

FILED
LOS ANGELES SUPERIOR COURT

APR 09 2012

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

11 **DAVID COPPEDGE**, an individual;

12 Plaintiff,

13 vs.

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

19 Defendants.

Case No. BC435600

The Honorable Ernest M. Hiroshige, Dept. 54

PLAINTIFF DAVID COPPEDGE'S NO-
TICE OF MOTION AND MOTION IN
LIMINE NO. 7. TO EXCLUDE AND TO
STRIKE ALL REFERENCE TO EM-
PLOYEE PERFORMANCE RANKING
SYSTEMS, FOR EVIDENTIARY
SANCTIONS, OR. ALTERNATIVELY
FOR A NEW TRIAL; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF; DECLARATION
OF WILLIAM J. BECKER, JR. IN SUP-
PORT THEREOF; EXHIBITS

22 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

23 PLEASE TAKE NOTICE that on April 9, 2012, at 10:00 a.m., or as soon after that date
24 as the matter can be heard, in Department "54" of the above-entitled court, located at 111 N. Hill
25 St, Los Angeles, California 90012, Plaintiff David Coppedge ("Plaintiffs"), will move the Court
26

1 for an Order in Limine to Exclude and to Strike all reference to employee performance ranking
2 systems, for evidentiary sanctions, or. alternatively for a new trial.

3 This motion is made on the grounds that Plaintiff presented surprise testimony incidental
4 to documentation that was never disclosed in discovery in this action and is thus entitled to a new
5 trial pursuant to Code Of Civil Procedure section 657, subd. 4,
6

7 This Motion will be based on this notice of motion, on the attached Memorandum of
8 Points and Authorities in Support Thereof; all papers, pleadings, and records on file in this ac-
9 tion and on any evidence presented at the hearing of the motion.

10 DATED: April 3, 2012

THE BECKER LAW FIRM

11 **William J**
12 **Becker Jr, Esq**

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13 By: _____

14 WILLIAM J. BECKER, JR., ESQ.
15 Attorneys for Plaintiff, DAVID COPPEDGE
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 On April 3, 2012, Kevin Klenk testified about a "forced ranking system" for compensa-
4 tion purposes. (See Exh. "1" attached hereto and incorporated herein by reference.) Annual
5 forced ranking meetings were held with Klenk, Plaintiff's section manager and all the group su-
6 pervisors for the section. *Id.* Klenk testified that between 2007 and 2009, Plaintiff ranked in the
7 lower half of all section employees. *Id.*

8 On cross-examination, Klenk testified that the ranking of employees was recorded in
9 written form produced annually. *Id.* These documents were never produced in response to dis-
10 covery requests, even though they would have been evidence of a legitimate, non-discriminatory,
11 non-retaliatory, non-pretextual reason for the adverse employment actions taken against Plaintiff.
12

13 Plaintiff served Defendant with a written set of documentation requests on September 17,
14 2010. (See Exh. "2" attached hereto and incorporated herein by reference.) Request No. 47
15 sought production of "[a]ll DOCUMENTS and WRITINGS RELATING TO YOUR Twelfth
16 Affirmative defense."
17

18 Defendant's Answer to the Complaint in this action contained the following Twelfth Af-
19 firmative Defense:

20 "The Complaint, and each of its causes of action, is barred because Defendants did not en-
21 gage in the alleged discrimination, harassment or retaliation set forth in the Complaint, but
22 even assuming for the sake of argument that they did, *Defendants would have taken the same*
23 *employment actions in any event for legitimate, non-discriminatory, non-retaliatory, non-*
pretextual reasons."

24 *Id.* (Emphasis added.) (See Exh. "3" attached hereto and incorporated herein by reference.)

25 At the time of Klenk's testimony, counsel for Plaintiff timely raised an objection to the
26 proffered evidence and moved to strike it. ("Your honor, I don't believe that was produced in
27 this case. I'm going to object that any reference to that documentation would constitute hearsay
28

1 in the case. I also would move to exclude any testimony regarding it, since that documentation
2 was not produced for any year.”) (Exh. “1”).

3 This motion seeks evidentiary sanctions excluding all references to the employee ranking
4 system. Alternatively, Plaintiff seeks a new trial based upon surprise evidence withheld from
5 discovery and sprung on Plaintiff during the course of trial.

