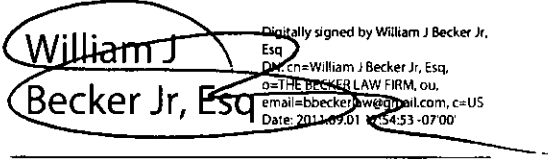
1 cease discussing a political issue casually in the workplace, under *Smedley* raises a triable issue
2 of JPL's intent and sustains Coppedge's several public policy causes of action: Second (discrim-
3 ination); Fourth (retaliation); Eighth (demotion); and Tenth (termination).

4 **X. CONCLUSION**

5 Given the many triable issues of material fact established in this brief, in Plaintiff's re-
6 sponses to Defendant's statement of facts, and Plaintiff's submitted facts, Plaintiff David
7 Coppedge requests this Court deny Defendant's Motion for Summary Judgment in its entirety.

8 DATED: September 2, 2011

THE BECKER LAW FIRM

9 
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