

1 William J. Becker, Jr., Esq. (SBN 134545)
2 **THE BECKER LAW FIRM**
3 11500 Olympic Blvd., Suite 400
4 Los Angeles, California 90064
5 Phone: (310) 636-1018
6 Fax: (310) 765-6328
7 Attorneys for Plaintiff David Coppedge

FILED
Superior Court of California
County of Los Angeles

DEC 14 2011

John A. Clarke, Executive Officer/ Clerk
By M. A. SOTO, Deputy
MOSES SOTO

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

10 **DAVID COPPEDGE**, an individual;
11 Plaintiff,

12 vs.

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

20 Defendants.

Case No. BC435600

The Honorable Ernest M. Hiroshige, Dept. 54

**PLAINTIFF DAVID COPPEDGE'S
OPPOSITION TO DEFENDANT'S
MOTION IN LIMINE NO. 4 FOR AN
ORDER EXCLUDING TESTIMONY,
EVIDENCE, COMMENT, OR
ARGUMENT REGARDING
COUNSEL'S PRIVILEGED
CONSULTATION WITH CALTECH;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

[Declaration of William J. Becker, Jr.;
Exhibits filed concurrently herewith]

FSC: February 24, 2012
HEARING TIME: 9:00 a.m.
DEPT: 54

Trial Date: March 7, 2011

25 COMES NOW PLAINTIFF DAVID COPPEDGE ("Coppedge") and hereby opposes De-
26 fendant California Institute of Technology's/Jet Propulsion Laboratory's ("JPL's") Motion in
27
28

1 Limine No. 4 for an order excluding testimony, evidence, comment, or argument regarding
2 counsel's privileged consultation with Caltech (JPL).

3 This Opposition is based on the ground that JPL's motion lacks merit, is improperly pre-
4 sented for the purpose of suppressing admissible evidence and would create confusion if granted.

5 DATED: December 13, 2011

THE BECKER LAW FIRM

William J

Becker Jr, Esq

By:

WILLIAM J. BECKER, JR., ESQ.

Attorneys for Plaintiff, DAVID COPPEDGE

Digitally signed by William J Becker
Jr, Esq
DN: cn=William J Becker Jr, Esq,
o=THE BECKER LAW FIRM, ou,
email=bbeckerlaw@gmail.com,
c=US
Date: 2011.12.14 05:31:57 -08'00'

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Coppedge is not seeking to open up privileged communications (i.e., information
4 transmitted). JPL correctly observes “the dates and fact of meetings with counsel ... are not priv-
5 ileged” (JPL Br., 1:11-12) and thus concedes the relevance and admissibility of the fact that two
6 employees – Dianne Conner and Richard Van Why – met with counsel concerning this lawsuit at
7 the same time they were assigned to determine layoffs. Conner’s and Van Why’s knowledge of
8 Coppedge’s lawsuit is circumstantial evidence showing a retaliatory motive (and pretext if they
9 deny the knowledge). Proving that knowledge is part of Plaintiff’s proof of causation. *Morgan v.*
10 *Regents of University of Cal.* (2000) 88 Cal.App.4th 52, 70 (“Essential to a causal link is evi-
11 dence that the employer was *aware* that the plaintiff had engaged in the protected activity” (em-
12 phasis added; citations to Ninth Circuit precedents omitted)).

13 On April 14, 2010, Coppedge filed the initial Complaint in this action alleging religious
14 discrimination, wrongful demotion and other legal theories. Eight months later, in January 2011,
15 Coppedge was fired. Coppedge subsequently amended the Complaint to allege wrongful termi-
16 nation and retaliation theories.

17 Sometime in April or May 2010, after the lawsuit had been filed, JPL’s litigation counsel
18 began hosting a series of meetings discussing the lawsuit with JPL management and other per-
19 sonnel. Such meetings with a corporate client are typical to make tactical decisions and discuss
20 developments in the case. Meetings with employees possessing information about the events
21 alleged in the lawsuit also are typical. It is unusual, however, to invite *non-management* corpo-
22 rate employees with *no involvement* in the events that prompted the lawsuit to attend such meet-
23 ings, particularly if those same employees are assigned to lay off employees.

