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 CALIFORNIA INSTITUTE OF TECHNOLOGY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

DAVID COPPEDGE, an Individual,

Plaintiff,

vs.

JET PROPULSION LABORATORY,  
 form unknown; CALIFORNIA  
 INSTITUTE OF TECHNOLOGY, form  
 unknown; GREGORY CHIN, an  
 Individual; CLARK A. BURGESS, an  
 Individual; KEVIN KLENK, an Individual;  
 and DOES 1 through 25, inclusive,

Defendants.

CASE NO. BC 435600

**DEFENDANT'S OPPOSITION TO  
 PLAINTIFF'S MOTION *IN LIMINE* NO. 3  
 PRECLUDING EVIDENCE AND  
 ARGUMENT SUGGESTING THAT  
 DEFENDANT HAD A RIGHT TO  
 INTERFERE WITH COPPEDGE'S  
 POLITICAL ACTIVITIES**

FSC Date:	February 24, 2012
Trial Date:	March 7, 2012
Time:	9:30 a.m.
Place:	Department 54
Judge:	Hon. Ernest M. Hiroshige

**FILED**  
 SUPERIOR COURT OF CALIFORNIA  
 COUNTY OF LOS ANGELES

FEB 09 2012

John A. Clary, Clerk  
 By GLORIETTA ROBINSON, Deputy

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 This Motion, which purportedly seeks to preclude Caltech from arguing that "it had a right  
4 to interfere with Coppedge's political activities," has two, equally meritless, purposes: (1) to  
5 prevent Caltech from referring to Proposition 8 at trial; and (2) to seek an improper, and untimely,  
6 motion for reconsideration of the Court's summary adjudication of Coppedge's Labor Code  
7 Section 1101 claim. Coppedge is right that he "cannot seek reconsideration of this Court's earlier  
8 ruling" – he missed that deadline – and he cannot utilize a motion *in limine* to circumvent that ruling  
9 and effect the same end. Motion at 4; L.A. Super. Ct. Local Rule No. 3.57(b).

10 Caltech has never argued that it had a "right" to interfere with Coppedge's political activities,  
11 nor does it plan to do so at trial. As Caltech has maintained throughout this lawsuit, it disciplined  
12 Coppedge because of the manner of his speech, without respect to its content. Caltech does have the  
13 right, indeed the obligation, to regulate employee conduct in the workplace, to prevent unwelcome,  
14 offensive and/or disruptive conduct, and that is all Caltech sought to do here.

15 This Motion is simply an exercise in gamesmanship by Coppedge's counsel – a backstop, if  
16 you will, if the Court denies his Motion *in Limine* No. 2 seeking to exclude reference to Proposition 8.  
17 As Coppedge's counsel explained to Caltech's counsel following a deposition in this case on  
18 January 24, 2012, he plans to present Caltech with what he views as a Hobson's choice: either  
19 Caltech agrees to exclude mention of what Coppedge considers to be political activity, including  
20 Proposition 8, or Coppedge will characterize Caltech's refusal to exclude Proposition 8 as a desire  
21 to argue that "it had a right to interfere with Coppedge's political activities" and use it as a basis  
22 to resurrect his Labor Code Section 1101 claim. By separating his requests into two motions,  
23 Coppedge is trying to have his cake and eat it, too: he wants to exclude reference to Proposition  
24 8, and at the same time re-open his Section 1101 claim.

25 There is no basis for either, and no need for Caltech to "choose." As Caltech explained in  
26 its Opposition to Plaintiff's Motion *in Limine* No. 2, incorporated herein by reference,  
27 Coppedge's insulting comment to Edgington can only be understood in reference to Proposition  
28 8, and therefore Proposition 8 has relevance beyond Coppedge's summarily-adjudicated Section

1 1101 claim. It provides necessary context for Coppedge and Edgington's encounter, which  
2 formed part of Caltech's legitimate, non-discriminatory basis for giving Coppedge the written  
3 warning. That does not mean that Caltech had (or sought) the right to control Coppedge's  
4 political activity, and certainly does not invoke Coppedge's Section 1101 claim.

5 For the reasons set forth in Caltech's Opposition to Plaintiff's Motion *in Limine* No. 2,  
6 and herein, Coppedge's request to limit argument or evidence pertaining to political activity –  
7 including but not limited to reference to Proposition 8 – should be rejected.

8 **II. THIS MOTION IN LIMINE IS AN IMPROPER ATTEMPT TO OBTAIN**  
9 **RECONSIDERATION OF A SUMMARY ADJUDICATION RULING**

10 In this purported motion *in limine*, Coppedge contends that it remains disputed whether  
11 Caltech interfered with his political activity – in other words, that his Section 1101 claim was not  
12 properly resolved in Caltech's favor as a matter of law. To the extent Coppedge seeks to  
13 resurrect his Section 1101 claim, it is an improper attempt to use a motion *in limine* to obtain a  
14 summary adjudication ruling (or here, reconsideration of such a ruling) – a practice expressly  
15 forbidden by the Los Angeles Superior Court Local Rules.

16 Summary Adjudication Improper. A motion *in limine* may not be  
17 used for the purpose of seeking summary judgment or the summary  
18 adjudication of an issue or issues. Those motions may only be  
made in compliance with Code of Civil Procedure section 437c and  
applicable court rules.

19 L.A. Super. Ct. Local Rule 3.57(b).

20 It also amounts to an improper motion for reconsideration. Any such motion was due  
21 within 10 days after service of the Court's summary adjudication ruling, and only based upon  
22 new or different facts, circumstances, or law. There are no new facts, circumstances, or law here,  
23 and the 10 day deadline expired on November 28, 2011. Cal. Civ. Proc. Code § 1008(a) ("When  
24 an application for an order has been made to a judge, or to a court, and refused in whole or in  
25 part, or granted, or granted conditionally, or on terms, any party affected by the order may, within  
26 10 days after service upon the party of written notice of entry of the order and based upon new or  
27 different facts, circumstances, or law, make application to the same judge or court that made the  
28 order, to reconsider the matter and modify, amend, or revoke the prior order.")

1 That was Coppedge's only means of seeking reconsideration, and he missed it. Cal. Civ.  
2 Proc. Code § 1008(e) ("No application to reconsider any order or for the renewal of a previous  
3 motion may be considered by any judge or court unless made according to this section.").  
4 Coppedge's dilatory attempt to obtain reconsideration at this late date is not only improper, but  
5 also a sanctionable violation of Section 1008(d) ("A violation of this section may be punished as  
6 a contempt and with sanctions as allowed by Section 128.7.").

7 **III. THIS MOTION IN LIMINE IS UNTIMELY, WHETHER AS A MOTION IN**  
8 **LIMINE OR AS MOTION FOR RECONSIDERATION OF THE COURT'S**  
9 **SUMMARY ADJUDICATION ORDER**

10 As Caltech explained in its Opposition to Plaintiff's Motion *in Limine* No. 2, motions *in*  
11 *limine* were due on November 30, 2011, and Coppedge has no justification for a two-month  
12 delay. This Motion is untimely, and the Court should decline to consider it on this ground alone.  
13 To the extent Coppedge is utilizing this Motion to obtain reconsideration of the Court's summary  
14 adjudication ruling, it is likewise untimely; as discussed *supra*, any motion for reconsideration on  
15 that ruling was due on November 28, 2011.

16 **IV. ARGUMENT**

17 **A. Clarification of Law And Record On Labor Code Section 1101.**

18 Coppedge misrepresents both Section 1101 and the Court's summary adjudication ruling  
19 on this claim, even suggesting that the issue remains in dispute. It is not.

20 **First**, Section 1101 does not "provide that a private employer *does not* have the right to  
21 control or direct an employee's political activities." Motion at 1:4-5. It provides that:

22 No employer shall make, adopt, or enforce any rule, regulation, or  
23 policy:

24 (a) Forbidding or preventing employees from engaging or  
25 participating in politics or from becoming candidates for  
26 public office.

27 (b) Controlling or directing, or tending to control or direct the  
28 political activities or affiliations of employees.

29 Cal. Labor Code § 1101 (emphasis added). The language regarding a "rule, regulation, or policy"  
30 is critical. The statute does not prohibit control or direction of political activity, without more, nor  
31 does it prohibit an employer from insuring that employees are not subjected to unwelcome,

1 offensive or disruptive conduct by co-workers in the workplace. As Coppedge admits elsewhere,  
2 it prohibits enforcement of a rule, regulation, or policy that so controls or directs political activity.  
3 Motion at 1:13-15.

4 **Second**, the Court found that Coppedge's Section 1101 claim failed as a matter of law  
5 because he neither alleged, nor provided evidence of, any such policy:

6 The § 1101 claim fails because Plaintiff has not alleged, let alone  
7 submitted evidence of, any Caltech policy that impedes the political  
8 expression of employees. (*Ross v. Independent Living Resource of*  
9 *Contra Costa County* (ND Cal. 2010) 2010 WL 2898773 [isolated  
episode of retaliation for political activity insufficient to show  
defendant, as a policy, barred its employees from engaging in  
political activity].)

10 Court's Tentative Ruling, dated October 26, 2011 (entered by the Court as to this claim, among  
11 others, on November 18, 2011). During briefing on Caltech's Motion for Summary Judgment,  
12 Coppedge identified no such policy. His contention here that he "introduced evidence of JPL's  
13 rule, regulation or policy of placing *de facto* prior restraints on his speech activity in opposition to  
14 JPL's Motion for Summary Judgment" is simply false. Now, nearly *four* months after submission  
15 of his Opposition to that Motion, and over *two* months after the Court's ruling upon it, he is  
16 advancing this new "prior restraint" theory for the first time – contending that his written warning  
17 and the April 13, 2009 meeting about it are evidence of a *de facto* prior restraint on his political  
18 speech activities. Motion at 2:14-27.

19 Not only is it far too late for Coppedge to try to introduce new legal claims, but this one is  
20 just meritless. Assuming *arguendo* any such "restraint" was placed on Coppedge (and it was  
21 not), this is not the standard under Section 1101, which prohibits enforcement of *policies*.  
22 Coppedge must "demonstrate that [the employer] had a 'rule, regulation, or policy' controlling or  
23 directing such activities." *Ross v. Indep. Living Res.*, No. C08-00854 TEH, 2010 WL 2898773, at  
24 \*9 (N.D. Cal. July 21, 2010). "The California Supreme Court . . . cited the following definition  
25 of 'policy': 'A settled or definite course or method adopted and followed by a government,  
26 institution, body, or individual.'" *Id.* (quoting *Lockheed Aircraft Corp. v. Super. Ct.*, 28 Cal. 2d  
27 481, 485-86 (1946)). The incidents that Coppedge has identified are "isolated episode[s],"  
28 involving him alone; they do not constitute Caltech policy and are not sufficient to support a

1 Section 1101 claim. *See, Ross*, 2010 WL 2898773, at \*9 (granting summary judgment on Section  
2 1101 claim: “Even if [plaintiff] were to succeed in his claim that his termination was an act of  
3 retaliation for his [political activity], that isolated episode would be insufficient to establish that  
4 [defendant], *as a policy*, barred its employees from . . . engaging in political activity.”) (emphasis  
5 added). Further, Klenk informed Coppedge that political speech *is* permissible at JPL, so long as  
6 it is not disruptive. Klenk Tr. 468:25-469:11; Ex. 44.<sup>1</sup>

7 In reality, Coppedge is trying to replace his narrow Section 1101 claim with a broader  
8 First Amendment claim – even though constitutional speech restrictions do not apply in private  
9 workplaces, as this Court held and as Coppedge concedes. Court’s Tentative Ruling on Caltech’s  
10 Motion for Summary Judgment at 5; Court’s Ruling on Caltech’s Motion for Summary Judgment  
11 at 3 (adopting tentative as to free speech claims); Motion at 1:10-11. *See Peterson v. Hewlett-*  
12 *Packard Co.*, 358 F.3d 599, 605 n.5 (9th Cir. 2004) (First Amendment concerns do not apply to  
13 limitations on workplace expression by private, rather than state, employers); *Golden Gateway*  
14 *Ctr. v. Golden Gateway Tenants Ass’n*, 26 Cal. 4th 1013, 1023 (2001) (“California’s free speech  
15 clause contains a state action limitation.”).

