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COURT OF APPEALS OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

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JOHN S. KAO,

Plaintiff/Appellant,

vs.

Appellate No. A135750  
SUPERIOR COURT CASE  
No. CGC-09-489576

UNIVERSITY OF SAN FRANCISCO,  
ET AL.,

Defendants/Respondents.

\_\_\_\_\_ /

ON APPEAL FROM THE JUDGMENT  
OF THE SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

THE HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE

REPORTER'S TRANSCRIPT ON APPEAL

February 7, 2012

Volume 1 (Pages 1 - 236)

For Plaintiff/Appellant:

KATZENBACH & KHTIKIAN  
1714 Stockton Street, Suite 300  
San Francisco, CA 94133  
(415)834-1778  
BY: CHRISTOPHER W. KATZENBACH, Attorney at Law  
CONOR MACK, Attorney at Law

For Defendants/Respondents:

VARTAIN LAW GROUP  
601 Montgomery Street, Suite 540  
San Francisco, CA 94111  
(415)391-1155  
BY: MICHAEL J. VARTAIN, Attorney at Law  
LINDA K. ADLER, Attorney at Law

REPORTED BY: HOLLY MOOSE, RDR-CRR-CCRR, CSR NO. 6438

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

BEFORE THE HONORABLE WALLACE P. DOUGLASS, JUDGE

DEPARTMENT NUMBER 318

---o0o---

JOHN S. KAO,

Plaintiff,

vs.

Case No. CGC-09-489576  
Jury Trial

UNIVERSITY OF SAN FRANCISCO,  
ET AL.,

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Defendants.  
\_\_\_\_\_ /

REPORTER'S TRANSCRIPT OF PROCEEDINGS

February 7, 2012

APPEARANCES OF COUNSEL:

For Plaintiff:

KATZENBACH & KHTIKIAN  
1714 Stockton Street, Suite 300  
San Francisco, CA 94133  
BY: CHRISTOPHER W. KATZENBACH, Attorney at Law  
CONOR MACK, Attorney at Law

For Defendants:

VARTAIN LAW GROUP  
601 Montgomery Street, Suite 540  
San Francisco, CA 94111  
BY: MICHAEL J. VARTAIN, Attorney at Law  
LINDA K. ADLER, Attorney at Law

REPORTED BY: HOLLY MOOSE, RDR-CRR-CCRR, CSR NO. 6438

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Tuesday, February 7, 2012

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1 SAN FRANCISCO, CALIFORNIA

2 Tuesday, February 7, 2012, 9:06 A.M.

3 Department No. 318

4 The Honorable Wallace P. Douglass, Retired Judge

5 ---o0o---

6 THE CLERK: Please remain seated and come to  
7 order. Department 318 of the San Francisco Superior  
8 Court is now in session, the Honorable Wallace Douglass,  
9 judge presiding. Please come to order.

10 THE COURT: Jurors and alternates are all  
11 present. Counsel from both sides are present. The  
12 plaintiff is personally present.

13 Madam Clerk, could you read off the phone  
14 number -- and I'd ask every juror, on a piece of paper  
15 from your notebook, to note the phone number of this  
16 department, this courtroom, so in case anything comes up  
17 and you're delayed, then you can let us know.

18 THE CLERK: Yes, Your Honor. Department 318's  
19 telephone number is 551-3738.

20 THE COURT: Next step in the trial will be for  
21 me to read some introductory instructions to you. Each  
22 of you has a set of those instructions, so you can  
23 follow along as I read them aloud. The side type is of  
24 no significance. They like to fill the page with type.  
25 Sometimes it's big; sometimes it's little. The titles

1 for the instructions are just to aid you in identifying  
2 them. Please don't use the titles as a tool to  
3 interpret what the instruction means.

4 Starting with number 100, I'll read the  
5 introductory instructions:

6 You have now been sworn as jurors in  
7 this case. I want to impress on you the  
8 seriousness and importance of serving on a  
9 jury. Trial by jury is a fundamental right  
10 in California. The parties have a right to  
11 a jury that is selected fairly and comes to  
12 the case without bias and that will attempt  
13 to reach a verdict based on the evidence  
14 presented.

15 Before we begin, I need to explain how  
16 you must conduct yourselves during the  
17 trial. Do not allow anything that happens  
18 outside this courtroom to affect your  
19 decision. During the trial, do not talk  
20 about this case or about the people involved  
21 in it with anyone, including family and  
22 persons living in your household, friends  
23 and coworkers, spiritual leaders, advisors  
24 or therapists.

25 This prohibition is not limited to

1 face-to-face conversations; it also extends  
2 to all forms of electronic communications.  
3 Do not use any electronic device or media  
4 such as a cell phone or smartphone, PDA,  
5 computer, the Internet, any Internet  
6 service, any text or instant messaging  
7 service, any Internet chat room, blog or Web  
8 site, including social networking Web sites  
9 and on-line diaries, to send or to receive  
10 any information to or from anyone about this  
11 case or your experiences as a juror until  
12 after I have discharged you from your jury  
13 duty.

14 You may say that you're on a jury and  
15 how long the trial may take, but that is  
16 all. You must not even talk about the case  
17 with the other jurors until after I tell you  
18 that it is time for you to decide the case.

19 During the trial, you must not listen  
20 to anyone else talk about the case or the  
21 people involved in the case. You must avoid  
22 any contact with the parties, the lawyers,  
23 the witnesses and anyone else who may have a  
24 connection with the case.

25 If anyone tries to talk to you about

1       this case, tell that person that you cannot  
2       discuss it because you are a juror. If he  
3       or she keeps talking to you, simply walk  
4       away and report the incident to the  
5       courtroom clerk as soon as you can.

6               After the trial is over and I've  
7       released you from jury duty, you may discuss  
8       the case with anyone but are not required to  
9       do so.

10              During the trial, do not read, listen  
11       to or watch any news reports about this  
12       case. This prohibition extends to the use  
13       of the Internet in any way, including  
14       reading any blog about the case or about  
15       anyone involved in it or using Internet maps  
16       or mapping programs or any other program or  
17       device to search for or to view any place  
18       discussed in the testimony.

19              You must decide this case based on the  
20       evidence presented in this trial and on the  
21       instructions of law that I will provide.  
22       Nothing that you see, hear or learn outside  
23       this courtroom is evidence unless I  
24       specifically tell you it is. If you receive  
25       any information about this case from any



1 source outside of the courtroom, promptly  
2 report the incident to the courtroom clerk.

3 That all jurors see and hear the same  
4 evidence at the same time is important.

5 Don't do any research on your own or as a  
6 group. Do not use dictionaries, the  
7 Internet or other reference materials. Do  
8 not investigate the case or conduct any  
9 experiments. Do not contact anyone to  
10 assist you, such as a family accountant,  
11 doctor or lawyer. Do not visit or view the  
12 scene of any event involved in this case.  
13 If you happen to pass by the scene, do not  
14 stop or investigate. All jurors must see or  
15 hear the same evidence at the same time.

16 Keeping an open mind throughout the  
17 trial is important. Evidence can only be  
18 presented one piece at a time. Do not form  
19 or express any opinion on this case while  
20 the trial is going on. You must not decide  
21 on a verdict until after you've heard all  
22 the evidence, have discussed it thoroughly  
23 with your fellow jurors in your  
24 deliberations.

25 Do not concern yourself with the

1 reasons for the rulings I make during the  
2 course of the trial. Do not guess what I  
3 may think your verdict should be by anything  
4 I might say or do.

5 When you begin your deliberations, you  
6 may discuss the case only in the jury  
7 deliberation room and only when all jurors  
8 are present. You must decide what the facts  
9 are in this case and, I repeat, must base  
10 your verdict only on the evidence which you  
11 see or hear in this courtroom. Do not let  
12 bias, sympathy, prejudice or public opinion  
13 influence your verdict.

14 At the end of the trial, I will explain  
15 the law that you must follow to reach your  
16 verdict. You must follow the law as I  
17 explain it to you even if you do not agree  
18 with the law.

19 To assist you in your tasks as jurors, I now  
20 explain how the trial will proceed. I begin by  
21 identifying the parties to the case. John Kao filed  
22 this lawsuit. He's called a plaintiff. He seeks to  
23 collect money from the University of San Francisco, USF,  
24 and from Martha Peugh-Wade, who are called defendants.

25 First, each side may make an opening statement,

1 but neither side is required to do so. An opening  
2 statement is not evidence; it is simply an outline to  
3 help you understand what that side expects the evidence  
4 will show. Also, because giving you the evidence in the  
5 most logical order is often difficult, opening  
6 statements allow you to keep an overview of the case in  
7 mind during your presentation of the evidence.

8           Next, the jury will hear the evidence. John Kao  
9 will present evidence first. When he's finished,  
10 defendants will have an opportunity to present their  
11 evidence. The side which asks the witness to testify  
12 will question the witness first. This questioning is  
13 called direct examination. Then the other side has its  
14 opportunity to question the witness. This questioning  
15 by the other side is called cross-examination.

16           Document and objects referred to during the  
17 trial are called exhibits. Exhibits which come from  
18 John Kao will receive number designations, beginning  
19 with the number 1, and exhibits which come from  
20 defendants will receive letter designations, beginning  
21 with the letter A. These designations help to ensure  
22 that the exhibits are clearly identified. Exhibits are  
23 not evidence until I admit them into evidence.

24           During your deliberations, you will be able to  
25 look at the exhibits admitted into evidence. Many rules

1 govern whether I can admit an exhibit into evidence.  
2 When one side asks me to admit an exhibit into evidence,  
3 the other side has a right to object and to ask me to  
4 decide whether the rules permit me to admit the exhibit  
5 into evidence. Sometimes I may decide immediately, but  
6 usually I will need to hear arguments outside of your  
7 presence, make sure I understand on what rules the  
8 evidence -- what rules the objection is based.

9           After the parties have presented their  
10 evidence, I'll instruct you further on the law that  
11 applies to this case, and the parties will present  
12 closing arguments. What is said in closing arguments is  
13 not evidence. The parties offer arguments to help you  
14 understand the evidence and how the law applies to the  
15 evidence.

16           Many times I will use the word "received"  
17 instead of "admitted," but it means the same thing in  
18 terms of an exhibit. If there's a motion to introduce  
19 an exhibit into evidence and I say it's received, that's  
20 the same thing as admitted.

21           Back to the text of 102.

22           You have been given notebooks and may  
23 take notes during the trial. Do not remove  
24 the notebooks from the jury box at any time  
25 during the trial. You may take your notes

1           into the jury room during deliberations.  
2           You should use your notes only to remind  
3           yourself of what happened during the trial.  
4           Do not let your note-taking interfere with  
5           your ability to listen carefully to all of  
6           the testimony and to watch the witnesses as  
7           they testify, nor should you allow your  
8           impression of a witness or other evidence to  
9           be influenced by whether or not other jurors  
10          are taking notes. Your independent  
11          recollection of the evidence should govern  
12          your verdict and you should not allow  
13          yourself to be influenced by the notes of  
14          other jurors, if those notes differ from  
15          what you remember.

16                 At the end of the trial, you may remove  
17          your notes from the notebooks and take them  
18          as souvenirs. If you do not want to keep  
19          your notes, they will be collected and  
20          destroyed. In either event, please leave  
21          behind notebooks, which still have blank  
22          pages in them for use by future jurors.

23                 Departing from the instruction for a moment, I  
24          want to elaborate on the note-taking instruction I just  
25          read. There are two points, essentially, that that

1 instruction makes: One is that the facial expressions,  
2 the gestures, the body language that accompany a  
3 witness's testimony are important things for you to  
4 notice, to help you evaluate the testimony.

5 So what I suggest is even if you do have the  
6 ability to take down word for word what a witness has  
7 said, that you not employ that ability, because if you  
8 do, you'll have your head down taking notes and you'll  
9 miss facial expressions, gestures and body language.

10 The second point the instruction makes is that  
11 each juror's notes are for his or her use in helping him  
12 or her to remember what the evidence was. They're not  
13 an official record of the trial. What that means is if  
14 within the course of deliberations a disagreement should  
15 arise as to what a certain witness said about a certain  
16 thing, please don't simply turn to one of your number  
17 and say "Oh, Ms. Jones, you took thorough notes. Look  
18 it up in your notes and tell us what the witness said."

19 What you need to do is discuss it, relying each  
20 on his or her own recollection. Often a little  
21 discussion will resolve the difference. Someone will  
22 say "Oh, you're right. I do remember now. He said he  
23 was going down the hill, not up the hill. I got turned  
24 around in my directions." Problem solved.

25 If, however, discussion doesn't resolve the

1 problem, we're fortunate enough to have a court reporter  
2 with us on this case. Ms. Moose has joined us now. And  
3 she does her job of taking down word for word what every  
4 witness said, and she doesn't have to be concerned with  
5 facial expressions and gestures. And you can ask for a  
6 read-back from the court reporter's notes.

7           If that becomes necessary, let me urge you to  
8 tailor your request for read-back as narrowly as you  
9 reasonably can. If, for example, this were a case  
10 involving two cars crashing together at an intersection,  
11 say a Ford and a Chevrolet, and there was a witness who  
12 was a pedestrian who saw the accident, and he testified  
13 at the trial and the question arose during deliberations  
14 as to what color the pedestrian said the traffic light  
15 was for the Chevrolet when it entered the intersection,  
16 if you simply ask for a read-back of the pedestrian's  
17 testimony, and the pedestrian testified two hours on  
18 direct examination and two hours on cross-examination,  
19 you'll get about four hours of read-back, which is more  
20 than you really need to answer the question you have.

21           If you tailor the request narrowly and say  
22 "What color did the pedestrian say the traffic light was  
23 for the Chevrolet when it entered the intersection,"  
24 probably be able to take care of the question in four  
25 minutes or so, and everyone comes out ahead.

1           On to 103.

2           There are two defendants in this trial.  
3           You should decide the case against each  
4           defendant separately as if it were a  
5           separate lawsuit. Each defendant is  
6           entitled to separate consideration of her or  
7           its own defenses. Unless I tell you  
8           otherwise, all instructions apply to each  
9           defendant.

10           A not-for-profit public-benefit  
11           corporation, University of San Francisco, is  
12           a party in this lawsuit. The University of  
13           San Francisco is entitled to the same fair  
14           and impartial treatment that you would give  
15           to an individual. You must decide this case  
16           with the same fairness you would use if you  
17           were deciding the case between individuals.

18           When I use words like "person" or "he"  
19           or "she" in these instructions to refer to a  
20           party, those instructions also apply to the  
21           University of San Francisco.

22           You must not consider whether any of  
23           the parties in this case has insurance. The  
24           presence or absence of insurance is totally  
25           irrelevant. You must decide this case based



1           only on the law and on the evidence.

2           Sworn testimony, documents and other  
3 things may be admitted into evidence. You  
4 must decide what the facts are in this case  
5 with the evidence you see and hear during  
6 the trial. You may not consider as evidence  
7 anything that you see or hear when court is  
8 not in session, even something done or said  
9 by one of the parties, attorneys or  
10 witnesses.

11           What the attorneys say during the trial  
12 is not evidence. In their opening  
13 statements and closing arguments, the  
14 attorneys will talk to you about the law and  
15 the evidence. What the lawyers say may help  
16 you to understand the law and the evidence,  
17 but their statements and arguments are not  
18 evidence. The attorneys' questions are not  
19 evidence. Only the witnesses' answers are  
20 evidence.

21           You should not think that something is  
22 true just because an attorney's question  
23 suggests that it is true. However, the  
24 attorneys for both sides can agree that  
25 certain facts are true. Such an agreement

1 is called a stipulation. A fact to which  
2 the parties have stipulated through their  
3 attorneys needs no other proof. You must  
4 accept stipulated facts as true in this  
5 trial.

6 Each side has the right to object to  
7 evidence offered by the other side. If I do  
8 not agree with that objection, I will say it  
9 is overruled. If I've overruled an  
10 objection to a question, the witness will  
11 answer and you may consider that answer as  
12 evidence.

13 If I agree with an objection, I will  
14 say that it is sustained. If I sustain an  
15 objection to a question, you must ignore the  
16 question. If the witness did not answer the  
17 question, you must not guess what the  
18 witness might have said or why I sustained  
19 the objection. If the witness has already  
20 answered, you must ignore the answer.

21 Sometimes I will need to talk to the  
22 attorneys privately. Do not be concerned  
23 about our discussions or try to guess what  
24 we were saying. If we confer in muted  
25 voices in the courtroom and you can hear

1 parts of what we're saying, please let us  
2 know we're speaking too loudly.

3 An attorney may make a motion to strike  
4 testimony that you have heard. If I grant  
5 the motion, you must totally disregard that  
6 testimony, must treat it as if it did not  
7 exist.

8 A witness is a person who has knowledge  
9 related to this case. You'll have to decide  
10 whether you believe each witness and how  
11 important each witness's testimony is to the  
12 case. You may believe all, part, or none of  
13 a witness's testimony.

14 In deciding whether to believe a  
15 witness's testimony, you may consider, among  
16 other things, the following: A, how well  
17 did the witness see, hear or otherwise sense  
18 what he or she described in court; B, how  
19 well did the witness remember and describe  
20 what happened; C, how did the witness look,  
21 act and speak while testifying; D, does the  
22 witness have any reason to say something  
23 that was not true, did the witness show any  
24 bias or prejudice, did the witness have a  
25 personal relationship with any of the

1 parties involved in the case, does the  
2 witness have a personal stake in how this  
3 case is decided; E, what was the witness's  
4 attitude toward this case or about giving  
5 testimony.

6 Sometimes the witness may say something  
7 that is not consistent with something else  
8 he or she said. Sometimes different  
9 witnesses will give different versions of  
10 what happened. People often forget things  
11 or make mistakes on what they remember.  
12 Also, two people may see the same event but  
13 remember it differently. You may consider  
14 these differences, but do not decide the  
15 testimony is untrue just because it differs  
16 from other testimony.

17 However, if you decide that a witness  
18 has deliberately testified untruthfully  
19 about something important, you may choose  
20 not to believe anything that witness said.  
21 On the other hand, if you think the witness  
22 testified untruthfully about some things but  
23 told the truth about others, you may accept  
24 the part which you think is true and ignore  
25 the rest.

1           Do not make any decisions simply  
2 because there were more witnesses on one  
3 side than on the other. If you believe the  
4 testimony of a single witness is true, that  
5 testimony is enough to prove a fact.

6           You must not be biased in favor of or  
7 against a witness because of his or her  
8 disability, gender, race, religion,  
9 ethnicity, sexual orientation, age, national  
10 origin or socioeconomic status.

11           Instructions for the alternate jurors:

12           As alternate jurors, you are bound by  
13 the same rules that govern the conduct of  
14 the 12 regular jurors who are sitting on the  
15 panel. You will observe the same trial and  
16 should pay attention to all of my  
17 instructions just as if you were sitting as  
18 a regular juror.

19           Sometimes a regular juror's excused  
20 during a trial on account of an illness or  
21 other reason. If that happens, an alternate  
22 juror will be selected to take that regular  
23 juror's place.

24           Each one of us has biases about or  
25 certain perceptions of other people. We may

1 be aware of some of our biases. We may not  
2 share them with others. We may not be aware  
3 of some of our other biases.

4 Our biases often affect how we react,  
5 favorably or unfavorably, towards someone.  
6 Bias can affect our thoughts, how we  
7 remember, what we see or hear, what we  
8 believe or disbelieve, how we make important  
9 decision.

10 As jurors, you're being asked to make a  
11 very important decision in this case. You  
12 must not let bias, prejudice or public  
13 opinion influence your decision. Your  
14 verdict must be based solely on the evidence  
15 presented.

16 You must carefully evaluate the  
17 evidence and resist any urge to reach a  
18 verdict that is influenced by bias for or  
19 against any party or witness.

20 From time to time during the trial, I  
21 may need to talk with the attorneys outside  
22 the hearing of the jury. Usually such  
23 conversations can take place in muted tones  
24 in a corner of the courtroom, or the  
25 attorneys and I will step into the hallway

1 to confer. Occasionally I may ask you to  
2 leave the courtroom while we confer in the  
3 courtroom setting.

4 The purpose is not to keep relevant  
5 information from you, but to decide how to  
6 treat certain evidence under the rules of  
7 evidence. Do not be concerned about what  
8 our discussions -- do not be concerned about  
9 our discussions or try to guess what is  
10 being said.

11 I may not always grant an attorney's  
12 request for a conference. Do not consider  
13 my granting or denying any request for a  
14 conference as an indication of my opinion of  
15 the case or my view of the evidence.

16 I know that many of us are used to  
17 communicating, and perhaps even learning, by  
18 electronic communications and research.  
19 However, there are good reasons why you must  
20 not electronically communicate or do any  
21 research or anything having to do with this  
22 trial or the parties.

23 In court, jurors must make important  
24 decisions that have consequences for the  
25 parties. These decisions must be based only

1 on the evidence that you see and hear in  
2 this courtroom.

3 The evidence that is presented in court  
4 can be tested and can be shown to be right  
5 or wrong by either side. It can be  
6 questioned and it can be contradicted by  
7 other evidence. What you might read or hear  
8 on your own could easily be wrong, out of  
9 date or inapplicable to this case.

10 The parties can receive a fair trial  
11 only if the facts and information on which  
12 you base your decisions are presented to you  
13 as a group, with each juror having the same  
14 opportunity to see, hear and evaluate the  
15 evidence.

16 Also, a trial is a public process. It  
17 depends on disclosure, in the courtroom, of  
18 facts and evidence. Using information  
19 gathered in secret by one or more jurors  
20 undermines the public process and violates  
21 the rights of the parties.

22 One topic in addition to the note-taking that I  
23 covered extemporaneously, I'll cover extemporaneously  
24 too, and that is the following: The question sometimes  
25 arises "Can jurors pose questions to be answered by the



1 witness who's testifying?" And the answer is yes, but  
2 only indirectly and according to the protocol I'm about  
3 to outline to you.

4 I'll let each attorney ask all the questions he  
5 wants to of every witness who testifies, subject to my  
6 power to cut them off if they get too long-winded or too  
7 far afield.

8 When the attorneys have concluded their  
9 questioning, I'll ask whether you, the jurors, have any  
10 questions you'd like to have posed to the witness. If  
11 you have, please indicate so by raising your hand, but  
12 please do not ask the question aloud. Write it down on  
13 a piece of paper from your notebook.

14 The questions will be collected. I'll confer  
15 with the attorneys. And then some questions I'll be  
16 able to ask just exactly as you've written them, just  
17 read to the witness word for word; some of them I might  
18 have to edit a little bit to comply with some technical  
19 requirement or other; and some questions won't be asked  
20 at all.

21 Common reason for not asking a question is that  
22 the answer to the question is not admissible evidence  
23 under the rules of evidence. Sometimes the mere tone of  
24 a question can be enough to keep it from being asked.  
25 For example, the question in the following tone would

1 not be asked: "Well, Mr. Witness, if you were so  
2 all-fired scared, like you said you were, why didn't you  
3 run away?"

4 This kind of question that challenges the  
5 accuracy of the witness's testimony and takes issue with  
6 the witness is called an argumentative question. It's  
7 objectionable when posed by an attorney. It's probably  
8 a little more objectionable from you, the jury, and me,  
9 the judge, who are neutrals in the case. So  
10 argumentative questions will not be asked.

11 I'll ask you when you do turn in your  
12 questions, don't fold up the piece of paper, 'cause I  
13 have to fumble to try to unfold it; I drop them on the  
14 floor. If you just turn them in flat, it makes it  
15 easier for me.

16 As for the alternates, your rights and  
17 obligations are the same as for the regular jurors.  
18 You're obliged to be on time and to pay attention, and  
19 you have the same right to take notes and ask questions.

20 What'll happen if a regular juror has to be  
21 discharged is that according to the order in which we  
22 called out your names and identified you, the next in  
23 order among the alternates will take the place of the  
24 juror who has had to be discharged. And you just move  
25 from alternate seat to juror seat, and you become juror

1 3 or 8 or 5 or whatever, and the trial goes on.

2 If the regular juror has to be discharged at a  
3 time after deliberations have begun, then it differs a  
4 little bit in that I will instruct the jury that they  
5 have to go back to square one, begin their deliberations  
6 anew, because the parties are entitled to a verdict  
7 which is a product of the same 12 jurors deliberating  
8 who actually sign on to the verdict or agree to the  
9 verdict.

10 Have the alternates any questions about their  
11 role?

12 Okay.

13 As indicated in the instructions I just read to  
14 you, the next step in the trial process is opening  
15 statements. Opening statements are an opportunity for  
16 each side to give you their notion, their idea,  
17 expectations of what the evidence will show and to put  
18 it in an order that will form a sort of a framework that  
19 you can fit the evidence into, if it fits.

20 I think at least one of the lawyers will have  
21 some presentation, PowerPoint. The fact that somebody's  
22 taken the trouble to put something in PowerPoint form  
23 doesn't make it any more reliable or any more true or  
24 give it the value of evidence it would not otherwise  
25 have. I emphasize again, opening statements are not

1 evidence.

2 Now, the plaintiff has options, two options.  
3 He can either waive opening statement or go ahead and  
4 present an opening statement now.

5 Mr. Katzenbach, what's your pleasure?

6 MR. KATZENBACH: Your Honor, we'd like to  
7 present an opening statement.

8 THE COURT: Okay.

9 MR. KATZENBACH: Pardon me, Your Honor. I'm at  
10 the mercy of electronics.

11 OPENING STATEMENT BY MR. KATZENBACH

12 MR. KATZENBACH: Ladies and gentlemen of the  
13 jury, this is an opportunity for John Kao to explain to  
14 you what the evidence that we will present shows.

15 We will be giving you a summary of what we  
16 think -- what we intend to prove to you in the course of  
17 this case. We intend to present to you an overview of  
18 the sort -- of the kinds -- of the evidence that the  
19 documents, the witnesses and the other matters --  
20 documents and witnesses we think will show.

21 We are not at this point going to argue to you  
22 inferences that you should draw from that. That is, of  
23 course, something that you will have to decide at the  
24 conclusion of the case after you've heard all the  
25 witnesses and all the testimony. But at this point, we

1 are going to go -- present to you an overview of what  
2 this case is about.

3 I will, in connection with this, try to give  
4 you an overview of what we think the evidence will be,  
5 what the facts will be, and will hope to give you a road  
6 map of what it is this case concerns.

7 But fundamentally, fundamentally, this case is  
8 about a simple problem -- a simple idea. There's a  
9 phrase that the nail that sticks up gets hammered down.  
10 For some cultures that's a phrase arguing for  
11 conformity. But in our culture, under our laws, when  
12 you stand up for -- to oppose discrimination, you cannot  
13 be lawfully hammered down. And that's what this case is  
14 going to be about. It's going to be about how the  
15 University of San Francisco hammered down Dr. Kao  
16 because he tried to raise issues of discrimination.

17 It is not going to be about violence in the  
18 workplace. It is going to be about the university's use  
19 of claims of violence in the workplace to hammer Dr. Kao  
20 down.

21 But let me begin with an overview of the people  
22 in this case. The people in this case begin -- pardon  
23 me -- begin with my client, Dr. Kao. He was a professor  
24 at the University of San Francisco from 1991 forward.  
25 He grew up in Utah, where he went -- where his father

1 was a professor at the University of Utah. The --

2 Well, I feel like a fool, don't I.

3 There we go.

4 The people in this case, begin, as I said, with  
5 Dr. Kao. He graduated from Utah at the age of -- the  
6 University of Utah at the age of 18, went to Princeton  
7 University to study mathematics, to get a Ph.D. He went  
8 into the graduate program at the Princeton University in  
9 mathematics at the age of 18.

10 And there is Dr. Kao, as you can see, standing  
11 in the back as a graduate student.

12 At the university, he was active in various  
13 affairs. This is a picture of him with the judo club.  
14 He was also on the Asian student union. And he also  
15 acted as a volunteer firefighter. He graduated in 1991.  
16 He graduated with a Ph.D. degree from Princeton  
17 University.

18 After teaching at -- after spending a postdoc  
19 year at the -- prior to getting his formal degree at  
20 University of North Carolina, he began teaching as an  
21 assistant professor at the University of San Francisco.  
22 He was assistant professor from 1991 to 1997. In 1997  
23 he was given tenure and became an associate professor.

24 And this is him today, where he continued --  
25 where he was associate professor at the University of

1 San Francisco from 1997 to 2009, when he was fired; 17  
2 years of teaching.

3 Also in this case there'll be evidence from  
4 Stephanie Kao, which is John Kao's sister. There will  
5 be testimony in this case from members of the University  
6 of San Francisco administration.

7 To the extent possible we have pictures here,  
8 it's to help you recognize the individuals when they  
9 testify.

10 We will have testimony from Jennifer Turpin,  
11 who, at the time of most of the events of this case, was  
12 the dean of the College of Arts and Science. And she's  
13 now the provost at the university. Sometimes people  
14 refer to her perhaps as dean, sometimes as provost, but  
15 she's in both capacities. She is the same person.

16 We will also have Martha Peugh-Wade. You'll  
17 hear from her. She's the assistant vice president of  
18 human resources. She's also a defendant in this case.

19 Brandon Brown, associate dean of sciences and  
20 is a professor of physics and astronomy at the  
21 university. He will be testifying to you primarily  
22 about the events in 2008 and the involvement, and  
23 particularly, as we will get into it, issues concerning  
24 the search for faculty members -- faculty member in the  
25 mathematics department that was being conducted in 2008.

1           We'll also have testimony from Dan Lawson, who  
2 was the direct of public safety.

3           In addition who may testimony are Donna Davis,  
4 general counsel; Marcello Camperi, who is the dean of  
5 Arts and Sciences after Dr. Turpin became the provost;  
6 we'll also have testimony from Maye-Lynn -- we may have  
7 testimony about and concerning -- possibly from  
8 Maye-Lynn Gon-Soneda, who was the assistant human  
9 resources director; David J. Philpott, who was the  
10 director of labor and employment relations; Carissa  
11 Harvey, program assistant for Dean Brown; and Liza  
12 Locsin, who was assistant to the dean.

13           Members of the department of mathematics that  
14 will be testifying or will be important people to  
15 remember are Peter Pacheco, who was the department  
16 chair, and there'll be testimony about what the role of  
17 the department chair is; Tristan Needham, who is a  
18 professor and a member of the search committee in 2008,  
19 which is going to be an important year for your  
20 deliberations, an important year in this case; Paul  
21 Zeitz, who is also a professor in mathematics, and he  
22 was the chair of the search committee; and Stephen  
23 Yeung, who was assistant professor and also a member of  
24 the search committee.

25           We have other members of the department of



1 mathematics that you will hear about and hear testimony  
2 from: Bob Wolf, who was assistant professor. He was  
3 assistant professor with tenure; Stephen Devlin, an  
4 associate professor; Professor Benjamin P. Wells, who  
5 was a professor both in mathematics and in computer  
6 science; and Dayna Soares, who was an adjunct professor.  
7 That is a professor who teaches on occasion, doesn't  
8 have tenure. You'll hear from them.

9           Also people that you may have reference to is  
10 John Stillwell, who's a professor at the mathematics  
11 department. I don't know that Mr. Stillwell will  
12 testify, but there may be testimony about him. Renée  
13 Brunelle is an instructor in the department of  
14 mathematics. We don't have a picture of her, I'm sorry  
15 to say. Cornelia Van Cott is an assistant professor.  
16 She was hired as a result of the 2007/2008 search.  
17 Christine Liu is the department program assistant.  
18 You'll hear testimony from her. Jim Finch was retired  
19 professor of mathematics. You'll hear testimony about a  
20 party that was involved concerning his retirement.  
21 Allan Cruse was also retired professor of mathematics,  
22 and his name may come up as well in this case.

23           Other professors that may be testifying in this  
24 case are Elliot Neaman, professor of history. And  
25 during 2008 he was the president of the USF faculty

1 association. That's really an association that's the  
2 faculty union.

3 Alan Heineman was professor of English and  
4 former president of the faculty association. He will  
5 also be testifying in this case about events and about  
6 the faculty collective bargaining contract and  
7 particularly limitations on the discharge of tenured  
8 employees -- tenured faculty.

9 Stephen Huxley, the professor in the School of  
10 Management, he's going to be testifying about  
11 interactions with Dr. Kao again in the late spring of --  
12 during the spring of 2008.

13 Kevin Oh is assistant professor of education.  
14 He will be testifying about a convocation event that he  
15 attended with Dr. Kao in 2007 that may be an issue that  
16 there will be some testimony about in this case.

17 Robert Toya is a retired professor. He may be  
18 testifying concerning agreements that Dr. Kao filed in  
19 2000 -- in 2000 and its resolution.

20 Finally, we have some doctors that will be  
21 testifying. We have Lenore C. Terr, Dr. Kao's  
22 psychiatrist. The testimony will be that for many years  
23 Dr. Kao was suffering on and off from issues of  
24 depression and that he was seeing a psychiatrist for  
25 medication for that, as well as for other psychiatric

1 treatment. You will hear that -- she will testify and  
2 she will tell you about -- that she was treating Dr. Kao  
3 throughout 2008 and prior. She will tell you about her  
4 opinion that Dr. Kao has no -- there's no danger to  
5 anyone, that she never felt any need to give any  
6 warnings of any dangerousness. And she will also  
7 testify to you that no one from the university ever  
8 sought to inquire of her as to any issues involving Dr.  
9 Kao or any concerns that the university now says it has  
10 with dangerousness.

11 Dr. Norman Reynolds, M.D. is a psychiatrist who  
12 was selected to perform the mental health evaluation you  
13 heard about in 2008.

14 Dr. Paul Good was a psychologist consulted by  
15 USF in February 2008. He'll be testifying in this case  
16 about a meeting that he had with USF concerning Dr. Kao,  
17 and he'll be telling you about his advice to USF that  
18 they should -- if they had concerns with Dr. Kao, they  
19 should go speak to him.

20 James Missett, M.D. -- again, do not have a  
21 picture for -- will be testifying about being consulted  
22 by USF in May 2008. And he will testify to you about  
23 what information he was given and what information and  
24 what he said to the university.

25 Now, giving you just an overview of the people

1 involved gives a -- gives a flavor of what this case is  
2 about and hopefully gives you a sense of what sort of  
3 things we intend -- the sort of things that we intend to  
4 show.

5           But I would also like to go over, briefly, a  
6 overview of what we believe that the events in this case  
7 are going to be about. The purpose of this is to  
8 present to you what we believe the evidence will show  
9 and try to put them in a time line or time frame so that  
10 when you hear about events from various witnesses,  
11 you'll have some reference in time to this.

12           Because this case involved many years and Dr.  
13 Kao was a professor at the university for many, many  
14 years, the time line will go quite some time. But if I  
15 might, the story here at the University of San  
16 Francisco, of course, begins in 1991 when Dr. Kao was  
17 hired as an assistant professor. Then in 1997, Dr. Kao  
18 is awarded tenure. In other words, he goes -- and the  
19 evidence will show that his award of tenure was based on  
20 exemplary teaching, exemplary research, and exemplary  
21 service to the university.

22           In 1998 and 2000 the events that are most  
23 important in this case begin. Starting in 1998, there  
24 was a proposal to hire a Professor Stillwell without a  
25 search. Dr. Kao objected to that, saying that "We

1 should have a search."

2 In fall of 2000, the hiring of Professor  
3 Stillwell was announced.

4 In November of 2000, Professor Needham, then  
5 dean, says Kao did not keep him informed about a project  
6 at the California College of Arts and Sciences. Dr.  
7 Kao -- that -- there's a letter that was sent concerning  
8 this. Dr. Kao filed a grievance over that. In  
9 December, that grievance was settled. There'll be  
10 testimony about that. The testimony will show that  
11 Needham, Dean Needham, was quite upset over that  
12 grievance.

13 In January to August in 2002, Dr. Kao was put  
14 on involuntary leave of absence by Dean Needham after  
15 Dr. Kao got sick from an adverse reaction to Prozac he  
16 was taking for depression. The evidence in this case  
17 will show that Dr. Kao was taking Prozac, prescribed  
18 Prozac -- began taking Prozac; after several days of  
19 taking it, began seeing hallucinations, which he will  
20 describe as like a fuzzy outline around -- like a aura  
21 around people.

22 He went to the emergency room. The doctor  
23 diagnosed the problem as relating to the Prozac. He  
24 advised the University of this. This was right before  
25 classes started in 2002.

1           The evidence will show that he then spoke to  
2 Dean Needham about coming back to work in two weeks  
3 after the Prozac was out of his system, and Dean Needham  
4 told Dr. Kao that he could not come back to work unless  
5 he personally interviewed with Dean Needham about this  
6 and that there had to be another professor in Dr. Kao's  
7 class for the entire semester to watch him while he was  
8 teaching.

9           In 2004 the evidence will show that there was a  
10 faculty search, that there was no faculty meeting to  
11 discuss the candidates, as the policies require, and  
12 that Professor Devlin was hired. This will become  
13 important because this will form part of the bases of  
14 one of Dr. Kao's complaints about the search process at  
15 the university.

16           In January 2006, Dr. Kao submits an informal  
17 discrimination complaint under the USF policies raising,  
18 as you will find, a number of issues concerning Dr.  
19 Kao's -- concerning the operations of the department but  
20 all along the lines of Dr. Kao's concern that the  
21 department was not engaging in searches that had the  
22 potential of getting minority and women candidates.

23           He was particularly concerned about the makeup  
24 of the department, which was largely male, in fact at  
25 that time was entirely male, and that he was the only

1 male in mathematics and -- the only Asian male in  
2 mathematics and the only minority in mathematics and  
3 computer sciences.

4 In spring of 2006, there was another search  
5 going on when Stephen Yeung was ultimately hired. This  
6 will again become an important event because after  
7 Professor Yeung was hired, Dr. Kao learned that Yeung's  
8 Ph.D. was not in the field of mathematics and he became  
9 concerned that qualified women and minorities, others  
10 that did have mathematics degrees, were not hired.

11 In May 2006, Kao filed a long formal complaint  
12 of discrimination. This document will be in evidence  
13 and you will see the nature of the complaints that Dr.  
14 Kao made pursuant to the university's policies.

15 In June through September 2006, there were  
16 meetings to discuss possible resolution of this  
17 complaint. However, in September 2006, USF asked Kao to  
18 agree that everything in the formal complaint would be  
19 confidential and asked Kao to agree to arbitration for  
20 alternative disputes.

21 In October 2006, Kao had another adverse  
22 reaction to medication. This one also put him in the  
23 emergency room. He dealt with Dean Turpin on this, and  
24 John was not allowed to come back to teaching, after  
25 this incident, for that semester -- he was given other

1 jobs -- even after this emergency room -- even after the  
2 physical reaction was over.

3 In January through March 2007, Kao rejected  
4 USF's proposals to keep material confidential and to  
5 arbitrate all future disputes. He will testify he did  
6 not feel either of those conditions were legitimate  
7 conditions, that he was concerned about giving up his  
8 future rights to -- in terms of complaints and ability  
9 to continue to oppose things that he felt were wrong in  
10 the department.

11 In August 2007, Kao files an addendum to the  
12 formal complaint complaining about the confidential  
13 arbitration provisions proposed by USF.

14 And in September 2008, vice president of human  
15 resources, Ms. Peugh-Wade, rejects all of Kao's  
16 complaints. She does that in a two-page memorandum,  
17 which will be in evidence. And you'll see the reasons  
18 that she used for that, doing so. But the evidence will  
19 show that they -- the evidence will show that her  
20 rejection of this complaint were based -- were, we  
21 think, based on a overall hostility to the fact that  
22 John was raising issues of discrimination, at the  
23 university, in the hiring process.

24 In January 2008, we come to the events that I  
25 think are going to be most critical about this case. On



1 January 3<sup>rd</sup>, Dr. Kao speaks to Paul Zeitz, who's chair  
2 of the search committee for the 2008 search, and Dean  
3 Brandon Brown, who was also the dean responsible for the  
4 2007/2008 search. It was again a search for a professor  
5 for the mathematics department.

6           What the evidence will show is that in this  
7 search, there were only 195 applicants. In the prior  
8 two searches, they had over 300 applicants each. And  
9 Dr. Kao became concerned that the reason there were so  
10 few applicants was that this search had not been  
11 advertised in any professional journal that would reach  
12 a large audience of people looking for mathematic jobs,  
13 as mathematic professors.

14           Dr. Kao researched the actual place that this  
15 job was advertised. And we will be showing you evidence  
16 that this was advertised essentially on on-line  
17 databases, that it was -- and that contained very little  
18 information about the jobs, but just links to the USF  
19 Web site. And Dr. Kao was concerned that this was the  
20 explanation of why the numbers were so low.

21           And what Dr. Kao was particularly concerned  
22 about was that the policies and procedures that he was  
23 aware of and he'd been involved in required the  
24 advertising of jobs in professional journals precisely  
25 because that was designed to reach the widest number of

1 possible applicants and get the broadest number of  
2 potential minority and women and other applicants for  
3 the jobs.

4 On January 7<sup>th</sup>, Kao sends a new email stating  
5 that he's filing a new complaint concerning the 2007 and  
6 2008 search. And at this point, the university begins,  
7 we believe, to try to be looking for some reason to get  
8 rid of Dr. Kao.

9 On January 17<sup>th</sup>, Dr. Kao consults with  
10 Dr. Chang about -- the university consulted with Dr.  
11 Chang about Kao. The evidence will show that Dr. Chang  
12 suggests that USF speak to Dr. Kao about any concerns  
13 they had.

14 In February 2007, key events are that there's a  
15 February 6<sup>th</sup> meeting over the final candidates. In  
16 this meeting, Kao argued the search was biased against  
17 minorities because the position had not been advertised  
18 in a professional journal. At this meeting, he also  
19 presents statistics, which will be in evidence, to  
20 support his claim to show that he felt that this search  
21 was biased from the start. He will explain that he was  
22 urging the department to reconsider the search and do it  
23 right.

24 On February 17<sup>th</sup> -- February 12<sup>th</sup>, USF now  
25 meets with another psychiatrist, Dr. Good, whose picture

1 I showed you. And Good says again "If you have  
2 concerns, speak to Dr. Kao."

3 On February 21<sup>st</sup>, Kao meets with  
4 Ms. Gon-Soneda, USF human resources, about his new  
5 informal complaint over the search.

6 In March, USF tells Kao that he has to use the  
7 faculty grievance procedure now for his complaints.

8 In April, Kao is overheard asking President  
9 Neaman about filing a union grievance. On April 21<sup>st</sup>  
10 there's an incident between Dean Turpin and Dr. Kao.  
11 This will be become an important incident in this case  
12 and you're going to need to listen to testimony from  
13 Dean Turpin and Dr. Kao about this, and you're also  
14 going to need to consider carefully what this incident  
15 means. You'll have to consider ...

16 On April -- finally, on April 28<sup>th</sup> through  
17 May 1<sup>st</sup>, USF begins interviewing the members of the  
18 faculty. Now, they interview three faculty members at  
19 the -- in the mathematics department, and only three.  
20 And what these interviews said, among other things, is  
21 that there are no verbal or physical threats by Dr. Kao.  
22 They state -- they stated that Dr. Kao behaves as if  
23 everyone hates him, and they state "We do, because we  
24 are afraid he's collecting data for a lawsuit against  
25 us." And they state they can't trust Dr. Kao because he

1 is suing people.

2 In May 2008, on May 9<sup>th</sup>, Dr. Kao attends the  
3 Finch retirement part at Professor Needham's home.

4 On May 12<sup>th</sup>, Zeitz and Needham now tell USF  
5 that Kao bumped into them some time during the semester  
6 or earlier. The evidence will show that they have no  
7 dates of this bumping, they made no reports of this  
8 bumping. It's only at this point that this issue of  
9 bumping somehow arises.

10 On May 20<sup>th</sup>, that's when USF now meets with  
11 the third -- its third consultant, Dr. Missett. The  
12 evidence will show that USF tells Missett that USF has  
13 spoken to Kao for six or seven years about his behavior.  
14 The evidence will show that that statement is not true,  
15 and in particular, no one's spoken to Dr. Kao at all,  
16 for even a minute, about any of his behavior or alleged  
17 behavior in the spring of 2008.

18 THE COURT: Mr. Katzenbach, at this time is it  
19 convenient for you to pause for a break?

20 MR. KATZENBACH: Yes, Your Honor. If I could  
21 just finish this one part, and then ...

22 THE COURT: Sure.

23 MR. KATZENBACH: He also tells Missett that  
24 students have complained about Kao. The evidence will  
25 show that that is untrue. He's never had a student

1 complain. And in fact, the evidence will show the  
2 opposite. The evidence will show that during the spring  
3 semester, the semester where these events are occurring,  
4 Dr. Kao, like every other professor at the University of  
5 San Francisco, is given composite ratings of how the  
6 students rate their performance. Those ratings are not  
7 only based on -- those ratings are national in scope, in  
8 the sense they rate a professor in comparison to the  
9 nation as a whole on six criteria, to the university as  
10 a whole on those same six criteria, to the department as  
11 a whole on those six criteria.

12 And in the spring of 2008, the evidence will  
13 show that Dr. Kao was better in his ratings than the  
14 national average and the department average and, in all  
15 but one case, the university's average. And in three of  
16 those six cases, not only was he better, but -- since  
17 this is mathematics, we had some mathematic data,  
18 actually starred them to indicate that in two of those,  
19 he was better -- he was essentially in the 95<sup>th</sup>  
20 percentile of teachers nationally, and in one, he was in  
21 the 99<sup>th</sup> percentile of teachers nationally on these  
22 ratings.

23 Finally, the evidence will show from USF -- the  
24 evidence will show that when they were discussing a  
25 fitness-for-duty examination for Dr. Kao, they also

1 discussed if he passed that fitness-for-duty examination  
2 that they would then consider these bumpings an assault  
3 and they could fire him for that as well.

4 Finally, the meeting notes kept by vice  
5 president of human resources, Ms. Martha Peugh-Wade,  
6 state the plan to get him out medically and keep him out  
7 medically.

8 This would be a good time for me to stop.

9 THE COURT: Ladies and gentlemen, remember the  
10 admonition. Do not form or express any opinion on this  
11 case until it's finally submitted to you for your  
12 decision. Do not discuss among yourselves or with  
13 others until that time. Please be back in your places  
14 at 10:10 according to the courtroom clock.

15 (Recess taken.)

16 THE CLERK: Please remain seated and come to  
17 order. Department 318 is again in session.

18 THE COURT: Jurors and alternates are all  
19 present. Counsel on both sides are present. Plaintiff  
20 is personally present.

21 Mr. Katzenbach, you may continue your opening  
22 statement.

23 MR. KATZENBACH: Thank you, Your Honor.

24 Thank you, ladies and gentlemen of the jury.

25 In June 2008, Dean Brown reports that Stephen

1 Yeung says Kao veered at him in the hallway. The  
2 evidence at trial is going to show that outside the  
3 men's room, Dr. Yeung was leaving and that Dr. Kao was  
4 walking down the hallway. And the testimony will be  
5 from Dr. Yeung that he's not sure that Dr. Kao ever saw  
6 him leaving.

7           What -- the evidence will show that no one  
8 interviews -- that human resources doesn't interview Dr.  
9 Yeung about this alleged incident. In June 18<sup>th</sup>,  
10 there is a meeting where Dr. Kao is told to come to a  
11 meeting with human resources and is told USF is  
12 considering sending him to a mental examination.

13           This is the first time that Dr. Kao hears  
14 anything about any problems with him, any concerns the  
15 university has during the entire semester.

16           The evidence will show that the university says  
17 that Dr. Kao is engaged in frightening behaviors such as  
18 grimacing, maniacal chuckling, clenching his fists with  
19 apparently unfeigned anger, bumping into people or maybe  
20 nearly bumping into people or charging at people in a  
21 way that makes them think that he's going to bump into  
22 them, walking stiffly, having a grimace or scary face.

23           Dr. Kao says "I don't know what this is about.  
24 Can you give me more information so I can respond."

25           The university says "No, we don't think that

1 would be useful."

2 Dr. Kao offers to meet with anyone who is  
3 concerned about him, to clear the air. The university  
4 says "No, we don't think that would be useful either."

5 On June 24<sup>th</sup>, Kao is told that he must go to  
6 a mental examination with Dr. Reynolds and is now banned  
7 from being on the campus because of these events.

8 At that time, Dr. Kao is told he has to provide  
9 all medical information that Dr. Reynolds requests and  
10 that Dr. Reynolds would give USF a report setting forth  
11 Dr. Reynolds' opinion as to Dr. Kao's condition and  
12 fitness to perform faculty functions.

13 At the same time, USF is in communications with  
14 Dr. Reynolds and directs Dr. Reynolds to use a form,  
15 medical release, that would require Kao to agree to give  
16 Dr. Reynolds a complete history and background -- for  
17 example, current difficulty, medical history, legal and  
18 financial history, education and work history, family  
19 and social history -- to undergo a mental status  
20 examination, have psychological test results and have  
21 laboratory results.

22 And that same form also states that Dr. Kao  
23 would have to agree that Dr. Reynolds would not provide  
24 Dr. Kao or anyone else, anyone he selects, with a copy  
25 of the psychiatric report that Dr. Reynolds would be



1 preparing, or any copies of Dr. Reynolds' records.

2 What the evidence will also show at the same  
3 time is that while the university is not telling Dr. Kao  
4 about what the evidence was that they were claiming  
5 against him, they were in fact telling Dr. Reynolds  
6 details of what Dr. Kao is accused of doing.

7 In July 2008 -- Dr. Kao was told at the end of  
8 June that he had to go on July 1<sup>st</sup> to Dr. Reynolds'  
9 examination. That examination was going to be down in  
10 San Jose, and it was going to go from 8:30 in the  
11 morning till 5:30 at night on one day. And then what  
12 Dr. Kao wasn't told, but which the evidence will show  
13 the university also knew, is that that same examination  
14 would continue for another three or so more hours the  
15 following day, also down in San Jose.

16 In July when Dr. Kao does not go, USF again  
17 repeats its demand and basically -- that Dr. Kao will be  
18 fired unless [sic] he does not go see Dr. Reynolds and  
19 that Dr. Kao will not be paid unless Dr. Kao files for  
20 sick leave.

21 Dr. Kao will testify, and the evidence will  
22 show, that Dr. Kao will not apply for sick leave 'cause  
23 Dr. Kao isn't sick and doesn't believe himself to be so.

24 In October 2008, on October 24<sup>th</sup>, Dr. Kao  
25 meets with David Philpott, USF labor relations. At this

1 meeting, Dr. Kao again presents evidence he's not  
2 dangerous. He's again asserts his mental exam is in  
3 retaliation for his prior discrimination complaints. He  
4 presents email invitations to social events from faculty  
5 in the department during the spring 2008, and actually  
6 including into September of 2008 when the new semester  
7 starts.

8 He says -- the evidence will show that he again  
9 asks for more information to support USF's claim that  
10 he's dangerous so he can make better responses to  
11 anything that he did that USF felt was improper.

12 MR. VARTAIN: Objection, Your Honor. There is  
13 no evidence and no claim of evidence by the plaintiff  
14 that the university ever said he was dangerous. He said  
15 they needed an assessment as to whether he was or was  
16 not. Plaintiff is mischaracterizing even what he thinks  
17 the evidence might best show.

18 THE COURT: Objection is overruled.

19 MR. KATZENBACH: In December 2008, USF repeats  
20 the demand that Dr. Kao go to a mental examination with  
21 Dr. Reynolds. USF continues to refuse to tell Dr.  
22 Reynolds [sic] about any specifics against him.

23 In January 2008, we have another event. In  
24 that time, the evidence will show Kao calls Professor  
25 Yeung and again inquires as to the number of applicants

1 in the next search. The next search is actually going  
2 on in 2008/2009. In a telephone conversation, Yeung  
3 refuses to tell Kao the number of applicants the  
4 department had received in that search.

5 USF also tells Kao that the only opinion that  
6 it will accept is that of Dr. Reynolds.

7 In February 2008, after 17 years of work for  
8 the University of San Francisco, after years of  
9 exemplary teaching, Dr. Kao is fired for insubordination  
10 for not going to see Dr. Reynolds.

11 Now, this case is a story, as I say, of Dr.  
12 Kao, who stood up 'cause he believed what the university  
13 was doing was wrong. What he wanted, the evidence will  
14 show, is for the university to actively meet the  
15 obligations that it says it supports. There's no doubt  
16 that the University of San Francisco takes -- says it  
17 takes affirmative action very seriously and wants  
18 diversity in its faculty and its student body.

19 Dr. Kao's efforts were to achieve that in the  
20 math department, that from the time he started there, up  
21 through these events, he felt was making insufficient  
22 efforts to find qualified women and qualified men with  
23 appropriate degrees that could be hired in mathematics  
24 and get a sufficient number of minorities so -- as he  
25 will explain to you -- so that the math department, in

1 its diversity, would be a role model for a diverse  
2 student body, that the students in the math department,  
3 the students that Dr. Kao had been dealing with for  
4 years, would look to find role models that they could  
5 have, that a student body that has a very high  
6 percentage of Asians would find mathematics professors  
7 that were also Asians and other minorities, so that they  
8 could say "Yes, this is a career for me."

9           The evidence will also show that throughout the  
10 spring of 2008, not only was Dr. Kao continuing to teach  
11 and continuing to do his faculty functions, he was  
12 continuing to engage in the very actions with students  
13 that he did -- had done for years.

14           The evidence will show Dr. Kao ran something  
15 called the math club. This was after school Friday --  
16 typically a Friday afternoon school event where Dr. Kao  
17 would meet with students in the math department office  
18 and they would play math-related games such as chess,  
19 and particularly Go. They would play games, discuss  
20 mathematics as a sort of way of encouraging the math  
21 majors to think about math careers and engage in sort of  
22 the fun aspects of math, something not necessarily  
23 easily done.

24           He will also show that throughout this period  
25 of time, every week there was a math tea where faculty

1 and students get together, and Dr. Kao was a regular  
2 attendee at these math teas where he would interact with  
3 faculty and students.

4           The evidence will show that throughout this  
5 period of time, throughout the spring 2008, throughout  
6 this period when the university was claiming Dr. -- when  
7 the university now thinks that Dr. Kao is engaged in  
8 scary behavior, that nothing was done to limit Dr. Kao's  
9 activities. Nothing was done to limit his interaction  
10 with students; nothing was done to even advise Dr. Kao  
11 of any concerns; that nothing was done to talk to -- to  
12 try to reach out to Dr. Kao in any way; that nothing was  
13 done not only to not [sic] talk to Dr. Kao, nothing was  
14 done to talk to any of Dr. Kao's good friends on the  
15 faculty department, including, for example, Dr. Wolf,  
16 Professor Bob Wolf; nothing was done to ask any of the  
17 other faculty members, other than the three that were  
18 complaining -- the three that were on the search  
19 committee, the three that were challenged by Dr. Kao's  
20 complaints about the search.

21           The other math departments [sic] wasn't  
22 interviewed to say "Are -- do you find Dr. Kao's  
23 behavior scary? Do you find Dr. Kao's actions  
24 frightening? Do you think Dr. Kao is mentally ill?"

25           Nothing was done to talk to Dr. Kao's

1 attorneys. They had -- nothing was done to talk to --  
2 nothing was done to talk to Dr. -- see if Dr. Kao's  
3 therapist, who they knew about, might want to talk to  
4 them or might be at least advised of the university's  
5 concerns so she could take that into account.

6 In fact, nothing was done at all to deal with  
7 these -- to discuss these matters with Dr. Kao until the  
8 18<sup>th</sup> of June, after the semester was over.

9 The evidence will show -- we hope when we  
10 present this evidence to you that you will agree with us  
11 that the notes reflected that -- the evidence that --  
12 the notes that USF wrote to get him out medically and  
13 keep him out medically explain this case.

14 Thank you very much for your time.

15 THE COURT: Thank you, Mr. Katzenbach.

16 The defendants have three choices with respect  
17 to opening statements: They can waive opening  
18 statement; they can give an opening statement now; or  
19 they can reserve opening statement and make it after the  
20 conclusion of the plaintiff's case.

21 Mr. Vartain, what's your pleasure?

22 MR. VARTAIN: Thank you, Your Honor. The  
23 university will present an opening statement now.

24 But I also have a motion, Your Honor. But I  
25 think you might want to hear it in -- you know, outside

1 the presence of the jury. It relates to -- it needs to  
2 be before I make my opening statement. I think you  
3 would want it there.

4 THE COURT: All right, folks. Step back here.  
5 Let's talk about it.

6 (Recess taken.)

7 THE COURT: Okay. Mr. Vartain, you're going to  
8 give an opening statement?

9 MR. VARTAIN: I promised you I would, Your  
10 Honor, and I will.

11 THE COURT: Keep your promise.

12 OPENING STATEMENT BY MR. VARTAIN

13 MR. VARTAIN: And I will promise this to the  
14 ladies and gentlemen of the jury:

15 When my daughter was nine years old, I was  
16 still smoking cigarettes, one a day. I know. My wife  
17 told me "Stop, get rid of the smoke." And so I stopped  
18 smoking, 'cause she was nine years old and she was  
19 getting all the no-smoking stuff from school.

20 Before I do my opening statement here, I want  
21 to get rid of some of the smoke of what we just heard,  
22 and I want to tell you what the actual evidence will be,  
23 contrary to the smoke.

24 The last three faculty members that the math  
25 department hired in the last three years of Professor

1 Kao's employment, each of which he objected to, were  
2 people from races and genders that were in fact  
3 underrepresented. Two women were hired, and Mr. --  
4 Professor Stephen Yeung was hired.

5           Each one of those three people, Professor Kao  
6 went to great lengths -- which he had the right to; he  
7 had the freedom of speech to -- he went to great length  
8 to object to each of those three people being hired.  
9 And then in some way or another, he did things that  
10 would make life, if not miserable, but difficult for  
11 those three people.

12           Professor Yeung, from Cornell University, he is  
13 a -- he already has tenure, he is such a star. His  
14 degree was from a program in applied mathematics, the  
15 same as Professor Kao's. Professor Kao said he wasn't  
16 qualified because his -- the label that Cornell gives an  
17 applied mathematics degree is "applied physics," or some  
18 word. He had an objection to that.

19           We got to the two women; he had two different  
20 objections. In both cases, the whole department had  
21 gone through six months of recruiting, interviewing,  
22 doing all that work, and he comes in at the end and says  
23 "Cancel the search; start all over," with not one piece  
24 of evidence that those two women were not the best  
25 qualified.



1           I don't know what he was opposing, but it  
2 wasn't discrimination. And the evidence will show that.

3           MR. KATZENBACH: Your Honor --

4           MR. VARTAIN: The evidence will show that the  
5 university, and in particular the math department, was  
6 in fact keeping to its word of diversity. I wanted to  
7 clear that smoke out.

8           I want to show you a graphic that will address  
9 this, in really the most plain terms. This goes to the  
10 exact year that Professor Kao was unwilling to go to the  
11 mental exam.

12           This is the data. Almost 50/50 male/female  
13 full-time faculty. We didn't do an accounting of all  
14 the temporary faculty. These are the tenured and  
15 tenure-track faculty at the university, including the  
16 math department, including the college where he worked.

17           This isn't now. We didn't take the numbers  
18 after the fact. The evidence will show that at that  
19 particular time when Professor Kao was saying what his  
20 attorney says he was saying, the university was actually  
21 doing it: not hiring unqualified women, hiring  
22 fully-qualified women for the best jobs at the  
23 university, the high-paying jobs, the tenure-track, the  
24 full-time faculty.

25           The other thing in terms of smoke getting

1 cleared away I'd like to mention is that Dr. -- the  
2 university actually met with his attorneys. Mr.  
3 Katzenbach was at all the meetings in 2008 that the  
4 university had with Professor Kao. He didn't mention  
5 that, but the evidence will show the university went  
6 through, point by point, the behaviors -- and we'll have  
7 it up on the screen in a minute -- gave it to him in  
8 writing so there'd be no mistake: the bumping, the  
9 getting in people's face, the yelling, the making the  
10 grimaces, the staring at people to make them upset.

