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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
JUL 01 2011
John A. Clarke, Executive Officer/Clerk
By [signature] Deputy
AMBER LAFLEUR-CLAYTON

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

MEMORANDUM OF POINTS AND AUTHORITIES BY DEFENDANT CALIFORNIA INSTITUTE OF TECHNOLOGY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES

Date: September 16, 2011
Time: 8:30 a.m.
Dept: 54

Trial Date: October 19, 2011

ORIGINAL

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I. INTRODUCTION

California Institute of Technology ("Caltech") employed David Coppedge ("Coppedge") as a system administrator ("SA") on the Cassini space flight project at the Jet Propulsion Laboratory ("JPL"). At no time did Coppedge experience discrimination, harassment or retaliation, based on religion or politics (or anything else). Yet, disappointed by the receipt of a disciplinary warning (later rescinded) and removal of his informal lead designation, Coppedge filed suit. Coppedge's disappointment – and lawsuit – expanded when a long anticipated staff reduction on Cassini led to his layoff. But disappointment is not actionable. Caltech's actions were legitimate, non-discriminatory and non-retaliatory, and there is no evidence of pretext.

The genesis of Coppedge's claims was his March 2, 2009 verbal disagreement with his project supervisor, Greg Chin, over a co-worker's complaint. An advocate of "Intelligent Design" ("ID"), Coppedge contends that Chin told him not to discuss ID or otherwise engage in religious or political speech. Because Coppedge accused Chin of creating a hostile work environment, Chin reported the matter to his and Coppedge's management and to Human Resources. This triggered a Human Resources investigation, in which co-workers reported that Coppedge harassed them regarding non-work related topics (such as ID and Proposition 8 ("Prop. 8," the gay marriage initiative). Based on Human Resources' recommendation, Group Supervisor Clark Burgess and Section Manager Kevin Klenk gave Coppedge a written warning on April 13, 2009. Burgess also removed Coppedge as team lead for the Cassini SAs, because of the on-going conflicts with others. Coppedge unsuccessfully appealed these actions in August 2009, though the warning was later rescinded. On May 4, 2010, Burgess and the new lead, Nick Patel, met informally with Coppedge to remind him to use work time productively (following reports he had not been doing so). In fall 2010, Cassini moved into the second extended phase of its mission, resulting in a long-anticipated 50% budget reduction and layoffs. Pursuant to an evaluation process overseen by new Section Manager Richard Van Why, Coppedge was one of two SAs laid off on January 24, 2011.

None of these events supports actionable claims. As explained below, all of the decisionmakers acted for legitimate reasons, and Coppedge has no evidence of pretext. Indeed, all of the decisionmakers (like Coppedge) are Christian, and at least two actually bought DVDs about ID from Coppedge. Further, Coppedge had long, cordial working relationships with everyone except new Section Manager Van Why, and Coppedge had no problem with him. In sum, all of Coppedge's claims fail as a matter of law, and summary judgment is warranted.

II. FACTUAL BACKGROUND

A. An Overview Of Caltech, JPL And The Cassini Mission.

1. JPL's Operations And Organization.

Caltech, a private, non-profit corporation, operates JPL, a Federally Funded Research and Development Center, pursuant to a prime contract with the National Aeronautics and Space Administration ("NASA"). Clennan-Price Decl. ¶ 4. JPL's mission is to expand the frontiers of space by conducting robotic space missions for NASA. *Id.* at ¶ 6. Employees who work at JPL are employed by Caltech. *Id.* at ¶ 5. JPL is a "matrix" organization consisting of Program Offices and Line Management organizations. Tr. 52:5-7.[1] Line Managers are responsible for supervisory tasks such as performance evaluations, recommending pay increases, promotions and discipline. Clennan-Price Decl. ¶ 7. Project managers direct employee work on projects. *Id.*

2. The Cassini Mission.

Cassini is a joint NASA-European Space Agency ("ESA") project to study the planet Saturn and its satellites. Chin 14:22-25; 15:16-16:16. The spacecraft was launched in 1997, reached Saturn in 2004, and has been transmitting scientific data back to earth ever since. Chin 15:7-9; 15:16-16:16. Cassini was successful, and as anticipated, NASA extended the mission in 2008, and extended it a second time in 2010, but on a much smaller scale with approximately a 50% reduction in funding. Chin 32:10-33:13; 13:6-7; 31:7-31:12.

B. Coppedge's Work History.

1. Coppedge's Work As A System Administrator On Cassini.

Coppedge initially worked at JPL as a contractor. Tr. 50:18-22. In March 2003, Burgess and Chin hired Coppedge as a Caltech employee. Tr. 50:12-14; 51:14-16; Burgess 10:5-10. Throughout his time at JPL, Coppedge was one of several SAs on Cassini. Tr. 181:12-13;184:8-9. In the late 1990's, Chin became Manager of Cassini's Mission Support and Services Office ("MSSO"), after which the Cassini SAs, including Coppedge, worked for him. Chin 12:17-19; Tr. 52:8-10; 268:25-269:4; 326:20-22. MSSO's primary duty was to help receive and process data from the spacecraft and deliver it to Cassini's scientists. Chin 17:4-17. The SAs performed various computer-related tasks. Chin 16:17-20:11.

Group Supervisor Burgess was Coppedge's line manager and immediate supervisor until Burgess retired in September 2010. Tr. 52:11-15; Burgess 11:22-25. Klenk was Section Manager and Burgess's immediate supervisor. Tr. 52:19-21; Klenk 300:7-20.

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[1] Coppedge's deposition is cited as "Tr. [page]:[lines]." Other depositions are cited by deponent name. Cited testimony and exhibits are attached to the Declaration of James A. Zapp.

2. Coppedge Served As Informal Lead For Cassini SAs.

In 2000, Chin, with Burgess's concurrence, made Coppedge lead SA on Cassini because he had the longest tenure of the SAs at the time. Chin 101:18-20; 102:6-12; 110:16-19; 111:8-17; 112:11-15; Burgess 20:17-19; 21:8-11. "Lead" was not a formal job classification, but only an informal designation for some administrative activities that Coppedge performed in addition to his regular SA duties. Burgess 20:6-16; 117:6-14; Chin 110:3-14. As lead, Coppedge acted as a conduit between MSSO and the project. He attended Chin's weekly staff meeting and passed the information onto the SAs, consolidated individual SA weekly status reports for Chin and relayed information from the project to Chin. Tr. 176:2-177:22; Chin 102:13-22.

3. Chin Tried To Help Coppedge When Cassini Members Complained About His Uncooperative Attitude And Poor Interpersonal Skills.