16 **Third, and finally**, Coppedge is misstating facts when he asserts that “it is a disputed  
17 issue in this case whether JPL’s compulsory order requiring Coppedge to ‘refrain from  
18 discussions which are argumentative, disruptive and/or harassing to your co-workers’ operated as  
19 a prior restraint on his political (speech) activities.” Motion at 3:23-26. Prior restraint is not an  
20 issue in this case *at all* – and even if it were, it would fail, because Caltech is a private employer  
21 and not subject to constitutional speech restrictions. As for whether Coppedge identified a policy  
22 sufficient for a Section 1101 claim, this also is not in dispute: the Court already, and properly,  
23 found as a matter of law that he did not.

24 Coppedge’s desire to try out a new legal theory, just over a month before trial, is not  
25 grounds to disregard the letter of the law and the actual state of the record.

26  
27  
28 <sup>1</sup> Klenk’s deposition excerpts and exhibit are attached to the concurrently-filed Gordon  
Declaration.

1           **B.     There Are No Grounds To Restrict Caltech's Ability To Discuss Political**  
2           **Activity.**

3           Although Caltech has no intention of arguing that it had a "right" to interfere with any  
4           particular kind of speech, political or otherwise, there are no grounds for granting this Motion.

5           First, to the extent Coppedge is trying to obtain reconsideration of the Court's ruling on  
6           his Section 1101 claim, that attempt is both procedurally improper and substantively meritless, as  
7           discussed above.

8           Second, to the extent Coppedge attempts to use this Motion to bolster his effort to exclude  
9           Proposition 8 from the trial, it must be denied on that ground as well. Permitting the jury to hear  
10          that Coppedge and Edgington were discussing Proposition 8 in no way suggests that Caltech is  
11          asserting any right to interfere with political speech. In the event the Court decides to grant this  
12          Motion, it should reject any such characterization by Coppedge and any corresponding effort to  
13          exclude reference to Proposition 8 from trial on this or any other basis.

14          **V.     COUNSEL FOR CALTECH MET AND CONFERRED IN GOOD FAITH**

15          Coppedge's counsel claims that Caltech did not meet and confer in good faith as to this  
16          Motion. He is wrong. Caltech did meet and confer in good faith.<sup>2</sup> On January 24, 2012,  
17          following a deposition in this case, Ms. Gordon indicated to Coppedge's counsel that Caltech  
18          would be opposing Coppedge's request to preclude evidence and argument that Caltech had a  
19          right to interfere with Coppedge's political activities.

20          **VI.    CONCLUSION**

21          For the foregoing reasons, Caltech respectfully requests that the Court deny Coppedge's  
22          Motion *in Limine* precluding evidence and argument suggesting that Defendant had a right to  
23          interfere with Coppedge's political activities.

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26  
27          <sup>2</sup> As discussed in Caltech's Opposition to Plaintiff's Motion *in Limine* No. 2, the meet and confer  
28          requirements for motions *in limine* apply to the *moving* party, not the opposing party. L.A. Super.  
        Ct. Local Rule 3.57(a).

1 DATED: February 9, 2012

2 PAUL HASTINGS LLP  
3 JAMES A. ZAPP  
4 CAMERON W. FOX  
5 MELINDA A. GORDON

6 By: 

7 MELINDA A. GORDON

8 Attorneys for Defendant  
9 CALIFORNIA INSTITUTE OF TECHNOLOGY  
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02/09/12

Superior Court of California  
County of Los Angeles

David Coppedge,

Plaintiff,

vs.

Jet Propulsion Laboratory, et al.,

Defendants.

Case **BC 435600**  
No.:

Tentative Ruling

**FILED**  
LOS ANGELES SUPERIOR COURT  
OCT 26 2011

JOHN A. CLARKE, CLERK  
BY S. TEMBLADOR, DEPUTY

Hearing Date: October 26, 2011  
Department 54, Judge Ernest M. Hiroshige  
Motion for Summary Judgment or, Alternatively, Summary Adjudication  
Moving Party: Defendant California Institute of Technology ("Defendant")  
Responding Party: Plaintiff David Coppedge ("Plaintiff")

T/R: THE MOTION FOR SUMMARY JUDGMENT IS GRANTED.

DEFENDANT TO NOTICE.

The Court considers the moving papers, the opposition, and reply.

Evidentiary Objections

The Court rules as follows on Plaintiff's evidentiary objections to Defendant's evidence:

- (1) overruled
- (2) overruled
- (3) overruled

The Court rules as follows on Defendant's evidentiary objections to Plaintiff's evidence:

Decl. of Lawrence Ball

(1)-(53) sustained. (*Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 290-292.)

11/28/11  
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EX.A

Decl. of David DeWolf

- (1)-(14) overruled
- (15) sustained only as to "(3) The treatment of David Coppedge...is illustrative of the hostility toward advocates of intelligent design."
- (16)-(25) overruled
- (26)-(31) sustained

Decl. of William Becker, Jr. in Support of Plaintiff's Opposition

- (1) sustained only as to portions of exhibit quoted in Defendants' evidentiary objections
- (2) overruled
- (3) Evidentiary objection does not comply with CRC 3.1354(b). Defendants object to the contents of an exhibit but do not set forth the objectionable material. Court cannot determine from objections whether contents of exhibits are objectionable.
- (4) Evidentiary objection does not comply with CRC 3.1354(b). See *supra*.
- (5) Evidentiary objection does not comply with CRC 3.1354(b). See *supra*.
- (6) Evidentiary objection does not comply with CRC 3.1354(b). See *supra*.
- (7) sustained only as to portions of exhibit quoted in Defendants' evidentiary objections
- (8) sustained only as to portions of exhibit quoted in Defendants' evidentiary objections
- (9) sustained only as to portions of exhibit quoted in Defendants' evidentiary objections
- (10) sustained only as to portions of exhibit quoted in Defendants' evidentiary objections
- (11) sustained only as to portions of exhibit quoted in Defendants' evidentiary objections
- (12) sustained only as to portions of exhibit quoted in Defendants' evidentiary objections
- (13) Evidentiary objection does not comply with CRC 3.1354(b). See *supra*.
- (14) Evidentiary objection does not comply with CRC 3.1354(b). See *supra*.
- (15) overruled
- (16) Evidentiary objection does not comply with CRC 3.1354(b). See *supra*.

Decl. of David Coppedge

- (1) overruled
- (2) overruled
- (3) overruled
- (4) overruled
- (5) overruled
- (6) overruled
- (7) overruled
- (8) overruled

- (9) overruled
- (10) overruled
- (11) overruled
- (12) overruled
- (13) overruled
- (14) overruled
- (15) overruled
- (16) overruled
- (17) overruled

Decl. of William Becker, Jr. in Support of Plaintiff's Supplemental Opposition

- (1) overruled

Analysis

A party may move for summary judgment "if it is contended that the action has no merit or that there is no defense to the action or proceeding." (CCP § 437c(a).) A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment. (CCP § 437c(f)(2).) The moving party bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact, and if he does so, the burden shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-51, citations omitted.)

First Cause of Action – Religious Discrimination

To establish a prima facie case of discrimination, the plaintiff must provide evidence that (1) he was a member of a protected class; (2) he was qualified or competent for the position sought or performed; (3) plaintiff suffered an adverse employment action; and (4) some other circumstance suggesting discriminatory motive. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) If the employee asserts a prima facie case, the employer is required to offer a legitimate non-discriminatory reason for the adverse employment action. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1002.) Once the Defendant presents a legitimate, non-discriminatory reason for its actions, Plaintiff must present evidence that the reasons stated for the adverse employment action were pretextual. (*Guz* at 361-362.)

Taking into account the totality of circumstances, including Plaintiff's ultimate termination, there is a triable issue of fact as to whether Plaintiff's demotion and the negative performance evaluations were a "substantial adverse change in the terms and conditions" of employment. (See P's Additional Material Facts (AMF) 6, 128; *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1456-1457.) The adverse employment actions discussed above, along with evidence that Plaintiff was told "not to talk about religion or politics within anyone in this office," are sufficient at the summary

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judgment stage to create an inference of discrimination. (See Plaintiff's Response to Defendant's Material Fact (PMF) 28; see also Plaintiff's Depo 275 [P was "pushing" his religion and needed to stop].)

Defendant has submitted evidence that it demoted Plaintiff from his lead positions because of dissatisfaction with Plaintiff's interactions with customers and colleagues; and that it laid off Plaintiff as part of funding-based reductions. (See Evidence cited at Motion 12:1-22.) Accordingly, Defendant has met its burden of presenting legitimate, non-discriminatory reasons for the adverse employment actions taken against Plaintiff.

Plaintiff contends that there is direct evidence of discriminatory animus because Defendant allegedly engaged in religious stereotyping. However, Plaintiff fails to point to evidence suggesting that Defendant made its decisions based on assumptions about how Christians or believers in Intelligent Design behave. (*Lindahl v. Air France* (9th Cir. 1991) 930 F.2d 1434, 1439 [direct evidence of sexual discrimination where district manager "saw the female candidates as nervous and emotional"].)

Plaintiff contends that because Chin told Plaintiff to stop "pushing" his religion, the reasonable inference is that Chin sought to squelch the content of Plaintiff's religious speech at work. However, undisputed evidence reflects that it was Plaintiff's persistence in advocating his religious views, rather than the content of his views, that led to complaints from co-employees and Chin's discussion with Plaintiff. Chin and Vetter felt that Plaintiff was trying to convert them to his religious beliefs. (AMF ¶¶ 66, 79.) Weisenfelder testified that it was Plaintiff's "persistence" that made her feel uncomfortable. With respect to the Intelligent Design DVD, she testified that "it was not the content of the DVD that made [her] feel targeted; it was the sticky note on the back of the cover [which contained a list of employees with whom Plaintiff was discussing ID]." (Weisenfelder 109-110; 22.) Plaintiff told Edgington that he "must not like children," because he disagreed with Plaintiff's views on Prop. 8. (Edgington 50.) The complaints from co-employees involved at least three different subjects – Intelligent Design; Proposition 8; and whether the "holiday party" should have been named a "Christmas party" – which supports the inference that it was the Plaintiff's persistence and manner of communication, rather than his content, that led to complaints.

Plaintiff also contends that the HR investigation was inadequate. However, the cases relied upon concern misconduct-based terminations that allegedly violated implied contracts not to terminate except for good cause. (See *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256.) This case law is not applicable here. Moreover, the expert testimony of Lawrence Ball, upon which Plaintiff relies, is inadmissible.

