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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. BC435600

SUPPLEMENTAL REPLY IN SUPPORT OF DEFENDANT CALIFORNIA INSTITUTE OF TECHNOLOGY'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES

Date: October 26, 2011
Time: 8:30 a.m.
Dept: 54

Trial Date: December 14, 2011

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I. INTRODUCTION

Coppedge fails to present any new basis for opposing summary judgment. Instead, he merely rehashes the same facts and affixes different (and inapplicable) labels to them, such as "stereotyping." This is no surprise. The Caltech documents that triggered this supplemental briefing themselves contained nothing new. To the contrary, those few documents are entirely consistent with the facts that Caltech presented in its motion for summary judgment, and only further establish that Caltech acted for legitimate, non-discriminatory, non-retaliatory and non-pretextual reasons.

There is no evidence of discrimination, indirect or direct, in either the previously-produced documents or the new ones. First, Coppedge's suggestion that there was a conspiratorial plan to oust him is pure speculation. There is nothing nefarious about addressing performance issues, or investigating complaints of harassment; that these issues were addressed concurrently does not mean they were one and the same. Second, Coppedge's belated attempt to paint himself as a victim of religious stereotyping is absurd; unlike in a stereotyping case, no one at Caltech proceeded based on assumptions of how Coppedge *would act* as a Christian. To the contrary, the case is based on interactions that *actually happened.* Third, in concocting his new stereotyping theory, Coppedge mischaracterizes the employees' complaints about him; he totally ignores that Edgington – a key player – complained about Coppedge's confrontation over politics, not religion (thus undermining the theory that religious stereotyping motivated the employees' complaints).

Coppedge cannot avoid the critical facts here: his religious beliefs had been widely known for years, but he was disciplined only after employees complained he was harassing them. This record allows for only one reasonable interpretation: it was the manner of Coppedge's speech that gave rise to the discipline, not its content. Summary judgment is warranted.

II. COPPEDGE SOLELY ARGUES HIS DISCRIMINATION CLAIMS

Coppedge's supplemental opposition focuses only on his discrimination claims, and only with respect to his written warning and lead removal. Those claims fail as a matter of law. All other issues, including Coppedge's retaliation claims and the basis for his layoff, should also be resolved in Caltech's favor, for the reasons set forth in Caltech's moving and reply papers.

III. COPPEDGE DOES NOT GENUINELY DISPUTE ANY MATERIAL FACT

Caltech produced a small set of documents in September 2011 (what Coppedge refers to as the "new documents") that it inadvertently had omitted from prior productions. Zapp Supp. Reply Decl. ¶ 1. The documents are entirely consistent with the undisputed facts in Caltech's

motion for summary judgment. To assert that these new documents show discrimination, Coppedge ignores or mischaracterizes indisputable evidence, and instead launches into unfounded speculation. His tactic fails to raise a triable issue. "[I]t is well established that a plaintiff's 'suspicions of improper motives . . . primarily based on conjecture and speculation' are not sufficient to raise a triable issue of fact to withstand summary judgment." *Kerr v. Rose*, 216 Cal. App. 3d 1551, 1564 (1990) (ellipses in original) (quoting *Crosier v. United Parcel Serv., Inc.*, 150 Cal. App. 3d 1132, 1139 (1983)).

Coppedge's Assertion	**Why The Assertion Fails To Create A Triable Issue Of Fact**
HR was investigating complaints "about Coppedge's religious views . . ." Supp. Opp'n 1 (dated 10/11/11).	Coppedge's characterization of Huntley's investigation is not supported by any evidence. It is undisputed that her investigation followed Chin's report about the March 2 meeting. During it, she learned that multiple employees felt harassed by Coppedge's *manner* in expressing his views, not the views themselves. Tellingly, Coppedge entirely omits mention of Edgington, whose incident with Coppedge had nothing to do with religion at all. *See* further discussion of the employee's complaints, *infra*.
The new documents "refer[] to the (religious) harassment issue . . . ." *Id.*	Coppedge's insertion of the modifier "religious" is disingenuous and baseless. Nowhere in the new documents does the phrase "religious harassment" appear.
There was a "strategic plan to oust Coppedge." *Id.*	Coppedge blatantly mischaracterizes the April 7, 2009 email, which memorializes a meeting in which HR met with Burgess to discuss Cassini's desire to move Coppedge off Cassini due to "conduct/interpersonal communications issues" with customers. Burgess Ex. 72. Far from presenting a plan to remove Coppedge, it makes clear that HR told Burgess that Coppedge *could not* be laid off, because work was available at the time. *Id.*
Cassini program management sought Coppedge's removal from Cassini because of the March 2 incident and HR investigation. *Id.*	Coppedge is ignoring his admission that even he was aware Mitchell wanted him off the project before the March 2, 2009 incident. Tr. 204:12-205:6 ("Q. Did Mr. Chin ever tell you that Program Management asked him several times to replace you? A. He said that. . . . Q. How many times did Mr. Chin tell you that Program Management had come to him and asked that you be replaced? A. I don't know. At least two."). Chin and Mitchell testified to that effect as well. Chin 188:11-189:12; 190:17-191:2; 373:2-374:1; Mitchell 48:24-49:12; 55:4-19. The testimony also makes clear that Mitchell wanted Coppedge off the project because of performance and communication issues (like those with customers), not the harassment investigation. *See, e.g.*, Chin 375:8-376:2.
"Chin's solution was to remove Coppedge from the Cassini program." Supp. Opp'n 2.	Coppedge again ignores his own testimony. He has acknowledged that it was Mitchell who requested his removal from Cassini, not Chin, and that Chin had actually tried to protect him. Tr. 205:6-12 ("And [Mr. Chin] would say, 'And Dave, I stood up for you, and I defended you.' Q. And is that true? You