It is important for SAs to work effectively, and maintain positive relationships, with the mission scientists and administrators ("customers" or "users"). Tr. 173:17-174:13. Chin received complaints from as many as twenty-five individuals about Coppedge, including his uncooperative attitude and poor interpersonal skills. Chin 54:16-55:20; 71:16-73:13; 80:15-81:18; 82:15-84:22.[2] The number of complaints about Coppedge was "significantly higher than anyone else on the team" and spanned "the entire time period" Chin knew him. Chin 64:24-65:6; 80:5-8. Coppedge knew people complained about working with him. Tr. 534:22-535:18 ("Q. Isn't it true that there were several people who complained about interacting with you and/or chose not to work with you even though you may have disagreed with their perceptions? . . . . A. Yes . . .").

Chin coached Coppedge on how to improve his interactions with others. Chin 55:21-56:1; 86:24-90:16; 334:2-5. While Coppedge wanted to do better, and his relationships with customers improved for a short while at times, more complaints inevitably followed. Chin 220:7-22; 325:22-326:10. Cassini's Project Manager, Bob Mitchell, suggested several times that Chin should remove Coppedge from the project, but Chin defended Coppedge. Tr. 204:12-205:12; Chin 188:11-189:12; 190:17-191:2. When Chin told Burgess about these complaints, Burgess tried to find another project for Coppedge, but there were no openings because JPL had fewer projects and positions over the years. Chin 97:5-99:6; Burgess 58:7-13; 60:9-22; 61:8-15. Burgess did not document many criticisms in Coppedge's annual performance reviews to maximize Coppedge's chance to transfer to another project. Burgess 58:14-59:7.

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[2] Coppedge's poor interpersonal skills affected non-work matters too. Over time, co-workers told Chin that Coppedge approached them at work in ways, and on topics, that made them uncomfortable, such as their religious views. Chin 264:12-265:1; 266:14-268:19; 270:8-25; 276:10-22. However, no one called Coppedge's conduct "harassment" until March 2, 2009.

C. **March 2, 2009: A Member Of Cassini Complained That Coppedge Had Harassed Her; When Chin Tried To Coach Coppedge (Again), Coppedge Accused Him Of Creating A Hostile Work Environment.**

On the morning of March 2, 2009, Cassini's Digital Librarian, Margaret Weisenfelder, told Chin that Coppedge had harassed her and was targeting others in the workplace. She said that Coppedge had harassed her at work about her views on Prop. 8. Weisenfelder also said that the back cover of a DVD Coppedge had given her about ID had a post-it note with a list of JPL co-workers whom he appeared to be targeting (the list had a notation "Try Again" beside one of the names). Chin 114:3-24; 128:11-129:8. Weisenfelder's reference to "harassment" was a red flag to Chin. He decided to talk to Coppedge informally about this in the hope of avoiding further (and even more serious) complaints. Chin 140:2-9.

Chin and Coppedge met after the staff meeting that afternoon.[3] Tr. 271:10-16; 300:3-19; 304:12-17; Ex. 1012. While their recollections of the meeting differ, they agree that the discussion became heated.[4] Chin said that colleagues had complained about Coppedge talking to them about non-work related topics such as religion and politics. According to Coppedge, Chin was hostile and argumentative from the outset, said ID was religion, not science, accused Coppedge of "pushing" religion on colleagues, and told him to stop bringing up religion and politics with others in the office, though he could discuss those topics during lunch or at home. Tr. 275:1-7; 276:5-15; 278:2-15; Ex. 1012. Coppedge asked for, but Chin declined to give him, the names of his "accusers."[5] Tr. 304:3-11. Coppedge tried to debate Chin about what constitutes science versus religion. Refusing to believe that anyone had complained, Coppedge argued that he had only offered co-workers DVDs on ID. Tr. Ex. 1012; 300:17-301:1. Chin allegedly told Coppedge that he could not talk about religion or politics in the office or it would be difficult for him to maintain employment in the organization.[6] Tr. 290:2-15. When Coppedge

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[3] At the staff meeting, Coppedge and an engineer had a heated argument over a work issue (which Chin tried to mediate). Coppedge acknowledges that this argument set the stage for how he reacted to Chin's comments in their meeting. Tr. 271:10-16; 272:1-273:4; 298:15-299:11.

[4] Chin wanted Coppedge to understand that discussing volatile topics (like religion and politics) during work hours could be disruptive. Chin 142:19-145:9. Chin told Coppedge he could discuss these topics at lunch or on his own time, but not during working time in the office. Tr. 274:14-25; 300:17-301:1; Ex. 1012; Chin 308:23-309:18. However, for purposes of this motion only, Caltech accepts Coppedge's version of the meeting as true.

[5] In the past, when Chin told Coppedge who had complained, Coppedge immediately confronted these individuals about their complaints. Chin 87:2-14.

[6] Coppedge never asked what Chin meant. Tr. 290:16-21. Chin was concerned that Coppedge would have difficulty finding assignments if he kept alienating people. Chin 316:13-317:20.

said Chin's words could be construed as creating a hostile work environment,[7] Chin told Coppedge to file a complaint if he felt that way. Tr. 295:2-296:9. The next day, Coppedge summarized his version of the meeting in an email to Chin. Tr. Ex. 1014; 329:9-330:1; 329:22-330:6. Chin did not respond. Tr. 276:12-15.[8]

D. Chin Notified Management About Coppedge's Accusation; Human Resources Investigated And Recommended That Coppedge Receive A Written Warning.

Chin notified his and Coppedge's management about the meeting and the hostile-work-environment comment. Chin 151:4-154:3. As a result, Human Resources Generalist Jhertaune Huntley investigated the situation. Huntley Decl. ¶ 4. Initially, she interviewed Coppedge, Chin and Burgess. *Id.* ¶ 5. Chin described Weisenfelder's complaint. *Id.* ¶ 6; Huntley 184:2-7. He also said that Coppedge had made another Cassini employee (Carmen Vetter) uncomfortable by discussing his religious views in the workplace. *Id.* When Huntley interviewed Coppedge, he volunteered that he had discussed Prop. 8 with another co-worker (Scott Edgington) and that their conversation had become heated, such that Coppedge had apologized the next day for his behavior. Tr. 104:8-10; 345:1-346:8; Huntley 331:5-14; Huntley Decl. ¶ 7.

Huntley then interviewed Weisenfelder, Vetter and Edgington. Huntley Decl. ¶ 8. Weisenfelder described the two incidents she reported to Chin. She explained that Coppedge's persistence made her feel uncomfortable and that he stepped over the line by discussing politics and religion during work hours. Weisenfelder 127:2-21; 141:10-17; 145:22-147:12; Ex. 31; Huntley Decl. ¶ 9. Vetter told Huntley that Coppedge had harassed her a few years earlier by demanding that she change the name of the Cassini "Holiday" Potluck to a "Christmas" Potluck. Coppedge had been so persistent that she had asked Chin to make Coppedge stop. Vetter 115:24-116:5; 116:17-19; 126:19-127:3; 130:15-20; 145:16-22; Ex. 26; Huntley Decl. ¶ 10. Edgington told Huntley that, after Coppedge had initiated a discussion about Prop. 8, Coppedge insulted him by saying that he "must not like children" because he disagreed with Coppedge's view on Prop. 8. Huntley 27:18-28:2; Edgington 28:4-6, 28:22-24; Ex. 27; Huntley Decl. ¶ 11. Edgington had to tell Coppedge twice to leave his office before he did so. Edgington 80:25-81:8; 101:23-103:2.