Finally, Plaintiff contends that Defendant's explanations for the disciplinary decisions lack credence. However, the issue is not whether Defendant rightfully believed that Plaintiff harassed other employees or had a hard time dealing with customers. Rather, the issue is whether there is a reasonable inference that discriminatory animus motivated Defendant's employment decisions. (*Guz*, 24 Cal. 4<sup>th</sup>

at 362.) As discussed above, there is undisputed evidence that several employees believed Plaintiff to be, and that he in fact was, aggressive in asserting his religious and political views. While Plaintiff contends that issues of customer dissatisfaction "never once came up" in the disciplinary proceedings, there is undisputed evidence that Burgess made the lead removal decision because of "several years of input" regarding Plaintiff's performance. (Burgess 96-97.) Plaintiff admits that customers complained about working with him, and testimony about customer complaints from other employees is admissible nonhearsay to show Defendant's motivation in disciplining Plaintiff. Interoffice harassment complaints and customer dissatisfaction reasonably fall under the same general performance issue which motivated Defendant's actions – "conduct/interpersonal communications issues." (Becker Suppl. Decl. Exh. 52.) Finally, Plaintiff has not persuasively rebutted evidence that his lay off was part of a funding-based reduction; that Van Why and Conner treated Plaintiff fairly; and that Van Why and Conner chose Plaintiff for layoff as part of a careful evaluation process. (PMF 66-80.)

Based on the foregoing, there is insufficient evidence that discriminatory animus motivated Defendant's decision to demote and later lay off Plaintiff. The MSA is granted.

#### First Cause of Action – Right to Free Speech

Defendant contends that the first cause of action fails to the extent it is based upon Plaintiff's alleged right to free expression. (Issue 3.) Defendant contends that FEHA bars discrimination based on membership in protected classes, not speech (Gov. Code § 12940(a); and that California law does not prohibit regulation of employee speech by a private employer like Cal Tech. (*Peterson v. Hewlett-Packard Co.* (2004) 358 F.3d 599, 605 n.5.) This argument is persuasive and has not been opposed by Plaintiff.

The MSA is granted as to Issue 3.

#### Second Cause of Action – Violations of Labor Code §§ 1101 and 98.6

Plaintiff claims that Defendant violated Labor Code §§ 1101 and 98.6 because employees reported that he harassed them regarding Prop. 8. (SAC ¶¶ 74-75.)

Section 1101 provides that no employer shall make or enforce any rule, regulation, or policy prohibiting employees from participating in politics or controlling or directing their political activities or affiliations. Section 98.6 prohibits discharge of or discrimination against an employee because the employee engaged in any conduct protected in that chapter of the Labor Code.

The § 1101 claim fails because Plaintiff has not alleged, let alone submitted evidence of, any Caltech policy that impedes the political expression of employees. (*Ross v. Independent Living Resource of Contra Costa County* (ND Cal. 2010) 2010 WL

2898773 [isolated episode of retaliation for political activity insufficient to show defendant, as a policy, barred its employees from engaging in political activity].)

The § 98.6 claim is apparently derivative of the § 1101 claim and thus fails for the same reasons. Plaintiff has not opposed the motion as to the § 98.6 claim.

The MSA is granted as to the second cause of action.

### Third and Fourth Causes of Action – Retaliation

To establish a *prima facie* case of retaliation a plaintiff must show (1) that she engaged in a protected activity, (2) that her employer subjected her to an adverse employment action, and (3) that there is a causal link between the two. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138.)

There is sufficient evidence to support Plaintiff's *prima facie* case at the summary judgment stage. Plaintiff was laid off eight months after filing his complaint, and the lay-off process began three months after his complaint was filed. (AMF 145; see *Passantino v. Johnson & Johnson Consumer Products, Inc.* (9th Cir. 2000) 212 F.3d 493, 507 [temporal proximity can support *prima facie* case].)

As discussed above, Defendant has asserted legitimate, non-retaliatory reasons for the disciplinary and layoff decisions. Thus, as with the discrimination claims, the issue is whether Plaintiff has evidence that the Defendant's explanation is pretextual.

To show pretext, Plaintiff submits evidence that he received negative ECAP performance reviews and other criticism from the team leader shortly after his complaint was filed, even though his prior ECAP reviews were generally positive. (AMF ¶¶136-139; compare Oppo. Exh. 31-33 with Exh. 34.) Plaintiff also suggests that the individuals responsible for evaluating layoff candidates schemed with Defendant's attorneys as to plausible rationales for selecting Plaintiff for layoff. (Oppo. 12:11-15.)

This evidence is insufficient to satisfy Plaintiff's burden of showing a triable issue. Plaintiff's speculation about Defendant scheming with its attorney is insufficient to defeat summary judgment. Given the extensive evidence as to Defendant's non-retaliatory motives, a reasonable juror could not conclude based on any changes in the ECAP reviews that the layoff process was unfair or pretextual. Moreover, earlier ECAP reviews refer to "customer concerns" (Oppo. Exh. 33) and thus are not inconsistent with Burgess' and other testimony that Plaintiff had a history of customer dissatisfaction and communication issues.

The MSA is granted as to the third and fourth causes of action.



Seventh, Eighth, Ninth, Tenth, and Eleventh Causes of Action – Wrongful Termination and Demotion in Violation of FEHA; Wrongful Termination and Demotion in Violation of Public Policy

These causes of action are derivative of the FEHA claims discussed above. For the reasons stated above, the MSA is granted as to these causes of action.

Fifth Cause of Action – Harassment

The elements of harassment are (1) the employer harassed employee; (2) on the basis of race, sex, or other grounds specified in Gov.Code § 12940(h); and (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment. (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465.) Harassment claims are generally based on conduct outside of normal business practices, such as slurs or derogatory drawings, physical interference with freedom of movement, or unwanted sexual advances. (*Reno v. Baird* (1998) 18 Cal.4th 640, 646.)


For the reasons stated in Defendant's moving papers, which are incorporated here by reference, there is no evidence that Defendant's alleged harassing conduct was severe and pervasive. Moreover, the events on which Plaintiff bases this claim appear to have been personnel management actions, which do not constitute harassment under FEHA as a matter of law. Plaintiff does not discuss the fifth cause of action in opposition and apparently concedes these arguments.

The MSA is granted as to the fifth cause of action.

Sixth Cause of Action – Failure to Prevent Discrimination or Harassment

It is unlawful for "an employer...to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." (Gov. Code § 12940(k).) This cause of action is inherently intertwined with the discrimination and harassment claims. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 288-89.) Accordingly, for the reasons stated above as to the discrimination and harassment claims, the MSA is granted as to this cause of action.

Date: October 26, 2011



Judge Ernest M. Hiroshige

02/09/12

EXHIBIT B

## SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 11/18/11

DEPT. 54

HONORABLE Ernest Hiroshige

JUDGE

S. TEMBLADOR

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

S. ALEXANDER, CRT. AST.

ELECTRONIC RECORDING MONITOR

Deputy Sheriff

NONE

Reporter

3:30 pm BC435600

Plaintiff  
Counsel

NO APPEARANCES

DAVID COPPEDGE

Defendant  
Counsel

VS

JET PROPULSION LABORATORY ET AL

## NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER/NOTICE OF ENTRY OF ORDER;

The Court having taken the matter under submission on October 26, 2011 hereby rules pursuant to the Court's written ruling which is signed and filed this date.

Clerk to notice via fax.

## CERTIFICATE OF SERVICE BY FACSTMILE

I, John A. Clarke, Executive Officer/Clerk of the Superior Court of California, County of Los Angeles, and not a party to the within action, hereby certify that on 11-18-11, I served the above minutes and copy of the Court's written ruling on counsel listed below by facsimile transmittal and the transmission was reported complete and without error.

Dated: November 18, 2011

John A. Clarke, Executive Officer/Clerk

By: S. Temblador

S. Temblador, Deputy

William J. Becker, Jr.  
310/765-6328

James A. Zapp  
Melinda Gordon

## SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 11/18/11

HONORABLE Ernest Hiroshige

HONORABLE

JUDGE

JUDGE PRO TEM

Deputy Sheriff

S. TEMBLADOR

S. ALEXANDER, CRT. AST.

NONE

DEPT. 54

DEPUTY CLERK

AST.

ELECTRONIC RECORDING MONITOR

Reporter

3:30 pm BC435600

DAVID COPPEDGE

VS

JET PROPULSION LABORATORY ET AL

Plaintiff

Counsel

Defendant

Counsel

NO APPEARANCES

NATURE OF PROCEEDINGS:

213/996-3294

**RULING ON SUBMITTED MATTER**November 18, 2011**David Coppedge v. Jet Propulsion Laboratory, et al.**

Case No. BC 435600

Department 54, Judge Ernest M. Hiroshige

Re: Motion for Summary Judgment, or in the Alternative, Summary Adjudication

(Original Hearing Date: October 26, 2011)

**RULING:** THE COURT MODIFIES ITS TENTATIVE RULING AS FOLLOWS: THE MOTION FOR SUMMARY JUDGMENT IS DENIED. THE MOTION FOR SUMMARY ADJUDICATION IS GRANTED AS TO ISSUE 3 IN DEFENDANT'S NOTICE OF MOTION, AND THE SECOND AND FIFTH CAUSES OF ACTION. THE MOTION FOR SUMMARY ADJUDICATION IS DENIED AS TO THE FIRST, THIRD, FOURTH, SIXTH, SEVENTH, EIGHTH, NINTH, TENTH, AND ELEVENTH CAUSES OF ACTION.

On October 26, 2011, the MSJ/MSA filed by defendant California Institute of Technology ("Defendant") came for hearing before the Court. After considering the parties' written and oral arguments, the Court took the matter under submission. After further review of the parties' arguments and cited legal authorities, the Court hereby rules as follows:

**Evidentiary Objections**

The Court rules as follows on the evidentiary objections to the Declaration of Lawrence Ball:

- (1)-(10) Overruled
- (11) Sustained
- (12)-(13) Overruled
- (14)-(15) Sustained
- (16) Overruled
- (17)-(18) Sustained
- (19)-(27) Overruled
- (28)-(35) Sustained
- (36)-(39) Overruled
- (40)-(53) Sustained

The Court adopts its tentative ruling on all other evidentiary objections.

**First, Third, and Fourth Causes of Action – Religious Discrimination, Retaliation**

After further review of the parties' arguments, the Court finds that a triable issue of material fact exists as to whether Defendant's stated reasons for the adverse employment actions against Plaintiff were pretextual.

There are triable issues of fact as to whether Plaintiff's demotion, written warning, negative performance evaluations, and ultimate termination were adverse employment actions. There is evidence that the team lead engaged in significant customer interaction and coordination of other employees. (UMF 17; P's AMF 6-7, 128.) Defendant's purported decision to remove Plaintiff from team lead due to communication issues suggests the team lead enjoyed significant additional responsibilities. Thus, a trier of fact could find that Plaintiff's demotion from team lead was a substantial adverse change in the terms of his employment. While the written warning or negative performance evaluations may not be actionable in isolation, a trier of fact would be entitled to consider them as a part of a generalized discriminatory response to Plaintiff's religious views or protected activities. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1060.)

Given the close temporal proximity between Plaintiff's confrontation with Chin on March 2, 2009, which centered on Plaintiff's religious views and speech, and Plaintiff's demotion on April 13, 2009, Plaintiff has asserted a prima facie case for discrimination. (*Passantino v. Johnson & Johnson Consumer Products, Inc.* (9th Cir. 2000) 212 F.3d 493, 507 [temporal proximity can support prima facie case].) A trier of fact could also view the events of March 2, 2009, as triggering a string of adverse employment actions leading up to Plaintiff's termination.

As to the retaliation claims, the temporal proximity between Plaintiff's claim of a "hostile work environment" in March 2009 and his demotion in April 2009 support a prima facie case. Especially given the evidence of earlier adverse employment actions, Plaintiff's termination eight months after the filing of his complaint also supports a prima facie case. This prima facie case is supported by evidence that the lay-off process began three months after Plaintiff's complaint was filed. (AMF 145.)