11 Not once, the evidence will show, did Professor  
12 Kao ever say -- much less agree to the mental  
13 evaluation, which was caused by his behaviors, not  
14 anybody else's -- not once did he say "Hmm, I'm sorry I  
15 upset people," or even "I'm sorry I might have upset  
16 people." Not once did he say anything to signify that  
17 he understood this was an issue.

18 Now, granted, he can contest, and he will  
19 contest, "Well, I wasn't quite yelling." The evidence  
20 will show different people can hear things differently.  
21 But the fact of the matter is the evidence will show  
22 that not once did Professor Kao, who was making well  
23 over \$120,000 a year for essentially working nine  
24 months, did he ever think "Hmm, I have some obligations  
25 to the employer too. Maybe they're right; maybe they're

1 wrong." But did he ever think that the evidence will  
2 show? No, he did not.

3 So in terms of smoke clearing away -- and I  
4 did -- I never smoked another cigarette again, so I'm  
5 going to stick with that analogy. This whole thing  
6 about discrimination, diversity, it's in Professor Kao's  
7 mind, the evidence will show. The evidence will show  
8 that the university actually did -- did everything that  
9 it committed to do in that area.

10 Now for the introductions, 'cause I wanted to  
11 clear the smoke away.

12 Bill Hamm is actually both -- he was the  
13 videographer for both law firms during the depositions.  
14 He counts, but he's not really -- he just looks like a  
15 lawyer.

16 You already met Ms. Adler. She and I have  
17 worked together for five years. And we, together with  
18 two other attorneys, represent only colleges and  
19 universities and non- -- not-for-profits. And we  
20 represent the University of San Francisco for any number  
21 of years.

22 The general counsel of the university's in the  
23 back there, Ms. Davis. And she and I go way back, when  
24 she was just in law school and -- or getting out of law  
25 school and I was a lot younger.

1           There's really just one question in this case.  
2       And the question is, did the people at the university  
3       who made the decision to send Professor Kao to the  
4       medical and psychological evaluation -- did they do it  
5       for reasons that Mr. Kao's attorney says -- that is, to  
6       retaliate because he raised, quote, issues -- or did  
7       they have a real sincere belief that there needed to be  
8       an assessment made by an independent qualified doctor so  
9       that the university could not be in the position of  
10      putting Professor Kao back in the same place where he  
11      had been worrying people sick.

12           That's the only issue because he's the one who  
13      thereafter, the evidence will show, made the decision to  
14      say no. So the fact that after seven months he was  
15      still saying -- not once, not twice -- in June, in July,  
16      in August, in October, November, December -- he said no  
17      every month to every letter. And the university  
18      evidence will show it was not harassing him, wasn't  
19      calling him up on the phone, was just sending letters to  
20      his attorney, to him, invited two or three different  
21      meetings. He said no, flat-out no, each time.

22           So the real issue will be going back to did the  
23      university people -- did they truly have a sincere  
24      concern over the workplace when they requested him to go  
25      and then, yes, made it a condition of his employment.

1           And there's going to be ten different facts  
2 that I'd like to work through with you to -- that will  
3 illustrate why the answer, I believe, at the end of the  
4 case will be of course they had a sincere motive.

5           Here -- and I'll go through the facts now one  
6 by one, each of them.

7           Ladies and gentlemen, before we come into this  
8 courtroom, we go through a whole information-gathering  
9 process, the attorneys do. We go and take sworn  
10 depositions. They're -- basically we question each  
11 other's witnesses in a conference room. Ms. Moose, who  
12 was there, takes it all down.

13           And then the attorneys can evaluate who's got a  
14 case, who doesn't, so that we don't come to court, A,  
15 unnecessarily; maybe we can settle out; B, if we do, we  
16 pretty much know what the witnesses are going to say.  
17 Yes, there's one or two witnesses that will come before  
18 you that that didn't happen. But basically I know,  
19 because Mr. Katzenbach questioned all the university  
20 people that I think are important -- I know what he --  
21 what they answered to their questions. It gets written  
22 up in a booklet and I read it.

23           So in that regard, you know, we're at a point  
24 where I can say I believe the evidence will show,  
25 because I've read it -- Mr. Katzenbach questioned all

1 the witnesses -- so fact 1, the university, as an  
2 institution that -- where people come there to learn and  
3 study, acted just like that when they went about trying  
4 to make this very difficult decision -- the university  
5 has only several times asked an employee to go in for a  
6 mental evaluation -- "medical and psychological  
7 evaluation" is the actual term -- both before and after  
8 they did that for Professor Kao.

9           It's not a often-used tool at the university,  
10 or maybe even other places, but it is used for these  
11 kinds of situations, the evidence will show. We will  
12 have witnesses from around the country who will say  
13 these are the situations where best practices are  
14 employers should send the employee to a medical and  
15 psychological evaluation for two reasons: One,  
16 employers generally don't have the expertise to assess  
17 what this really means; are these behaviors going to  
18 forecast a terrible tragedy; are they going to forecast  
19 an assault; or maybe not any of it, just the person  
20 needs some different medication or something.

21           The expert witnesses that we will -- and Mr.  
22 Katzenbach has questioned them; he knows what they're  
23 going to say -- will also --

24           MR. KATZENBACH: Your Honor, I'm going to  
25 object. The constant references to, you know, what I've

1 done and not done is not an appropriate part of opening  
2 statements. Argumentative.

3 MR. VARTAIN: I don't -- go ahead.

4 THE COURT: Objection overruled, without  
5 prejudice to a motion to strike if counsel goes too far.

6 MR. VARTAIN: Those experts in the field of  
7 preventing violence will come and explain that the  
8 medical and psychological evaluation in the  
9 circumstances that the university asked of Dr. Kao will  
10 be the best tool to do two things: assure the privacy of  
11 the employee, Professor Kao; and two, give information  
12 to the employer, that it can assess the risk: "Is this  
13 going to be okay, we can bring the person back; what  
14 accommodations might they need if we do bring them  
15 back," or "We've got to wait and keep them out on  
16 medical leave; they shouldn't be around the workplace."

17 So the witnesses will make it very clear that  
18 for privacy reasons, again, the doctor that -- Dr.  
19 Reynolds -- that Professor Kao was asked to go to  
20 doesn't release the medical information.

21 Ms. Adler, when you get a chance -- it doesn't  
22 have to be right now -- would you put that June 24<sup>th</sup>  
23 letter up on the -- and then Mr. Hamm, I will ask you to  
24 play one of the video clip numbers on this. So you can  
25 tee up video clip number 5 and 6 -- they're the last

1 two -- if you could, while Ms. Adler's getting that  
2 ready.

3           Again, privacy of the employee. The  
4 information -- Mr. Katzenbach is correct, the university  
5 instructed Professor Kao to give all his medical  
6 information. But it goes into a box and it stays there.  
7 The only thing that comes out of the box, the evidence  
8 will show, the doctor tells the university he can come  
9 back to work or he can't. And if he can't, what are the  
10 things that he can't do; what are the limits on his  
11 ability.

12           Maybe the limit would be he can't be working in  
13 the math department anymore, these people make him so  
14 angry; he can maybe work in a different department. But  
15 the evidence will show the university picked the process  
16 that would be most private for Professor Kao and most  
17 informative for the university to figure out is he or is  
18 he not a real risk.

19           The university never said to Professor Kao  
20 "You're dangerous" or "You're not." It said "You need  
21 to cooperate with us so we can assure a safe and healthy  
22 workplace."

23           If you could just take it down here.

24           This is the letter of June 24<sup>th</sup> the  
25 university gave to Professor Kao after meeting with Mr.



1 Katzenbach and Professor Kao.

2 "You're on a leave of absence. You may draw  
3 sick pay." Didn't say what Mr. Katzenbach said it said;  
4 that is, you will only draw sick pay if you request.

5 The letter went on to --

6 MR. KATZENBACH: Your Honor, I'm going to  
7 move -- that is argumentative, the last comment. I move  
8 to strike it.

9 THE COURT: Motion to strike is denied.

10 MR. VARTAIN: The letter went on to say "You  
11 must provide all medical information the IP requests,"  
12 the IP being the independent physician. It didn't say  
13 "Provide the information to USF."

14 The employer didn't want his confidential  
15 medical information. Go give it to the independent  
16 physician is what this letter, which will be admitted  
17 into evidence, said to Professor Kao.

18 It also said "The IP" -- that's Dr. Reynolds,  
19 the one who was supposed to do the evaluation -- "will  
20 not release your confidential medical information to the  
21 university."

22 Now, could you play that particular ...

23 This is what Professor Kao said he thought that  
24 meant; that is, "The physician will not release your  
25 confidential" --

1 (Playing video clip as follow:

2 MR. VARTAIN: Q. You agree that the  
3 university gave you explicit promises in  
4 writing that Dr. Reynolds would not release  
5 your medical information to the university,  
6 correct?

7 ANSWER: Yes.

8 QUESTION: And --

9 ANSWER: They gave me a letter to that  
10 effect.

11 QUESTION: And you never told the  
12 university that you needed more proof than  
13 just the letter, correct?

14 ANSWER: I needed more proof for what?

15 QUESTION: You never told the  
16 university "I don't believe you. I need you  
17 to give me more proof if I'm going to go see  
18 Dr. Reynolds"; you never said that, did you?

19 ANSWER: I never asked for more  
20 assurance on that particular issue.)

21 MR. VARTAIN: The issue being, of course,  
22 whether the information -- the medical information would  
23 stay in that box at Dr. Reynolds' office. He got the  
24 letter that said it would. He never asked for any more  
25 assurance. He never doubted it, the evidence will show.

1 Can you go to the next clip. Even before --

2 (Playing video clip as follow:

3 MR. VARTAIN: Q. At the time you made  
4 your fitness-for-duty evaluation decision --  
5 that is, to not comply with the university's  
6 instruction -- you had no reason to believe  
7 that the university had ever violated your  
8 medical privacy, correct?

9 ANSWER: Yes.)

10 MR. VARTAIN: The evidence will show -- and  
11 that's a piece of it -- that Professor Kao, as he just  
12 said, had never had a situation where the university had  
13 ever violated his medical privacy. And when he got this  
14 guarantee, the evidence will show he accepted the  
15 guarantee. But he still didn't go.

16 So you can tee up number 1, if you will. But  
17 I'm not going to play it yet.

18 Linda, you can take that off.

19 I was talking about the fact that when the  
20 university was behaving like a university and looking  
21 for information, they asked Professor Kao to go through  
22 a process which would provide information about him.  
23 That was the independent physician.

24 In the same vein, before making that decision,  
25 the university consulted with James Missett, M.D., a

1 month earlier in May. Mr. Katzenbach mentioned that  
2 there was a meeting with Dr. Missett.

3 Dr. Missett is someone who is a psychiatrist in  
4 Menlo Park. He is a consultant to the Secret Service of  
5 the United States, which isn't why the university hired  
6 him, but he's -- it shows that he's an expert on  
7 assessing behaviors, as to whether they are a concern  
8 for violence.

9 He actually had done one project for the  
10 University of San Francisco before this, the evidence  
11 will show. He was on the university's radar screen, in  
12 a sense, where he -- he did exactly a medical and  
13 psychological evaluation of a police officer on the  
14 campus.

15 Dr. Missett, after doing that evaluation, the  
16 kind of thing that the university sent Professor Kao to  
17 do with this other doctor, Reynolds -- when Dr. Missett  
18 did one for the university, he evaluated that police  
19 officer and he cleared that woman officer to go back to  
20 work at the university with some limitations and some  
21 time off. But she got her job -- she didn't get fired.  
22 She was cleared, eventually, to go back.

23 This is who the doctor -- this is the doctor  
24 who the university consulted when the university was  
25 trying to decide "How do we go about dealing with this."

1 He's the doctor, Dr. Missett, who said "You need to have  
2 a medical and psychological evaluation performed. These  
3 behaviors are concerning. I can't say -- and I will not  
4 say -- if he's dangerous or not. Only the doctor who  
5 does the complete evaluation can say that."

6 And he said "And I'm not going to do it 'cause  
7 I'm serving as your advisor. It wouldn't be fair for  
8 me."

9 So again, back to information-gathering. The  
10 university consulted with experts. This was not a  
11 situation, the facts and evidence will show, that the  
12 university had a heck of a lot of experience with. Same  
13 fact 1. The university went to Dr. Reynolds.

14 Another fact-gathering process -- okay, fact 1.

15 Now fact 2 of the ten facts. Professor Kao had  
16 engaged in these behaviors -- I'm going to get to what  
17 they are in a second. We'll put that letter back up in  
18 a few minutes.

19 The university could have but didn't discharge  
20 him for doing those things. Harassing other people,  
21 shouting at people, getting in their face, grimacing,  
22 acting like you're going to hurt them is a fireable  
23 offense. The university has a no-harassment policy.

24 The university did actually have a concern  
25 whether he had a health problem that was causing it.

1 They gave him the benefit of the doubt, the evidence  
2 will show. He was not fired for that.

3           Instead, he was given the softer -- clearly we  
4 knew it was going to be difficult for Professor Kao to  
5 accept the medical psychological -- if you asked me to  
6 do that, I'd be wanting to know what --

7           MR. KATZENBACH: Your Honor, I don't think the  
8 witness can testify -- counsel can testify as to his own  
9 personal beliefs.

10           MR. VARTAIN: I'm saying what the evidence will  
11 show.

12           THE COURT: Well, no, your reaction to a  
13 request that you undergo a medical exam is not what the  
14 evidence is going to show in this case. Accordingly,  
15 the motion to strike is granted.

16           MR. VARTAIN: Okay. I misspoke.

17           The witnesses for the university will testify  
18 that they knew that it was difficult to ask this of  
19 Professor Kao, and that's why they waited till June,  
20 July, August, September, October, November, December,  
21 letter after letter, request after request. They knew  
22 this was going to be difficult for someone to accept.  
23 But they also knew it had to be mandatory.

24           Fact 3: The university involved their  
25 attorney -- his attorney. The university HR people are

1 not lawyers. They don't bring lawyers to meetings.  
2 They didn't have the university's general counsel, their  
3 in-house counsel, come to meetings with Professor Kao;  
4 they sent their HR people. They invited Professor Kao  
5 to bring his own lawyer. The evidence will show that  
6 their motive in doing that was pure. They wanted  
7 Professor Kao to feel his rights were being looked  
8 after.

9           That's fact 3. The university did reach out to  
10 make sure that Professor Kao, at each stage, would have  
11 the right to counsel. And even when the university  
12 basically said "We're not going to have our counsel  
13 there. Let Professor Kao feel this way" -- why would --  
14 why would an employer -- the evidence will show -- and  
15 they wanted him to think that, and they believed it: He  
16 should have counsel that he wanted.

17           Fact 4 -- I'm going to review what facts 1  
18 through 3 are. The university acted on the basis of an  
19 informed decision, getting expertise. Didn't act like a  
20 bunch of know-it-alls.

21           Fact 2: The university did not fire Professor  
22 Kao for these behaviors. It instead, the evidence will  
23 show, said "Look, let's just let the past be past; let's  
24 go for the medical evaluation."

25           By the way, Mr. Katzenbach said -- and I want

1 to address this by what the evidence will actually  
2 show -- he said that Dr. Missett advised the university  
3 "Well, if he -- if he -- you could fire him for the  
4 assaults if he passes -- if he fails the  
5 fitness-for-duty evaluation, fine; he won't come back.  
6 But if he passes, then you can fire him for the  
7 assault."

8           The evidence will show that's exactly what  
9 wasn't said. The evidence will show that Dr. Missett  
10 said "If he passes the fitness-for-duty evaluation, that  
11 means he's healthy enough to be in the workplace. And  
12 then if he commits assaults, then, you know, he's doing  
13 it intentionally, and that could be -- you know, then  
14 you have to treat that as a disciplinary matter."

15           It wasn't that they would go back and do double  
16 jeopardy, so to speak.

17           Next fact, fact 5: Along the -- well, down --  
18 along the lane -- the Donnybrook Lane of these seven  
19 months where the university was working each month with  
20 Mr. Katzenbach and Professor Kao for meeting after  
21 meeting, letter after letter, it became clear that  
22 Professor Kao was -- to the university; and the  
23 witnesses will say -- he was dug in.

24           The witnesses will explain they did some  
25 head-scratching. They couldn't let him back on campus,



1 they will testify, 'cause they hadn't had the  
2 assessment. They hadn't had the evaluation that would  
3 let them assess the risk of whether there was a safety  
4 problem or not. The head-scratching -- no comment on my  
5 hair, but head-scratching led to this -- what the  
6 evidence will show was a creative solution that the  
7 university put forward to Professor Kao.

8 He once again rejected it, a second time.

9 The university said "You won't go for the  
10 medical and psychological evaluation. We won't bring  
11 you back without it. You're saying, Professor Kao, that  
12 you don't think it's legal." The university said "Let's  
13 get an impartial person to say if you have to go or  
14 not."

15 The university proposed to hire a retired  
16 judge, to be mutually selected by both sides, who would  
17 referee did he have to go or didn't he have to go.

18 The university agreed to forgo terminating him,  
19 the evidence will show, until the impartial opinion from  
20 the retired judge would come down. Wouldn't be picked  
21 by the university. Mutually picked. University even  
22 said "He may not want to spend the money. We'll pay  
23 Professor Kao's half of his fee."

24 Now, the judges work -- and I'll just -- the  
25 evidence will show this -- judges work long and hard.

1 But after they retire from the bench, a lot of them do  
2 practice judging on a fee basis as a retired judge,  
3 particularly because the courts are so clogged; a lot  
4 of -- a lot of attorneys want to get things done faster.

5 The university proposed two different times in  
6 the last month before terminating Professor Kao because  
7 he didn't go, "Why don't we have a retired judge settle  
8 this and we'll -- the university will abide by it."

9 And even the university said "If you don't like  
10 the result, you can still keep your rights to sue. You  
11 don't have to give up your lawsuit rights. We'll just  
12 look at this as a way to get an independent opinion."

13 THE COURT: Mr. Vartain, at a time that's  
14 convenient to you, we'll take a break.

15 MR. VARTAIN: Twenty seconds, Your Honor,  
16 please.

17 THE COURT: Go for it.

18 MR. VARTAIN: Okay.

19 So fact 5: The university actually acted --  
20 not just said, but acted -- in a compromising, flexible,  
21 caring way. The only thing it wouldn't compromise is on  
22 [sic] he had to go. When, who got to review it first,  
23 whether a judge would, all that -- he had all the time  
24 it took.

25 But in all -- all of the evidence will show the

1 university did not try to jam this down Professor Kao's  
2 throat and did not try, as Mr. Katzenbach alluded, to  
3 hammer a nail down. The nail stood up there for month  
4 after month after -- and even when that nail was, from  
5 Mr. Katzenbach's point of view, prickling other people,  
6 which you will hear from -- there really wasn't -- he  
7 had been doing this since 2000, the complaining and the  
8 grievance. That's a way of life at the university.  
9 Everybody has their free speech. It wasn't just  
10 Professor Kao. Others.

11 So we'll leave it at that fact. I think I'm on  
12 number 5. And then I'll finish with the other five  
13 facts after the break.

14 Thank you, Your Honor.

15 THE COURT: Ladies and gentlemen, remember the  
16 admonition. Do not form or express any opinion on this  
17 case until it's finally submitted to you for your  
18 decision. Do not discuss among yourselves or with  
19 others until that time. Please be back in your places  
20 at 11:10 according to the courtroom clock.

21 (Recess taken.)

22 THE CLERK: Remain seated and come to order.  
23 Department 118 is back in session.

24 THE COURT: Jurors and alternates are all  
25 present. Counsel from both sides are present. The

1 plaintiff is personally present.

2 Mr. Vartain, you may continue with your opening  
3 statement.

4 MR. VARTAIN: Thank you, Your Honor.

5 I left off at fact 5, ladies and gentlemen of  
6 the jury. I'd like to discuss what the evidence will  
7 show as to fact 6 and what fact 6 is.

8 Fact 6 is that the university selected a  
9 truly-independent qualified doctor, Dr. Reynolds, to do  
10 this. This was somebody whom the university had never  
11 had any contact with. Dr. Reynolds had done nothing at  
12 the university.

13 Dr. Missett, who had advised the university,  
14 gave the university three doctors' names.  
15 Ms. Peugh-Wade will testify, the HR person, she herself  
16 did some research and she chose the one -- the one  
17 doctor that she thought would be most fair to Professor  
18 Kao. She will testify as to why she did that. She will  
19 testify -- she answered the questions from Mr.  
20 Katzenbach in the deposition.

21 Professor Kao had 17 years with the university.  
22 True, some of his behaviors in earlier years had  
23 surfaced. But it was really this past year is when the  
24 behaviors got scary. The university, she will testify,  
25 had invested many years. He was a tenured faculty

1 member. The university does not like to lose tenured  
2 faculty members. "Can we keep him? Can we find a way  
3 to save our investment and at the same time save  
4 Professor Kao's job?"

5 She picked Norman Reynolds.

6 Dr. Missett, who was the one who recommended or  
7 gave three names of doctors, will testify he explained  
8 to the university that Norman Reynolds is actually very  
9 experienced in doing these medical and psychological  
10 evaluations for teachers, faculty members, people who  
11 work at colleges.

12 That -- and Ms. Wade, Ms. Peugh-Wade, the HR  
13 person, will testify, given that, she thought this  
14 doctor may be able to relate to Professor Kao, get his  
15 confidence and do a really fair assessment. So she  
16 picked Norman Reynolds. And he was -- or would have  
17 been, the evidence will show -- truly independent, could  
18 not be bought, had never worked for the University of  
19 San Francisco, and was highly recommended by someone who  
20 knew, Dr. Missett, another expert.

21 Fact 6: An independent evaluator, who was  
22 qualified, was selected.

23 Fact 7: The evidence is going to be, from  
24 multiple witnesses -- I don't know if Mr. Katzenbach is  
25 going to testify, but he was at the meeting with

1 Ms. Peugh-Wade in June where Ms. Peugh-Wade said to  
2 Professor Kao "If you have any information" -- this is  
3 after she gave him a letter -- not this one, but one  
4 you'll see -- which listed all the behaviors that were  
5 concerning -- Ms. Peugh-Wade informed Professor Kao "If  
6 you have any information that you think would -- we  
7 should consider, let us know. Tell us what that  
8 information is."

9           You heard Mr. Katzenbach say that his doctor,  
10 Lenore Terr, will come in and tell you "Well, the  
11 university never called me. I would have said he's not  
12 dangerous."

13           But the actual evidence will show the  
14 university did not feel it can go and call someone's  
15 doctor up on its own. That's actually an invasion of  
16 privacy.

17           Rather, the university, the evidence will show,  
18 in writing, in person, invited Mr. Katzenbach and  
19 Professor Kao on more than one occasion to come forward  
20 with any information that they had that could make the  
21 university maybe change its mind.

22           Nothing. What came back was the lawyer  
23 mumbo-jumbo.

24           The university witnesses actually --

25           MR. KATZENBACH: Your Honor, I object to that.

1 I really --

2 MR. VARTAIN: Well --

3 MR. KATZENBACH: He's attacking me, and he  
4 continually does that. I'd ask to strike it. That's  
5 argumentative.

6 MR. VARTAIN: The university --

7 THE COURT: Folks, will you be quiet for a  
8 minute.

9 Overruled. The objection is overruled.

10 MR. VARTAIN: The university witnesses I expect  
11 will testify that they saw the lawyer stuff coming back.  
12 What was the lawyer stuff that came back? Mind you, the  
13 university didn't have lawyers. It was Mr. Katzenbach's  
14 letter saying "You tell us who are the people doing  
15 the -- saying they have concerns."

16 University had advice from Dr. Missett: "Don't  
17 release that information. That's information that Dr.  
18 Reynolds will discuss with him. You don't give out  
19 information about who are the people who feel unsafe.  
20 They have their own privacy too."

21 So the university did say "No, we're not giving  
22 you name, rank and serial number of the people who have  
23 come forward with concerns." And they said that to Mr.  
24 Katzenbach and to Professor Kao when they asked for the  
25 information in response to the university inviting him

1 to provide medical information.

2 Through June, July, August, September, October,  
3 December, January until he was terminated  
4 February 3<sup>rd</sup>, not once did Professor Kao have his  
5 doctor call the university, send a letter, send a report  
6 with any kind of different medical information, even  
7 though the university had asked for it. That's what the  
8 evidence is going to show.

9 So fact 7 is the university invited Professor  
10 Kao and his attorney on multiple occasions. "Tell us  
11 what you want to tell us, if it'll change our mind." He  
12 didn't. He refused.

13 Fact 8, depression. How many people in this --  
14 and the witnesses will say -- Ms. Peugh-Wade is in HR.  
15 She administers the medical policies for the university.  
16 She is the one who actually made the final decision that  
17 she would accept Dr. Missett's advice and send Professor  
18 Kao for the medical and psychological evaluation.

19 Ms. Peugh-Wade will testify -- she is the  
20 person who decides the health benefits of the  
21 university. She will testify that she personally has  
22 been an advocate through the years -- she's been at the  
23 university 20 years. If you look at the university's  
24 health benefits -- and you will see it in evidence --  
25 mental health, nervous condition, drug rehabilitation



1 benefits. Unlike the corporations, they haven't been  
2 removed. She has fought to keep those benefits in  
3 there.

4 She's had numerous leaves of absence requests  
5 from people with depression. The university does not  
6 treat mental health issues any different than physical  
7 health issues for any purposes. And the university has  
8 many employees who have used those.

9 The fact that Professor Kao -- and the evidence  
10 will show he self-disclosed his depression seven, eight  
11 years ago. He sent a letter around to the department  
12 "I've had a drug -- I've had a drug problem. I'm going  
13 to be taking a leave." And he self-disclosed it.

14 The university never asked him or inquired of  
15 that. But for all those years, he never had any issues  
16 with the university related to depression, as the  
17 evidence will show. Ms. Peugh-Wade will explain to you  
18 that's never an issue at the university.

19 What happened that was different in this year,  
20 in 2008, wasn't that Professor Kao got depression; he  
21 had had that for years. What was different was the  
22 behaviors were starting to scare people that he was  
23 becoming unstable. They had real concerns, they will  
24 testify, as to what might happen. That was the new and  
25 different thing. The depression had been there forever.

1           Okay. Could you play -- this is what Professor  
2 Kao testified at his deposition, that nobody held it  
3 against him that he had depression.

4           (Playing video clip as follow:

5           MR. VARTAIN: Q. Did anyone in the  
6 chain of command above you -- that is, your  
7 supervisors, managers, directors -- ever say  
8 to you something that suggested to you that  
9 they were ridiculing of you because you had  
10 depression?

11           ANSWER: No.

12           QUESTION: Did you ever ask the  
13 university or any supervisors at the  
14 university to give you any accommodations  
15 for depression, or any other physical or  
16 mental condition, that they refused to give  
17 you?

18           ANSWER: No specific accommodations,  
19 no.)

20           MR. VARTAIN: Nothing was ever denied Professor  
21 Kao for his depression. He had never been ridiculed.  
22 His testimony when I get to question him, I believe,  
23 will be exactly that. Depression will be a nonfact in  
24 this case, the evidence will show, except to show that  
25 the university actually had a positive, empathic and

1 compassionate view, in the sense that they didn't fire  
2 him for those behaviors; they tried to look at it as a  
3 potential medical issue by sending him to a medical  
4 doctor for an assessment.

5 So that's fact 8. Depression wasn't the issue.

6 Fact 9: Sort of covered this when I blew away  
7 the smoke. But this business of his complaints and this  
8 being alleged retaliation, Mr. Katzenbach himself said  
9 he started making complaints in the year 2000. If you  
10 remember his time line, it was way back then. And he  
11 even said the complaint number 1 was settled.

12 What employer who has a retaliatory refusal  
13 attitude towards an employer [sic] -- the evidence will  
14 show they didn't -- would settle the complaint.

15 Fact 2 -- point 2: He made a complaint in  
16 2006. The evidence will show -- Mr. Katzenbach didn't  
17 put this in his opening statement -- was that the  
18 university offered to settle that one too. He had this  
19 issue that his medical leave four years earlier -- he  
20 shouldn't have been on medical leave, he should, he  
21 shouldn't.

22 The proposal was to settle that 2006 complaint  
23 to give him his salary back that he said he'd lost for  
24 that medical leave, in return for which sign away the  
25 wipe-the-slate-clean agreement. You saw that that's

1 what -- Mr. Katzenbach made the point. He didn't want  
2 to do that. He didn't want to sign away. But even  
3 then, the university compromised -- reached out to him.

4           So the evidence will show that the university  
5 didn't have a motive of being negative towards him  
6 'cause he's, you know, a kind that likes to complain.  
7 It was to have a motive of "Look, he's a faculty member.  
8 We got faculty members there. He's complained. Let's  
9 get him off the complaining. Let's resolve this  
10 complaint so he can go back and work hard."

11           The next and last point, yes, Professor Kao  
12 made another complaint at the same time as he was  
13 engaging in these behaviors. Actually, the behaviors he  
14 was engaging in were an envelope in which was this  
15 complaint.

16           You'll see the faculty members were scared, not  
17 because he was still making these complaints but because  
18 now they were in the envelope of these very scary  
19 behaviors.

20           So fact 8: It wasn't the complaining; it was  
21 the behaviors.

22           Fact 9: You'll hear from the people who were  
23 concerned for their safety. Mr. Katzenbach took their  
24 deposition. I saw some of them. Ms. Adler saw some.  
25 They were videotaped. I've read their depositions.

1 They're rank and file employees, in a sense. Not all of  
2 them. Four of them were just professors. They're not  
3 part of the management team.

4 They are -- they will testify -- because they  
5 already did, so I know that -- I can anticipate that  
6 they will -- that they were so concerned, but -- for  
7 themselves, but they were also concerned for Professor  
8 Kao. They did wonder whether something was going on  
9 inside him that was making him much worse than he had  
10 been before.

11 They will testify, including people who are  
12 Chinese-American, who have no racial bias or even --  
13 they're -- you know, Professor Yeung, Stephen Yeung,  
14 other faculty members will testify they've known -- they  
15 go back 20 years. These are not -- these are mature,  
16 stable people. They have seen Professor Kao in his up  
17 phase, and his down phase. They will testify this year  
18 was -- this time, it was very different.

19 And we all know that -- and they will explain  
20 from their perspective, there was something going on  
21 there that scared them in a way they hadn't ever been  
22 scared before. And you'll get to hear from them in  
23 person.

24 But the fact 9 is that -- whether they say  
25 there was yelling, shouting, it happened on this day or

1 that day, they will say that they -- they will testify,  
2 to a man and woman, that they truly felt something was  
3 going on with Dr. Kao which could cause him to act in a  
4 violent way. And they wanted to get out in front of  
5 this and prevent him.

6 They will also testify that yes, they -- one or  
7 two of them will admit -- quote, admit -- I don't think  
8 it's an admission -- that they were sick and tired of  
9 being harassed by Professor Kao.

10 One will say "You know, we sort of do hate him.  
11 He sends letters to the department. He signs his name  
12 with his attorney's name right after it. He worries us,  
13 not just as to his stability, but is he going to come  
14 after us legally." They were so candid with HR -- you  
15 remember in voir dire we had HR people here, both  
16 sides -- HR person made them say "Do you have anything  
17 against Professor Kao? I know you're scared of his --  
18 what do you have?"

19 And they'll say "Well" -- they were very  
20 candid -- "he does this lawyer thing. He signs his --  
21 he sends letters with his -- copies his names of his  
22 lawyers, Khtikian and Katzenbach," and it does worry  
23 them. "We think he's sort of harassing us with the fear  
24 of" -- and so they will say that's part of it. But it  
25 wasn't the part that made them scared; it was the

1 behaviors that made them scared. They will so testify.

2           Could you put the threat policy up, please, Ms.  
3 Adler.

4           And I mentioned, ladies and gentlemen, that  
5 they -- these faculty members -- and there were two  
6 deans who had these personal observations of Professor  
7 Kao acting in a new, scary way -- they actually had a  
8 duty to report those behaviors.

9           The university has a policy called "Threatening  
10 And Violent Behavior." And I don't think you can  
11 necessarily see it, but I'll pass it around during the  
12 evidence. You probably can't read this.

13           Can you open it up a little more? All right.

14           It says "Threats may be statements of intention  
15 or expressions of" -- there you go right there. Great.  
16 Thank you -- "expressions of strong emotion. They can  
17 be direct or" -- this is the university's policy. This  
18 isn't -- "They can be direct or indirect, verbal or  
19 nonverbal," threats can be. "Shaking a fist" -- the  
20 evidence will show Professor Kao did that -- "or  
21 pounding a desk, throwing things, and showing a weapon  
22 are all examples of nonverbal threats."

23           So just like Mr. Katzenbach's PowerPoint wasn't  
24 evidence, nor is my opening statement actual evidence,  
25 it doesn't have to be a threat -- to be a threat, it

1 doesn't have to be the person actually says "I'm going  
2 to kill you"; if they do something that implies that  
3 there is a potential for danger, that's a threat, under  
4 university policy.

5 University policy didn't ask the faculty  
6 members to make a decision. It says these situations  
7 are complex, and it is not expected that individuals  
8 will be able to assess whether the threat is serious and  
9 might actually lead to harm.

10 The evidence will show the university just  
11 wanted the faculty -- "Tell us what happened. Don't  
12 tell us what we should do about it. Your job is to  
13 report your concerns. The authorities at the  
14 university's job is to assess whether it's serious."

15 And the university authorities, as I -- as I  
16 explained before, the evidence will show, they needed to  
17 get expertise to help them assess whether this was  
18 serious. They did the right thing.

19 I think probably that's enough for now. We'll  
20 talk about that later.

21 Because I've mentioned that these four faculty  
22 members who knew Professor Kao for a long time, and two  
23 deans, will testify, just wanted to give you a little  
24 bit of what I anticipate their testimony to be. And I  
25 anticipate it from hearing what their testimony was when



1 Mr. Katzenbach questioned them.

2 And I won't -- it's just so much, I won't read  
3 it all. But I do want you to have a flavor of it so  
4 when you hear the testimony, you can sort of put it  
5 together.

6 Professor Needham -- he'd known Professor Kao  
7 for years and years -- testified and will testify that  
8 he saw a gradual deterioration in Professor Kao over the  
9 years. But he said in 2008 -- he will testify -- he  
10 would pass Professor Kao in the hall and Professor Kao  
11 would be glaring at him -- hadn't happened before --  
12 with such intensity that -- quote:

13 "Glaring at me with such intensity that  
14 I was really afraid of him."

15 And then this also started in 2008, this  
16 business of:

17 "Cackling, like wild laughing, just  
18 walking down a hall or in his office, which  
19 was right next to my office. You would hear  
20 this sort of bizarre laughter when he wasn't  
21 with anybody. But he would also do it just  
22 when he was walking around. And I reported  
23 my concerns and the concerns of my  
24 colleagues for our physical safety, to the  
25 Dean's Office."

1           Then Professor Needham talked about this bump.  
2 He wasn't telling the university about oh, you know --  
3 sometimes my son -- he's 22, and sometimes when we see  
4 each other, we just sort of bump each other, sort of  
5 like high-five or something like that. This wasn't  
6 that.

7           Professor Needham will testify that the bumping  
8 happened -- incidents started to happen when he began  
9 this precipitous decline of:

10           "Glaring at me angrily every day with  
11 facial contortions that I compare to the  
12 Virginia Tech killer. That's why I believe  
13 that it would have been in that final  
14 semester in the spring."

15           Quote, "We all" -- this is what he's going to  
16 testify to, I believe, because he -- this is what he  
17 told Mr. Katzenbach.

18           "I had conversations with Professor  
19 Yeung and Professor Zeitz. And it turned  
20 out essentially the same thing had happened  
21 to both of them, which all made us more  
22 nervous once we realized it was not an  
23 isolated thing that had happened to us  
24 individually."

25           Back to the bumps, he testified -- and I

1 anticipate he will testify --

2           "What actually happened was John bumped  
3 into me fairly forcefully in the hall. We  
4 were walking in opposite directions. So  
5 that in the normal course of things -- and  
6 we were on opposite sides of the hall -- we  
7 wouldn't have come anywhere near each other.  
8 The hallway was empty. I was reading a  
9 piece of paper. I just took note of the  
10 fact that John was walking in my direction,  
11 but I didn't particularly want to make eye  
12 contact. The next thing I know, I was  
13 forcefully bumped by him and he just -- he  
14 just kept going. I felt there was no way it  
15 could be an accident, and it was strange  
16 that even if it was, he would have  
17 apologized, you'd think. I was sort of  
18 shocked. It didn't hurt that much, but it  
19 was a forceful bump."

20           And he testified that this had happened  
21 multiple times in that semester.

22           Professor Pacheco, also 20 years in the  
23 department, another just long-time student-devoted  
24 faculty member -- he will testify, 'cause he answered  
25 Mr. Katzenbach's questions under oath, quote:

1            "It seemed to me that over a long  
2            period of time, his mental state had  
3            deteriorated" --

4            MR. KATZENBACH: Your Honor, if he wants to  
5            testify to what he thinks people will say, that's fine,  
6            but to read from a deposition's hearsay. So objection.

7            THE COURT: Objection overruled.

8            MR. VARTAIN: I anticipate that Professor  
9            Pacheco will testify, 'cause he did, that Professor Kao,  
10           quote:

11           "Would more frequently become upset in  
12           2008. And this would express itself" -- I'm  
13           quoting -- "by his tensing up, his ceasing  
14           to respond to questions and statements that  
15           were made to him. He would repeat himself  
16           frequently. He would shout at people.  
17           Became more progressively frequent. I guess  
18           his muscles flexed and he'd become fairly  
19           rigid except some quivering. Face -- his  
20           face would turn into sort of a mask-like  
21           grin."

22           Professor Zeitz -- I don't think 20 years, but  
23           maybe 18 years. And at the end, I'm going to suggest to  
24           you what the evidence will show, why these people were  
25           on the receiving end of the angry and scary behavior and

1 not others, 'cause Mr. Katzenbach will bring in some  
2 people who will say, well, they didn't see this. So not  
3 everybody in the whole university was interviewed about  
4 Mr. Kao, the facts will show.

5 Professor Zeitz: "We were in the men's  
6 room -- we were both in the men's room and  
7 washing up. Somehow in the course of moving  
8 about in the men's room, Professor Kao  
9 bumped into me. And I could not recall a  
10 single incident of this kind occurring with  
11 any other individual in the 20 years --  
12 practically 20 years I've been at USF. And  
13 then it happened again. I was leaving the  
14 office. I was leaving my office. Dr. Kao  
15 was there. There was plenty of room for  
16 maneuvering, but again he just bumped up  
17 against me. Both of them were disturbing.  
18 I had never had this physical contact  
19 before. And I -- and it was a change of  
20 behavior in an aggressive way because now my  
21 physical space, you know, that was being --  
22 that was being invaded."

23 I just am giving you a few. There's many more.  
24 We can't take all the time. It'll come out in  
25 testimony.

1           Professor Yeung, the Chinese -- he's not  
2 Chinese-American; he's Chinese because he's actually  
3 emigrated from Taiwan. He corrected me on that. He's  
4 not an American citizen, but he hopes.

5           He -- when he comes in to testify, you need to,  
6 as the court suggested, look at his body language. He  
7 is still very, very upset. And he may testify in a  
8 manner that reflects that deep anxiety. He has small  
9 children, and he will testify about that. He's  
10 talking -- he's answering Mr. Katzenbach's questions  
11 about a particular meeting, and he said -- he described  
12 Professor Kao's behavior, and he said things were --  
13 quote:

14           "Things were getting out of control. I feared  
15 for my safety, that it would," quote, "escalate into  
16 some bodily, physical argument."

17           He then testified about this cackling laughter  
18 that he had never heard before until that particular  
19 semester, and it sounded -- he will testify -- like  
20 nothing he'd ever heard before. And it was in the next  
21 office from him.

22           He will testify to other incident -- other  
23 things Professor Kao engaged in that caused him to want  
24 to work at home.

25           The other faculty will testify they started to

1 work at home. They didn't want to come into their --  
2 they changed their path of travel; they changed the  
3 times of day when they would work.

4 Professor Needham will testify he started  
5 working on the weekends 'cause he didn't think Professor  
6 Kao was around, and he wanted to limit cause of a safety  
7 concern. And he actually had a real anxiety attack when  
8 he came in on the weekend and found Professor Kao there,  
9 because it was after these -- this glaring and yelling  
10 had continued for some time.

11 Dean Turpin. Dean Turpin, the one who's now  
12 the second at the university -- it's called the provost;  
13 it's really like the executive vice president -- she was  
14 the dean of -- there's five colleges. She was the dean  
15 of the College of Arts and Science. Now she's the  
16 second under the president.

17 She will testify as to several -- two different  
18 really -- particularly for a woman -- a scary encounter  
19 with Professor Kao when he looked like he was not in  
20 control of his emotions and his body. He got very close  
21 to her. He was shouting at her. And he said things  
22 about her children that really scared her, all because  
23 he -- she asked him, in a compassionate way, has -- "Is  
24 your mom better? Has she finished her procedures," and  
25 so on.

1           And Professor Kao will testify -- 'cause I  
2 asked him -- that Dean Turpin is a compassionate person.  
3 But he returned the compassion with behavior that was  
4 extremely scary to her.

5           You know, I've got so many more incidents here,  
6 but I think -- I think I will complete fact 9 by  
7 pointing out that this was not a situation that had yet  
8 escalated to violence. It had not yet escalated to  
9 certainty by anybody that it would ever escalate to  
10 violence.

11           What it had escalated to was to a point, the  
12 evidence will show, that the university felt the duty to  
13 assess it in a professional, expert, independent way.

14           Testimony will show that Professor Kao  
15 rejected -- even when he knew that it was his job or the  
16 assessment, he rejected the university's right to get  
17 that independent assessment.

18           The testimony will show that Professor Kao  
19 knowingly, consciously, chose to give up his job, 'cause  
20 he knew there was only one thing the university asked of  
21 him, and that is to do the medical and psychological  
22 evaluation with the hope that it would give the  
23 university reassurances that it could bring him back  
24 with whatever accommodations were necessary.

25           The testimony will show that he chose -- much



1 less than the university chose -- he chose that the fact  
2 that he's not working at the university anymore.

3 Thank you for your time of your court, Judge,  
4 and I will stand down.

5 THE COURT: All right. Thanks, Mr. Vartain.  
6 Plaintiff may call his first witness.

7 MR. KATZENBACH: Yes. Your Honor, we're going  
8 to begin with a witness I hope to get done before noon,  
9 not very long, Liza Locsin.

10 Your Honor, do you want questioning from the  
11 podium?

12 THE COURT: I don't care.

13 MR. KATZENBACH: Okay. We'd like to call Liza  
14 Locsin.

15 (Witness sworn.)

16 LIZA LOCSIN,

17 having been first duly sworn, testified as follows:

18 THE CLERK: Will you have a seat. Will you  
19 please state your name and then spell it for the record.

20 THE WITNESS: Liza Locsin, L-I-Z-A,  
21 L-O-C-S-I-N.

22 DIRECT EXAMINATION BY MR. KATZENBACH

23 MR. KATZENBACH: Q. Good morning, Ms. Locsin.  
24 Who do you work for?

25 A. I work for the College of Arts and Sciences at

1 the University of San Francisco.

2 Q. And what position do you have?

3 A. I'm an assistant to the dean.

4 Q. What does an assistant to the dean do?

5 A. Well, for me it's -- I'm the gatekeeper for the  
6 schedule. So I -- this is my third dean.

7 Q. Okay.

8 A. And my work is very project-oriented. I deal  
9 with program reviews and the -- and social events and  
10 conferences and organizing, meetings, workshops.

11 Q. And you --

12 A. And other duties.

13 Q. And other duties. Okay.

14 And you indicated this is your third dean.

15 What deans have you worked for?

16 A. I worked for Stanley Nel -- oh, I actually  
17 worked -- this is my fourth dean.

18 Q. Very good.

19 A. I worked for Carl Naegel, Stanley Nel, Jennifer  
20 Turpin, and now Marcello Camperi.

21 Q. And what years did you work for Dean Turpin?

22 A. All of the years that she was dean. 2000 to  
23 2008, I guess. I'm sorry, I'm not very good with the --

24 Q. Do you recall the dean that you were working  
25 for in the spring semester of 2008?

1 A. Yes.

2 Q. Who was that?

3 A. Jennifer Turpin.

4 Q. Okay. Thank you.

5 Now, can you tell us where the Dean's Office is  
6 located at the University of San Francisco.

7 A. It's in Harney Science Center Building, Room  
8 240.

9 Q. Okay. Does that mean it's on the second floor?

10 A. Yes.

11 Q. And is that -- do you know where the  
12 mathematics department is located?

13 A. It's also on the second floor.

14 Q. How far apart are those offices?

15 A. They're on the -- not very far. You just have  
16 to walk down the hallway.

17 Q. Would it be accurate to describe that the  
18 math -- that you would -- from the math department,  
19 you'd walk down the hallway and then walk -- take a  
20 right turn, and then you'd walk into the Dean's Office?

21 A. Yes.

22 Q. Okay.

23 A. Well, you have to walk a little bit --

24 Q. After --

25 A. -- past the elevator and -- yeah.

1 Q. Okay. Fine.

2 And your particular desk, where does that sit?

3 A. Well, the Dean's Office is a complex of  
4 offices. So we are technically in Room 240, but there's  
5 a reception area in the front and there are small  
6 offices in the back. And I've been in different spaces  
7 at, you know, times -- different times in my job.

8 Q. Do you recall where you were located in the  
9 spring semester of 2008?

10 A. Yes.

11 Q. And where was that?

12 A. In 240.

13 Q. Okay. Now, do you know John Kao, who's sitting  
14 over there at the plaintiff's table?

15 A. Yes.

16 Q. How long have you known Professor Kao or Dr.  
17 Kao?

18 A. Since he started working at USF. Please don't  
19 ask me when, 'cause I don't remember.

20 Q. That's all right. How did you first come --  
21 how did you get to know him?

22 A. He was hired by Stanley Nel.

23 Q. Okay.

24 A. So ...

25 Q. And what sort of -- did you have social

1 interactions with Dr. Kao?

2 A. Yes, we're friends.

3 Q. Okay. Can you describe what sort of things you  
4 would do together socially.

5 A. You know, we'd have coffee, lunch.

6 Q. And did that continue throughout the time Dr.  
7 Kao was working?

8 A. Yes.

9 Q. All right. And did that include the spring of  
10 2008?

11 A. Yes.

12 Q. Okay. At any time -- do you have children?

13 A. Yes, I have a daughter.

14 Q. Have your -- have you ever brought your  
15 children to work?

16 A. Yes.

17 Q. Did you ever introduce them to Dr. Kao?

18 A. Yes. My daughter knows John.

19 Q. Can you tell us how they got together -- how  
20 they were introduced?

21 A. John's pretty good with -- was pretty good with  
22 Isabel. He met her when she was little, so ... I think  
23 like maybe first grade or even maybe younger, so ...

24 Q. Okay. Do you recall going to any events with  
25 Dr. Kao and your children -- and Isabel?

1           A.    We went to the Exploratorium 'cause we're both  
2 members, so ... and I think we went to the zoo. Not  
3 quite sure.

4                    I do recall that.

5           Q.    And do you ever recall visiting -- Isabel  
6 visiting Dr. Kao in his office?

7           A.    Yes, when I'm -- sometimes when Isabel comes  
8 with me on weekends or something and when she sees John,  
9 she goes and talks to him, plays with -- he has like  
10 toys, kind of -- oh, he has giant cards and -- he had  
11 giant cards in his office, so she liked to play with  
12 those, or kind of like -- I think he had Rubik's cubes  
13 or something. And she liked to play with those too,  
14 so ...

15          Q.    And during the spring 2008 semester, did anyone  
16 come to you and indicate that they had any concerns  
17 about Dr. Kao?

18          A.    No. Everyone knows that he's a friend of mine,  
19 so I took really good care about separating my  
20 relationships at work, so ... I'm very careful about --  
21 even if I work in the Dean's Office -- there was another  
22 assistant to the dean that dealt with the issues that he  
23 had. For instance, if there were faculty issues and  
24 things like that, the other assistant would take care of  
25 it because that was a part of her job.

1 Q. When you say that everyone knew that you were  
2 friends of John's, why do you think that?

3 A. 'Cause we would go to lunch or coffee or  
4 some -- people would see us around campus, so ...

5 Q. And just to be clear, no one ever came to you  
6 and addressed anything to you about their concerns about  
7 John during the spring 2008 semester?

8 A. No. Not that I recall, anyway.

9 Q. And you don't recall Dean Turpin asking you  
10 about John Kao during the spring 2008 semester?

11 A. I'm sure she did, but not about personal -- I  
12 mean, if there were meetings or something. I -- I, of  
13 course, took care of her schedule. If there were  
14 meetings to be made, then --

15 Q. Okay.

16 A. -- I would have made them.

17 Q. But nothing about any behavior by John Kao that  
18 was frightening to her or to other people?

19 A. She didn't ask me anything. She did tell me  
20 about one encounter; I just don't know when. So I can't  
21 really say if it was in 2008 --

22 Q. Okay.

23 A. -- or whatever year that was. I just have a  
24 memory. And I'm sorry, I can't really kind of explain  
25 when, or I can't even remember. I tried to remember.

1 Q. Okay.

2 A. Like ...

3 Q. Did anyone come to you and say that they were  
4 concerned during 2000- -- spring 2008, come to you and  
5 say that they were concerned about John Kao's mental  
6 health?

7 A. Not that I recall.

8 MR. KATZENBACH: Thank you. That's all I have.

9 THE COURT: Mr. Vartain, would you care to  
10 inquire?

11 MR. VARTAIN: I would, Your Honor, very little  
12 and very gently.

13 CROSS-EXAMINATION BY MR. VARTAIN

14 MR. VARTAIN: Q. Ms. Locsin, I'm the  
15 university's attorney, and I have a few questions.

16 A. Okay.

17 Q. You mentioned the dean -- Dean Turpin, that  
18 you -- she mentioned to you, I think you said, but you  
19 don't remember exactly when, that she had had an  
20 encounter with Professor Kao.

21 A. Yes, I seem to recall an encounter by a parking  
22 lot. I -- or near -- kind of the library parking lot.  
23 But that's all.

24 Q. When you saw Dean Turpin and she discussed --  
25 did she mention something about having had an encounter



1 with Professor Kao?

2 A. Yes.

3 Q. Did she mention anything about her emotional  
4 condition as a result of that encounter, or is there --  
5 did she indicate it to you by her face, or anything  
6 about it?

7 A. She seemed disturbed by it, but ...

8 Q. Did she seem to be in any way worried about it?

9 A. A little. I think. I don't know. I'm trying  
10 to remember. She -- she wasn't -- she's usually very  
11 calm and, you know, bubbly and when -- and happy and  
12 stuff, but -- and when she talks to me, she's very calm  
13 and stuff. But I seem to recall that she was kind of  
14 perturbed or -- I don't really know what the word is.  
15 But she wasn't herself.

16 Q. She wasn't her normal calm self. Did she tell  
17 you, on that day that she wasn't her normal calm self --  
18 did she say when she had had this incident with  
19 Professor Kao in the parking lot?

20 A. Not really. I don't -- I'm trying to remember  
21 if it was at the end of the day or the beginning, but I  
22 don't.

23 Q. Would you be confident in telling the jury,  
24 though, that from what you could tell, the dean was  
25 telling you something about an interaction or an

1 incident she had with Professor Kao, that incident or  
2 interaction having happened in the past day or so?

3 A. I believe it was.

4 Q. Okay. And that she didn't seem her normal calm  
5 self to you?

6 A. No.

7 Q. Is that correct?

8 A. She usually discusses things that happen, you  
9 know, during -- if something had happened on the way to  
10 work or anything, so ...

11 Q. But on --

12 A. It would be customary for her to do that.

13 Q. But I think you said on this occasion, she  
14 didn't seem to be her normal self.

15 A. Yeah, no, but, I mean, just like talking about  
16 what happened --

17 Q. Yeah.

18 A. -- on the way to work would be --

19 Q. I think you're saying it wouldn't be abnormal  
20 for the dean to have a conversation --

21 A. Yes.

22 Q. -- with you.

23 A. With me.

24 Q. Is that what you're saying?

25 A. Yes.

1 Q. Okay. Good.

2 A. In a roundabout way.

3 Q. Well, I think you did it. But I think -- would  
4 it be fair to say that what was different about this  
5 particular conversation was that the dean did seem to be  
6 not calm and somewhat agitated?

7 A. Yes. I don't know if that's a good word. I  
8 just can't think of one right now.

9 Q. Okay. But it's been -- it's been four years?

10 A. Yes.

11 Q. Is that right?

12 A. Yes.

13 Q. And nobody asked you to give your deposition  
14 along the way to this case. This is -- you just came in  
15 today, correct?

16 A. Yes.

17 Q. What was your experience with Dean Turpin in  
18 terms of being your boss over those years? Was she a --  
19 someone who seemed to you to be fair to all people of  
20 races, genders and the like?

21 MR. KATZENBACH: I'm going to object. I think  
22 that's just going into character.

23 THE COURT: Sustained.

24 MR. VARTAIN: Q. Did you have any personal  
25 experience with Dean Turpin in your -- in your -- you

1 know, as a supervisor of you? Is she your direct  
2 supervisor?

3 A. Yes, she was.

4 Q. Okay. So throughout those years, you came to  
5 know her in such a way that you could actually identify  
6 when she was upset and when she was not upset; would  
7 that be fair to say?

8 A. Yes.

9 Q. And on the day you saw her, she seemed to be  
10 somewhat upset, correct?

11 A. Yes.

12 MR. VARTAIN: No further questions.

13 THE COURT: Further questions for the  
14 plaintiff?

15 REDIRECT EXAMINATION BY MR. KATZENBACH

16 MR. KATZENBACH: Q. Did anyone from human  
17 resources interview you about John Kao?

18 A. No.

19 Q. Did anyone from human resources interview you  
20 about anything you may have observed about Dean Turpin?

21 A. No. You mean on that day --

22 Q. At any time.

23 A. -- or just in general.

24 Q. At any time.

25 A. No.

1 MR. KATZENBACH: Okay. That's all I have.

2 MR. VARTAIN: That opens up a question or two.

3 May I, Your Honor?

4 THE WITNESS: What?

5 MR. VARTAIN: I'm asking permission from His

6 Honor to ask you a question or two more. I guess

7 he's -- by looking at me, he's saying I --

8 THE COURT: Yeah, it's your turn.

9 MR. VARTAIN: I'm going to take that as a green  
10 light.

11 RE-CROSS-EXAMINATION BY MR. VARTAIN

12 MR. VARTAIN: Q. Ms. Locsin, did you ever  
13 report something to human resources of a concern with  
14 Professor Kao?

15 A. No.

16 Q. Did you ever give human resources any reason to  
17 come and interview by making a complaint?

18 A. No.

19 Q. Or sending an email?

20 A. No.

21 Q. Did you ever ask anybody, whether it be in  
22 supervision or human resources, to talk to you?

23 A. No.

24 Q. Did you ever tell anybody that you had some  
25 information that would bear on whether the university

1 should continue to employ Professor Kao or not?

2 A. No.

3 Q. Did Professor Kao ever ask you -- you were his  
4 friend then, weren't you?

5 A. Yes.

6 Q. Did he ever ask you to go to human resources  
7 and put in a good word for him?

8 A. No.

9 Q. Did he ever ask you to go to human resources  
10 and give him your personal views on his stability or his  
11 employability?

12 A. No.

13 MR. VARTAIN: No further questions.

14 THE COURT: Any redirect?

15 MR. KATZENBACH: One second, Your Honor.

16 THE COURT: Jurors, do you have questions that  
17 you'd like to pose to this witness? I see no hands.

18 May the witness be excused?

19 MR. KATZENBACH: No questions, Your Honor.

20 MR. VARTAIN: No further questions, Your Honor.

21 THE COURT: May the witness be excused?

22 MR. VARTAIN: Yes.

23 MR. KATZENBACH: Yes.

24 THE COURT: Thank you very much, ma'am. You're  
25 free to go.

1 Ladies and gentlemen, remember the admonition.  
2 Do not form or express any opinion on this case until  
3 it's finally submitted to you for your decision. Do not  
4 discuss among yourselves or with others until that time.

5 Please take your lunch break. Be in place --  
6 back in your places at 1:30 according to the courtroom  
7 clock. Please leave your instructions and notebooks  
8 behind.

9 (Jurors left the room.)

10 THE COURT: Jurors and alternates have left the  
11 courtroom. Counsel for both sides and the plaintiff  
12 remain.

13 Defendant made a motion off the record for a  
14 judgment of nonsuit as to a couple of the theories of  
15 recovery. I denied the motion on the ground that the  
16 plaintiff hadn't had warning that this was coming and  
17 therefore hadn't been presented with full opportunity to  
18 meet the questioning of the adequacy of the evidence to  
19 support theories of recovery.

20 Last break, I ran down the hall and took a look  
21 at the hearing annotated code for Code of Civil  
22 Procedure 681c [sic].

23 It didn't definitively answer the question of  
24 the correctness of my ruling but seemed to support it by  
25 mentioning the nonsuit after opening statement being a

1 disfavored theory of proceeding and material to the fact  
2 that plaintiff should be given every opportunity to  
3 demonstrate that his theory of recovery was proof  
4 against a nonsuit, which didn't happen in this case.

5 I invite comment from the defendant first.

6 MR. VARTAIN: Yes, I did indicate, Your Honor,  
7 off the record, after the plaintiff completed his  
8 opening statement, that I had a motion for nonsuit.

9 I didn't have the opportunity to state it on  
10 the record, and we agreed that I would present it to you  
11 on the record after the conclusion of both opening  
12 statements. And you gave me permission -- or you  
13 instructed me to wait until after both opening  
14 statements were completed.

15 The motion is brought under CCP Section 581c  
16 and it is brought as to two -- the fifth and sixth  
17 causes of action of the complaint, the sixth cause of  
18 action being defamation for which under the case of  
19 Jensen v. Hewlett-Packard, while nonsuits after opening  
20 statements are generally disfavored, in defamation  
21 actions they are a favored remedy. See Jensen v.  
22 Hewlett-Packard, 14 Cal. App. 4<sup>th</sup> 958, 965.

23 The motion for nonsuit on the defamation claim  
24 is both as to defendant University of San Francisco and  
25 as to defendant Martha Peugh-Wade. And it's actually



1 the only cause of action that the plaintiff has brought  
2 against Martha Peugh-Wade, so it's of particular  
3 significance to her as, if that motion was granted on  
4 the defamation claim, then she would be eliminated as a  
5 defendant and would not have to bear the burden of  
6 proceeding in this case.

7           And the basis for the motion of nonsuit as to  
8 defamation was that the plaintiff did not identify any  
9 evidence by which Martha Peugh-Wade would have or did  
10 make statements that would meet the definition of  
11 defamation under the Civil Code.

12           There was absolutely no reference to any oral  
13 statement or written statement by her to any  
14 disinterested party. There was no reference to any oral  
15 or [sic] statement by her that was false and not an  
16 opinion.

17           There was just nothing at all about anything  
18 she said to anybody except to Professor Kao and  
19 Professor Kao's attorney, and except to the other  
20 decision-makers at the university, and to the  
21 consultant, Dr. Missett, where she was obviously in a  
22 privileged -- qualified privileged capacity where she  
23 was seeking advice and exchanging information with Dr.  
24 Missett, who was retained to advise the university.

25           And very specifically nothing -- there was no

1 statement asserted in any specific or even general way  
2 that was attributed to Martha Peugh-Wade that the  
3 plaintiff contends defamed plaintiff.

4 So that's my motion on the nonsuit -- on the  
5 nonsuit on the defamation, both as -- the motion brought  
6 both on behalf of Martha Peugh-Wade and the university.

7 On the fifth cause of action for violation of  
8 the Unruh Civil Rights Act, a motion for nonsuit is  
9 brought on the basis that the plaintiff did not identify  
10 any facts that would show that the university -- A, that  
11 the plaintiff was in the capacity in relation to the  
12 university, other than as an employee.