Based on her investigation, Huntley concluded that Coppedge's behavior violated Caltech's Unlawful Harassment Policy and its Ethics and Business Conduct Policy. Huntley

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[7] At deposition, Coppedge conceded that he only meant that Chin was being hostile in that one conversation. Tr. 106:1-11; 295:21-296:5.

[8] Chin's management and Human Resources advised him not to respond. Chin 304:23-306:19.

Decl. ¶ 12, Exs. A, B. She recommended that he receive a written warning for his conduct. Huntley Decl. ¶ 14. Burgess and Klenk agreed. *Id.*; Burgess 118:13-119:2; Klenk 130:18-23.

E. April 13, 2009: Coppedge Received A Written Warning And Was Removed As Lead.

On April 13, 2009, Burgess and Klenk delivered the written warning to Coppedge. Tr. 406:12-14; 235:10-19; Ex. 1010; Tr. 389:17-20; Klenk 306:5-19. Coppedge acknowledges that Burgess and Klenk treated him courteously, and no one raised his voice. Tr. 395:21-396:5. They told Coppedge that the warning concerned *the manner* in which he had interacted with his co-workers, *not the substance* of what he had discussed. Tr. 395:12-20. Klenk told him they had "no issue with people discussing religion and politics in the office so long as it's not unwelcome or disruptive." Klenk 313:25-314:14; 468:25-469:11; Ex. 44, at 7. Despite this, Coppedge continued to focus on the content of what he discussed rather than his behavior. Klenk 337:2-15; 395:18-396:6.

Burgess decided during the meeting that he had to remove Coppedge as lead. Burgess 96:18-20. For years, Chin had told Burgess about complaints regarding Coppedge, and this was another instance of Coppedge creating conflicts. Burgess 96:20-97:4; Tr. 432:16-433:19.[9] Burgess concluded he had been remiss in not acting sooner. Burgess 96:15-97:5. There was no change in Coppedge's job classification, salary grade, pay or benefits. Tr. 49:6-25.

F. Coppedge Appealed The Warning And His Removal As Lead; Klenk Reviewed All The Facts And Denied The Appeal.

On May 1, 2009, Coppedge "appealed" his written warning and removal as lead to Human Resources. Tr. 406:15-18; 479:2-16; Ex. 1025. The appeal process called for him to meet with Klenk. Tr. 529:20-25. Klenk interviewed Huntley regarding her investigation and reviewed all the facts. Klenk 388:16-389:21; 419:25-420:15; Ex. 47; Huntley Decl. ¶ 15. Klenk then met with Coppedge on August 25, 2009. Tr. 123:5-9; 530:7-9. Hearing no reason to modify the earlier decision, Klenk determined that Burgess acted appropriately and denied the appeal. Klenk Ex. 47. Klenk sent Coppedge a memorandum summarizing his decision. 567:25-568:19; Tr. Ex. 1031. Though Coppedge disagreed with the decision, he described Klenk's demeanor in the meeting as "polite" and "gentlemanly." Tr. 556:11-13. There was no hostility, and neither raised his voice. Tr. 556:13-16.

[9] Burgess told Coppedge: "[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.

G. Human Resources Rescinded The Written Warning.

On April 7, 2010, Burgess and Klenk again met with Coppedge. Tr. 572:2-8. At Human Resources' direction, they rescinded the April 13, 2009, warning, but not his removal as lead. Tr. 167:4-14; Klenk 441:7-11; 456:16-19. Human Resources had concluded that an oral admonition (rather than a formal written warning) was sufficient to make Coppedge aware of how he should conduct himself. Klenk 456:20-457:2; 476:14-477:5; Tr. 573:18-575:4.

H. Coppedge Filed This Lawsuit.

On April 14, 2010, Coppedge filed the instant lawsuit, asserting claims for religious discrimination and harassment, retaliation and wrongful demotion.

I. May 4, 2010: Burgess And Patel Talked To Coppedge Regarding Use Of Work Time.

On May 4, 2010, Burgess and Patel spoke to Coppedge to remind him to use work time productively, following reports suggesting he had not been doing so. Tr. 584:10-23; 648:22-649:2; Burgess 145:4-146:13; 147:13-148:2, Ex. 54.

J. Coppedge Was Laid Off As Part Of The Staff Reduction For The Second Extended Mission.

When Cassini's Second Extended Mission began in October 2010, there was a significant funding reduction, personnel were released, and System Administration was reorganized. Chin 36:3-19; 30:21-24; 32:3-6; 36:21-37:6; Tr. 790:1-5; 7-10; Conner 20:9-21:1. Chin warned the SAs two years earlier about the cuts and that "no one would be guaranteed a slot . . ." Tr. 768:18-24; 769:8-18. Coppedge took "training . . . to prepare [himself] in case [he] had to look for other employment . . . ." Tr. 772:22-773:9. Mitchell dissolved MSSO. Chin 36:21-37:6. System Administration became part of Integrated Uplink Systems ("IUS"), managed by Diane Conner. Conner 17:10-19. Due to the cuts, Cassini needed two fewer SAs. Conner 21:24-24:9; 28:20-22.

Caltech has an established procedure for reductions in force; most require a layoff ranking. Clennan-Price Decl. ¶ 8. Section Managers rank employees performing the same or similar work (typically, employees who are in the same job classification) within their section according to established factors. *Id.*[10] The purpose of the ranking is to determine employees' relative qualifications, skills and abilities to perform the work needed after the reductions. *Id.*

Van Why became Section Manager in Summer 2009, and Acting Group Supervisor following Burgess's retirement at the end of September 2010. Van Why Decl. ¶¶ 4-5; Tr. 807:16-808:7. With Conner's input and Human Resources' assistance, Van Why evaluated and ranked