A trier of fact would be entitled to disbelieve Defendant's stated reasons for the adverse employment actions. The Court was persuaded by Plaintiff's argument at the hearing that a trier of fact should decide whether Weisenfelder, Chin, Burgess, and the relevant decisionmakers acted based on the content of Plaintiff's religious views as opposed to his alleged persistence. Because of the distinctive facts of this case, particularly Plaintiff's alleged "pushing" of Intelligent Design and the perception of Intelligent Design as religion by various co-employees, this determination requires an inquiry into the internal mental states of individuals that is inappropriate for summary adjudication. Defendant's argument that the relevant decisionmakers are in the same "protected category" (i.e. Christian), and thus lacked discriminatory bias, is not persuasive. Christianity is diverse, and a trier of fact could reasonably conclude that the decisionmakers held different views on Christianity and Intelligent Design than Plaintiff. While there is evidence in the record that Weisenfelder and others believed Plaintiff to be persistent, a trier of fact should be able to consider evidence that Plaintiff was tactful in approaching co-employees with his religious ideas and that other employees were not offended by Plaintiff's conversations. (See, e.g., AMF 20, 24.)

A trier of fact could find it suspicious that Defendant initially investigated Plaintiff for workplace harassment, issued a written warning that was later rescinded, and demoted Plaintiff for reasons separate from the alleged workplace harassment. The shifting nature

of Defendant's response to the alleged workplace harassment could cause a trier of fact to question the legitimacy of the demotion and written warning.

Defendant primarily relies on the testimony of Clark Burgess to show that Plaintiff's demotion from team lead was based on a longstanding dissatisfaction with Plaintiff's interaction with colleagues. (Burgess Depo. 96; Mot. 12:12-16.) Burgess testified that the incident on March 2, 2009, was the "straw that broke the camel's back" and that he "couldn't take it anymore." However, a trier of fact would be entitled to disbelieve Burgess' testimony in light of Plaintiff's performance evaluations, which were signed by Burgess and were generally positive. (Oppo. Exh. 4, 6, 31-34.) While Plaintiff's performance evaluations prior to 2009 briefly refer to "customer concerns," the evaluations could be viewed as inconsistent with Burgess' suggestion at deposition that Plaintiff's performance issues were longstanding. If such was the case, one could presume Plaintiff's performance issues would have been more clearly documented in his pre-2009 evaluations.

Finally, as argued by Plaintiff at the hearing, a trier of fact could also reasonably question evidence that Plaintiff's performance evaluations appear to become lengthier and more negative after his altercation with Chin regarding "pushing religion" and his complaint of a hostile work environment in March 2009. (Oppo. Exh. 4, 6, 31-34.)

The MSA is denied as to the first, third, and fourth causes of action.

Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Causes of Action – Wrongful Termination and Demotion in Violation of FEHA; Wrongful Termination and Demotion in Violation of Public Policy; Failure to Prevent Discrimination or Harassment


As stated in Defendant's moving papers, these claims are derivative of Plaintiff's discrimination and retaliation claims. Thus, for the reasons stated above, the MSA is denied as to these causes of action.

Issue 3, and Second and Fifth Causes of Action – Right to Free Speech (Issue 3): Violations of Labor Code §§ 1101 and 98.6; Harassment

The Court was unconvinced from Plaintiff's oral argument that it should change its tentative ruling as to Issue 3 in Defendant's notice of motion or as to the second cause of action. Plaintiff apparently conceded as to his harassment claim. Accordingly, the MSA is granted as to Issue 3 and the second and fifth causes of action.

Clerk to serve notice via fax to the parties' counsel of record.

Date: November 18, 2011

  
Judge Ernest M. Hiroshige

02/09/12



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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

DAVID COPPEDGE, AN INDIVIDUAL, )  
 )  
 PLAINTIFF, )  
 )  
 VS. ) CASE NO.  
 ) BC 435600  
 JET PROPULSION LABORATORY, FORM )  
 UNKNOWN; CALIFORNIA INSTITUTE )  
 OF TECHNOLOGY, FORM UNKNOWN; )  
 GREGORY CHIN, AN INDIVIDUAL; )  
 CLARK A. BURGESS, AN INDIVIDUAL; )  
 KEVIN KLENK, AN INDIVIDUAL; AND )  
 DOES 1 THROUGH 25, INCLUSIVE, )  
 )  
 DEFENDANTS. )  
 )

**ORIGINAL**

DEPOSITION OF KEVIN STANLEY KLENK,  
VOLUME II, PAGES 270 - 481  
TAKEN ON WEDNESDAY, APRIL 6, 2011

24 || A. SULLIVAN REPORTERS  
25 || COURT REPORTERS  
  
2420 W. CARSON STREET, SUITE 210  
TORRANCE, CALIFORNIA 90501  
PHONE 310 • 787 • 4497  
FAX 310 • 787 • 1024

REPORTED BY:  
HEIDI SULLIVAN  
CSR NO. 6600  
FILE NO.: 11-129

02/09/12

EX. C

1 A. WHAT IS THE QUESTION?  
2 Q. BELOW THE "FYI" AND THE LINE THERE, IS  
3 THAT AN E-MAIL YOU SENT TO HR?  
4 A. YES, I BELIEVE SO.  
05:15:55PM 5 Q. AND WHAT WAS THE PURPOSE OF THAT E-MAIL?  
6 A. JUST TO SUMMARIZE TO HR WHAT THE WRITTEN  
7 WARNING MEETING WENT LIKE.  
8 Q. IS THERE ANYTHING IN THERE THAT STATES  
9 THAT YOU INFORMED MR. COPPEDGE THAT HE WAS FREE TO  
05:16:10PM 10 DISCUSS HIS PERSONAL VIEWS, INCLUDING, BUT NOT  
11 LIMITED TO, RELIGION, POLITICS, AND INTELLIGENT  
12 DESIGN, SUBJECT TO CERTAIN CONDITIONS?  
13 A. NO, I DON'T SEE ANYTHING IN THERE  
14 EXPLICITLY.  
05:17:43PM 15 (DISCUSSION HELD OFF THE RECORD.)  
16 MS. FOX: COUNSEL, MAY I SUGGEST IF IT'S IN  
17 THE TRANSCRIPT, WE CAN SHORT-CIRCUIT THIS.  
18 MR. BECKER: I'M NOT GOING TO ATTACH THIS.  
19 ALL RIGHT. LET'S LOOK AT THE TRANSCRIPT  
05:18:03PM 20 REAL QUICK, AND IT WILL MAKE EVERYBODY HAPPY.  
21 MS. FOX: MR. KLENK WILL BE ABLE TO HELP YOU.  
22 (DISCUSSION HELD OFF THE RECORD.)  
23 MR. BECKER: OFF THE RECORD WE WERE SEARCHING  
24 THE TRANSCRIPT THAT WAS PREVIOUSLY MARKED AS 44.  
05:20:19PM 25 Q. MR. KLENK, YOU REFERRED ME TO THE LINE

02/09/12

05:20:33PM

1 IN THAT TRANSCRIPT THAT SAYS, "WE HAVE NO ISSUE WITH  
2 PEOPLE DISCUSSING RELIGION AND POLITICS IN THE OFFICE  
3 SO LONG AS IT'S NOT UNWELCOME OR DISRUPTIVE"; IS THAT  
4 RIGHT?

5 A. CORRECT.

6 Q. IS IT YOUR TESTIMONY THAT THAT WAS YOUR  
7 ATTEMPT TO INFORM MR. COPPEDGE THAT HE WAS FREE TO  
8 DISCUSS RELIGION AND POLITICS SO LONG AS IT WAS NOT  
9 UNWELCOME OR DISRUPTIVE?

05:20:55PM

10 A. THAT WAS AN EXPLICIT STATEMENT TO THAT  
11 EFFECT.

12 Q. NOW, LET ME ASK YOU THIS.

13 THE EVIDENCE IN THIS CASE, I'LL  
14 REPRESENT TO YOU, SHOWS THAT DAVID WOULD APPROACH AN  
15 INDIVIDUAL ONE TIME, OFFER TO DISCUSS A TOPIC, AND IF  
16 TOLD THAT IT WAS NOT SOMETHING THAT PERSON WANTED TO  
17 DISCUSS, HE WOULD LEAVE. AND YET THAT WAS THAT  
18 CHARACTERIZED BY AT LEAST ONE INDIVIDUAL AS BEING  
19 UNWELCOME AND DISRUPTIVE.

05:21:27PM

20 WERE YOU AWARE THAT ONE INDIVIDUAL HAD  
21 ENCOUNTERED DAVID ON ONLY ONE OCCASION AND THAT THAT  
22 PERSON HAD COMPLAINED THAT DAVID'S APPROACHING HER  
23 WAS UNWELCOME AND DISRUPTIVE?

05:21:47PM

24 MS. FOX: OBJECTION TO THE PREAMBLE AS  
25 MISCHARACTERIZES THE RECORD. THE SECOND PART ALSO

52/09/12

Transcript of recorded conversation concerning David Coppedge and allegations that he violated JPL's Ethics Policy and Policy on Unlawful Harassment by handing out DVDs to coworkers on intelligent design.

Date: April 13, 2009

Location: Office of Kevin Klenk, Bldg 601, JPL Woodbury facility

Present:

- David Coppedge, Cassini System Administrator Team Lead
- Kevin Klenk, Section 173 Manager under Office of Chief Information Officer
- Clark A. (Cab) Burgess, Sec 173 Group Supervisor, responsible for allocating system administration resources to flight projects at JPL.

Other people referred to in the discussion:

- Jhertaune Huntley: HR investigator
- Greg Chin: Cassini Mission Support and Services Office Manager (MSSO), responsible for Cassini-related task assignments for David Coppedge.

[Meeting opens. David asks if it can be recorded; Kevin says yes. David is handed the Written Warning accusing him of violating JPL Ethics and JPL Policy on Unlawful Harassment by handing out DVDs on intelligent design.]

Burgess: Jhertaune wanted to make sure you got copies of those... [inaudible]

Coppedge: Am I supposed to read this? Now, or ...

Burgess: Let's go over it together.

Klenk: [inaudible conversation with someone who stopped in with a question.]

Burgess: So as Jhertaune interviewed a number of people on considered your customers with the flight-- with the Cassini project specifically, and this is kind of the result of what she found, and I think it looks to me like two different areas here she's trying to address at least. [pause, Dave reading]

That first bullet she talks about that you approached coworkers during work hours. And she's found that a lot of people had been overly nice to you when they-- just to move on, and to, when you presented the ideas of whatever it was, politics, [mumbled] and they were just in agreement without being rude or anything else, but she's found a lot of people who were concerned about the discussions you were trying to get into with them.

And then there's this other instance where you met someone in his office and he asked you to leave. That was considered inappropriate. So she's found that as she understands it, you've violated several business rules and ethics here at JPL.

It's not the nature of, it's not the subject matter so much as it is interruption of quote-unquote 'JPL work' that she's trying to focus on. Whether pro or con on any particular issue it really doesn't matter. To her was, whatever the discussions that were going on that you were attempting were not JPL work. And that was a big concern on her part.

Klenk: And the other people were finding it unwelcome and disruptive; that's the major portion of it. They were feeling uncomfortable with the situation.

Coppedge: Nobody has communicated this to me, and did you get a copy of the,



Burgess: They were trying to be nice to you. [Pause, paper shuffling.]

[Coppedge hands Klenk some of the documents he had given Jhertaune, explaining the nature of the material being shared and the way it was being shared.] Did Jhertaune show you this?

Klenk: No, I didn't receive that, [unclear], the summary.

Coppedge: Alright, for the record let me give you what I gave her. [pause, 2-3 words inaudible as papers are being handed over.]