13 The Unruh Act does not apply to employment  
14 relationships; the Fair Employment and Housing Act does.  
15 The Unruh Act would apply to the relationship between a  
16 university and a consumer, like a student, or other  
17 purchaser of its services.

18 There's absolutely no facts whatsoever that  
19 plaintiff alluded to in his opening statement that  
20 Professor Kao, either during or after his employment  
21 ended, sought or had any relationship with the  
22 University of any kind that would be regulated by the  
23 Unruh Act.

24 Further, even apart from that fact, that was  
25 not a fact that was asserted in the opening statement --

1 Mr. Katzenbach did not in any way state that there was  
2 any action by the university in the capacity of  
3 providing services to another, like a consumer, which  
4 were denied to Professor Kao, and finally, that were  
5 denied to Professor Kao on any basis that's prohibited  
6 by the Unruh Act.

7 So for all those reasons, the motion for  
8 nonsuit is brought as to the fifth cause of action.

9 The other causes of action are untouched by the  
10 motion for nonsuit.

11 THE COURT: Mr. Katzenbach?

12 MR. KATZENBACH: Yes, Your Honor. I believe  
13 that on these matters, first, that the reason that -- if  
14 the counsel had brought this motion and explained the  
15 basis for it, I would have, of course, had the right to  
16 supplement my opening statement as to the reasons  
17 brought at that time, and we would, of course -- we  
18 would have fixed any problems that might be there.

19 As to the allegations, the evidence is that  
20 the -- on the defamation, I think I stated on opening  
21 that information had in fact been given to Dr. Reynolds  
22 concerning the alleged facts. And I also put in  
23 evidence indicating that they did not really believe  
24 these facts that this evidence was retaliation for his  
25 prior complaints.

1 I also -- as to the Unruh Act, they -- the  
2 testimony -- I think the opening statement did refer to  
3 the fact that Dr. Kao was banned from campus.

4 And the campus is a open -- is an open campus.  
5 The campus is -- the Unruh Act is not -- either --  
6 neither pro or against the fact he was once an employee;  
7 it's a fact -- a question of whether or not -- whether  
8 or not it's a campus that people go to regardless of,  
9 you know, their employment status. And that fact  
10 is a -- that fact -- the fact that it's an open campus  
11 is a fact that if not apparent from the opening  
12 statement would have been a fact easily added.

13 Secondly, the basis for the banning, I think  
14 that is apparent from the argument that they were  
15 treating him as if he had some mental disease. That's  
16 an argument, in fact, that defendants reasserted in  
17 their own opening statement.

18 So my feeling would be, Your Honor, that this  
19 was something -- these allegation -- if -- if there's  
20 anything in the opening that was deficient, this would  
21 have been easily cured had the specific objections been  
22 made at the time, and we could have certainly added  
23 those factors to the opening.

24 THE COURT: Okay. Anything further, Mr.  
25 Vartain?

1           MR. VARTAIN: The only further thing was, Your  
2 Honor, you -- you asked me in the -- off the record  
3 whether I had anticipated this, and if so, did I give  
4 notice to plaintiff.

5           And the answer is I did not anticipate either  
6 of these bases, and I -- and I just didn't know what he  
7 was going to assert in his opening statement.

8           So I don't think there's any -- I know that  
9 there's no case law or statute that requires that I, you  
10 know, have divine intervention and then give notice of  
11 any conceivable motion for nonsuit.

12           But I did timely object -- or I did timely give  
13 notice to opposing counsel and the court after the  
14 conclusion of the opening statement. At least as to the  
15 defamation cause, it's a favored remedy, and I would ask  
16 the court to entertain that because it would have the  
17 effect of allowing me to release a defendant from this  
18 case who is not a proper defendant, if that -- if that  
19 claim is nonsuited: Ms. Peugh-Wade.

20           THE COURT: All right. The ruling stands.

21           Mr. Vartain, I need your jury instructions.

22           MR. VARTAIN: Yes, I will bring them tomorrow,  
23 Your Honor, okay.

24           THE COURT: I think the code requires that you  
25 get them in before the first witness is sworn, but

1 better late than never.

2 MR. VARTAIN: We'll have them emailed. I --  
3 yes, I thought you were referring to today's -- the  
4 opening instructions. But yes, okay.

5 THE COURT: Okay. Got a note from one of the  
6 alternates. Turns out he knows some of the cast of  
7 characters, he didn't realize.

8 Let's go off the record and I'll show you guys  
9 the notes and we can decide what to do about them.

10 (Lunch recess from 12:15 to 1:30.)  
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1 AFTERNOON SESSION 1:28 P.M.

2 THE CLERK: Please remain seated and come to  
3 order. Department 318 is back in session.

4 THE COURT: Jurors and alternates are all  
5 present. Counsel from both sides are present. The  
6 plaintiff is personally present.

7 Mr. Salem, I got your note. What I'm going to  
8 ask you to do is, when I send the rest of the jurors  
9 home for the day, ask you to stay for a few minutes and  
10 we'll deal with it at that time.

11 Plaintiff may call his next witness.

12 MR. KATZENBACH: Yes, Your Honor. The  
13 plaintiff will call Dayna Soares.

14 (Witness sworn.)

15 DAYNA SOARES,

16 having been first duly sworn, testified as follows:

17 THE CLERK: Have a seat. Will you please state  
18 your name and spell it for the record.

19 THE WITNESS: Dayna Soares, S-O-A-R-E-S, first  
20 name is D-A-Y-N-A.

21 THE CLERK: Thank you.

22 THE COURT: Mr. Katzenbach, you may inquire.

23 DIRECT EXAMINATION BY MR. KATZENBACH

24 MR. KATZENBACH: Q. Ms. Soares, can you tell  
25 me who you're currently employed by.

1           A.    I'm currently employed by USF through  
2 AmeriCorps.

3           Q.    Okay.  And what do you do for USF?

4           A.    So currently I am a student teacher in a high  
5 school classroom at Mission High.

6           Q.    And have you taught classes at the University  
7 of San Francisco?

8           A.    I have.

9           Q.    How long have you been doing it for the --  
10 teaching classes at the University of San Francisco?

11          A.    Five years.

12          Q.    And in what area do you teach classes?

13          A.    Math.

14          Q.    And are you a part of the math department  
15 there?

16          A.    I'm an adjunct, so part --

17          Q.    What is an adjunct?

18          A.    It's a part-time faculty who is not on a  
19 tenured track but does teach classes for the university.

20          Q.    All right.  And what sort of degrees do you  
21 have?

22          A.    I have a master's degree in math.

23          Q.    And are you working towards any other degrees?

24          A.    I'm currently working towards a master's in  
25 education.



1 Q. And what sort of math courses do you teach --  
2 have you taught at the University of San Francisco?

3 A. I've taught several statistics courses, an  
4 algebra course, quantitative methods for business, and a  
5 course that I designed that was called real-world math,  
6 just another sort of general education-level math class.

7 Q. All right. And did -- going back to -- do  
8 you -- did you have an office at the University of San  
9 Francisco?

10 A. I did.

11 Q. And do you still have that?

12 A. I think my name's still on the door, but I'm  
13 not using it currently.

14 Q. Going back to spring of 2008, did you have an  
15 office then?

16 A. Yes.

17 Q. And where was that office?

18 A. Room 220.

19 Q. Okay. Can you describe briefly sort of how the  
20 math department is laid out.

21 A. It sort of straddles a hallway in Harney, which  
22 is the building that it's in. There's a main sort of --  
23 the main office, where the program assistant sits, that  
24 has two faculty offices, and then there's two sort of  
25 side hallways that have several smaller offices off of

1 them.

2 Q. Okay. And were you in a pod with other  
3 offices?

4 A. Yes, three other offices.

5 Q. What were -- during spring 2008, who were the  
6 other professors in the offices in the same pod where  
7 you were?

8 A. So Bob Wolf and Tristan Needham. And I think  
9 John Kao was there as well that semester.

10 Q. Okay. And where was your office located in  
11 relation to Dr. Kao's office?

12 A. Right next-door.

13 Q. And during the course of -- how frequently were  
14 you on campus in spring 2008?

15 A. About two days a week.

16 Q. And what would you do when you were on campus?

17 A. Hold office hours, teach my courses, and then  
18 sometimes spend time in the office grading and planning.

19 Q. Okay. During the -- during spring 2008, did  
20 you ever observe any behaviors by Dr. Kao that  
21 frightened you?

22 A. No.

23 Q. Did you ever observe Dr. Kao engaging in any  
24 frightening behaviors towards any other professor?

25 A. No.

1 Q. Towards any other person?

2 A. No.

3 Q. Did you have -- did anyone come to you -- did  
4 any other math professors, start there, come to you and  
5 say that Dr. Kao was doing something that was bothering  
6 them?

7 A. No.

8 Q. Did you -- did you hear John -- did you hear  
9 Dr. Kao occasionally laughing?

10 A. Yes.

11 Q. And how did you hear that?

12 A. The wall is fairly thin between our offices.

13 Q. What does his laugh sound like?

14 A. Like laughter.

15 Q. Fair enough. Is there anything about his  
16 laughter that caused you to be concerned?

17 A. No.

18 Q. Did you observe his facial expressions on  
19 occasion?

20 A. Occasionally.

21 Q. Did -- at any time, did he seem to be  
22 displaying a facial expression that was frightening or  
23 scary?

24 A. No.

25 Q. During the course of when you were at the

1 university in the spring of 2008, did any faculty member  
2 come to you and say they thought that John needed some  
3 form of mental help?

4 A. No.

5 Q. Did anyone come to you -- did any faculty  
6 member -- strike that.

7 Do you know Professor Wolf?

8 A. Yes.

9 Q. Do you know if he has any reputation as a  
10 friend of Dr. Kao's?

11 A. No, I don't know anything about their  
12 relationship.

13 Q. Do you -- when you were in the -- during the  
14 spring of 2008, did anyone from human resources come to  
15 you and ask you about what you had observed regarding  
16 Dr. Kao?

17 A. No.

18 Q. Now, as a faculty -- as a adjunct faculty  
19 member, do you -- do you attend faculty meetings?

20 A. Twice.

21 Q. Are you there for the whole time?

22 A. No.

23 Q. On the occasions that you've been in faculty  
24 meetings, have you observed Dr. Kao?

25 A. Yes.

1 Q. And what has been his demeanor during those  
2 meetings?

3 A. At the one that I was at, I was -- I was only  
4 there to present something about my course, and he asked  
5 me some questions about it.

6 Q. Did you find anything that he was asking you  
7 frightening?

8 A. No.

9 Q. Did you find the questions he was doing  
10 appropriate for the presentation you were making?

11 A. Yes.

12 Q. Have you ever observed him yelling in any  
13 context?

14 A. No.

15 Q. Have you ever seen him with his fists clenched?

16 A. I don't think so.

17 Q. Have you ever seen him angry at anyone?

18 A. I've seen him animated about issues, but I've  
19 never seen him angry at somebody.

20 Q. What sort of issues have you seen him animated  
21 about?

22 A. I remember having a conversation with him once  
23 about textbook adoption, I think. And he was -- he  
24 didn't -- I think he didn't agree with or had some  
25 opinions about -- about the textbook. I think the

1 business school wanted us to change textbooks. I can't  
2 remember the exact context. So he was kind of -- he had  
3 opinions about -- about that book.

4 Q. Does he tend to be forceful in expressing his  
5 opinions?

6 MR. VARTAIN: Objection. Leading.

7 THE COURT: Overruled. What is the answer?

8 THE WITNESS: So, I mean, his opinion -- he --  
9 he was showing his opinions. He wasn't holding them  
10 back.

11 MR. KATZENBACH: Q. Okay. Anything -- when he  
12 expressed his opinion, anything about that that you  
13 found frightening or scary?

14 A. No.

15 Q. Did you ever see, when he talks to people or  
16 talking to you -- sorry. Strike that.

17 When he's talking to you, did you feel him  
18 getting inappropriately close?

19 A. No.

20 Q. Did you ever see him getting inappropriately  
21 close to anyone else?

22 A. No.

23 Q. Did you ever see him impeding on other people's  
24 movements around the department?

25 A. No.

1 Q. Did he ever do that to you?

2 A. No.

3 Q. Taking a look at the -- you -- the math  
4 department office, what goes on in the office?

5 A. The main one?

6 Q. Yes.

7 A. So that's where students go to ask questions of  
8 the program assistant, if they have registration  
9 questions. Students drop off -- graders drop off work  
10 for their professors. Sometimes if you don't -- if you  
11 have overflow of students in your office, you might meet  
12 with students in there. People eat their lunch in there  
13 sometimes.

14 Q. Is that a fairly confined space?

15 A. I mean, it's not huge, but it's not -- it's not  
16 supertight quarters. There's enough room for several  
17 people in there.

18 Q. Okay. Now, during -- has anyone at any time --  
19 sorry. Strike that.

20 Do you recall at some time -- I think when you  
21 just started teaching at the University of San  
22 Francisco, you took over a course that Dr. Kao was  
23 teaching.

24 A. Right.

25 Q. Can you tell the jury about what year that was

1 and what quarter that was.

2 A. It was fall of 2006.

3 Q. Okay. Now, who told you that you'd be teaching  
4 Dr. Kao's course?

5 A. I think at the time, Brandon Brown, I think,  
6 was the dean. And he called me.

7 Q. Okay. And at that time, did you then speak to  
8 John Kao about the course or anything about the course?

9 A. We had some email exchange about it.

10 Q. Okay. And is there anything about the exchange  
11 or any interaction with Dr. Kao in connection with that  
12 course that you found unpleasant or -- you found  
13 unpleasant with Dr. Kao?

14 A. No.

15 Q. Did Dr. Kao seem interested in helping you take  
16 over his course?

17 A. Yeah.

18 Q. Okay. And -- now, are you aware that Dr. Kao's  
19 no longer employed by the university?

20 A. Yes.

21 Q. How did you learn that?

22 A. I don't remember exactly. He was no longer in  
23 his office, and then -- I don't really know how I how --  
24 just kind of -- maybe I learned it from Christine, the  
25 program assistant. I don't remember the exact way it



1 was communicated.

2 Q. Has anyone from the university given you any  
3 official explanation as to why Dr. Kao is not there?

4 A. No.

5 Q. Now, during the spring -- period of spring  
6 2008, did anyone from the university tell you that Dr.  
7 Kao was a danger to anyone?

8 A. No.

9 Q. Did anyone from the university say that people  
10 were -- that people were concerned that Dr. Kao might  
11 become violent?

12 A. No.

13 Q. Did anyone from the university tell you that  
14 they were -- they were concerned that Dr. Kao might hurt  
15 anybody?

16 A. No.

17 Q. Did anyone tell you that he might hurt any  
18 particular teachers?

19 A. No.

20 Q. Did anyone tell you that he might hurt  
21 students?

22 A. No.

23 Q. Did anyone tell you that he might hurt staff?

24 A. No.

25 Q. Have you ever observed Dr. Kao's interactions

1 with students?

2 A. A few.

3 Q. And how did those appear to you?

4 A. Friendly.

5 Q. Did he run the math club?

6 A. You know, I don't know.

7 Q. Okay. During the period -- and I want to  
8 expand this out just slightly. During the period of the  
9 entire year from -- academic year, starting in fall 2007  
10 going through the end of spring 2008 on into the fall  
11 of -- fall 2008, did anyone from the university seek to  
12 interview you about Dr. Kao?

13 A. No.

14 Q. During that period of time, did anyone tell you  
15 that you should be on the lookout in case Dr. Kao came  
16 on campus?

17 A. No.

18 Q. Did anyone tell you, during that entire period  
19 of time, that there was any concern of any nature that  
20 Dr. Kao was dangerous to anybody?

21 A. No.

22 Q. And during that entire period of time, did  
23 anyone ask you about your interactions with Dr. Kao or  
24 what you had observed?

25 A. No.

1 MR. KATZENBACH: Thank you. That's all the  
2 questions I have.

3 THE COURT: Mr. Vartain, so would you care to  
4 examine?

5 MR. VARTAIN: Yes, I would, Your Honor. Thank  
6 you.

7 THE COURT: Go ahead.

8 CROSS-EXAMINATION BY MR. VARTAIN

9 MR. VARTAIN: Q. Good afternoon, Ms. ...  
10 Soares?

11 A. "Soarez."

12 Q. I'm an attorney for the university. I have  
13 some questions.

14 A. Okay.

15 Q. Hopefully not too many.

16 You mentioned that you are teaching at Mission  
17 High.

18 A. Yeah.

19 Q. Is that the one in San Francisco?

20 A. That's right.

21 Q. And how long have you been doing that?

22 A. Just since August.

23 Q. And before that, did you -- and while you were  
24 a part-time instructor at the University of San  
25 Francisco, did you hold another job at that time?

1 A. All except for the first year, yes.

2 Q. Okay. So let's give the jury a little bit of  
3 the picture of how much you actually worked at the  
4 university and how often you were there.

5 So it sounds like you first came to work at the  
6 university in the math department in 2006.

7 A. Right.

8 Q. And you're still working there as of now, still  
9 on a part-time basis?

10 A. Technically right now I'm on a leave of  
11 absence.

12 Q. Oh, you are?

13 A. But I'm still currently employed by the  
14 university. And I have another -- sort of as a student,  
15 I have a position through them, but it's not through the  
16 math department.

17 Q. Okay. I want to focus on being at -- on campus  
18 as part of the math department. That started in 2006 in  
19 the fall?

20 A. Right.

21 Q. And it ended when?

22 A. August of 2011.

23 Q. August of 2011, okay. And during that time  
24 that -- year time -- did I get it right? My math is  
25 okay?

1 A. Mm-hm.

2 Q. -- you held this title of adjunct professor?

3 A. Right.

4 Q. Was it the whole time?

5 A. Yes.

6 Q. And the adjunct professor is something very  
7 different from the title of associate professor or  
8 professor, correct?

9 A. Right.

10 Q. The title of adjunct professor means you just  
11 come for whatever -- fill in for whatever courses they  
12 need at any given year, if someone's on a leave of  
13 absence, maternity, or they have an overload, something  
14 like that?

15 A. They have ongoing adjunct positions. So you're  
16 not generally just filling in for people, but you're  
17 not -- you don't have a continuing guarantee of a  
18 contract every year.

19 Q. Okay. Would it be fair to say that every  
20 semester from fall of 2006 to August of 2007 you were  
21 teaching at least one course at the university in the  
22 math department?

23 A. Right.

24 Q. Okay. And they gave you an office. And you  
25 described for the jury that it was near these other

1 professors.

2 A. Right.

3 Q. And you told us that in that -- for the  
4 particular time we're most concerned about in this case,  
5 which is January to June of 2008 -- we call it spring  
6 semester 2008 -- is that the time you had in mind when  
7 you were answering some questions?

8 A. Yeah, January through May.

9 Q. Okay, 'cause that's right. Graduation's in May  
10 and classes end in May; is that right?

11 A. Yeah.

12 Q. Okay. In that point in time, you would be on  
13 campus two days a week or so?

14 A. Yes.

15 Q. Okay.

16 A. Pretty much.

17 Q. That is, was it like a Tuesday/Thursday  
18 schedule that spring -- that semester, or was it any  
19 particular set two days?

20 A. It might have been Monday/Wednesday.

21 Q. Okay.

22 A. I don't remember which days it was, but it was  
23 two days that I had my class and my office hours, and  
24 then occasionally I might be in there a different time  
25 dropping things off, picking things up, making

1 photocopies.

2 Q. Okay. And what were you doing that semester  
3 for work when you weren't working at USF, if anything?

4 A. I worked at an after-school program in  
5 Richmond.

6 Q. Okay. And like how many hours a week were you  
7 working there that particular semester?

8 A. About 25.

9 Q. Okay. So would you say you were working about  
10 15 hours a week at USF and about 25 hours a week at the  
11 after-school program?

12 A. Do you mean hours that I was actually at USF?

13 Q. Yeah.

14 A. I was probably at the university less than 15  
15 hours a week.

16 Q. That's what I thought, 'cause you might do your  
17 course preps at home.

18 A. Right.

19 Q. So maybe you were only there at the university  
20 eight or ten hours a week; would that be a fair  
21 estimate?

22 A. Probably between ten and 15.

23 Q. Okay. So in that spring semester, you were at  
24 the university about ten to 15 hours a week, but some of  
25 that time, you'd be off in a classroom teaching; would

1 that be fair?

2 A. Right.

3 Q. Okay. And then the rest of the workweek, you  
4 were off campus somewhere else?

5 A. Right.

6 Q. Okay. You mentioned to Mr. Katzenbach that you  
7 attended two faculty meetings.

8 A. Right.

9 Q. But is it true that by and large, you aren't  
10 part of the faculty, as such, of the math department;  
11 you -- you were not a regular attendee at the -- at  
12 their meetings?

13 A. That's correct.

14 Q. So the two meetings you mentioned, are those  
15 two in those whole five years?

16 A. Right.

17 Q. So only two meetings that Professor Kao would  
18 have been at, in five years, that were regular  
19 departmental meetings?

20 A. Right. And not even the whole meeting.

21 Q. And not even the whole meeting, okay.

22 So would it be fair to say as compared to the  
23 other math faculty who were regular tenure track, you  
24 didn't really -- you didn't really have a chance to see  
25 what was going on, with Professor Kao or otherwise,



1 in -- in the department meetings of the math department?

2 Correct?

3 A. Right.

4 Q. And you -- during the spring 2008, you didn't  
5 have any regular business with Professor Kao that you  
6 would be in his office on a regular basis, did you?

7 A. No.

8 Q. You weren't working with him on any particular  
9 projects or any particular students where you were  
10 sitting down interacting with him?

11 A. No.

12 Q. Is that correct?

13 A. That's correct.

14 Q. Have you ever been over and above Professor Kao  
15 in some supervisory capacity where you had to give  
16 any -- this is sort of an obvious question -- where you  
17 had to give direction to him, give him instructions, or  
18 in any way have to interact with him even as an equal?

19 A. No.

20 Q. Have you ever had any situation where you had  
21 the unfortunate task of giving him some news about his  
22 employment that was of a negative nature where you would  
23 have had to see how he reacted to that news?

24 A. No.

25 Q. Have you ever been in his home or seen him on a

1 regular social basis where you would get to know his  
2 personality, character, et cetera?

3 A. No.

4 Q. Mr. Katzenbach asked you if you had ever been  
5 invited, asked, solicited by the human resources offices  
6 to come and talk to them about your experience with --  
7 such as it was -- with Mr. -- with Professor Kao in  
8 spring of 2008. Remember those questions?

9 A. Yeah.

10 Q. Did Professor Kao ever ask you to go and speak  
11 on his behalf with human resources?

12 A. No.

13 Q. Did he ever go -- did he ever tell you he was  
14 having any difficulties with his colleagues or the  
15 administration and he wanted you to sort of give your  
16 side of him?

17 A. No.

18 Q. Was it -- in your experience working with the  
19 full-time professors in the department, did they ever  
20 come to you and confide in you of any problems they were  
21 having among each other?

22 A. No.

23 Q. That wouldn't be like those professors to come  
24 and tell you if they were having concerns about the  
25 other professors; is that correct?

1 A. That's correct.

2 Q. 'Cause you were in a wholly different category;  
3 you weren't part of that -- that group of tenured  
4 professors, correct?

5 A. Right.

6 Q. In all those five years that you were working  
7 at the university, give me the sum total of business  
8 meetings that you had with Professor Kao.

9 A. Business meetings?

10 Q. Yeah. I don't mean passing in the hall saying  
11 "Hi, how are you?" I mean sit down and you have an  
12 opportunity to work with him. Would it be less than  
13 half a dozen?

14 A. Oh, yeah.

15 Q. Like two maybe?

16 A. Like conversations about the math department  
17 stuff?

18 Q. Yeah. I mean anything other than just in  
19 passing.

20 A. Yeah, maybe two -- somewhere between two and  
21 five.

22 Q. Two and five in a whole five years, yes?

23 A. Yes.

24 Q. Were you anywhere in the vicinity of an  
25 incident between Professor Kao and the dean of the

1 college that happened in the parking lot in spring of  
2 2008?

3 A. Not that I know of, no.

4 Q. Were you present at any incidents that happened  
5 between Professor Stephen Yeung and Professor Kao in the  
6 spring of 2008?

7 A. I don't think so.

8 Q. Were you present where you could observe what  
9 happened in any of the incidents between Professor  
10 Needham and Professor Kao?

11 A. No.

12 Q. Or Professor Pacheco and Professor Kao?

13 A. No.

14 Q. Or Associate Dean Brown and Professor Kao?

15 A. No. It's possible I saw interactions between  
16 Professor Needham and Professor Kao 'cause their offices  
17 were right next to each other and outside of mine. But  
18 nothing that stands out.

19 Q. Nothing that you remember today?

20 A. No.

21 Q. Did Professor Kao ever file a grievance about  
22 anything you ever did, or did he ever express  
23 displeasure that you did something that hurt him or  
24 grieved him or made him mad?

25 A. No.

1 Q. Have you had an opportunity to observe the math  
2 department faculty members in such that -- have you ever  
3 observed them mistreating Professor Kao?

4 A. No.

5 Q. Have you ever observed Professor Pacheco  
6 mistreat Professor Kao?

7 A. No.

8 Q. Or Professor Needham?

9 A. No.

10 Q. Or Professor Yeung?

11 A. No.

12 Q. Professor Zeitz?

13 A. No.

14 Q. Have you ever -- any one of them ever say  
15 anything, even if you just overheard it, of a gossipy or  
16 negative nature about Professor Kao?

17 A. No.

18 Q. Have you ever heard any of them speak ill of  
19 him and his personal matters, whether it's his health  
20 matters?

21 A. No.

22 Q. Have you ever heard any of them speak ill of  
23 him in his filing complaints or having any grievances  
24 against the university?

25 A. No.

1 Q. Have you heard any dean, Associate Dean Turpin,  
2 Associate Brown [sic] -- have you ever had any  
3 interaction with them where they said anything  
4 whatsoever negative about Professor Kao?

5 A. No.

6 MR. VARTAIN: No further questions.

7 THE COURT: Further direct?

8 MR. KATZENBACH: Yes, Your Honor.

9 REDIRECT EXAMINATION BY MR. KATZENBACH

10 MR. KATZENBACH: Q. You indicated that your  
11 office was right next to Tristan Needham's -- Professor  
12 Needham's office as well?

13 A. Across -- yeah, near.

14 Q. And that was also near where John's office --  
15 Dr. Kao's office was?

16 A. Right.

17 Q. And during the entire time you were there, you  
18 never saw any interaction between the two of them that  
19 gave you any concern, any cause for concern?

20 A. Right.

21 Q. In other words, just you saw nothing, no -- no  
22 action by Tristan Needham that led you to say "Why is he  
23 doing that?"

24 MR. VARTAIN: Objection.

25 MR. KATZENBACH: I'll rephrase that.

1 Q. You saw no action by Tristan Needham that  
2 indicated to you that Professor Needham was at all  
3 afraid of Dr. Kao?

4 MR. VARTAIN: Improper suggestive question.

5 THE COURT: Overruled. The witness may answer.

6 THE WITNESS: You know, I don't actually  
7 remember seeing them interact very much at all.

8 MR. KATZENBACH: Okay.

9 THE WITNESS: So nothing stands out.

10 MR. KATZENBACH: Q. And during that same  
11 period of time, Tristan Needham didn't come to you and  
12 say, you know, "You need to watch out for Dr. Kao; he's  
13 dangerous"?

14 A. No.

15 Q. No one else from the math department said that  
16 to you?

17 A. No.

18 Q. No one from the administration said that to  
19 you?

20 A. No.

21 Q. No one from public safety said that to you?

22 A. No.

23 Q. No one -- no -- none of the staff said that to  
24 you?

25 A. No.

1 Q. And as far as you knew, would it be accurate to  
2 say that during the entire spring semester 2008, you had  
3 no indication that anyone was frightened of Dr. Kao?

4 A. That's right.

5 Q. And that there was -- you had no indication  
6 that anyone was concerned with any behaviors that he had  
7 engaged in?

8 A. Yeah, that's right.

9 Q. One other question. You mentioned an adjunct  
10 professor. I asked you earlier. Are you on one-year  
11 contracts?

12 A. Semester contracts.

13 Q. Semester contracts. So every semester, you  
14 have to come back and cut a new agreement with USF to  
15 continue to be employed there?

16 A. Right.

17 MR. KATZENBACH: Thank you. That's all I have.

18 THE COURT: Further, Mr. Vartain?

19 MR. VARTAIN: Yes. Thank you.

20 RECROSS-EXAMINATION BY MR. VARTAIN

21 MR. VARTAIN: Q. But in the spring of 2008,  
22 Ms. Soares, you actually had very little opportunity to  
23 see Professor Kao; isn't that true?

24 You were there only two days a week, and you  
25 had no business meetings with him, correct?



1           A.    Yeah, I think that might have been the semester  
2 that I went to one of the faculty meetings.  But I don't  
3 remember if our schedules were even the same day.  It  
4 doesn't stand out.  I mean, I might have been there the  
5 same day as him.  I don't remember.

6           Q.    'Cause Professor Kao wasn't on campus, and none  
7 of the other professors were on campus, every single day  
8 of the week; is that correct?

9           A.    Mostly, yeah, that's true.

10          Q.    Yeah.  So you don't even remember in the spring  
11 of 2008 whether the two days you were working on campus  
12 were -- generally overlapped with the days he was  
13 working on campus; is that correct?

14          A.    Right.  That happened some of the time that I  
15 worked there, but I don't remember if that was that  
16 semester.

17          Q.    Yeah.  And I'm just focused on the spring of  
18 2008.

19                    Would it be fair for the jury to know that --  
20 for you to tell the jury that in that spring of 2008,  
21 you don't really have any recollection that the days you  
22 worked on campus, those two days, were days that  
23 Professor Kao was regularly on campus?  Correct?

24          A.    That's correct, yeah.

25          Q.    And that's why you -- you have no recollection

1 of seeing any particular interactions between Professor  
2 Kao and Professor Needham, Professor Kao and Professor  
3 Yeung, Professor Kao and the other professors, correct?

4 A. Right.

5 MR. VARTAIN: No further questions.

6 THE COURT: Mr. Katzenbach?

7 MR. KATZENBACH: Just a follow-up on that last  
8 point.

9 FURTHER REDIRECT EXAMINATION BY MR. KATZENBACH

10 MR. KATZENBACH: Q. Would it be accurate to  
11 say that just nothing sticks out in that semester  
12 unusual regarding Dr. Kao?

13 A. Yeah, that's accurate.

14 Q. So that the times you were there, nothing  
15 appeared unusual to you?

16 MR. VARTAIN: He's suggesting, leading the  
17 witness.

18 THE COURT: Sustained.

19 MR. KATZENBACH: Okay.

20 Q. And when you saw -- when you indicated there  
21 was nothing unusual, that was -- that includes not only  
22 your own observations, but anything else that anyone  
23 told you?

24 MR. VARTAIN: Objection. Leading,  
25 argumentative and compound.

1 THE COURT: Sustained.

2 MR. KATZENBACH: All right.

3 Q. Did anyone tell you anything about Dr. Kao that  
4 that -- in which they expressed any concern about him?

5 MR. VARTAIN: He's asked that question three  
6 times, Your Honor. Objection.

7 THE COURT: Yes. Asked and answered.  
8 Sustained.

9 MR. KATZENBACH: Very well.

10 Q. During the times that you were on campus during  
11 spring 2008, was Tristan Needham's office always in the  
12 same location; in other words, next to Dr. Kao's and  
13 yours?

14 A. Yes.

15 MR. KATZENBACH: Thank you.

16 THE COURT: Mr. Vartain?

17 MR. VARTAIN: Nothing further. Thank you. The  
18 witness may be excused, from the university.

19 THE COURT: Well, let's find out whether the  
20 jurors have any questions of Ms. Soares.

21 Jurors, do you have any questions? I see  
22 shaking heads.

23 May the witness be excused?

24 MR. VARTAIN: Yes, Your Honor.

25 MR. KATZENBACH: Yes, Your Honor.

1 THE COURT: Ms. Soares, thank you very much.  
2 You're free to go.

3 Next witness for the plaintiff.

4 MR. KATZENBACH: Yes, Your Honor. We'd like to  
5 call -- yes, Your Honor. We'd like to call Professor  
6 Heineman.

7 (Witness sworn.)

8 ALAN HEINEMAN,  
9 having been first duly sworn, testified as follows:

10 THE CLERK: You can have a seat. Will you  
11 please state your name and spell it for the record.

12 THE WITNESS: Alan, A-L-A-N, Heineman,  
13 H-E-I-N-E-M-A-N.

14 THE CLERK: Thank you.

15 THE COURT: Mr. Katzenbach, you may inquire.

16 MR. KATZENBACH: Thank you, Your Honor.

17 DIRECT EXAMINATION BY MR. KATZENBACH

18 MR. KATZENBACH: Q. Professor Heineman, can  
19 you tell us where you're employed.

20 A. University of San Francisco.

21 Q. And can you tell us what your capacity is. In  
22 what capacity are you employed?

23 A. I'm a professor of English.

24 Q. And how long have you been at the University of  
25 San Francisco?

1           A.    This is my 42<sup>nd</sup> year.  Slow learner.

2           Q.    And now -- I'm sorry.  Can you tell us, is  
3 there a faculty union at the University of San  
4 Francisco?

5           A.    Yes.

6           Q.    Can you tell us about -- what does the faculty  
7 union do?

8           A.    The short answer is that it administers the  
9 contract and represents individual faculty members.  It  
10 bargains contracts.  It participates in governance.  It  
11 does a number of -- I mean, I don't think you -- if you  
12 want more detail, I can supply it.

13          Q.    Well, let's just go back.

14                    Do you have any involvement in the creation of  
15 the faculty union?

16          A.    Yes.

17          Q.    Can you describe that to the jury.

18          A.    The union was founded in 1975.  I was not  
19 involved in the very first activities of the faculty who  
20 started the union up, but I came on board within a few  
21 months.

22                    And in the first regular election, union  
23 election, I was elected to the executive board of the  
24 union.  And I served on the executive board from that  
25 time in 1975 until I stepped down in 2005, so for 30

1 years. And for the last 17 of those years, I was  
2 president of the faculty association.

3 Q. All right. And what were your duties during  
4 that period of time on behalf of the union?

5 A. They were many. Again, to -- to bargain the  
6 contract, along with the bargaining team, to administer  
7 the contract, to defend and advocate for faculty, to  
8 participate in governance, to meet with administrators,  
9 try to resolve differences or innovate new programs.

10 It's a fairly wide range of activities.

11 Q. Is there a agreement -- collective bargaining  
12 agreement that covers the faculty?

13 A. Yes.

14 Q. Could you please take a look at the -- one of  
15 the volumes in front of you.

16 May I approach, Your Honor?

17 THE COURT: You may.

18 MR. KATZENBACH: I'd like to hand you what has  
19 been previously marked as Exhibit 8.

20 (Plaintiff's Exhibit 8  
21 marked for identification.)

22 MR. KATZENBACH: Q. And it -- can you take a  
23 look at tab 8 in that volume. Yes?

24 A. I have it.

25 Q. Okay. Taking a look at what has been

1 previously marked as Exhibit 8, can you identify that  
2 document.

3 A. This is the collective bargaining agreement  
4 between the university and the faculty association,  
5 effective July 1, '05 through June 30, 2012.

6 MR. KATZENBACH: Your Honor, I'd like to move  
7 Exhibit 8 into evidence.

8 MR. VARTAIN: No objection, Your Honor.

9 THE COURT: It's received.

10 (Plaintiff's Exhibit 8  
11 received in evidence.)

12 MR. KATZENBACH: Thank you.

13 Q. Now, does the collective bargaining agreement  
14 also cover -- let me back this up.

15 Is there a difference between the rights -- the  
16 job security rights of a tenured faculty versus an  
17 untenured faculty?

18 A. Yes.

19 Q. Can you describe what the difference is.

20 A. A nontenured faculty member can be terminated  
21 at will during -- I would have to refresh my memory as  
22 to the number of years, but during, I believe, the first  
23 and second year of full-time employment. After that,  
24 there are safeguards that get built in. But that  
25 faculty member can still be terminated at will; it's

1 just that the due process protection becomes greater.

2 A tenured faculty member cannot be terminated  
3 at will.

4 Q. And what are the limitations on the termination  
5 of a tenured faculty member?

6 A. There are several, but I think it's covering it  
7 to say, in general, that it's -- it must be for cause.

8 Q. And when you use the phrase "for cause," what  
9 type of causes are you thinking of?

10 MR. VARTAIN: Objection. The collect- --

11 MR. KATZENBACH: I'll rephrase it.

12 Q. Have you had experience --

13 Let me just lay a foundation, Your Honor. I'm  
14 going to rephrase.

15 During the time you were working for the union,  
16 including the time you were union president, did you  
17 come to an understanding of what sort of cause was  
18 necessary to fire a tenured faculty member?

19 A. Such as I could understand it, yes. I'm not an  
20 attorney.

21 Q. I understand. But as to the practice at the  
22 university, did you understand that?

23 A. Yes.

24 Q. Can you describe to the jury what the practice  
25 at the university was in connection with terminating a



1 tenured faculty member.

2 A. One area was the allegation that the faculty  
3 member was no longer competent in his or her field.  
4 There were a couple of instances of that.

5 Q. Okay.

6 A. Another kind of allegation is that there had  
7 been some kind of bad behavior. One of the clauses in  
8 the bargaining agreement says that a faculty member  
9 shall not be guilty of moral turpitude, as commonly  
10 defined throughout the academic arena. And that covers  
11 a number of possible actions.

12 Q. Okay. And generally speaking, how many  
13 tenured -- while you were president -- president of the  
14 union, how many tenured faculty members were ever fired?

15 A. I can't give a precise answer. Can I -- may I  
16 explain that or not?

17 Q. Sure. That would be fine.

18 A. Some -- the university initiated action against  
19 a number of tenured faculty.

20 Q. Okay.

21 A. Some of them came to the faculty association  
22 for help. Some did not. I was simply informed by the  
23 university that Professor So-and-so had been let go.

24 They told -- the university told me that they  
25 had informed the faculty member of his or her rights. I

1 also left messages for or wrote to the faculty member  
2 saying "We're available for help."

3 Some faculty members did not choose to avail  
4 themselves of that help, so I don't know what happened  
5 in those instances.

6 Q. Okay.

7 A. There were other instances in which actions  
8 were initiated, and at a certain point the faculty  
9 member availed him- or herself of an attorney, taking it  
10 out of the union and grievance process. And whatever  
11 resolution was reached, I was not necessarily privy to.  
12 In fact, most of the time I was not privy to it.

13 So whether it came off -- whether it was  
14 officially and for the record fired or whether it was  
15 officially and for the record retired or resigned, I  
16 can't say.

17 So it's very hard for me to give you a number  
18 to the question you're asking.

19 Q. Okay. But generally speaking, can you  
20 describe -- are you familiar generally with the process  
21 through which someone might get fired?

22 A. Yes.

23 Q. All right. What would have to happen before  
24 someone would get to the point of being fired?

25 MR. VARTAIN: Objection. Vague.

1           Are you speaking of, Counsel, a tenured faculty  
2 member, or what kind of faculty member?

3           MR. KATZENBACH: Okay. Let me perhaps be more  
4 clear on that.

5           Q. For a tenured faculty member, what sort of  
6 things would have to happen, in your experience, at USF  
7 before a faculty member would be fired?

8           A. It would really depend on the university's  
9 allegation as to behavioral competence or whatever.

10           In general, the union supports progressive  
11 discipline; that is to say, counseling, warning, and  
12 then various other penalties, up to and including  
13 termination. And that clause repeats itself in a  
14 bargaining agreement several times, "discipline, up to  
15 and including termination."

16           There were some kinds of behavior that the  
17 university apparently felt were so serious that  
18 progressive -- it felt that progressive discipline was  
19 not appropriate and the faculty -- termination  
20 proceedings were initiated --

21           Q. Okay.

22           A. -- immediately or soon.

23           Q. All right. In terms of your experience -- in  
24 terms of your experience under the contract, are you  
25 aware of any faculty member being filed -- fired without

1 there being prior warnings?

2 A. I'm not aware of any, but there are some cases  
3 where I don't have that information one way or the  
4 other.

5 Q. That's fine.

6 Are you any -- aware of any -- are you aware of  
7 any tenured faculty member not being told of the reasons  
8 for the university's concern over his -- his activities?

9 MR. VARTAIN: Objection. Lacks foundation.

10 MR. KATZENBACH: I'll rephrase that.

11 Q. When you described progressive discipline, is  
12 part of progressive discipline, as you understand it  
13 from your experience at the university, the opportunity  
14 of a faculty member to respond to any concerns the  
15 university has about his behavior or his teaching?

16 A. Yes.

17 Q. And is it your understanding in general that  
18 tenured faculty members would be given an opportunity to  
19 correct any behaviors that the university disapproved  
20 of?

21 A. Not if the university felt that that behavior  
22 was so serious that correction -- the horse was out of  
23 the barn.

24 Q. And so that anything that wouldn't -- so  
25 generally speaking, what type of cases would it be, in

1 your experience, that would be so serious that there  
2 would be no opportunity to -- no correction, no  
3 procedure like that?

4 A. For example, inappropriate sexual behavior  
5 towards students.

6 Q. Anything other than that?

7 A. Not that I recall.

8 Q. All right. Now, who in the -- who at the  
9 university initiates the disciplinary action against  
10 faculty members?

11 A. I don't know that.

12 Q. Okay.

13 A. It comes -- sorry.

14 Q. I'm sorry. Is there an office that decides on  
15 disciplinary matters?

16 A. I'm sorry. Say again.

17 Q. Is there a particular position that decides on  
18 disciplinary actions?

19 A. The discipline is administered by the dean --

20 Q. Okay.

21 A. -- of the individual school or college, as a  
22 rule.

23 Q. All right. Now, I asked you briefly about the  
24 tenure process, and we talked briefly about the  
25 distinctions between a tenured professor and a

1 nontenured professor. I'd like to go briefly back  
2 through the tenured process.

3 Can you tell me what has to happen before a  
4 faculty member gets tenure.

5 MR. VARTAIN: Objection. It's not relevant to  
6 this case, Your Honor. Professor Kao was granted  
7 tenure. This is -- you know, there's no dispute about  
8 that. He had earned tenure.

9 THE COURT: Mr. Vartain, that's more than six  
10 words. Sustained.

11 Let me explain to the jury.

12 I told the attorneys that the format for making  
13 objections is to state the fact that the attorney has an  
14 objection, then to state the ground for the objection in  
15 six words or less. So if I say "That's more than six  
16 words," I'm referring to that rule of procedure.

17 MR. KATZENBACH: Let me just rephrase it in  
18 this way:

19 Q. When a professor is granted tenure, is there a  
20 review of their file?

21 MR. VARTAIN: Objection. Same objection.

22 THE COURT: I'll hear the answer. Overruled.

23 THE WITNESS: Yes.

24 MR. KATZENBACH: Q. And in what areas is the  
25 file reviewed?

1 A. Areas?

2 Q. For example, the university professors are  
3 involved in teaching, research, service, other matters.  
4 What areas --

5 A. Those are the three areas in which there is  
6 review. And in fact, it's limited to those three areas.

7 Q. And who does that type of review?

8 A. Two people or groups of people: the dean, along  
9 with whatever administrators the dean chooses to involve  
10 in the process, typically associate deans; and then  
11 there are also faculty peer review committees.

12 Q. When you say "faculty peer review committees,"  
13 where are those faculty drawn from?

14 A. From -- there are two levels of committee. The  
15 first is drawn from the school or college in which the  
16 tenure applicant is employed. And then there is a  
17 universitywide peer review committee with faculty  
18 representing all of the schools and colleges that are  
19 covered by the bargaining agreement.

20 Q. Okay. And to get tenure, you have to pass  
21 through every one of these levels of review; is that  
22 correct?

23 MR. VARTAIN: Objection. Same objection. The  
24 tenure process is not part of this case.

25 THE COURT: Sustained.

1 MR. KATZENBACH: Q. And at the end of that  
2 process, an individual gets tenure or is denied tenure;  
3 is that correct?

4 A. Yes.

5 Q. Now, I'd like if you could please take a look  
6 again at Exhibit 8. And I'd like you to direct your  
7 attention, if you would, to page 107, which is article  
8 40.

9 A. Yes.

10 Q. And taking a look at article 40, can you tell  
11 me what article 40 concerns.

12 A. Discipline and discharge of faculty or  
13 association members with tenured -- with a tenured  
14 appointment.

15 Q. And does that describe the -- taking a look at  
16 exhibit -- section -- Exhibit [sic] 40, I'd like to  
17 direct your attention to the phrase "basis of the just  
18 cause principle." Do you see that?

19 A. Yes.

20 Q. Is that -- we asked you a bit about the  
21 progressive disciplinary system and some of the other  
22 warnings, and things like that.

23 Is that the language in the contract that forms  
24 the basis for your testimony?

25 A. Yes.



1 Q. And during the course -- and -- thank you.

2 Now, taking a look at the last section of  
3 this -- of this termination provision, you see the last  
4 sentence of article 40?

5 A. Yes.

6 Q. And I'd like to direct your attention to the  
7 language where it's "subject to the grievance and  
8 arbitration provisions set forth in this contract."

9 Are you familiar with the grievance and  
10 arbitration --

11 A. Excuse me. You're asking about the last  
12 section of article 40?

13 Q. No, last sentence of the first paragraph of  
14 article 40.

15 A. Oh, 40.1. Beg your pardon. I see that.

16 Q. I can't highlight that. I have tried to  
17 highlight the language up here.

18 Have you participated in any grievance and  
19 arbitration provision -- proceedings?

20 A. Yes.

21 Q. In connection with going through a grievance or  
22 arbitration, does the university advise the union and  
23 the professor of the nature of any of the allegations  
24 against him?

25 MR. VARTAIN: Objection. The question is vague

1 as framed.

2 THE COURT: Let me ask a question.

3 Do you understand the question?

4 THE WITNESS: I understand that counsel is  
5 asking whether the -- in the course of grievance and  
6 arbitration the university advises the faculty member of  
7 the allegations against him or her. Is that ...

8 THE COURT: Sounds like a yes.

9 So the objection is overruled.

10 MR. KATZENBACH: Okay.

11 Q. And does that usually include specifics as to  
12 what the professor's accused of doing?

13 A. Yes.

14 Q. And does that usually include the names of any  
15 persons who are bringing -- who claim the professor has  
16 done something bad to them?

17 MR. VARTAIN: Objection. Lacks foundation and  
18 not relevant. Professor Kao did not file a grievance.  
19 So what happens in a grievance procedure --

20 THE COURT: That's over six words. Sustained.

21 MR. VARTAIN: Thank you. Seems like it's  
22 working. But I'll promise to keep it under six, Your  
23 Honor.

24 THE WITNESS: You'll never be a professor,  
25 then.

1 MR. VARTAIN: Especially an English one.

2 MR. KATZENBACH: Q. If the university imposes  
3 discipline on a faculty member, the faculty member can  
4 bring a grievance, right?

5 A. Yes.

6 Q. So if the university -- and in connection with  
7 that grievance, there would be the proceedings you just  
8 described?

9 MR. VARTAIN: Objection. Same objection. It's  
10 not relevant 'cause Professor Kao never chose to file --

11 MR. KATZENBACH: Your Honor -- Your Honor, if  
12 he wants to make the objection, that's fine. But I  
13 don't really appreciate him arguing to the jury.

14 THE COURT: Nor do I.

15 Is there an objection pending?

16 (Reading realtime feed.)

17 Yes, there is.

18 MR. VARTAIN: Yes, there is.

19 THE COURT: Objection is overruled. Witness  
20 may answer.

21 THE WITNESS: I'm sorry, can you repeat the  
22 question.

23 (Record read as follows:

24 *QUESTION: So if the university -- and*  
25 *in connection with that grievance, there*

1       *would be the proceedings you just*  
2       *described?)*

3               THE WITNESS: I haven't described any  
4 proceedings.

5               MR. KATZENBACH: That's what I wanted to be  
6 sure.

7       Q.     So in connection with the -- if the university  
8 imposed discipline, the professor would have a right to  
9 bring a grievance; is that correct?

10       A.    Yes.

11       Q.    And if the university -- and in connection with  
12 that grievance, the professor would be allowed to  
13 present their side of the story?

14       A.    Yes.

15       Q.    And the university would have to present its  
16 side of the story?

17       A.    Yes.

18       Q.    And you'd have to have people come in and  
19 testify as to what happened?

20       A.    Not necessarily.

21       Q.    People would have to come in and give some  
22 version of what they assert happened?

23       A.    Not necessarily. Only if the grievance  
24 proceeded to arbitration is that procedure followed. In  
25 the lower or earlier stages of the grievance, we don't

1 necessarily get to testimony from others. We may, but  
2 we may not.

3 Q. And when you're not getting testimony, do you  
4 get some sort of information as to the basis for the  
5 university's position that discipline is justified?

6 A. Yes.

7 Q. And that would include typically, in your  
8 experience, some form of specific explanation as to what  
9 the faculty member did wrong?

10 A. Yes.

11 Q. Thank you.

12 Now, have you ever heard anything negative  
13 about Dr. Kao?

14 A. Not that I can recall.

15 Q. Have you ever -- have you ever heard that Dr.  
16 Kao was banned from the University of San Francisco  
17 campus?

18 A. No.

19 Q. Has anyone ever told you that you should be --  
20 you or professors should be on the lookout for Dr. Kao  
21 to be sure that he doesn't come onto that campus?

22 A. No.

23 Q. Are you aware of one case -- oh, strike that.

24 Now, is -- can you describe generally sort  
25 of -- what sort of activities occur on the USF campus

1 that are open to the general public.

2 A. There are sometimes social events, sometimes  
3 lectures, sometimes films. How long a list would you  
4 like?

5 Those are -- those are the main kinds of  
6 activities where folks from outside can come in.  
7 They're not invited to come and sit in on classes as  
8 they choose.

9 Q. No, but there are many sort of social events?

10 A. Sure.

11 Q. Would basketball be among them?

12 A. Yes.

13 Q. The -- and do you recall any -- in your  
14 experience, do you recall any faculty members ever being  
15 banned from campus?

16 A. Not to my knowledge.

17 Q. Okay. Do you recall at any time a faculty  
18 member being terminated for -- after claims of  
19 incompetence and alcohol abuse?

20 A. Again, if I may ...

21 Q. Yes.

22 A. I don't know whether in a given case it's  
23 terminated or voluntarily separated formally. But there  
24 are -- there have been tenured faculty who -- whom the  
25 university has alleged have engaged in, for example,

1 alcohol abuse, who have then left the university.

2 Q. Okay. Thank you.

3 Now, I'd like to also ask you a little bit  
4 about University of San Francisco and affirmative  
5 action. Are you familiar with -- does the University of  
6 San Francisco have a particular attitude towards  
7 diversity and affirmative action?

8 A. It's very powerfully in favor of such action.

9 Q. Do you think that -- is that something that's  
10 important to the faculty members as a whole?

11 A. I believe so. It's certainly important to the  
12 university's mission and a lot of the activities that  
13 both the administration and the faculty are engaged in.

14 Q. Do you think --

15 THE COURT: Ladies and gentlemen, remember the  
16 admonition. Do not form or express any opinion on this  
17 case until it's finally submitted to you for decision.  
18 Do not discuss among yourselves or others until that  
19 time. Please be back in your places at 2:30 according  
20 to the courtroom clock.

21 Mr. Heineman, you don't have to perch there if  
22 you don't want to.

23 THE WITNESS: We're done?

24 THE COURT: We're taking a break. I'll expect  
25 you back in ten minutes.

1 (Recess taken.)

2 THE CLERK: Please remain seated and come to  
3 order. Department 318 is again in session.

4 THE COURT: Jurors and alternates are all  
5 present. Counsel on both sides are present. Plaintiff  
6 is personally present. Professor Heineman's on the  
7 stand.

8 You may continue your inquiry.

9 MR. KATZENBACH: Thank you.

10 Q. All right. I was asking you, I think, when we  
11 stopped, about affirmative action.

12 A. Yes.

13 Q. Okay. Just to go back to that subject, does --  
14 I think you testified that USF takes its obligations  
15 under affirmative action and diversity seriously.

16 A. Yes.

17 Q. All right. Do you think that such -- do you  
18 think that affirmative action issues and diversity  
19 issues are important to a faculty member's reputation in  
20 the faculty at USF?

21 MR. VARTAIN: Ambiguous question. Objection.

22 THE COURT: Sustained.

23 MR. KATZENBACH: All right.

24 Q. Would a faculty -- let me ask it a slightly  
25 different way.



1           In your career at University of San Francisco,  
2 have you been involved in the search for new faculty  
3 members?

4           A.    Yes.

5           Q.    Can you describe to the jury the nature of how  
6 you would be involved, as a faculty member, in a search  
7 for a new-hire.

8           A.    It would be -- in my case, it's been  
9 exclusively hiring for members of the English  
10 department.

11          Q.    Okay.

12          A.    And I would sit on -- normally, but not  
13 always -- on the search committee.

14          Q.    Okay.  And is there also a role for faculty  
15 members who aren't on the search committee?

16          A.    Not usually.

17          Q.    Okay.  What does the search committee do?

18          A.    Generates, usually in concert with the entire  
19 department, in case there is a difference between the  
20 committee and the whole department -- generates the  
21 position advertisement, the description of the position  
22 that's circulated in academic journals, sets a deadline  
23 for submission of applications, reads every  
24 application -- each member of each committee reads every  
25 application -- and begins to discuss, begins to narrow

1 down. That can be done in various ways.

2 The usual process would then be to get to a  
3 narrowed-down list to present to the dean. And the dean  
4 will either okay it or not, in case -- so the dean also  
5 checks to make sure that we have followed all the  
6 procedures, including affirmative action procedures.

7 And then normally a department is permitted to  
8 invite up to three candidates for a position to come to  
9 campus. When the candidates come, they typically will  
10 present a model or specimen class or lecture and also be  
11 interviewed by the department and by the dean.

12 And then a recommendation is made for the hire  
13 by the search committee. The dean is free to reject  
14 that recommendation. Normally the dean adopts it, but  
15 not always.

16 Q. Is the ultimate decision to hire made by the  
17 Dean's Office?

18 A. Yes.

19 Q. All right. And just so that the jury  
20 understands, is there a organizational structure at  
21 University of San Francisco? What college is the  
22 English department in?

23 A. Arts and Sciences.

24 Q. And is that the same college that the  
25 department of mathematics is in?

1           A.    Yes, although some activities are split between  
2 the arts and the sciences.

3           Q.    All right.

4           A.    But the college is the College of Arts and  
5 Sciences.

6           Q.    And the dean that's the head of the College of  
7 Arts and Sciences is the head of both -- is over both  
8 the mathematics department and the English department?

9           A.    Correct.

10          Q.    And it's that dean that would make the ultimate  
11 decision on hiring or not hiring a particular proposed  
12 faculty -- new faculty member?

13          A.    Correct.

14          Q.    All right.  And in connection with searches  
15 that you've been involved in, has there been any  
16 discussion of affirmative action or diversity  
17 requirements?

18          A.    Yes.

19          Q.    Can you tell us what that has been.

20          A.    Typically somebody either from the Dean's  
21 Office or from human resources will explain what needs  
22 to be done and what needs to be considered, in terms of  
23 affirmative action.

24          Q.    Okay.

25          A.    And then it goes as -- it goes in the narrowing

1 down. I think we're all pretty aware by now that we  
2 have to be careful to make sure that everyone is treated  
3 equally and that insofar as possible, various  
4 ethnicities, and certainly both genders, are represented  
5 in every or nearly every department.

6 Q. And has there been any discussion about what  
7 the Dean's Office could do with regards to a search if  
8 they felt that there had been a failure of affirmative  
9 action?

10 A. The Dean's Office can cancel the search for any  
11 reason.

12 Q. Okay.

13 A. The budget has disappeared, for example.

14 Q. Okay.

15 A. But certainly the affirmative action -- the  
16 belief that a search committee has failed to do its due  
17 diligence with regard to affirmative action could indeed  
18 cause the dean to cancel the search, I believe.

19 Q. All right. And is cancelling a search a  
20 serious issue?

21 A. Yes.

22 Q. And why is that?

23 A. It's very hard to get new positions budgeted,  
24 economic realities being what they are. So each  
25 department fights hard to get its -- the faculty

1 positions that it feels necessary budgeted.

2           Once that search is cancelled for any reason,  
3 you've lost a year 'cause you can't -- you can't do a  
4 new search inside of the same academic year. The  
5 process is too cumbersome and too long. So you've lost  
6 the position you wanted for at least a year and  
7 conceivably more.

8           Q.    Okay. Now, in response to an earlier question,  
9 you mentioned advertising in professional scholarly  
10 journals. What are those?

11           MR. VARTAIN:  Objection.  Lacks foundation.  
12 There was no testimony on that.

13           THE COURT:  Overruled.  The witness may answer.

14           THE WITNESS:  I'm sorry, what are scholarly  
15 journals?

16           MR. KATZENBACH:  Yeah.

17           Q.    What do they have in them?

18           A.    Essays, scholarship, research, results of  
19 research, editorials, sometimes listing of positions.

20           Q.    Okay. And what would be the purpose of  
21 advertising a job in a scholarly journal like that?

22           A.    You want to get the widest possible application  
23 from people -- range of applications from people in the  
24 field.

25           Q.    And in your experience as both a faculty member

1 and on the faculty search committees, has it been the  
2 practice to advertise positions in such scholarly  
3 journals?

4 A. Yes.

5 Q. Can you think of any time where you haven't  
6 done that?

7 A. In the distant past, yes. But the principle  
8 has been over the last -- I can't tell you how many  
9 years, but several years, maybe decade and more -- that  
10 every search goes through all of -- all of the  
11 procedures. There are no shortcuts.

12 Q. When you say "no shortcuts," that means  
13 including an advertisement in a scholarly journal?

14 A. That -- a shortcut would be not advertising in  
15 the journal.

16 Q. And so -- just so that -- to clear this -- to  
17 make it clear, is the scholarly journal that we're  
18 talking about different than an on-line database?

19 A. Yes.

20 Q. Okay. Now, I'd like to direct you to another  
21 incident. Do you recall a discussion with Dean Turpin  
22 about a student banging on a faculty member's car in a  
23 parking lot?

24 A. Yes.

25 Q. Do you recall when that occurred?

1 A. No.

2 Q. What position did Dean Turpin have at the time  
3 you had that discussion?

4 A. I could not tell you whether she was then  
5 associate dean or dean.

6 Q. Okay. And do you recall what -- do you recall  
7 what you said to her and what she said to you in that  
8 discussion?

9 MR. VARTAIN: Objection. Insufficient  
10 foundation.

11 THE COURT: Overruled. The witness may answer.

12 THE WITNESS: Our position was that -- it was a  
13 psychology professor that had had the experience. She  
14 was very frightened by it, very unnerved by it. I told  
15 the dean that I expected measures to be taken that would  
16 protect the faculty member from any further incidents of  
17 the kind.

18 MR. KATZENBACH: Q. And what did Dean Turpin  
19 say?

20 A. That she would do her best to do so.

21 Q. Do you know of anything that she did regarding  
22 that incident?

23 A. My best memory is I followed up. Some steps  
24 were taken. For example, public safety, I believe, was  
25 alerted, and there may have been or there may not have

1 been extra security officers put on duty for part of  
2 that time or for a short while.

3 The complaint did not recur.

4 Q. Okay. Now --

5 Those are all the questions I have for you,  
6 sir. I think counsel from the university has some.

7 THE COURT: Cross-examination?

8 MR. VARTAIN: I don't know if that's the right  
9 word for me questioning an English professor, but I'm  
10 going to -- I'll let him correct me if I use bad  
11 grammar.