[10] The factors are: need, skills, ability, performance, conduct, reliability, education/training and

the SAs in his section: Patel, Harvey Chien, Oscar Castillo, Coppedge, and Gary Wang.[11] Van Why Decl. ¶¶ 9, 11, 13-14; Conner 34:22-36:8; 42:4-13; Clennan-Price Decl. ¶ 9. Based on this process, Van Why concluded that Patel, Castillo, and Wang were more qualified than Coppedge and Chien, and determined that Coppedge and Chien should be laid off.[12] Van Why Decl. ¶¶ 14-15, Ex. B. On January 24, 2011, Van Why notified Coppedge and Chien of their layoffs. Tr. 797:1-12; 838:10-18; Ex. 1053; Van Why Decl. ¶ 16. Coppedge filed a Second Amended Complaint, adding claims regarding his termination.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is proper where no material factual issue exists, and where the record establishes that no cause of action asserted against a party can prevail. Cal. Civ. Proc. Code § 437c. Summary judgment should be granted where the plaintiff cannot provide evidence to establish a cause of action, or where the defendant can provide a complete defense. *Id.* at § 437c(o)(2); *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238, 1252 (1994). A defendant moving for summary judgment "need not" present evidence that "conclusively negates an element of the plaintiff's cause of action." *Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826, 855 (2001). Rather, defendant simply "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact . . . ." *Id.* at 850. Once defendant satisfies that burden, plaintiff, opposing the motion, is "subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." *Id.* The plaintiff "may not rely upon the mere allegations or denials of its pleadings. . . but, instead, [must] set forth the specific facts showing that a triable issue of material fact exists. . . ." Cal. Civ. Proc. Code § 437c(p)(2).

IV. COPPEDGE'S CLAIM FOR RELIGIOUS DISCRIMINATION UNDER FEHA (FIRST CAUSE OF ACTION) FAILS AS A MATTER OF LAW

On summary judgment, Coppedge's discrimination claim is analyzed using the familiar burden-shifting standard of proof. Coppedge has the initial burden of establishing a *prima facie* case of discrimination. *Caldwell v. Paramount Unified Sch. Dist.*, 41 Cal. App. 4th 189, 196-97

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experience. Van Why Decl. Ex. B, at 2.

[11] One SA who worked on Cassini, Chris Cordell, was not ranked, because he worked out of a different section and on projects other than Cassini. Van Why Decl. ¶ 12. Further, Cordell is a highly qualified system administrator, and would not have been subject to layoff in any event. *Id.*

[12] Coppedge contends he should have been retained because, among other things, he had the "most experience and the most seniority" on Cassini, and he believes, of course, that he was more qualified than the other SAs. Tr. 867:11-14; 882:18-883:12.

(1995). If he does so, the burden shifts to Caltech to articulate a legitimate, nondiscriminatory reason for its adverse employment decision. *Id.* At that point, the burden shifts back to Coppedge "to show that [Caltech's] stated reason for the adverse employment decision was in fact pretext." *Id.* Coppedge contends he experienced discrimination due to religion (Christianity) or perceived religion (ID), in violation of FEHA and the California Constitution. SAC ¶¶ 62-64.[13] But as shown below, Coppedge cannot establish a *prima facie* case of discrimination; even if he could, Caltech had legitimate reasons for all actions taken, and Coppedge has no evidence of pretext. Further, Coppedge's reliance on free speech principles is misplaced: FEHA protects against discrimination based on protected class, not speech, and neither the California nor federal constitution prevents a private employer like Caltech from regulating employee speech.

A. Coppedge Cannot State A *Prima Facie* Claim For Discrimination.

To establish a *prima facie* case, Coppedge must show that (1) he belongs to a protected category; (2) he is otherwise qualified to do his job; (3) he suffered an adverse employment action; and (4) there are circumstances raising an inference of discrimination based on the protected category (here, religion). *See Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 355 (2000).

None of the conduct Coppedge alleges supports a *prima facie* case. Other than his layoff, none of the events he identifies are adverse employment actions. In all events, Coppedge's *prima facie* case fails on the fourth prong: employers are permitted to regulate conduct at work, religious or otherwise, and there is no evidence to suggest that anything Coppedge experienced, including the layoff, occurred because of his actual or perceived religious beliefs.

1. Except For The Layoff, There Is No Adverse Employment Action.

Coppedge contends that he was "ordered . . . to discontinue" religious speech. SAC ¶ 64. While Caltech disputes this, even if true, it is not an adverse employment action. An employment decision is actionable only if it results in "a *substantial* adverse change in the terms and conditions" of employment. *Akers v. County of San Diego*, 95 Cal. App. 4th 1441, 1455 (2002) (emphasis added). A request that Coppedge limit non-work-related speech did not impact the terms and conditions of his employment *at all*, much less substantially.

Coppedge also contends that he was "demoted" when Burgess transferred informal lead duties to Patel – but concedes that his salary, benefits and job classification stayed the same. Tr. 49:6-25. This change was not a demotion, but merely a change in some job duties and loss of an

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[13] Coppedge is an evangelical Christian and practicing Baptist. Tr. 28:20-29:1. He believes that ID is "a scientific theory of life's origins," SAC ¶ 9, but asserts that his views on ID were "perceived" as religion. SAC ¶ 64.

informal designation, neither of which is an adverse employment action. *Akers*, 95 Cal. App. 4th at 1455; *Thomas v. Dep't of Corr.*, 77 Cal. App. 4th 507, 511 (2000) (action must "be more disruptive than . . . an alteration of job responsibilities") (internal quotations and citation omitted); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 453-57 (7th Cir. 1994) (no adverse employment action where transfer was at same salary and benefits, with semantic change in title and reporting relationship).[14] That Coppedge felt "humiliated" does not render the change actionable. SAC ¶ 54; *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1054 (2005), citing, *inter alia, Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997) (that employee felt "frightened" and "humiliated" insufficient), and *Flaherty*, 31 F.3d at 457 ("bruised ego" insufficient").[15]

2. All Allegations Fail On The Fourth Prong: Coppedge Cannot Establish An Inference Of Discrimination.

While Coppedge's layoff could constitute an adverse employment action, he still cannot establish a *prima facie* case based on it, or the other events about which he complains, because there are no "circumstance[s] suggest[ing a] discriminatory motive." *Guz*, 24 Cal. 4th at 355.

First, even if Chin had ordered Coppedge to stop discussing religion altogether (he did not), this is not discrimination: Any effort by Chin to modulate Coppedge's conduct was in response to employee complaints, and reflected the *manner* of Coppedge's speech, not its content. Employers may regulate workplace conduct affecting other employees, even where that impacts religious expression. *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603-05 (9th Cir. 2004) (affirming summary judgment; plaintiff failed to establish fourth prong of *prima facie* case, after discharge for refusal to remove anti-homosexual posters from his cubicle that he contended expressed religious belief: "[H]e was discharged, not because of his religious beliefs, but because he violated the company's harassment policy . . . and because he was insubordinate in that he repeatedly disregarded the company's instructions to remove the demeaning and degrading postings from his cubicle."); *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 744 (9th Cir. 2004)

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[14] "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying [California's] own statutes." *Guz*, 24 Cal. 4th at 354.