Burgess: So she and Nancy Aguilar, who's our 1X rep, Human Relations, both offered to be here, but I thought we could discuss this without HR being in attendance, but if you'd care to discuss it more with them later, you can. These are the two main points that they had concern over.

Klenk: They do this regularly. ER, they go out, we actually heard that you said someone was creating a hostile work environment. So we immediately called ER, that you were being, you felt you were in a hostile work environment, so we had them immediately go over and say please check into it. It was an impartial point of view.

Coppedge: No.

Klenk: The response to us was, well, there was a hostile work environment and we feel that David is the one creating it.

Coppedge: Did you receive the transcript of the meeting that Greg Chin had with me on March 2?

Klenk: Transcript? No.

Burgess: Did you send that to, that was HR? [brief talking over]

Coppedge: I gave Jhertaune a copy; immediately after Greg had a conversation with me. I said this is kind of a sensitive subject, and it might be good for both of us to document what was said.

Klenk: Uh-hm.

Coppedge: So I gave him my recollections of his conversation with me, and I had that here with me; here it is, if you'd like to look at it. [Hands copy of email to Klenk; he reads it.]

Klenk: Partly on this, I see that the last line where Greg decided to report it, that you said he [Greg] was creating a hostile work environment.

Coppedge: I didn't initiate anything...

Klenk: So his, that was the first time that he had been accused of that, so he reported it to us, I believe it was; in which case we said, OK, we'll bring it to ER and investigate the situation. The...

Coppedge: OK, but I did not instigate a thing. Basically, I was trying to work it out with Greg, and I documented it in an email to him and him alone, OK. He took the step of starting an investigation.

Klenk: no we did.

Coppedge: Well, he had to hear...

Klenk: We did.

Coppedge: You had to hear it from him, because I didn't contact...

Klenk: That's correct; he let us know that he was being accused of it, and since we are, actually are your line managers, not Greg, he, Greg shouldn't have been involved in this sort of discussion necessarily, so as your line managers, we immediately called Employee Relations, which is the procedure we're supposed to go through. OK; we go through that, 'please investigate the situation, let us know what the situation is, and provide us with a set of your recommendations for this sort of situation.'

Coppedge: Uh-hm, but...

Klenk: That's what the memo here is a result of. This is the feedback we received from them. After talking with the people in your area, and these things are, if you look into the Ethics Policy, and the Harassment Policy, and things, they are considered anonymous and confidential. We don't want people to have retaliation against them for having reported it. But the people did say they felt it was an uncomfortable work environment.

Burgess: even though they didn't tell you about it.

Klenk: They were, Jhertaune came back and it was, she absolutely said, it was very uncomfortable for the people there.

Coppedge: OK, [Klenk talks over him]

Klenk: So, as your management, we have to follow through. This is a written warning of the situation, so we have it documented and put in your file.

Coppedge: OK, you said at this meeting that I'd be supplied with all the information that I was requesting.

Klenk: And this is the summary we have; that's part of it; you received the thing on the JPL Policy,

Burgess: Actually there's two copies.

Klenk: There were two copies of it, that's the Ethics Policy, and the...

Coppedge: Right, but those are policy documents. I was asking for a procedure for investigating employees.

Klenk: That would be ER. They regularly do this and our procedure is to call them and have them go through their routine investigation.

Coppedge: OK, so there must be a routine investigation documented.

Klenk: That is something that we aren't a part of.

Burgess: Jhertaune called me this morning and said there is nothing written down as far as procedure for them to follow other than investigating the [circumstances?]

Klenk: But, that's what it is. But in the past they've behaved with professionalism and I don't expect them to do anything less than that.

Coppedge: Well, undoubtedly. But I find it hard to believe that an institution as large as JPL does not have written procedures for investigating employees. And that's what I've been requesting for a month now, and no one will give it to me.

Burgess: Well Jhertaune reminded me that she told you that they don't have anything.

Coppedge: She said that on Thursday. [April 9]

Burgess: She reminded me today that they had nothing written on that as far as what they go through as an organization.

Coppedge: OK, a couple of points here. I've never been accused of this in my entire professional career. Let the record state that.

Klenk: We understand that. We, Cab and I, we're not aware of the situation,

Coppedge: And let the record state as I put in my document that this has been infrequent, on the average once a month I might approach people. These are people who are not total strangers but coworkers and friends that I know and they know me. And the approach is "This is interesting, would you be interested in viewing it?" It's usually at the end of a Friday when people are going home anyway--never when they're actively busy with things. And so those 12 points I documented, I have records to show that's the way it's been. I don't recall anybody telling me that asking them this was unwelcome, and if they did, I backed off, and that was the end of it.

Now the fact that this came all of the sudden on March 2 the first time after working with Greg Chin for some 10 years -- out of the blue this accusation comes. And I tried to work directly with Greg, [after?] our conversation, "What are you talking about?" "What have I done?" and he says, "You're handing out DVDs to coworkers and some people have complained that you're harassing them." Harassing is a strong word, as you know.

Klenk: Uh-hm.

Coppedge, So I said, OK, here's what you're saying. Is this your recollection? This is a sensitive conversation here. and he refused to respond to my e-mail. Instead, from what I knew, he kicked off an investigation of me.

Now I supplied Jhertaune with ample documentation and records of what I actually had done, as you can see and I also requested, and never received whether JPL agrees with the Federal Guidelines on Religious Expression in the workplace. Are you familiar with that document?

Klenk: No. I...

Coppedge: OK, let me show it to you, just so you know. This is posted on the [NASA] Glenn website and I would like an answer from somebody whether these

federal guidelines which basically interpret existing law about what is permissible in terms of religious expression in the workplace, whether these guidelines are enforced here at JPL. So I'm still waiting.

Burgess: Jhertaune takes the attitude that no matter what the discussions were -- religious, political, whatever -- that is impertinent to what is going on. What's pertinent is the interruption of the JPL workforce.

Klenk: And do people, are they feeling any intimidation or harassment or hostile intent or anything along those lines. And at the minimum people felt it was unwelcome. If you look into our Diversity Training that we have, it all, they go over to a painful extent that it's really about, if it's not specifically work-related, if people think it's unwelcome, then it's not permitted.

Coppedge: I understand that.

Klenk: That, that's basically the bottom line.

Coppedge: Right, [trying to get back to the Federal Guidelines document]

Klenk: And so in this situation, the people on the 3rd floor felt it was unwelcome. That's the real bottom line there. It's not the topic that's the problem.

Coppedge: OK, let me just read some samples of this. "Employees are permitted to engage in religious expression directed at fellow employees and may even attempt to persuade fellow employees of the correctness of their religious views to the same extent as those employees may engage in comparable speech not involving religion. Some religions encourage adherents to spread the faith at every opportunity, a duty that can encompass the adherent's workplace. As a general matter, proselytizing is as entitled to constitutional protection as any other form of speech as long as a reasonable observer would not interpret the expression as government endorsement of religion." OK, they give an example. "During a coffee break one employee engages another in a polite discussion of why his faith should be embraced. The other employee disagrees with the first employee's religious exhortations but does not ask the conversation to stop. Under these circumstances, agencies should not restrict or interfere with such speech." Now I don't recall anybody asking me to stop. Somebody may claim that, but that's hearsay.

Klenk: Now in your case, what the feedback we received was that multiple people indicated that the behavior was unwelcome. That was what Jhertaune got from her investigation. You know there was, this we documented one, I think there might have been two people who said you were asked to leave their offices over this. This is over an extended period of time, but they said, it was unwelcome, and,

Coppedge: I cannot recall any, look--let me tell you the one, the only one we can think of. We got into a discussion about a particular proposition that was on the ballot. And it was, he disagreed with me, and I was trying to defend my view; he was defending his. It went on for some time. I don't recall him asking me to leave. It was clear he was uncomfortable with my view, and I think we got a little defensive. But I came back to him the next day and said, so-and-so, I think I was a little bit, perhaps aggressive and not showing the kind of friendliness I should have toward you, will you forgive me? And he reached up and shook my hand and thanked me. OK? That is my pattern. If somebody



appears to be hostile to me, I don't want to have that kind of relationship with anybody.

Burgess: But it sounds like what Jhertaune talked to this individual he gave further slant on this, that he was uncomfortable with the whole situation, even though he made appeasement.

Coppedge: Did he initiated a complaint against me.

Klenk: No, this is all based on a very short note that Greg sent saying that there was allegations of a hostile work environment and Greg said, someone said this to me, I think it should be investigated. I don't know if he said investigated, but he said, basically here's the situation, you should follow up with this. And so, based on that, that was just a very short note. We tried to be completely above board in the section.

Coppedge: I try to be, too.

Klenk: We get the note, and say OK, we call up our ER representative, they go out, they do their investigation, and they report back.. It took about 2 weeks, 2-3 weeks, something like that?

Burgess: It drug on for a while.

Klenk: It drug on for awhile, and they came back and she said, here is my findings. And I believe she met with Cab and she met with me. And it's laid out, and it was completely focused on basically the coworker's feeling was 'unwelcome and disruptive in the workplace'. One right after another, that was where the findings were focused.

Coppedge: OK, I have documents to show that this, number one, was very occasional, on the average once a month I would approach somebody. I also have documentation that the vast majority were pleasant and cordial and even once\* thanked me and said, "That was great. How can I get that?" That has been the typical response. OK.

\*[comment: the point being that most responses were positive.]

How do you feel also about the fact that Greg brought me in on March 2 and accused me to my face of pushing religion in the workplace? And as you can see from my transcript of that conversation, when I tried to say, "What do you mean by that?", he was argumentative -- even angry.

Klenk: Well, what we have done is we have talked to Greg and the idea is that he should be working with us for those same kind of things. He should have been working with us, and that would have should have been the more appropriate way that been you handled.

Coppedge: I mean, he was nearly shouting at me. And I said, "You know, Greg, this gets into issues of freedom of speech," and he blew me off. And I said, "Greg, this could be construed as creating a hostile work environment." He stood up and said, "Go ahead and file a complaint!" and stormed out the door. That is what happened. I ask you: whose rights are being violated here? I mean, who is creating [a hostile work environment]; who is harassing?

Klenk: We are trying our best to remain impartial. We got a very thorough feedback from Jhertaune about the situation, and we've written up, the milder document than we could have written up over the whole thing. We don't do it.

often. But we felt it's important write it down, document, here is what the findings were.

Coppedge: OK, in my opinion, there is no way that this can be construed as harassment that I have committed. And that's why I think this document [i.e., the Federal Guidelines on religious expression] needs to be studied. And I would like a statement somewhere from JPL whether this applies to this lab. Because what I have done fits in with this. The only time a boss can tell an employee not to discuss this is with an individual who either tells the person doing it to stop, or tells the boss, 'I don't want to hear about that anymore.' Then the boss can go to the employee and say don't talk to so-and-so. But Greg told me you are not to discuss religion or politics with anyone in this office. That's what he told me. How do you feel about that?

Klenk: We have no issue with people discussing religion and politics in the office so long as it's not unwelcome or disruptive.

Coppedge: I understand. My claim is that it wasn't. Now I went to the Chief Ethics Officer right after Greg talked to me and I said, "Can a boss do this? Can a boss give a blanket order that you're not to discuss this?" And he said, "Well, no, that's overboard," and he gave me some suggestions on how to handle these things. But in other words I was immediately seeking, have I done something wrong here, or is that proper?

Klenk: I think partly you should think through that, both of you seeking out external sources on this, you must have felt that at some point that there was some things done that caused tension in the workplace, on both sides. One suggestion I would have is perhaps you weren't reading the body language of these people well enough. You were looking for a 'Dave, I understand you refused, I don't believe in this; please don't talk to me again about it' whereas they were trying to be more polite, being that they felt uncomfortable, and were trying to say, 'Please don't talk about it, I'd rather do talk about something else,' and you weren't reading the more subtle [clues?].