12 CROSS-EXAMINATION BY MR. VARTAIN

13 MR. VARTAIN: Q. I don't know that we've had  
14 the pleasure of meeting, Professor Heineman, but now  
15 we're doing so. Thank you for appearing here.

16 I want to talk a little bit, not so much about  
17 this incident with the student banging on the car -- was  
18 it the professor's car?

19 A. I believe so.

20 Q. Yeah -- but what that meant to you as the union  
21 president. Was it the case that you were concerned to  
22 watch out for the health and safety of one of your union  
23 members?

24 A. Yes.

25 Q. And would it be the -- is it the case that the



1 university's collective bargaining agreement, that  
2 contract that Mr. Katzenbach showed you -- that your  
3 view of that contract is that the university has some  
4 obligations to its faculty members to provide a safe and  
5 healthy campus for them to work in?

6 A. Yes.

7 Q. And so insofar as faculty members, if they have  
8 complaints or concerns that they bring to the  
9 university, that they feel a concern for their safety,  
10 is it, from your perspective as the union president, the  
11 duty of the administration to take those concerns  
12 seriously?

13 A. Yes.

14 Q. Would it be the union's position that if the  
15 university did not take those concerns seriously of a  
16 group of faculty members, that it might be actually  
17 violating its obligations to the -- to the union, as set  
18 forth in the agreement?

19 A. Yes.

20 Q. And you would be on the university's back if  
21 they didn't do that, wouldn't you, as the union  
22 president?

23 I'm not using good grammar, but you would have  
24 the right to challenge the university and take them to  
25 arbitration if they didn't take faculty members'

1 concerns, or concerns about feeling worried in the  
2 workplace, seriously; is that right?

3 A. Yes.

4 Q. And has it been your experience that when  
5 presented with concerns such as you presented Dean  
6 Turpin -- that is, this faculty member was concerned for  
7 safety around the car -- that the university generally  
8 tries to take action to prevent a further escalation or  
9 a further safety problem?

10 A. Sometimes.

11 Q. Sometimes they don't do it quite the way you  
12 see it, correct?

13 A. Yes.

14 Q. The way you would want them to do it, right?

15 A. Correct.

16 Q. Because it's your job to sort of hold the  
17 university's feet to the fire -- fire -- hold the  
18 university's feet to the fire; would that be correct?

19 A. I'm sorry, can you ask the question again.

20 Q. It would be -- if you felt the university was  
21 not doing as much as they should be in the area of  
22 safety and health for faculty members, it's the union's  
23 job to hold the university's feet to the fire?

24 A. Yes.

25 Q. Okay. And you have made that clear to the

1 university that that's something, when you were  
2 president, you were watching them for?

3 A. Yes.

4 Q. And so that -- and has the university taken its  
5 obligations to comply with the union contract seriously  
6 over the course of your time as president?

7 I'm not saying you agree all the time. But the  
8 university does have a serious attitude toward the  
9 collective bargaining agreement, correct?

10 A. I would say in my later years as president,  
11 yes. In my earlier years as president, less so.

12 Q. You see Mr. Philpott in the back there? He's  
13 going to be a witness here. Is he part of the  
14 university's later years? He's the director of labor  
15 relations, correct?

16 A. Yes.

17 Q. Is he part of the time period where you say the  
18 university's been more serious in trying to conform to  
19 the obligations under the collective bargaining  
20 agreement?

21 A. Yes.

22 Q. And he was the director of labor relations when  
23 Professor Kao was going through his issues, correct?

24 A. I don't know.

25 Q. You weren't part of those issues?

1 A. No.

2 Q. That came after you, that's right. You ended  
3 in 2005; is that right?

4 A. My term ended. I didn't.

5 Q. You didn't. Okay. Don't turn me in to my -- I  
6 was not an English major; I was a political science  
7 major.

8 Point being that Mr. Philpott is -- is  
9 representative of the time of the university when it  
10 appeared to you to take seriously its obligations under  
11 the union contract, including safety --

12 A. Yes.

13 Q. -- correct?

14 Now, I want to ask us to talk a little bit  
15 about what you call -- what Mr. Katzenbach asked you  
16 about -- the grievance procedure.

17 Could you tell the jury, who -- some of whom  
18 are in a union, or some have been and some haven't, what  
19 is the importance to workers, employees, union employees  
20 like faculty, to have a grievance procedure in their  
21 contract and then what is the part of the grievance  
22 procedure that we call arbitration.

23 If you could just sort of explain that to the  
24 jury, 'cause you're going to be probably -- except for  
25 Mr. Philpott -- you two are the experts in this area.

1           A.    I'll give you a brief answer and if you want  
2 more detail, I can certainly -- I'll give you a  
3 relatively brief answer.

4           The first question is how important is it, and  
5 the answer is it's vital.  If a contract can't be  
6 enforced, you don't have a contract.

7           Q.    Well, what's the grievance procedure got to do  
8 with enforcing the contract for the benefit of the  
9 employees?

10          A.    A grievance is precisely an employee's claim  
11 that the employer has violated the collective bargaining  
12 agreement.  That's what it is.

13          Q.    So does the union's collective bargaining  
14 agreement -- the faculty union's collective bargaining  
15 agreement with USF give every faculty member, including  
16 Professor Kao, when he was there, the right to file a  
17 grievance saying that the university violated the  
18 contract as to what their rights were, that particular  
19 faculty member?

20          A.    Yes.

21          Q.    And does the union represent them through the  
22 process of taking their grievance through the grievance  
23 procedure?

24          A.    Eventually.  An individual is always entitled  
25 to union representation.

1 Q. Being you --

2 A. No, no.

3 Q. -- when you were the --

4 A. Not necessarily. There are grievance officers  
5 in each school and college. I am the chair of the  
6 grievance committee, so I formally -- I get it when it  
7 hits a certain stage of the grievance. And I can  
8 elaborate on that if you want.

9 But as a matter of fact, we have, what, about  
10 300 faculty, and they all have their own private  
11 president, which is me. And so I often got the phone  
12 call directly, even though I wouldn't normally come in  
13 in the early stages.

14 Q. So would there be -- you know, this word "union  
15 steward" -- you would have other union representatives,  
16 that are faculty members, that would handle the  
17 grievance before it got to the more elevated level where  
18 you would take it over?

19 A. Normally.

20 Q. Okay.

21 A. Though if I were requested, and there was some  
22 good reason for me to do it at the lower level, I would  
23 sometimes do that as well.

24 Q. So explain to the jury what this word means,  
25 "arbitration," that comes at the end of a grievance

1 procedure. Tell them why that's important from the  
2 perspective of the professor's interest, as opposed to  
3 the university's interest.

4 A. Again, it's vital. Almost every faculty  
5 handbook or faculty contract in America has some sort of  
6 process that permits the faculty to say that some  
7 wrongdoing has occurred.

8 And the process goes all the way up to the  
9 president of the university or to the board of trustees,  
10 but ultimately the employer in those cases.

11 Q. In the nonunion cases?

12 A. Correct. And in some union cases.

13 Q. Okay. But not USF, correct?

14 A. Right. So ultimately you allege that the  
15 employer has done wrong; at the end of the day, it's the  
16 employer who decides whether the employer has done  
17 wrong.

18 Q. Does that --

19 A. This does not seem, to us, helpful.

20 Q. And is it that way at USF, or is there a  
21 neutral party that --

22 A. No, there's a neutral party, a professional  
23 arbitrator. We have selected that arbitrator in various  
24 ways, but normally there are three named in the  
25 bargaining agreement. And cases rotate, simply by lot

1 or automatically, from arbitrator one to two to three.

2 Q. When you say "we have," do you mean the  
3 university and the union attorneys negotiate that, or  
4 the university and the union president and labor people  
5 agree on who are these impartial people?

6 A. That's done by -- through collective bargaining  
7 by the union, the faculty, in negotiations with the  
8 administration. The attorneys often process the  
9 arbitration. They are the -- they are the union --  
10 union and university counsel for arbitration.

11 But up until that point, the bargaining -- the  
12 process of grievance and arbitration and handling the  
13 arbitration -- sorry -- handling grievances up to  
14 arbitration is done by the union.

15 Q. But the university administration doesn't  
16 dictate who the arbitrators will be; it's done jointly  
17 between the union and the university when they're  
18 writing that contract out?

19 A. That's correct.

20 Q. Okay. And was that the case at the time  
21 Professor Kao was employed? That is, in the contract  
22 Mr. Katzenbach showed you, was it the case that there  
23 were neutral arbitrators that were negotiated by both  
24 sides?

25 A. Yes.



1 Q. So if Professor Kao had wanted to file a  
2 grievance and take it to arbitration, he would have gone  
3 to one of those three impartial arbitrators?

4 MR. KATZENBACH: Objection, Your Honor.  
5 Argumentative and assumes -- hypothetical.

6 THE COURT: Overruled.

7 THE WITNESS: The -- not exactly.

8 MR. VARTAIN: Q. Explain.

9 A. Any individual has the right to file a  
10 grievance. There is -- there are three steps to the  
11 in-house -- four steps to the in-house grievance  
12 process. There's what's called step zero or informal  
13 meeting between the individual faculty member and his or  
14 her dean. There may be a union representative there or  
15 not.

16 Q. And would step 5 be the arbitration?

17 A. Yes.

18 Q. Okay.

19 A. Yeah.

20 Q. So we don't have to get -- Mr. Katzenbach  
21 pointed out Professor Kao didn't file the grievance, so  
22 it never went through there. But I just want you to  
23 tell the jury, had he done so, it might have ended up at  
24 step 5, arbitration?

25 A. It might have. The union has the right to

1 determine whether to proceed to arbitration.

2 Q. Okay.

3 A. So there may be a case in which an individual  
4 says "Go ahead, I want to have arbitration," and the  
5 union will say "Because we don't think it's a good case,  
6 we can't -- we can't take it to arbitration."

7 Q. The union doesn't want to pay their lawyers to  
8 take a case to arbitration unless the union agrees with  
9 the employee that it --

10 A. Financial concerns are not a permissible reason  
11 to --

12 Q. Oh, okay.

13 A. -- fail to take -- so it's not -- it's not  
14 based on finances; it's based only on is this --

15 Q. Got a good case.

16 A. -- is this a winnable case.

17 Q. Right. In other words, for example, in a  
18 termination where the contract says the university  
19 should have just cause for terminating the faculty  
20 member, the tenured faculty member, if the union agrees  
21 with the faculty member that the university did not do  
22 it for just cause, then the union would push it to  
23 arbitration?

24 A. Oh, especially in a case of termination.

25 Q. Especially?

1           A.    It would be extremely unlikely not to proceed  
2 to arbitration in a case of -- just as in tenure denial.

3           Q.    'Cause it's so serious?

4           A.    'Cause it's the end --

5           Q.    Yeah.

6           A.    -- of the individual's working career at the  
7 university, yes.

8           Q.    So the union has negotiated, in a contract, an  
9 opportunity to faculty members, such as Professor Kao,  
10 if they're involuntarily terminated and it's not for  
11 good cause or just cause, the union has a way to get it  
12 to an arbitrator to -- if they prove their case rule  
13 against the university -- and get the person their job  
14 back?

15          A.    Yes.

16          Q.    Have you ever heard -- you've talked to Mr.  
17 Katzenbach several times?

18          A.    No.

19          Q.    Have you ever talked to Professor Kao about  
20 this case?

21          A.    No.

22          Q.    Okay.  So you don't -- you don't have firsthand  
23 knowledge as to whether he's ever filed a grievance at  
24 the union?

25          A.    I have no knowledge.

1 Q. Okay. Fair enough. That's why I think Mr.  
2 Katzenbach said what he said.

3 You described to the jury this thing of  
4 progressive discipline that the university and the union  
5 have in their contract.

6 A. The progressive discipline is not stipulated in  
7 the contract.

8 Q. You said it was sort of the practices, I  
9 believe.

10 A. Yes.

11 Q. Okay. Wherein the university, generally  
12 speaking, before they fire a faculty member, in most  
13 cases -- not every case; you mentioned there were some  
14 where they don't do it -- but they mostly will give a  
15 warning or some other heads-up to correct the faculty  
16 member before they're fired; is that true?

17 A. In most cases, yes.

18 Q. Not in every case.

19 Would you -- I want to ask you some questions  
20 about an exhibit.

21 May I approach the witness and get the exhibit  
22 out?

23 THE COURT: You may.

24 MR. VARTAIN: And for counsel, I'm going to  
25 address the witness's attention to Exhibit 219 of the

1 university's exhibits, which is a letter from the  
2 university to Professor Kao.

3 (Defendant's Exhibit 219  
4 marked for identification.)

5 MR. VARTAIN: And, Ms. Adler, would you --

6 MR. KATZENBACH: Your Honor, just as a matter  
7 of procedure, I would prefer if documents are first  
8 shown to the witness, identified, accepted into evidence  
9 before they're projected.

10 MR. VARTAIN: Would you stipulate -- I was  
11 going to ask you -- this is a authentic -- would you  
12 stipulate this be admitted in evidence, Mr. Katzenbach,  
13 so we don't have to go through that?

14 MR. KATZENBACH: Well, hold on one second.

15 No. 219, did you say?

16 MR. VARTAIN: 219, June 30, Martha Peugh-Wade  
17 to John S. Kao. I won't show it to the witness until  
18 you tell me.

19 MR. KATZENBACH: No, I'd be happy to stipulate  
20 that this is a document from the university. That's not  
21 a problem.

22 MR. VARTAIN: Can we stipulate that it may be  
23 received by His Honor?

24 MR. KATZENBACH: Of course we can do that.

25 MR. VARTAIN: Okay.

1           MR. KATZENBACH: I just want counsel -- I just  
2 would prefer not -- you know, there may be other  
3 exhibits that we'd have more of a problem with.

4           MR. VARTAIN: I don't have any other exhibit  
5 for this witness.

6           Can I help you, Your Honor?

7           Will you receive Exhibit 219?

8           THE COURT: Yes.

9           (Defendants' Exhibit 219  
10 received in evidence.)

11          MR. VARTAIN: May I show it to the witness,  
12 Your Honor?

13          THE COURT: You may.

14          MR. VARTAIN: I've put in front of you --

15          And for the jury, it's up on the screen.

16          Could you scroll it down so the jury can see  
17 the top of the letter, please. All the way down with  
18 the letter.

19          So that's from human resources, June 30, 2008,  
20 to John S. Kao. It's been received into evidence.

21          Q. Could you read the letter -- the body of the  
22 letter out loud. It's more for you, Professor Heineman.  
23 Then I'm going to ask you some questions about the word  
24 "insubordination."

25          A. All right.

1           "Professor Kao: I have received and  
2 reviewed your correspondence of June 26th  
3 and June 27<sup>th</sup>. Despite your objections,  
4 your appointment with the IME remains in  
5 effect."

6           Q.    Would you stop right there. For the jury, IME  
7 is short for the Dr. Reynolds independent medical.  
8 That's -- I'm just telling you, okay. That's Dr.  
9 Reynolds.

10          A.    "As you have received a direct  
11 instruction, approved by the dean, to attend  
12 the IME and to cooperate in good faith, your  
13 not attending the IME as directed will be  
14 insubordination. Insubordination is subject  
15 to discipline.

16                "It's within your rights to file a  
17 grievance and correspondence from your  
18 attorney on the" -- sorry -- "to file a  
19 grievance, and correspondence from your  
20 attorney on the issue is welcome. However,  
21 it does not alter the university's belief in  
22 the need for the IME process and for the  
23 leave of absence.

24                "You may file a grievance  
25 electronically, and at this point there is

1 no need for you to be on campus. Therefore,  
2 the instruction to remain off campus remains  
3 in effect and no exception will be made at  
4 this time. Thank you."

5 Q. So my question would be, Professor Heineman, as  
6 the union president, did the university speak accurately  
7 when it stated that Professor Kao was within his rights  
8 to file a grievance under the collective bargaining  
9 agreement to challenge this instruction that the HR  
10 officer gave to go to the doctor?

11 A. The question is -- I'm sorry, what is the  
12 question? Did --

13 Q. I'm going to say it over 'cause I don't think I  
14 did it well. I'll say it over.

15 Was the university HR person, Martha  
16 Peugh-Wade, speaking correctly in that letter when she  
17 told Professor Kao he had the right to file a grievance  
18 if he disagreed with this instruction to go to the  
19 doctor?

20 A. Yes.

21 Q. And had he done so, would it -- the union have  
22 treated it as if it had been -- would it be processed  
23 under this grievance arbitration procedure of the union  
24 contract?

25 A. I'm sure it would have. Again, I was not in



1 office at the time.

2 Q. Okay.

3 A. But I -- yes.

4 Q. Is "insubordination" a term that you're  
5 familiar with in labor relations?

6 A. Yes.

7 Q. Is it a term that means that the employer has  
8 given an instruction to its employee, and if the  
9 employee willfully disobeys the instruction, it's called  
10 insubordination?

11 A. Yes, assuming the instruction is a legitimate  
12 instruction.

13 Q. And assuming that the -- the instruction is one  
14 the university has the right to give to the employee.

15 You know, if the employer says "Divorce your  
16 wife," that wouldn't be legitimate. Therefore, it  
17 wouldn't be instruction that could be insubordination,  
18 correct?

19 A. Correct, though the parties might disagree on  
20 what a legitimate instruction is.

21 Q. I don't think they'd disagree on that one,  
22 though, would they?

23 A. On that one, no, I don't think so.

24 Q. On the wife you've gotta divorce?

25 A. I don't think so.

1 Q. Okay. But if the union disagreed with the  
2 university that the instruction was legitimate, the  
3 union could back the employee in the grievance  
4 procedure, correct?

5 A. Yes.

6 Q. Okay. And that's what the grievance procedure  
7 is for; even where there's a work instruction, the  
8 employee can challenge it with a grievance, correct?

9 A. Yes.

10 Q. Okay. And if it's a legitimate instruction,  
11 would you agree to what Ms. Peugh-Wade said in that  
12 letter, that then it is insubordination and then it's  
13 subject to discipline or discharge, if it's a legitimate  
14 instruction?

15 MR. KATZENBACH: Your Honor, asks for  
16 speculation.

17 THE COURT: Overruled. The witness may answer.

18 THE WITNESS: I think so, but I think it  
19 would -- it might depend on the circumstances.

20 MR. VARTAIN: Q. Okay. And you don't know the  
21 particular facts of this case or the circumstances, so  
22 you don't want to render an opinion, and I won't ask you  
23 to.

24 A. No.

25 Q. Is that fair?

1 A. Yes.

2 Q. Okay. I guess the point of what I want to ask  
3 you is, by the human resources officer giving Professor  
4 Kao information that the university could consider this  
5 as insubordination, was the -- in your judgment, was the  
6 human resources officer, just by doing that, violating  
7 any term of the contract?

8 A. No, to the contrary. There's -- there is a  
9 clause about mandatory sick leave and so forth that can  
10 be ordered by the --

11 Q. By the HR --

12 A. -- supervisor -- well, not by HR, but by the  
13 supervisor.

14 Q. Right. So putting Professor Kao mandatorily on  
15 leave was -- is permissible?

16 A. Under -- if all the conditions are met, yes.

17 Q. Okay. Under -- I mean, by the contract --  
18 under the union contract.

19 A. Yes.

20 Q. Okay. Are you aware that there is a section of  
21 the collective bargaining agreement that basically says  
22 words to the effect of one faculty member shall not  
23 harass other faculty members? It's a no-harassment  
24 provision.

25 A. You would have to refresh my memory on that.

1 I'm aware of parallel provisions, but not of that one.

2 Q. Okay. And we can -- we'll talk about it.

3 You've been on the witness stand a long time. I wanted  
4 to talk about when faculty members -- new faculty  
5 members are hired.

6 Yes, you can close that up.

7 The question being that it's the dean of the  
8 college that oversees whether the hiring process is  
9 going to be fair enough that there's a outreach to women  
10 and ethnic minorities and so on. That's the dean's job;  
11 is that not true?

12 A. Principally, yes.

13 Q. Not only her job [sic], but that is one of her  
14 jobs?

15 A. Yes.

16 Q. And you've worked with Dean Turpin over the  
17 years?

18 A. Yes.

19 Q. And has she been a person that, to your  
20 experience, takes that job -- takes that role with a  
21 good-faith or serious mind?

22 A. Yes.

23 Q. So when she's been the -- when she was in  
24 charge over the math department, when she was the dean,  
25 was it your observation, as the union president, that

1 she acted sincerely and in good faith to manage these  
2 hirings so that, you know, there was nondiscrimination  
3 and affirmative action?

4 A. I can speak only to the English department  
5 searches that I was involved in. And the answer to your  
6 question in those cases is yes.

7 Q. Have you ever had any experience with her to  
8 the contrary out of the English department, that she, as  
9 the dean, was not supportive of nondiscrimination, not  
10 supportive of affirmative action?

11 A. No.

12 MR. VARTAIN: No further questions at this  
13 time. Thank you, Professor.

14 THE WITNESS: Sure.

15 THE COURT: Redirect?

16 MR. KATZENBACH: Yes, I do.

17 REDIRECT EXAMINATION BY MR. KATZENBACH

18 MR. KATZENBACH: Q. You were talking a little  
19 bit with counsel, Mr. Vartain, about -- and he asked you  
20 about insubordination.

21 A. Yes.

22 Q. And you indicated it would depend on  
23 circumstances.

24 A. Yes.

25 Q. Would one of those circumstances be, for

1 example, an employee's assertion that they had rights  
2 protected by state law against a compelled mental  
3 examination?

4 A. Yes. The contract includes a provision that  
5 demands that we adhere to law. So that would be a basis  
6 of objection.

7 Q. And again -- and the constitutional right of  
8 privacy in California, that would be another basis for  
9 such an objection, don't you think?

10 A. I don't know. I don't have any expertise  
11 there.

12 Q. All right. But if an employee was asserting a  
13 legal right to say that this was overly invasive, that  
14 would be not necessarily insubordination, as you  
15 understand it?

16 MR. VARTAIN: Objection. The question is vague  
17 because an assertion doesn't make it an illegal order.

18 THE COURT: Again that's more than six.

19 Overruled. Witness may answer.

20 THE WITNESS: I'm sorry, will you ask again.

21 MR. KATZENBACH: Let me see if I --

22 Q. If an employee -- sorry.

23 Could you read the question back.

24 (Record read as follows:

25 *QUESTION: But if an employee was*

1       *asserting a legal right to say that this was*  
2       *overly invasive, that would be not*  
3       *necessarily insubordination, as you*  
4       *understand it?)*

5               THE WITNESS: It would not necessarily be. We  
6 would have to see what the facts revealed.

7               MR. KATZENBACH: Q. How about if an employee  
8 was asking the university to give it -- give him some  
9 more information so he could assess their demand on him;  
10 do you think that --

11              MR. VARTAIN: Calling for speculation.

12              THE COURT: What's the ground?

13              MR. VARTAIN: Objection. Speculation.

14              THE COURT: Overruled.

15              MR. KATZENBACH: I'm sorry, let me rephrase the  
16 whole question.

17              Q. If an employee was asking for more information  
18 so he could assess the university's demand, would that  
19 be insubordination?

20              A. A request for information can't be  
21 insubordination, no.

22              Q. That -- so -- okay. The -- okay.

23              Now, will you take a look at what's in front of  
24 you as Exhibit 8. That's in -- that's the collective  
25 bargaining agreement. And if you could look at page 70

1 of that agreement.

2 A. I have it.

3 Q. I'd like to direct your attention to the last  
4 paragraph on that page, which is paragraph number  
5 26.3.4. Do you see that?

6 A. Yes.

7 Q. Is there any other provision -- in this  
8 contract, is there any provision at all, to your  
9 recollection -- to your knowledge, governing the right  
10 of the university to demand that an employee undergo a  
11 mental or psychological examination?

12 A. I am not aware of -- I don't recall any other  
13 than this.

14 Q. Okay. And this section deals with the health  
15 condition interfering with the scope or quality of an  
16 associate professor's responsibility. Is it -- do you  
17 see the section?

18 A. Yes.

19 Q. And as you understand this section, have you  
20 ever seen this section apply to demand a mental  
21 examination for a faculty member?

22 A. Yes.

23 Q. In what case, what situation?

24 A. I prefer not to name the individuals --

25 Q. No, I'm sorry --



1 A. -- involved.

2 Q. -- just in general. I don't want names. It  
3 wouldn't be necessary.

4 A. In both cases, there were student complaints  
5 that the faculty member was not fulfilling his or her  
6 duties appropriately or fully.

7 There were also some complaints from the  
8 faculty member's colleagues within her or his  
9 department.

10 So there was an allegation that work wasn't --  
11 work wasn't being done and that it was -- some condition  
12 was affecting it, in both cases.

13 Q. When you say "some condition," what do you mean  
14 by that?

15 A. Some physical and/or psychological condition.

16 Q. Okay. Now, when an employee takes sick  
17 leave -- are you experienced, under the contract, with  
18 the provisions for getting sick leave?

19 A. Yes.

20 Q. And I believe that when an employee has sick  
21 leave, the union [sic] typically requires a physician's  
22 certificate from -- a doctor's note -- to justify sick  
23 leave. Is that right?

24 A. I think you said the union generally requires.

25 Q. I'm sorry, USF, the university.

1 A. Yes.

2 Q. So basically that would come from -- in most  
3 cases you're aware of, does that note come from the  
4 employee's own doctor?

5 A. Normally, yes.

6 Q. So for the most part, would it be accurate to  
7 say that if the employee -- if the university -- if the  
8 employee's having a health problem requiring sick leave,  
9 that the -- it would be the employee's own doctor that  
10 would identify the health problem and provide that  
11 information to the university?

12 A. Not necessarily.

13 Q. It could be who else?

14 A. If it's the employee's initiative, then the  
15 answer to your question is yes. If it's the  
16 university's initiative, the answer may or may not be  
17 yes.

18 Q. Okay. If you continue on looking at the  
19 section of -- the section 26.3.4, if you turn to the  
20 next page, it indicates that the associate may -- the  
21 dean may require the association member to request an  
22 appropriate leave of absence pursuant to this article,  
23 which would normally be sick leave; is that right?

24 A. That's what it says, yes.

25 MR. VARTAIN: Objection, Your Honor. The whole

1 sentence wasn't written [sic] for the benefit of the  
2 witness. It goes back above the other -- if I can read  
3 it, Your Honor, it says:

4 "If no agreement is reached, the dean  
5 may require the association member to  
6 request an appropriate leave of absence."

7 THE WITNESS: Yes.

8 MR. VARTAIN: Could you show that to the jury,  
9 please, Mr. Katzenbach.

10 MR. KATZENBACH: Certainly. I think -- if you  
11 would like, I can highlight that for you, if that would  
12 help.

13 MR. VARTAIN: What might be useful is if the  
14 second page could be seen by the jury, along with the  
15 bottom of the first page.

16 MR. KATZENBACH: That is beyond my technical  
17 skills. Having enough trouble just getting ...

18 Q. Other than the provisions that you're reading  
19 right here providing for sick leave, right, and -- other  
20 than the provisions, is there anything specific in the  
21 contract that deals with the rights or prohibitions on  
22 requiring a mental examination?

23 A. Not that I'm aware of.

24 Q. Is there anything in the contract, that you're  
25 aware of, that gives the university the right to demand

1 that an employee see only a doctor of the university's  
2 choosing?

3 MR. VARTAIN: Objection. The question is  
4 vague. Other treatment or evaluation?

5 MR. KATZENBACH: For any reason.

6 MR. VARTAIN: Same objection.

7 THE COURT: Dr. Heineman, do you understand the  
8 question?

9 THE WITNESS: No.

10 THE COURT: Objection sustained.

11 MR. KATZENBACH: Thank you. Let me ask it  
12 differently.

13 Q. Is there anything in the contract, that you're  
14 aware of, that requires -- that allows the university to  
15 demand that a faculty member go to a doctor of the  
16 university's own choosing?

17 A. Not that I'm aware of.

18 MR. VARTAIN: Move to strike. The question was  
19 vague because it didn't indicate whether it was going to  
20 the doctor for evaluation or treatment.

21 MR. KATZENBACH: I honestly -- if you would  
22 like, Your Honor, I can ask two questions, if that would  
23 be --

24 THE COURT: Same ruling on the objection.  
25 Objection's overruled.

1 MR. KATZENBACH: The answer stands?

2 THE COURT: The answer stands.

3 MR. KATZENBACH: Thank you, Your Honor.

4 Q. Now, directing your attention to the grievance  
5 procedure in the contract. Does the grievance  
6 procedure -- the grievance procedure -- isn't it correct  
7 that the grievance procedure's designed to remedy issues  
8 of contract violation?

9 A. Yes.

10 Q. And it's limited to contract violations?

11 A. Yes.

12 Q. It's not a remedy that would normally be  
13 invoked for someone claiming a violation of California  
14 law, let's say antidiscrimination law?

15 A. There is an adherence-to-law clause, so you  
16 could get at it that way.

17 Q. But typically it's involving contract  
18 violations?

19 MR. VARTAIN: Objection. Ambiguous,  
20 "typically."

21 MR. KATZENBACH: Q. Okay. Let me just say the  
22 grievance procedure describes itself as remedying  
23 contract violations?

24 A. Yes.

25 Q. And that would include any contract provisions

1 that allowed -- that would include -- does anything in  
2 the contract preclude an employee from invoking other  
3 legal remedies?

4 A. It's possible that some clause somewhere -- I  
5 truly can't recall. It's possible that some clause  
6 somewhere says attorneys can't come in here. But in  
7 general, the answer is no, it's not precluded.

8 Q. So if somebody --

9 A. Unless it's specifically stated, it's not  
10 precluded.

11 Q. Okay. So unless something in the contract says  
12 "You cannot bring a case under the Fair Employment and  
13 Housing Act," the employee would be free to do so?

14 A. As far as I know.

15 Q. Thank you. Now --

16 THE COURT: Ladies and gentlemen, remember the  
17 admonition. Do not form or express any opinion in this  
18 case until it's been submitted to you for your decision.  
19 Do not discuss among yourselves or others until that  
20 time. Please be back in your places at 3:40 according  
21 to the courtroom clock.

22 (Recess taken.)

23 THE CLERK: Please remain seated and come to  
24 order. Department 318 is again in session.

25 THE COURT: Jurors and alternates are all

1 present. Counsel from both sides are present. The  
2 plaintiff is personally present. Dr. Heineman is on the  
3 stand.

4 Mr. Katzenbach, you may continue your inquiry.

5 MR. KATZENBACH: Thank you, Your Honor.

6 Q. Doctor, just to pick up where -- hopefully  
7 where we left off, I'd like to direct your attention, if  
8 you would, back to Exhibit 8, which is the collective  
9 bargaining agreement.

10 And I'd like you to look at page 103, which I  
11 have also projected up on the screen behind me. And I'd  
12 like you to direct your attention to paragraph numbered  
13 38.4. Do you see that?

14 A. Yes.

15 Q. Does that paragraph describe the limits of the  
16 arbitrator's authority under the contract?

17 A. That paragraph and 38.5 describe the limits of  
18 the arbitrator's authority.

19 Q. So 38.4 requires a violation of a specific  
20 provision as written and expressed in this agreement?

21 A. Yes.

22 Q. I'm sorry. In 38.5, that states:

23 "The arbitrator shall have no authority  
24 to add to, subtract from, modify, change,  
25 alter or ignore in any way provisions of the

1 agreement."

2 A. Yes.

3 Q. All right. Now, I'd like you to take a look at  
4 the next page of the contract, which is on page 103.

5 A. The next page is 104.

6 Q. Sorry, 104. And I'd like to direct your  
7 attention to the top section where paragraph 38.5  
8 continues. And again, that states that:

9 "The award of the arbitrator so made  
10 shall be final and binding on the parties."

11 A. Yes.

12 Q. Right. So what happens -- strike that.

13 Did you understand that the award of an  
14 arbitration, if Dr. Kao had gone in that direction,  
15 would result in something that should be final and  
16 binding?

17 A. I'm sorry. If there were an arbitration, yes.

18 Q. And that would mean he couldn't come to court?

19 MR. VARTAIN: Objection. Calls for a legal  
20 opinion.

21 MR. KATZENBACH: You're right. I'll withdraw  
22 that question.

23 I think that's ...

24 Q. Now, you -- in response to questions from Mr.  
25 Vartain, you indicated that you would expect the



1 university to take issues of safety seriously.

2 A. Yes.

3 Q. I'd like to explore the word "seriously" a  
4 little bit with you. Would you consider it part of  
5 taking something seriously to take prompt action?

6 A. It would depend on the circumstances.

7 Q. If you received a complaint that someone had  
8 engaged in threatening or violent behavior, would you  
9 expect the university, as you understand what their  
10 duties are, to take prompt action?

11 A. Normally, yes.

12 Q. Would you expect them to conduct a thorough and  
13 fair investigation?

14 A. Yes.

15 Q. Would you expect them to talk to everyone who  
16 might have knowledge of the issues?

17 A. All the relevant parties, yes.

18 Q. Would one of those relevant parties be the  
19 accused?

20 A. I would think so.

21 Q. I mean, you'd want to get his side -- his or  
22 her side of the story too, right?

23 A. I would think so.

24 Q. Okay. And in fact, the university has policies  
25 on harassing and threatening behavior, doesn't it?

1 A. The university does, yes.

2 Q. Okay. And does it also have a book called --  
3 often called The Respect Handbook?

4 A. Yes.

5 Q. And that's another -- that's a policy the  
6 university has for dealing with claims of people who  
7 feel they're harassed, right?

8 A. I believe so.

9 Q. And are you familiar with that policy -- or the  
10 handbook?

11 A. Generally.

12 Q. Do you recall that all employees were given a  
13 copy of that?

14 A. I don't know that.

15 Q. All right. Do you recall taking a training  
16 course -- on-line training course about that -- the  
17 "respect" policy?

18 A. I have taken an on-line training course, in  
19 fact, two or three times on sexual harassment.

20 Q. Okay.

21 A. Not necessarily on the "respect" policy.

22 Q. Okay. Would you take a look at Exhibit 216  
23 that counsel showed you earlier. I think it's in the  
24 university's book. I'm sorry, 219.

25 A. 21 ...

1 Q. 9.

2 A. Yes.

3 Q. In that letter, in the third paragraph, it  
4 states:

5 "It is within your rights to file a  
6 grievance," and then it continues. "And  
7 correspondence from your attorney on the  
8 issue is welcome." Then it continues.

9 "However, it does not alter the university's  
10 belief of the need for the IME process and  
11 for the leave of absence."

12 Do you see that?

13 A. Yes.

14 Q. And then it says -- the conclusion, the last  
15 paragraph, it says:

16 "Therefore, the instruction to remain  
17 off campus remains in effect and no  
18 exception will be made at this time."

19 Is there anything in Exhibit 219 that  
20 identifies any provision of the collective bargaining  
21 agreement that the university is claiming that Dr. Kao  
22 is violating in connection with its demand that he go to  
23 an IME?

24 MR. VARTAIN: Objection. Lacks foundation.

25 THE COURT: Sustained.

1 MR. KATZENBACH: Q. Does Exhibit 119 indicate  
2 that there's anything that Dr. Kao can do --

3 A. 219?

4 Q. Sorry, 219. I apologize.

5 The letter of June 30<sup>th</sup>, does that say  
6 anything about if Dr. Kao would file a grievance, the  
7 university would reconsider its position on going to an  
8 IME?

9 A. That's not stated in this letter.

10 Q. Does it say that if Dr. Kao would file a  
11 grievance, that might change the university's view about  
12 staying off campus?

13 A. That's not stated in this letter.

14 Q. In fact, the letter says exactly the opposite,  
15 doesn't it? It says that filing a grievance isn't going  
16 to alter the university's position?

17 MR. VARTAIN: Objection. Vague. Position on  
18 what?

19 THE COURT: Overruled. Witness can answer.

20 THE WITNESS: It says if a grievance is filed  
21 or there is correspondence from the attorney, it would  
22 not alter the university's belief in this.

23 So I think the answer to your question is yes.

24 MR. KATZENBACH: Okay. I'll take your -- I'll  
25 take your reading. Thank you.

1 I think you've answered all of my questions.  
2 Thank you very much. Counsel for the university may  
3 have ...

4 THE COURT: Mr. Vartain, any further questions?

5 MR. VARTAIN: I have no further questions, Your  
6 Honor. Thank you.

7 THE COURT: Jurors, do you have questions for  
8 Mr. Heineman?

9 JUROR 1: Yes. Yes, I'd like you to explain --

10 JUROR 2: We have to write it down.

11 JUROR 1: I'm sorry, Your Honor. I forgot.

12 (Judge and counsel left the room.)

13 THE CLERK: Jurors, just a reminder, if you do  
14 have a question for witnesses in the future, just write  
15 it on one page and just hand it to us. Thank you.  
16 We'll actually come by to pick it up from you.

17 (Judge and counsel entered the room).

18 THE COURT: I'm not sure of the thrust of the  
19 question, so I'm allowing the attorneys to question on  
20 the subject matter of the question submitted by the  
21 juror.

22 Go ahead, Mr. Katzenbach.

23 MR. KATZENBACH: Yes.

24 REDIRECT EXAMINATION BY MR. KATZENBACH (RESUMED)

25 MR. KATZENBACH: Q. How serious does the

1 university consider following the spirit of the  
2 affirmative action process?

3 A. I think they take both the letter and the  
4 spirit of the law and of the policy absolutely  
5 seriously. I can't give you the current numbers, but I  
6 believe that the full-time faculty is now virtually or  
7 actually equal numbers of men and women. I don't know  
8 the numbers of non-Caucasian faculty, but they are  
9 substantial.

10 And I know, although this is not directly  
11 responsive to the question, we've -- USF is among the --  
12 what is the ten or 12 most diverse campuses, in terms of  
13 its student body. So I think it's all taken quite  
14 seriously.

15 Q. Both the letter and the spirit?

16 A. Yes.

17 Q. Okay.

18 MR. VARTAIN: I have no questions. Thank you.

19 THE COURT: All right.

20 MR. KATZENBACH: Your Honor, what should I do  
21 with this?

22 THE COURT: Give it to the clerk.

23 Can Dr. Heineman be excused?

24 MR. VARTAIN: I agree, Your Honor.

25 MR. KATZENBACH: Yes.

1 THE COURT: Dr. Heineman, thank you very much.  
2 You're free to go.

3 Plaintiff may call his next witness.

4 MR. KATZENBACH: Yes. We call the plaintiff,  
5 John Kao.

6 (Witness sworn.)

7 JOHN S. KAO,

8 having been first duly sworn, testified as follows:

9 THE CLERK: Have a seat. Please state your  
10 name and spell it for the record, once you're seated.

11 THE WITNESS: My name is John, last name is  
12 Kao. My first name is spelled J-O-H-N, last name  
13 spelled K-A-O.

14 DIRECT EXAMINATION BY MR. KATZENBACH

15 MR. KATZENBACH: Q. Dr. Kao, do you have a  
16 Ph.D.?

17 A. Yes.

18 Q. And what is it in?

19 A. Mathematics; in particular, applied  
20 mathematics.

21 Q. And where did you get your degree?

22 A. Princeton University.

23 Q. Now, I'll address you as Dr. Kao. During -- at  
24 any time when you were a member of the faculty at USF,  
25 did you intentionally try to scare anybody?

1 A. No.

2 Q. Did you intentionally threaten anybody?

3 A. No.

4 Q. At any time when you were a member of the  
5 faculty at USF, did you ever intentionally bump into  
6 anybody?

7 A. No.

8 Q. Did you ever intentionally veer at anybody?

9 A. No.

10 Q. Did you ever do any action to intentionally  
11 cause anyone to suffer any distress of any nature?

12 A. Absolutely not.

13 Q. Now, during the time -- up until June 18<sup>th</sup>,  
14 2008, had anyone from the university ever come to you  
15 and said they were in any way concerned that your  
16 behavior in 2008, 2007, 2006 or earlier was causing  
17 anyone to feel harassed in any way?

18 A. No.

19 Q. Did anyone from the university come up to you  
20 and tell you that your behavior had caused anyone to  
21 feel threatened?

22 A. No.

23 Q. Had anyone from the university come up to you  
24 and told you that you were scaring anybody?

25 A. No.



1 Q. I'd like you to go back, tell the jury a little  
2 bit about your background. Where did you grow up?

3 A. I was born in Salt Lake City, Utah. I grew up  
4 there till I left for graduate school when I was 18.

5 Q. What was -- what was your father's profession?

6 A. He was a professor at the University of Utah in  
7 the field of atmospheric sciences.

8 Q. And your mother, did she work outside the home?

9 A. Yes. She was a librarian, also at the  
10 University of Utah. She was the head of the cataloging  
11 department there.

12 Q. When you were growing up, did you have any  
13 experience with your father regarding his job -- his  
14 role as a faculty member at the University of Utah?

15 A. My recollection of my father was that he worked  
16 very hard. He didn't have a lot of time for recreation  
17 for his own pleasure, but he always made time to further  
18 my education with tutoring in mathematics and science.  
19 That was his area.

20 Q. And when you were going to school in Utah, did  
21 you -- did you move along at a more-rapid-than-normal  
22 pace?

23 A. In Salt Lake City at the time, they didn't have  
24 too many programs for I suppose what would be called now  
25 gifted or advanced, accelerated, students. So my

1 teachers, starting in elementary school, they encouraged  
2 me that if I wanted to learn at a faster rate, I  
3 could -- I had the opportunity to advance grades, skip  
4 grades, as it were. So I did. Starting in elementary  
5 school, I skipped fifth grade, then seventh grade, and  
6 then also in high school one grade.

7 Q. At some point in your childhood, did your  
8 father die?

9 A. Yes. That would be when I was 13 and I had  
10 started high school. I believe it was my second year in  
11 high school. So that's when I lost him.

12 Q. And how did -- who then became the primary  
13 support of your family?

14 A. My mother.

15 Q. Okay. Now, as you went through high school,  
16 did you begin focusing on a career?

17 A. Yes. I missed my father very much and I  
18 considered that if I pursued the same profession that  
19 was very important to him -- excuse me -- that that  
20 would be a way for me to stay close to him.

21 And so at some point in high school, I made the  
22 decision to pursue a teaching career at the college or  
23 university level, I would guess within a year or two  
24 after my father passed.

25 Q. And did you make a decision as to what areas

1 you would pursue?

2 A. That decision came after I started the  
3 university of Utah as an undergraduate. I believe I was  
4 15 at that time. I started in the physics program, but  
5 after a year of physics, I switched to mathematics. I  
6 preferred more theoretical working with pencil and  
7 paper. I wasn't good in the lab. And that was the area  
8 that my father spent tutoring me when I was a kid.

9 Q. How long were you at the University of Utah?

10 A. Three years. I graduated when I was 17. I  
11 turned 18 just shortly after graduation. That would  
12 have been 1985.

13 Q. And as -- when you -- as you were graduating  
14 from the University of Utah, what sort of graduate work  
15 were you looking to do?

16 A. I completed my undergraduate studies a little  
17 bit shorter than expected. I was able to finish the  
18 coursework in three years instead of four. I was taking  
19 a lot of summer classes. So when I saw that I could  
20 complete my degree at a given -- within that semester, I  
21 decided I would give it a shot to try to get into a  
22 graduate program.

23 So during my senior year, also with the  
24 encouragement of a professor at University of Utah, I  
25 applied to, I believe, about ten graduate schools that

1 were sort of at the top of where I wanted to go. And I  
2 also applied for government fellowships. My thinking  
3 was that if I didn't get accepted, I could take another  
4 year and maybe get a second undergraduate degree and  
5 then reapply.

6 Q. You also indicated you applied for a government  
7 fellowship. What sort of fellowship did you apply for?

8 A. Specifically my math professor encouraged me to  
9 apply for what's called the National Science Foundation  
10 graduate fellowship. I believe this program is still in  
11 existence.

12 When I applied, the U.S. government, if you  
13 were awarded it, would pay basically your tuition  
14 through graduate school. What was significant for me  
15 was you would also get a research stipend.

16 So in a sense, if you were able to get this  
17 fellowship, it would be like you're working for the  
18 government. The government will pay your way.

19 Q. Why was that important to you?

20 A. Well, my mother was a single mother raising me  
21 and my sister. We didn't have any extended family to  
22 help us, either financially or in the usual ways aunts  
23 and uncles might assist.

24 So I guess it was always in the back of my mind  
25 that the sooner I could get out of the house and earn a

1 living on my own, the easier it would be for my mother.

2 So it was a great honor when I was accepted at  
3 Princeton, which was the top mathematics department. It  
4 was the top mathematics department in the United States  
5 at the time. My math professor said it would be very  
6 difficult, if not impossible, to get in, but I got in.  
7 And then the government would pay my way. So I eagerly  
8 accepted it.

9 Q. Thank you.

10 How old were you when you started at Princeton?

11 A. I was 18.

12 Q. Tell us about going to Princeton. What was  
13 that like for you?

14 A. The first two years, it was pretty rough going  
15 for me. I sort of stuck with students within the  
16 applied math program, which was a branch of the  
17 mathematics program. But we were a smaller group within  
18 mathematics. So that was basically my colleagues, I  
19 considered, at that time.

20 In my cohort, I believe, that year, there were  
21 about eight of us. Half of us had undergraduate degrees  
22 from American universities, half were from abroad. And  
23 it was a struggle for those of us with bachelor's  
24 degrees from American universities because if, for  
25 example, a person went to a school in England or Germany

1 or China, all of their undergraduate curriculum would be  
2 subject-specific, whereas those of us who went to an  
3 American University, we would be expected to take  
4 coursework outside our specific discipline: history  
5 classes, English classes, that sort of thing.

6 So the four of us from American universities,  
7 we had to work harder to sort of catch up within the  
8 field of mathematics. It was a struggle, I think, for  
9 all of us. But we helped each other. The first few  
10 years, it was a lot of academic work and ...

11 Q. As you were -- as you progressed at Princeton,  
12 did you find, also, time to do things other than  
13 academic work?

14 A. Not during the first two years. We were  
15 expected to pass a series of examinations, I believe  
16 three at the end of our first year, two at the end of  
17 our second year.

18 If we were able to pass what they referred to  
19 as the general exams, we would be awarded a master's  
20 degree and then start our doctoral research.

21 After the second year and me and my colleagues  
22 passed our exams, then we were able to take a little  
23 more time for ourselves and socialize more, take time to  
24 expand as a more human person as opposed to just  
25 specifically thinking about our subject all the time.

1 Q. So what did you do when you had this  
2 opportunity to expand your social activities?

3 A. Well, I became interested in sports. I got  
4 involved in the judo club at Princeton. For one year, I  
5 was president of the judo club. That was the first time  
6 I was serious about a sport.

7 I became interested in student organizations.  
8 There was a Asian-American student association at  
9 Princeton. They were part social, also with some  
10 political aspects to it, political dimension. I know  
11 the students were advocating for a Asian-American  
12 studies program at Princeton, which they didn't have. I  
13 served as a graduate student representative to that  
14 organization for one year.

15 I also became interested in the volunteer fire  
16 department at Princeton. They didn't have a  
17 professional fire department at that time. It was all  
18 volunteer. And so I started that when I turned 21. I  
19 was two years in the volunteer fire department.

20 Q. Tell us a little bit about the judo club. How  
21 many members did it have, what did it do?

22 A. We had a very small group when I started, maybe  
23 five students. I know there was one student who was an  
24 undergraduate. His father was a professional instructor  
25 from Tennessee. He was a great American gentleman, and

1 he was sort of trying to start a club.

2           And then judo is a Japanese martial art. It's  
3 a form of wrestling, which means the training is --  
4 it's -- it's not one of the more popular martial arts.  
5 It's a kind of sport, I guess. So it's not as popular  
6 as karate or Tae Kwon Do.

7           So we had started with a small group. We tried  
8 to find an instructor in the area that wasn't a student,  
9 that was more like an advanced person who could come in.  
10 We didn't have any funds to pay the individual, but --  
11 so they would have to work as a kind of community  
12 service.

13           But we identified such a person, and then it  
14 grew. At the time I graduated, I think we had about 15  
15 people regularly coming to practice.

16           Q.   And were there tournaments or anything else  
17 that the judo club did?

18           A.   Well, we were a small group, so -- and if we  
19 went to a tournament, we would have to fund it  
20 ourselves. But we tried to participate in competitions.  
21 So maybe once a semester, we would get in somebody's car  
22 and drive to a school in the area or a professional dojo  
23 in the area for a tournament.

24           Q.   Did you get any -- participate in any  
25 tournaments?



1 A. Yes.

2 Q. And what tournaments did you participate in,  
3 that you recall?

4 A. I recall one or two dojo tournaments I  
5 participated in. I recall there was what was called the  
6 Ivy League championship, which was organized once per  
7 year. I think one time it was held at Columbia, another  
8 time at Cornell. And I did participate in one of the  
9 tournaments as a white belt.

10 Q. And did you win anything?

11 A. I won second place in the white belt division  
12 of the tournament that year. There were, I believe,  
13 eight of us in that pool.

14 Q. Okay. And let me ask you a little bit about  
15 your volunteer -- activity as a volunteer firefighter.  
16 What was involved there?

17 A. It would be the full range of activities that  
18 men and women would engage in in order to be a  
19 firefighter. So you had to get special -- first you had  
20 to pass an exam, both a written test, a practical exam  
21 and first aid, in order to qualify to be a regular  
22 firefighter.

23 There were higher levels, if you wanted to be a  
24 captain and sort of direct the operations against a  
25 burning building. Some members were certified to drive

1 a fire truck. I only did the basic firefighting.

2 But we did have fires, and, you know, it would  
3 be going into the building with a hose and trying to put  
4 the fire out. If you're firefighting, it's important  
5 that you take preventative measures to ensure that  
6 there's not what's called a backdraft explosion.

7 What that means is if there's a unit and  
8 there's -- part of that unit is on fire, you have to  
9 ventilate it to release the hot air. If you don't, if  
10 people come in with a hose and then open the door,  
11 what'll happen is that the oxygen has been depleted from  
12 the -- from the room, and then when you open the door  
13 from the sides, the air will rush in and it'll explode.

14 So, you know, you have to climb to the roof;  
15 you have to cut a hole in the roof to release that  
16 before it's safe for the firefighters to enter the  
17 building.

18 Q. Now, I just want to go -- just before -- go  
19 back a second 'cause I forgot to ask you -- and I  
20 apologize -- what ethnic group was your -- were your  
21 father and mother from?

22 A. I'm of mixed Asian ethnicity. My father was  
23 from China originally and my mother was from Japan  
24 originally.

25 They met at UCLA. My father taught at UCLA for

1 a short time after he graduated. My mother was -- was  
2 in graduate school there, like my father, although my  
3 mother -- in the end, she graduated from USC. She  
4 didn't complete her degree. But they met in Los  
5 Angeles.

6 They obtained citizenship, I believe, in the  
7 1950s after they were married. And then I think around  
8 1962 was when my father got a teaching position at the  
9 University of Utah.

10 Q. All right. Now, let's go back to Princeton.  
11 As a doctoral candidate, did you have to write a  
12 dissertation?

13 A. Yes.

14 Q. Okay. So tell us a little bit about what  
15 your -- what was your dissertation about?

16 A. Well, I was in the applied math program. There  
17 were several areas at that time where -- which the  
18 department was well known for in applied mathematics.  
19 My -- the area that I selected to specialize in was  
20 probability theory.

21 My thesis advisor was a faculty member, was a  
22 professor of civil engineering. At that time, the  
23 statistics program was part of the civil engineering  
24 department, not the mathematics department. So my  
25 thesis advisor -- his name is Erhan Cinlar, he -- well,

1 he did teach engineering, but he also had emphasis in  
2 statistics. And I think maybe midway through his  
3 career, he became very interested in pure math --  
4 mathematics as opposed to statistics, which is  
5 theoretical.

6           Probability theory is the theoretical  
7 mathematical foundation underlying statistical  
8 techniques.

9           Q.    So what was your --

10          A.    So --

11          Q.    So just to interrupt you, what was your -- what  
12 was the subject of your doctoral thesis?

13          A.    My thesis was developing the mathematics behind  
14 the model that my thesis advisor had proposed. He had  
15 in mind engineering applications of it. But I  
16 developed -- my thesis work was on the mathematical  
17 side.

18                So it was called "Birth And Death Processes On  
19 Flows." That was the name that we coined  
20 mathematically. It's referred to as "measure value  
21 random processes driven by status flow." It's a little  
22 bit technical, but "measure" referred to measuring  
23 amounts of substance.

24                He had in mind particles, like if you have an  
25 oil spill in the ocean, so you're trying to measure how

1 much oil, how much contaminant, is in a particular area.

2 The ocean is subject to turbulence and so the  
3 motion of the liquid, of the water, is -- has a random  
4 character to it. And so you're trying to measure a  
5 random amount of substance that's being carried by  
6 stochastic -- "stochastic" meaning random -- flow.

7 Q. And eventually did you -- did you finish your  
8 thesis and obtain a doctoral degree?

9 A. Yes.

10 Q. Now, in the course of finishing your thesis,  
11 did you also engage in some teaching?

12 A. Not directly at Princeton -- at Princeton,  
13 because I had this research fellowship, so I focused on  
14 research. My thesis advisor did ask me to be a teaching  
15 assistant of sorts for his graduate class. I did that  
16 for a couple years.

17 And -- however, in my last year at Princeton as  
18 an official student, they were evaluating my  
19 dissertation, so I didn't have to be physically on  
20 campus during that last year, and so I had a  
21 postdoctoral teaching position at the University of  
22 North Carolina at Charlotte.

23 Q. And what courses did you teach at the  
24 University of North Carolina?

25 A. That was mostly research. I was working in a

1 different area of probability theory with a gentleman by  
2 the name of Dr. Wihstutz. But I had a teaching duty of  
3 one class, which I believe was a business statistics  
4 class.

5 Q. All right. Now, at some point did you decide  
6 to go and get yourself a job teaching in an academic  
7 institution?

8 A. Yes.

9 Q. And what was involved in getting the job as a  
10 university professor?

11 A. Well, I believe I started looking for a  
12 position in spring of 1991. That would be the semester  
13 which I officially received my doctorate. And by the  
14 end of the spring, I completed some teaching at the  
15 University of North Carolina at Charlotte. So I had  
16 both research and teaching experience and the degree.

17 So I applied for positions for the academic  
18 year '91 and '92. I looked for openings. There's a  
19 publication called "Notices of the American Mathematical  
20 Society." They have a classified section where the  
21 advertisements are posted, starting summer and then  
22 running until December.

23 I looked at available jobs for fall of '91, and  
24 then I applied to about 50 places.

25 Q. And at some point, were you invited to visit

1 the University of San Francisco as an applicant?

2 A. Yes.

3 Q. Can you tell us about what that experience was  
4 like?

5 A. Typically for an opening, they'll select  
6 finalists. And then those finalists would be offered to  
7 visit the campus, and there would be interviews with the  
8 department, interviews with the dean.

9 You might be expected -- one might be asked to  
10 give a research talk, like a seminar. One might be  
11 asked to give a teaching talk.

12 I received an interview from the University of  
13 San Francisco in, I believe, March of 1991 and visited  
14 campus. They offered me a position after my visit, and  
15 I accepted.

16 Q. What was -- how did you feel about coming to  
17 teach at the University of San Francisco?

18 A. I was delighted. I was very honored for the  
19 position. University of San Francisco is more  
20 teaching-oriented than research-oriented. That appealed  
21 to me. They did have a research emphasis as well, but  
22 it was mostly geared towards teaching.

23 I liked the location. I always wanted to live  
24 in California, and Bay Area in particular. So it was --  
25 I was very happy to have that opportunity.

1           Q.    So what was your first -- what was your formal  
2 position when you began work at the University of San  
3 Francisco?

4           A.    I was what they referred to as tenured, tenure  
5 track.  That means that you're in a probationary period  
6 as an untenured teacher for six years, and then you can  
7 apply for tenure.

8                   Those kinds of positions, they give you a  
9 title.  They would ordinarily say "assistant professor."

10          Q.    And was that your title?

11          A.    Yes.

12          Q.    And what sort of courses did you teach when you  
13 were assistant professor?

14          A.    In academic year '91/'92, the department of  
15 mathematics at USF was about ten people, if I recall.  
16 They didn't, at that time, have a graduate program in  
17 mathematics.  I don't believe they do now.

18                   All of us -- all of the full-time faculty in  
19 mathematics were expected to teach both lower-division  
20 courses and upper-division courses at the undergraduate  
21 level.

22                   And I taught a variety within mathematics, both  
23 at the -- both for nonmajors, statistics for general  
24 education, mathematics for business -- I guess now they  
25 call it quantitative methods for business --



1 calculus for the sciences, and specific upper-division  
2 courses that are designed only for mathematics majors.

3           And I taught the whole gamut, almost as soon as  
4 I started. I tried to mix it so that I had one  
5 senior-level class and then two mid- or lower-level  
6 classes.

7           Q. How did you like teaching?

8           A. I enjoyed it very much. I think -- I think  
9 what I liked the most about it is the kind of connection  
10 I suppose I felt to my father. And so it was, in a way,  
11 kind of recreating that experience.

12           As a teacher -- I think a lot of teachers feel  
13 that way within that profession. You take on a kind of  
14 parental role, albeit in a limited sense. And I enjoyed  
15 working with students that I thought were talented in  
16 math and science and encouraging them.

17           In the classroom, I found students were pretty  
18 receptive to my teaching. I worked hard at it. And I  
19 liked getting their positive feedback.

20           We're evaluated at the end of every semester  
21 with some kind of teaching evaluation instrument. I  
22 always did well in my scores from my students. And  
23 then -- so I appreciated them. And -- and when they  
24 worked hard and tried to develop their talents, I  
25 appreciated their efforts. And I felt they appreciated

1 my teaching.

2 MR. KATZENBACH: Now, we can either stop here  
3 or I can go on for another few minutes.

4 THE COURT: Want to go on for two minutes or  
5 call it for the day?

6 MR. KATZENBACH: Your Honor, I'll defer to you.

7 THE COURT: We'll call it a day.

8 Ladies and gentlemen, remember the admonition.  
9 Do not form or express any opinion on this case until  
10 it's finally submitted to you for a decision. Do not  
11 discuss among yourselves or others until that time. Be  
12 back in your place in this courtroom 9:00 tomorrow  
13 morning. Please remember to leave your notebooks and  
14 your instructions behind.

15 (Jurors left the room.)

16 THE COURT: Jurors have left the room. An  
17 alternate stayed.

18 Mr. Salem, you gave us a note at the noon hour  
19 saying that you realized after the opening statements  
20 that you knew Professor Heineman, hadn't realized it  
21 beforehand; in fact, know him well enough so that the  
22 name of his wife and dog are known to you.

23 ALTERNATE JUROR: That's correct, Your Honor.

24 THE COURT: You did exactly the right thing in  
25 writing the note. You saw Professor Heineman testify.

1 Do you think your acquaintanceship with him hampers  
2 you or makes it easier for you to judge his testimony?

3 ALTERNATE JUROR: No, sir, I do not think it  
4 should -- it would bear any -- make any bearing on my  
5 opinion.

6 THE COURT: So you don't think, through your  
7 acquaintanceship with him and having seen him testify,  
8 he's any more or less likely to be accurate in his  
9 testimony?

10 ALTERNATE JUROR: No, sir.

11 THE COURT: Okay.

12 Mr. Katzenbach, do you have any questions you  
13 want to direct to the juror?

14 MR. KATZENBACH: No, Your Honor.

15 MR. VARTAIN: No. Thank you, Your Honor.

16 THE COURT: Okay. Why don't we confer for a  
17 moment.

18 (Judge and counsel conferred privately.)

19 THE COURT: Okay. Mr. Salem, the decision is  
20 that you're still on the jury as an alternate. We'll  
21 see you tomorrow at 9.

22 ALTERNATE JUROR: Thank you, Your Honor.

23 THE COURT: Thank you for bringing this to our  
24 attention.

25 (Mr. Salem left the room.)

