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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

JUN 08 2012

John A. Clarke, Executive Officer/Clerk
BY Raul Sanchez Deputy

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

10 **DAVID COPPEDGE**, an individual;

11 Plaintiff,

12 vs.

13 **JET PROPULSION LABORATORY**, form
14 unknown; **CALIFORNIA INSTITUTE OF**
15 **TECHNOLOGY**, form unknown; **GREGO-**
16 **RY CHIN**, an Individual; **CLARK A.**
17 **BURGESS**, an Individual; **KEVIN KLENK**,
an Individual; and **Does 1** through **25**, inclu-
sive,

18 Defendants.

Case No. BC435600

The Honorable Ernest M. Hiroshige, Dept. 54

PLAINTIFF DAVID COPPEDGE'S
POST-TRIAL REPLY BRIEF

BY FAX

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. JPL HAS FAILED TO SET FORTH A LEGITIMATE, NON-DISCRIMINATORY**
3 **BASIS FOR ITS ACTIONS.**

4 JPL was required to articulate a legitimate, non-discriminatory reason for its actions –
5 reasons that would make obvious the absence of religious animus or retaliation after Coppedge
6 had challenged the discriminatory actions. (*See McDonnell Douglas Corp. v. Green* (1973) 411
7 U.S. 792, 802.) Predictably, JPL has ignored overwhelming evidence of religious animus and
8 delivered a distracting argument overwrought with needless repetition, implausibilities, incon-
9 sistencies, incoherencies, contradictions and post-hoc rationalization. These weaknesses add up
10 to a compelling case of pretext, which the court should reject.

11 **II. JPL'S MISLEADING RENDITION OF THE FACTS IS EVIDENCE OF PRE-**
12 **TEXT.**

13 “A plaintiff demonstrates pretext by producing evidence of such *weaknesses, implausi-*
14 *bilities, inconsistencies, incoherencies, or contradictions* in the employer’s proffered legitimate
15 reasons for its action that a reasonable factfinder could rationally find them unworthy of cre-
16 dence and hence infer that the employer did not act for the asserted non-discriminatory reasons.”
17 *Jaramillo v. Colorado Judicial Dept.* (10th Cir. 2005) 427 F.3d 1303, 1308 (internal punctuation
18 omitted; emphasis added).

19 Coppedge has argued that JPL acted in the first instance on the basis of religious animus
20 when Chin excoriated him on 3/2/2009 for pushing his religion. JPL tries to explain Chin’s ac-
21 tions by stating (1) Chin had been aware of Coppedge’s religious beliefs for years, (2) that Chin
22 is too nice of a guy to be of any harm, and (3) that Chin was trying to protect Coppedge from
23 others who had criticized Coppedge for other reasons in the past. (See JPL Br., 3:12-4:6). These
24 are weak and incoherent explanations for Chin’s erratic behavior on the one occasion when he
25 singled out Coppedge for his religious practices, because they fail to explain that behavior and
26 what motivated Chin to react in such a volatile manner.

27 JPL has failed also to explain how Chin’s conduct could have been motivated by any-
28 thing other than religious animus. JPL argues only that examples of religious animus had not
been revealed in the past. However, references to past forbearance neither justify nor explain
Chin’s religious attitude he expressed on the March 2, 2009, occasion. In disparate treatment
cases, there is no rule requiring evidence of a pattern or practice of discrimination. (*See Walnut*
Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal.3d 245, 283 (“‘unlawful prac-
tice’ means any single act in violation of FEHA”).)