Coppedge: Are these not mature adults that can say the words that I'd rather not talk about that? Am I supposed to interpret 'I'm harassing somebody' by their body language, is that what you're telling me?

Klenk: I think in some cases yes.

Coppedge: OK, is JPL offering a course in reading body language or something? Because that's extremely subjective. And it seems to me that

Klenk: Most of the harassment things are subjective.

Burgess: Jhertaune said that when she interviewed these people, it was the majority of the people had the same kind of understanding that they were trying to be nice to you, to get by, so to speak, without causing any further

Klenk: disruption in the workplace.

Burgess: They just wanted it to go away. They either didn't tell you specifically so it was clear. But a lot of people, she said, had this common position.

Coppedge: Again, nobody will give me any specifics or, or names, or-- I mean, I understand the reason why you don't--why you want to protect the

confidentiality. But my recollection is, is totally different than that. And, you know, -- let me continue reading another paragraph here:

Burgess: Uh-hm.

Coppedge: "Federal law requires an agency to accommodate employee's exercise of their religion unless such an accommodation would impose an undue hardship on the conduct of the agency's operation. That cost or hardship, nevertheless, must be real, rather than speculative or hypothetical. The accommodation should be made unless it would cause an actual cost to the agency or to the other employees, or an actual disrupting of work, or unless it is otherwise required by law." So,

Burgess: Again, she's saying that you're trying to focus on religion and politics, and that's not HR's discovery. Their discovery is that you've done something that has interrupted the JPL workforce, from doing JPL work, no matter what the subject discussed was.

Coppedge: Again, no one has accused me of this until Greg had his outburst against me on March 2nd. I have been working Cassini for 12 years.

Burgess: You must understand that he got challenged by several people that day that were very upset over whatever happened between you and them prior to Greg getting involved.

Coppedge: Let me tell you, maybe the most recent case before Greg's conversation is instructive. There is a lady in the office, a coworker, a friend, somebody I've worked with for years, who I approached on a Friday, on the end of the day, "Would you like to watch this on the weekend?" She probably disagrees with the content of it. But she took it, and sounded interested. On the Monday morning I found it on my desk and never brought it up again. Never mentioned it. We passed in the hallway, we would say, 'Hi; how are you.' Never was brought up again. It's interesting that it was that very day, that it was that afternoon that Greg ...

Klenk: I would warn you against trying to speculate who it was or anything. JPL does have a policy against any sort of retaliation, or anything like that. So it wouldn't be good, if the person was one of the people who was saying, 'I find this uncomfortable,' to then confront the individual about, 'I hear you're uncomfortable with this; let me talk to you.' It would be better just to try to work towards the inclusive, welcoming work environment.

Coppedge: This particular DVD [Unlocking the Mystery of Life] was about science, it was not about religion. You are welcome to watch it if you would like. I'd be glad to give you a copy and you can see exactly what it was about. There's no way it can be construed as pushing religion. And in fact it's a subject that is of great interest to everyone. Alright? In fact one of the most popular films I like to give out [The Privileged Planet] has 4 JPL scientists in it who were interviewed on lab with the full NASA cooperation with the producer. This is the kind of material we're talking about. And there was not a hint of body language or speech or anything by this person that what I was doing was unwelcome. She thanked me. She said that looks very interesting. She took it, and left it on my desk, and there was no follow-up at all. That was the day where in the afternoon Greg accused me of this. So what I ask you Kevin is, what protections are you giving me to hear that my side of the story is the correct one, rather than the testimony of these people that Jhertane is saying. Now if you go up to somebody and say, 'We're investigating Dave for

possibl[y] harassing people; has he ever...' I don't know how she posed the question. But you can ask leading questions that may draw out a response you're looking for.

Klenk: We can speculate on all sorts of things. But in my experience ER has always handled these sorts of things with discretion. They've done it, being above board, trying to be professional about it. At some point I trust that they've done the right thing. They try to give the employee leeway. They try to understand how the other people are feeling, and they try to write up a report that's accurate, that's appropriate, and give us recommendations on what to do. So after listening to their recommendation, I don't think Cab and I had any disagreement what the next step was.

Coppedge: OK, so are there protections that an employee has against an office manager who angrily accuses him of things and gives him a blanket order that goes well beyond what any perceived accusation was? Do I have any protection?

Klenk: If you feel that there's a hostile work environment we can investigate that as well. If it doesn't rise to that immediately, we can talk with Greg, Dave, and say, 'here's how we'd like you to handle this.'

Coppedge: Is it, let's say that I had DVDs on sports that I wanted to share. And somebody was not interested in sports, and yet I said, 'oh, this is really good; you would enjoy that.' Am I harassing them?

Klenk: It certainly could become unwelcome or disruptive in the workplace. Absolutely.

Coppedge: OK, so you're not singling out content here, right?

Klenk: No.

Burgess: HR certainly isn't. They said, 'Forget all that. It's interruption of the JPL workforce from doing JPL work.'

Coppedge: I would still like you to read the 12 points in the documentation that I'm leaving you and I'm still requesting a procedure that has been followed in this and a statement whether JPL abides by these Federal Guidelines. I have asked for that for a month now and nobody will give it to me.

Klenk: Well, we will pass it along to ER requesting that, and if we do not get a response we can certainly have you forward it up the chain.

Coppedge: Well, these Federal Guidelines allow for vigorous discussion on matters of disagreement and it says that is not harassment. Now I cannot be expected to read the body language of somebody who we're having a vigorous discussion with that is supposed to be telling me nonverbally, 'get out of here,' see. And if they can go to the office manager and say 'I don't want Dave talking to me about that anymore,' then the office manager certainly has the responsibility and the right to tell me, 'Don't talk to that person.'

Burgess: Actually they should come talk to me.

Klenk: They should talk to Cab.

Burgess: They shouldn't be doing that at all.

Coppedge: OK.

Burgess: That's supposed to be me.

Coppedge: OK.

Klenk: Greg should come and talk to Cab if people report it to him.

Coppedge: Has anybody come to you, complaining of that to you?

Burgess: Everybody including HR trying to set the record straight that whenever these kind of problems happen from this point forward they're going to be with me rather than Greg.

Coppedge: Right. Well, I'm asking...

Burgess: The intent of that letter, its interpretation, if another problem arises, is my decision to go further with it or not, not Greg's.

Coppedge: OK. But I'm asking, has anybody ever come to you complaining.

Burgess: They have not.

Coppedge: They have not. Can you also state for the record how my reviews have been?

Burgess: Oh they've been great. Technically you're qualified. But now we're hearing through this interview process that there's a lot of latent hostility out there with a large number of people including the Project Manager.

Coppedge: There is a lot of hostility in our culture against intelligent design. Perhaps you're aware of that.

Klenk: Not particularly, but...

Coppedge: Believe me; there is. What I espouse is certainly a minority view among the scientific community. I'm also aware that some of the scientific community are aware of my beliefs, because on my own time I write things that some of them have come across. And some of them at one point got upset about that. How do I know that there is not some kind of pressure being brought on the Program Manager, that this employee is undesirable and are there ways we can find... I mean, how do I know that's not going on? And that this is not some kind of retaliatory action by these individuals? I went to the Project Scientist when this came to my knowledge a couple years ago, and he was aware of it, but he said, 'Look, if anybody gives you any trouble over this, just talk to me and I'll take care of it.' I had written permission from the Chief Ethics Officer prior to my writing anything that was published that it was OK, what I was doing, to say 'Dave Coppedge works at Jet Propulsion Laboratory.' And I let this group of scientists who were complaining know about that. But they're aware of that, and it's a very unpopular view among the consensus. Now I'm letting you know some of these--some of this background information that may be brought to bear on why I am being singled out as the harasser here when Cab has not had any personal knowledge of this heretofore, and the only one, the first one and only one who had ever accused me of that was Greg Chin.

Klenk: Well, also look at who Cab has generally interviewed traditionally for your ECAP [i.e., annual performance review]; It was coworkers, coworkers meaning

people within 173 on the SA team, the customers you're working for, Greg Chin, and the like. But he would not have interviewed people nearby you on the 3rd floor. Now, so if you're working with the chief scientists or any of the other science people or mission people they wouldn't have been part of the interview process. They wouldn't be considered necessarily a coworker. It would be more of a person who was on the floor nearby you, working the same,

Coppedge: I understand. But I'm just saying that as another consideration that it is certainly a possibility when you mention the Program Manager, you know. I have had nothing but cordial and businesslike and pleasant relationships with the Program Manager, but he may hear things from this group, about me that make me persona non grata, and how do I know that pressure is not being brought to bear on Greg?

Klenk: I'm not sure how but we have not heard of that pressure.

Coppedge: Well I wouldn't expect you

Klenk: Cab says we're trying to clarify that the people who are going to look at this is Cab, is your line manager and he's going to look at this situation, not the people on Cassini, if that clarifies things.

Burgess: Well I've found that the ECAP process, for example, people respond to requests for information tend not to be negative. They either give you something that's positive or they don't say much at all.

Klenk: They don't say much at all, primarily focused on the work that you do. So even if they are extraordinarily uncomfortable with you, it won't necessarily come out; and that is true.

Burgess: It's fine because you have that option when you respond, to either share it with the individual or not, and even that doesn't bring out much negative on anybody.

Coppedge: So Cab has no personal evidence of anybody complaining about. I mean if this were a pattern of behavior that characterized me, don't you think over a matter of 11 years or so, that this would have come forward? Why did it come out all of the sudden on March 2nd?

Klenk: I'd say in this case it's because we investigated it and we looked you up. I'm not sure about, why Greg said, had the conversation with you on March 2nd versus another day, but when we had ER look into it, they came back and said, 'Yes, this is a extended period of time this has been going on and this is unwelcome in the environment.'

Coppedge: How do you feel about what Greg said to me on March 2nd? Is that justified?

Klenk: I think you should work through Cab on this sort of thing.

Coppedge: I think I have been.

Burgess: As far as that blowup, one on one it shouldn't have happened at all. It should have with me in my office. But Greg has been, they've told him that, essentially he, Greg, in his position does not deal with HR unless it's an issue with himself. Any manager on a project that is not line management has to take

that view as far as dealing with HR. It's up to the line people to deal with them, not the customer project.

Coppedge: Alright; well, that's not what happened. What happened was an angry outburst with me on March 2nd out of the blue. I have told Greg on a couple of occasions over the years, "Greg, if I am ever doing anything that offends somebody or is wrong, please come to me, give me a chance to fix it." He did not do that. Without any warning he came at me for this matter of what he accused me of on that day: pushing my religion in the workplace. He is the only one who has ever made that accusation in my entire professional career. I want you to understand that.

Klenk: I understand that completely, Dave.

Coppedge: What rights do I have to defend myself against those kinds of charges when the evidence and the documentation I have shows otherwise? And that I am standing on Federal Guidelines that say approaching people on matters of controversial subjects is protected speech even in the workplace.

Klenk: I think the key is it being to recognize when people feel it's unwelcome and disruptive in the workplace. I know you're saying it's a hard thing to do, but

Coppedge: Kevin, I think I do that. I think I do that.

Klenk: And what the investigation found is that you have not been doing that adequately, obviously. People have felt it's unwelcome and disruptive.

Coppedge: OK, so...

Klenk: That's the bottom line on that, that the people they talked to came back, one right after another, saying the same sorts of things. I know that's hard to hear.

Coppedge: Alright; well, it may be unwelcome, but it's only harassment if it's persistent, isn't it? I mean you may not know if someone disagrees with something unless you first have an opportunity to talk with them. They could go and say 'that was unwelcome'...