	believe that he did stand up and defend you? A. Tammy says that's what he did. I have no reason to doubt it."). When Mitchell determined it was time to move forward on removing Coppedge, Chin merely "concurred" with this input; it was "not something [he] wanted to do." Chin 375:18-376:2; 377:1-25.
Both the written warning and lead removal stemmed from the HR harassment investigation. Supp Opp'n 3.	Coppedge's attempt to lump the written warning and lead removal together is unsupported by the record. The written warning was a disciplinary action that resulted from Huntley's investigation, and was later rescinded. The lead removal was an action taken by Burgess to manage Coppedge's performance issues (namely, customer complaints about him). *See* further discussion of the grounds for these actions, *infra*.
Burgess "conced[ed] the trigger was Coppedge's discussing intelligent design." *Id.*	Coppedge brazenly mischaracterizes Burgess's email. First, Burgess indicated that the issue was his actions in "passing out DVDs and discussing them," not their content. Tr. Ex. 1022. Indeed, Burgess never even refers to "intelligent design." Second, the email makes clear that Burgess was talking solely about the written warning, not the lead removal (which had nothing to do with the harassment investigation). In reality, Burgess's email simply acknowledges the uncontested fact that HR's investigation was triggered by the March 2 incident, and confirms that it was the investigation that led to the warning.

In short, Coppedge fails to show that the new documents raise a triable issue as to discrimination.

IV. THE DISCRIMINATION CLAIM STILL FAILS AS A MATTER OF LAW

As before, Coppedge cannot establish either a *prima facie* case or pretext. The complained-of actions here (written warning and lead removal) do not constitute adverse employment actions. And he has still no facts giving rise to any inference of discrimination, much less direct evidence of such. This is fatal to his discrimination claim.

A. Neither The Written Warning, Nor The Removal Of Coppedge's Lead Duties – Distinct Events –Were Adverse Employment Actions.

These incidents do not constitute adverse employment actions. First, the written warning was not an adverse action, because it had no impact on the terms and conditions of employment, and was ultimately rescinded. *See, e.g., Sabido v. Walgreen's Drugs*, No. C 03-2857 MJJ, 2005 WL 522078, at *5 (N.D. Cal. Mar. 2, 2005) ("[A]lthough Plaintiff received a written warning . . . regarding her conduct, such warnings are not considered an adverse employment action.").[1] Second, the removal of Coppedge's lead duties was not a demotion. There was no change in job classification, salary grade, pay or benefits. Tr. 49:6-25. *Akers*, 95 Cal. App. 4th at 1455

[1] *Cf. Akers v. County of San Diego*, 95 Cal. App. 4th 1441, 1457 (2002) (documents in question labeled plaintiff "dishonest, incompetent and insubordinate;" "[A]lthough written criticisms alone are inadequate . . . , where the employer wrongfully uses the negative evaluation to substantially and materially change the terms and conditions of employment, this conduct is actionable.").

(decision is actionable only if it results in "a substantial adverse change in the terms and conditions" of employment).

B. Caltech's Investigation And Warning Were Non-Discriminatory.

1. Contrary To Coppedge's Assertions, There Is No Direct Evidence Of Discrimination.

Coppedge claims that there is direct evidence of discrimination, but fails to identify any. Instead, he relies, for the first time in this case, on the notion of "stereotyping," in an effort to take advantage of federal case law finding that stereotyping can be direct evidence of discrimination. He argues that "JPL engaged in religious stereotyping by adopting and ratifying the biased views of Coppedge's accusers that he held a particular religious 'agenda' by promoting ID, Christmas and Proposition 8." Supp. Opp'n 5. This is nonsense.