[15] Coppedge's written warning was not an adverse action either: 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."). *Cf. Akers*, 95 Cal. App. 4th at 1457 (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.").

(affirming summary judgment; plaintiff, an Evangelical Christian discharged for harassing lesbian subordinate by telling her that the Bible prohibited homosexuality, could not establish fourth prong; she "failed to present any legitimate 'comparator' evidence" and did not "demonstrate[] other circumstances . . . that demonstrate a bias or animus against her religion . . .").[16]

Second, the written warning was based on Coppedge's interactions with other employees, and the fact that the employees felt uncomfortable as a result – not the content. Indeed, some of the discussions were not even about religion, but about Prop. 8. At the April 13 meeting, Burgess and Klenk emphasized to Coppedge that the warning was based on the *manner* of his communication, not the substance, and that Caltech had "no issue with people discussing religion and politics" so long as it was not disruptive. Tr. 395:12-20; Klenk 468:25-469:11; Ex. 44, at 7.

Third, Burgess transferred lead activities to Patel because of ongoing complaints about Coppedge's manner of dealing with others. That colleagues felt harassed by Coppedge, as confirmed by HR's investigation, was another example of Coppedge creating conflicts. Burgess concluded that Coppedge should not serve in a position that required interaction with those who felt uncomfortable with him. Klenk Ex. 44, at 20.

Fourth, Van Why made the layoff decision via a formal process, in which he determined (with Conner's input) that Coppedge was one of the two least qualified SAs. Van Why Decl. ¶¶ 11, 14-15; Conner 34:22-36:8; 42:4-13. Coppedge's testimony establishes that there is no evidence of bias or unfair treatment by Van Why or Conner. He never had a disagreement with Van Why regarding religion, politics or ID, and "does not recall" if they even discussed them. Tr. 900:18-901:3. While Coppedge discussed these topics with Conner, she was not offended; in fact, she bought one of his DVDs about ID. Tr. 901:13-23. Besides the layoff, Coppedge never felt Van Why "treated [him] unfairly," and he had always had a "good working relationship" with Conner. Tr. 813:1-6; 657:10-18. Coppedge never heard Van Why or Conner make any statement suggesting they wanted to discriminate or retaliate against him. Tr. 895:21-896:10.[17]

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[16] *See also, e.g., Berry v. Dep't of Social Serv.*, 447 F.3d 642, 646-47, 656-57 (9th Cir. 2006) (no discrimination where employer prohibited employee from discussing religion with clients, displaying religious items in his cubicle, and using conference room for prayer meetings); *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 476 (7th Cir. 2001) (employer could prevent employee from ending conversations with customers and vendors with phrase, "Have a Blessed Day," as at least one customer had complained).

[17] Although Coppedge did not identify the May 2010 meeting as a basis for his discrimination claim, it could not support it. It was not an adverse action because it did not impact the terms or conditions of employment. It was a legitimate response to concerns about his use of work time. And Coppedge had good relationships with Burgess and Patel. Tr. 151:7-11; 588:8-20.

B. Caltech's Legitimate Non-discriminatory Reasons.

Caltech has legitimate reasons for each action, shifting the burden back to Coppedge.

1. Chin's Admonition Was A Legitimate Regulation Of The Manner Of Coppedge's Speech.

Chin was responding to the concerns of other employees, and he sought to help Coppedge avoid further complaints and understand that discussing topics like religion at work could be disruptive. Chin 114:4-24; 142:19-145:9. This is entirely lawful: employers may regulate religious expression in the workplace. *See* discussion, *supra*; *Peterson*, 358 F.3d at 603-04.

2. The Written Warning Was A Legitimate Regulation Of The Manner Of Coppedge's Speech.

Burgess issued the warning in response to the concerns of employees, who felt harassed by the manner of Coppedge's speech. While Caltech has a right to regulate religious expression, Klenk nevertheless made clear that there was "no issue with people discussing religion and politics" so long as it was not disruptive. Klenk 468:25-469:11; Ex. 44, at 7.

3. Loss Of Informal Lead Duties Was Based On Longstanding Dissatisfaction With Coppedge's Interaction With Colleagues.

Burgess shifted the lead activities from Coppedge to Patel for an entirely legitimate, non-discriminatory reason: a long record of dissatisfaction with Coppedge's interactions with others. Burgess 96:18-20; 96:20-97:4. Whether Coppedge disagrees with Burgess's assessment is irrelevant: the employer's "reasons need not necessarily have been wise or correct"; they need only be "facially unrelated to prohibited bias . . . ." *Guz*, 24 Cal. 4th at 358.

4. Coppedge Was Laid Off As Part Of A Funding-Based Reduction.

Coppedge's layoff was likewise based on job performance. Faced with necessary staff reductions, Van Why, with Conner's input, engaged in a careful process to evaluate the relative qualifications of the SAs, determined that Coppedge was among the least qualified, and chose him for layoff. Van Why Decl. ¶¶ 11, 14-15; Conner 34:22-36:8; 42:4-13. That Coppedge disagrees with their assessment, or believes he should have been retained for other reasons (*e.g.*, long tenure), is irrelevant. *Guz*, 24 Cal. 4th at 358.

C. Coppedge Has No Evidence of Pretext.

In the final stage of the burden-shifting analysis, Coppedge must produce specific, substantial evidence that the actions in question were taken *because* of his religious views. *Guz*, 24 Cal. 4th at 361 ("[T]here must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions.") (emphasis in original); *Hersant v. Dep't of Soc. Servs.*, 57 Cal. App. 4th 997, 1009 (1997) (employee must offer substantial evidence that employer's stated reason is untrue or

pretextual); *Ibarbia v. Regents of Univ. of Cal.*, 191 Cal. App. 3d 1318, 1330 (1987) ("highly speculative allegations" are insufficient). Coppedge cannot meet this burden.

First, as discussed above, there is *no* evidence giving rise to any inference of discrimination, with respect to any of the conduct alleged to be discriminatory.