24 At least two JPL employees who lacked management or supervisorial authority over
25 Coppedge and were uninvolved in the circumstances alleged in the initial Complaint attended
26 litigation strategy sessions in 2010. These same individuals were responsible for selecting who
27 would be terminated under a planned reduction in force later in the year.

28 Coppedge alleges, *inter alia*, that JPL retaliated against him by firing him after he filed
his Complaint. JPL claims that it did not retaliate against Coppedge, and is expected to argue
that Coppedge’s layoff was the result of an objective selection process. Evidence showing that
the same disinterested parties who attended litigation meetings would later be responsible for

1 terminating Coppedge is relevant to show retaliatory causation and/or pretext. This evidence
2 does not reveal confidential attorney-client information and therefore does not violate Evid.
3 Code § 952.

4 II. DETAILED FACTUAL BACKGROUND

5 On September 13, 2009, Coppedge, through his attorney, placed JPL on notice of a po-
6 tential lawsuit by sending a letter to JPL's HR department. (Exh. No. 1, Letter from W.Becker to
7 K.Saidiner).¹ The letter outlined the legal theories then being considered. In November and De-
8 cember 2009, counsel for Coppedge communicated with JPL's appointed outside counsel, Jim
9 Zapp, in an attempt to forestall litigation and resolve the matter. (Exh. No. 2, e-mails from
10 W.Becker to J.Zapp.) Finally, on April 14, 2009, Coppedge filed his Complaint. His attorney
11 delivered a courtesy copy of the Complaint to Mr. Zapp requesting he execute a Notice of
12 Acknowledgement and Receipt on behalf of all named Defendants. (Exh. No. 3, e-mail from
13 W.Becker to J.Zapp.)

14 In April or May 2010, Mr. Zapp began a series of meetings with JPL employees regard-
15 ing this lawsuit. (Exh. No. 4, Conner Dep.Tr., 104:12-25; Exh. No. 5, Van Why Dep.Tr., 37:18-
16 38:6.) These meetings were attended by various individuals, including in-house attorneys, HR
17 employees, Cassini's Program Manager, Bob Mitchell, Coppedge's Group Supervisor, Clark
18 Burgess (a named Defendant), Coppedge's Section Manager, Kevin Klenk (also a named De-
19 fendant) and others.

20 Also attending one or more of these meetings were Dianne Conner and Richard Van
21 Why.

22 **Dianne Conner:** Under the organizational structure in place in 2009, Coppedge worked
23 under Greg Chin as a system administrator ("SA") in a unit called Mission Support and Services
24 Office ("MSSO"). As part of a restructuring within Cassini, that office was to be abolished and
25 replaced by a new office to be named Integrated Uplink Systems ("IUS"). Dianne Conner was a
26 senior engineer in the Mission Sequence Uplink Team of a parallel office in the Cassini program,
27 the Instrument Operations Office ("IO").

28 In April or May 2010, Mitchell invited Conner to manage IUS and to deliver a proposal
for IUS operations. Mitchell informed Conner that she would be responsible for staff reductions.

¹ All exhibits are attached to the Declaration of William J. Becker, Jr., filed concurrently herewith.

1 Conner first met with Zapp close to the time of the filing – her best recollection is in
2 April or May 2010. (Exh. No. 4., Conner Dep.Tr., 104:12-25, 107.) She further has testified that
3 the purpose of the meeting was *solely* to discuss the lawsuit:

4 “Q. Was the purpose of the meeting to meet with counsel regarding this lawsuit?