First, there was no stereotyping. Stereotyping occurs when an individual assumes characteristics or conduct on the basis of group membership. *See, e.g., Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991) (district manager saw "[male candidate] as aggressive and cool . . . , while he saw the female candidates as nervous and emotional. His comments could suggest that [he] made his decision on the basis of stereotypical images of men and women . . ."). Here, the employees' reports to Huntley were based on their *actual* interactions with Coppedge, not assumptions about how Christians act in general.

Second, Coppedge's reliance on *Raad v. Fairbanks N. Star Borough*, 323 F.3d 1185 (9th Cir. 2003) is misplaced. In *Raad*, the employer contended that it terminated the plaintiff, a Muslim, because she made a bomb threat. *Id.* at 1196. Raad disputed that she made a bomb threat, creating an issue of fact. *Id.* at 1188, 1196. The court found that a jury "could conclude that she made no bomb threat at all and that the District's contrary interpretation of the event was influenced by stereotypes about her religion or nationality." *Id.* at 1196. Unlike in *Raad*, where the employer's perception differed due to stereotyping, Caltech and Coppedge *agree* as to what happened here: Coppedge discussed his views on Intelligent Design, the holiday party, and Proposition 8 with co-workers. Coppedge is merely incredulous that the co-workers found the manner in which he did so unwelcome, and unhappy that Caltech responded to their concerns.

2. There Is No Evidence Of Religious Animus.

What Coppedge is actually claiming here is not stereotyping, but rather, religious animus – and he has no evidence of that, either. Coppedge misrepresents the record by suggesting that the three complaining employees were Chin, Weisenfelder and Vetter. He acknowledged in his opposition that the employees were Weisenfelder, Vetter, and Edgington. *See, e.g.*, Opp'n 9,

Stmt. of Add'l Facts, Nos. 68-115. In any event, there is no evidence that *any* of these individuals (all Christians themselves) harbored religious animus toward Coppedge. To the contrary:

- Chin testified that he believes in Christian principles. Chin 170:20-22. There is no dispute that Coppedge and Chin had a good relationship for years, throughout which Chin was fully aware of Coppedge's religious beliefs. Tr. 141:25-142:4; 328:20-24; Chin 200:6-9. It was only following Weisenfelder's complaint of harassment that Chin spoke to Coppedge regarding his religious and political speech. Tr. 271:10-16; Chin 128:11-129:8; 140:2-9.

- Weisenfelder is Episcopalian. Weisenfelder 103:23-24. She made clear that it was Coppedge's "persisten[ce]" that made her feel uncomfortable, not what he was saying. Weisenfelder 109:24-110:25; 127:2-21; 145:22-147:12; Ex. 31; Huntley Decl. ¶ 9. With respect to the DVD, she testified explicitly 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." *Id.* 22:5-7.

- Vetter, a Christian Lutheran, felt harassed by Coppedge's insistence on changing the name of the holiday party, not by his beliefs regarding Christmas – a holiday that she herself celebrates. Vetter 73:6-8; 115:24-116:5; 116:17-19; 126:19-127:3; 130:14-20; 145:16-22; Ex. 26; Huntley Decl. ¶ 10.

- Edgington is a Presbyterian, but he and Coppedge did not even discuss religion. Edgington 26:19-20. Rather, Coppedge initiated a discussion with Edgington about Prop. 8, and then insulted Edgington by saying that he "must not like children," because he disagreed with Coppedge's view on Prop. 8. *Id.* 27:18-28:2; 28:4-6, 28:22-24; Ex. 27; Huntley Decl. ¶ 11.

Finally, even if any complaining employee harbored animus toward Coppedge because of his beliefs (and there is no evidence anyone did), this does not undermine Huntley's good faith determination (based on the employees' reports) that Coppedge's behavior violated JPL policies, or Burgess's and Klenk's reliance on her assessment. *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 358 (2000) (the employer's "reasons need not necessarily have been wise or correct"; they need only be "facially unrelated to prohibited bias . . .") (original emphasis omitted).

3. Coppedge Still Has No Evidence Of Pretext.

Coppedge also contends that the new documents provide evidence of pretext, and that this is enough to establish discriminatory motive. Supp. Opp'n 3-4. He is wrong on both counts.