Second, the circumstances here undermine any suggestion of bias: each of the decisionmakers is Christian, and two (Burgess and Conner) even bought DVDs from Coppedge.[18] No inference of discrimination arises when the decisionmaker is in the same protected category as the plaintiff. *See, e.g., Askari v. L.A. Fitness Int'l, LLC*, No. 09-2789 ADM/JSM, 2010 WL 3938320, at *5 (D. Minn. Oct. 5, 2010) (granting summary judgment; "[A]lthough members of a protected class may sometimes discriminate against other members in that class, a plaintiff faces a difficult burden of establishing discrimination when the decision-maker is a member of the same protected class .... Thus, the fact that Evans, the very person who recommended [plaintiff's] termination, is African American negates an inference of pretext.") (citations omitted); *Taylor v. Procter & Gamble Dover Wipes*, 184 F. Supp. 2d 402, 413 (D. Del. 2002) ("[A]n inference of discrimination is less plausible when the decision-maker is a member of the same protected class as the plaintiff."), *aff'd*, 53 Fed. Appx. 649 (3d Cir. 2002). Chin believes in Christian principles, and has never subscribed to another doctrine. Chin 170:20-22; 171:16-20. Klenk is Christian, and attends American Martyrs church. Klenk 133:4-5; 263:18-19. Burgess and Van Why are Christians as well. Burgess 66:18-19; Van Why Decl. ¶ 18.[19]

D. <u>Coppedge Cannot Establish His Claim With A Free Speech Argument</u>.

Coppedge alternatively suggests that his being asked to limit his speech discriminated against him with respect to his free speech rights. SAC ¶¶ 63-64. But Coppedge cannot rely on free speech principles here. FEHA bars discrimination based on membership in protected classes, not speech, Cal. Gov't Code § 12940(a). And neither the federal nor California constitutions prohibit regulation of employee speech by a private employer like Caltech. *See Peterson*, 358 F.3d at 605 n.5 (First Amendment concerns do not apply to limitations on workplace expression by private, rather than state, employers). *See also Golden Gateway Center v. Golden Gateway Tenants Ass'n*, 26 Cal. 4th 1013, 1023 (2001) ("California's free speech clause contains a state

[18] Tr. 901:13-18; Burgess 33:7-34:25. Huntley and the three employees whom Coppedge harassed are Christians as well. Huntley (Decl. ¶ 16, Protestant); Vetter (50:24-51:8: Christian Lutheran); Weisenfelder (103:23-24, Episcopalian); Edgington (26:19-20: Presbyterian).

[19] Coppedge contends that Chin, Weisenfelder, Vetter, and Edgington "share a worldview that clashes" with his, citing their lack of practice and Democratic party membership. SAC ¶ 33. Whether they attend church, or are Democrats, does not change the fact that they are Christians.

action limitation"); *Thornbrough v. W. Placer Unified Sch. Dist.*, No. 2:09-cv-02613-GEB-GGH, 2010 WL 2179917, at *7 (E.D. Cal. May 27, 2010) (whistleblower suit; citing *Golden Gateway*, and granting motion to dismiss claim for violation of Free Speech Clause of California Constitution against individual defendant, because plaintiff failed to allege that his conduct constituted state action).

V. <u>COPPEDGE'S CLAIM FOR VIOLATION OF LABOR CODE SECTIONS 1101 AND 98.6 (SECOND CAUSE OF ACTION) FAILS AS A MATTER OF LAW</u>

Coppedge claims that Caltech violated Cal. Labor Code Sections 1101 and 98.6 because employees reported that he harassed them regarding Prop. 8. SAC ¶¶ 74-75. Neither those allegations, nor any other conduct Coppedge has identified, establish a violation of either section.

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. A plaintiff must "demonstrate that [the employer] had a 'rule, regulation, or policy' controlling or directing such activities." *Ross v. Indep. Living Res.*, No. C08-00854TEH, 2010 WL 2898773, at *9 (N.D. Cal. July 21, 2010). "The California Supreme Court . . . cited the following definition of 'policy': 'A settled or definite course or method adopted and followed by a government, institution, body, or individual.'" *Id.* (quoting *Lockheed Aircraft Corp. v. Superior Court*, 28 Cal. 2d 481, 485-86 (1946)). Coppedge's allegations in SAC ¶¶ 74-75 fail, because they do not address any *Caltech* policy, but rather focus on *employee* actions. None of Coppedge's other allegations suffices, either: he has not alleged, much less provided evidence of, any Caltech policy that impedes political expression of employees. *See, e.g., Ross*, 2010 WL 2898773, at *9 (granting summary judgment on Section 1101 claim: "Even if [plaintiff] were to succeed in his claim that his termination was an act of retaliation for his [political activity], that isolated episode would be insufficient to establish that [defendant], *as a policy*, barred its employees from . . . engaging in political activity.") (emphasis added); *Brahmana v. Lembo*, No. C-09-00106 RMW, 2010 WL 965296, at *5 (N.D. Cal. Mar. 17, 2010) (granting motion to dismiss Section 1101 claim where there was neither a policy forbidding employees from participating in politics nor any threat of discharge for engaging in a particular course of political activity"). Further, Klenk informed Coppedge that political speech *is* permissible at JPL, so long as it is not disruptive. Klenk 468:25-469:11; Ex. 44.

Coppedge's claim under Section 98.6 likewise fails. Section 98.6(a) prohibits discharge of, or discrimination against, an employee because the employee engaged in any conduct

protected in that chapter of the Labor Code or filed a complaint with the Labor Commissioner. *Grinzi v. San Diego Hospice Corp.*, 120 Cal. App. 4th 72, 87 (2004) (plaintiff "must allege . . . termination occurred because she exercised a right protected *by the Labor Code*") (emphasis in original). To the extent this claim is derivative of the Section 1101 claim, it fails, as Coppedge cannot state a claim under that section. Alternatively, he cannot base his claim on some alleged "right" to promote political speech at work without restriction: like FEHA, and the California or federal constitutions (as to private employers), the Labor Code does not protect such conduct.

VI. COPPEDGE'S CLAIMS FOR RETALIATION (THIRD, FOURTH CAUSES OF ACTION) FAIL AS A MATTER OF LAW

Coppedge contends that he experienced a "string of circumstances [he] thought were retaliatory," including the written warning, his alleged demotion, the May 2010 meeting regarding use of work time, his performance evaluations for 2009 and 2010, and his layoff. Tr. 864:6-11; 891:25-893:17; SAC ¶¶ 82, 85, 93. None of this is retaliation.

A. Coppedge Cannot Establish A Retaliation Claim Under FEHA.

To establish a *prima facie* case, Coppedge must show that (1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) there was a causal link between the two. *Flait v. N. American Watch Corp.*, 3 Cal. App. 4th 467, 475 (1992).

First, to the extent Coppedge bases this claim on purported "protected status as a person lawfully engaged in constitutionally protected expressive activity," SAC ¶ 84, it fails: FEHA does not prohibit restrictions on speech, and thus does not prohibit retaliation against those who oppose such restrictions. *Villanueva v. City Of Colton*, 160 Cal. App. 4th 1188, 1198-99 (2008) ("[plaintiff's] claim of retaliation fails because there is no evidence that he ever engaged in a protected activity related to an employment practice proscribed by the FEHA."); Cal. Gov't Code § 12940(h) (retaliation provision: "unlawful employment practice . . . [f]or any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden *under this part* . . .") (emphasis added).