5 MR. ZAPP: I’m going to object to the extent that it invades the attorney-client privilege.
6 I guess I’ll allow you to answer that question, but only without discussing anything that
7 was said in the meeting or the communications that actually took place, if you know what
8 the purpose of the meeting was.

9 THE WITNESS: *It was just to discuss the lawsuit.*”

10 (*Id.*, 105:22-106:7, emphasis added.)

11 Connor recalls that Zapp, another lawyer, a JPL in-house lawyer, Mitchell and an HR
12 representative attended the meeting. (*Id.*, 105:1-16.) Conner testified that a lawyer asked her to
13 attend the meeting and for a second time described the meeting as “about this lawsuit.” She con-
14 firmed that a jury would not learn what was discussed at the meeting:

15 “Q. So in April or May of 2010, counsel asked you to attend a meeting *regarding this*
16 *lawsuit*, and the jury is not going to know why; right?

17 A. That’s correct.”

18 (*Id.*, 107:19-22, emphasis added.)

19 At the time of the meeting, Conner had *no supervisory or management authority* over
20 Coppedge. In fact, she was merely a co-employee, whose computers he serviced:

21 “Q. In April or May of 2010, were you supervising David’s work?

22 A. No.

23 Q. What was your relationship to David at that point in time, your business relationship?

24 A. We worked together.

25 Q. In what sense?

26 A. He supported a lot of the tasks that I worked on.”

27 (*Id.*, 107:23-108:6.)

28 Conner participated in additional meetings with counsel about this lawsuit in the first half
of 2010 (*id.*, 109:5-15) and around August and September 2010 (*id.*, 109:16-110:1) *prior to as-*
suming her new assignment. Her last meeting with counsel took place a month before
Coppedge’s “layoff.” (*Id.*, 111:5-17.) At that time, she was aware that Coppedge would be laid
off. (*Id.*, 111:16-24.)

1 Conner had already been working with Van Why on ranking the SA team on July 28,
2 and, prior to that, had participated with Burgess in a conference call with Van Why to assess the
3 relative strengths and weaknesses of the SA's (Exh. No. 4, Conner Dep. Tr. 123:10-127:9) for
4 the purpose of ranking the SAs (Exh. No. 5, Van Why Dep. Tr. 66:18-24, 69:2-21) – well before
5 Conner took over leadership of the SA team on September 29, 2010 (Exh. No. 4, 10:6-8).

6 **Van Why:** In 2009, Richard Van Why was a Section Manager for IT Operations and
7 Clark Burgess was Coppedge's Group Supervisor, Section 1731. In October 2010, Burgess re-
8 tired (Exh. No. 6, Burgess Dep.Tr. 6:12-21) and Van Why took on additional duties as Acting
9 Group Supervisor, Section 1731, while retaining his position as Section Manager for IT Opera-
10 tions. (Exh. No. 5, Van Why Dep.Tr., 19:14-20:15.)

11 Prior to assuming his new position, Van Why learned about this lawsuit at a meeting with
12 counsel in May 2010. (*Id.*, 24:11-16; 28:7-10.) However, although Van Why attended meetings
13 with counsel to discuss this lawsuit, he claims that he never read the complaint, or learned the
14 nature of the allegations or the accusations against Coppedge. (*Id.*, 95:1-19). Sometime in the
15 summer of 2010, Van Why began working on layoffs as Acting Group Supervisor (*id.*, 54:6-21)
16 even though he would not officially assume that title until Burgess's retirement effective October
17 1, 2010 (*id.*, 19:14-24). Van Why claims he made the decision to lay off Coppedge. But the de-
18 cision was based on input from Conner and Burgess.

19 **Bob Mitchell:** Mitchell was and remains Cassini's program manager. He recalls partici-
20 pating in three meetings concerning the lawsuit. (Exh. No. 7, Mitchell Dep.Tr., 65:7-17.) He
21 testified that the first two meetings were "prompted as a consequence of the lawsuit." (*Id.*,
22 62:24-25, 63:2-7.)