1           THE COURT: Mr. Salem has left the courtroom.  
2 Counsel for the parties and the plaintiff remain.

3           Anything you want on the record, Mr.  
4 Katzenbach?

5           MR. KATZENBACH: No.

6           THE COURT: Mr. Vartain?

7           MR. VARTAIN: No. Thank you.

8           THE COURT: All right. See you tomorrow.  
9 Off the record. Out of session.

10           (Proceedings adjourned at 4:34 p.m.)

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REPORTER CERTIFICATE

I hereby certify that the foregoing proceedings were taken at the time and place herein named; that this transcript is a true record of the proceedings, as reported to the best of my ability by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed under my direction into typewriting by computer.

I further certify that I am not interested in the outcome of said action, nor connected with, nor related to any of the parties in said action, nor to their respective counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 23rd day of September, 2012.

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HOLLY MOOSE, CSR NO. 6438

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COURT OF APPEALS OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

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JOHN S. KAO,

Plaintiff/Appellant,

vs.

Appellate No. A135750  
SUPERIOR COURT CASE  
No. CGC-09-489576

UNIVERSITY OF SAN FRANCISCO,  
ET AL.,

Defendants/Respondents.

\_\_\_\_\_ /

ON APPEAL FROM THE JUDGMENT  
OF THE SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

THE HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE

REPORTER'S TRANSCRIPT ON APPEAL

February 8, 2012

Volume 2 (Pages 237 - 459)

For Plaintiff/Appellant:

KATZENBACH & KHTIKIAN  
1714 Stockton Street, Suite 300  
San Francisco, CA 94133  
(415)834-1778  
BY: CHRISTOPHER W. KATZENBACH, Attorney at Law  
CONOR MACK, Attorney at Law

For Defendants/Respondents:

VARTAIN LAW GROUP  
601 Montgomery Street, Suite 540  
San Francisco, CA 94111  
(415)391-1155  
BY: MICHAEL J. VARTAIN, Attorney at Law  
LINDA K. ADLER, Attorney at Law

REPORTED BY: HOLLY MOOSE, RDR-CRR-CCRR, CSR NO. 6438

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

BEFORE THE HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE

DEPARTMENT NUMBER 318

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JOHN S. KAO,

Plaintiff,

vs.

Case No. CGC-09-489576  
Jury Trial

UNIVERSITY OF SAN FRANCISCO,  
ET AL.,

Pages 237 - 459

Defendants.

\_\_\_\_\_ /

REPORTER'S TRANSCRIPT OF PROCEEDINGS

February 8, 2012

APPEARANCES OF COUNSEL:

For Plaintiff:

KATZENBACH & KHTIKIAN  
1714 Stockton Street, Suite 300  
San Francisco, CA 94133  
BY: CHRISTOPHER W. KATZENBACH, Attorney at Law  
CONOR MACK, Attorney at Law

For Defendants:

VARTAIN LAW GROUP  
601 Montgomery Street, Suite 540  
San Francisco, CA 94111  
BY: MICHAEL J. VARTAIN, Attorney at Law  
LINDA K. ADLER, Attorney at Law

REPORTED BY: HOLLY MOOSE, RDR-CRR-CCRR, CSR NO. 6438

I N D E X

Wednesday, February 8, 2012

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1 San Francisco, California

2 Wednesday, February 8, 2012, 9:06 A.M.

3 Department No. 318

4 The Honorable Wallace P. Douglass, Retired Judge

5 ---o0o---

6 THE COURT: Jurors and alternates are all  
7 present. Counsel on both sides are present. Plaintiff  
8 is personally present.

9 Dr. Kao, you can resume the witness stand for  
10 your examination. I apologize for the delay in getting  
11 started.

12 Dr. Kao, the oath you took yesterday is still  
13 in effect today. You're still testifying under oath.

14 THE WITNESS: Yes, Your Honor.

15 THE COURT: Mr. Katzenbach, you may continue  
16 your inquiry.

17 MR. KATZENBACH: Thank you.

18 DIRECT EXAMINATION BY MR. KATZENBACH (RESUMED)

19 MR. KATZENBACH: Q. Now, Dr. Kao, you  
20 eventually obtained tenure, did you not?

21 A. Yes.

22 Q. What was the tenure process at USF?

23 A. The probationary period depended a little bit  
24 on how much prior experience an individual had. In my  
25 case, since I didn't have that much experience as a

1 regular faculty member, I was expected to go through the  
2 full six-year process. So in the sixth year, we would  
3 be evaluated in the areas of teaching, research and  
4 service. The evaluation would be based on a file that  
5 we assembled and then submitted to the university.

6 Q. And can you just describe briefly what those  
7 three areas mean.

8 A. Research means original work in the subject  
9 area. In mathematics, typically research means or  
10 involves looking at a specified problem and trying to  
11 solve that problem. That problem might involve deriving  
12 or creating a formula. And so the result would be like  
13 a formula or an equation. And then that's the product  
14 that would be communicated to the scientific community  
15 in the form of a paper.

16 Q. All right. And what would teaching consist of?

17 A. At USF, the emphasis is on teaching. So  
18 teaching would be the most important criteria. I  
19 believe the university would evaluate not only the  
20 quality of a single course, but also sort of your  
21 aggregate teaching ability that you teach lower-division  
22 courses, middle-level courses and then advanced courses.

23 I think those of us who were applying for  
24 tenure would try to get assignments that would spread  
25 out over a variety of areas to demonstrate to the

1 university that we would be able to teach, in the  
2 future, in a variety -- in different capacities.

3 The most important assessment of a faculty  
4 member's teaching would be the student evaluations that  
5 were completed by the students at the end of the  
6 semester.

7 Q. And what did service mean?

8 A. Service, as defined by the collective  
9 bargaining agreement, which is like -- also served as  
10 our faculty handbook; that's what we were instructed --  
11 service -- that section of the handbook described  
12 different types of service.

13 The most common type of service would be things  
14 involving university administration. So there might be  
15 a committee, for instance, to develop a new program or a  
16 new major, like a certificate program. A faculty member  
17 might serve on that committee and then as a group reach  
18 some kind of decision as to what new courses should be  
19 developed, and this -- that kind of thing. So it would  
20 be service on committees.

21 The committees might include departmental  
22 subcommittees, college-level committees; for instance,  
23 at one point, I served on the science scholarship  
24 committee, which was -- there was a foundation, the Arts  
25 Foundation, that donated money in the form of yearly

1 annual scholarships for science students. And that  
2 committee would evaluate which student will receive the  
3 fellowship.

4 Q. Okay. Now, as part of the tenure process,  
5 did -- strike that.

6 Did you eventually get tenure?

7 A. Yes.

8 Q. And how were you rated, as far as -- on the  
9 three areas that you've described?

10 A. After I submitted my application, I believe  
11 that the first round of evaluation of my file was at the  
12 college level.

13 Then the file -- if it passed the college  
14 committee, it would be advanced to a universitywide peer  
15 review committee. The universitywide peer review  
16 committee gave me scores. And I received a letter, when  
17 I was promoted, that indicated the scores that I was  
18 forwarded by my peers.

19 Q. And what were those scores?

20 A. They rated us basically A, B and C for each of  
21 those categories. And there were 12 people on the  
22 committee. All but one of the 12 gave me As in all  
23 three categories. I had one person on the committee  
24 rated me two As and a B.

25 Q. And once you received tenure, what did that

1 mean for you?

2 A. It meant that I would be advanced, in terms of  
3 rank, from assistant to associate professor, and I was  
4 no longer probationary, which meant my position was  
5 secure.

6 Q. Right now, I'd like to talk to you a little bit  
7 about your teaching in the -- in -- your teaching, as  
8 you were.

9 First of all, do you recall developing a --  
10 using a Rubik's cube in some of your teaching?

11 A. Yes.

12 Q. Tell us about that.

13 A. Well, there was a course that was designed for  
14 mathematics majors. It was kind of an introduction to  
15 upper-division courses. The title was "Formal Methods"  
16 when I started teaching it.

17 The focus of the course was to introduce  
18 students to mathematical proof. That would be similar  
19 to what students might learn in high school geometry,  
20 you know, where you have a theorem and then, you know,  
21 proposition, assumptions, and then you sort of tie the  
22 assumptions together in order to prove the proposition.

23 I mean, that would be the basic essence of the  
24 course.

25 But formal methods, as taught at different



1 universities, might have a specific focus. Some  
2 universities, the focus would be on calculus, like  
3 advanced calculus. At USF, the focus was on what they  
4 referred to as advanced algebra. So it's a -- it's the  
5 same set of principles as in ordinary algebra, but at a  
6 higher level. So it's abstractified.

7 Variable X may not necessarily represent a  
8 number like it would in ordinary algebra; it might  
9 represent something more esoteric like -- like the  
10 orientation of the cube, of the Rubik's cube.

11 Q. So how do you use a Rubik's cube in this?

12 A. Well, at the end of the semester, I introduced  
13 the Rubik's cube as an example where you could apply  
14 these techniques and solve, algebraically, that particular  
15 puzzle.

16 Q. Now, you were also involved in a couple of  
17 other -- can you describe the other sort of things that  
18 you did on a regular basis as part of your teaching and  
19 work in the department.

20 A. Let's see. Well ... could you be more  
21 specific.

22 Q. Sure. Let me just describe this. Did you work  
23 with students in any particular -- let me -- strike  
24 that.

25 Let me ask you this: Was there a math club?

1           A.    Yes.

2           Q.    Can you tell us how the math club came about  
3 and what, if any, your role in that was.

4           A.    Well, the name "math club" sounds a little bit  
5 funny outside of mathematics, but within the discipline  
6 at the undergraduate level, a lot of schools have this  
7 kind of an organization.

8                    The math club may involve social activities; it  
9 may involve counseling, in terms of preparing for  
10 whatever job the students might be interested in  
11 applying for with a mathematics degree when they  
12 graduate; it might involve counseling, in terms of how  
13 to put together an application to graduate schools; it  
14 might involve solving puzzles, mathematical problems; it  
15 might involve preparing for -- there's a national math  
16 contest called the Putnam exam, and students across the  
17 country in mathematics, they take this test. And it's a  
18 competition basically. So the top 15 students, you  
19 know, in this exam, they get a lot of special  
20 consideration by the -- by the mathematics community.  
21 If you are one of the winners, you might have a lot of  
22 advantage if you applied to graduate schools.

23                    So math clubs at different schools have a  
24 variety of functions. We didn't have a math club until  
25 after 2000. Some students approached me and said they

1 were interested in starting it. I gave it a try, like a  
2 trial run, in about 2000 for one semester, another trial  
3 run in 2001 for one semester, and then I think in 2002  
4 or 2003 we started doing it every semester.

5 Q. So what was involved in the math club?

6 A. Originally we were more -- the students were  
7 more focused on maybe a monthly meeting, solving  
8 problems, preparing for the examination, the Putnam  
9 test. Then later, more social things were incorporated.

10 So after about 2003, basically we had weekly  
11 meetings. Refreshments would be served. There would be  
12 some mathematical games the students would play, like  
13 chess. There's a Chinese game called Wei-Chi. In  
14 Japanese it's called Go. That's fairly mathematical.  
15 And that would be another game that was popular with the  
16 students.

17 So the meetings would be in the afternoons for  
18 about an hour and a half to two hours. A lot of  
19 socializing, playing these games. Sometimes students  
20 would work together on problems from their courses. So  
21 there might be sort of a small group that would break  
22 off and do a study session.

23 And then around the time of the Putnam exam,  
24 there might -- we might organize -- help to organize a  
25 training session for that test.

1 Q. Okay. And what was your role in the math club?

2 Strike that.

3 Where did the math club meet?

4 A. Well, space was always an issue. In the early  
5 years, as the advisor, I would have to arrange  
6 everything, including, you know, the refreshments,  
7 including the games and reserving the space.

8 So I believe the first few years, we would try  
9 to get a classroom somewhere on campus. And, you know,  
10 that would be arranged with the administration. There'd  
11 be the office that we could sign up for an empty  
12 classroom in the afternoon.

13 Q. Okay.

14 A. Later on, we wanted something closer to the  
15 department so we wouldn't have to carry all of our gear,  
16 as it were, to this other building. Sometimes we had to  
17 sort of lug things across campus. I had sort of a  
18 grocery cart that we would pile everything into and walk  
19 across campus together to the classroom.

20 Later on, we sort of lobbied for a lounge-type  
21 area. The mathematics department office isn't terribly  
22 big, but there's a -- sort of a, like, reception area.  
23 And the program assistant had a desk; faculty had  
24 mailboxes; there would be a microwave, water cooler,  
25 refrigerator. And then on to the side -- we arranged to

1 have furniture put in so that on the side with the  
2 blackboard, there'd be kind of -- I wouldn't really call  
3 it a lounge area. Reception area's more accurate.

4 But we found that it would be large enough, if  
5 we put folding chairs up, that students could conduct  
6 the math club in that -- in that area.

7 By necessity, I would have to be in the math  
8 club watching them because there's sensitive materials  
9 in the office. But I didn't mind that.

10 So since about 2005, it was always conducted in  
11 the math office.

12 Q. All right. I'd like to show you a document.  
13 Just let me show -- going to introduce this as Exhibit  
14 2.

15 MR. VARTAIN: Have I seen this? Can you  
16 withhold offering it, since I've never seen it before,  
17 and keep on going? You can question the witness and let  
18 me look at it while you're questioning.

19 MR. KATZENBACH: Sure.

20 MR. VARTAIN: If you don't have an extra copy,  
21 I'll just wait.

22 MR. KATZENBACH: Can I have this marked as  
23 Exhibit 2?

24 (Plaintiff's Exhibit 2  
25 marked for identification.)

1 MR. KATZENBACH: Let me show you what's been  
2 marked as Plaintiff's Exhibit 2.

3 May I approach, Your Honor?

4 THE COURT: You may.

5 MR. KATZENBACH: Q. Can you identify what  
6 Exhibit 2 is.

7 A. This is a gift that I received from one  
8 semester. At the end of the academic year, the  
9 executive officers of the math club gave this as a sort  
10 of memorabilia. It has some photographs and a list of  
11 the activities that they conducted. So I was -- I was  
12 touched that they would go to that effort for me.

13 MR. KATZENBACH: Okay. I'd like to move  
14 Exhibit 2 into evidence.

15 MR. VARTAIN: Same objection. I haven't seen  
16 the exhibit. Could we defer that?

17 THE COURT: We'll hold off on that, then.

18 MR. KATZENBACH: Okay.

19 Q. Taking -- just -- do you recall, as part of the  
20 math club, conducting an experiment with a Coke bottle?

21 A. Yes. The students --

22 Q. Tell us about that.

23 A. The students had read on-line that if you -- if  
24 you put mints -- there's a brand of mints called  
25 Mentos -- into a two-liter soda bottle and then close

1 the top, it would -- it would explode.

2 And so I think towards the end of the summer,  
3 one afternoon they said "Well, why don't we try it."

4 And I said "Well, okay."

5 We went outside into the -- there's a kind  
6 of -- not a park, but a survey area where people can eat  
7 lunch outside next -- between the student center and  
8 mathematical -- the science building.

9 And then about 4 in the afternoon, we -- I let  
10 them do it. And then -- you drop the Mentos in. I  
11 guess what happens -- the physics behind it is the  
12 Mentos -- as the candy is manufactured, it has little  
13 ridges -- like little microscopic ridges around it.

14 And so as you drop the -- five or six of these  
15 things, mints, into the -- into the two-liter plastic  
16 soda bottle and screw the top on, then the CO2 in the --  
17 in the soda kind of clings to the Mentos, and then all  
18 of a sudden it bubbles up and then you get kind of a  
19 volcanic (makes sound) like this.

20 And they took a picture and put it in here. I  
21 was very careful to clean up afterwards. I went to the  
22 men's room and got a bunch of paper towels.

23 THE COURT: When he said "like this," he raised  
24 his hands from face level to over his head.

25 THE WITNESS: Pardon me?

1 MR. KATZENBACH: You were describing the  
2 explosion.

3 THE WITNESS: Oh, yes. Yeah, it came up --

4 THE COURT: We have to make an intelligible  
5 record. The court reporter can't take down your  
6 gesture, so I described it.

7 THE WITNESS: Oh, yes. I understand.

8 MR. KATZENBACH: Q. In Exhibit 2, is there a  
9 photograph of that experiment?

10 A. I believe so, yes.

11 MR. KATZENBACH: Okay. Perhaps if we get  
12 Exhibit 2 in evidence, we can show that.

13 Q. Now, in addition to the --

14 MR. VARTAIN: You can show -- excuse me. You  
15 can show it now, if it's convenient, Mr. Katzenbach. I  
16 don't mind you working through your outline.

17 MR. KATZENBACH: Okay. Thank you.

18 Let's see. I think we'll use this one.

19 Q. Taking a look at what's projected up, is that a  
20 photograph of the experiment?

21 A. Yes.

22 Q. And that's the soda bottle and the reaction?

23 A. Yes. It made quite a mess. It took me a  
24 while.

25 Q. Okay. Thank you.



1           In addition to the math club, were there other  
2 sort of events involving faculty and students that you  
3 regularly attended?

4           A.    In the mathematics department, we had the  
5 institution called the math tea. That started around  
6 the time I began working at USF, around 1991.

7           I think the reason it started is when I  
8 attended department meetings early on, I'm new, and then  
9 I kind of mentioned that at Princeton they have a weekly  
10 math tea. And what that was was -- and it's quite  
11 famous within mathematics -- mathematical community.

12           Basically the department would provide  
13 refreshments, tea and then cakes, and graduate students  
14 would come in and socialize with the faculty.

15           At Princeton, it has a kind of special meaning  
16 because the -- it's pretty hierarchical in its culture.  
17 So the professors are kind of like, you know, far above,  
18 intellectually, the graduate students, and there's not a  
19 lot of sort of casual conversations, casual friendships,  
20 except with your own thesis advisor. That may depend --  
21 that kind of personal relationship may depend on the  
22 individual thesis advisor.

23           And so at Princeton, this was one weekly time  
24 where people -- students and teachers could get together  
25 and talk informally.

1           Q.    And so what was the -- what was the faculty tea  
2 like at the University of San Francisco?

3           A.    Well, when I made this remark, people in the  
4 department said that "Well, we don't want to be like --  
5 have that kind of separation. We want a close  
6 association between our students."

7                    Tristan Needham, who graduated from Oxford  
8 University, said that at Oxford they have a similar type  
9 of social event weekly. So perhaps Princeton was  
10 copying Oxford when they started it.

11                   But between the two of us, we proposed to the  
12 department that we would start something similar in the  
13 mathematics at USF.

14           Q.    And did you?

15           A.    Yes.

16           Q.    And so as you were teaching -- tell us a little  
17 bit about how the math teas functioned at USF.

18           A.    Well, early on, one of the faculty members  
19 would have to go out and purchase, you know, on behalf  
20 of the department, the refreshments. Later on, the  
21 college allowed us to release the program assistant to  
22 do this --

23           Q.    Okay.

24           A.    -- for some time in the afternoon.

25                   But, you know, it's the same type of structure:

1 Cake and cookies are bought, and tea is sort of  
2 provided, and then we sit around in that lounge area  
3 that I described before, both faculty and students.

4 Q. Were you regular -- were you a regular attendee  
5 at math teas?

6 A. I tried to go almost every week. Some faculty  
7 would go, let's say, every other week and some faculty  
8 maybe once a semester. It depended on how busy they  
9 were.

10 Of course, it has to be scheduled in the late  
11 afternoon when students are available. And oftentimes  
12 faculty have teaching obligations, so they may or may  
13 not be able to attend.

14 Q. All right. Now, in addition to math club  
15 faculty teas we've talked about, did you also provide  
16 any sort -- during your years of teaching at USF, did  
17 you also serve as an editor of any publications?

18 A. Yes. As specified in that contract or faculty  
19 handbook, they describe all the different ways a teacher  
20 can perform service on behalf of the university.

21 So -- and it describes -- service can mean  
22 administrative activities, like service on a committee.  
23 Service can mean advising a student organization, like  
24 the math club. It can mean service to the profession,  
25 which would be service on professional like boards. It

1 can be service as editor of a journal. And then there's  
2 also service to the community.

3 So I believe if a faculty member was involved  
4 in, say, a church organization or an athletic  
5 organization, theoretically they could list that as --  
6 as part of university service.

7 Q. Okay.

8 A. But -- but I did serve as a editor for a  
9 statistics journal.

10 Q. What was involved, actually, for you in your  
11 role as an editor of a statistics journal?

12 A. Well, the position would be called an associate  
13 editor. This was a journal published in India. The  
14 title of the journal was "Advances And Applications In  
15 Statistics." And I received a correspondence in 2002  
16 offering the position of associate editor for that  
17 journal.

18 Q. Okay.

19 A. So I would be a member of the editorial board,  
20 which would -- at that time, there were about 12 faculty  
21 from around the world so designated. And then there's a  
22 managing editor that sits above.

23 Q. Okay.

24 A. The managing editor would send us papers,  
25 scientific articles, to review.

1 Q. Okay. Now, in -- what did you have to do to  
2 review an article?

3 A. It would depend on the specific circumstance.  
4 Sometimes the article -- well, if I -- if I think of  
5 that kind of work broadly, the managing editor is  
6 receiving articles from all over the place, people who  
7 want to publish something in this journal.

8 The managing editor would have to filter out  
9 those articles that are clearly not appropriate; either  
10 it's the wrong subject or the result isn't significant  
11 enough.

12 Once it passes that review process, the  
13 managing editor would send papers to individual  
14 associates --

15 Q. Okay.

16 A. -- for more careful consideration. Sometimes I  
17 would receive a paper and because it's outside of my  
18 area of specialization, I'd send it back and say that  
19 "Well, the paper may or may not be good, but it's too  
20 outside what I know in mathematics to evaluate, so  
21 please send it to somebody else."

22 Q. What about papers that you -- you know, were  
23 within your area; what did you have to do?

24 A. Within my area, the first consideration is --  
25 would be is it significant enough of a result to merit

1 publication. If I judged it as significant, then --  
2 then I would have to check all the work very carefully.  
3 I'd have to check the theory, make sure the calculations  
4 were correct, the final result -- which might be a  
5 formula; it might be a statistical technique -- that  
6 mathematical machinery would work.

7 In other words, people would read the article;  
8 they could say "Well, in this situation, I can apply  
9 this formula." And that would be appropriate.

10 Q. Okay.

11 A. And the final result would be scientifically  
12 valid.

13 Q. About how many papers did you have to do this  
14 sort of review for each year?

15 A. Well, they would send me one or two articles a  
16 year, maybe a third, but which I would just send back  
17 because it was outside of my area of specialization. A  
18 careful review, I did about one per year.

19 Q. And how much time did this careful review take  
20 you?

21 A. It took me a lot of time. One of the  
22 difficulties was that I don't have a doctorate degree in  
23 statistics. My degree is in mathematics. And this is a  
24 statistics journal. Albeit my area of specialization is  
25 probability theory, which is the theoretical

1 underpinnings -- mathematical underpinnings of  
2 statistics. So I was really only qualified to review  
3 the theoretical papers that they were publishing.

4 But I was very thorough in that, you know, I  
5 would go down to Stanford library -- ordinarily a paper,  
6 the end result is a formula. But that formula, of  
7 course, is something that people don't know about. And  
8 that formula is based on a variety of other formulas  
9 that are published in other articles and other journals.

10 So I would go around the library and photocopy  
11 the articles that are really important in the derivation  
12 of that one formula. I'd have to study those articles  
13 and make sure that machinery all fit together in the  
14 appropriate way so that the end result would work.

15 Q. Okay.

16 A. Also, sometimes they would do like computer  
17 simulations, you know, and try to illustrate how the  
18 formula would be applied. I took the time to check all  
19 the numbers and make sure that those were properly  
20 computed.

21 Sometimes I would find mistakes. Not in the  
22 formula, but rather, in the side calculations that --  
23 you know. So I was very careful to make sure  
24 everything -- everything was correct.

25 The problem, of course, is that if you -- if

1 you pass the paper, then it shows up in the journal;  
2 people are reading it, and they discover the mistake.  
3 Okay, well, they'll send a letter to the journal, and  
4 they'd have to publish a retraction. And it's very  
5 embarrassing for the journal, and it's embarrassing for  
6 the editor that passed the paper.

7 Q. Okay. Now, you indicated earlier in your  
8 testimony that you received student -- that the  
9 professors at USF receive student evaluations.

10 A. Yes.

11 Q. Could you please take a look at Exhibits 9 and  
12 10.

13 (Plaintiff's Exhibits 9-10  
14 marked for identification.)

15 MR. KATZENBACH: Q. Do you have those in front  
16 of you?

17 A. Yes.

18 Q. Okay. Taking a look at Exhibit 9, can you tell  
19 us what that is.

20 A. Exhibit 9 are the teaching evaluations that I  
21 received in fall of 2007.

22 Q. Can you tell us what Exhibit 10 is.

23 A. 10 are my teaching evaluations from spring of  
24 2008.

25 MR. KATZENBACH: All right. Now, I'd like to



1 move Exhibits 9 and 10 into evidence.

2 THE COURT: Any objection?

3 MR. VARTAIN: May I just have one second to  
4 look at them, Your Honor.

5 THE COURT: Sure.

6 MR. VARTAIN: Counsel, could you just state for  
7 the record, is this for all courses in each of those two  
8 semesters?

9 MR. KATZENBACH: I'll have the witness answer.

10 Q. Are these for all courses in each of those two  
11 semesters?

12 A. Yes.

13 MR. VARTAIN: No objection.

14 MR. KATZENBACH: Q. Taking a look at what is  
15 Exhibit 9, which is the one for the fall 2007. Can you  
16 please describe the columns that are there across the  
17 top. "Instruct Mean," "Unit Mean," "Institution Mean"  
18 and "National Mean"; tell us what those mean.

19 A. Yes. Well, what we're looking at here is --  
20 the first page, that's the cover page of the  
21 evaluations. The evaluations go on for a number of  
22 pages because it's several classes, and then each class  
23 has a series of results.

24 The cover page groups all of the students'  
25 evaluations from all the classes for that instructor.

1 And so this would be the summary along six different  
2 factors for that instructor's teaching.

3 They have -- the scores I received are on the  
4 left-hand side.

5 Q. So the score that you received would be --  
6 well, goofed on there, sorry.

7 The score you received would be the one -- the  
8 score under "Instructor Mean"?

9 A. Yes, the left-hand column.

10 Q. And that's this one here, this column here?

11 A. Yes.

12 Q. And the unit mean, what did that refer to?

13 A. "Unit" refers to the department of mathematics.

14 Q. And "Institution Mean"?

15 A. That would refer to USF.

16 Q. And the "National Mean"?

17 A. That would refer to -- well, this is -- this is  
18 the SUMA instrument. It's administered -- well, it's  
19 processed by the SUMA Information Solutions, Inc. in  
20 North Carolina.

21 But they use -- they collect this type of form  
22 from schools around the country. So the national mean  
23 is based on an aggregate of, they said, 1 million  
24 student applications going back four years.

25 Q. All right. Now, just so that we're clear,

1 what's a mean?

2 A. Mean is average in the ordinary sense, so the  
3 ordinary average.

4 Q. And then there's a phrase -- there's also one  
5 in -- a number in parenthesis marked "SD."

6 A. They're referring to what they call in  
7 statistics the standard deviation.

8 Q. Okay.

9 A. So there's a bell curve, right. And so within  
10 your own scores, you can produce a -- like a histogram.  
11 And there's a curve. The center of that curve is your  
12 mean.

13 The standard deviation measures the width of --  
14 or the dispersion of the scores. If you have a large  
15 standard deviation, that means some students like you a  
16 lot and some students disliked you a lot.

17 A small standard deviation means everyone more  
18 or less gave you the same score.

19 Q. Okay. Now, I'd also like to note on this --  
20 one of -- one of the numbers there under "Factor 4,  
21 Testing" contains an asterisk.

22 A. Yes.

23 Q. Do you see that?

24 A. Yes.

25 Q. What does that asterisk mean?

1           A.    The asterisk is in reference to what's called  
2 the P value of the statistic.  The meaning of an  
3 asterisk or two asterisks or three asterisks, those are  
4 the possible annotations for any given score.  That's  
5 given in -- that's provided with a legend at the bottom  
6 of the form.  And that indicates the meaning of the  
7 asterisk.

8           Q.    And is that the -- and what is the significance  
9 of getting an asterisk on your evaluation?

10          A.    Well, in statistics, the P value has a  
11 different meaning in different contexts.  But when I  
12 taught statistics to students, I would say "Well, think  
13 of the P value as measuring the extremity of the data."

14                "Extremity" could mean extremely good or it can  
15 mean extremely bad.  But the smaller the P value, the  
16 closer it is to zero, the more extreme the data is.

17          Q.    And take -- go ahead.

18          A.    So one star, two stars or three stars is a  
19 measurement of how extreme that score is, either good or  
20 bad.

21          Q.    Now, taking a look at factor 3 where you have  
22 one star, that legend indicates that that's at the .05  
23 level.  What does that mean?

24          A.    The P value for that score is smaller than five  
25 percent.  So in colloquial terms, that means that the

1 score -- in this case, I'm above the average in the --  
2 in the department, in the school, along the national  
3 scale.

4 So I'm at the top five percent -- oh, and the  
5 star refers to the national scale. So on the national  
6 level, all the students filling in this form, this type  
7 of instrument to evaluate a teacher, I'm at the top five  
8 percent. Or another way to express it would be I'm in  
9 the 95<sup>th</sup> percentile.

10 Q. All right. And this indicates that your scores  
11 were higher than the average for the department -- that  
12 is, the math department -- in every area?

13 A. Yes.

14 Q. And it was high -- you were higher than the  
15 national in every area? No, I'm sorry, there's one area  
16 that you were lower.

17 A. Yes, in every area except the factor that's  
18 labeled "Instructor/Student Interaction."

19 In mathematics, we kind of assumed that our  
20 courses would be rated lower than subjects like English  
21 or political science where there's a lot of discussion  
22 on a particular topic.

23 Q. And you're also rated a little lower on the  
24 factor of course objectives, a little lower than the  
25 national average and institution?

1           A.    Well, that's practically the same.  I mean,  
2   it's .02 difference.  So I would say -- it's a touch  
3   lower, yes, on course objectives.  But  
4   instructor/student interaction, I am higher than the  
5   department, you know.  So within the area of  
6   mathematics, in terms of discussions, you know, a little  
7   bit higher.  Not a lot.

8           Q.    Okay.  Now, take -- would you please take a  
9   look at Exhibit 10.

10          A.    Yes.

11          Q.    And again, can you tell the jury what this form  
12   is.

13          A.    Exhibit 10 --

14          Q.    And you can look at the document right in front  
15   of you.  Here it comes up.

16          A.    This is the cover page for the spring of 2008.

17          Q.    Now, I notice that in this -- on this form, you  
18   do somewhat better on the asterisks.

19          A.    Yes.

20          Q.    Can you describe again -- are these asterisks,  
21   again, back to the same -- same -- mean the same things  
22   that you just described as to the previous exhibit?

23          A.    Yes.

24          Q.    Okay.  So in this one, you received, however,  
25   a -- you received two single asterisks.  Do you see

1 that?

2 A. Yes.

3 Q. And, now, you have -- you also have one for a  
4 double asterisk. What did that mean?

5 A. Well, I received two stars under "Testing." I  
6 mean, the way to -- the six factors actually are  
7 combined -- the students have 40 questions they have to  
8 rate you on. And then the company converts those 40  
9 questions into these six factors.

10 So testing would be like fairness of the  
11 evaluation. So two stars -- if you look at the legend  
12 at the bottom, it says "Significant at the .01 level."  
13 So the P value is less than one percent, which means  
14 that I'm at the top one percent, or at the 99<sup>th</sup>  
15 percentile, along that factor.

16 Q. And once again, your scores are above the unit  
17 mean. That means above the average of the department?

18 A. Yes. In each factor, I'm above the department  
19 average.

20 Q. Thank you.

21 In Exhibit 10, for spring 2008, is this the  
22 student ratings that you received during your last  
23 semester teaching at USF?

24 A. Yes, spring -- spring 2008 was my last  
25 semester.

1 Q. Thank you.

2 Now, I'd like to now have you look -- strike  
3 that.

4 Let me ask you this: How important was  
5 teaching for you at USF?

6 A. I believe that faculty considered -- faculty  
7 considered that teaching was the most important criteria  
8 by which we'd be evaluated by the administration.

9 Q. And how about you; what did you think?

10 A. Well, the emphasis on teaching was one of the  
11 things that attracted me about the position. So it was  
12 important to me, every semester, that I provided a good  
13 product for the students.

14 Teachers had different opinions as to the  
15 importance of these evaluations. But the administration  
16 looked at those scores closely. I should add that they  
17 also looked at your grades and made -- you know, to sort  
18 of, you know, make -- evaluate your -- to judge your  
19 evaluations in connection with what kind of grades  
20 you're giving, because there is a sense that, you know,  
21 you can buy, quote, end quote, good evaluations by  
22 giving high grades to all of your students.

23 And so that was something that the dean would  
24 examine. They'd look at your grades, you know, see how  
25 it compared to the department. Sometimes the department



1 would set standards for what kind of grades were  
2 appropriate in a given class. And then -- and then in  
3 connection with those grades, they'd look at how  
4 students rated you.

5 But that process was very important. And  
6 that's how -- at least in terms of the deans that I  
7 served under.

8 Q. Now, when you were teaching at USF, did you  
9 typically teach -- again, let's talk about your later  
10 years. Did you typically wear a suit when you taught?

11 A. Yes, I -- I wore a suit from when I started  
12 teaching.

13 Q. Okay. And why did you wear a suit?

14 A. Well, I mean, I guess one of the reasons I was  
15 attracted to teaching as a profession was because my  
16 father was a professor. And it was a way of sort of  
17 preserving or continuing that relationship that I had.

18 And my father told me he always wore a suit and  
19 tie when he taught. His rationale was that in the Asian  
20 culture, by wearing -- dressing up when you're giving a  
21 presentation, that's a way of showing respect for your  
22 students.

23 Now, I did ask students what they thought over  
24 the years, you know, I would ask students "What do you  
25 think about how I dress? I know it's a little more

1 formal than most teachers at USF." I wasn't the only  
2 teacher that dressed this way, but I was curious what  
3 students thought.

4           And what I found was that the students who were  
5 from abroad -- and there's a lot of Asian students,  
6 students from Asia, that come to USF to study in the  
7 United States. Almost always, the Asian students said  
8 that they appreciated it because they were taught the  
9 same kind of principle: If you're making a preparation,  
10 you know, a suit and tie is a way of showing respect.

11           Q. Thank you.

12           Now, did -- while you were at USF, did you  
13 become aware that there were policies that USF had  
14 concerning discrimination and respect for people?

15           A. Yes.

16           Q. I'd like to have you look, if you would, at  
17 Exhibit No. 5, the binder in front of you.

18           A. Exhibit 5? I'm sorry, I don't -- it's not one  
19 of these three.

20                   (Plaintiff's Exhibit 5  
21 marked for identification.)

22           THE WITNESS: Okay. I have it.

23           MR. KATZENBACH: Q. Can you tell us what  
24 that -- what Exhibit 5 is.

25           A. It's a document with the title "University Of

1 San Francisco Prevention Of Sexual And Other Unlawful  
2 Harassment Policy," from 2006.

3 Q. And do you understand what this policy is?

4 A. Yes.

5 Q. Who issued this policy?

6 A. Human resources.

7 Q. Human resources of what institution?

8 A. At the University of San Francisco.

9 MR. KATZENBACH: I'd like to move Exhibit 5  
10 into evidence, Your Honor.

11 THE COURT: What was the exhibit number?

12 MR. KATZENBACH: Exhibit 5, Plaintiff's --

13 THE COURT: Any objection?

14 MR. VARTAIN: No objection.

15 THE COURT: It's received.

16 (Plaintiff's Exhibit 5  
17 received in evidence.)

18 MR. KATZENBACH: Q. Now, taking -- how did you  
19 learn about Exhibit 5?

20 A. Well, I -- in the fall 2005, I had met with the  
21 affirmative action officer, Elsie Tamayo. And I told  
22 her there were some issues that I was facing and I was  
23 interested in filing a complaint with human resources.  
24 She directed me to this document.

25 And then in February, I received the latest

1 version of that document, which wasn't appreciably  
2 different than what Elsie gave me. I received copies  
3 from Elsie; I received copies from the Dean's Office.

4 Q. All right. And now, in addition -- in addition  
5 to Exhibit 5, was there another -- was there another  
6 policy that was -- another document that described USF's  
7 policies concerning harassment and discrimination?

8 A. Yes. I can think of two.

9 Q. Okay.

10 A. There was -- I think preceding this, there was  
11 a -- on the university Web site, there was a prior  
12 version of this document, a prior version of this --  
13 they would call it the PSOUH -- using the acronym --  
14 PSOUH policy.

15 And in addition, human resources published what  
16 they called a Respect Handbook. And that was a  
17 pamphlet.

18 MR. KATZENBACH: Why don't you just take a look  
19 at Exhibit 6, if you would.

20 (Inaudible discussion.)

21 MR. KATZENBACH: Could you mark this one as  
22 Exhibit 6.

23 (Plaintiff's Exhibit 6  
24 marked for identification.)

25 MR. KATZENBACH: Q. May I approach the

1 witness, Your Honor?

2 THE COURT: You may.

3 MR. KATZENBACH: Q. Dr. Kao, handing you  
4 another copy of Exhibit 6, can you identify Exhibit 6.

5 A. Yes, this is the Respect Handbook from August  
6 of 2007.

7 MR. KATZENBACH: Okay. And at this point, Your  
8 Honor, I'd like to move Exhibit 6 into evidence.

9 THE COURT: Any objection?

10 MR. VARTAIN: None, Your Honor.

11 THE COURT: Received.

12 (Plaintiff's Exhibit 6

13 received in evidence.)

14 MR. KATZENBACH: Q. Now, in addition to the  
15 Exhibit 6, was there a training course that was also --  
16 at the time Exhibit 6 was distributed, was there also a  
17 training course that went -- that members of the faculty  
18 took?

19 A. Yes. This particular handbook I received in  
20 the office mail. And that was in connection with a  
21 memorandum that informed all the faculty that we would  
22 be required to complete an on-line training course in  
23 unlawful discrimination and harassment. And that  
24 training course would have to be completed by the end of  
25 fall of 2007.

1           But -- so the memorandum had this as an  
2 attachment. We were meant to read the Respect Handbook  
3 and then take the course.

4           Q.    And did you do so?

5           A.    Yes.

6           Q.    Thank you.

7           Now, did you understand these two policies  
8 included harassment other than like sexual harassment?

9           A.    Yes.

10          Q.    And did you -- now, directing your attention --  
11 you recall -- you described a conversation with an Elsie  
12 Tamayo.

13          A.    Yes.

14          Q.    Who was Elsie Tamayo?

15          A.    She was in the Office of Human Resources. Her  
16 title was affirmative action officer. She had a  
17 cotitle, but I can't remember -- I can't recall what --  
18 what that cotitle was.

19          But she had another function within human  
20 resources as well as being the affirmative action  
21 officer.

22          Q.    All right. Now, did you at some point decide  
23 to pursue a -- pursue matters under the PSOUH policy?

24          A.    Yes. She gave me the copy of the policy, I  
25 think, in September of 2007.

1           And then I had a conversation with her  
2 afterwards, I believe -- whether -- I can't recall  
3 whether that was in her office or in the hallway, but  
4 that was around December. And she sort of gave me the  
5 details of it.

6           And then in January of 2006, I decided to file  
7 a complaint.

8           Q.    Now, what types of complaints did you  
9 understand that you could file under the PSOUH policy?

10          A.    That policy provided for two types of  
11 complaints: an informal complaint and then a formal  
12 complaint.

13          Q.    Okay. And did you understand what the  
14 difference was between those two?

15          A.    Informal complaint, you didn't have to provide  
16 anything specific in writing. You didn't need to write  
17 up your report -- complaint report and then submit that  
18 document.

19                Meet with an intake officer, describe the  
20 situation. You could bring materials in to that  
21 meeting. And then the intake officer would follow up on  
22 that complaint. And that was -- that would be an  
23 informal one.

24          Q.    Okay. And what was the formal one?

25          A.    The formal complaint meant that you actually

1 wrote a complaint document. I believe -- well,  
2 typically you would have to provide supporting evidence.  
3 But it would be a written submission to the Office of  
4 Human Resources.

5 Q. Okay. And going back to -- would you please  
6 take a look at Exhibit 106.

7 THE COURT: Ladies and gentlemen, remember the  
8 admonition. Do not form or express any opinion on this  
9 case until it's finally submitted to you for your  
10 decision. Do not discuss among yourselves or others  
11 until that time. Please be back in your places at 10:10  
12 according to the courtroom clock.

13 (Recess taken.)

14 THE COURT: The jurors and alternates are now  
15 present. Counsel from both sides are present.  
16 Plaintiff, Dr. Kao, is on the stand.

17 Mr. Katzenbach, you may continue your inquiry.

18 MR. KATZENBACH: Yes. I'd like to show the  
19 witness, Your Honor, for identification, Exhibits 112  
20 [sic] and 112B, if I might.

21 THE COURT: Okay.

22 (Plaintiff's Exhibits 112A-112B  
23 marked for identification.)

24 MR. KATZENBACH: And if I might approach the  
25 witness?



1 THE COURT: You may.

2 MR. KATZENBACH: These are not part of the ones  
3 in our binder, Your Honor. They're additional.

4 THE COURT: I was looking in vain.

5 MR. KATZENBACH: Showing the witness what have  
6 been marked as Exhibit 112A and 112B.

7 Q. Can you tell us what those are.

8 A. These are issues of the journal "Advances And  
9 Applications In Statistics." There's a volume from June  
10 of 2008 and then another volume from April 2008.

11 Q. Is this the journal that you served as an  
12 editor for?

13 A. Yes.

14 Q. And does the back cover of that journal  
15 reflect -- have your name on it?

16 A. Yes.

17 Q. Okay. Thank you.

18 Your Honor, I will move Exhibits 112A and B  
19 into evidence. But counsel indicated he wanted to  
20 review them first.

21 MR. VARTAIN: Well, yeah, 'cause I hadn't seen  
22 them. But keep on going. You can ask him all the  
23 questions. We'll take care of that off the record.

24 MR. KATZENBACH: That's fine.

25 Q. Now, going back to January 2006, you indicated

1 that you met with Ms. Tamayo.

2 A. Yes.

3 Q. Prior to that meeting, did you prepare a  
4 memorandum?

5 A. Yes. I prepared the two-page memo as a -- as a  
6 preview for the meeting. So the memo -- one of the  
7 purposes of the memo was to ask for the intake meeting.  
8 Another purpose of the memo would be to give Ms. Tamayo  
9 an indication of the issues that I wanted to talk about.

10 Q. All right. Can you please take a look at  
11 Exhibit 106.

12 (Plaintiff's Exhibit 106  
13 marked for identification.)

14 MR. KATZENBACH: Q. And can you identify  
15 Exhibit 106.

16 A. Yes. This is the memorandum.

17 Q. Is this a document you prepared?

18 A. Yes.

19 Q. And is it a document you gave to Ms. Tamayo?

20 A. Yes.

21 MR. KATZENBACH: I'd like to move Exhibit 106  
22 into evidence, Your Honor.

23 THE COURT: Any objection?

24 MR. VARTAIN: No objection.

25 THE COURT: Received.

1 (Plaintiff's Exhibit 106

2 received in evidence.)

3 MR. KATZENBACH: Q. Taking a look at Exhibit  
4 106, the top line indicates two cc's.

5 A. Yes.

6 Q. One to -- one to -- the first cc is to Brandon  
7 Brown.

8 A. Yes.

9 Q. And he's described as associate dean of  
10 sciences. What was the associate -- what was the sort  
11 of administrative role of the associate dean of  
12 sciences?

13 A. There were two colleges: the College of Arts  
14 and the College of Sciences. The mathematics department  
15 is part of the College of Sciences. The associate dean  
16 of sciences was the supervisor within the administration  
17 of all the faculty within sciences, including  
18 mathematics.

19 Q. And below -- below Professor Brown's -- Dean  
20 Brown's name is Jennifer Turpin's name. And she's  
21 described as dean of Arts and Sciences.

22 A. Yes.

23 Q. And what was her position?

24 A. Within the universities, the Arts and Sciences  
25 are combined into one unit, one employment unit, as it

1 were. And so the dean of Arts and Sciences is the  
2 supervisor sitting above Brandon Brown.

3 So I reported directly to Brandon Brown.  
4 Brandon Brown reported to Jennifer Turpin.

5 Q. Thank you.

6 Now, does this memo -- does Exhibit -- this  
7 exhibit describe in general terms the issues that you  
8 were seeking to raise with Ms. Tamayo?

9 A. Yes.

10 Q. Like you to, if you would, start taking a look  
11 at the body of this. It indicates that you're basing  
12 this on the PSOUH policy, correct?

13 A. Yes.

14 Q. And down in the body of this, this indicates  
15 too that you're also concerned about the actions of two  
16 particular -- two particular individuals: Tristan  
17 Needham and Stanley Nel.

18 Can you describe what -- who Mr. Needham --  
19 Professor Needham was.

20 A. Yes. Tristan Needham, Dr. Needham, is --  
21 was -- is a faculty member within mathematics. The  
22 deans are oftentimes appointed from within the faculty.

23 So, for instance, a physics professor might  
24 move into the administration and become dean for a  
25 while.

1           While they're dean, they're no longer part of  
2 the union. But that [sic] would, before the period of  
3 time that they serve as dean. And when they step down  
4 from the Dean's Office, they would return to the  
5 department and continue teaching.

6           So Tristan Needham, a member of the mathematics  
7 department, he was associate dean, my supervisor, as  
8 indicated in the memorandum, from 1999 to 2004.

9           Q.    And what was -- and Stanley Nel is referred to  
10 as the dean of Arts and Sciences from fall 1990 to  
11 spring 2003. Can you -- is that the same position that  
12 Dean Turpin had in 2006?

13          A.    Yes.

14          Q.    And was Mr. Nel also a member of the  
15 mathematics department?

16          A.    Yes. Stanley Nel was also a mathematics  
17 professor, and then he moved to the position of dean in  
18 1990.

19          Q.    All right. Now, I'd like to now go down and  
20 look at -- refer you to the specific areas that you were  
21 raising.

22                Taking a look at the first bullet point on the  
23 first page of Exhibit 106, can you tell us what that  
24 bullet point concerns.

25          A.    There was a faculty appointment in mathematics.

1 This appointment was announced in the year 2000. That  
2 would be of Dr. Stillwell, Dr. John Stillwell. He  
3 started teaching in fall 2002. So officially -- the  
4 date of his official appointment is somewhere between  
5 2000 and 2002.

6 Q. Now, as to this appointment, you raised -- what  
7 was your concern?

8 A. My concern was that they didn't conduct a  
9 search at all for this position; Dr. Stillwell was just  
10 chosen by the Dean's Office and then appointed into a  
11 regular faculty position.

12 Q. Why was that important? What was the issue  
13 about a search that was -- that you felt was important?

14 A. Well, the university rules require a search for  
15 any regular position.

16 MR. VARTAIN: Objection. Motion to strike.  
17 Lacks foundation.

18 THE COURT: It does. Sustained.

19 MR. KATZENBACH: Q. Have you --

20 THE COURT: Without prejudice to laying a  
21 foundation.

22 MR. KATZENBACH: That would be fine.

23 Q. Prior to filing this complaint, had the math --  
24 had you been involved, as part of the mathematics  
25 department, in any searches?

1           A.    I was involved in a search in my first year of  
2 teaching from -- that would be 1991/'92 academic year.

3           Q.    All right.  And in regard to that search, did  
4 you come to understand in general the policies regarding  
5 searches at the university?

6           A.    As a member of the search committee, which was  
7 in fact the entire department -- that year, everybody in  
8 the department was on the search committee -- we were --  
9 we were apprised -- we were given a set of rules to  
10 follow.

11          Q.    All right.  And have you subsequently also seen  
12 rules applicable to the university and the College of  
13 Arts and Sciences?

14          A.    Yes.  There were universitywide rules published  
15 on the USF Web site.  I believe those are the same rules  
16 that were published in 1991.

17          Q.    And were there also rules for the College of  
18 Arts and Sciences?

19          A.    Yes.

20          Q.    Could you please take a look at Exhibit 21.

21          A.    Yes.

22                   (Plaintiff's Exhibit 21  
23                   marked for identification.)

24           MR. KATZENBACH:  Q.  Can you identify what  
25 Exhibit 21 is.

1           A.    It's a document -- the title of the document is  
2 "College Of Arts And Sciences, Chronological Procedures  
3 For Hiring Probationary And Term Faculty."

4           Q.    And where did you receive a copy -- did you  
5 receive a copy of that document?

6           A.    Yes.

7           Q.    And how did you receive a copy of that  
8 document?

9           A.    I asked for a copy from the Dean's Office.  The  
10 Dean's Office emailed this document to me.

11                  MR. KATZENBACH:  I'd like to move Exhibit 21  
12 into evidence.

13                  THE COURT:  Any objection?

14                  MR. VARTAIN:  No objection, Your Honor.

15                  THE COURT:  Received.

16                  (Plaintiff's Exhibit 21  
17 received in evidence.)

18                  MR. KATZENBACH:  Q.  Now, would you please take  
19 a look at Exhibit 22?

20           A.    Yes.

21                  (Plaintiff's Exhibit 22  
22 marked for identification.)

23                  MR. KATZENBACH:  Q.  And can you tell us what  
24 that document is.

25           A.    This document has the title "Faculty



1 Recruitment Procedures." This is a document that's  
2 published on the USF Web site.

3 Q. Will you take a look at Exhibit 23.

4 A. Yes.

5 (Plaintiff's Exhibit 23  
6 marked for identification.)

7 MR. KATZENBACH: Q. And what is Exhibit 23?

8 A. It's a document with the title "Faculty  
9 Recruitment Procedures."

10 Q. And is Exhibit 23 a Web site -- published from  
11 a Web site?

12 A. Yes.

13 Q. And how did you receive Exhibit 21 and Exhibit  
14 23?

15 A. I printed them from the USF Web site.

16 MR. KATZENBACH: Move Exhibit 22 and 23 into  
17 evidence, Your Honor.

18 THE COURT: Any objection?

19 MR. VARTAIN: No showing of relevance as to the  
20 time period. We have a 1991 date on one.

21 THE COURT: All right. There is an objection,  
22 so we'll take it up outside the presence of the jury.

23 MR. KATZENBACH: Okay.

24 Q. Taking a look -- based on your experience --  
25 strike that.

1           Taking a look now back to Exhibit 21, does that  
2 describe the search procedures in the College of Arts  
3 and Sciences?

4           A.    Yes.

5           Q.    All right.  Now, I'd like to direct your  
6 attention in particular to the last paragraph on page 1  
7 of Exhibit 21, the paragraph that refers to job  
8 advertisement.

9           A.    Yes.

10          Q.    Was there any job advertisement created for the  
11 position Professor Stillwell ultimately received?

12          A.    No advertisement.

13          Q.    Now, I would note that this procedure refers to  
14 an advertisement in a journal specific to the field.

15          A.    Yes.

16          Q.    What is a journal specific to the field?

17          A.    That would be a professional journal.  A  
18 journal would be like -- would be a publication that  
19 contains articles.  They might be scientific articles;  
20 they might be articles concerning the profession, what's  
21 going on within -- within the profession.  And at the  
22 back of the journal might be a section for classified  
23 advertisements.

24          Q.    All right.  And to your -- if you could please  
25 take a look at Exhibit 26, if you would.

1 A. Yes.

2 (Plaintiff's Exhibit 26

3 marked for identification.)

4 MR. KATZENBACH: Q. Can you describe in  
5 general terms what Exhibit 26 consists of.

6 A. 26 is a copy of a journal, the Notices Of The  
7 American Mathematical Society. This particular issue is  
8 from June/July of 2008.

9 Q. All right. Is the -- are the Notices Of The  
10 American Mathematical Society a professional journal in  
11 mathematics?

12 A. Yes.

13 Q. Can you describe what it is, in terms of its  
14 stature or its role.

15 A. This is a primary journal within the profession  
16 of mathematics. If you're a mathematician in the United  
17 States, typically you belong to the American  
18 Mathematical Society.

19 There's a membership fee that you have to pay.  
20 In connection with that membership, you receive a  
21 subscription to this journal.

22 Q. Now, Exhibit 26 contains sections of classified  
23 listings --

24 A. Yes.

25 Q. -- from that journal.

1 A. Yes.

2 Q. Are those typical of the listings that would  
3 appear -- would have appeared in the AMS -- the Notices  
4 Of The AMS in 2002 through 2007?

5 A. Yes.

6 MR. KATZENBACH: Like to move Exhibit 25 -- 26  
7 into evidence.

8 THE COURT: Any objection?

9 MR. VARTAIN: None, Your Honor.

10 THE COURT: Received.

11 (Plaintiff's Exhibit 26  
12 received in evidence.)

13 MR. KATZENBACH: Could we have these exhibits,  
14 Your Honor, marked as 26A, just the whole package.

15 (Plaintiff's Exhibit 26A  
16 marked for identification.)

17 MR. KATZENBACH: May I approach the witness,  
18 Your Honor?

19 THE COURT: You may.

20 MR. KATZENBACH: Q. I'm handing you what's  
21 been marked as Exhibit 26A.

22 Ask the witness if he can identify what -- the  
23 package of exhibits that's been marked as 26A.

24 A. These are issues of the Notices Of The American  
25 Mathematical Society. They're for the months

1 October 2008, June/July; that's one issue, August 2008,  
2 September, November, and then January 2009.

3 Q. All right. Now, are these the Notices -- the  
4 full copies of the journal from which the classified ads  
5 that are part of Exhibit 26 were taken?

6 A. Yes.

7 MR. KATZENBACH: Okay. Now, I'd like to move  
8 Exhibit 26A into evidence.

9 THE COURT: Any objection?

10 MR. VARTAIN: Can we please defer that, as the  
11 counsel has not shown it to me before today -- or just  
12 before now.

13 THE COURT: I will defer a decision, then.

14 MR. KATZENBACH: Okay.

15 Q. Now, going back to your meeting with Ms. Tamayo  
16 in 2006.

17 A. I'm sorry, could you give me the exhibit number  
18 again.

19 Q. We were referring to Exhibit 106.

20 A. 106.

21 Q. And you were indicating the nature of your  
22 concerns about the hiring of Professor Stillwell.

23 A. Yes.

24 Q. And just to go back to that, just describe in  
25 general terms what your concern was.

1 MR. VARTAIN: Objection. The document explains  
2 it.

3 THE COURT: Overruled. Witness may answer.

4 THE WITNESS: Well, my first concern was that  
5 they did not conduct a search.

6 My second concern was they did not consult the  
7 department. This was a decision made by the Dean's  
8 Office. And the Dean's Office announced to the  
9 department that John Stillwell would be hired. That  
10 announcement was made in spring 2000 -- in spring of  
11 2000.

12 MR. KATZENBACH: Q. All right. And why would  
13 you bring a complaint about that under a policy  
14 involving discrimination?

15 A. Well, I mean, the -- I mean, if one talks about  
16 the equal opportunity and antidiscrimination policies,  
17 the sort of basic principle is that people from a  
18 diverse range of backgrounds have the same  
19 opportunities.

20 If a position is offered to an individual,  
21 there's no advertisement, there's no kind of faculty  
22 oversight, then there's a lot of people who never have  
23 that same opportunity for employment.

24 Q. Thank you.

25 Now, I'd like to take you to the next bullet

1 point on Exhibit 106 and ask you what did that concern?

2 A. The next one -- the next bullet item refers to  
3 a search in the mathematics department that was  
4 completed in spring 2004.

5 Q. And what was your concern about that search?

6 A. The department -- or the search committee did  
7 not follow the college rules in the conduct of that  
8 search.

9 Q. In what manner did they not follow it?

10 A. The college rules require that the search  
11 committee meet with the department to discuss the  
12 finalist candidates. That's referred to in the rules as  
13 to the second meeting of the department and the search  
14 committee.

15 Q. Okay.

16 A. And that meeting was never held.

17 Q. And what's the purpose of this -- what you've  
18 referred to as the second meeting?

19 A. The search committee is -- consists of mostly  
20 people from the department, plus sometimes one faculty  
21 from another department to introduce some diversity in  
22 the proceedings, right. But not everybody in the  
23 department is on the search committee.

24 Finalists visit campus. They give a teaching  
25 talk and a research talk. Faculty members are

1 encouraged to attend both of these talks.

2 They're also encouraged to meet with the  
3 prospective -- you know, with the applicants in a -- in  
4 some kind of social event, either at math tea, or  
5 sometimes they have a dinner, and sort of get to know  
6 them on a personal level.

7 And then the members of the department who are  
8 not on the search committee are asked to evaluate the  
9 finalists and give input to the search committee so that  
10 they might have the full range of opinions when  
11 evaluating the finalists.

12 Q. All right. And what -- in what -- what  
13 individual was hired in connection with this search?

14 A. Stephen Devlin.

15 Q. Let's take a look, if you will, at the next  
16 bullet point item that describes "Dean Needham engaged  
17 in harassment and discrimination against me."

18 What was involved in that issue?

19 A. That was -- involved incidents that took place  
20 in spring of 2000. That was the same semester that  
21 Dr. Stillwell's appointment was announced to the  
22 department. I had delivered a course on behalf of USF  
23 at a different institution. That was the College of --  
24 California College of Arts and Crafts. They changed the  
25 name. It's now called -- instead of CCAC, it's now



1 called CCA, the California College of Arts.

2 But USF had an arrangement at that time where  
3 there was a student exchange between the College of Arts  
4 and -- CCAC and USF. They had CCAC architecture  
5 students taking classes at USF campus and USF campus  
6 [sic] taking art classes at CCAC.

7 And I was asked to deliver a mathematics class  
8 that was connected to the physics class. I delivered  
9 that class the prior semester, which was spring of 1999,  
10 at CCAC campus. So I had completed that teaching  
11 assignment and I felt like I had done a good job.

12 And -- and then in fall of 2000, the semester  
13 after I finished that project, I received a letter of  
14 reprimand from Dr. Needham.

15 Q. And what was Dr. Needham reprimanding you for?

16 A. Dr. Needham alleged that I had not kept him in  
17 the loop, that I had conducted negotiations with the  
18 administrators at CCAC, and as a result of those  
19 negotiations, we have lost the contract -- we had lost  
20 the -- that particular course -- that is to say, the  
21 math course -- being delivered at CCAC.

22 Q. Now, the letter you're referring to, was that  
23 addressed to anyone else as well?

24 A. It was addressed to also Dr. Zeitz, Paul Zeitz.

25 Q. But did that letter specifically refer to your

1 reactions?

2 MR. VARTAIN: Objection. The attorney's  
3 suggesting the answer to the witness.

4 MR. KATZENBACH: I'll withdraw that question.  
5 And we'll eventually get around to that letter in detail  
6 if we want. Let me just rephrase it, okay.

7 Q. As a consequence -- prior to receiving this  
8 letter, had Dean Needham ever spoken to you about the  
9 issue?

10 A. No.

11 Q. Did you take any action in response to that  
12 letter?

13 A. Well, I wanted a retraction of that letter of  
14 reprimand. And then in the end, I filed a faculty  
15 grievance in order to obtain that retraction.

16 Q. All right. And did you -- what eventually  
17 happened with the faculty grievance?

18 A. The Dean's Office provided me with a written  
19 statement -- a written letter -- written statement of  
20 retraction.

21 Q. And who signed that written statement of  
22 retraction?

23 A. Dean Nel.

24 Q. Had you asked Dean Needham to sign a written  
25 statement of retraction?

1 A. Yes.

2 Q. And what was his response?

3 A. He refused to give me a written signed letter.

4 Q. Did he agree to give you an email to that  
5 effect?

6 A. He provided me with a email retraction. But I  
7 didn't feel the email was secure and carried the same  
8 weight as a letter of reprimand which was on USF  
9 letterhead.