6
7 **II. JPL’S CONCEALING THE SECTION EMPLOYEE PERFORMANCE RANK-
8 ING DOCUMENTATION UNTIL TRIAL, WHEN THE SECTION EMPLOYEE
9 PERFORMANCE RANKING DOCUMENTATION WAS POTENTIALLY
10 HIGHLY RELEVANT OR PROBATIVE AND THUS ESSENTIAL TO PLAIN-
11 TIFF’S PREPARATION AND EXECUTION OF TRIAL, GIVES GROUNDS FOR
12 A NEW TRIAL UNDER CODE OF CIVIL PROCEDURE SECTION 657 SUBD. 4.**

11 Referring to undisclosed documents at trial to surprise an opposing party is improper and
12 can result in mistrial. “Newly discovered evidence, deliberately concealed, and material to the
13 case of the aggrieved party, is indisputably grounds for a new trial in California (and probably
14 everywhere else).” *Los Angeles Airways, Inc. v. Hughes Tool Co.* (1979) 95 Cal.App.3d 1, 6 (ci-
15 tations omitted).

16 Here, a defense witness, Kevin Klenk (“Klenk”) admitted on the stand that Defendant
17 JPL had a vital documentation that JPL had failed to identify and produce during discovery.
18 This documentation purportedly tracked complaints or problems with Plaintiff Coppedge’s per-
19 formance over the years – problems that were not disclosed to him on his annual performance
20 evaluations (ECAPS).

21
22 By concealing this documentation from Plaintiff and counsel, Defendant JPL prevented
23 Plaintiff from: (1) identifying additional witnesses that might need to be deposed; (2) developing
24 cross examination approaches for all JPL witnesses; and (3) preparing to meet the evidentiary
25 challenge of the documentation and its supporting witnesses.
26

1 **III. PLAINTIFF REQUESTED THE SECTION EMPLOYEE PERFORMANCE**
2 **RANKING DOCUMENTATION IN DOCUMENT REQUEST NO. 47.**

3 In Plaintiff's Demand for Inspection and Copying of Documents, Tangible Things and
4 Electronically Stored Information (Set One), Plaintiff requested JPL provide "[a]ll DOCU-
5 MENTS and WRITINGS RELATING TO YOUR Twelfth Affirmative defense." This request
6 plainly encompasses the section employee performance ranking documentation. JPL did not
7 produce it, but now comes to trial with surprise testimony revealing the existence of such docu-
8 mentation and attempting to allow witnesses to testify based on their memory of the process in
9 which such documentation was produced and upon which they relied as the source of their recol-
10 lections. The section employee performance ranking documentation was not listed on the pretri-
11 al statement and is entirely a surprise. Under Section 657 subd. 4, this kind of surprise "indis-
12 putably" warrants a new trial. *Los Angeles Airways, supra*.

14 **IV. JPL'S FAILURE TO DISCLOSE THE SECTION EMPLOYEE PERFORMANCE**
15 **RANKING DOCUMENTATION IN DISCOVERY, BUT ATTEMPT TO USE IT**
16 **AND ITS CONTENTS AS A SURPRISE AT TRIAL, WARRANTS PRECLUSION**
17 **OF THE SECTION EMPLOYEE PERFORMANCE RANKING DOCUMENTA-**
18 **TION AND ALL TESTIMONY THAT FLOWS FROM THE CONTENTS OF**
19 **THE SECTION EMPLOYEE PERFORMANCE RANKING DOCUMENTATION.**

20 **A. JPL's Concealment and Nondisclosure of the section employee performance**
21 **ranking documentation Violates Judicial and Public Policy Underlying the Dis-**
22 **covery Procedures and Statutes.**

23 "California's discovery process allows for discovery of all relevant material and is de-
24 signed to eliminate the element of surprise." *Garamendi v. Golden Eagle Ins. Co.* (2004) 116
25 Cal.App.4th 694, 712 n.8 (emphasis added).