Klenk: And if the people start trying to avoid you or to change their work habits because of it,

Coppedge: Has anybody done that? I have no way, I've never noticed people changing their work habits because of me or trying to avoid me. Where is the evidence for these things that are being charged, other than subjective opinions?

Klenk: This is a subjective topic. When they talk about the whole idea of a workplace being hostile, or the inclusion and all that, it's all subjective.

Coppedge: The record shows that loaning these DVDs was very infrequent. On average one per month. Offering someone a DVDs took a minute or less. This means that 99.99 percent of the workday the lender was on the job, not engaging in this activity. OK? Do you agree with Greg's statement that I am not to talk about religion or politics with anybody in the office from now on? Do you agree with that?

Klenk: I agree that you have created an unwelcome disruptive situation in the workplace. There is no policy against you talking about religion and politics in the office so long as it's not unwelcome or disruptive.

Coppedge: But again, what you're saying [is that] I'm just supposed to feel vibes or see body language, even on a first time. And my practice has been, if the person is not interested, I back off. What may cause a conversation is if they start arguing with me and put me on the defensive and I offer a point, counterpoint. There's been a couple of occasions of that. But they're not telling me this is unwelcome. They're saying let's talk about this topic. I may have a point of view and we're both [involved]. That's protected speech. Now, if they later on tell an HR person, 'That was an unwelcome conversation' because they disagreed with me, I was not harassing them if they were vigorously stating a different point of view but not telling me to stop. There have been a few occasions of that but they have been rare and they have been the exception.

Klenk: Well, at least some of them have been remembered by the participants in a negative way.

Coppedge: I'm sure they have.

Klenk: So that's what we're trying to preserve is the workplace that's welcoming, that has no hostility. That's what we're trying to do.

Coppedge: I certainly understand the right of an employer to not give a false impression of what the company is about, to not go to total strangers--like that. But again these are people that I know and know me. We are friends. We are coworkers. We have been on this program for over 10 years in many cases. For me to approach them on a subject that I think is interesting and worthwhile is protected speech. And if they want to engage me with a vigorous discussion on that, that is also protected speech. It only becomes what Greg called harassment if it is persistent, if it is unwelcome, if they are telling me, 'Stop, stop' or if they go to the manager saying, 'I don't want to hear about that any more from Dave Coppedge.' But they don't do that.

Klenk: I think in many cases in a hostile work environment people do not do that. They sit there, and they are uncomfortable and they do not verbalize it.

Coppedge: Even though these are adults, who certainly

Klenk: Even though they are adults.

Coppedge: OK, then how...

Klenk: For example, the more classic one is sexual harassment. People don't say anything typically even when they are being harassed.

Coppedge: I understand. But I think what I'm doing is certainly not in the category of sexual harassment--not even close!

Klenk: [talking over Dave] It's not, but: the example is people haven't said that this is verbalized to you. I was trying to give you an example. People don't always verbalize the [sentiment?]. You say that's not the adult thing to do.



Coppedge: And yet I'm supposed to know somehow just through vibes, even though nobody tells me that they're uncomfortable, and even though Greg Chin or Cab Burgess doesn't tell me that. I'm just supposed to know.

Klenk: Now that we've heard we will try to hear and try to listen to people [??], but the fact is that you have to focus on that. If you want to carry on these kinds of conversations, at the same time you have to make sure it's welcome and not disruptive.

Coppedge: I believe that to be the case. I think I have, on that occasion of that one guy that got into kind of an argument, and then I went and apologized to him the next day. I think we were both getting a little bit heated because we both had strong feelings.

Klenk: But separately to, before it got to the point of a significant argument, to have recognized it.

Coppedge: OK, well does, does this cut both ways? In other words, if people come at me with unwelcome topics. I mean, for instance, in meetings there are points of views expressed about the way we ought to do things and stuff that get quite heated.

Klenk: Is it work related?

Coppedge: Well,

Klenk: If it's work related--how are we going to maintain the system--JPL is well known for having spirited discussions on that.

Coppedge: Sure.

Klenk: If it's not work related,

Coppedge: It's not always.

Klenk: If it's not work related, then certainly you can bring it up to your management chain or to their management chain.

Coppedge: Right; but there have been times when people have posed points of view quite stridently about what they believe, politically, culturally, whatever. I don't feel that I have some kind of constitutional right against being offended by that, you know? I'm a man, I can take it. I've got my point of view, I'm willing to defend it and have a discussion. Not always--but these were instigated by others sometimes. Now I suppose if I had a gripe against such a person because I disagreed with their political point of view or something, and if an HR person said 'Did this person offend you?' or something, I suppose I could put in a jab against them by saying 'Yeah, I think that was an unwelcome comment.' Would that be fair for me to do that? And yet that's... certainly a conceivable type of...

Klenk: If it's unwelcome and disruptive you're certainly allowed to do that.

Coppedge: OK; but again, where is there any...? My records show that these were not unwelcome. First of all, they're very infrequent. Most of the time they're on the weekend. People are getting up to go home, they're not, it's not disrupting their work. I never go up to somebody who is busy on the job and approach them like with an interesting thing to watch. And I don't have any

records of anybody telling me that this was unwelcome and 'No, I'm not interested.' And if they didn't look interested, I usually read that body language pretty quick. [I] say 'OK, this person's not interested.' But the vast majority of the time they say 'Yeah, that looks interesting, OK sure.' And then they come back and say 'Wow, that was real interesting, I've never thought about that before.' Or 'Yeah I didn't agree with that, but here it is, I watched it.' Or they'll just leave it on my desk and that's the end of it. That's my pattern, I'm telling you. So; and that's protected speech in the workplace. I would like you to affirm that. I would like you read this document and say 'Yes, JPL affirms these rights of employees in the workplace.' And I would certainly agree with you that anything that constitutes harassment is wrong, and can be forbidden. But harassment is a strong word.

Burgess: Did you ask the same questions of the HR people?

Coppedge: Yes.

Burgess: And what did they say?

Coppedge: They didn't give me... She said she'd get back to me and she never did. I asked her twice. And I have asked her on the day of the interview and I asked her again last week, and she told me she doesn't want to put things in writing very often, she'll just call me and leave a voice mail, and 'What was that 3rd question again?', and that was the basic thing.

And--to me, I feel like I'm getting the runaround here. I'm asking for specific information

Klenk: Uh-huh.

Coppedge: ... and I'm getting these vague 'You've got to watch people's body language and it's your fault if you don't interpret their body language.' I have documentation to show what I've done. I'm being up front with you about exactly what I've done, I'm giving you examples, and I'm telling you that on March 2nd, Greg launched into me in an accusation that nobody has ever made against me before. And of course, once that accusation is made, you can maybe find supporting evidence to back it up because you've created this suspicion.

Klenk: I don't think that Jhertaune was reaching to support by the sounds of what she reported to us.

Coppedge: Can we get a second opinion? This goes into my record as something quite serious--a charge of harassing people. I've never had something like that in my record before.

How do you feel about this other document? I listed together a couple of pages of sample stories that are reported on JPL News. We have had people like Michael Shermer here. We have had others who are ardent skeptics and atheists and proud of it stand up in the Von Karman Auditorium and present their point of view. Now, do I have the right to say I'm being harassed because I'm hearing something that offends me? No. I would never do that. I would say, 'Hey, I'll take you on; let's have a discussion about that.' Why don't we have a fairness of points of view? So that if one side gets the pulpit to be able to say this is supported by science, somebody else can counter that? Now I have an example of a page and a half of... these are published news stories with religious or philosophical overtones, and you're welcome to look through these things. These make claims that go way beyond the scientific evidence that talk about ultimate

meanings, ultimate destiny, ultimate origins, I mean... these are what could be construed as religious content. I showed this to Jhertaune and at the end I read 3 observations about this: "Discussion of ultimate questions is acceptable at JPL," number 1. That's proved by these. Number 2, "The philosophical or theological implications of scientific findings are fair game for discussion." OK? And number 3, "Exposing employees to philosophical and theological positions, some of which may differ markedly from their own strong, strongly held beliefs, does not constitute harassment." Otherwise, they're harassing me almost every day.

Klenk: Again, what the memo, the written warning here is about is your on one-on-one working relationships with your coworkers.

Coppedge: Am I allowed to get some character witnesses that would counter that impression? Because I think I could find quite a few that would say, 'No, I don't think what Dave's doing is unwelcome or harassing, or'

Klenk: What does matter that there are some people who said the behavior was unwelcome and disruptive.

Coppedge: What should have happened then was that they should have told Cab and he should have told me, 'Don't talk to that person.'

Klenk: We should have done it; we should have done it earlier.

Coppedge: Because that has never happened. Up until, and even when I invited Greg Chin, 'Look, if I'm ever doing anything offensive or wrong, please tell me and give me a chance to fix it,' he never did. And then all the sudden I'm investigated here as being this harassing person. I don't think that's fair.

Klenk: Well, it was a situation where it was both ways they investigated. Is Greg creating a hostile work environment? And they looked into the whole situation. And this is the result of the investigation. It wasn't, was Dave being investigated, it was the situation as we were reported to them. Will you agree with that, Cab?

Burgess: Yeah,

Coppedge: Yeah, but again, I was not filing a grievance or making a claim.

Klenk: Once we were made aware of it, we're required to pursue ER and have them check into it.

Coppedge: Cab's I think very familiar with my manner about loaning these things out. Have you ever had a problem with me?

Burgess: Me personally? No, never ever.

Coppedge: No. OK, so I'd say where's the evidence other than maybe a few people that Jhertaune was able to dig up.

Burgess: Don't say a few; HR said there's a lot out there, though.

Coppedge: OK, can I get a count? How many are we talking about?

Klenk: They said they don't want to do that in order to not have retaliation or anything that would compromise the anonymity of the people who talked to them.

Coppedge: A number of people? I mean a digit number? I don't think that compromises anybody's anonymity. I mean, a lot--is that 3, is that 12, is that 20?

Klenk: We could pursue having HR talk to you more about the situation.

Coppedge: Alright. Anyway, Kevin, I've laid out for you what I think is the documentation. I'm up front and open about what I have been doing and what I have done. I don't feel I have harassed anybody, and I'm sorry that some are giving that impression. I think I go overboard to be accommodating to people and to hear them and recognize [their responses]. But you know, having a spirited discussion on something, like, let's say, on a Friday at 5:00, you know... People don't have a constitutional right to have everybody agree with them on everything, obviously. And if anybody says, 'This is unwelcome,' they can certainly let me know that.

Klenk: We would hope they would. But in this case it sounds like they are not able to articulate that to you or unwilling to do that even though they are uncomfortable.

Coppedge: OK, Kevin will you do me a favor of at least reading my material,

Klenk: I will read your material,

Coppedge: And hearing me out? You are hearing me out as far as, I mean, you are obviously today, but...

Klenk: I'm hearing you out now. And I will read through the documents that you've left here.

Coppedge: Because, to the point that my constitutional rights are protected, I think I always have strived to be very accommodating to what management or the boss wants.

Klenk: We have; this is not an infringement on your constitutional rights.

Coppedge: A blanket statement saying never to do this is.

Klenk: I don't believe there's anything in this that says that.

Coppedge: That's what Greg told me verbally. And I gave him this,\

Klenk: And that's where we said, you are to work with Cab, we've written up our understanding of the findings and in no place does it say that.

Coppedge: Alright. I want to just affirm [to] you that I agree with the JPL policies and the ethics and I strive to be an upright employee in every way that I can. That is my commitment and my affirmation; it always has been. It's a great shock to me to be accused of this. And I think the evidence is lacking, and I think there could be elements of retaliation against people, certain people that disagree with a point of view by claiming it's harassment, when they could have simply...