1 JPL asserts that Chin “protected” Coppedge from critics. But Chin did not protect
2 Coppedge from harm resulting from his religious intolerance. Indeed, Chin was singlehandedly
3 responsible for *exposing* Coppedge to it by inviting an HR investigation and steering Huntley
4 toward other employees with grievances concerning Coppedge’s actual or perceived religious
5 activities. To explain Vetter’s and Weisenfelder’s critique of Coppedge’s perceived religious
6 activities, JPL offers nothing new beyond its previous talking points that the women were justi-
7 fied in feeling that Coppedge had harassed. JPL’s explanation fails to make sense of why these
8 women would mischaracterize Coppedge’s benign and infrequent interactions as “harassment” or
9 any realistic explanation for their discomfort over his religious attitude. As for Edgington’s reli-
10 gious animus, JPL simply asserts that Edgington never watched the DVD, yet ignores
11 Coppedge’s evidence that contradicts it. Huntley’s notes certainly reflect the fact that Edgington
12 harbored some form of religious hostility toward Coppedge that entered into her disciplinary
13 considerations. JPL tries to explain Weisenfelder’s mental state and what motivated her to ac-
14 cuse Coppedge of harassment by arguing that she “worried he was re-offering the DVD to peo-
15 ple who already declined it.” (JPL Br., 2:9-10). But the basis of Weisenfelder’s pitched anxiety
16 remains incoherent. Since no one had complained to her about Coppedge’s DVDs, Weisenfelder
17 had no reason to believe Coppedge actually planned to fulfill the menacing ambitions she appar-
18 ently feared. Nor has JPL tried to explain why Coppedge’s attempt to re-offer a DVD to Wei-
19 senfelder or anyone else would have caused concern. By avoiding the question, JPL appears to
20 be ducking the obvious explanation: Weisenfelder felt the DVD propagandized an illicit reli-
21 gious message and was reacting to the religious message she believed the DVD contained – not
22 Coppedge’s behavior in offering her the DVD to borrow, which was brief and cordial.

23 Moreover, Weisenfelder’s subjective feelings of being judged are contradicted by evi-
24 dence of Coppedge’s harmless treatment of her. Evidence of Coppedge condemning Weisen-
25 felder’s ideological views never materialized at trial. Weisenfelder’s feelings of discomfort can
26 logically only be explained by a hyper-sensitivity toward Coppedge’s views – i.e., religious ani-
27 mus/prejudice. The evidence establishes that it was not Coppedge but Weisenfelder passing
28 judgment (e.g., characterizing Coppedge’s contacts with her a harassment, insisting he was
crossing an imaginary line regulating workplace conduct).

JPL’s explanations for demoting Coppedge from the Team Lead position fail the plausi-
bility test. JPL asserts that Burgess was influenced by Coppedge’s behavior at the 4/13/2009
disciplinary meeting, which he described as “confrontational,” and that he had not (in 12 years)

1 ever witnessed it. (JPL Br., 10:26-11:7). The Court has listened to the audio recording of the
2 meeting and should be skeptical of JPL's insistence that Coppedge was in any way confronta-
3 tional. (Exh. No. 351). Rather, Coppedge was trying without success to defend himself against
4 serious accusations without the benefit of even knowing the facts.

5 JPL fares no better at explaining what other factors motivated Burgess to demote
6 Coppedge. JPL states that Burgess "felt transferring the lead duties would lessen the strife
7 Coppedge's poor people skills had caused, and he expressed the same concern about Coppedge's
8 unhappy customer base and HR's findings." (JPL Br., 11:9-11). This inaccurately interprets the
9 evidence. Burgess specifically stated, "Now *I'm going on what HR says...* [T]his is *directly a*
10 *result of all the interviews that HR conducted. To them, you see, it looks to them* like you've got
11 a customer base out there that's very uncomfortable, and removing you from that to be focused
12 on something else is going to lessen the strife in the workplace." (Exh. No. 102, 36:8-22; em-
13 phasis added). The inference that HR based its disciplinary recommendations on factors other
14 than the harassment claims is unsupported by Burgess's statement. Burgess *relied* on HR. HR
15 acted on claims of religious harassment, and none of the evidence shows HR to have been re-
16 sponding to other factors. Besides, he had worked this out with Chin beforehand. (*Id.*, 35:16-
17 36).

18 JPL also tries to wiggle out of admitting that removing Coppedge from the Team Lead
19 position was not a demotion. (JPL Br., 18:2-8). But such a claim is contradicted by evidence
20 that the Team Lead was a position of privilege with significant responsibilities (Exh. No. 102,
21 36:8-22) and that the loss of these privileges and responsibilities would therefore result in ad-
22 verse action.