Second, of the purported "retaliatory" events identified by Coppedge, only one is an adverse employment action – his layoff – and he cannot establish a nexus between it and his arguably protected activity: his claim of a "hostile work environment" in March 2009, and his lawsuit in April 2011.[20] To state a claim, Coppedge must show he would not have been laid off

[20] Coppedge identified as his protected activity "free speech," including asking the Omsbudsman whether JPL has a religious expression policy; without more, this is not protected activity. Tr. 133:11-18; 136:11-13. Solely for this motion, Caltech focuses upon actions taken by Coppedge

"but for" his protected activity. *Gen. Dynamics Corp. v. Superior Court*, 7 Cal. 4th 1164, 1191 (1994) (plaintiff "bears the burden of establishing . . . that the employer's conduct was motivated by impermissible considerations under a 'but for' standard of causation"); *Reeves v. Safeway Stores, Inc.*, 121 Cal. App. 4th 95, 108 (2004) (ultimate issue "is whether retaliatory animus was a but-for cause of the employer's adverse action"). Coppedge has no evidence of *any* link between his alleged protected conduct and his layoff, let alone "but for" causation:

- Any temporal connection is weak at best: Coppedge was not laid off until January 2011 – almost *two years* after he accused Chin of creating a hostile work environment, and over nine months after he filed his lawsuit. *See Arteaga v. Brink's, Inc.*, 163 Cal. App. 4th 327, 354, 357 (2008) ("temporal proximity by itself . . . is not adequate to show pretext").[21] Retaliators act; they do not delay. Had Caltech wanted to get rid of Coppedge because of that complaint, other purported gripes, or the lawsuit, it surely could have done so then, not months or years later.[22]

- Coppedge suggests that his layoff must have been retaliatory, because he had the longest tenure on Cassini and, in his mind, was the most qualified SA. But such "subjective personal judgments of . . . competence alone do not raise a genuine issue of material fact." *Horn v. Cushman & Wakefield W., Inc.*, 72 Cal. App. 4th 798, 816 (1999). Van Why concluded that Coppedge was one of the least two qualified SAs, based on the ranking process – and it was this conclusion, not Coppedge's beliefs, desire to express them, or lawsuit, that led to his layoff.[23]

- Where, as here, the decisionmaker lacks unlawful animus, the plaintiff cannot show a causal relationship sufficient to raise a triable issue of fact. Coppedge's testimony establishes an *absence* of animosity by Van Why and Conner, and he specifically admits that neither said anything to suggest they wanted to retaliate against him. Tr. 895:21-896:10.

Finally, even if the other incidents that Coppedge identifies as retaliatory were adverse employment actions (they are not), Coppedge likewise cannot establish a causal nexus. Because

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that could function as protected activity, without conceding that they constitute such.

[21] *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (18-month lapse too long to give rise to inference of causation); *Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706, 711 (7th Cir. 2002) (three-month interval, "without more, [was] insufficient").

[22] *See Coutu v. Martin County Bd. of County Comm'rs*, 47 F.3d 1068, 1074 (11th Cir. 1995) ("Had [defendants] wished to terminate [plaintiff] because of her efforts to 'stop discrimination,' they had ample opportunity and reason to do so long before [plaintiff's actual termination].").

[23] Coppedge suggests that Chien's layoff and the warning withdrawal are circumstantial evidence of retaliation. Tr. 893:18-25. Not so. Chien was laid off in the same process as Coppedge (and due to the same cuts that resulted in dozens of other lost jobs). The basis for the withdrawal was legitimate (see discussion *supra*), and in any event was in his favor – the antithesis of retaliation.

he did not file his lawsuit until April 2010, Coppedge would have to show that the first two events – the written warning and removal of lead duties – would not have occurred but for his "hostile work environment" complaint at the March 2 meeting with Chin. He cannot do so: as discussed above, the warning was due to the complaints of other employees, which arose from events preceding the March 2 meeting. The removal of lead duties, meanwhile, was the culmination of performance issues that had gone on for years. As for the May 2010 meeting regarding use of work time, and the performance evaluations, Coppedge would have to show that if not for one or both of the "hostile work environment" accusation and his lawsuit, these events would not have occurred. Coppedge has no evidence to support causation: both the informal discussions with Coppedge at the May 2010 meeting and the input on the evaluations were due to performance issues, some of which had gone on long before that time (*e.g.*, complaints about Coppedge's interactions with customers).

B. Coppedge Cannot Establish A Public Policy Retaliation Claim.

Like his FEHA retaliation claim, Coppedge's public policy claim fails because he cannot establish causation. Additionally, to the extent he tries to rely on his alleged right to free speech in the workplace, his claim fails for a further reason: A public policy claim must be grounded in a fundamental policy established by a constitutional, statutory or regulatory provision. *Green v. Ralee Eng'g Co.*, 19 Cal. 4th 66, 76, 90 (1998). Coppedge cannot identify one. He asserts that he was "demoted and subsequently terminated for *asserting his statutory and constitutional rights to engage in protected expressive activity*." SAC ¶ 93 (emphasis added). But FEHA does not bar discrimination based on speech (or regulation of speech), and he cannot base a public policy claim on conduct that does not violate the statute on which he relies. *Stevenson v. Superior Court*, 16 Cal. 4th 880, 904 (1997). The First Amendment cannot provide the basis for a claim against a private employer like Caltech. *Grinzi*, 120 Cal. App. 4th at 77 ("We find the First Amendment free speech provision fails to establish public policy against terminations by private employers for speech-related activities because this provision applies only to government actions and expresses no public policy regarding terminations by private employers."). California's free speech clause is inapplicable for the same reason. *See Golden Gateway*, 26 Cal. 4th at 1023 ("We . . . conclude that California's free speech clause contains a state action limitation.").

VII. COPPEDGE'S CLAIMS FOR WRONGFUL DEMOTION AND WRONGFUL TERMINATION FAIL AS A MATTER OF LAW.

A. Coppedge's FEHA Claims For Wrongful Demotion And Wrongful Termination (Seventh, Ninth Causes Of Action).

These claims fail for the same reason as Coppedge's religious discrimination and retaliation claims. Neither the alleged demotion nor his layoff (nor any other conduct) had any connection to his religious beliefs (actual or perceived). *See* discussion, *supra*.

B. Coppedge's Public Policy Claims For Wrongful Demotion And Wrongful Termination Fail (Eighth, Tenth, Eleventh Causes Of Action).

These claims are duplicative of Coppedge's FEHA causes of action. Because his FEHA claims fail as a matter of law, so too do these public policy claims for wrongful demotion and termination. *Hanson v. Lucky Stores, Inc.*, 74 Cal. App. 4th 215, 229 (1999) ("because Hanson's FEHA claim fails, his claim for wrongful termination in violation of public policy fails."). To the extent Coppedge attempts to rely on his alleged right to free speech in the workplace, these claims also fail because he cannot tether them to a fundamental public policy, as required. *Green*, 19 Cal. 4th at 76, 90. As discussed *supra*, neither FEHA, nor the California or federal constitutions, support a public policy claim based on free speech in a private workplace like Caltech.