23 III. ARGUMENT

24 A. JPL's Defense Of Ignorance Does Not Shield It From Liability For Retaliation 25 Where An Inference Can Be Drawn That The Layoff Decisionmakers – Van 26 Why And Conner – Learned About and Could Have Been Influenced By Discus- 27 sions Concerning Legal Strategy After The Filing Of This Lawsuit.

28 Govt. Code § 12940 (h) (Fair Employment and Housing Act, "FEHA") prohibits JPL
from retaliating against Coppedge for filing a complaint. The FEHA aims to prevent employers
from deterring employees good faith discrimination complaints. *Akers v. County of San Diego*
(2002) 95 Cal.App.4th 1441, 1455. Only after Coppedge challenged Chin's outburst and filed
his discrimination complaint did JPL start to build its "case" against him.

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

9 In retaliation cases, pretext may be inferred by, *inter alia*, the timing of the company's
10 termination decision, ***the identity of the person making the decision***, and the terminated em-
11 ployee's job performance before termination. See *Flait v. North American Watch Corp.* (1992) 3
12 Cal.App.4th 467, 479. Here, the identity of the layoff decision-makers is particularly relevant,
13 because it establishes a causal link between Coppedge's protected activity (filing of the com-
14 plaint) and JPL's action (terminating Coppedge). See *Reeves v. Safeway Stores, Inc.* (2004) 121
15 Cal.App.4th 95, 107.

16 A causal link exists in this case between (1) legal strategy meetings attended by Conner
17 and Van Why at a time when they were not decision-makers and there is no articulated reason
18 why their presence would have been necessary and (2) Conner's and Van Why's use of subjec-
19 tive criteria in the layoff process leading to Coppedge's termination. Van Why and Conner will
20 try to distance themselves from having any knowledge of Coppedge's lawsuit, or, at least testify
21 that they did not take the lawsuit into account when determining layoff criteria and selecting
22 Coppedge for termination. They will *claim that they were unaware* of the lawsuit and/or its par-
23 ticulars, even though they contradicted themselves at deposition. JPL can then claim that one
24 cannot be motivated by an event or condition of which one is wholly ignorant and, on that basis,
25 will try to deny liability for retaliating because Conner and Van Why didn't know anything about
26 the lawsuit, or knew only as much as necessary to prepare them for their new assignments. But
27 since JPL cannot argue what Conner and Van Why were told in closed door meetings with coun-
28 sel, it will simply argue that there is no evidence of what was said to them in confidence.

1 Courts have characterized this as the "ignorance defense." *See id.* If Conner and Van
2 were ignorant of the lawsuit or its particulars, their decision to fire Coppedge could not have
3 been influenced by the lawsuit or counsel's litigation strategy.

4 But Conner and Van Why *did* attend the litigation briefings and knew about JPL's litigation
5 strategy. The jury can therefore draw the inference that they knew *something* about JPL's
6 legal interests, theories and strategy and come to its own conclusions about it, particularly in the
7 absence of any explanation. That the meetings were confidential is not basis for preventing such
8 evidence from coming in. "[I]t plainly is permissible for a jury to conclude that an evaluation at
9 any level, if based on discrimination, influenced the decisionmaking process and thus allowed
10 discrimination to infect the ultimate decision." *Id.*, at 108. A plaintiff can establish causation "by
11 showing that any of the persons involved in bringing about the adverse action held the requisite
12 animus, provided that such person's animus operated as a but-for cause, i.e., a force without
13 which the adverse action would not have happened." *Id.*, at 108. "If a supervisor makes another
14 his tool for carrying out a discriminatory action, the original actor's purpose will be imputed to
15 the tool, or through the tool to their common employer." *Id.*, at 113.