23 JPL's weak and implausible explanations for terminating Coppedge fare no better. JPL
24 claims Coppedge's evidence of dissembling by JPL witnesses amounts to mere speculation.
25 (JPL Br., 14:7-8). JPL benefits from its ability to claim plausible deniability, as evidenced by:
26 (1) convenient memory loss (e.g., Van Why's failure to recall Burgess's 3/19/2010 e-mail notify-
27 ing him months before the layoff process that Cassini wanted Coppedge laid off (Exh. No. 154)),
28 (2) confidential communication constraints (Van Why's and Conner's litigation briefing coincid-
ing with their assignments as layoff decision-makers), (3) rubberstamping (Klenk's and Burgess'
complete reliance on HR to perform their job properly), and (4) no formal reporting (Huntley's
process of shoddy note-taking replaced with detailed recall reinforcing JPL's defenses). JPL's
ignoring Coppedge's arguments, selective use of evidence, erroneous interpretation of key doc-

1 uments, dependency on plausible deniability and other factors invite disbelief, distrust and skept-
2 ticism that JPL has been forthcoming.

3 **III. JPL'S POST-HOC RATIONALIZATIONS SHOW PRETEXT.**

4 JPL's post-hoc rationalizations fail to camouflage evidence that JPL's actions were based
5 upon impermissible considerations.¹ To show that an employer's proffered justifications are
6 post-hoc rationalizations, a plaintiff must demonstrate their falsity. *See Dennis v. Columbia*
7 *Colleton Med. Ctr., supra*, at 646-49. "In appropriate circumstances, the trier of fact can reason-
8 ably infer from the falsity of the explanation that the employer is dissembling to cover up a dis-
9 criminatory purpose." *Holley v. North Carolina Dept. of Admin., N.C.* (E.D.N.C., Feb. 10, 2012,
10 5:09-CV-345-D) 2012 WL 441175. JPL states: "Caltech laid off Coppedge because of his rela-
11 tive lack of skills, *and for no other reason.*" (JPL Br., 1:4-5; emphasis added). JPL then incon-
12 sistent states Coppedge was laid off due to a "long history of customer complaints" about his
13 "people skills." JPL offers no explanation for why this problem became exigent simultaneously
14 (and coincidentally) with an investigation into Coppedge's perceived religious practices. It is
15 only *after* Coppedge openly questions Chin's right to censor his expressive freedom does the
16 blame shift to Coppedge, and then only in the form of isolated and trivial incidents. Substantial
17 evidence absolves Coppedge and the SA team from responsibility for problems associated with
18 complaints by other managers. (See Exh. Nos. 301, 303, 304, 306, 308, and 309). Moreover,
19 criticisms were not universally held, as evidenced by Jay Brown's comments in the 2010 ECAP,
20 and the trial testimony of Aguilar, Elgin and Kesterson.

21 JPL's shifting explanations for disciplining Coppedge due to the manner in which he ap-
22 proached people are no more credible. Were JPL's actions based on Coppedge's *manner* or his
23 *message*? At page 10, lines 5-6 of its brief, JPL's internally ambiguous heading exalts confu-
24 sion over clarity: "Coppedge Is Disciplined For His *Manner* In Approaching Workers *On Sensi-*
25 *tive Personal Topics*, Not For The Content Of What He Said." JPL should understand that "sen-
26 sitive personal topics" = content. With an absence of evidence that Coppedge's manner was in-
27 appropriate, it is obvious that the actual and perceived religious subject matter of Coppedge's
28 activities – and not the manner in which he approached or confronted people – was at the core of
JPL's impermissible considerations. The Written Warning (Exh. No. 103) issued to Coppedge

¹ A post-hoc rationalization is a new rationale for an employer action, while a post-hoc explanation is an employer's discussion of the previously-articulated rationale for the challenged action. *See National Oilseed Processors Ass'n v. Browner* (D.D.C. 1996) 924 F.Supp. 1193, 1204 *aff'd* in part and remanded sub nom. *Troy Corp. v. Browner* (D.C. Cir. 1997) 120 F.3d 277.

1 was not directed at behavioral factors but at Coppedge's practice of handing out DVDs and dis-
2 cussing his "personal views." No matter how often Burgess and Klenk may have repeated the
3 talking point that it was Coppedge's manner HR found to have violate JPL policies, that conclu-
4 sion finds no support in the record. At the end of the day, JPL has failed to refute evidence of
5 religious animus.