Klenk: I don't believe the harassment word was in the paper; I think they said they that people feel uncomfortable.

Coppedge: Greg said it was.

Klenk: Look, I'm not debating what Greg said. I'm just talking about what our ER rep Jhertaune told us.

Coppedge: Did she use the harassment word?

Klenk: No, she did not.

Coppedge: OK; well, is that in the statement then?

Klenk: She said, that's her summary of it. You violated the un[garbled], Unlawful Harassment Policy.

Coppedge: OK, so she is claiming it's harassment.

Klenk: Um hm. Based on her understanding of what people reported. What I was hearing when you said harassment, I didn't have anyone say, 'I am being harassed by Dave' Coppedge.

Coppedge: That's right.

Klenk: That word. But she found that the elements of people's responses on top that did fall into that category.

Coppedge: This is highly subjective and I deny it. I deny I've harassed anybody. I certainly will take great pains to read people's body language, but people need to step up and say, 'This is unwelcome; I don't want to hear about it.' Or I need to be told specific[s], or they need to tell Cab and he needs tell me and it can be against that one person. But something is going into my record against my perception of what has really happened. And I want your affirmation that you are protecting an employee's rights against unfair accusations.

Klenk: We are doing our best to have this done impartially by ER, to the best of our understanding. OK, all points of view, this was the findings. These findings are accurate.

Coppedge: [Pause; reading the Written Warning] I disagree with that statement: 'You failed to stop these activities when you were told they were unwelcome and disruptive.' I think that's false. 'When you were told.' Nobody ever told me this was unwelcome or disruptive. That is false. If they gave me some kind of body language I'm supposed to read, oh well, I'm going to try to take better pains to read body language. But this says that I was told they were unwelcome or disruptive. That's not true.

As far as that point 2, I know who the individual was, and that's the one that I went to and apologized and he shook my hand. And I think I consider him a friend and I we never discussed that since, now that I know what is feelings are. And I've interacted with this person multiple times over the life of the mission. I consider him a friend. He's a scientist. I love talking about his work on his instrument. This was a very rare thing on a very controversial ballot initiative in the last election. And I was just offering him some information to read. He chose to get angry about it and start arguing about it. I would have just left it right there except that he wanted to talk about it and kind of put me on the defensive. He didn't say this is unwelcome and disruptive. Yes, it got a little bit animated to the point where I thought, I

want to affirm to him that he's a friend even if he doesn't agree with me, and I went to him the next day and told him that. He spontaneously stood up and shook my hand. OK? That's the facts. And yet this says I created a disruption by... This colors it totally different. Now, I don't know what he said to the ER person but that was not what he expressed to me.

So what's next?

Klenk: This is a signature from both you and Cab. This is Cab presenting it to you.

Coppedge: Well I'm not going to sign anything without legal counsel. Because I think this is...

Klenk: By the way, what this is, your signature is just to warrant that this has been discussed with you and you received a copy. That's what you're signing.

Coppedge: I'm afraid it will give assent to the fact that this is truthful when I think it's not. I'd like, before signing anything, I'm going to have to consult legal counsel.

Klenk: OK, we will be putting this in your file signed with in lieu of signature that we did have the discussion with you and you have been informed of the policy.

Coppedge: I know the policy and I don't think I violated it.

Klenk: But we will be putting it in the file with the note in lieu of...

Coppedge: I would like there to be some kind of a statement in the record that the employee disagrees with the facts that were

Klenk: You are welcome to provide that to us and we will include that.

Coppedge: OK. So I'm going to be expecting from you some kind of a written procedure on what was conducted.

Klenk: No, I said I would talk to ER about that. I wouldn't expect it from me to do an investigation of the procedures and policies of ER.

Coppedge: Well, this should be a JPL-wide policy.

Klenk: I will pass the note along about that.

Coppedge: If I get no response can I come back to you and say that I have got no response?

Klenk: And I will certainly note that.

Coppedge: OK, can I also expect a statement whether JPL abides by the Federal Guidelines on Religious Expression in the Workplace, as I've stated?

Klenk: You are welcome to pursue that.

Coppedge: No, I want you to...

Klenk: I don't know if you are going to receive that policy. I am not authorized, nor is Cab.

Coppedge: These should be open statements on JPL Rules. It's a matter of not just a policy that JPL can choose, these are federal guidelines for all government employees, that are, the guidelines are an interpretation of current law.

Klenk: It's my interpretation we don't discriminate on the basis of religion. We certainly don't allow harassment based on it.

Coppedge: Certainly. But, whether this is even called religion is I think a debatable question because the films I was loaning out are about scientific subjects--no less scientific than the things I listed that JPL News routinely publishes. OK? Alright, thank you for this discussion.

Klenk: Thank you.

Burgess: We have some more to deal with now.

Coppedge: OK.

Burgess: I wanted to know myself what I could do to lesson the strife in your area, so I'm going to remove you from the lead of the system admin team. I'm going to give the lead to someone else. And you will remain on the team, and there's no need to be discussing this or the letter with anybody in public. This is all private information. I had a discussion with Greg on how to deal with that rearrangement and he and even HR suggested that when it comes to any announcement that you are taking on some other role other than that I should divorce myself from that so it's not obvious to the people who are hearing this that it's part of anything else. So I've asked Greg to bring this up at his next team meeting, and as of next Monday, someone else will be leading the team and he's going to address your role as specifically focused on getting the servers that you're trying to bring up as your focal point from now on and not running the team with minutes and task assignments and all that. That's going to pass to someone else. And the idea there is that you won't have that interface to these people out there on the project that are complaining that they're uncomfortable with your actions.

Coppedge: You're certainly within your rights to do that Cab, but again I deny that anybody has, that I have harassed anybody. And nobody has told me that anything I have done has been unwelcome or disruptive.

Burgess: Now I'm going on what HR says, they say this has gone on too long, they can't believe this is prevalent, this point of view out there, as much as it is. We're talking about a lot of your customers.

Coppedge: I have no way of knowing what the questions were to these individuals. I think that could have a profound impact on the kind of answer they gave.

Burgess: Well that's why we're relying on HR. They're supposed to be the trained individuals that know how to deal with these kind of problems.

Coppedge: OK, you're claiming this is no kind of retaliation action that this is suddenly happening after Greg Chin's outburst, then, against me.

Burgess: It's not that specifically; no, it's not.

Coppedge: You were going to do this anyway?

Burgess: No, this is directly a result of all the interviews that HR conducted. To them, you see, it looks to them like you've got a customer base out there that's very uncomfortable, and removing you from that to be focused on something else is going to lessen the strife in the workplace.

Coppedge: Greg has, on occasion, accused me of being difficult to get along with certain individuals. And yet he has never offered specifics. It's always been vague allegations, OK? And I have pleaded with him and begged with him, 'Greg, if he can show me something that I have done that is wrong, I will crawl on my knees to that person and apologize to them. That is my commitment to you.' He never does that. This is the latest outburst and he found a new lightning rod to use. What guarantee do I have that he doesn't have some kind of personal vendetta that is using tools to get back at me here?

Burgess: I don't think he has a personal vendetta. He has discussed with me in the past about whether there is other work for you on the lab, on other projects.

Coppedge: Well that would certainly be convenient for him, but I...

Burgess: And, we just don't have any big projects going. In the old days when we had a lot of different customers, you could move the SA's around, and eliminate those kinds of problems.

Coppedge: Kevin, you can look at my previous 2 office managers: Dave Childs, Pamela Ray. Never had a problem with them. I was working on Cassini before Greg Chin came in. I was there first. He came in as the office manager. Immediately I tried to establish a good relationship with him, and I think that for the most part we have one. It's cordial, it's professional, but from time to time, he has initiated conversations with me, saying, 'Dave, you are the problem.' That type of thing. Vague allegations, never anything specific. And then one time the person who was apparently having trouble with me gave the same trouble to him, and he became the target. And then I think he began to empathize with what I was feeling.

Klenk: Well, I think we need to work closely with Cab on coaching on how to handle situations better, improve the workplace, those sorts of things.

Coppedge: OK, I mean, you certainly have my commitment as far as being a gracious, personable person, OK? But we also have freedom of speech in this country, and we have freedom of speech in the workplace, and to the extent that my rights of freedom of speech and religious expression are protected, I will do (and I think I have been doing) all I can to maintain a professional, cordial relationship, with all of my coworkers. This has been my commitment and it remains so now. I cannot control what other people think and what they say, when I have documents that show otherwise. Please read my materials.

Klenk: I said I will.

Coppedge: And give me the benefit of the doubt, because I think there may be more going on here than just what one particular HR person found, and what... I have no idea what kind of questions she asked and how this was conducted. On



something this sensitive, we'd better be following established policy for your protection and for mine.. OK?

Klenk: OK. Thank you for stopping by..

=== End of Recording ===

1 STATE OF CALIFORNIA )

2 COUNTY OF LOS ANGELES )

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4

5 I, HEIDI SULLIVAN, A CERTIFIED SHORTHAND REPORTER

6 LICENSED BY THE STATE OF CALIFORNIA, CERTIFY:

7

8 THAT THE FOREGOING DEPOSITION OF KEVIN KLENK

9 WAS TAKEN BEFORE ME PURSUANT TO NOTICE

10 AT THE TIME AND PLACE THEREIN SET FORTH, AT WHICH

11 TIME THE WITNESS WAS PUT UNDER OATH BY ME;

12

13 THAT THE TESTIMONY OF THE WITNESS AND ALL OBJECTIONS

14 MADE AT THE TIME OF THE EXAMINATION WERE RECORDED

15 STENOGRAPHICALLY BY ME AND WERE THEREAFTER

16 TRANSCRIBED;

17

18 THAT THE FOREGOING IS A TRUE RECORD OF THE TESTIMONY

19 AND OF ALL OBJECTIONS AT THE TIME OF THE EXAMINATION.

20

21 IN WITNESS WHEREOF, I HAVE SUBSCRIBED MY NAME THIS

22 9TH DAY OF MAY, 2011.

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LICENSE NUMBER 6600

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(213) 683-6294  
jameszapp@paulhastings.com

June 7, 2011

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VIA E-MAIL AND US MAIL

William J. Becker, Jr., Esq.  
The Becker Law Firm  
11500 Olympic Blvd., Suite 400  
Los Angeles, CA 90064

Re: *Coppedge v. Jet Propulsion Laboratory, et al.*  
Los Angeles Superior Court Case No. BC435600

Dear Bill:

Please be advised that Kevin Klenk reviewed and signed the original of Volume II of his deposition transcript on June 7, 2011. Mr. Klenk made the following corrections/changes:

<u>Page:Line</u>	<u>Reads</u>	<u>Should Read</u>
293:12	"Yes."	"Yes, we discussed changing his role as to who he needed to talk to."
393:10	"I knew what I was reported to by"	"I knew what was reported to me by"
353:25	"the specific."	"the specific topic."
367:1	"I was told by Ms. Huntley that David was"	"I understood that David was"
384:21	"No, I did not."	"No, I did not question HR's ability to investigate the facts."
411:23	"The threatened or harassed by"	"The not feeling threatened or harassed by"

*Paul Hastings*

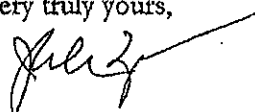
William J. Becker, Jr., Esq.

June 7, 2011

Page 2

A copy of Mr. Klenk's signature page is enclosed. If you have any questions, please do not hesitate to contact me directly.

Very truly yours,



James A. Zapp

of PAUL, HASTINGS, JANOFSKY & WALKER LLP

JAZ:cw

Enclosure

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