16 The evidence in this case shows that Conner and Van Why – the decision-makers on
17 layoffs scheduled to take place in the first quarter of the 2011 fiscal calendar year ("FY2011"
18 beginning October 2010) – were briefed regarding this lawsuit and met privately with both JPL's
19 in-house attorneys and JPL's outside retained attorneys litigating this lawsuit as early as April-
20 May 2010, approximately six months before assuming their new assignments. Evidence of their
21 participation leads ineluctably to a rational inference that they were at least informed about the
22 lawsuit, participated in meetings with JPL's legal counsel concerning legal strategy in this case
23 and influenced by the briefings they attended with counsel. In short, this evidence shows that
24 Conner and Van Why, the layoff decision-makers, could have been influenced by adverse state-
25 ments made about Coppedge during the strategy sessions but at minimum were influenced in
26 some way adverse to Coppedge's interests by their mere participation in the meetings. These in-
27 dividuals became the "tools" of management and thus allowed discrimination to infect the ulti-
28 mate decision.

1 **B. Coppedge Does Not Seek To Place Confidential Communications Before The Jury – Only The Fact Of The Meetings About The Lawsuit And Who Attended Them.**
2

3 Under Evid. Code § 952, “[C]onfidential communication between client and lawyer”
4 means *information transmitted* between a client and his lawyer in the course of that relationship
5 and in confidence by a means which, so far as the client is aware, discloses *the information* to no
6 third persons other than those who are present to further the interest of the client in the consulta-
7 tion or *those to whom disclosure is reasonably necessary for the transmission of the infor-*
8 *mation or the accomplishment of the purpose for which the lawyer is consulted*, and includes a
9 legal opinion formed and the advice given by the lawyer in the course of that relationship.”
(Emphasis added.)

10 In this case, (1) Coppedge does not seek to disclose “information transmitted” at the JPL
11 meetings with counsel; and (2) there is no evidence that the information disclosed at private
12 meetings with counsel was reasonably necessary to be disclosed to Conner and Van Why. The
13 latter is at least a jury question.

14 “[T]he fundamental purpose behind the privilege is to safeguard the confidential relation-
15 ship between clients and their attorneys so as to promote full and open discussion of the facts and
16 tactics surrounding individual legal matters.” *Zurich American Ins. Co. v. Superior Court* (2007)
17 155 Cal.App.4th 1485, 1494. The question to be put to jurors is: Why would Conner and Van
18 Why – the layoff decision-makers – attend meetings with counsel exclusively about this lawsuit
19 unless they were discussing the *facts and tactics* surrounding this lawsuit? If they had nothing to
20 do with the litigation strategy, then – as layoff decision-makers – they should have been barred
from attending the meetings.

21 Regardless of what was said during the meetings, JPL’s counsel has already lifted the veil
22 to testimony concerning the purpose of the meetings and the identities of the individuals attend-
ing them:

23 “Q. Was the purpose of the meeting to meet with counsel regarding this lawsuit?

24 MR. ZAPP: I’m going to object to the extent that it invades the attorney-client privilege.
25 *I guess I’ll allow you to answer that question, but only without discussing anything*
26 *that was said in the meeting or the communications that actually took place, if you*
know what the purpose of the meeting was.”

27 (*Id.*, 105:22-106:7, emphasis added.)
28

1 Mitchell testified that the first three meetings all involved discussion about this lawsuit
2 and that at least the first two meetings were exclusively about this lawsuit. Counsel allowed him
3 to describe what the meetings were about (this lawsuit) and who attended them:

4 "Q. Now, sometime in first quarter 2010 did you participate in a meeting with counsel
concerning the lawsuit?

5 MR. ZAPP: Well, objection. Vague as to 'concerning the lawsuit.'

6 THE WITNESS: I participated in a meeting with counsel.

7 BY MR. BECKER: Q. Do you recall specifically what month that meeting occurred?

8 A. NO.

9 Q. Do you recall who attended that meeting?

10 A. Yes,

11 Q. Who?

12 A. Jim was there. Hima was there. Diane Conner was there. Sheri Curtis was there. A
JPL, I think, OGC member, a lawyer by the name of Karen - I don't know her last name -
- was there. I think that's all.