10 He had sent it not just to, you know,  
11 administrators at USF, but he had sent it to the dean  
12 and the chair of the departments over at CCAC. And so,  
13 you know, sort of transmitting a one-paragraph email  
14 didn't seem to me it was concomitant with the original  
15 letter of reprimand.

16 Q. Did you ask Dean Needham if he would just  
17 sign -- if he would sign the email?

18 A. Yes.

19 Q. And what was his response?

20 A. He wouldn't.

21 Q. I'd like to now direct your attention to the  
22 next bullet point, which is -- begins "As a result of a  
23 temporary medical condition."

24 Can you describe that situation.

25 A. In January of 2002, I started suffering from

1 depression. And I consulted with a psychiatrist -- his  
2 name's Dr. Fred Parris -- in San Francisco.

3 He recommended that I take Prozac as treatment  
4 for this depression. I started taking Prozac maybe  
5 January 15<sup>th</sup>, maybe a few days earlier. And about two  
6 weeks after I started, I began experiencing adverse  
7 effects of that medication.

8 Q. Can you describe what those adverse effects  
9 were.

10 A. The adverse effects were a form of  
11 hallucination. It was visual distortions and auditory  
12 distortions. So if I were sitting here and I'm looking  
13 at the room, the lighting would appear different. Like  
14 objects would have like -- sort of like a light -- you  
15 know, it was -- there would be like -- kind of like a --  
16 the edge of contrast between dark and light could have  
17 some kind of fluorescence to it.

18 And then when I would be listening to people  
19 talk, the tones would be different from what I think  
20 would be normal. So a person's voice might sound really  
21 deep and maybe have a resonance to it that it wouldn't  
22 ordinarily have.

23 It was that that I would describe as a type of  
24 hallucination.

25 Q. In relation to the start of your teaching job,

1 your teaching duties at the University of San Francisco,  
2 when did these effects manifest?

3 A. Well, my first consultation with Dr. Parris was  
4 in early January. And then -- so I got a prescription  
5 and I started taking it. And then the first day of  
6 class was January 22<sup>nd</sup>. And I started -- I believe it  
7 was a -- it was either a Monday or a Tuesday. And then  
8 the weekend prior is when I started having these  
9 effects.

10 Q. What did you do when you began having these  
11 effects?

12 A. Well, I made an appointment; you know, left a  
13 message. And then -- on the doctor's answering machine.  
14 I think I -- I -- I believe it was -- I didn't get the  
15 appointment until Monday afternoon. That would be  
16 January 21<sup>st</sup>. So I was able to see him directly on  
17 January 21<sup>st</sup> and have him evaluate me.

18 Q. And what did you do as a consequence of that  
19 evaluation?

20 A. Dr. Parris informed me that this was a reaction  
21 to the medication; I should stop the medication  
22 immediately.

23 Q. And did you do --

24 A. Which I did.

25 Q. And did your -- the symptoms that you were

1 describing, the hallucinations, did those clear up?

2 A. Yes. It was better almost by the next day. It  
3 was completely pretty much gone.

4 Q. Now, in connection with this, did you have any  
5 discussions with Dean Needham about your work?

6 A. Yes. I spoke with Dean Needham on the 22<sup>nd</sup>  
7 or 23<sup>rd</sup> by telephone. I can't recall the date  
8 exactly.

9 Q. Okay. And did you -- in that conversation, did  
10 you discuss returning to work?

11 A. Yes.

12 Q. Okay. What did -- what did you tell Dean  
13 Needham and what did Dean Needham tell you?

14 A. Well, I explained what happened and that my  
15 doctor had recommended two weeks off from work to make  
16 sure that the Prozac, which builds up in the system and  
17 then dissipates over time -- for it to completely flush  
18 out of my system.

19 Dean Needham said that in order for me to get  
20 back into -- if I wanted to teach that semester, I have  
21 to pass an interview with him. That was the first  
22 condition.

23 The second condition was that there would be  
24 faculty members -- in my department, I gathered -- that  
25 he had hired part-time faculty, and they would be in my

1 classroom to help me out, in case there were any  
2 problems, for the entirety of the semester.

3 Q. And what was your reaction to those proposals?

4 A. I told him that that wasn't my understanding  
5 when I had talked to the Dean's Office assistant prior.  
6 She had told me that in this kind of situation, if I  
7 just had a note from my doctor saying that, you know,  
8 this is what happened and that I was healthy, I could  
9 take two weeks' leave and then get back into the  
10 classroom with that note.

11 So I told him that wasn't my understanding of  
12 what the rules were, and so I don't agree with the  
13 conditions that he wanted to impose.

14 Q. And in response to your statement that you just  
15 wouldn't agree to these conditions, did Dean Needham do  
16 anything?

17 A. Dean Needham was insistent that I had to abide  
18 by both of these conditions if I wanted to teach that  
19 semester.

20 Q. And as -- did you teach that semester?

21 A. I chose not to teach that semester.

22 Q. Thank you.

23 Now, Exhibit 1- -- let's continue with Exhibit  
24 106. The next two paragraphs also discuss the hiring  
25 practices of the mathematics department and the computer

1 science department at USF.

2 A. Yes.

3 Q. Let's begin by asking why did you put both  
4 those departments together?

5 A. At USF, at the time, within the College of Arts  
6 and Sciences they had a type of special appointment  
7 called a dual appointment.

8 That meant that if you received one of these  
9 dual appointments, you were a member of two departments.

10 Math and computer science were the most  
11 prevalent of these dual appointments. And at that time,  
12 there were -- at the time of this -- the memo was  
13 written -- about 12 faculty -- full-time faculty in  
14 mathematics. Three of them were dually-appointed in  
15 computer science.

16 And from the time -- from 1991, it was an  
17 understanding these two departments are connected  
18 through that -- you know, through that prevalence.

19 Q. Now, in this complaint, can you describe what  
20 the nature of your concern was.

21 A. Well, in this paragraph, I'm referring to the  
22 diversity statistics for those two departments  
23 considered as a group, combined.

24 Q. And what was your concern?

25 A. Well, I note that in nine appointments of



1 tenure track faculty within these two departments from  
2 fall 1991 to present -- "present" being January 2006 --  
3 so they had nine appointments, and only white males were  
4 appointed.

5 Q. Now, do you recall in opening statement Mr.  
6 Vartain had a chart?

7 A. Yes.

8 Q. Do you recall that?

9 MR. KATZENBACH: Mr. Vartain, can I have access  
10 to your chart?

11 MR. VARTAIN: Sure. You didn't want it up  
12 before, but you can have it now.

13 MR. KATZENBACH: Q. Now, Mr. Vartain's chart  
14 shows a ethnic or a -- a full-time faculty breakdown  
15 generally, at the university, by gender.

16 Do you see this?

17 A. Yes.

18 Q. In comparison to this chart, what was the  
19 breakdown in gender in the mathematics and computer  
20 science department?

21 A. When I wrote this memo, there were no females  
22 in those two departments.

23 Q. In this case -- so in this case, there would be  
24 no yellow and all brown?

25 A. Yes.

1 Q. Thank you.

2 And in -- thank you.

3 And why did that concern you?

4 A. Well, at USF, among student population when I  
5 was teaching there, about 60 percent of the students are  
6 female. And that statistic was reflected in the  
7 mathematics major. Maybe fewer women, you know, than in  
8 the university as a whole, but it's close. So at least  
9 50 percent of math majors were always female.

10 And in higher education, it's considered  
11 important that the faculty provide role models for  
12 students to give them encouragement to know that women  
13 and minorities can be good math teachers, math  
14 professors.

15 And so from that standpoint, diversity is  
16 considered important to the teaching mission.

17 Q. All right. So to be -- to go back to Mr.  
18 Vartain's chart, so you would -- in the computer  
19 sciences and math department, in order to bring them --  
20 the -- I believe you indicated there were -- how many --  
21 how many professors were in that department? Eighteen  
22 regular teaching faculty, correct?

23 A. Yes.

24 Q. At that time, of which there were no females,  
25 right?

1 A. Yes.

2 Q. So in order to bring that up to the university  
3 standard, they would have had to hire, what, eight or  
4 nine females?

5 MR. VARTAIN: Objection. Form of the question.  
6 Ambiguous, argumentative, "university standards."

7 THE COURT: Overruled. Witness may answer.

8 THE WITNESS: They would have had to hire about  
9 15 women.

10 MR. KATZENBACH: Okay.

11 THE WITNESS: Within the two departments.

12 MR. KATZENBACH: All right.

13 Q. Now, this also refers to the last two  
14 appointments in the mathematics department.

15 A. Yes.

16 Q. And those last two appointments were who?

17 A. Dr. Stillwell and Dr. Devlin.

18 Q. And what gender were those individuals?

19 A. White male.

20 Q. Thank you.

21 Now, did you have an -- did you actually  
22 meet -- after preparing Exhibit 106, did you actually  
23 have a meeting with Ms. Tamayo?

24 A. Yes.

25 Q. And where was that -- where did that meeting

1 take place?

2 A. In human resources, in her office.

3 Q. And what did you discuss during that meeting?

4 A. I discussed the issues raised in this memo. I  
5 brought along some supporting documents. In preparation  
6 for that meeting, I inspected my personnel file.

7 Q. Okay.

8 A. And there were issues in my file. I discussed  
9 with her that as well.

10 Q. All right. Would you please take a look at  
11 Exhibit No. 7.

12 A. Yes.

13 (Plaintiff's Exhibit 7  
14 marked for identification.)

15 MR. KATZENBACH: Q. Can you tell -- can you  
16 identify Exhibit No. 7.

17 A. This is the PSOUH -- no wait, I'm sorry -- 7.  
18 7 is a memorandum that Ms. -- or a letter -- well,  
19 memorandum, excuse me -- that Ms. Tamayo sent to me on  
20 February 27<sup>th</sup> of 2006. The subject line is "Meeting  
21 On January 26, 2006."

22 Q. And does this memorandum refer to the meeting  
23 you had with Ms. Tamayo about your informal complaint?

24 A. Yes.

25 MR. KATZENBACH: I'd like to move Exhibit 7

1 into evidence.

2 MR. VARTAIN: No objection.

3 THE COURT: It's received.

4 (Plaintiff's Exhibit 7

5 received in evidence.)

6 MR. KATZENBACH: Q. Now, I'd like to go down

7 to the bottom two paragraphs of the first page of

8 Exhibit 7.

9 This refers to -- and take -- I'd like to refer  
10 you to the phrase that says:

11 "He has decided to conduct a formal  
12 investigation of your complaint."

13 Do you see that?

14 A. Where on the first page? I'm sorry.

15 Q. Bottom two paragraphs.

16 A. On the first page?

17 Q. Yes.

18 A. Oh, yes. The first paragraph:

19 "After consultation with AVP Stoner, I  
20 advise you that he has decided to conduct a  
21 formal investigation of your complaint."

22 Q. And who was AVP Stoner?

23 A. That would be the vice president of human  
24 resources. I gathered that Ms. Tamayo was reporting to  
25 him.

1 Q. All right. In connection with conducting a  
2 formal investigation of the complaint, did you -- this  
3 letter describes some of the things that would be done.

4 Did you have any other understandings of what  
5 an informal investigation would consist of?

6 MR. VARTAIN: Objection. Lacks foundation,  
7 leading.

8 THE COURT: Overruled. Witness may answer.

9 THE WITNESS: Yes.

10 MR. KATZENBACH: Q. What were those?

11 A. Well, I would be referring to the PSOUH policy  
12 statement, as identified in this memorandum. They  
13 indicate steps that would be taken.

14 The person who is -- against which the  
15 complaint is filed would receive notification. There  
16 would be some interviews and a response by the -- you  
17 know, the person accused.

18 I expected that documents would be -- would be  
19 looked at and examined in connection -- you know, as  
20 relevant.

21 I would expect that the other people who were  
22 involved but were neither the complainant nor the person  
23 complained about would -- might be interviewed, as -- as  
24 necessary, by the affirmative action officer or  
25 investigator in connection with that investigation.

1 Q. All right. This -- and did you understand that  
2 in going -- moving forward with this policy that there  
3 would be a report prepared?

4 A. Yes.

5 Q. And based on what you read in this letter, did  
6 you understand that the report might go even beyond  
7 whether or not there was a technical violation of the  
8 policy?

9 MR. VARTAIN: Suggesting the answer. Leading.

10 THE COURT: Overruled.

11 THE WITNESS: Yes.

12 MR. KATZENBACH: Q. And what would that be?  
13 Even if it's -- let me just strike that.

14 How would -- how would this report be useful,  
15 whether or not there was a violation of the specific  
16 policy?

17 A. Well, it would be of use in terms of the  
18 future -- you know, in terms of how people, in the  
19 future, made decisions, administrative decisions, and  
20 conducted their administrative activities --  
21 professional activities, I should say.

22 Q. Okay. Now, after receiving Exhibit 7, did you  
23 prepare any further documents in connection with this  
24 complaint procedure?

25 A. Yes. I prepared a formal complaint.

1 Q. Can you please take a look at Exhibit 3.  
2 (Plaintiff's Exhibit 3  
3 marked for identification.)

4 MR. KATZENBACH: Q. In looking at Exhibit 3,  
5 can you tell us what that is.

6 A. This is the formal complaint that I filed in  
7 May of 2006.

8 MR. KATZENBACH: Now, at this point, I'd like  
9 to move Exhibit 3 into evidence.

10 THE COURT: Well, the tab that's 3 in my binder  
11 is a report of race-based discrimination and  
12 harassment --

13 THE REPORTER: I'm sorry, Your Honor. I can't  
14 hear you.

15 MR. KATZENBACH: That's correct, Your Honor.

16 THE REPORTER: I need him to repeat it.

17 MR. KATZENBACH: Sorry.

18 THE COURT: We're talking about the same thing?

19 MR. KATZENBACH: Yes.

20 THE REPORTER: Can you please repeat what you  
21 said.

22 THE COURT: I'm a little confused. I'm looking  
23 at report of race-based discrimination and harassment,  
24 Mr. Katzenbach?

25 MR. KATZENBACH: Yes.



1 THE COURT: Assures me that's what he's  
2 referring to?

3 MR. KATZENBACH: Yes.

4 THE COURT: And is there any objection to its  
5 receipt in evidence?

6 MR. VARTAIN: May I just ask counsel the number  
7 of pages in this document so I can just make sure I have  
8 what you have.

9 MR. KATZENBACH: My electronic counter says  
10 there are 485 pages.

11 MR. VARTAIN: I only have 367.

12 MR. KATZENBACH: Well, but that's SD 367.  
13 Those are source documents. There's also another  
14 hundred pages of text that precedes it, and a cover  
15 letter.

16 MR. VARTAIN: Do I have what you have?

17 MR. KATZENBACH: You have everything I have.

18 MR. VARTAIN: Okay. Then there's no objection.

19 THE COURT: Okay. The exhibit is received.

20 MR. VARTAIN: And I'm not going to review it  
21 all right now.

22 Did you say -- okay.

23 THE CLERK: Counsel, did you say 485 pages?

24 MR. KATZENBACH: No, I said -- yes, you're  
25 right. You got me right. I thought I said --

1 THE CLERK: Thank you.

2 MR. KATZENBACH: Yes.

3 (Plaintiff's Exhibit 3  
4 received in evidence.)

5 MR. KATZENBACH: Q. Now, Mr. Vartain has  
6 suggested this is a lengthy document. Would you  
7 describe --

8 MR. VARTAIN: Absolutely not. Just kidding.

9 MR. KATZENBACH: Well, perhaps Mr. Vartain  
10 isn't even suggesting that.

11 MR. VARTAIN: I have only suggested the number  
12 of pages, Counsel.

13 MR. KATZENBACH: Q. Why does this document  
14 contain almost 500 pages?

15 A. Well, the vast majority of the document is what  
16 I labeled as source documents. And so those are  
17 supporting evidence to the complaint. That would be one  
18 reason why the document is so lengthy.

19 The source documents include policy statements  
20 like the ones that we were looking at earlier that I  
21 downloaded off of the USF Web site.

22 Since I didn't have hard copies, I thought, you  
23 know, I could -- I could print those and include them.

24 They included reports -- pages from reports  
25 made to the trustees of USF that had statistics, like

1 the statistics and pie chart that we looked at before,  
2 so that I could compare the statistics within math and  
3 computer science with the university at large.

4 So that was -- that kind of, like, policy  
5 statement and demographic information had to be  
6 substantiated by documentary evidence.

7 In addition, there were issues in my personnel  
8 file whereby my former union grievance was completely  
9 missing in my personnel file. I included a complete  
10 copy of that grievance and the source documents.

11 Teaching evaluations were missing. I included  
12 that in the source documents.

13 There was my letter of promotion and tenure,  
14 which had the scores that I received from the peer  
15 review committee, that was missing from my personnel  
16 file. There was no record of what kind of scores I  
17 received when I received tenure in my personnel file.  
18 And so those were included.

19 The missing documents from the personnel file  
20 were included in this appendix.

21 THE COURT: Ladies and gentlemen, remember the  
22 admonition. Do not form or express any opinion on this  
23 case until it's finally submitted to you for your  
24 decision. Do not discuss among yourselves or with  
25 others until that time. Please be back in your places

1 at 11:10 according to the courtroom clock.

2 (Recess taken.)

3 THE COURT: Jurors and alternates are all  
4 present. Counsel for both sides are present. Plaintiff  
5 is personally present on witness stand.

6 Mr. Katzenbach, you may continue your inquiry.

7 MR. KATZENBACH: Yes.

8 Q. Dr. Kao, to continue with Exhibit 3, which  
9 you've identified at your formal complaint, I'd like to  
10 refer you to the table of contents.

11 A. Yes.

12 Q. I'd like to just go through those titles --  
13 those sections. And if you could briefly describe for  
14 the jury what those areas -- what that -- what that  
15 generally involved, if you would.

16 A. Well, let's see. I divided the complaint into  
17 two sections.

18 There's a summary, which is 30 pages long. The  
19 summary gives indication of each item of my complaint in  
20 brief, with some evidence from the source documents  
21 quoted. Some pages in the source -- in the appendix is  
22 included in that 30 pages for the most significant  
23 items.

24 So the issues in the complaint are in the  
25 summary. Then in addition, there's the section --

1 second section, which is labeled "Complaint." And that  
2 gave more detail and more pieces of evidence for each  
3 one of the items in the summary.

4 Q. All right. I'd like to just refer to parts of  
5 this, if you would, so you could explain to the jury  
6 what you meant when you wrote this. And looking at the  
7 summary Roman numeral 3, it refers to explicit  
8 discrimination.

9 A. Yes.

10 Q. What did you mean by "explicit discrimination"?

11 A. Those would be actions, incidents, that  
12 explicitly harmed me or was explicitly impacting, I  
13 guess, women and minorities as a group. So sort of  
14 explicit acts that I could kind of point to and identify  
15 as a problem. Explicit rule violations, that sort of  
16 thing.

17 Q. And what was implicit discrimination?

18 A. Implicit discrimination would be things where  
19 it wouldn't be necessarily adverse treatment in the  
20 sense of favoring a specific group over another group  
21 or, you know, adverse treatment towards me, but rather,  
22 things that might not have any real intent behind it but  
23 had adverse impact in terms of the demographics within  
24 math and computer science.

25 Q. Now, going down the table of contents, I'd like

1 to discuss -- if you could briefly discuss either of  
2 these, sort of, subsections.

3 Number 5 refers to "USF Administrative  
4 Structure, Math/CS" and "Dual-appointment Faculty."

5 What was involved in that?

6 A. Well, I raised the issue of the so-called dual  
7 appointments. As I testified earlier, some faculty were  
8 awarded a dual appointment whereby they'd be members of  
9 two departments.

10 This is done at other universities. It's  
11 usually considered quite prestigious to have a dual  
12 appointment.

13 I noted that at USF there were no standards as  
14 to who -- you know, what criteria were being used to  
15 determine who would receive a dual appointment.

16 In addition, there was no application  
17 procedure. There were no sort of announcements that a  
18 dual appointment of a specific kind would be available  
19 so that people who were interested could apply.

20 Dual appointments were awarded by the dean  
21 solely at his or her discretion.

22 Q. Number 6 refers to "USF Professional Record."  
23 What was involved in that subsection?

24 A. I gave a summary of the -- you know, the  
25 activities that I'd been involved in at USF and

1 included, for instance, my promotion and tenure  
2 information under that item.

3           Activities with -- for instance, there was an  
4 ethnic study certificate program committee that I was  
5 involved in, I was appointed to early at USF.

6           In 1991/'92, I served on the multicultural  
7 action plan committee, which was a universitywide  
8 committee. There weren't too many Asian faculty at that  
9 time, so I was the one Asian faculty on the committee  
10 serving then.

11           So that kind of background information. Some  
12 of it was relevant with respect to the personnel file.

13           Q. All right. Now, taking a look at the next area  
14 that you were raising, which is:

15           "Appointment without a search an  
16 ongoing violation of collective bargaining  
17 agreement."

18           What did that concern?

19           A. That concerned Dr. Stillwell's appointment.

20           Q. And did that concern the issues that you  
21 previously discussed?

22           A. Yes.

23           Q. Okay. Taking the next one, it says:

24           "Libel, forgery of evidence and  
25 defamation of character."

1           What did that concern?

2           A.    "Defamation of character" referred to the  
3 letter of reprimand that I received from Dr. Needham in  
4 2000.  That letter was on USF letterhead, from the  
5 dean -- associate dean of sciences, and it was  
6 distributed to administrators within USF and also to  
7 administrators outside of USF at CCAC.  There were  
8 attachments to that letter, and I had evidence that the  
9 attachments were email forgeries.

10          Q.    Taking a look at the next area, which is:

11                "Forced leave of absence in violation  
12 of Americans With Disability Act."

13          A.    Yes.

14          Q.    Can you describe what that section was about.

15          A.    That referred to the semester of 2002 where I  
16 had a reaction to Prozac and then I needed two weeks'  
17 leave and there were conditions placed on my return to  
18 teaching, if I wanted to, that semester.

19          Q.    And then taking a look at the next one, which  
20 is number 10:

21                "Appointment with special privileges."

22                What did that refer to?

23          A.    Number 10 is in reference to Dr. Stillwell.  
24 And he had a reduced teaching load.

25          Q.    And what would -- what concerned you about



1 that?

2 A. It was similar to the issue with the  
3 dual-appointment faculty. If he was receiving these  
4 sort of a special arrangement in terms of how many  
5 months he had to teach during the academic year, when he  
6 had to be present on campus during the academic year, as  
7 specified in the handbook, I felt like all full-time  
8 faculty should have the opportunity to apply for those  
9 kinds of privileges.

10 There was a issue he received special housing  
11 from the university. Again, I felt if he's entitled to  
12 live in sort of a nice apartment, which was right next  
13 to campus, then other faculty should be applied --  
14 should be entitled to apply and have the same  
15 opportunity.

16 Q. Taking a look at the next one, which is Roman  
17 numeral XI, it says:

18 "Appointment in violation of search  
19 procedures."

20 What did that concern?

21 A. That refers to the search in 2004 where the  
22 search committee failed to conduct the meeting with the  
23 department to get the department's impact --  
24 department's input into the search.

25 Q. And number 12, Roman numeral XII, refers to:

1           "Maladministration, DDTP single subject  
2 accreditation."

3           What was that involved -- what did that  
4 involve?

5           A.    One of the service activities I was involved in  
6 was serving as the mathematics department representative  
7 to a program with the School of Education. It was  
8 called the DDTP program. It involved training students  
9 in preparation for a career in teaching.

10           DDTP students could be intending to teach  
11 either at the elementary school level or at the middle  
12 school or higher level. If a person wanted to teach  
13 high school -- let's say middle and high school -- let's  
14 consider that as high school, right -- so if a person  
15 wanted -- an individual wants to teach high school in  
16 the state of California, they have to be certified.

17           That certification process changed over time.  
18 But at the time I wrote this complaint, there was an  
19 accreditation program whereby a student, for instance,  
20 wanting to teach high school mathematics would be a  
21 mathematics major. They would take a list of courses.

22           Those courses -- that curriculum had to be  
23 vetted by the state. So you'd have to send, you know, a  
24 set of materials and be approved in an office in  
25 Sacramento.

1           With that accreditation, students could  
2 complete a math degree in a certain way with certain  
3 extra courses, also courses from the School of  
4 Education, some internships, and then immediately be  
5 qualified, on graduation, to teach high school. And  
6 there were problems with that.

7           There were issues that I encountered serving on  
8 that committee involving me and the associate dean that  
9 I felt was a form of harassment.

10          Q.    All right. And what was the -- what was your  
11 concern about the form of harassment that was involved?

12          A.    Well, I had -- I had -- I had discovered  
13 mistakes in the application to Sacramento. And I had  
14 raised this with the department. I raised this with the  
15 dean.

16                I had found a way whereby I felt if they would  
17 make a simple correction to their mistake, they'd save  
18 students money.

19                And the Dean's Office -- well, the  
20 administration as -- the administrators in charge of  
21 this program wouldn't be responsive to those issues that  
22 I raised.

23                And then in the process, commitments were made  
24 to me from the associate dean, who was Brandon Brown at  
25 the time, and those commitments were broken. They just

1 didn't follow through with their promises.

2 Q. All right. Now, the next one there is number  
3 13, "Destruction of personnel documents."

4 What happened there?

5 A. That refers to the materials that were missing  
6 in my personnel file. I didn't understand why those  
7 materials weren't there. I -- I asked the Dean's Office  
8 staff about retention of the documents, was there any  
9 kind of policy. There didn't seem to be any written  
10 policy on that matter.

11 Basically it seemed that those documents really  
12 should be in my file, and they were missing. And -- and  
13 so -- I mean, my main concern was to get the documents  
14 that were missing vetted in some way so they're  
15 authenticated and then reintroduced into my personnel  
16 file.

17 But it troubled me that I had to go to so much  
18 trouble and then -- you know, at USF, faculty members  
19 don't regularly check their personnel file. So it was  
20 just because I had been interested in filing a complaint  
21 or considered filing a complaint that I even discovered  
22 this information was missing.

23 And so I considered this a form of  
24 discrimination.

25 MR. VARTAIN: Move to strike because there's no

1 testimony that he'd ever seen the documents in the  
2 personnel file at any other time, as to him now saying  
3 it's missing. Lacks foundation.

4 THE COURT: Motion to strike is denied.

5 MR. KATZENBACH: Q. Taking a look at the next  
6 one, which is Roman numeral XIV, it describes:

7 "Appointment of strictly unqualified  
8 candidate over two qualified candidates,  
9 both having diversity status."

10 What did that concern?

11 A. Well, in the memorandum of -- that I submitted  
12 in January of 2006, I raised the issue of the  
13 demographics within math and computer science.

14 And at that time, there was a search being  
15 conducted in mathematics. They hadn't picked the  
16 finalist candidates prior to January 10 when I filed the  
17 memo.

18 And then when the search committee came back  
19 from the meetings and then they presented to the  
20 department the candidate list, the three finalists were  
21 all diversity candidates. There was two Asian males and  
22 one white female.

23 This had never happened before. You know, I  
24 was pleased that they seemed to be reactive to -- or  
25 responsive to my complaint. But then an appointment was

1 made. And after the appointment was made, I was looking  
2 at this individual's resumé, and it -- and he didn't  
3 have a Ph.D. in mathematics.

4 Q. Now, in opening statement -- what was that  
5 individual's name?

6 A. Stephen Yeung.

7 Q. And in the opening statement, Mr. Vartain  
8 stated that Mr. Yeung -- that Dr. Yeung had a -- had a  
9 doctorate in applied mathematics, the same -- and made  
10 the point -- he said that was the same doctorate that  
11 you had. Was that true?

12 MR. VARTAIN: Objection. Misstates the opening  
13 statement. I can say what I -- I can tell you what I  
14 said, Mr. Katzenbach.

15 MR. KATZENBACH: I think I just did.

16 THE COURT: Characterization of the opening  
17 statement by defense counsel is stricken.

18 MR. KATZENBACH: Let me just rephrase that.

19 Q. Was Dr. Yeung's doctorate in applied  
20 mathematics?

21 MR. VARTAIN: I --

22 THE WITNESS: No.

23 MR. VARTAIN: Withdraw the objection. He's  
24 answered.

25 MR. KATZENBACH: Q. What was Dr. Yeung's

1     doctorate in?

2           A.     When I looked at the -- when I looked at his  
3     resumé carefully, I noted that his Ph.D. was in  
4     theoretical and applied mechanics.

5           Q.     Were you familiar with what that meant, what  
6     that degree was?

7           A.     I did research into and tried to get the  
8     information as to what a degree in theoretical and  
9     applied mechanics was.

10          Q.     When you did -- just stop there.

11                    When you did that research, did you reach any  
12     conclusions as to the relationship of that degree in  
13     mechanics as opposed to a more traditional degree in  
14     mathematics?

15          A.     Well, the curriculum from the program that Dr.  
16     Yeung graduated from appeared to be more or less a  
17     mechanical engineering program.

18          Q.     All right. Now, in terms -- and what was your  
19     concern about this?

20          A.     My concern was that the advertisement required  
21     that applicants have a doctorate in mathematics. When  
22     you make that statement -- and it's the same language  
23     they used in the other searches. When you say "a  
24     doctorate in mathematics," you mean a doctorate in  
25     mathematics or applied mathematics.

1 MR. VARTAIN: Objection. Motion to strike.  
2 The plaintiff is nonresponsive to the question.

3 THE COURT: Objection's overruled. The motion  
4 to strike is denied.

5 MR. KATZENBACH: Q. Now, in terms of -- what  
6 was your concern -- did you have any concerns about how  
7 this would affect Dr. Yeung's position at the  
8 university?

9 A. Well, my concern was that he'd be forever under  
10 the thumb of the administration because he doesn't have  
11 the strict qualifications for the job.

12 Q. Now, this also dealt with -- you said two  
13 qualified candidates, both having diversity status.

14 What were those other two -- what were those  
15 other two candidates in that search?

16 A. There was Dr. Deng, who graduated from NYU,  
17 which is a well-known applied mathematics -- well, it's  
18 a well-known mathematics department in the United  
19 States. So he had a degree in mathematics.

20 And there was a Dr. McMillan, who was from  
21 Arizona State University -- University of Arizona, which  
22 is a -- maybe -- it's ranked like tenth in the United  
23 States in applied mathematics. And she was scheduled to  
24 receive her doctorate.

25 I mean, the language of the advertisement was



1 "will have received a doctorate by the time they start  
2 in the fall." And she was just at the end of her -- you  
3 know, just -- just -- when she interviewed, it was just  
4 a few months short of her graduation. So she would have  
5 been qualified.

6 Q. All right. Now, taking -- well, let me just  
7 make a quick question here.

8 You raise a number of -- you raised issues  
9 concerning the search for Professor Devlin and the  
10 search for Professor Yeung; is that correct? There was  
11 a violation of search procedures in both those searches?

12 MR. VARTAIN: Leading. Objection.

13 MR. KATZENBACH: I'll --

14 THE COURT: Sustained.

15 MR. KATZENBACH: I'll rephrase it.

16 Q. In raising the issues concerning searches, did  
17 you -- what was your -- what was your intention, if any,  
18 as to how this might affect the actual hiring decisions  
19 of Dr. Yeung and Dr. Devlin?

20 A. Well, I didn't mean any ill will to either  
21 candidate that was hired. I didn't mean that they  
22 should be fired. I was concerned that the rules hadn't  
23 been followed, and I wanted the department and search  
24 committee to follow the rules.

25 I mean, I figured that the rules embody

1 principles of antidiscrimination and equal opportunity  
2 in a fashion that involves input from all kinds of --  
3 all administrative units within the university.

4           You know, opinions are solicited. You know,  
5 there's -- there's legal -- there are standards within  
6 the profession, in terms of what's appropriate  
7 affirmative action and what's not appropriate  
8 affirmative action.

9           And all of these considerations get discussed  
10 and studied and analyzed over a great period of time.  
11 All of that effort is then embodied in a series of rules  
12 that -- that would be the first step, in terms of  
13 implementing a policy of equal opportunity at the  
14 institution.

15           So if you're serious about  
16 antidiscrimination/equal opportunity, I think the -- I  
17 mean, it seems to me that the first step is to follow  
18 the rules that -- that -- that apply in that area.

19           And so I wanted the department and the search  
20 committees to follow the rules in the future.

21           Q. Thank you. Now, taking the last -- taking the  
22 next one there, number -- Roman numeral XV, it says:

23                   "Implicit discrimination math/CS  
24 demographics."

25                   What was involved there?

1           A.    Well, I mean, as I say, within the industry,  
2 there's -- there -- within higher education, there is a  
3 concept of, you know, adverse -- adverse treatment and  
4 adverse impact.

5           I mean, you might make decisions that are --  
6 you know, you feel are -- or -- you might make decisions  
7 that you feel are just neutral with respect to issues of  
8 diversity, but it might have a adverse impact  
9 unintentionally.

10           And so if you look at the demographics of a  
11 certain, you know, unit and then compare it to the  
12 demographics of, say, the institution, or at other  
13 departments in other institutions throughout the  
14 country, one might get concerned that -- that through no  
15 ill intent, you might have policies or procedures  
16 that -- that are -- are adversely impacting, you know,  
17 that statistic.

18           Q.    Okay. And going back to number -- when it  
19 refers to "math/CS demographics," what was the specific  
20 demographics that you were concerned about?

21           A.    The fact that there were very few women and  
22 minority faculty members in math and computer science.

23           I mean, at the time -- I filed this complaint,  
24 okay, so they did hire one Asian male in mathematics.  
25 And they did hire -- after my -- I filed my, you know,

1 memorandum in January 10<sup>th</sup> -- January of 2006, there  
2 was a female professor in computer science who had, at  
3 that time, a one-year contract with computer science.  
4 And then I learned that at the end of the spring  
5 semester she had been awarded a tenure track position.

6 And so they had hired one female and one -- in  
7 computer science and one Asian male in mathematics.

8 Nevertheless, of the 18 faculty members, they  
9 had two Asian males and one -- one white female. And  
10 then the remaining 15 of the 18 -- let's see. That's  
11 two plus the 18. So that'd be 20. So three diversity  
12 faculty versus 17 white males within those two  
13 departments.

14 And so, you know, we had a long ways to go in  
15 terms of adjusting that demographic.

16 Q. I'd like to -- number 16 refers to "implicit  
17 discrimination, dual-appointment demographics."

18 What was that issue?

19 A. Well, I was concerned that there were no  
20 standards, no application procedures for these  
21 dual-appointment positions. I mean, that was just the  
22 system that was in place since even -- since even before  
23 I was hired in 1991.

24 But, you know, the appointments -- the dual  
25 appointments were made by the Dean's Office, at the

1 discretion of the dean. I can't make any determination  
2 as to whether the dean had any adverse treatment in mind  
3 when he made those appointments.

4 But it appeared there was adverse impact  
5 because, I mean, I went through the list of  
6 dual-appointment faculty; ethnically they were all white  
7 and there was one female among the dual appointments  
8 throughout the college, both in sciences and in the  
9 humanities. I think there were eight at that moment.

10 But I had done the research in terms of, you  
11 know, where -- you know, who these people were. And  
12 then, you know -- and so I compared that statistic with  
13 the demographics of the university as a whole.

14 Q. All right. Now, taking a look, if you would,  
15 starting at page 105 of your report. And I'm projecting  
16 page 105 up on the screen. Is this the analysis that  
17 you did regarding the math/CS demographics?

18 A. Yes.

19 Q. And in connection with this, did you perform  
20 any calculations?

21 A. Yes.

22 Q. Take a look at page 107 in particular.

23 A. Yeah.

24 Q. What were these calculations intended to do?

25 MR. VARTAIN: This is not relevant. Objection.

1 THE COURT: Overruled.

2 THE WITNESS: Well, I mean, I guess there's two  
3 ways to look at the issue. I mean, one issue would be  
4 if you have a statistic referring to diversity -- let's  
5 say, for instance, proportion of females in a work unit,  
6 right -- and that proportion is different from, let's  
7 say, other institutions or -- in terms of, you know --  
8 let's say the industry analysis of qualified people in  
9 that area. Maybe there are fewer women than you would  
10 hope. Well, the -- that's one sort of identification  
11 that you can make.

12 The other issue would be, you know, how  
13 significant is this. If it's a small difference, then  
14 maybe that's not, you know, such an issue -- such a  
15 significant issue to raise. If it's a big difference,  
16 at what point does that difference become significant.

17 So again, in statistics, you know, we have  
18 measurement, P value, that can be utilized to do this  
19 kind of analysis. It's something I teach in my classes.

20 So I applied that system, that formula, to  
21 these kinds of issues and tried to determine or make the  
22 argument that in fact the discrepancy in the diversity  
23 statistics for math and computer science for dual  
24 appointments were significant statistically.

25 Q. Taking a look at the next page, which is 108,

1 can you tell us what those charts are.

2 A. Let's see. 108. I'm making a comparison with  
3 other institutions in the United States.

4 Q. Okay.

5 A. So that table refers to within -- you know, so  
6 this information I got on-line from documents published  
7 by like the National -- for instance, National Research  
8 Council as to, you know, within the United States,  
9 faculty in mathematics, and, you know, how many -- what  
10 fraction are female, what fraction are male, what  
11 fraction are Asian, what fraction are black, what  
12 fraction are Hispanic, what fraction are native, et  
13 cetera -- you know, each of the categories -- using the  
14 nomenclature identified by -- you know, using the same  
15 nomenclature as the National Research Council.

16 Q. Okay. And did you make some -- taking a look  
17 at the next page, did you make some calculations?

18 MR. VARTAIN: Objection.

19 Your Honor, may I have a bit of dialogue on  
20 this?

21 I have a hearsay objection. It's out-of-court  
22 statements. If the attorney is not offering them to  
23 prove the truth of this data, then I don't mind.

24 But if you're trying to prove this -- the truth  
25 of what's in here, then I have a hearsay objection.

1           But may I ask the counsel what his offer is.

2           MR. KATZENBACH: My offer -- well, the  
3 document's already in evidence, Your Honor. But my  
4 offer would be to show what he was presenting to the  
5 university for their consideration, if they had -- for  
6 them to consider what his position was, not necessarily  
7 to establish the proof of discrimination or the proof of  
8 the things he's saying.

9           MR. VARTAIN: Are you trying to prove the truth  
10 of this?

11          MR. KATZENBACH: No, I'm trying to --

12          MR. VARTAIN: If you're -- fine. Then if  
13 you're not offering it to the court to prove the truth  
14 of this data, then I will not assert the hearsay  
15 objection. But if you are, I will.

16          MR. KATZENBACH: Well, there are two -- there  
17 are two issues. I'm not attempting to prove, for  
18 example, what the demographics are, as he represented,  
19 only that this is the evidence he had to present to the  
20 university.

21           As to the truth of the accuracy of the  
22 calculations, he can testify that he did these  
23 calculations based on that data. So that -- to that  
24 extent, I'm not -- the accuracy of the calculations is  
25 being offered for the truth of how -- the calculations,



1 based on the data that he had.

2 MR. VARTAIN: I don't quite understand you,  
3 sir. I'm asking --

4 THE COURT: Nor do I. But I do see a couple of  
5 nonhearsay uses for this information.

6 MR. VARTAIN: And I do acknowledge that if he's  
7 just trying to prove that the witness made assertions of  
8 discrimination, we don't even challenge that.

9 If he's trying to prove that the plaintiff  
10 proved his assertions of discrimination, we challenge  
11 that directly, and this document is hearsay.

12 THE COURT: No, I understand. I tell you what;  
13 the evidence is admissible, in all probability for  
14 limited purposes. We'll let it come in. We'll decide  
15 and craft an instruction to make clear the limited  
16 purposes for which it was admitted.

17 MR. KATZENBACH: That's certainly fine with me.

18 THE COURT: Okay. Carry on.

19 MR. KATZENBACH: Thank you.

20 Q. Taking a look at page 109 of your report, what  
21 are these statistics intended to show to the university?

22 A. The discrepancy identified in the proportions  
23 for -- along the lines of gender and ethnicity are  
24 significant statistically.

25 Q. And you refer -- as you'll see on this

1 document, you're calculating a P value?

2 A. Yes.

3 Q. And that's -- what is a P value?

4 A. A P value has different meanings in different  
5 contexts. Generally P value, that nomenclature, is used  
6 to describe a calculation. The P value is a product of  
7 that calculation. The P value measures the extremity of  
8 the evidence. The smaller the P value, the closer it is  
9 to zero, the more extreme the evidence is.

10 Q. Thank you.

11 Now, in connection with your -- in your  
12 descriptions of the issues that you were raising, one in  
13 particular I want to draw your attention back to. And  
14 that's the dispute that you had with Dean Needham over  
15 the CCAC courses. Do you recall that?

16 A. Yes.

17 Q. Now --

18 MR. VARTAIN: This is -- which one is this,  
19 counsel? The year 2000?

20 MR. KATZENBACH: This is for the year 2000.

21 MR. VARTAIN: He had different years in there.  
22 He had a 2002 as well.

23 MR. KATZENBACH: I think -- let's just go to  
24 the 2000 -- year 2000.

25 Q. Now, you referred to that issue as involving a

1 letter of reprimand that you received.

2 A. Yes.

3 Q. I'd like you to take a look, if you could, at  
4 the document that you have marked in your -- in Exhibit  
5 3 that you've -- you have marked as source document 9,  
6 or SD 9.

7 A. Yes.

8 Q. Could you get to that document.

9 A. One moment.

10 Yes, I have it.

11 Q. Is source document 9 the letter of reprimand  
12 that you were referring to?

13 A. Yes.

14 Q. Let me -- now, I'd like to ask you a few  
15 questions about that.

16 First of all, this is a document actually  
17 addressed to Paul Zeitz; is that right?

18 A. Yes.

19 Q. Okay. And did you receive a copy of this  
20 document?

21 A. Yes, I'm cc'ed.

22 Q. And if you look on the second page of this  
23 document, there are a number of cc's on this document.

24 A. Yes.

25 Q. And could you identify for the jury who these

1 people are.

2 A. Yes. So Associate Dean Needham's my direct  
3 supervisor. He's writing the letter.

4 The cc includes Dean Nel, who is Needham -- Dr.  
5 Needham's supervisor.

6 It includes then Father Lucas, who's director  
7 of the CCAC joint BFA bachelor of architecture program  
8 at USF. So he's the one in charge of this arrangement  
9 whereby there's a student exchange between CCAC and USF.

10 And it's cc'ed to me.

11 And then it's cc'ed to Dr. Meckel,  
12 M-E-C-K-E-L -- he's the dean of design and architecture  
13 at CCAC -- and Dr. Loomis, who's the chair of  
14 architecture at CCAC.

15 The work that I conducted when I delivered this  
16 math course at CCAC campus was under the direction of  
17 Dr. Loomis. And so in connection with this contract, I  
18 reported to Dr. Loomis.

19 At USF, I reported to Dean Needham, as my  
20 direct supervisor. And then Dr. Zeitz was chair of  
21 mathematics, so I'm in a sense reporting to him, but  
22 the -- with the faculty association at USF, the chair is  
23 like a shop steward. They don't have a supervisory --  
24 strict supervisory role.

25 I had communications with Dr. Zeitz in his role

1 as shop steward. And then he's reporting, in turn, to  
2 the dean.

3 Q. All right. Now, I'd like you to direct your  
4 attention to the first page of this letter. And I'd  
5 like to direct your attention to the paragraph that  
6 begins "Less happily, and my reason for writing."

7 A. Yes.

8 Q. Now, this paragraph states -- he states in  
9 here:

10 "I was, as you know, very disturbed to  
11 discover that as a result of private  
12 communications between John Kao and John  
13 Loomis at CCAC that it was decided," in  
14 quotes, "that USF would not deliver this  
15 course for spring 2001."

16 Now, how did you react when you saw this  
17 letter?

18 MR. VARTAIN: Irrelevant. Objection. This is  
19 2000. We're eight years from the point in time of the  
20 case. How he reacted --

21 MR. KATZENBACH: I'll rephrase the question.

22 Q. Had Tristan Needham, prior to -- prior to the  
23 time you received this letter, had Tristan Needham asked  
24 you anything about any negotiations or discussions that  
25 you had with John Loomis at CCAC?

1 MR. VARTAIN: Objection. Asked and answered.  
2 He already -- and it's also irrelevant.

3 THE COURT: Overruled. Witness may answer.

4 THE WITNESS: No. Dean Needham hadn't talked  
5 to me that there was a issue.

6 MR. KATZENBACH: Q. I'd like to refer down  
7 to -- I would like to refer down to the next -- the  
8 first -- the next paragraph and the first numbered  
9 paragraph there.

10 It says:

11 "Neither John Kao nor you are empowered  
12 to negotiate with CCAC on behalf of USF."

13 Now, did you consider this document to be a  
14 letter of reprimand?

15 MR. VARTAIN: Objection. Irrelevant.

16 THE COURT: Overruled. Witness may answer.

17 THE WITNESS: Yes.

18 MR. KATZENBACH: Q. Now, did you file -- is  
19 this a document over which you filed a grievance that  
20 was settled?

21 A. Yes.

22 Q. Now, attached to this letter, were there some  
23 draft emails -- or rather -- I'm sorry -- were there  
24 some attached emails?

25 A. Yes.

1 Q. I'll just see if I can get them.

2 Now, what -- taking a look at these emails --  
3 see if I can get them up on the screen -- what concerned  
4 you about them?

5 A. Well, these emails aren't originals. I noted  
6 in my -- in my complaint document that they appear to  
7 be -- I mean, he writes -- he puts it -- he prints it as  
8 if these are like what would come out of the browser, or  
9 the email reader, but clearly they're editation --  
10 there's elements of it that have been edited.

11 So these are more like quotations of an email.

12 And more significantly, I received copies of  
13 the email that he must have taken -- I mean, these were  
14 originally attachments to an email that Zeitz sent to  
15 Dean Needham. And Zeitz forwarded that email to me.  
16 There's a date on when he received these -- these  
17 emails. And that date isn't included on this.

18 So in other words, he's not -- he's not  
19 actually printing out the email that he's relying on;  
20 he's just, you know, clipping these things without the  
21 date that he's receiving them.

22 These emails, which I suppose are  
23 representative of this negotiation -- negotiation  
24 between me and Dr. Loomis, appear to be early August,  
25 August 2<sup>nd</sup>. And a reply on August 3<sup>rd</sup> is when I,

1 you know, am sending something back to Dr. Loomis. So  
2 I'm communicating with Dr. Loomis on August 3<sup>rd</sup>. And  
3 then when I get the copy from Zeitz of the email that  
4 Needham is working on -- working off of, that email is  
5 dated August 15<sup>th</sup>.

6 So, I mean, if he's referring to some  
7 negotiation that was secret and not provided to him in a  
8 timely manner -- he talks about being out of the loop.  
9 Well, he had these emails on August 15<sup>th</sup>, which is  
10 within two weeks of the communications.

11 In addition, I told Dr. Zeitz that there was  
12 some issue about CCAC right at the time I wrote these  
13 emails. And Dr. Zeitz told me that he had, you know,  
14 orally communicated with Dean Needham within a few days  
15 of that and then followed it up with a email of  
16 August 15.

17 So, I mean, if there were a problem -- if there  
18 was a problem with the contract involving CCAC, and this  
19 is in the summertime, if Dean Needham had acted promptly  
20 on August 15<sup>th</sup>, I can't see how the contract could  
21 have been lost.

22 Q. All right. I'm going to try to project up on  
23 the screen a document.

24 Is this a copy of the sort of original email  
25 that you were provided by Dr. Zeitz?



1 MR. VARTAIN: Would you identify the document  
2 for the record, please, Counsel.

3 MR. KATZENBACH: Yes. It's marked as SD 41.

4 MR. VARTAIN: Of which exhibit, please?

5 MR. KATZENBACH: Of Exhibit 3.

6 MR. VARTAIN: Thank you.

7 MR. KATZENBACH: No problem.

8 Q. Taking a look at SD 41.

9 A. Yes.

10 Q. Do you have that in front of you?

11 A. Yes.

12 Q. Is that a copy of an email that you received  
13 from Dr. Zeitz?

14 A. Yes. Dr. Zeitz gave me this copy, yes.

15 Q. And does this appear to be -- does this appear  
16 to be, to you, Dr. Zeitz informing Tristan Needham of  
17 these -- of your two emails?

18 A. Yes. You see at the -- starting about a third  
19 of the way from the bottom, you have the August 2<sup>nd</sup>  
20 date. That would be the first one that he's, you know,  
21 attaching to that letter.

22 And then if you turn the page, there's a  
23 different -- let's see. There's another email that's  
24 dated August 3<sup>rd</sup>. And you see that Dean Needham's  
25 receiving these on the 15<sup>th</sup> of August.

1 Q. And you're referring again to the header at the  
2 very top of this email?

3 A. Yes.

4 Q. Thank you.

5 Now, after you submitted the formal complaint  
6 which is Exhibit 3, what was the next thing that  
7 happened with regard to your complaint?

8 MR. VARTAIN: The question is ambiguous. We've  
9 had a number of different complaints, formal complaints  
10 and grievances. Perhaps could you specify, Counsel.

11 MR. KATZENBACH: Sure, be happy to.

12 Q. What was the next thing that happened as to the  
13 formal complaint, which is Exhibit 3?

14 MR. VARTAIN: Maybe you could -- objection.  
15 Could you clarify the date for all of us.

16 MR. KATZENBACH: Q. You filed the formal  
17 complaint on what date?

18 A. August 15 -- I'm sorry -- May 15<sup>th</sup>, 2006.

19 Q. All right. And what was -- did the university  
20 make any response to this formal complaint?

21 A. Yes.

22 Q. What was the first response the university  
23 made?

24 THE COURT: Save it till after lunch.

25 Ladies and gentlemen, remember the admonition.

1 Do not form or express any opinion on this case until  
2 it's finally submitted to you for your decision. Do not  
3 discuss among yourselves or others until that time.  
4 Please be back in your places at 1:30 according to the  
5 courtroom clock. Please remember to leave your  
6 notebooks and instructions behind you.

7 (Jurors left the room.)

8 THE COURT: Jurors and alternates have left the  
9 courtroom. Counsel for both sides and the plaintiff  
10 remain.

11 Mr. Vartain, you wanted to have a look at some  
12 exhibits.

13 MR. VARTAIN: I just took care of -- I took  
14 care of the ones that are up there. So if you want to  
15 state your offers again, I can recite my position,  
16 Christopher.

17 MR. KATZENBACH: Okay. We'd like to offer No.  
18 2, which is the binder.

19 MR. VARTAIN: No objection.

20 (Plaintiff's Exhibit 2  
21 received in evidence.)

22 MR. KATZENBACH: We'd like to offer number 26A,  
23 which are the original copies of the Notices.

24 MR. VARTAIN: Which one is that?

25 MR. KATZENBACH: 26A, I believe, is --

1 MR. VARTAIN: The five magazines?

2 MR. KATZENBACH: Six, I believe.

3 THE CLERK: Seven.

4 MR. KATZENBACH: I believe there's one more on  
5 the --

6 THE CLERK: There were seven.

7 MR. KATZENBACH: Seven. Here we go. There are  
8 two more than I -- the first -- the top one, the one  
9 that at the bottom has the number -- the one at the very  
10 bottom of the pile, I think, has the number.

11 MR. VARTAIN: No objection.

12 (Plaintiff's Exhibit 26A  
13 received in evidence.)

14 MR. KATZENBACH: And then 112A and B, which are  
15 the two statistics journals.

16 MR. VARTAIN: For the period April 2008 and  
17 June 2008 respectively. No objection.

18 (Plaintiff's Exhibits 112A-B  
19 received in evidence.)

20 MR. KATZENBACH: And I also believe, Your  
21 Honor -- our notes don't reflect whether Exhibits 9  
22 and -- Exhibits 9 and 10 were formally admitted into  
23 evidence.

24 THE COURT: 9 and 10 Mr. Vartain said "No  
25 objection." Then you plowed ahead without waiting for

1 my ruling, and so I guess it's due. The motion is  
2 granted with respect to 9 and 10.

3 MR. KATZENBACH: Very well, Your Honor. Thank  
4 you.

5 MR. VARTAIN: Thank you, Your Honor.

6 (Plaintiff's Exhibits 9-10  
7 received in evidence.)

8 MR. KATZENBACH: Your Honor, we do have one --

9 THE COURT: What about 22 and 23?

10 MR. VARTAIN: What I'd like to request is Your  
11 Honor withhold ruling until cross-examination, when I  
12 will combine voir dire with cross-examination.

13 THE COURT: Hold off on 22 and 23?

14 MR. VARTAIN: Please.

15 THE COURT: Okay. I think that -- I don't see  
16 any other blanks.

17 Anything else you'd like to put on the record,  
18 Mr. Katzenbach?

19 MR. KATZENBACH: Yes, Your Honor.

20 We are attempting to schedule witnesses, and we  
21 had hoped to have a Dr. Paul Good testify. Dr. Good has  
22 informed us that he's available either tomorrow morning  
23 or all day Friday.

24 What we're having trouble with is he couldn't  
25 be here Friday -- tomorrow afternoon, and we're just not

1 sure when it is that we will be -- when Dr. Kao would be  
2 finished testifying.

3 It seems to me, quite candidly, hard to believe  
4 that he would be finished with both cross and direct  
5 today -- and any redirect today, but I can't be sure.  
6 So I'm trying to sort of juggle Dr. Good.

7 And what I'm not sure about is if we finished  
8 early -- if we finished Dr. Kao quickly, like if we  
9 finished today, then I'm not sure if I have enough other  
10 witnesses for a complete full day without Dr. Good.

11 We have a bunch coming, but I just don't know  
12 that they're going to be so long as to without Dr. Good,  
13 they'd take up a full court day.

14 THE COURT: You're warning me you're likely to  
15 come up short on witnesses.

16 MR. KATZENBACH: I'm worried that I might come  
17 up short.

18 THE COURT: All right. Do your best to avoid  
19 it.

20 MR. KATZENBACH: I will.

21 THE COURT: I don't know how else to advise  
22 you.

23 MR. KATZENBACH: I am really -- it's my hope  
24 that we'll call Dr. Good Friday. But I simply wanted to  
25 alert you to his scheduling problems and how that's

1 going to impact us.

2 THE COURT: I take it if necessary, you don't  
3 have any problem with splitting Dr. Kao's testimony.

4 MR. KATZENBACH: No.

5 If we could get Dr. Good in, I think that that  
6 would be okay with me. But the chances are that we  
7 would be splitting up cross-examination, and I think  
8 that that would be really more a call for Mr. Vartain  
9 than me.

10 THE COURT: Mr. Vartain, any comment?

11 MR. VARTAIN: I don't have any comment yet  
12 because I don't -- I don't have a feel for when  
13 counsel's going to finish direct of Kao.

14 I've told him that it's likely that I will not  
15 exceed 50 percent of direct time when I do my cross.  
16 That's my best speculation now.

17 And then that gives him the ability to predict  
18 what he needs for tomorrow.

19 So what I'm telling you is I'm not going to  
20 take up as much time on cross as he's taking up on  
21 direct, by quite a bit.

22 THE COURT: Okay. Any other concerns?

23 MR. KATZENBACH: That's all. Excuse me. Not  
24 at the moment, Your Honor.

25 THE COURT: Mr. Vartain?

1 MR. VARTAIN: No. Thank you, Your Honor.

2 THE COURT: All right. Off the record, out of  
3 session. See you after lunch.

4 (Lunch recess from 12:04 to 1:30.)

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1 AFTERNOON SESSION

1:29 P.M.

2 THE COURT: Jurors and alternates are all  
3 present. Counsel for both sides are present. Plaintiff  
4 is personally present on the stand.

5 And, Mr. Katzenbach, you may renew your  
6 inquiry.

7 MR. KATZENBACH: Thank you, Your Honor.

8 DIRECT EXAMINATION BY MR. KATZENBACH (RESUMED)

9 MR. KATZENBACH: Q. Dr. Kao, after filing the  
10 formal complaint which is Exhibit 3, were there any  
11 meetings that you had over that complaint?

12 A. Yes.

13 Q. Can you describe those meetings and when they  
14 occurred.

15 A. I believe I received the invitation to a  
16 meeting with administrators within a month of filing the  
17 complaint. So the first meeting was held, I think, in  
18 June of 2006.

19 Q. All right. And what did -- who was present at  
20 that meeting?

21 A. I -- it was myself; Terry Stoner, who was vice  
22 president, human resources; Donna Davis, general  
23 counsel; Jennifer Turpin, dean of Arts and Sciences; and  
24 yourself.

25 Q. And what was discussed at that meeting?

1           A.     The proposal was placed before me for  
2 settlement process in lieu of an investigation of the  
3 complaint.

4           Q.     And during the course of that, were there  
5 discussions of any particular issues that you'd raised  
6 in the complaint?

7           MR. VARTAIN:   Objection.   Settlement  
8 negotiations are privileged.

9           THE COURT:   No, not these.   Not these.   It was  
10 decided in limine.   Overruled.

11          MR. VARTAIN:   Your Honor, may I -- it was  
12 deferred.

13          THE COURT:   Let me check my notes.

14          Does either of you counsel or your colleagues  
15 remember the number?

16          MR. KATZENBACH:   I'm not sure, Your Honor, and  
17 I'm not sure I have it with me.

18          MR. VARTAIN:   Mr. Katzenbach, did we -- did --  
19 is that your recollection, that this issue was deferred  
20 by the court?

21          MR. KATZENBACH:   I don't have that -- I don't  
22 have that specific recollection.   My recollection is  
23 slightly different.

24          MR. MACK:   Your Honor, I believe it was motion  
25 in limine number 7.

1 THE COURT: Thanks.

2 Mr. Vartain, you're right. My notes say  
3 "deferred."

4 MR. VARTAIN: I'm glad, Your Honor.

5 THE COURT: So we better steer clear of that  
6 till that's decided.

7 MR. KATZENBACH: Well, Your Honor, at this  
8 point --

9 THE COURT: We can do it at the next break.

10 MR. KATZENBACH: Very well.

11 Q. Moving ahead, Dr. Kao. Just in general,  
12 without disclosing any content, did there come a time  
13 when your meetings with the university that you just  
14 identified ended?

15 A. Yes.

16 Q. And during the course of those meetings, did  
17 you agree to any settlement -- sorry, strike that.

18 As -- after those meetings, did you file any  
19 additional material in connection with your formal  
20 complaint?

21 A. Yes.

22 Q. Would you take a look at what's Exhibit --  
23 previously marked as Exhibit 4.

24 A. Yes.

25 (Plaintiff's Exhibit 4

1 marked for identification.)

2 MR. KATZENBACH: Q. What -- can you identify  
3 Exhibit 4 for us.

4 A. This is a document. It's labeled "Report And  
5 Addendum," parentheses "(PSOUH policy)," submitted to  
6 the assistant vice president for human resources,  
7 University of San Francisco. It's dated August 15<sup>th</sup>,  
8 2007.

9 Q. Without going into too much of the details of  
10 Exhibit 4, who did you provide Exhibit 4 to?

11 A. I submitted it to human resources department.

12 Q. All right. And did Exhibit 4 concern matters  
13 that had arisen during previous discussions with the  
14 university?

15 MR. VARTAIN: Objection. Leading.

16 THE COURT: Overruled. Witness may answer.

17 THE WITNESS: This document contained the prior  
18 formal complaint and an addendum to that complaint. The  
19 addendum addressed the issues related to the meetings --

20 MR. KATZENBACH: Thank you.

21 THE WITNESS: -- so referred to.

22 MR. KATZENBACH: Thank you.

23 And at this point, I'd like to move Exhibit 4  
24 into evidence.

25 THE COURT: Any objection?

1 MR. VARTAIN: May I have some identification of  
2 the length, Mr. Katzenbach. I'm not sure I have the  
3 same one as you.

4 THE COURT: Identification of what?

5 MR. KATZENBACH: Length.

6 MR. VARTAIN: The length, Your Honor.

7 MR. KATZENBACH: Here's the same one that I  
8 have.

9 MR. VARTAIN: Could you just tell me the number  
10 of pages. I don't have -- that's all I need.

11 MR. KATZENBACH: You just need the number of  
12 pages?

13 THE COURT: Quite a few.

14 MR. KATZENBACH: Quite a few. I think I would  
15 agree with that characterization. But you need the  
16 number of pages, Mr. Vartain?