VIII. COPPEDGE'S FIFTH CAUSE OF ACTION FOR HARASSMENT FAILS AS A MATTER OF LAW

Coppedge bases this claim on the following events: (1) the March 2 meeting with Chin, (2) Chin's failure to reply to his March 3 email; (3) Chin's purportedly telling him not to discuss religion or politics in the office; (4) the written warning; (5) his so-called "demotion"; (6) the denial of his appeal, including the August 25 meeting; and (7) his termination. Tr. 101:22-103:25; 140:21-141:20); SAC ¶¶ 35, 37, 57, 100. None of these supports a harassment claim.

First, Coppedge cannot establish that any conduct by Chin was severe or pervasive, as required. *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 279 (2006) (conduct actionable as harassment only if "sufficiently severe or pervasive to alter the conditions of the [plaintiff's] employment and create an abusive work environment") (quotations and citation omitted). The March 2 meeting was nothing more than an isolated *verbal* argument. A plaintiff cannot maintain a harassment claim based on isolated verbal *abuse*, much less a mere verbal dispute. *See, e.g., Cozzi v. County of Marin*, No. C 08-3633 PJH, 2011 WL 1465603, at *22 (N.D. Cal. Apr. 18, 2011) (summary judgment on harassment claim; "The 'severe or pervasive' standard excludes occasional, sporadic, isolated, or trivial incidents of verbal abuse.").[24] Chin's failure to respond to Coppedge's March 3 email is not harassment either. Even *if* Chin chose not to respond to be rude (he did not), "rudeness should not be confused with . . . harassment . . . ."

[24] *See also Etter v. Veriflo Corp.*, 67 Cal. App. 4th 457, 464 (1998) (affirming judgment for employer on racial harassment claim following trial, "trivial (i.e., not severe) or occasional,

Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998) (quotations and citation omitted). *See, e.g., Ginger v. Dist. of Columbia*, 477 F. Supp. 2d 41, 55 (D.D.C. 2007) ("silent treatment" found not to "provide sufficiently severe or pervasive conduct to support a hostile work environment claim"). Finally, Chin's admonition to Coppedge regarding religious and political speech cannot constitute harassment. Such counseling is the kind of personnel action which is not actionable as harassment, as a matter of law. *See* discussion, *infra*. Even if it were, an isolated request for an employee to modify his behavior, for the benefit of co-workers, is neither severe nor pervasive. *See, e.g., Jones v. United Space Alliance, L.L.C.*, 170 Fed. Appx. 52, 53 (11th Cir. 2006) (request "to turn down the religious music that [plaintiff] played at work" among conditions found not to be severe or pervasive).

Second, Coppedge cannot establish that Klenk, Burgess, or Van Why engaged in harassment, because their conduct constituted personnel management actions. Such actions, including issuing or upholding a warning, a so-called demotion, or conducting a layoff, are not "harassment" under FEHA, as a matter of law. *Reno v. Baird*, 18 Cal. 4th 640, 646-47 (1998) ("[T]he Legislature intended that commonly necessary personnel management actions such as hiring and firing, . . . performance evaluations, . . . deciding who will be laid off, and the like, do not come within the meaning of harassment."). The proper method for challenging a personnel decision is a claim for discrimination. *Id.* at 647 ("[Employment decisions] may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment."). Coppedge already has a discrimination claim against Caltech, and he cannot bring a harassment claim based on the same conduct.

Third, courts look to the "totality of the circumstances" in determining whether harassment took place. *See, e.g., Lyle*, 38 Cal. 4th at 286-87. Coppedge's testimony confirms that the events alleged were isolated instances in cordial working relationships. Tr. 813:1-6 (never felt Van Why treated him unfairly, besides layoff); Tr. 141:25-142:4 ("Greg has been a great boss, and I've worked with him for eight years. He's a great guy. . . . And I was frankly shocked at this [March 2, 2009] outburst."); 151:7-11 (I couldn't believe that . . . Burgess would be a part of this, or Kevin Klenk, because all of my working relationship with them before had been terrific and cordial and cooperative.").[25] There is also no evidence of religious animus (including the fact that Chin, Burgess, Klenk, and Van Why are Christians).

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sporadic, or isolated (i.e., not pervasive) incidents of verbal abuse are not actionable").
[25] *See also* Tr. 328:20-24; 150:9-12; 154:19-22; 164:6-15.

Finally, to the extent Coppedge bases his harassment claim on Caltech's alleged desire "to suppress his constitutional and statutory right to engage in protected speech activity," SAC ¶ 100, this claim fails: neither FEHA, nor the California or federal constitution, prohibit a private employer like Caltech from regulating expression in the workplace. *See* discussion, *supra.*

IX. COPPEDGE'S SIXTH CAUSE OF ACTION FOR FAILURE TO PREVENT DISCRIMINATION AND HARASSMENT FAILS AS A MATTER OF LAW

This claim fails, in the first instance, because Coppedge cannot prove that unlawful conduct occurred. *See* discussion, *supra. Trujillo v. N. County Transit Dist.*, 63 Cal. App. 4th 280, 288-89 (1998) (employer cannot be liable for failing to prevent harassment when no such conduct actually occurred). Even if it were cognizable, Caltech still would prevail. An employer meets its obligation to take reasonable steps to prevent discrimination and harassment by implementing policies and taking action to investigate and remedy charges under them. *Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.*, 103 Cal. App. 4th 1021, 1035 (2002) ("Prompt investigation of a discrimination claim is a necessary step by which an employer meets its obligation . . ."); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001) (distribution of anti-harassment policy is proof that employer has exercised reasonable care to prevent and correct sexual harassment).

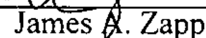
Caltech has taken all reasonable steps to meet its obligations. It has implemented a Nondiscrimination And Equal Employment Opportunity Policy and an Unlawful Harassment Policy, which Coppedge himself cites. Zapp Decl. ¶ 12, Ex. J; Huntley Decl. ¶ 12, Ex. A; SAC ¶ 108. JPL employees can access policies online. Huntley Decl. ¶ 13. And these policies worked as intended here: Chin promptly reported Coppedge's claim that he (Chin) had created a "hostile work environment," and Human Resources conducted an investigation – not only into Coppedge's concerns, but those of other employees as well. Coppedge simply did not like the outcome of the investigation.

X. CONCLUSION

For all the foregoing reasons, Caltech respectfully requests that the Court grant summary judgment, or in the alternative, summary adjudication of issues.

DATED: July 1, 2011

PAUL, HASTINGS, JANOFSKY & WALKER LLP

By: 
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