13 Q. Richard Van Why?

14 A. No.

15 Q. Greg Chin?

16 A. No.

17 Q. Cab Burgess?

18 A. No.

19 Q. Why was Diane Conner at that meeting?

20 A. I don't know.

21 Q. Did you invite her?

22 A. No.

23 Q. Was she invited by counsel?

24 MR. ZAPP: Objection to the extent it calls for speculation.

25 THE WITNESS: I don't know."

26 (Mitchell Dep.Tr., 61:3-62:10.)

27 "Q. Was there a subsequent meeting with counsel present regarding the lawsuit?

28 MR. ZAPP: Objection. vague, 'regarding the lawsuit.'

THE WITNESS: There was a subsequent meeting that I attended with counsel.

BY MR. BECKER: Q. Was that meeting pertaining to this lawsuit?

1 MR. ZAPP: Objection. Vague as to 'the lawsuit.' Go ahead.

2 THE WITNESS: The meeting was prompted as a consequence of the lawsuit.

3 BY MR. BECKER: Q. The earlier meeting we were talking about, was that prompted as
4 a consequence of the lawsuit as well?

5 MR. ZAPP: Same objections. vague. Go ahead.

6 THE WITNESS: Yes.

7 * * *

8 Q. Who attended it?

9 A. Jim, Hima, Diane, Richard Van Why, Kevin Klenk, Karen -- I think --

10 Q. Karen?

11 A. Yeah, the other lawyer. I don't know her last name."

12 (Mitchell Dep.Tr., 62:12-63:17.)

13 **C. The Jury Is Allowed To Draw Rational Inferences From The Evidence.**

14 JPL wants a jury to believe that Conner and Van Why, the layoff decision-makers, had a
15 legitimate purpose in participating in meetings about this lawsuit with JPL's litigation counsel.
16 But Conner and Van Why had nothing to do with this lawsuit when it was filed. The Complaint
17 filed on April 14, 2010, alleged wrongful demotion and discrimination theories. Conner and Van
18 Why had nothing to do with the disciplinary decisions concerning Coppedge's claims at the time.

19 JPL has elected not to tell the jury why Conner and Van Why were necessary to the meet-
20 ings about the lawsuit. That is its prerogative. Having made that choice, JPL cannot deny
21 Coppedge the right to produce evidence that Conner and Van Why attended those meetings and
22 the "causal" evidence from which rational inferences can be drawn that JPL fired Coppedge in
23 retaliation for his filing the lawsuit.

24 **IV. CONCLUSION**

25 The dates and fact of meetings with counsel are not privileged and Coppedge is not seek-
26 ing to open up privileged communications (i.e., information transmitted). The mere *fact* that
27 Conner and Van Why attended litigation strategy sessions with counsel (1) at a time when they
28 held no management position necessitating their participation, (2) at a time when they had no
participation in or other connection to the facts and circumstances forming the basis of the alle-
gations in the initial complaint for wrongful demotion/discrimination, and (3) where they were
engaged in the process of evaluating employee layoffs is sufficient to raise an inference that the

1 layoff process was influenced by the lawsuit. This evidence is relevant to Coppedge's arguments
2 to support causation and to show JPL's stated reasons for firing him are pretextual. Accordingly,
3 the court is respectfully urged to deny JPL's motion.

4 DATED: December 13, 2011

THE BECKER LAW FIRM

William J

Becker Jr, Esq

Digitally signed by William J Becker Jr,
Esq.
DN: cn=William J Becker Jr, Esq, o=THE
BECKER LAW FIRM, ou,
email=bbeckerlaw@gmail.com, c=US
Date: 2011.12.14 05:32:14 -08'00'

By:

WILLIAM J. BECKER, JR., ESQ.

Attorneys for Plaintiff, DAVID COPPEDGE