17 MR. VARTAIN: If we could defer.

18 MR. KATZENBACH: No. I want to ask him some  
19 questions about it, sir.

20 MR. VARTAIN: That's fine. I'd just defer the  
21 offer and you can ask him all the questions you want.

22 MR. KATZENBACH: No, I'd like this --

23 THE COURT: Okay, Counsel. End the colloquy.

24 Mr. Katzenbach, proceed.

25 MR. KATZENBACH: Okay.

1 Q. Now, after you submitted this Exhibit 4, this  
2 addendum, did they then rule -- did the university then  
3 make some decision -- strike that question.

4 What were the issue -- in Exhibit -- did the  
5 university then make some decision on your formal  
6 complaint?

7 A. I received a memorandum from the vice president  
8 of human resources -- assistant vice president, human  
9 resources, who had replaced Terry Stoner in the interim  
10 period -- the lady's name is Ms. Peugh-Wade -- I  
11 received a memorandum from her in response to this  
12 document about a month later.

13 Q. Now, would you please take a look at Exhibit  
14 70.

15 A. Yes.

16 (Plaintiff's Exhibit 70  
17 marked for identification.)

18 MR. KATZENBACH: Q. Can you identify Exhibit  
19 70 for us.

20 A. This is a memorandum from Ms. Peugh-Wade  
21 addressed to me that's dated September 17<sup>th</sup>, 2007,  
22 subject line "Your August 15, 2007 report and addendum."

23 MR. KATZENBACH: Like to move Exhibit 70 into  
24 evidence.

25 THE COURT: Any objection?

1 MR. VARTAIN: No objection, Your Honor.

2 THE COURT: 70 is received.

3 MR. KATZENBACH: Thank you.

4 (Plaintiff's Exhibit 70  
5 received in evidence.)

6 MR. KATZENBACH: Q. Now, for the record, Dr.  
7 Kao, how many pages is Exhibit 70?

8 A. Well, now that I see Ms. Peugh-Wade's  
9 memorandum, at the top "41 pages."

10 Q. Her memorandum was 41 pages long?

11 A. No, no, she states that my "report and addendum  
12 of 41 pages."

13 Q. All right. But how long is Exhibit 70, her  
14 response?

15 A. Oh, her response? Her response is two pages.

16 Q. Now, I'd like to take a minute to take a look  
17 at some of the responses. Let me strike that.

18 Were you satisfied with this response?

19 MR. VARTAIN: Objection. Not relevant.

20 THE COURT: I think it is. Overruled.

21 THE WITNESS: No.

22 MR. KATZENBACH: Q. Why not?

23 A. I expected an investigation of the complaint,  
24 as provided for in the PSOUH policy. This appears from  
25 this memorandum that she chose not to investigate any of

1 the items in my complaint.

2 Q. Taking a look at the pages of Exhibit 7 -- I'm  
3 sorry -- Exhibit 70, did she, in connection with this  
4 document, propose any -- address any of the concerns you  
5 had over the various searches, in terms of whether or  
6 not they violated the policy, whether there was some  
7 administrative remedies that should be instituted?

8 A. She did not indicate any specific remedies.  
9 There's a paragraph that refers to, I believe, that item  
10 in my complaint.

11 MR. VARTAIN: Could I ask the counsel to  
12 publish to the jury the first page so that they can read  
13 that part, which is actually what pertains to what  
14 you're questioning the witness on.

15 MR. KATZENBACH: Well, the answer is  
16 technically I can, and I'll be happy to do it. But  
17 we'll have to see if I am technically good enough to  
18 manage that.

19 MR. VARTAIN: If you're not, I'll withdraw my  
20 request.

21 MR. KATZENBACH: Well, there's page 1. And  
22 let's see if I can get page 2 over here.

23 No, it won't do it that way. I'm sorry.

24 MR. VARTAIN: Proceed. Best efforts.

25 JUROR 3: Excuse me. Can we raise a question



1 to the court? Legibility is kind of an ongoing issue  
2 from this distance with this projector and technology.

3 JUROR 4: This whole time, I haven't been able  
4 to see anything.

5 JUROR 3: So when they go over the stuff  
6 verbatim and read it, we can follow it through the  
7 diction, but we're not actually able to read the  
8 documents. I'm speaking for myself.

9 UNIDENTIFIED JUROR: I can't read it either.

10 MR. KATZENBACH: Okay. I've tried to  
11 enlarge -- when I enlarge it, can you read it?

12 JUROR 3: It depends on the quality of the  
13 image. But oftentimes when you say like can we see the  
14 whole document, unless we can read the whole document,  
15 we're only going with the snippets that the court has  
16 pointed out to us.

17 MR. KATZENBACH: Okay. Let me try this, then,  
18 Your Honor. Let me --

19 Q. Dr. Kao, take a look at the bottom of the first  
20 page of Exhibit 70. And starting at the bottom of the  
21 first page of Exhibit 70, is there a paragraph that  
22 addresses your complaints about the search process?

23 A. Yes.

24 Q. What is -- can you -- starting at the bottom of  
25 the page -- starting at the paragraph beginning at the

1 bottom of the page --

2 I apologize, Your Honor. I'm getting different  
3 commands on this than are showing up there.

4 Why don't you read for the jury the paragraph  
5 beginning at the bottom of the first page of Exhibit 70  
6 onto the second page.

7 A. "Notwithstanding the above, even had  
8 you promptly filed or reactivated a  
9 complaint under PSOUH, I note your report  
10 and addendum contains assertions that other  
11 university faculty members were appointed to  
12 positions for which you did not apply. As  
13 to these assertions, I conclude that no  
14 adverse employment action against you took  
15 place because the university did not deny  
16 any request, application or petition you  
17 submitted."

18 Q. Now, in terms of -- is there anything else in  
19 the university's response in Exhibit 70 which addresses  
20 the issues of the search?

21 A. No.

22 Q. Now, after you received Exhibit 70, did there  
23 come a time when you became again concerned about the  
24 search process in -- at -- in the department of  
25 mathematics?

1 A. Yes.

2 Q. Can you tell us about how you -- what was going  
3 on in the department of mathematics regarding the search  
4 that you became concerned about.

5 A. Well, I received this memorandum -- this is  
6 September of 2007. So we're referring now to the  
7 academic year 2007/2008. At the time I received this  
8 memorandum, the academic year was just beginning, or we  
9 were about two weeks into the academic year.

10 At that time, the department had initiated a  
11 new search in mathematics.

12 Q. And what caused you to become concerned in  
13 regard -- did you become concerned in regards to the  
14 search that was going on?

15 A. Yes.

16 Q. And can you tell me when your concerns started.

17 A. I started thinking that there might be a  
18 problem in November of 2007, but I wasn't sure.

19 Q. What first led you to think that there might be  
20 a problem?

21 A. In the past, the department program assistant  
22 would write on the whiteboard in the math department  
23 office the number of applicants from week to week. It  
24 would be like, you know, just a update on what's  
25 happening with the search. So as you enter the math

1 department office, there'd be a number in the corner of  
2 the whiteboard.

3 I know that in the past two searches, the one  
4 in 2004 and then the one in 2000- -- that concluded in  
5 2004 and the other search that concluded in 2006, by the  
6 time the search process closed, which would be mid  
7 December -- December 15<sup>th</sup>, typically -- there would be  
8 over 300 applicants.

9 As of November -- beginning of November of  
10 2007, the numbers in the corner of the whiteboard were  
11 on the order of 40. And I thought that was peculiar.

12 Q. Did you -- during the remainder of the semester  
13 2007, did you continue to follow up with your --  
14 checking the number of applicants?

15 A. Yes.

16 Q. And how did you do that?

17 A. I asked the program assistant from --  
18 periodically -- well, I would check the number that was  
19 written in the corner of the whiteboard.

20 I believe sometime in December -- I mean, the  
21 searches ended December -- middle of the month. I asked  
22 Ms. Christine Liu, the program assistant, what the  
23 official final number was I think sometime in December,  
24 towards the end of December, before Christmas break.

25 Q. And when you asked her about the final number,

1 what was the number that she gave you?

2 A. I believe 196.

3 Q. Now --

4 A. Approximately. 190 something.

5 Q. All right.

6 A. I can't recall specifically.

7 Q. Could you please take a look at Exhibit 14.

8 THE CLERK: Counsel, is that 14?

9 MR. KATZENBACH: One-four.

10 THE CLERK: Thank you.

11 (Plaintiff's Exhibit 14

12 marked for identification.)

13 MR. KATZENBACH: Q. Exhibit 14 is a multipage  
14 document.

15 A. Yes.

16 Q. Can you just try describe to us what Exhibit 14  
17 consists of.

18 A. This is my professional calendar starting in  
19 August of 2007. This exhibit runs August, September,  
20 October, November, continues on into the next calendar  
21 year. The last page of this exhibit is for the end of  
22 June of 2008.

23 Q. Now, I would like you to take a look, if you  
24 could -- does this -- Exhibit 14 contain notes that you  
25 made contemporaneously with events?

1           A.    Yes.  If there was something I felt of  
2           significance, whether that would involve a student or  
3           another faculty member, in addition to my appointments,  
4           I would make a annotation -- if it's a short note, I  
5           would make an annotation on the day -- the box in the  
6           calendar.

7                         Sometimes if there was more narrative that I  
8           wanted to kind of record for myself, I'd put a notation  
9           and then continue on to the back of the page of the  
10          calendar.

11                        This was the method whereby I could keep track  
12          of, specific dates, what happened.  Oftentimes I put a  
13          time that something happened.

14          Q.    Does -- taking a look at the page of Exhibit 14  
15          which is entitled "December 2007 to January 2008."  I  
16          believe it's the fifth page of the exhibit.

17          A.    Yes.

18          Q.    Does that contain notes that you made  
19          concerning the number of applications received in the  
20          search?

21          A.    Yes.

22                        MR. KATZENBACH:  Your Honor, at this point I'd  
23          like to move Exhibit 14 into evidence.

24                        THE COURT:  Any objection?

25                        MR. VARTAIN:  It's hearsay, Your Honor.

1 THE COURT: So it is.

2 MR. KATZENBACH: I believe, Your Honor, it's a  
3 document that he indicated he kept in the regular course  
4 of his business.

5 THE COURT: It's a document what?

6 MR. KATZENBACH: That he kept in the regular  
7 course of his business as a teacher.

8 THE COURT: Well, then you'll have to go  
9 through the quadripartite foundation under 1271 of the  
10 Evidence Code.

11 MR. KATZENBACH: Very well, Your Honor.

12 Q. What was the purpose of maintaining Exhibit 14?

13 A. Well, I mean, it's my professional calendar in  
14 reference to teaching. That's significant because  
15 students -- oftentimes they'll make appointments, you  
16 know, for additional help outside of office hours; I get  
17 an email or telephone call; and then I mark this  
18 calendar "I saw this student" or "I'm planning to see  
19 this student at 5:00 on a Friday," for instance. I  
20 might add some more annotation: "This is for a makeup  
21 exam."

22 In terms of administrative duties, service that  
23 is for the university, there might be a committee  
24 meeting. The committee meeting would take place in a  
25 particular location on campus. To remind myself and

1 make sure that I would not be late for that meeting, I'd  
2 note, you know, the room number, the time, sometimes the  
3 purpose of the meeting.

4           If there were any incident that occurred -- for  
5 instance, maybe there would be a student that there's  
6 some discipline issue or something like that that, you  
7 know -- I might want to document that at this meeting, I  
8 raised this issue with the student. Maybe there's an  
9 issue of academic dishonesty.

10           At any rate, if I'm meeting with that person  
11 and there's some discussion, I want a record if  
12 something important happened at that meeting.

13           The academic calendar -- this professional  
14 calendar was convenient for that because I could -- I  
15 could specify both the day, the time. And again, I  
16 could continue to the back of the calendar if there was  
17 more detail I wanted to document.

18           Q.    Was this calendar maintained in the normal  
19 course of your duties as a professor?

20           A.    Yes.

21           Q.    And did you maintain this calendar as part of  
22 your obligations as a professor for the university?

23           A.    Yes.

24           Q.    And were the entries in this calendar made --  
25 accurate at the time you made them?



1 A. Yes.

2 Q. And did you have a duty to make accurate  
3 entries into this calendar?

4 A. Yes.

5 Q. And is this calendar a document that you  
6 maintain in your possession?

7 A. Yes.

8 Q. And did you have custody and control over it?

9 A. Yes.

10 MR. KATZENBACH: Your Honor, I renew my effort  
11 to -- I renew my request to admit Exhibit 14.

12 THE COURT: I think you forgot the  
13 chronological element.

14 MR. KATZENBACH: Excuse me?

15 THE COURT: Chronological element. The entry  
16 has to be made --

17 MR. KATZENBACH: Oh. All right.

18 THE COURT: -- at or near the time the event  
19 occurs.

20 MR. KATZENBACH: Q. Did you make entries in  
21 this calendar at or near the time of the events  
22 described?

23 A. Yes.

24 THE COURT: All right. Submitted?

25 MR. VARTAIN: Voir dire, please, Your Honor.

1 THE COURT: You may do it, sure.

2 VOIR DIRE EXAMINATION BY MR. VARTAIN

3 MR. VARTAIN: Some questions, Professor Kao.

4 Q. If -- material on this calendar is not limited  
5 to your work at the university; you have personal items  
6 on this calendar?

7 A. Some, yes. For instance, if I have an  
8 appointment with a doctor or if I have to --

9 Q. I see you had a chair delivered, a recliner  
10 chair. I see you have things about Starbucks here.

11 A. The recliner is furniture for my office. I  
12 believe it's a office chair that would sit back. So  
13 that's a business item.

14 Q. Is it true you have various and sundry personal  
15 nonwork-related things on this calendar?

16 A. There are some, yes.

17 Q. I want to address your attention, please, to  
18 the entries -- some of the entries, not all of them, on  
19 the month January -- I'm sorry -- December '07 to  
20 January '08. Would you look at the -- at the entries  
21 for the dates of January 3<sup>rd</sup> and 4<sup>th</sup>.

22 A. Yes.

23 Q. You have some entries there that concerns --  
24 that concern a complaint with the affirmative action  
25 officer. You had that?

1           A.    January 3<sup>rd</sup>? This is in reference to a  
2 conversation with Dr. Yeung that I had at 11 a.m.  
3 regarding the search.

4           Q.    I understand that, sir. But that was not an  
5 appointment that you had with Professor Yeung; you wrote  
6 that note on the calendar after the fact of the  
7 conversation with Professor Yeung, correct?

8           A.    Yes.

9           Q.    The conversation took place sometime in the  
10 first week of January. But do you know, as you sit  
11 here, when you wrote the entry that you -- that purports  
12 to talk about the conversation with Professor Yeung?

13          A.    Could you repeat the question.

14          Q.    As you sit here today -- I mean, you've just  
15 told me that the notes on the calendar that concern the  
16 conversation with Professor Yeung were made after the  
17 fact; is that right?

18          A.    After the conversation, correct.

19          Q.    How long after the fact, if you know? If you  
20 don't, that's okay.

21          A.    Within an hour.

22          Q.    Some of these -- some of this calendar has  
23 entries that have notes about a meeting, the content of  
24 the meeting, but many of the entries have no notes about  
25 the contents of the meeting, correct?

1           A.     Could you repeat the question.

2           Q.     I said -- let me -- some of your entries on  
3 this calendar contain your notes about what happened at  
4 a meeting, but not all of the meetings represented on  
5 this calendar have notes about what happened at those  
6 meetings; would that be correct?

7           A.     No. I mean, some of the notes are appointments  
8 for which a meeting occurred. For instance, you know,  
9 at the top of the calendar it says "Mia 3:00 p.m." That  
10 would be, I believe, a makeup exam for Mia Benoit, one  
11 of my students. The date is towards the end of  
12 December, so I presume from that that it's a makeup exam  
13 for a final.

14          Q.     Sir --

15          A.     And there's -- I mean, there's no notes for  
16 what happened at that appointment with Mia Benoit. But  
17 that's -- that's a appointment. If there -- but I did  
18 have a meeting with her at 3.

19          Q.     Would it be fair to say that there are many  
20 meetings on this -- that are noted on this document for  
21 which you have no notes on this document about what  
22 actually happened at the meeting?

23                   Is that true; that is, you have no notes on  
24 this document about what happened at the meeting?

25          A.     There are meetings which are listed here which

1 have no notes that correspond.

2 Q. And there are meetings listed here that have  
3 some notes that correspond to the meeting but those  
4 notes were made after the fact of the meeting, correct?

5 A. Yes.

6 Q. Okay. And some of the after-the-fact notes  
7 that you made on this calendar were made regarding your  
8 disputes that you were raising with the administration,  
9 correct?

10 A. Yes, that's correct.

11 Q. For example, please look at the entry that you  
12 made for a meeting on February 20. It's around  
13 Presidents' Day that -- the week of Presidents' Day that  
14 year, where I want you to address your attention to the  
15 notes called -- looks like "lie detector" and then  
16 "breach of contract."

17 A. I made some notes, yes. It says that, yes.

18 Q. What does that note refer to with regard to  
19 university business, "lie detector"? Is that what it  
20 means, "lie detector"? Sir, does that mean "lie  
21 detector," L-I-E, D-E-T-E-C-T period?

22 A. Yes. I'm just not sure if these notes are in  
23 reference to a meeting that took place on the 20<sup>th</sup>.

24 Q. Well, there are -- they are entered in the box  
25 for February 20<sup>th</sup>, are they not?

1 A. Yes.

2 Q. Okay.

3 A. But it doesn't say -- it's -- it's possible,  
4 but I -- there's no annotation as to -- I mean, it might  
5 be something that I'm thinking about at that time.

6 Q. Sir, you entered the notes -- you entered notes  
7 in a box for the calendar [sic] of February 20<sup>th</sup>; is  
8 it true?

9 A. Yes. It's possible that that's in reference to  
10 a meeting that might have taken place -- it could have  
11 been February 20<sup>th</sup>. I just can't tell from this  
12 calendar whether that's the meeting with human  
13 resources. But probably it is, yes.

14 Q. And that's my point exactly, sir. This  
15 calendar -- it doesn't -- there are entries in different  
16 dates that don't reflect for sure that the meetings  
17 actually happened on those dates that are referenced,  
18 correct?

19 A. This is one instance.

20 Q. Well, let's go to the other instances.

21 A. There will be other documents that would verify  
22 were the meeting I'm thinking of took place on  
23 February 20<sup>th</sup>. I just can't tell from this calendar  
24 whether that was the date that the meeting took place.

25 Q. And that's my precise objection, that this

1 calendar does not necessarily reflect the ordinary  
2 course of business. It isn't necessarily -- so let's  
3 look at the next day, February --

4 MR. KATZENBACH: Your Honor --

5 MR. VARTAIN: -- 21<sup>st</sup>.

6 MR. KATZENBACH: -- if he -- I think he's now  
7 starting to go through the calendar in  
8 cross-examination. Going beyond the scope of voir dire.

9 THE COURT: He can voir dire as to his ability  
10 under 1271. If I get tired of listening to particular  
11 samples, I'll cut him off.

12 MR. KATZENBACH: Okay.

13 MR. VARTAIN: Q. Look at the next day,  
14 February -- the entry for 9:45, February 21.

15 A. Yes.

16 Q. Were those -- do those notes reflect a meeting  
17 that took place on February 21?

18 A. It says "Gon-Seneda, Lone Mountain, 307,  
19 10 a.m."

20 Q. No, I'm sorry. I apologize. I meant the notes  
21 regarding Professor Zeitz, who's going to be a witness  
22 here. You have notes in the box for February 21. Did  
23 you have a meeting with Professor Zeitz on February 21?

24 A. Well, when you look at the calendar that you  
25 have in front of you, there's sort of a circle. And the

1 notation of "Zeitz" is circled. There's an arrow from  
2 that annotation into the box of February 20<sup>th</sup>. So I  
3 presume from that that I had a conversation or a meeting  
4 at 9:45 a.m. with Dr. Zeitz. The notation says that:

5 "Dr. Zeitz" --

6 MR. KATZENBACH: No.

7 THE WITNESS: -- "informed that Duchin  
8 declined. All other finalists still  
9 available."

10 MR. VARTAIN: Q. The question I asked you was  
11 did you have a meeting with Professor Zeitz on  
12 February 21?

13 A. February 20<sup>th</sup>, not 21, as the arrow indicates  
14 into the box labeled "20."

15 MR. VARTAIN: Your Honor, I don't want to get  
16 you tired. Can we -- can we reserve -- let him ask all  
17 the questions. Can we reserve the offer, and I'll take  
18 it on cross with the rest of the questions?

19 THE COURT: All right.

20 MR. VARTAIN: Thank you.

21 MR. KATZENBACH: Your Honor, I'll ask the  
22 questions a little differently, see if we can do it in a  
23 way that would be most useful.

24 DIRECT EXAMINATION BY MR. KATZENBACH (RESUMED)

25 MR. KATZENBACH: Q. Taking a look at the fifth



1 page of the proposed Exhibit, Exhibit 14, which you've  
2 identified, does that refresh your recollection as to  
3 the number of applicants that --

4 MR. VARTAIN: Objection.

5 MR. KATZENBACH: Q. -- the number of  
6 applicants that you were informed had applied in the  
7 2008 search?

8 MR. VARTAIN: Objection. The witness's  
9 recollection has not been shown to be in need of  
10 refreshment on that point.

11 MR. KATZENBACH: I believe --

12 May I respond, Your Honor?

13 THE COURT: Yes.

14 MR. KATZENBACH: I believe the witness  
15 testified that he recalled it being about 196  
16 applicants. And I think the phrase "about" suggests  
17 that his recollection is a little shaky on that, and so  
18 I think that it is appropriate to refresh it.

19 THE COURT: All right. I'll allow it.

20 MR. KATZENBACH: Q. Does that refresh your  
21 recollection as to the number of applicants received --  
22 applications received?

23 A. Yes.

24 Q. And what was the number?

25 A. 195.

1 Q. All right. Now, I'd like to direct your  
2 attention -- when did that -- when did the -- when did  
3 that search close? When did the application process for  
4 that search close?

5 MR. VARTAIN: Objection. Lacks foundation that  
6 this witness had any involvement with managing the  
7 search.

8 MR. KATZENBACH: Let me -- let me rephrase it,  
9 then.

10 Q. During the course of the search, would the  
11 members of the department be involved in being told of  
12 the number of applicants?

13 A. Yes, in various ways.

14 Q. And were the members of the department informed  
15 as to when the application deadline was?

16 A. Yes. There would be a advertisement on the  
17 department Web site. One could check that  
18 advertisement. The advertisement would have a closing  
19 date.

20 Q. Would you please take a look at Exhibit 18.

21 A. Yes.

22 (Plaintiff's Exhibit 18  
23 marked for identification.)

24 MR. KATZENBACH: Q. Can you identify Exhibit  
25 18.

1           A.     This is a printout of the on-line version of  
2 the advertisement off of the USF Web site. I printed  
3 it, according to the bottom printer-generated label, on  
4 November 13<sup>th</sup> of 2007.

5           Q.     All right. And is this the job that was  
6 being -- for which the search in 2007 and 2008 -- is  
7 this the job announcement for that search?

8           A.     Yes.

9           Q.     Does that indicate --  
10           I'd like to move Exhibit 18 into evidence, Your  
11 Honor.

12           THE COURT: Any objection?

13           MR. VARTAIN: No, Your Honor.

14           MR. KATZENBACH: All right.

15           Q.     Does --

16           THE COURT: Received.

17           (Plaintiff's Exhibit 18  
18 received in evidence.)

19           MR. KATZENBACH: Q. Does Exhibit 18 indicate a  
20 closing date?

21           A.     Yes.

22           Q.     And what -- let me see if I can get this up.  
23 Try to enlarge it.

24           I apologize, Your Honor.

25           What is the closing date indicated on Exhibit

1 18?

2 A. December 17<sup>th</sup>, 2007.

3 Q. And just since we have Exhibit -- and the  
4 closing date is reflected at the top of the second page  
5 of 2000 -- of Exhibit 18?

6 A. Yes. It's --

7 MR. KATZENBACH: May I -- Your Honor, I don't  
8 know -- could the court inquire of the jury as to  
9 whether that's visible to them.

10 THE COURT: I see heads shaking from side to  
11 side.

12 MR. KATZENBACH: Okay.

13 JUROR 1: There was one time he did have it  
14 magnified, and it was readable when he magnified it.  
15 Once.

16 MR. KATZENBACH: Is that size better?

17 JUROR 1: Yeah, that's nice.

18 MR. KATZENBACH: Unfortunately, I can't get it  
19 all in there, but let's see what we can do. There we  
20 go.

21 Q. Now --

22 Thank you.

23 Now, looking at the first page of Exhibit 18.

24 A. Yes.

25 Q. I'd like to direct your attention to the

1     bulleted labels on there.  That describes -- what do  
2     those bullets describe?

3             A.    It states:  "Applicant should submit  
4             the following documents."

5             Q.    Okay.  And I'd like to direct your attention in  
6     particular to the last item.

7             A.    Yes.

8             Q.    It states:  "Three letters of recommendation."

9             A.    Yes.

10            Q.    Was that -- in your experience at the  
11     University of San Francisco, was that a typical  
12     requirement for a job in mathematics?

13            A.    Yes.

14            Q.    Have you also looked at job announcements for  
15     other institutions?

16            A.    Yes.

17            Q.    And can you describe, what do they usually  
18     require in terms of letters of recommendation?

19            A.    Three or four letters of recommendation is  
20     typical.

21            Q.    And what's the purpose of the letters of  
22     recommendation?

23            A.    Well, within the industry, in the position of  
24     assistant professor, applicants are expected to show  
25     promise in research teaching and service.  And so the

1 letters, as an aggregate, ought to give some indication,  
2 some evidence, of that promise.

3 The easiest way to do that is to give evidence  
4 of experience and success in those areas. But -- but  
5 not every letter would address every one of the three.

6 You know, you might have one letter that  
7 addresses all three, one letter that addresses only one,  
8 one letter that addresses one -- one or two of the  
9 three.

10 Say for instance teaching and research; if the  
11 person didn't perform service in that capacity, the  
12 person writing the letter would not have direct  
13 knowledge.

14 Q. Okay. Thank you.

15 I'd like to go back, if you will -- we're  
16 jumping back to December 2007 and January 2008.

17 Now, after you looked at the board at the end  
18 of December and saw 100 and -- saw the number of  
19 applicants, did you do any -- did you look -- what did  
20 you do next with regard to the search?

21 A. On what day are you referring to? I'm sorry.

22 Q. Okay. Did you check to see where the search  
23 had been advertised?

24 A. In November when I started -- when the concerns  
25 first arose in my mind, I did look to see if there was a

1 advertisement placed up to that point.

2 Q. Where would that advertisement have been?

3 A. Well, the first place I checked was the Notices  
4 Of The American Mathematical Society up to the date that  
5 was available. That would be the -- I mean, that's  
6 where -- it was always advertised in that journal in the  
7 past, from the years 1991 up to that time.

8 And when I applied for the position at USF,  
9 that was where I looked, was in the Notices, the  
10 classified sections.

11 So it being the premier professional journal,  
12 that's where advertisements had been placed in the past;  
13 that would be the first place I checked.

14 Q. All right. Did -- when you checked the  
15 journal -- the Notices, what did you find concerning an  
16 advertisement by the University of San Francisco?

17 A. As of November -- and bear in mind that the  
18 Notices are distributed at the very beginning of the  
19 month. So we received them in the mail maybe on the --  
20 by -- by the 3<sup>rd</sup> of the month. So November came in,  
21 you know, November 2<sup>nd</sup>, for example. For the year  
22 2007, there was no advertisement as of the beginning of  
23 November.

24 Q. All right. After the search closed at the end  
25 of -- December 17<sup>th</sup>, did you check the Notices again?

1 A. Yes.

2 Q. And what did you find?

3 A. There was no advertisement in December.

4 Q. Did you have any understanding as of  
5 December -- at the end of December -- well, strike that.

6 Did you also check other sources where there  
7 might have been an advertisement?

8 A. Yes, I checked -- there's several other  
9 publications. The Notices is -- focuses on the teaching  
10 activity -- I mean, not the teaching -- the research  
11 activities of mathematicians in the United States.

12 There are publications that emphasize the  
13 teaching aspects as opposed to research. I believe I  
14 checked two journals of that nature for classifieds.

15 Q. And what journals were those?

16 A. Focus Magazine, I believe, and -- I made a note  
17 of it in a -- in a email. But Focus, Mathematical --  
18 Mathematics Magazine, I believe. There's another  
19 teaching-oriented journal called The Mathematical  
20 Monthly. But I don't -- my recollection is that there  
21 are only one or two classifieds typically. In other  
22 words, it doesn't have a classified section.

23 Q. All right. Did you also at that -- did you  
24 take any other -- make any other efforts to determine  
25 where the mathematics position for the University of San



1 Francisco had been advertised?

2 A. There's a publication by the Society of  
3 Industrial and Applied Mathematics, SIAM. I believe I  
4 checked there.

5 I also understood that there was a on-line  
6 database that the department had announced it might be  
7 using. It's operated by the AMS. And I checked on that  
8 database.

9 Let's see. In the past, the department was  
10 told that they were going to place a ad in the  
11 Association For Women In Mathematics newsletter. That's  
12 a publication -- it's like a -- well, it's -- as it  
13 says, it's a newsletter. So it's -- it -- it's a very  
14 short type of publication. But we've been told in the  
15 past that advertisements would be placed there as a way  
16 of addressing the issue of gender diversity. I don't  
17 subscribe to that. I mean, I'm not a member of AWM, so  
18 I don't receive that newsletter.

19 I tried to check that publication, but the USF  
20 library doesn't carry it, and the other libraries in the  
21 Bay Area that I visit from time to time -- for instance,  
22 Stanford, UC Berkeley -- they didn't carry it.

23 I mean, I can check all of this on-line. And  
24 none of the academic -- you know, for instance, in the  
25 UC system, including SF State University, they don't

1 carry it. So there's no way for me to check at the  
2 library.

3 Q. Did you look for any on-line listing for the  
4 American Women In Mathematics [sic]?

5 A. Yes. When I was doing this research off of the  
6 AWM Web site, they indicated that there was a AWM  
7 on-line database. And so I checked there as far as  
8 on-line advertise -- on-line postings. The AWM  
9 database, and then also the EIMS, which the AMS on-line.

10 Q. Could you please take a look at Exhibit 19.  
11 (Plaintiff's Exhibit 19  
12 marked for identification.)

13 MR. KATZENBACH: Q. And could you identify  
14 what Exhibit 19 is.

15 A. This is a printout. The notation at the bottom  
16 indicates that I printed this on January 2nd of 2008.  
17 This is in connection with the AMS -- I mean the --  
18 yeah, the EIMS employment database.

19 Q. Is this the database that you checked for an  
20 advertisement for the mathematics job at the University  
21 of San Francisco?

22 A. Yes.

23 MR. KATZENBACH: I'd like to move Exhibit 19  
24 into evidence, Your Honor.

25 THE COURT: Any objection?

1           MR. VARTAIN: I do have an objection that it is  
2 hearsay.

3           MR. KATZENBACH: It's not being -- it's only  
4 being offered for what's available -- to show what  
5 advertisements were or were not available. I don't  
6 think that's a hearsay use. It's just the content of  
7 the document.

8           THE COURT: Is there a hearsay objection?

9           MR. VARTAIN: Yes, Your Honor.

10          THE COURT: Okay. We'll take it up outside the  
11 presence of the jury.

12          MR. KATZENBACH: Very well.

13          Q. When you checked the on-line listing, the AMS  
14 on-line listing, did you find a reference to the job at  
15 the University of San Francisco?

16          A. Yes.

17          Q. How was -- how was that listing portrayed?

18          A. It was a one-line -- "Position available at  
19 USF," one line, and without the narrative description.

20                 You click on that and it's basically a link to  
21 the Web site that we were just looking at. So it linked  
22 to the departmental Web site advertising.

23          Q. And when you looked at that, how many other job  
24 links came up in your search?

25          A. I did the search criteria, which would be

1 consistent with the classified section in the Notices Of  
2 The American Mathematical Society. So I used the same  
3 criteria: academic position, tenure or tenure track  
4 position, mathematics, applied mathematics. And -- and  
5 so I received a list of these types of links.

6 Q. And links -- that included the link to the  
7 University of San Francisco?

8 A. Yes.

9 Q. And how many total such links do you recall?  
10 When you did the search, how many links came up?

11 A. Using this search criteria, 254.

12 THE COURT: Ladies and gentlemen, remember the  
13 admonition. Do not form or express any opinion on this  
14 case until it's finally submitted to you for your  
15 decision. Do not discuss among yourselves or with  
16 others until that time. Please be back in your places  
17 at 2:40 according to the courtroom clock. Taking a  
18 little longer break 'cause, as you know, we have some  
19 things to sort out.

20 (Recess taken.)

21 THE COURT: Jurors and alternates are all  
22 present. Counsel from both sides are present.  
23 Plaintiff is on the witness stand.

24 Mr. Katzenbach, you may continue your inquiry.

25 MR. KATZENBACH: Your Honor, should we put the

1 court's rulings on the record at this point on the  
2 documented evidence?

3 THE COURT: I'm not sure I can recite them,  
4 actually.

5 MR. KATZENBACH: Then perhaps at the end of the  
6 day.

7 THE COURT: Perhaps at the end of the day.

8 MR. KATZENBACH: All right. Thank you.

9 Q. Now, getting back to the -- getting back to  
10 December -- getting back to the documents you were  
11 looking at, can you please take a look at Exhibit 20.

12 A. Yes.

13 (Plaintiff's Exhibit 20  
14 marked for identification.)

15 MR. KATZENBACH: Q. Can you tell us what  
16 Exhibit 20 is.

17 A. This is -- this corresponds to the on-line  
18 database for the AWM, Association For Women In  
19 Mathematics.

20 Q. And when did you look at this database?

21 A. I printed it -- as indicated on the document,  
22 that would be January 2<sup>nd</sup>, 2008.

23 Q. And does this document contain a reference to  
24 the University of San Francisco's advertisement for the  
25 mathematics department job?

1 MR. VARTAIN: Not relevant 'cause it's after  
2 the closing date.

3 THE COURT: Overruled.

4 THE WITNESS: Yes.

5 MR. KATZENBACH: Your Honor, at this point I'd  
6 like to move Exhibit 20 into evidence.

7 THE COURT: Any objection?

8 MR. VARTAIN: Just relevance, Your Honor.

9 THE COURT: Okay. We'll take it up outside the  
10 presence of the jury.

11 MR. KATZENBACH: Q. When you looked at the  
12 Women In Mathematics database, Dr. Kao, what types of  
13 ads were in that document?

14 A. There were two sections. There was a longer  
15 section where there would be a narrative description of  
16 about a paragraph for each position. Then there was a  
17 short section -- there was a section at the end of that,  
18 so second section, where there would just be a one-line  
19 reference to a position and a link to a Web site.

20 Q. And where did the advertisement for the  
21 University of San Francisco job in mathematics appear?

22 A. There was a one-line link corresponding to the  
23 position that was being advertised for 2007/2008.

24 Q. Now, you indicated that you looked at the --  
25 that you printed out these when -- information from

1 these Web sites on the 2<sup>nd</sup> of January. What happened  
2 next concerning your interest in this search?

3 A. Well, in November I checked journals to see  
4 whether their advertisement had appeared. I don't  
5 recall checking immediately in December because that was  
6 towards the end of the semester.

7 So my recollection is that after I had turned  
8 in grades and then the campus reopened on January 2<sup>nd</sup>,  
9 when grades were due, after I submitted my grades, I  
10 went to the library and checked for December the  
11 journals that I referred to before.

12 I didn't find a classified advertisement for  
13 the search in any of the journals.

14 Q. And what happened next concerning the search?

15 A. Well, I wanted some response from members of  
16 the search committee. So on January 3<sup>rd</sup>, I -- and  
17 people were returning to campus -- I had a conversation  
18 with two members of the search committee.

19 Q. And who would -- who did you -- now, in this  
20 search committee -- who were the members of this search  
21 committee for the search that we're talking about?

22 A. Let's see. I'll do my best to remember all of  
23 them. But the chair of the search committee was Dr.  
24 Zeitz. Dr. Needham was a member of the search  
25 committee. Dr. Pacheco started as a member of the

1 search committee but then dropped off sometime early in  
2 the fall. Dr. Finch was a committee member. Dr. Yeung.  
3 Dr. Devlin, I believe, was a committee member.

4 Q. Okay.

5 A. There was also Dr. Tzagar- -- it's a Greek  
6 name -- Tzagarakis-Foster, from another department. She  
7 would be the outside person on the search committee.

8 Q. Now, you indicated -- did you speak -- did you  
9 speak to Dr. Zeitz about the search?

10 A. Yes, on January 3<sup>rd</sup>. I asked him --

11 Q. That's right. All right. About what time in  
12 the morning was that conversation?

13 A. It was in the morning, I believe around 10:00.

14 Q. Where did that conversation occur?

15 A. Well, there's a math department office that was  
16 referred to in earlier testimony. That serves as a kind  
17 of reception area for two offices of faculty that's at  
18 the rear of that room. Dr. Zeitz had one of those  
19 offices. Dr. Stillwell had the other office.

20 So my recollection of that conversation was  
21 that I went into the math department office, past  
22 Christine Liu, who was, you know, sitting at her desk.  
23 And Dr. Zeitz's office door was open. And I talked to  
24 him while standing in the doorway area of his office.

25 Q. Okay. And what did you say to him and what did



1 he say to you?

2 A. I asked him had the search been advertised in a  
3 professional journal, as required by the college rules.  
4 He informed me that the decision had been made not to  
5 advertise it in a journal, but rather, to utilize only  
6 the on-line databases.

7 Q. Is there anything else that was said during  
8 this conversation?

9 A. He told me that Dean Brown was the one who  
10 approved that decision. I raised the issue that the  
11 number of applicants being under 200, whereas the prior  
12 two searches, we had over 300.

13 I hypothesized that maybe because we didn't  
14 advertise as before, that's why the numbers had dropped.

15 He didn't agree that that was the reason why  
16 the number of applicants were so much lower. I think he  
17 said something to the effect of "We have enough  
18 applicants," or something of that nature.

19 Q. Now, at around the time of this conversation,  
20 did you have any discussion with Ms. Liu as to how many  
21 applicants had been received in prior searches?

22 A. Well, I had asked her in December -- before I  
23 talked to Dr. Zeitz, I wanted to make sure that I had  
24 all my facts clear. So prior to my conversation with  
25 Dr. Zeitz, I asked Ms. Liu as to the number of

1 applicants for that year and also the specific numbers  
2 of applicants for the prior two searches. And she gave  
3 me the exact numbers.

4 Q. Do you recall what those numbers were for the  
5 prior two searches?

6 A. Well, I made a note of it, but my recollection  
7 right at the moment is approximately 318 for 2004,  
8 approximately 326 for 2006.

9 Q. Could you take a look, if you would, at Exhibit  
10 13.

11 (Plaintiff's Exhibit 13  
12 marked for identification.)

13 MR. KATZENBACH: Q. Just looking at Exhibit  
14 13, does that help refresh your memory as to the precise  
15 numbers that Ms. Liu gave you for the prior searches?

16 A. Yes.

17 Q. What would -- with your refreshed memory, can  
18 you tell us what the numbers were for the prior two  
19 searches.

20 A. In 2004, the search at which Dr. Devlin was  
21 appointed, there were 328 applicants. In 2006, the  
22 search at which Stephen Yeung was appointed, there were  
23 303 applicants.

24 Q. Thank you.

25 Now, during -- during the course of -- strike

1 that.

2 Now, after you -- after you spoke to Professor  
3 Zeitz, before leaving the math office, did you speak to  
4 any other of the professors?

5 A. I recall that Stephen Yeung -- I spoke to him  
6 in the area of the mathematics department office.  
7 Perhaps as he was coming in through the entrance.

8 Q. Okay. And do you recall what you said to him  
9 and what he said to you?

10 A. I recall saying I was unhappy about that -- the  
11 department -- the search committee had failed to  
12 advertise according to the college rules; I might file a  
13 complaint about it.

14 Q. All right. Following your conversations with  
15 Dr. Yeung and -- well, strike that.

16 Let me ask you this: Now, during the course of  
17 your conversations with Dr. Zeitz and Dr. Yeung, what  
18 was your tone of voice?

19 A. It was a ordinary speaking voice. I recall  
20 that with Dr. Zeitz, I made a effort to speak a little  
21 louder because I wanted Christine to hear our  
22 conversation. I didn't want there to be any question --  
23 I mean, I suppose I was more interested that Dr. Zeitz  
24 would say, you know, "Yes, there was no advertisement,"  
25 and then Christine would hear that. But I wanted there

1 to be no question as to what was said. And I wanted  
2 Christine as -- as a witness to it in case there were a  
3 problem in the future.

4 Q. Okay. Following your conversations with Dr.  
5 Zeitz and Dr. Yeung, what did you do next?

6 A. I made a telephone call to Dean Brown shortly  
7 after my conversation with Dr. Zeitz because Dr. Zeitz  
8 had said that it wasn't the search committee that made  
9 the final decision, that it was really Dean Brown that  
10 was the decision-maker on that particular issue.

11 So I wanted to talk to Dean Brown directly.  
12 I'd made a telephone call to him and I -- and he agreed  
13 to meet with me at noon.

14 Q. Okay. And can you tell me what -- did you --  
15 did you meet with him?

16 A. Yes.

17 Q. Can you tell me about -- where was that --  
18 where did that meeting take place?

19 A. That would be in Dean Brown's office, which is  
20 on the same floor of Harney Science. The mathematics  
21 department office is along one hallway.

22 Then if you're walking towards the street  
23 entrance, which is Golden Gate Avenue, you take a right  
24 turn, you pass the elevators, and there's a second  
25 hallway.

1           The building's like an L shape.

2           And at the very end of that second hallway is  
3 where Dean -- Dean Brown's office area was, at the very  
4 end of the hallway.

5           Q.    All right.  And who else -- was there anyone  
6 else present during the meeting between you and Dean  
7 Brown?

8           A.    Well, I -- I -- Dean Brown has an arrangement  
9 whereby his program assistant, Miss Carissa Harvey, sits  
10 in a room which is like a reception area to his office.  
11 So I recall passing by Ms. Harvey to get to Dean Brown's  
12 office.  He led me into his office, closed the door, and  
13 then we had a conversation.

14          Q.    Where were you sitting during this  
15 conversation?

16          A.    Let's see.  Dean Brown had a desk, and so his  
17 desk sort of faced the wall.  If you -- if -- this is  
18 the doorway here, and then the hallway's on this side.  
19 So you pass through; you pass Carissa Harvey's desk;  
20 then Dean Brown's office is like this.

21                There's another dean -- there's a doorway to  
22 his reception area, if you will.  And then -- so you  
23 enter into Dean Brown's office.  He had a desk like  
24 this, just offset from the door.

25                My recollection is that I sat down in front of

1 his desk and he sat down behind his desk.

2 Q. And of the two of you, who was closer to the  
3 doorway?

4 A. I was.

5 Q. Can you tell us during this conversation what  
6 you -- what you said to Dean Brown and what Dean Brown  
7 said to you.

8 A. Well, I said that I was concerned that there  
9 wasn't a advertisement placed in a professional journal,  
10 as required by the college rules.

11 Dean Brown said that he would -- he would  
12 follow up on it.

13 Q. Did Dean Brown tell you anything at all about  
14 other places that the job may have been advertised?

15 A. Not at that meeting.

16 Q. At some point, did he?

17 A. Yes.

18 Q. What did he tell you?

19 A. I received an email from him. And the email  
20 suggests -- well, the email says we always --

21 Q. Let me -- just hold it, 'cause it would be  
22 easier -- rather than testify as to the content of the  
23 document, we can show that to you.

24 If you can take -- please take -- but just go  
25 back to the meeting. Prior to receiving this email, was

1 there any discussion of what actions might happen, that  
2 you might take, with regards to the search?

3 A. Well, I indicated -- I told Dean Brown that --  
4 one of my concerns was that I had filed two complaints  
5 in reference to prior searches, and the department was  
6 still not following the rules that governed those  
7 searches.

8 Dean Brown said that he hadn't read these rules  
9 and complaints.

10 Q. Okay. Did you say -- did he say -- did either  
11 of you say anything else about complaints?

12 A. Well, I did say that I would -- I was  
13 considering filing another complaint on this search,  
14 that there would be -- if I did, there -- I would start  
15 with an informal complaint, as per the PSOUH procedure.  
16 That informal complaint consists basically of an intake  
17 meeting.

18 And then Dean Brown said if I did have that  
19 meeting, he'd like to attend.

20 Q. Now, during the course of that meeting, what  
21 was the tone of voice?

22 A. It was friendly. I didn't completely believe  
23 Dr. Zeitz when he told me that it was Dean Brown's  
24 discretion to advertise. So -- but I wasn't sure one  
25 way or the other. I consider that I was going to Dean

1 Brown for his assistance in this matter. He seemed  
2 willing to look into it and provide that assistance. So  
3 it was just a ordinary conversation.

4 Q. Thank you.

5 Could you please take a look at what's been  
6 previously marked as Exhibit 12.

7 (Plaintiff's Exhibit 12  
8 marked for identification.)

9 MR. KATZENBACH: Q. Do you have Exhibit 12 in  
10 front of you?

11 A. Yes.

12 Q. Can you tell -- first, can you begin  
13 identifying what Exhibit 12 is.

14 A. This is a email that I sent. The date is  
15 January 7<sup>th</sup>, 2008. It's addressed to Dean Brown. I  
16 also copied Dean Turpin and yourself and Ms. Kimberly  
17 Hancock from your firm. The subject line is "ad  
18 placement."

19 Q. And taking a look at the second and third pages  
20 of Exhibit 12, can you tell us what those -- what's on  
21 those pages.

22 A. The email that we're referring to, that's  
23 actually a response email. So Dean Brown wrote me on  
24 January 4<sup>th</sup>, 2008, following our meeting on  
25 January 3<sup>rd</sup>.



1 Q. And --

2 A. 'Cause I'm responding to his email the  
3 following Monday.

4 Q. Does Exhibit 12 contain the contents of Dr.  
5 Brown's email to you?

6 A. Yes.

7 MR. KATZENBACH: At this point, we'd like to  
8 move Exhibit 12 into evidence.

9 THE COURT: Any objection?

10 MR. VARTAIN: No objection, Your Honor.

11 THE COURT: It's received.

12 (Plaintiff's Exhibit 12  
13 received in evidence.)

14 MR. KATZENBACH: Q. In Dr. Brown's email to  
15 you -- beginning with your email to Dr. Brown, you  
16 discuss -- you discuss the publication -- the  
17 publication -- the size of the journals and the  
18 publication in journals.

19 A. In my reply?

20 Q. Yes, in your email.

21 A. Yes.

22 Q. And do you give him -- do you provide  
23 information concerning the circulation of these  
24 journals?

25 A. Yes.

1 Q. Where did you obtain that information?

2 A. I obtained that on-line from the various  
3 organizations that publish those journals.

4 MR. KATZENBACH: Your Honor, can I inquire of  
5 the jury whether that's visible to them?

6 THE COURT: You may.

7 MR. KATZENBACH: Thank you.

8 (No verbal response.)

9 MR. KATZENBACH: Q. Now, I'd like to direct  
10 your, also, attention to the top part of this. Strike  
11 that.

12 In connection with -- you also refer in Exhibit  
13 12 that you "checked this morning in Gleeson library and  
14 there's no advertisement in our current Chronicle of  
15 Higher Education." What did that concern?

16 A. Well, Dean Brown's email to me the prior -- the  
17 prior week refers to advertisement in the Chronicle of  
18 Higher Education, which is a -- it's a journal for  
19 professors in the United States generally, without a  
20 specific focus on mathematics. It's a widely-circulated  
21 journal, the Chronicle of Higher Education.

22 Q. All right. And so did you review the Journal  
23 [sic] of Higher Education to see if there was an  
24 advertisement in that journal?

25 MR. VARTAIN: Objection. Not relevant except

1 as to the point in time. At what point in time,  
2 Counsel? Is it before the search closed or after the  
3 search closed?

4 THE COURT: Overruled.

5 MR. KATZENBACH: Q. Did you review --

6 A. Yes.

7 Q. And what did you find?

8 A. Well, as indicated in the email, for the months  
9 of the fall of 2007 there were no advertisements for the  
10 position in the Chronicle of Higher Education.

11 Q. Now, I would like to take a look, if you would,  
12 at Exhibit No. 100.

13 A. Yes.

14 (Plaintiff's Exhibit 100  
15 marked for identification.)

16 MR. KATZENBACH: Q. Can you identify what  
17 Exhibit 100 is.

18 A. This is one section of the classified section  
19 for one of the issues of the Chronicle of Higher  
20 Education. The date is November 30<sup>th</sup>, 2007.

21 Q. Why did you -- is this a copy of -- is this a  
22 document that you prepared or that you copied when you  
23 looked at the Chronicle of Higher Education?

24 A. Yes.

25 Q. Why did you copy Exhibit 100? Sorry, strike

1 that.

2 Does Exhibit 100 contain any advertisement from  
3 the University of San Francisco?

4 A. Yes.

5 MR. KATZENBACH: Okay. At this point, I'd like  
6 to move Exhibit 100 into evidence.

7 THE COURT: Any objection?

8 MR. VARTAIN: How many pages, Counsel?

9 MR. KATZENBACH: There are two pages.

10 MR. VARTAIN: No objection.

11 THE COURT: Received.

12 (Plaintiff's Exhibit 100  
13 received in evidence.)

14 MR. KATZENBACH: Q. Now, does the Exhibit 100  
15 contain an advertisement from the University of San  
16 Francisco for a job position?

17 A. Yes.

18 Q. Does that -- was that a position in the  
19 mathematics department?

20 A. No.

21 Q. Where was it?

22 A. It was from -- it was for a position in the  
23 College of Professional Studies.

24 Q. And let me just see if I can ...

25 And is this the ad that you're referring to?

1 A. Yes.

2 Q. At the bottom --

3 A. In the lower left-hand corner is the upper half  
4 of the ad. This particular page -- the Chronicle is a  
5 large publication, physically. So I had to copy two  
6 pages. So this first -- the page that we're looking at,  
7 you see most of the advertisement in the lower left. On  
8 the upper right-hand corner is the date,  
9 November 30<sup>th</sup>, 2007.

10 Q. Okay.

11 A. The next page of the exhibit contains the  
12 complete ad, but without the date.

13 Q. All right. And -- thank you.

14 Now, I'd also like to direct your attention  
15 back to Exhibit 12, if you would. Exhibit 12.

16 A. One moment. Yes.

17 Q. And in connection with Exhibit 12, did -- is  
18 there anything -- how did Dr. Dean Brown end his -- end  
19 his email to you?

20 A. Let's see. He writes:

21 "We also run all faculty position ads,  
22 I believe, in the Chronicle of Higher  
23 Education. I hope this information is  
24 helpful. If you would like to discuss this  
25 further, please schedule a meeting via

1 Carissa Harvey."

2 Q. And is there anything in Exhibit 12 that  
3 indicates that Dr. Brown was in any way disturbed by  
4 your conduct in your meeting with him on January 3<sup>rd</sup>?

5 A. No.

6 Q. Did you do anything in your meeting with Dr.  
7 Brown on January 3<sup>rd</sup> that was in any way -- that in  
8 any way, in your mind, gave Dr. Brown any reason to be  
9 concerned about your behavior?

10 A. No.

11 Q. Now, what happened after your meeting with --  
12 what was the next thing that happened after your meeting  
13 with Dean Brown and your letter -- and the email  
14 response that you made?

15 A. I wrote to the Office of Human Resources to  
16 schedule a intake meeting, as per the informal complaint  
17 procedure.

18 Q. All right. And take a look, if you would, at  
19 Exhibit 11.

20 A. Yes.

21 (Plaintiff's Exhibit 11  
22 marked for identification.)

23 MR. KATZENBACH: Q. Can you tell us what  
24 Exhibit 11 is.

25 A. This is a email to the affirmative action

1 officer at that time; that's in January 2008. Her name  
2 is Ms. Maye-Lynn Gon-Soneda.

3 Q. And is this an email that you sent to Maye-Lynn  
4 Gon-Soneda?

5 A. Yes.

6 Q. And does this concern your -- the filing of a  
7 complaint under the USF policies?

8 A. Yes.

9 MR. KATZENBACH: I'd like to move Exhibit 11  
10 into evidence.

11 THE COURT: Any objection?

12 MR. VARTAIN: No objection.

13 THE COURT: It's received.

14 (Plaintiff's Exhibit 11  
15 received in evidence.)

16 MR. KATZENBACH: Q. Now, taking a look at the  
17 top part of this email, who are the -- can you identify  
18 the people to whom you sent cc's.

19 A. Yes. There's a cc to Dean Brown; Dean Turpin;  
20 Dr. Pacheco, who was chair of mathematics at the time;  
21 Ms. Peugh-Wade, vice president human resources;  
22 Ms. Davis, general counsel; yourself; Ms. Hancock from  
23 your firm.

24 Q. Now, after you sent Exhibit 11, did you -- what  
25 was the next thing that happened concerning the search?

1           A.     There was a meeting scheduled in February,  
2 towards the end of February. In the meantime, the  
3 search was under way.

4                     And there were two meetings of the search  
5 committee with the department, one in January before the  
6 finalists came to visit campus; and after the finalists  
7 came to visit campus, there was the second meeting, as  
8 required by the -- by the college rules, with the  
9 department and the search committee.

10                    And both of those meetings took place prior to  
11 when the intake meeting was finally held, which was late  
12 February.

13           Q.     All right. Now, you've previously described  
14 the search procedures the mathematics department used.

15                    Now, did there come -- was there -- in this  
16 case -- and you described a second meeting of the  
17 faculty.

18                    In this case, was there a second meeting of the  
19 faculty?

20           A.     In this case, there was.

21           Q.     And when did that meeting take place?

22           A.     February 6<sup>th</sup>, is my best recollection.

23           Q.     All right. Now, prior to that meeting, what --  
24 did the candidates come and visit the campus?

25           A.     Yes. The finalists, as identified by the



1 committee, visited campus.

2 Q. Now, at the time they were having the campus  
3 visits by the finalists, how many finalists were there?

4 A. Four candidates visited.

5 Q. And how many finalists were there, that you  
6 understood?

7 A. Well, there were six semifinalists that we  
8 discussed at the first meeting. Ordinarily if you're  
9 not a member of the search committee, you do not get to  
10 see -- inspect the files of all the candidates.

11 Assuming there were 195 candidates that  
12 actually submitted applications on time, each one has a  
13 resumé, letters of recommendation, other materials like  
14 teaching evaluations.

15 Unless you're a member of the search committee,  
16 you aren't allowed to look at that file. However, when  
17 they reduce that number down to the finalists, everyone  
18 in the department is given a copy of their resumé.

19 And then at the first meeting held towards the  
20 end of January, we talked about the six semifinalists.  
21 Then from the six, after that meeting, the department  
22 further selected four to visit campus.

23 Q. And of the -- let's say -- just go to the six  
24 semifinalists. What was the gender and ethnic makeup of  
25 that group?

1           A.     Of the six, there were four women, two men.  
2 All of them were white.

3           Q.     Okay. And in terms of the -- and how many of  
4 those individuals actually ended up visiting USF?

5           A.     Four.

6           Q.     And what did they do when they got to USF?

7           A.     As I testified, a site visit involves talks,  
8 teaching or research.

9                     At that time, the committee set their itinerary  
10 as a teaching talk to students, which were encouraged to  
11 attend, an afternoon research talk primarily for  
12 faculty, including faculty from other departments were  
13 invited to attend, some students. So there were two  
14 talks.

15                    That year, the social event was the math tea.  
16 So they scheduled a math tea to coincide with the  
17 prospective candidates' visits. And that was our  
18 opportunity to sort of meet with them in person.

19                    It changed from year to year. Because it's  
20 math tea, then you could see the individual interacting  
21 with students and you could watch how that sort of  
22 happened, how good they were with students on a personal  
23 level.

24                    Unfortunately, as a teacher, you weren't able  
25 to interact with the candidates as much.

1 Q. Now, after the -- after the candidates  
2 visiting, there was a second meeting. Do you recall  
3 that?

4 A. Yes.

5 Q. Okay. Now, in connection with -- let's take a  
6 look at what's been previously marked as Exhibit 17.

7 A. Yes.

8 (Plaintiff's Exhibit 17  
9 marked for identification.)

10 MR. KATZENBACH: Q. Can you tell me what  
11 Exhibit 17 is.

12 A. These were notes that I prepared prior to the  
13 meeting, that second meeting when we were discussing the  
14 finalists. The purpose of that meeting was to give  
15 input into, you know, the candidates that visited  
16 campus. And then --

17 Q. Do these --

18 A. I --

19 Q. Sorry. Strike that.

20 Just generally, were these -- did you  
21 distribute these notes at the second meeting?

22 A. Yes.

23 Q. And what do these notes, in general terms,  
24 concern?

25 A. Well, I had several concerns with the search at

1 that point, all in connection with their failure to  
2 advertise. I was concerned that the number of  
3 applicants had dropped from 300 to 200. That was one  
4 concern.

5 I was concerned that all of the semifinalists  
6 were white. There were no minorities in this group.  
7 That would be in contrast to the last round where two  
8 thirds were minority.

9 I was also concerned because we received  
10 correspondence that indicated that the administration  
11 was considering offering two positions instead of one  
12 this year. They hadn't decided, at the time of that  
13 meeting, whether to pick two from that pool or just one.

14 Those were my three concerns.

15 Q. And did you do any statistical -- and on  
16 Exhibit 17, did you do any statistical calculations  
17 concerning bias?

18 MR. VARTAIN: Objection. Argumentative.

19 THE COURT: Overruled.

20 THE WITNESS: Yes.

21 MR. KATZENBACH: At this point, I'd like to  
22 move Exhibit 17 into evidence.

23 THE COURT: Any objection?

24 MR. VARTAIN: You know, I think I would need  
25 some voir dire to -- but it's definitely hearsay.

1           Are you offering it for the accuracy of it, Mr.  
2 Katzenbach?

3           MR. KATZENBACH: Am I offering it for the  
4 accuracy of the --

5           MR. VARTAIN: That is, the truth of it?

6           MR. KATZENBACH: I'm offering it for two  
7 purposes: I'm offering it first to establish that he  
8 was presenting issues of discrimination to the -- to the  
9 faculty.

10           And I'm offering it for the second purpose, and  
11 that is that the statistical calculations on it are --  
12 indicate what they indicate, namely that -- and so he  
13 can explain what he -- the significance of the  
14 calculations.

15           But the main purpose of this document is to  
16 show him raising issues of discrimination with the math  
17 faculty and for him to explain what these statistics  
18 indicated and to explain his concerns.

19           MR. VARTAIN: I don't have a problem with it  
20 being offered to show that he perceived discrimination,  
21 'cause I can take that up on cross-examination. But if  
22 you're offering it for the truth of it, then it's  
23 hearsay and I will object.

24           MR. KATZENBACH: The truth of -- I'm just  
25 confused on that. Are you offering it -- suggesting

1 that you'd like to voir dire on his calculations?

2 MR. VARTAIN: No, I don't think I need to voir  
3 dire. I'm saying if it's --

4 May I -- should I stop the dialogue, Your  
5 Honor? I've asked him if he's offering it for the  
6 truth. He won't answer me.

7 MR. KATZENBACH: Oh, I -- perhaps -- excuse me,  
8 Your Honor. I apologize. I don't mean to interrupt  
9 you. I think I -- I'm not offering it to prove  
10 discrimination.