26 Compliance with discovery requests is essential to the justice system. JPL's failure to
27 comply with discovery by withholding the section employee performance ranking documentation
28 thwarts public and judicial policies. The pretrial discovery procedures aim:

- 1 (1) to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury;
- 2 (2) to provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses; to make available, in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty;
- 3 (3) to educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements;
- 4 (4) to expedite litigation;
- 5 (5) to safeguard against surprise;
- 6 (6) to prevent delay;
- 7 (7) to simplify and narrow the issues; and,
- 8 (8) to expedite and facilitate both preparation and trial.

9 *Greyhound Corp. v. Superior Court In and For Merced County* (1961) 56 Cal.2d 355, 376 (em-
10 phasis added to otherwise verbatim text); *Davies v. Superior Court* (1984) 36 Cal.3d 291, 299
11 (quoting and citing *Greyhound, supra*).

12 In this trial, JPL wants to argue that Plaintiff Coppedge had a long history of low perfor-
13 mance and/or complaints about his performance. JPL did not document that long history in
14 Coppedge's annual performance reviews (ECAPS), so Coppedge was unaware of the bases for
15 any low performance rankings. Suddenly, long after discovery is closed and all depositions com-
16 pleted, JPL offers testimony based upon knowledge or refreshed recollection from the employee
17 performance ranking documentation.

18
19 By withholding this documentation, which evidently is key to JPL's defense, JPL reduced
20 the opportunity for the parties to settle the case in view of all known facts and documents. JPL
21 impeded the ascertaining of truth. JPL interfered with Plaintiff's counsel's ability to prepare for
22 the host of witnesses and for this documentation at trial.

23
24 Most notably, JPL nakedly imposed a surprise upon Plaintiff and counsel at trial. As
25 *Garamendi* and other decisions have expressly declared, pretrial discovery is designed to elimi-
26 nate surprise at trial. JPL's concealment of its performance ranking documentation nevertheless
27 produced exactly the kind of surprise that pretrial discovery is supposed to eliminate.

1 **B. To Correct The Injustice Imposed By JPL's Concealing The Section Employee**
2 **Performance Ranking Documentation And Hatching A Surprise At Trial, This**
3 **Court Should, At Minimum, Impose Evidentiary Sanctions.**

4 The appellate courts frequently affirm superior courts' imposing evidentiary sanctions
5 upon a party who fails to produce documents or otherwise disclose pretrial the evidence that it
6 attempts to spring at trial. One sanction is to declare a mistrial and order a new trial that allows
7 the disadvantaged party the opportunity to review and address the concealed evidence. *See Los*
8 *Angeles Airways, Inc., supra*, 95 Cal.App.3d 1, 6.

9 Another sanction is to preclude the admission of the evidentiary documentation and all
10 testimony that flows from the facts in that documentation. In *City of Santa Clarita v. NTS Tech-*
11 *nical Systems* (2006) 137 Cal.App.4th 264, 274-275, the trial court correctly excluded opinion
12 testimony based upon information in the documentation not timely produced before trial.

13 In *Pate v. Channel Lumber Co.* (1997) 51 Cal.App.4th 1447, the defendant made refer-
14 ence to documents not previously produced to plaintiff, despite plaintiff's request for all such
15 documents in discovery. *Id.*, at 1452. The superior court imposed the evidentiary sanction bar-
16 ring the use of the numerous documents at trial, rebuffing the defendant's claim that barring the
17 documents undermined its defense. *Id.*, at 1454. The appellate panel affirmed the superior
18 court's ruling, holding that such an evidentiary sanction may well be the only one that is practi-
19 cal to impose under these circumstances, i.e., when the evidence is being brought into during the
20 trial itself. *Id.*

21
22
23 **V. CONCLUSION**

24 Plaintiff requests that this Court exclude all testimony referring to the section employee
25 performance ranking and all documentation derived therefrom and strike all defense testimony
26 that relates to or was refreshed by the contents of the section employee performance ranking
27 documentation. Specifically, as highlighted in Exh. "1," Plaintiff requests the examination and
28

1 testimony appearing at 9:23 through 12:8 be stricken. In the alternative, Plaintiff requests that
2 this Court grant Plaintiff a new trial due to JPL's concealment of material and relevant documen-
3 tation crucial to both sides.

4 DATED: April 8, 2012

THE BECKER LAW FIRM

5 **William J**
6 **Becker Jr, Esq**

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