First, Coppedge does not offer any new evidence to show that the written warning was pretextual. Supp. Opp'n 6-7. Rather, he presents the same flawed argument he offered in his opposition: that his actions did not rise to the level of harassment. Opp'n 9-10. As Caltech

explained in its reply, whether the harassment finding was correct or not is irrelevant, because nothing here suggests a discriminatory motive. *See Arteaga v. Brink's, Inc.*, 163 Cal. App. 4th 327, 343 (2008) ("'The [employee] cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent'") (citations omitted, alteration in original); *Guz*, 24 Cal. 4th at 358 ("if nondiscriminatory, Bechtel's true reasons need not necessarily have been wise or correct."). The only new thing here is Coppedge's misrepresentation of which employees complained. Supp. Opp'n 6. *See* Caltech's clarification of these facts, *supra*. Coppedge also speculates that the employees would not have "found his conduct objectionable" if they agreed with his views. Supp. Opp'n 6-7. This not only lacks foundation, but also is belied by the record; as discussed above, these individuals are Christians – and they still found his conduct harassing.

Second, even if Coppedge could should show Caltech erred (and he cannot), that would not be sufficient to survive summary judgment. The California Supreme Court has made clear that a plaintiff's "discrimination claim . . . cannot survive . . . summary judgment" unless he "rais[es] a triable issue, i.e., a permissible inference, that, in fact, [defendant] acted for discriminatory purposes." *Guz*, 24 Cal. 4th at 362. "[A]n inference of intentional discrimination cannot be drawn solely from evidence, if any, that the company lied about its reasons." *Id.* at 360. *See also, e.g., Slatkin v. University of Redlands*, 88 Cal. App. 4th 1147, 1157 (2001) (affirming summary judgment for employer in religious discrimination case; quoting *Guz*, 24 Cal. 4th at 360-61, for same). Coppedge's reliance on *Noyes v. Kelly Services*, 488 F.3d 1163, 1170-71 (9th Cir. 2007) and *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998) is misplaced. He cannot simply ignore clear California Supreme Court guidance in favor of a few federal decisions that he perceives as more favorable to him.

C. <u>The Lead Removal Was Likewise Non-Discriminatory</u>.

Finally, Coppedge contends that Caltech's explanation for the lead removal (customer dissatisfaction with him) is pretextual. He challenges the admissibility of those complaints, suggests that it was Human Resources that made the removal decision, and questions whether the complaints came up at the time of the lead removal. None of these arguments has any traction.

First, the evidence of customer complaints is not hearsay. Coppedge's testimony that others complained about working with him and/or did not want to work with him is not hearsay because it is a party admission. Tr. 534:22-535:18; California Evidence Code Section 1220. As

for other witnesses' testimony about customer complaints, and the complaints themselves, they are not hearsay either, because they are not offered for the truth of the matters asserted. Rather, they show Caltech's motivation and intent at the time it assigned the team lead duties to another employee. *See, e.g.*, Chin 80:15-81:18; 54:16-55:20; 82:15-84:22; 71:15-73:13; Burgess 96:20-97:4. California Evidence Code Section 1250.

Second, that the April 7, 2009 email mentioned lead removal as an option is irrelevant. It was Burgess who decided to remove Coppedge as lead. Burgess's testimony establishes that he made this decision during the April 13, 2009 meeting with Coppedge, based on what happened at that meeting – not on anything discussed by HR on April 7. Burgess 96:18-20; 231:10-232:1.

Third, Coppedge's claim that customer complaints "never once came up" seriously misrepresents the record. Supp. Opp'n 7. Coppedge admits that customers complained about working with him. Tr. 534:22-535:18. Burgess expressly told Coppedge at the April 13, 2009 meeting: "[T]he idea there is that you won't have that interface to these people . . . that are complaining that they're uncomfortable with your actions." Klenk Ex. 44, at 20. Burgess mentioned the issue again in his email regarding the meeting. Burgess Ex. 50 (lead removal took place "in order to remove the strife that seemed to exist" on the project). That customer complaints were not discussed in the written warning makes sense: the warning was based on Huntley's investigation and findings of harassment, not Coppedge's performance issues (which were dealt with separately). There was no reason for Burgess to mention the customer complaints in responding to Coppedge's email seeking clarification about the warning. There was also no reason for Klenk to discuss the complaints in his email regarding the April 13 meeting, because it too focused on the written warning.[2]

V. CONCLUSION

For the foregoing reasons, and those in its moving and reply papers, Caltech respectfully requests that the Court grant summary judgment, or in the alternative, summary adjudication of issues.

DATED: October 18, 2011 PAUL HASTINGS LLP

By: _____
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[2] The version of the Klenk email cited by Coppedge is incomplete. A complete version is attached as Exhibit G to the Zapp Supplemental Reply Declaration.