6 **IV. DIFFERENT GROUNDS EXIST FOR PROVING RETALIATORY ADVERSE** 7 **ACTIONS.**

8 JPL's Brief fails to inform this Court that JPL is employing only half of the legal test for
9 retaliatory adverse action. JPL's Brief, at page 17, sneers, "Coppedge's post-trial brief expands
10 yet again the list of events he wants to call "adverse employment actions." JPL nowhere cites the
11 California precedent, *Taylor v. City of Los Angeles Dept. of Water and Power* (2006) 144
12 Cal.App.4th 1216 (disapproved on unrelated grounds, *Jones v. Lodge at Torrey Pines Partner-*
13 *ship* (2008) 42 Cal.4th 1158, 1162). In *Taylor*, the Second District Court of Appeal expressly
14 followed the U.S. Supreme Court's holding in *Burlington Northern & Santa Fe Ry Co. v. White*
15 (2006) 548 U.S. 53. An "adverse employment action" for discrimination purposes is different
16 from an "adverse action" for retaliation purposes. See *Taylor, supra*, 144 Cal.App.4th at 1233-
17 1234; *Burlington, supra*, 548 U.S. at 68-69. JPL sidesteps Supreme Court precedent expressly
18 rejecting an argument identical to JPL's here. See *Burlington, supra*, 548 U.S. at 61 (employer
19 actions prohibited by the anti-retaliation provision should are not limited to conduct that affects
20 the employee's 'compensation, terms, conditions, or privileges of employment). In this ruling the
21 *Burlington* Court adopted a position previously taken by the Ninth Circuit in *Ray v. Henderson*
22 (9th Cir. 2000) 217 F.3d 1234, 1242-1243. Under *Burlington*, a retaliatory "adverse employment
23 action" is found when evidence shows the employer's "materially adverse" actions that "well
24 might have dissuaded a reasonable worker from making or supporting a charge of discrimina-
25 tion." *Id.* at 68; *Emeldi v. Univ. of Oregon* (9th Cir. 2012) 673 F.3d 1218, 1225 (following *Bur-*
26 *lington*). "Whether an action is 'materially adverse' is understood in terms of the action's objec-
27 tively deterrent effect – i.e., whether it well might have dissuaded a reasonable worker from
28 making or supporting a charge of discrimination." *Rattigan v. Holder* (D.D.C. 2009) 604 F.
Supp. 2d 33, 46 (emphasis added; internal quotation marks and citation omitted).

Even if an employer's isolated action does not rise to the "materially adverse" threshold,
a series of adverse actions can collectively satisfy that standard. *Noviello v. City of Boston* (1st
Cir. 2005) 398 F.3d 76, 89. The Ninth Circuit has expressly held a series of employer actions
must be evaluated by asking whether, "taken in their totality ... [they would] dissuade a reasona-

1 ble worker from making or supporting a charge of discrimination.” *Alvarado v. Fed. Express*
2 *Corp.* (9th Cir. 2010) 384 Fed. Appx. 585, 589.

3 The Eighth Circuit in *Quinn v. St. Louis County* (8th Cir. 2011) 653 F.3d 745 recently
4 summarized the law, holding that an employee suffers a materially adverse employment action in
5 the context of a ... retaliation claim when the employer engages in conduct that would dissuade a
6 reasonable employee from making a discrimination claim which may be met by the “cumulative
7 effect” of an employer’s alleged retaliatory conduct, if the acts, considered in the aggregate,
8 would dissuade a reasonable employee from reporting discrimination. *Id.* at 751 (applying federal
standards to retaliation claim under state law; emphasis added; citations omitted).

9 “Context matters” in retaliation cases. *Burlington*, 548 U.S. at 69. “[I]t behooves courts to
10 consider whether based upon the *combined effect* of alleged events, a reasonable worker could be
11 dissuaded from engaging in protected activity.” *Smith v. Vilsack* (D. Md., June 2, 2011, CIV.A.
12 DKC 10-2306) 2011 WL 2181514 (emphasis in original; internal punctuation omitted), citing
13 *Test v. Holder* (D.D.C. 2009) 614 F. Supp. 2d 73, 84 ; accord, *Sanford v. Main Street Baptist*
14 *Church Manor, Inc.* (6th Cir. 2009) 327 Fed. Appx. 587, 599 (“while some of the incidents alone
15 may not rise to the level of an adverse employment action, the incidents taken together might
dissuade a reasonable worker from making or supporting a discrimination charge”).

16 What does a retaliatory adverse action look like? Consider the range of individual and
17 cumulative events. In *Emeldi v. Univ. of Oregon, supra*, “the University did not formally dis-
18 miss Emeldi from the Ph.D. program, [but] as a practical matter, it rendered her unable to com-
19 plete the degree.” *Emeldi, supra*, 673 F.3d at 1225. In *Billings v. Town of Grafton* (1st Cir.
20 2008) 515 F.3d 39, the employee’s transfer to “an objectively less prestigious job, reporting to a
21 lower ranked supervisor,” involving a reduced public profile and requiring less experience and
22 qualifications constituted a materially adverse action under *Burlington*. *Id.*, at 53-54. In *Taylor,*
23 *supra*, the employee was stripped of a supervisory position, threatened with a shift change,
24 blocked from educational opportunities, excluded from meetings and information flow, accused
of various things, suffered invasion of privacy, and discouraged from even hoping for a promo-
25 tion. *Taylor, supra*, 144 Cal.App.4th at 1235.

26 Under these kinds of circumstances, the courts found the adverse actions sufficiently un-
27 pleasant as to deter a reasonable employee from participating in EEO activity. The adverse ac-
28 tions need not be earth-shattering to be a deterrent to exercising EEO rights.

1 In Coppedge's case, the question is: would he have challenged the unfair and unprece-
2 dented orders restricting his legitimate activities knowing he would be subjected to threats, a bi-
3 ased, sloppy investigation and reprimands, slandered as a harasser and accused of various things,
4 stripped of his long-held lead position and supervisory responsibilities (over team members,
5 e.g., assigning tasks), placed under surveillance, issued unprecedented negative performance re-
6 views, deprived of due process and set up to be discharged? As the *Taylor* court held: "[t]o ap-
7 ply the deterrence test, we examine defendants' actions to determine whether a jury could find
8 they were so harmful as to dissuade a reasonable worker from making or supporting a charge of
9 discrimination." *Taylor, supra*, 144 Cal.App.4th at 1235. Clearly, the precedential detriment
10 caused by JPL's serial actions would dissuade an employee from asserting employment rights.

11 **V. COPPEDGE IS ENTITLED TO THE FULL AMOUNT OF DAMAGES SOUGHT.**

12 JPL claims Coppedge is not entitled to the full amount of the damages he seeks because
13 he failed to mitigate his damages. However, JPL has depended on its expert witness, a statisti-
14 cian with no qualification to accurately assess whether Coppedge has conducted a sufficient job
15 search and based his opinion on deposition testimony that was not specified on the record at trial.
16 In any event, Coppedge is not a statistic and JPL's expert witness cannot predict whether
17 Coppedge is likely to ever find comparable employment, particularly in light of his acute medi-
18 cal problem (intense and disabling headaches), his permanent residency in Santa Clarita, his age
19 (61) and his responsibilities caring for his 87-year-old mother suffering from Alzheimer's dis-
20 ease.

21 **VI. THE COURT SHOULD OVERRULE JPL'S OBJECTION TO COPPEDGE'S**
22 **FILING OF HIS CLOSING ARGUMENT'S VISUAL PRESENTATION.**

23 The Court informed counsel on the final day of trial that it would consider both the post-
24 trial briefing as well as counsel's closing arguments. Counsel for Coppedge made use of a Pow-
25 erPoint presentation as part of his closing argument, portions of which are referred to in the tran-
26 script and cannot be sufficiently understood without access to the visual supplement. Accord-
27 ingly the Court should take into account the entirety of counsel's closing argument presentation,
28 which included a visual component, in arriving at a ruling.

DATED: June 8, 2012

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