11 MR. VARTAIN: No, that's not the question.

12 MR. KATZENBACH: Okay.

13 MR. VARTAIN: The question is are you offering  
14 it to prove the truth of what's stated in the document?  
15 If you are, then it's hearsay and should not be admitted  
16 for that purpose.

17 MR. KATZENBACH: It's being offered to prove --

18 THE COURT: Mr. Katzenbach, are you offering it  
19 as to the truth of the matter asserted therein or for  
20 some other purpose?

21 MR. KATZENBACH: For some other purpose, Your  
22 Honor.

23 THE COURT: Okay. It's admitted.

24 (Plaintiff's Exhibit 17

25 received in evidence.)

1           MR. KATZENBACH: Q. Did you present Exhibit 17  
2 at the meeting -- the faculty meeting?

3           A. Yes.

4           Q. And what were you -- what was the purpose of,  
5 in your mind, of presenting this information?

6           A. I guess my main -- my main purpose was to point  
7 out the possible problems with this search, this group  
8 of finalists, given that they hadn't advertised  
9 according to the college rules.

10          Q. And why did you present this document in the  
11 form it is in, in the series of calculations?

12          A. I'm addressing a mathematically-inclined  
13 audience, so I thought it appropriate to use  
14 mathematical language to express the ideas or the  
15 principles in my presentation.

16          Q. And when you made this presentation, what point  
17 were you trying to make [sic] home about the search?

18          A. The procedures that they followed were flawed.  
19 It doesn't mean that they intended any ill will towards  
20 any particular group, but that there were implications  
21 they're not following the rules.

22                 For instance, number of applicants being lower  
23 suggests that the number of qualified --  
24 highly-qualified applicants are lower. You're not  
25 necessarily getting the most qualified people.

1 I was concerned that there were no minority  
2 candidates within the final -- semifinalist pool. In  
3 the past, there had always been minority candidates,  
4 although the portion changed from year to year.

5 And I was particularly concerned that they were  
6 going to -- they were considering offering positions to  
7 two candidates from the biased pool.

8 Q. And why did that last concern -- why was that  
9 last concern about two candidates of particular concern  
10 to you?

11 A. Well, if the -- if the -- if the number -- if  
12 the pool from which you're selecting from is biased --  
13 for instance -- against any particular group, whether  
14 it's women or minorities, I mean, it -- just speaking in  
15 general, if you're selecting candidates from a biased  
16 pool, I mean, the more candidates you select, the more  
17 problems you're creating implicitly.

18 Q. Thank you.

19 A. I mean, you might justify one, but then -- I  
20 mean, the second one is sort of doubling or compounding  
21 the bias therein.

22 Again, I didn't want to suggest that the  
23 members of the search committee had any malintent  
24 towards a group, but just that by not following the  
25 rules, they created problems in the composition of the



1 pool, both in terms of quality and in terms of  
2 diversity.

3 Q. Thank you.

4 Now, did you -- was there a discussion in the  
5 math faculty concerning your concerns, and in particular  
6 concerning Exhibit 17?

7 A. Yes. When the meeting started, they -- the  
8 chair of the search committee, Dr. Zeitz, informed us  
9 that they were going to use a slightly different  
10 procedure this year than they had in the past.

11 When Stephen Yeung was appointed in 2006, at  
12 the second meeting -- the way the meeting was conducted  
13 was that there was a vote within the department as to  
14 who would be the first choice, second choice, et cetera,  
15 among the department and the search committee together.

16 That vote -- the results of that vote would be  
17 transmitted to the dean. The dean would select who  
18 would be offered the position. Of course, the  
19 department vote might be different from the search  
20 committee vote. I mean -- and in fact it was in 2006.

21 Dr. Zeitz said that at this meeting they would  
22 have a different procedure. He said that the search  
23 committee had decided already what they thought was the  
24 appropriate ranking, first choice, second choice, third  
25 choice, fourth choice.

1           What they would do this year, in lieu of a  
2 vote, would be that each faculty member that was not on  
3 the search committee would express their opinion, give a  
4 ranking, first, second, third, fourth.

5           Those rankings would then be transmitted to the  
6 dean, along with the search committee rankings.

7           Ultimately the dean would decide who would -- who would  
8 be offered a position.

9           They asked me to present first. And I  
10 basically stated the position that I've testified to in  
11 the past few questions, that I had concerns that this  
12 pool was biased. I recommended that they postpone  
13 offering a position; cancelling the search, in other  
14 words.

15           Q.    Now, when you -- what was the tone -- was there  
16 a discussion following your presentation?

17           A.    Yes. I mean, there was -- we talked about 20  
18 minutes between -- various people, you know, expressed  
19 their opinion in reference to my opinion. So we  
20 discussed this for about 20 minutes, both the issue of  
21 the advertisement, what kind of claim I was really  
22 making.

23           I know Dr. Finch, who had a reputation of  
24 having more of a statistical background than some of the  
25 other faculty, he re- -- he rephrased my argument. What

1 I recall him saying was that "Okay, I believe what  
2 you're saying, John, is the following, that -- and  
3 correct me if I'm wrong."

4 And I agreed that his -- his interpretation was  
5 more or less what I was saying.

6 He said "You're trying to express the following  
7 idea, that a journal is going to be read by people who  
8 may not be actively looking for a job. They might have  
9 a tenure track position at another institution. But  
10 since they're subscribing to the Notices, they'll be  
11 reading the articles in the Notices. They might turn to  
12 the classified section and see that there's a position  
13 available, also tenure track, in San Francisco. They  
14 might become interested in that position and then apply.  
15 So even though they may not be actively looking for a  
16 position, they might see it and then decide, you know,  
17 to see what happens and send in an application. Because  
18 of that, perhaps you're missing people by not  
19 advertising in a professional journal."

20 And I agreed with that characterization.

21 THE COURT: Ladies and gentlemen, remember the  
22 admonition. Do not form or express any opinion on this  
23 case until it's finally submitted to you for your  
24 decision. Do not discuss among yourselves or with  
25 others until that time. Please be back in your places

1 at 3:40 according to the courtroom clock.

2 (Recess taken.)

3 THE COURT: Jurors and alternates are all  
4 present. Counsel for both sides are present. Plaintiff  
5 is present on the witness stand.

6 Mr. Katzenbach, you may continue your inquiry.

7 MR. KATZENBACH: Yes.

8 Q. Going back to the meeting. You were describing  
9 a -- comments that Dr. Finch made.

10 A. Yes.

11 Q. And following Dr. Finch's comments, what did  
12 you do?

13 A. I made my recommendation to the search  
14 committee. And then in turn, the other faculty members  
15 who were not members of the search committee made their  
16 recommendation. Each recommendation consisted of a  
17 ranking.

18 Q. Okay. And during the course of this  
19 conversation over Exhibit 17 and your position, what was  
20 the tone of voice of participants at the meeting?

21 A. Well, several people were not in agreement with  
22 my argument as to whether it was important that they had  
23 advertised in a professional journal. So it was of the  
24 nature of a debate.

25 Q. All right. And how -- what was your tone of

1 voice during that meeting?

2 A. It would be consistent with a debate.

3 Q. Well, how would you -- what would be -- how  
4 would you describe for the jury how you were speaking?  
5 Loudly, softly, modulating? In what way?

6 A. In an ordinary fashion for a discussion in  
7 which there's some disagreement. I would say, you know,  
8 my voice maybe got a little louder sometimes, but other  
9 people's voices also got louder sometimes.

10 Q. Okay. Now, during the course of this meeting,  
11 did you throw any papers?

12 A. No.

13 Q. Did you distribute Exhibit 17?

14 A. Yes, I passed out this exhibit.

15 Q. All right. And after the presentation, did the  
16 meeting continue to -- did the meeting continue?

17 A. Yes.

18 Q. Did your presentation in any way prevent the  
19 meeting from functioning, as far as you could tell?

20 A. No.

21 Q. And did -- I guess -- I gather you indicated  
22 that the professors were there to rank the candidates?

23 A. Yes.

24 Q. And was all that done?

25 A. Yes.

1 Q. And was all that information communicated to  
2 the search committee?

3 A. Yes.

4 Q. All right. Now, in connection with this  
5 meeting, are you aware of any official minutes that were  
6 kept concerning this meeting?

7 A. My recollection of the meeting was that at the  
8 beginning of the meeting, Dr. Zeitz explained the  
9 procedure that we would be following this year compared  
10 to last year.

11 Ms. Liu, the program assistant, was in  
12 attendance. She had her laptop. I presumed that  
13 minutes would be taken of this meeting, as in the other  
14 meetings that were held. For instance, in 2006, the  
15 search in which Dr. Yeung was appointed, there were  
16 minutes taken that recorded the vote. My recollection  
17 was Ms. Liu was typing on her laptop.

18 Q. All right. Now, were any minutes of this  
19 meeting ever distributed to the faculty for their  
20 review?

21 A. No.

22 Q. Are you aware whether or not there are any such  
23 minutes?

24 A. I'm not aware.

25 Q. Have you attempted to locate them? Well,

1 strike that.

2 Have you attempted to obtain copies of any  
3 minutes from the university?

4 A. Yes. In connection with this -- after -- after  
5 I was discharged in connection with this case --

6 Q. And have --

7 A. -- the request was made of the minutes of that  
8 meeting.

9 Q. And have any such minutes been produced?

10 A. No.

11 Q. Now, did you take your own notes of this  
12 meeting?

13 A. Yes, I took my own notes.

14 Q. Will you take a look at Exhibit 16, please.

15 A. Yes.

16 (Plaintiff's Exhibit 16  
17 marked for identification.)

18 MR. KATZENBACH: Q. And can you just identify  
19 what Exhibit 16 is.

20 A. These are the notes that I took at that  
21 meeting.

22 MR. KATZENBACH: Okay. Your Honor, I'm going  
23 to offer Exhibit 16.

24 THE COURT: Any objection?

25 MR. VARTAIN: Never seen these before, Your

1 Honor. May I have a moment?

2 THE COURT: Sure.

3 MR. VARTAIN: Maybe, Mr. Katzenbach, could you  
4 elicit when the witness prepared this document.

5 MR. KATZENBACH: Certainly.

6 Q. When did you prepare Exhibit 16?

7 A. During the meeting.

8 MR. VARTAIN: I'd just like to reserve on this  
9 and handle it on cross, please, Your Honor.

10 MR. KATZENBACH: That's fine, Your Honor.

11 THE COURT: Okay.

12 MR. KATZENBACH: We'll withhold offering it if  
13 he wants to ask questions about it.

14 Q. At the conclusion of this meeting, did Dr.  
15 Zeitz say anything?

16 A. At the --

17 Q. Let me just -- directing your attention back to  
18 the meeting on February 2<sup>nd</sup>. As the meeting was  
19 ending, do you recall Dr. Zeitz saying anything to you?

20 A. Yes.

21 Q. What did Dr. Zeitz say?

22 A. I thought what he said was inappropriate.

23 Q. What did he say?

24 A. He said "John, I hope that when the new  
25 faculty, whomever that is that we hire, come to USF



1 campus, you treat that person with respect."

2 Q. And did you say anything in response to him?

3 A. Yes.

4 Q. What did you say back?

5 A. I was surprised that he would make that  
6 statement in front of my colleagues in an official  
7 meeting of the department. I said "I'll treat them with  
8 the same respect that they treat me."

9 Q. Now, after that meeting, did you learn that  
10 there were going to be job offers made?

11 A. Yes. The search committee would meet with the  
12 dean. The dean's the one that actually makes his offer  
13 to the candidates. And so those offers are the  
14 results -- the subsequent events for this search were  
15 communicated to the department through emails.

16 Q. Could you please take a look at Exhibit 108.

17 (Plaintiff's Exhibit 108  
18 marked for identification.)

19 MR. KATZENBACH: Q. And can you identify  
20 Exhibit 108.

21 A. This is an email dated February 22<sup>nd</sup>, 2008,  
22 subject line "search update." It's from Dr. Zeitz. The  
23 address list is -- are the full members -- the full-time  
24 faculty in the department.

25 Q. And does this describe the initial outcome of

1 the jobs -- the search?

2 A. This is one. I believe there was a prior  
3 email. But this is the second email, I think, in  
4 connection with this -- what was happening at that time.

5 MR. KATZENBACH: I'd like to move Exhibit 108  
6 into evidence, Your Honor.

7 THE COURT: Any objection?

8 MR. VARTAIN: None, Your Honor.

9 THE COURT: It's received.

10 (Plaintiff's Exhibit 108  
11 received in evidence.)

12 MR. KATZENBACH: Q. I'd like to focus your  
13 attention and enlarge ...

14 Does this indicate how -- does this -- does  
15 this email indicate the outcome of the initial  
16 developments?

17 A. Yes.

18 Q. All right. Now, looking at paragraph numbered  
19 1, Duchin, was Duchin -- at this point, was -- sorry.

20 Was Duchin the first choice?

21 A. The prior email indicated that Dr. Duchin was  
22 the first choice by the Dean's Office.

23 Q. Okay. And is Duchin male or female?

24 A. Pardon me?

25 Q. Duchin's gender?

1 A. Female.

2 Q. And number 2 indicates that Professor Van Cott  
3 had accepted the offer; is that correct?

4 A. Yes. I believe the prior information that I  
5 had was Dr. Van Cott was the second person on the list.

6 Q. Is Dr. Van Cott male or female?

7 A. Female.

8 Q. And then line 3 states "The provost has  
9 approved making an offer to Jones"?

10 A. Yes.

11 Q. Jones, male or female?

12 A. Male.

13 Q. And was there a third -- a fourth person on the  
14 list?

15 A. Yes.

16 Q. And who was that?

17 A. Dr. Treneer.

18 Q. And Dr. Treneer, was that male or female?

19 A. Female.

20 Q. And was there a follow-up?

21 Please take a list -- please take a look at  
22 Exhibit 109.

23 A. Yes.

24 (Plaintiff's Exhibit 109

25 marked for identification.)

1 MR. KATZENBACH: Q. What is Exhibit 109?

2 A. It's an email dated March 3<sup>rd</sup> of 2008.

3 Q. Okay. And what is the subject matter of  
4 Exhibit 9 -- 109?

5 A. Search update.

6 Q. And is this -- does this describe further  
7 developments concerning the search?

8 A. Yes.

9 MR. KATZENBACH: I'd like to move Exhibit 109  
10 into evidence.

11 THE COURT: Any objection?

12 MR. VARTAIN: No, sir.

13 MR. KATZENBACH: Q. Taking a look --

14 THE COURT: Received.

15 MR. KATZENBACH: Thank you, Your Honor.

16 (Plaintiff's Exhibit 109

17 received in evidence.)

18 MR. KATZENBACH: Q. Taking a look at Exhibit  
19 109. Does that describe the outcome of the offer to Mr.  
20 Jones?

21 A. Yes.

22 Q. And what is the outcome of the offer to  
23 Professor Jones?

24 A. The email reads: "Jones took another  
25 offer," parentheses, "(Holy Cross in

1           Massachusetts). The search is officially  
2           over."

3           Q.    As far as you are aware, was any offer ever  
4           made to the fourth candidate, the female candidate?

5           A.    No offer was made.

6           Q.    Now, you had some discussion earlier about the  
7           advertisements and things -- advertising in professional  
8           journals. At some point later in that semester, did the  
9           faculty hold a vote as to whether or not there should be  
10          such an advertisement?

11          A.    We have monthly department meetings, at  
12          which -- those are -- those are the meetings at which  
13          issues of the administration of the department are  
14          decided.

15                The department is a unit within the faculty  
16          union. No one has administrative authority higher than  
17          anybody else, so all the decisions are made by vote.

18                I recall at one of the meetings we discussed  
19          what the procedures would be used for the next search,  
20          when we were told that they would have the opportunity  
21          to do a follow-up in the academic year '08/'09.

22          Q.    And what was the vote to do?

23          A.    I recommended that for the next search, they  
24          advertise in the AMS Notices.

25          Q.    And did the faculty vote to do so?

1           A.     Yes.  The vote was unanimous.  The department  
2 agreed that for the next academic year, advertisement  
3 would be placed in the AMS Notices.

4           Q.     Would you please take a look at Exhibit 95.

5           A.     Yes.

6                     (Plaintiff's Exhibit 95  
7                     marked for identification.)

8           MR. KATZENBACH:  Q.  Can you identify Exhibit  
9 95.

10          A.     This document has the heading "Math Department  
11 Meeting, April 8<sup>th</sup>, 2008."  This would be the minutes  
12 of the meeting for April.

13          Q.     And does that concern -- does this have a  
14 section that concerns the vote to advertise in the  
15 Notices?

16          A.     Yes.

17          MR. KATZENBACH:  I'd like to move Exhibit 95  
18 into evidence.

19                 THE COURT:  Any objection?

20                 MR. VARTAIN:  No, sir.

21                 THE COURT:  It's received.

22                     (Plaintiff's Exhibit 95  
23                     received in evidence.)

24          MR. KATZENBACH:  Q.  Directing your attention  
25 to the paragraph that begins "Brandon Brown."

1 A. Yes.

2 Q. And can you read that paragraph for the jury.

3 My enlargement doesn't work.

4 A. Yes. It states -- oh, it --

5 "Brandon Brown anticipates we can  
6 conduct a faculty search next year. There  
7 is no" -- "There is yet no official  
8 approval. We will make up an announcement  
9 and send the list of venues for it. There  
10 will be a hiatus between Jim's retirement  
11 and the new search. John K recommends now  
12 and again in the Notices. The ad will start  
13 running" -- "will run starting September or  
14 October, through December. Peter will send  
15 around a copy from last year's search. Let  
16 him know suggestions, et cetera."

17 Q. Now, was there a -- I would like you -- to have  
18 you take a look at Exhibit 96.

19 A. Yes.

20 (Plaintiff's Exhibit 96  
21 marked for identification.)

22 MR. KATZENBACH: Q. Can you identify what  
23 Exhibit 96 is.

24 A. This document has the heading "Mathematics  
25 Department Meeting May 6 [sic], 2008." These would be

1 the minutes of the May meeting.

2 Q. Thank you.

3 Does that meeting also contain a correction --  
4 do these minutes contain a correction for the April  
5 meeting concerning your request to -- the issue of  
6 advertising in the Notices?

7 A. Yes.

8 MR. KATZENBACH: I'd like to move Exhibit 96  
9 into evidence.

10 THE COURT: Any objection?

11 MR. VARTAIN: No, Your Honor.

12 THE COURT: Received.

13 (Plaintiff's Exhibit 96  
14 received in evidence.)

15 MR. KATZENBACH: Q. Taking a look at Exhibit  
16 96, can you please read the paragraph beginning  
17 "Correction" to the jury.

18 A. Yes. At the beginning of the meeting, we  
19 discussed the minutes from the prior meeting so people  
20 can make corrections. And those corrections are  
21 discussed before they're adopted in the -- by the  
22 department. That item reads:

23 "Correction: Renée was present at the  
24 last meeting. Also, John K made a motion to  
25 advertise in the Notices, and the department



1           voted in favor of that decision. Add those  
2           corrections."

3           Q.    Thank you.

4                    Now, did you ever look at the Notices to see if  
5           the department -- if there was an advertisement actually  
6           placed in the Notices for the next search?

7           A.    Yes.

8           Q.    Was there?

9           A.    No.

10          Q.    I'd like you to take a look at, if you could,  
11          what we previously marked as Exhibit 26A.

12          A.    Yes.

13          Q.    Are those the copies of the Notices for -- the  
14          copies of the Notices that you were referring to that  
15          were referred to in the minutes?

16          A.    Yes, they are. Yes.

17          Q.    And what -- and what period of time does this  
18          cover?

19          A.    June/July of 2008, running through December.

20          Q.    And have you reviewed those?

21          A.    Yes.

22          Q.    And is there any advertisement at all from the  
23          University of San Francisco for a position in the  
24          department of mathematics in those Notices?

25          A.    No.

1 Q. Now, I'd like to get back ...

2 After the meeting on February 6<sup>th</sup>, did anyone  
3 come up to you at any time and tell you that your  
4 conduct during that meeting had been inappropriate in  
5 any way?

6 A. No.

7 Q. Did anyone come up to you and say "John, I  
8 didn't like your yelling"?

9 A. No.

10 Q. Did anyone come up to you and say "John, you  
11 frightened me during that meeting"?

12 A. No.

13 Q. Did anyone say anything negative to you that --  
14 about your behavior in presenting your argument on  
15 discrimination?

16 A. No.

17 Q. Okay. Did you hear indirectly that anyone had  
18 a problem with what you'd done at that meeting?

19 A. No.

20 Q. Thank you.

21 Now, after the meeting, did you continue to  
22 pursue the informal complaint over this search?

23 A. Yes.

24 Q. What was the next thing that happened in that  
25 regard?

1           A.     There was a meeting with Ms. Gon-Soneda. I  
2 believe it was February 20 -- approximately  
3 February 22<sup>nd</sup>. The meeting with the search committee  
4 was February 6<sup>th</sup>.

5           Q.     Okay. Now --

6           A.     It was towards -- towards the end of the month,  
7 20<sup>th</sup> or 22<sup>nd</sup>. I'm not quite sure.

8           Q.     Okay. Now, did you attend that meeting?

9           A.     Yes.

10          Q.     And at that meeting, did you discuss your  
11 concerns with the search?

12          A.     Yes.

13          Q.     And when you went to that meeting, did you  
14 bring any documents with you?

15          A.     Yes, I brought a binder. It was about maybe  
16 this -- this thick with (indicating) --

17          Q.     I'm sorry. For the record, you have to sort of  
18 indicate how many inches thick that would be.

19          A.     Oh, I'm sorry, yes.

20                 THE COURT: Handing you a tape measure.

21                 THE WITNESS: No, thank you, Your Honor.

22                 I would say three quarters of an inch maybe.  
23 It contained -- well, for the statistics in that one  
24 page of notes, I referred to demographics within  
25 mathematics as a whole for the United States. For

1 instance, fraction --

2 MR. KATZENBACH: That's okay. I just want a  
3 general -- the general stuff that you had in the binder.

4 Q. What was the purpose of it?

5 A. It was the evidence of -- that I wanted to  
6 present in case Ms. Gon-Soneda wanted background  
7 information about the demographics. You know, the  
8 printout of the database was included. The one-page of  
9 notes that I testified about was included. My  
10 minutes -- not my minutes -- my notes from the meeting  
11 that I testified about were in that document.

12 Q. Okay.

13 A. Were in that binder.

14 Q. All right. And so -- so during the course of  
15 this meeting, was there any discussion about your  
16 behavior at that meeting?

17 A. No.

18 Q. Did Ms. Gon-Soneda indicate -- say anything to  
19 you that suggested that anyone felt that you had acted  
20 inappropriately in connection with that meeting?

21 A. No.

22 Q. Did Ms. Gon-Soneda indicate to you that anyone  
23 felt that you had been acting inappropriately regarding  
24 your raising issues with the search?

25 A. No.

1 Q. Did Ms. Gon-Soneda say anything to you that you  
2 had acted inappropriately in either of your meeting --  
3 either your meeting with Dr. Zeitz or your meeting with  
4 Dr. Brown?

5 A. No.

6 Q. Now, following -- what was -- what was -- did  
7 Ms. Gon-Soneda make any commitments to you with regards  
8 to what her next actions would be?

9 A. Yes.

10 Q. What were those?

11 A. I raised three specific issues at that meeting.  
12 Ms. Gon-Soneda said she would follow up on each one of  
13 these three items and would send me her response on each  
14 one of these three items.

15 Q. And what were the three items?

16 A. Well, okay. There -- the first item was the  
17 search, which was the primary purpose of that informal  
18 complaint.

19 The second item was that I wasn't satisfied --  
20 I wasn't happy with Ms. Peugh-Wade's response to my  
21 formal complaint, which was given to me in that  
22 memorandum that I testified to that was dated September  
23 of 2007. I read the back of the Respect Handbook, and  
24 there's a provision for appealing the determination of a  
25 formal complaint. And I asked if I can apply that

1 appeal procedure.

2 And the third issue was in relation to the  
3 negotiation -- the meetings between May 15<sup>th</sup>, 2006,  
4 when I submitted my formal complaint, and August 15<sup>th</sup>,  
5 2007, when I submitted the addendum and asked to  
6 activate my formal complaint -- asked that my formal  
7 complaint, the original one, was investigated.

8 Q. All right. Did Ms. Gon-Soneda eventually get  
9 back to you following your meeting?

10 A. Yes.

11 Q. Would you please take a look at Exhibit 24.

12 A. Yes.

13 (Plaintiff's Exhibit 24  
14 marked for identification.)

15 MR. KATZENBACH: Q. Can you identify what  
16 Exhibit 24 is.

17 A. This is an email from Ms. Gon-Soneda. It's  
18 dated March 27<sup>th</sup>, 2008.

19 Q. Does this concern your informal complaint  
20 concerning --

21 A. Yes.

22 MR. KATZENBACH: I'd like to move Exhibit 24  
23 into evidence.

24 THE COURT: Any objection?

25 MR. VARTAIN: No objection.

1 THE COURT: Received.

2 (Plaintiff's Exhibit 24  
3 received in evidence.)

4 MR. KATZENBACH: Q. Now, taking a look at  
5 Exhibit 24, does it address all the issues that you  
6 raised with Ms. Gon-Soneda in your meeting?

7 A. No.

8 Q. What does it omit?

9 A. Well, she writes:

10 "This letter is a response to the two  
11 questions you brought up at our  
12 February 21<sup>st</sup> intake meeting. We had  
13 agreed that on or around March 24<sup>th</sup>, one,  
14 we would determine if the 'Respecting The  
15 Dignity Of Every Person Handbook,' "  
16 parentheses, "(Respect Handbook), applies to  
17 staff and faculty; two, whether or not your  
18 complaint will proceed to a formal  
19 investigation."

20 Q. Okay.

21 A. That's her response. I had an interpretation  
22 to that response.

23 Q. Well, I think we'll get objections, but I just  
24 want to know, did that response satisfy you?

25 A. No.

1 Q. Did this response in any way address your  
2 concerns over the search itself?

3 A. No.

4 Q. All right. Now, following receiving -- looking  
5 down, as we looked at the -- did the Exhibit 24 also  
6 discuss the use of the union grievance procedure?

7 A. Yes.

8 Q. And what did it discuss in regards to that?

9 A. She writes: "The Respect Handbook is a  
10 complement to the university's prevention of  
11 sexual and other unlawful harassment policy.  
12 As such, its contents apply to university  
13 students, faculty, staff, administrators, et  
14 cetera."

15 Q. Okay. And what did she say about any appeal  
16 process that you should use?

17 A. "To remain consistent with the appeals  
18 process in the prevention of sexual and  
19 other unlawful harassment policy, your  
20 appeal should proceed under the applicable  
21 collective bargaining agreement; that is,  
22 the USFFA," which is the full-time faculty  
23 associate -- union -- the full-time faculty  
24 union.

25 That was not the appeal process in the Respect



1 Handbook, so I didn't understand her response, but ...

2 Q. And did she indicate anything about what would  
3 happen to the original complaint in the meantime?

4 A. Yes.

5 Q. What did she say?

6 A. "Whether or not your original complaint  
7 will proceed to a formal investigation will  
8 be determined once the review has been  
9 completed via the USFFA grievance  
10 procedures."

11 Q. Thank you.

12 Now, after you received Exhibit 24, did you  
13 have any discussions with any member of the union or any  
14 official of the union concerning filing a grievance?

15 A. Yes.

16 Q. What -- can you tell us when that occurred.

17 A. Around -- I -- around the middle of April.

18 This is -- I received this March 27<sup>th</sup>.

19 Q. Yes.

20 A. Around the middle of April, Dr. Elliot Neaman,  
21 who's a faculty member in -- in -- I'm sorry, it escapes  
22 me right now.

23 Q. Well, does he have a role -- does he have a  
24 role with the union?

25 A. Well, he's the president of the union.

1 Q. All right. So -- and you had a discussion with  
2 him?

3 A. Yes. Dr. Neaman was leaving the men's room in  
4 Harney Science. My office is down the hall from the  
5 men's room, past the math department office. I saw him  
6 coming out of the men's room and I said "Do you have a  
7 minute? I want to discuss some item with you. Can we,  
8 you know, just take a minute to talk about it here?"

9 And so I --

10 Q. Just stop there.

11 A. Yes.

12 Q. And where did you proceed, then, to have a  
13 conversation with Dr. Neaman?

14 A. Yes, that would be right outside the hall in  
15 front of the men's room, where we spoke for about ten  
16 minutes.

17 Q. And what was the subject of your conversation?

18 A. I told him that I had filed a complaint with  
19 human resources and human resources had referred me to  
20 the union grievance procedure. I was thinking about  
21 filing a union grievance procedure as -- as they were  
22 recommending me to do. I wanted to know what the steps  
23 were for the grievance.

24 I told him that I had filed a grievance in  
25 2000, but that was some time ago, and perhaps he'd be

1 able to give me, you know, more information if there'd  
2 been any changes.

3 Q. And what did Professor Neaman say to you?

4 A. He said -- I think he gave me some details.  
5 But those details were consistent with what had taken  
6 place in 2000. Basically he told me that there hadn't  
7 been any changes from 2000 to 2008.

8 Q. Okay. And, now, how did that conversation end?

9 A. It was cordial. I mean, he -- he -- he -- I  
10 recall him saying something to the effect of "Well, you  
11 feel free to call me and, you know, we can talk about  
12 this further." He was helpful.

13 And -- I mean, it was -- it was in line with  
14 that I had told him I was thinking about it, and then he  
15 was giving me information.

16 Q. Now, at this time, were there any members of  
17 the math -- let me just back this up.

18 We've talked about the union president. Was  
19 there also some sort of union board?

20 A. Yes. The union president, that's an elected  
21 position. There's what we refer to as the policy board.  
22 Each member of the policy board is elected to that  
23 position. I believe the union president was like the  
24 chair of the policy board. He didn't have higher  
25 authority than any other member of the policy board.

1 Administrative decisions were made by that -- by that --  
2 that unit, the policy board.

3 Q. Was any member of the math department on the  
4 union's policy board?

5 A. Yes.

6 Q. Who?

7 A. Dr. Zeitz.

8 Q. Thank you.

9 Now, I'd like to now move to June 18<sup>th</sup>. Do  
10 you recall going to a meeting with Martha Peugh-Wade on  
11 June 18<sup>th</sup>, 2008?

12 A. Yes.

13 Q. And do you recall how that meeting was set up?

14 A. I received an email from Ms. Peugh-Wade early  
15 in June; June 7<sup>th</sup>. The email said something to the  
16 effect of "I'd like you to come in to a meeting with me.  
17 Your -- you may bring your attorney, Mr. Katzenbach."

18 The email wasn't specific as to the nature  
19 why -- what -- what the subject of that meeting would  
20 be.

21 Q. Okay. Did you make -- did you make a further  
22 inquiry as to the subject of that meeting?

23 A. Yes.

24 Q. Would you please take a look at Exhibit 29.

25 (Plaintiff's Exhibit 29

1 marked for identification.)

2 MR. KATZENBACH: Q. Can you identify Exhibit  
3 29.

4 A. Yes.

5 Q. What is it?

6 A. It's an email from Ms. Peugh-Wade to yourself.  
7 It's copied to Ms. Davis, general counsel. It's dated  
8 June 16<sup>th</sup>, 2008.

9 Q. And does that concern setting up a meeting  
10 with -- concerning setting up a meeting with Martha  
11 Peugh-Wade?

12 A. Yes.

13 Q. And looking at the email address that Ms.  
14 Peugh-Wade -- on Exhibit 29, is that the email address  
15 Ms. Peugh-Wade uses?

16 A. Yes.

17 MR. KATZENBACH: All right. I'd like to move  
18 Exhibit 29 into evidence.

19 THE COURT: Any objection?

20 MR. VARTAIN: No objection, Your Honor.

21 THE COURT: It's received.

22 MR. KATZENBACH: Thank you.

23 (Plaintiff's Exhibit 29  
24 received in evidence.)

25 MR. KATZENBACH: Q. Taking a look at Exhibit

1 29, what does it say about the subject of this meeting?

2 A. It says: "With regard to the topic, I  
3 would rather not put the details in an  
4 email. The subject is about health-related  
5 matters. Therefore, I would like to have a  
6 private meeting with you and Professor Kao."

7 Q. Now, did you see a copy of this email before  
8 the meeting?

9 A. Yes.

10 Q. Now, did you have any idea of what she was --  
11 what was being referred to in "health-related matters"?

12 A. No, I had no idea.

13 Q. Were you out on any sort of sick leave at that  
14 time?

15 A. No. The semester had ended May 20<sup>th</sup>, or  
16 shortly thereafter. May 20<sup>th</sup> was a convention -- I  
17 mean, not the -- the commencement ceremonies. And then  
18 grades typically are due a day or two after  
19 commencement.

20 So my duties for the academic year had  
21 concluded as soon as I turned in my grades. We were on  
22 summer break. I was off duty. I was -- I happened to  
23 be working on campus that summer on a matter  
24 representing the mathematics department to the School of  
25 Business and Management.

1           Professor -- Dr. Wolf and I were representing  
2 the mathematics department and curriculum development  
3 for the business school -- that would be quantitative  
4 methods in business -- the content of that course, the  
5 textbook of that course. So I was on campus, but it was  
6 summer break.

7           And I had -- and so certainly I wasn't on  
8 leave. I didn't have to be on campus.

9           Q.    Right. You referred to working with Professor  
10 Huxley on this business school matter. What was that  
11 involved [sic]?

12          A.    Well, Dr. -- Dr. Huxley was the representative  
13 on the business side in this matter. Dr. Wolf and I had  
14 been appointed to this particular project late in fall  
15 of 2007. And Dr. Wolf and I had been having discussions  
16 starting from when we were designated by the department.

17                We set up a meeting with representatives from  
18 the business school, I believe, in March of 2008. So  
19 the business school had identified -- identified  
20 Dr. Huxley as the point person in the business school.  
21 The meeting was set.

22                Dr. Wolf and I went over and met with  
23 Dr. Huxley and several other people from the business  
24 school, who were very involved in curriculum  
25 development: Ms. Sheryl Barker, who was -- I think her

1 title was like director of students. She was also a  
2 professor. She also taught classes. And then I think a  
3 Dr. Lorton. I think that was it.

4 Oh, there was one individual who came in for  
5 part of the meeting, gave a presentation to us in terms  
6 of what they wanted in business school, and then left  
7 the meeting. But --

8 So it was the three people, me and Dr. Wolf.  
9 And we spent about two hours --

10 Q. Now --

11 A. -- you know, discussing curriculum.

12 Q. Did that project continue on after the end of  
13 the academic year?

14 A. Yes.

15 Q. And was that project still sort of ongoing into  
16 early June?

17 A. Yes.

18 Q. Were there any health-related issues that you  
19 could see regarding that project?

20 A. No.

21 Q. All right. Now, did you attend the meeting on  
22 the 18<sup>th</sup> of June?

23 A. Yes.

24 Q. When you arrived at that meeting, were you  
25 given anything?



1 A. Yes.

2 Q. Take a look at Exhibit 30.

3 A. Yes.

4 (Plaintiff's Exhibit 30  
5 marked for identification.)

6 MR. KATZENBACH: Q. Can you tell us what  
7 Exhibit 30 is.

8 A. It's -- this document is in the form of a  
9 letter. The date is June 18<sup>th</sup>, 2008. It says  
10 "Confidential," underneath, "Draft, discussion item."

11 Q. And how did you obtain Exhibit 30?

12 A. Ms. Peugh-Wade handed me this document at the  
13 meeting of June 18<sup>th</sup>.

14 MR. KATZENBACH: I'd like to move Exhibit 30  
15 into evidence, Your Honor.

16 THE COURT: Any objection?

17 MR. VARTAIN: No objection.

18 THE COURT: It's received.

19 (Plaintiff's Exhibit 30  
20 received in evidence.)

21 MR. KATZENBACH: Q. Now, before this -- taking  
22 a look at -- strike that.

23 Taking a look at Exhibit 30, does it contain  
24 any statements about your behaviors?

25 A. Yes.

1 Q. Now, taking a look at that, was this -- before  
2 this meeting, up until June 18<sup>th</sup>, had anyone raised  
3 any issue with you concerning any behaviors of yours?

4 A. None.

5 Q. And --

6 A. No.

7 Q. I'd like to try to enlarge, if we could, a --  
8 nope, apparently not.

9 Could you read the paragraph that begins  
10 "Specifically."

11 A. "Specifically there have been multiple  
12 reports from a variety of well-intentioned  
13 individuals who are, quite frankly,  
14 frightened by your conduct. There are  
15 reports of your yelling, exhibiting  
16 highly-contorted facial expressions that  
17 suggest unfeigned anger," parentheses,  
18 "(staring/glaring, e.g.)," parentheses,  
19 "(impeding or attempting to impede others'  
20 physical movements)," parentheses, "(e.g.,  
21 sudden movements in the hallways that cause  
22 people to believe you will suddenly run into  
23 them or impede their pathway)," right  
24 parentheses, "similarly, bumping and/or  
25 nearly bumping into people in a manner that

1 suggests intent to do so, rapidly repeating  
2 the same words during meetings and  
3 conversations, displaying an expression or  
4 gesture that indicates you cannot or do not  
5 want to listen to what others have to say,  
6 and bizarre chuckling in an" -- "in a  
7 intimidating tone that conveys the message  
8 you are doing so to frighten whomever may  
9 hear it."

10 That's the end of the paragraph.

11 Q. Thank you.

12 Now, had you heard anything at all from anyone  
13 about complaints like this against you?

14 A. No. Not even to the extent of "Stop doing  
15 that," any statement of that kind --

16 Q. What was --

17 A. -- in reference to this -- this description.

18 Q. Had you ever done anything like this that's  
19 described in this letter?

20 A. No.

21 Q. Now, it refers to bumping or nearly bumping  
22 people. Do you see that?

23 A. Yes.

24 Q. Could you think of any -- in your -- in the  
25 time you were at USF, can you think of any incident

1 where you had bumped into somebody?

2 A. Yes.

3 Q. What incident was that?

4 A. Well, there are two incidents that I remember  
5 clearly from the 17 years that I was teaching there.

6 Of course, when I read the letter, I was  
7 thinking of the semester of 2008. I was trying to think  
8 of was there any case where I bumped into someone or  
9 someone bumped into me. And I did recall that towards  
10 the middle of the semester, Dr. Cruse bumped into me in  
11 the hallway.

12 We were approaching each other in the vicinity  
13 of the men's room. There were students on either side  
14 of each of us. So it was like a group of -- me in the  
15 middle of a group of students walking one direction,  
16 towards the mathematics department office, another group  
17 of students coming in the opposite direction, Dr. Cruse  
18 being in the middle of that group.

19 Dr. Cruse was looking down at the floor. He  
20 appeared to be thinking about his classes. And then I  
21 was standing there; I saw him coming towards me; I  
22 stopped because I couldn't move to either side of --  
23 of -- because of the students; and then Dr. Cruse bumped  
24 into me. That was one incident.

25 There was another incident from years back in

1 '90 -- in the mid '90s that I remember a student opened  
2 the door into me. But, of course, that's not -- that  
3 wouldn't have been something that was referred to here.

4 The incident -- the incident with Dr. Cruse, my  
5 recollection was Dr. Cruse said "I'm sorry, John," and  
6 then I said "No, Allan, I'm sorry."

7 Q. All right. Other than that incident you recall  
8 with Dr. Cruse, could you think of anything else that  
9 this could be referring to?

10 A. No.

11 Q. What was your immediate -- what was your  
12 response to this letter?

13 A. I said "I don't remember anything like this."

14 THE COURT: Ladies and gentlemen, remember the  
15 admonition. Do not form or express any opinion on this  
16 case until it's finally submitted to you for your  
17 decision. Do not discuss among yourselves or with  
18 others until that time. Please be back in your places  
19 tomorrow morning at 9:00. Please remember to leave your  
20 notebooks and instructions behind.

21 (Jurors left the room).

22 THE COURT: Jurors and alternates have left the  
23 courtroom. Counsel from both sides and the plaintiff  
24 remain.

25 Let's review what we figured out on the first

1 break of the afternoon.

2 I apologize, Mr. Vartain. I had misremembered  
3 how we had handled motion in limine number 7 by the  
4 plaintiff. You were right; I was wrong. I had  
5 forgotten what happened. You reminded me that at the  
6 time we were initially discussing this motion, you'd  
7 expressed concern that if we got into the question of  
8 prelitigation negotiations, that it might become  
9 necessary to call Mr. Katzenbach as a witness. I had  
10 forgotten that conversation and that concern.

11 However, counsel were able to reach out and  
12 compromise to the following effect: Each side will  
13 present a letter showing that side's position with  
14 respect to the pretrial/presuit negotiations, and that  
15 will be all the evidence we have on that issue.

16 Any comment, Mr. Vartain?

17 MR. VARTAIN: I proposed that solution. I  
18 didn't -- Mr. Katzenbach -- that there would be no oral  
19 testimony about the meeting in question that -- that the  
20 witness was about to be asked about, or any other  
21 meetings concerning that negotiation. We would just  
22 handle it by those two documents, yes.

23 THE COURT: That accords with what I remember  
24 of our conversation earlier this afternoon.

25 Mr. Katzenbach, any comment?

1           MR. KATZENBACH: That's acceptable as long as  
2 it doesn't come up somewhere else in this case due to  
3 anything Mr. Vartain introduces.

4           THE COURT: Yes, always make allowances for the  
5 possibility of the bizarre occurring.

6           MR. KATZENBACH: Yes.

7           THE COURT: With respect to the hearsay  
8 objection with respect to Dr. Kao's calendar, I examined  
9 the calendar and its entries. It seems although it's a  
10 mixed bag of social things, things that were planned or  
11 may not have happened and things that are more business  
12 oriented. I think that the tone of the material is  
13 overwhelmingly business-oriented. So I think it comes  
14 in under 1271 of the Evidence Code.

15           But defendant has the right to suggest  
16 redaction of anything that appears there that defendant  
17 thinks would be particularly prejudicial.

18           Comment, Mr. Vartain?

19           MR. VARTAIN: I thought that was a good  
20 solution, Your Honor. You also said that I would be  
21 permitted to on cross-examination ask voir dire-like  
22 questions and -- within reason -- and I could, if I felt  
23 the ruling was subject to change, move later on that  
24 subject.

25           THE COURT: Mr. Katzenbach, any comment?

1           MR. KATZENBACH: That's fine, Your Honor. I  
2 think he has the right to ask any questions he wants to  
3 on a document. That's fine.

4           THE COURT: There's several documents to which  
5 there was a hearsay objection. Mr. Katzenbach explained  
6 that things were not introduced for the truth of the  
7 matter asserted therein. I agree that they're  
8 admissible.

9           What I'll ask you to do is to consult -- I'm  
10 not sure my notes are accurate -- and give me a list of  
11 exhibits to which there was such an objection, in which  
12 I propose to admit for purposes other than the truth  
13 thereof, and I'll try to draft an instruction of version  
14 306 that's particular to what we're dealing with.

15           MR. KATZENBACH: That would be fine, Your  
16 Honor.

17           MR. VARTAIN: Will you make the list, Chris?

18           MR. KATZENBACH: Yes, I will try -- I will do  
19 that. I'll try to get that to you tomorrow.

20           MR. VARTAIN: I don't think there's a huge  
21 rush, but ...

22           MR. KATZENBACH: Just to clarify on the first  
23 issue, we are talking, I think, about Exhibits 68 and  
24 69. 68 would be the draft release, and 69 would be the  
25 letter response.



1 (Plaintiff's Exhibits 68-69  
2 marked for identification.)

3 THE COURT: Mr. Vartain is looking through his  
4 binders.

5 MR. VARTAIN: Just give me one second, Your  
6 Honor, please.

7 Those are the admissible exhibits. So I would  
8 suggest that pursuant to our agreement, that there won't  
9 be any oral testimony on that subject; 68 and 69 be  
10 received by stipulation.

11 MR. KATZENBACH: I would like at least the jury  
12 to know that that has been admitted into evidence.

13 THE COURT: Like the jury to know what?

14 MR. KATZENBACH: That those documents have been  
15 admitted into evidence, since they hadn't been referred  
16 to in any testimony.

17 THE COURT: Well, if you mean -- I'm not sure  
18 what you mean.

19 MR. KATZENBACH: Well, Your Honor, I guess that  
20 I would like the jury informed that Exhibit 68, which is  
21 a USF draft release, and Exhibit 69, which is a  
22 response -- and Exhibit 69, which is a response letter,  
23 have been admitted by stipulation without the need of  
24 further testimony.

25 THE COURT: Okay. Sure. You can say that. I

1 can say that.

2 MR. KATZENBACH: I would be happy to say that.  
3 And the -- and I guess as long -- that should be fine.  
4 I'll just say that, if the court wants.

5 THE COURT: Okay. Anything else that needs to  
6 go on the record?

7 MR. VARTAIN: One housekeeping matter, Your  
8 Honor. Since we're -- since we're talking about  
9 complaints and grievances, I have a grievance.

10 There's been a rather enormous amount of  
11 unproduced exhibits being offered in this trial; that  
12 is, exhibits of which we had no notice. We didn't even  
13 have them on an exhibit list, much less copies being  
14 produced in discovery.

15 I would like to request an order to be issued  
16 orally from the bench that by 9:00 tomorrow morning, Mr.  
17 Katzenbach provide me with copies of any other exhibits  
18 not already provided yesterday that he intends to offer  
19 that have not been produced.

20 THE COURT: Sounds reasonable.

21 What do you say, Mr. Katzenbach?

22 MR. KATZENBACH: Well, Your Honor, I'm happy to  
23 endeavor to do that for the -- for counsel. And so why  
24 don't -- but obviously --

25 THE COURT: Anything you think might hinder

1 your endeavor?

2 MR. KATZENBACH: If something comes up, I don't  
3 want to be accused of not having given him a document  
4 that might be responsive to an issue that comes up that  
5 I don't anticipate.

6 THE COURT: Accused correctly, but you'd have  
7 an excuse.

8 MR. KATZENBACH: Correct, Your Honor. I just  
9 want to reserve my ability to --

10 THE COURT: Tender an excuse?

11 MR. KATZENBACH: Yes. Otherwise I'll be happy  
12 to do that.

13 THE COURT: Okay.

14 MR. VARTAIN: I have no problem with him being  
15 able to tender an excuse if I have an opportunity to  
16 evaluate it.

17 MR. KATZENBACH: Well, he can have an  
18 opportunity to object.

19 MR. VARTAIN: It looks -- makes me look bad in  
20 front of the jury when I'm getting a document for the  
21 first time, and I have -- frankly, I have to react right  
22 away as to things. It's really not been -- it's been  
23 difficult for me on and on and on in this.

24 THE COURT: I don't think it makes you look bad  
25 at all. Makes you look like a conscientious

1 practitioner who's not going to carelessly agree to  
2 things that he hasn't been able to think through.

3 MR. VARTAIN: Okay. Your Honor, I take that as  
4 a compliment, but -- okay. Enough said. If Chris is  
5 willing to agree to do that, then I'm happy.

6 THE COURT: Okay. Anything else?

7 Okay. Off the record, out of session. See you  
8 tomorrow.

9 (Proceedings adjourned at 4:37 p.m.)

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## REPORTER CERTIFICATE

1  
2 I hereby certify that the foregoing  
3 proceedings were taken at the time and place herein  
4 named; that this transcript is a true record of the  
5 proceedings, as reported to the best of my ability by  
6 me, a duly certified shorthand reporter and a  
7 disinterested person, and was thereafter transcribed  
8 under my direction into typewriting by computer.

9 I further certify that I am not interested in  
10 the outcome of said action, nor connected with, nor  
11 related to any of the parties in said action, nor to  
12 their respective counsel.

13 IN WITNESS WHEREOF, I have hereunto set my  
14 hand this 23rd day of September, 2012.

15  
16 \_\_\_\_\_  
17 HOLLY MOOSE, CSR NO. 6438  
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23  
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25

1 COURT OF APPEALS OF THE STATE OF CALIFORNIA

2 FIRST APPELLATE DISTRICT

3 ---o0o---

4 JOHN S. KAO,

5 Plaintiff/Appellant,

6 vs.

Appellate No. A135750

SUPERIOR COURT CASE

No. CGC-09-489576

7 UNIVERSITY OF SAN FRANCISCO,  
8 ET AL.,

Defendants/Respondents.

9 \_\_\_\_\_/

10 ON APPEAL FROM THE JUDGMENT  
11 OF THE SUPERIOR COURT OF CALIFORNIA  
12 COUNTY OF SAN FRANCISCO

13 THE HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE

14 REPORTER'S TRANSCRIPT ON APPEAL

15 February 9, 2012

16 Volume 3 (Pages 460 - 674)

17 For Plaintiff/Appellant:

18 KATZENBACH & KHTIKIAN  
19 1714 Stockton Street, Suite 300  
20 San Francisco, CA 94133  
21 (415)834-1778

22 BY: CHRISTOPHER W. KATZENBACH, Attorney at Law  
23 CONOR MACK, Attorney at Law

24 For Defendants/Respondents:

25 VARTAIN LAW GROUP  
601 Montgomery Street, Suite 540  
San Francisco, CA 94111  
(415)391-1155

BY: MICHAEL J. VARTAIN, Attorney at Law  
LINDA K. ADLER, Attorney at Law

REPORTED BY: HOLLY MOOSE, RDR-CRR-CCRR, CSR NO. 6438

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

BEFORE THE HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE

DEPARTMENT NUMBER 318

---o0o---

JOHN S. KAO,

Plaintiff,

vs.

Case No. CGC-09-489576  
Jury Trial

UNIVERSITY OF SAN FRANCISCO,  
ET AL.,

Pages 460 - 674

Defendants.  
\_\_\_\_\_ /

REPORTER'S TRANSCRIPT OF PROCEEDINGS

February 9, 2012

APPEARANCES OF COUNSEL:

For Plaintiff:

KATZENBACH & KHTIKIAN  
1714 Stockton Street, Suite 300  
San Francisco, CA 94133  
BY: CHRISTOPHER W. KATZENBACH, Attorney at Law  
CONOR MACK, Attorney at Law

For Defendants:

VARTAIN LAW GROUP  
601 Montgomery Street, Suite 540  
San Francisco, CA 94111  
BY: MICHAEL J. VARTAIN, Attorney at Law  
LINDA K. ADLER, Attorney at Law

REPORTED BY: HOLLY MOOSE, RDR-CRR-CCRR, CSR NO. 6438

I N D E X

Thursday, February 9, 2012

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| ---o0o---                          |           |             |             |  |

1 San Francisco, California

2 Thursday, February 9, 2012, 9:10 A.M.

3 Department No. 318

4 The Honorable Wallace P. Douglass, Retired Judge

5 ---o0o---

6 THE CLERK: Please remain seated and come to  
7 order. Department 318 is now in session, the Honorable  
8 Wallace Douglass, judge presiding.

9 THE COURT: Jurors and alternates are all  
10 present. Counsel from both sides are present. John Kao  
11 is on the stand.

12 And, Mr. Katzenbach, you may continue your  
13 inquiry.

14 MR. KATZENBACH: Thank you, Your Honor.

15 THE COURT: Dr. Kao, your oath carries over  
16 from day to day. You're still under oath.

17 THE WITNESS: Yes.

18 DIRECT EXAMINATION BY MR. KATZENBACH (RESUMED)

19 MR. KATZENBACH: Q. Dr. Kao, we were  
20 talking -- we were talking last -- yesterday about the  
21 meeting on June 18<sup>th</sup>.

22 So directing your attention back to that, I'd  
23 like to just go through a few more -- a few more events.  
24 I believe last time, you testified about your initial  
25 comments at that meeting. I'd like to go back now, sort

1 of continue on through that meeting.

2 After you received the letter -- after you  
3 received the letter of June 18<sup>th</sup>, what was -- what  
4 else was said during this meeting?

5 A. Well, on my behalf, you asked for more  
6 specifics.

7 Q. Okay. And what was the university's response  
8 at that time?

9 A. They didn't provide any specifics.

10 Q. Was there anything else said in connection with  
11 this meeting?

12 A. I addressed the issue of the chuckling with --

13 Q. What did you say?

14 A. Which was the last item in the description.

15 I said I do laugh when I'm nervous. This is a  
16 Japanese cultural trait. I know that my mother does  
17 that. I've seen my aunt do that when she visits from  
18 Japan. I've seen it in movies. I've read about it in  
19 books.

20 In Japanese, there's a term for it. I believe  
21 the translation is "nervous laughter." It's something  
22 that people do when they don't know what to say or they  
23 feel socially awkward. It was possible that people  
24 misperceived that.

25 Q. Okay. Was anything else said during this

1 meeting?

2 A. Ms. Peugh-Wade wasn't responsive to that  
3 remark.

4 Q. Okay. Was there any other -- during that  
5 meeting, were any -- did -- were any proposals made for  
6 alternative things that could be done to address the  
7 university's concerns?

8 A. On my behalf, you proposed a clear-the-air  
9 meeting with whomever were concerned about the alleged  
10 behaviors.

11 Q. Okay. And did the university have any response  
12 to that?

13 A. They -- I believe Ms. Peugh-Wade was dismissive  
14 of that proposal.

15 Q. Now, following that meeting, do you --  
16 Would you please take a look at Exhibit 31.

17 A. Yes.

18 (Plaintiff's Exhibit 31  
19 marked for identification.)

20 MR. KATZENBACH: Q. Can you tell us what  
21 Exhibit 31 is.

22 A. This is an email from Ms. Peugh-Wade. It's  
23 dated June 20<sup>th</sup> of 2008.

24 Q. And does this concern matters arising from the  
25 June 18<sup>th</sup> meeting?

1           A.     Yes.  It's addressed both to myself and to you.

2           MR. KATZENBACH:  At this point, I would like to  
3 move Exhibit 31 into evidence.

4           THE COURT:  Any objection?

5           MR. VARTAIN:  No objection, Your Honor.

6           THE COURT:  It's received.

7           (Plaintiff's Exhibit 31

8           received in evidence.)

9           MR. KATZENBACH:  Q.  Now taking a look at  
10 Exhibit 31, and -- taking a look at Exhibit 31, the --  
11 taking a look at the opening paragraph, it refers to  
12 providing information -- we -- providing information to  
13 the university as of Monday, June 23<sup>rd</sup>.

14          MR. VARTAIN:  Objection.  Misstates the  
15 document.

16          MR. KATZENBACH:  I'm sorry.  Why don't we just  
17 have the witness read the opening paragraph -- sorry --  
18 the second paragraph of the letter.

19          MR. VARTAIN:  Objection.  The first paragraph  
20 is necessary to understand the second paragraph.  The  
21 question's ambiguous.

22          THE COURT:  Okay.  Sustained.

23          MR. KATZENBACH:  Dr. Kao, could you read the  
24 first two paragraphs of this email.

25          THE WITNESS:  "Thank you for meeting

1 with me Wednesday. I want to reiterate that  
2 if you have any information you believe the  
3 university should consider in making its  
4 decision on this matter, please either  
5 provide the information to me or let me know  
6 the nature of the information by Monday,  
7 June 23<sup>rd</sup>. Additionally, if you want to  
8 voluntarily agree to the independent medical  
9 evaluation and/or the leave of absence,  
10 please provide written notification of such  
11 by Monday as well."

12 Q. All right. Now, at the meeting on the 18<sup>th</sup>,  
13 was there any discussion of any deadline to submit  
14 information?

15 A. No specific deadline was discussed. There was  
16 some mention of a July 1<sup>st</sup> date. But that being about  
17 a week and -- well, June 18<sup>th</sup>, July 1<sup>st</sup> -- there was  
18 some mention of July 1<sup>st</sup>, but no specific deadline  
19 earlier than that.

20 Q. And in this email that you -- that you received  
21 on Friday, June 28<sup>th</sup>, was this the first time you'd  
22 heard of any Monday deadline?

23 A. Yes.

24 Q. Now, did this email also address the issue of  
25 giving -- providing you more information?

1 A. No.

2 Q. Please take a look at the next paragraph of  
3 Exhibit 31. Could you read that to the jury.

4 A. "With regard to your request for  
5 detailed information about the reports that  
6 form the basis for concern, I do not believe  
7 providing that information would be  
8 productive. As I mentioned, this matter  
9 does not stem from a complaint against  
10 Professor Kao or a complaint against" --  
11 "under the university's sexual and other  
12 unlawful harassment policy, and it is not a  
13 disciplinary matter."

14 Q. Were you familiar with the complaint procedure  
15 under the university's sexual and other unlawful  
16 harassment policies?

17 A. Yes.

18 Q. In fact, that was a complaint procedure that  
19 you had used?

20 A. Yes.

21 Q. And what was your understanding -- what was  
22 your understanding of what would happen had there been a  
23 complaint under that policy?

24 MR. VARTAIN: Calls for speculation; objection.

25 THE COURT: Sustained.

1 MR. KATZENBACH: Q. Does that policy state  
2 what would be the -- what would be the results of a  
3 complaint?

4 A. Yes.

5 MR. VARTAIN: Objection. The exhibit is in  
6 evidence and speaks for itself.

7 THE COURT: Overruled. Witness may answer.

8 THE WITNESS: There would be a prompt  
9 investigation.

10 MR. KATZENBACH: Q. Can you take a look at --  
11 can you take a look at Exhibit 6, which is in front of  
12 you -- I'm sorry.

13 If you take a look at the actual handbook to  
14 your right.

15 A. Yes.

16 MR. VARTAIN: Your Honor, may I be heard on  
17 this line of questioning as it being irrelevant, the  
18 line being I believe Mr. Katzenbach is going to take a  
19 detour into the policy against sexual harassment.

20 THE COURT: Let's have an offer of proof.

21 MR. VARTAIN: I was just going to say --

22 MR. KATZENBACH: No, not in front of the jury,  
23 please.

24 MR. VARTAIN: -- I believe it's not relevant.

25 (Judge and counsel confer privately.)



1 THE COURT: I accept the offer of proof.

2 Overrule the objection.

3 MR. KATZENBACH: Q. Dr. Kao, so again I'm  
4 directing your attention to Exhibit 6, which you have in  
5 front of you.

6 A. Yes.

7 Q. And taking a look at Exhibit 6, if you would,  
8 does that discuss the complaint procedure under the  
9 university's Respect Handbook?

10 A. Yes.

11 Q. Directing your attention to the last page of  
12 the Respect Handbook.

13 A. Yes.

14 Q. Taking a look -- does that -- does that section  
15 address, in part, issues of filing complaints?

16 A. Yes.

17 Q. All right. Now, take -- can you read to the  
18 jury what it says in the first paragraph under the  
19 phrase -- under the heading "Investigation."

20 A. "USF will promptly investigate a  
21 complaint of harassment and, when  
22 appropriate, take corrective action, up to  
23 and including termination of  
24 employment/expulsion from USF. It is a  
25 violation of university core values and

1 policy to intimidate, discipline, discharge  
2 or retaliate against any individual because  
3 he/she has reported harassment, assisted in  
4 an investigation or formally or informally  
5 objected to sexual harassment."

6 Q. And does it also contain a provision addressing  
7 issues of who would be informed of the results of  
8 investigation and conclusions reached?

9 A. Yes.

10 Q. What does it say there?

11 A. "Making a determination. Both the  
12 accuser and the accused will be informed of  
13 the results of the investigation and the  
14 conclusion reached."

15 Q. All right. And does it also provide for an  
16 appeals procedure?

17 A. Yes.

18 Q. And what does it provide for in that regard?

19 A. Heading, "Appeal procedure":

20 "If the person who made the complaint  
21 is unsatisfied with the investigation  
22 results, he or she may request an  
23 administrative review by sending a letter to  
24 Ms. Martha Peugh-Wade, assistant vice  
25 president of human resources, business and

1 finance, 415-422-6707," her email address  
2 follows, "or David Philpott, director of  
3 employment/labor relations," telephone  
4 number/email follows.

5 Q. Okay. And --

6 A. Shall I continue or ...

7 Q. Yes, if you would.

8 A. "Contact the Equal Employment  
9 Opportunity Commission or the Department of  
10 Fair Employment & Housing. Phone numbers  
11 for each of these organizations are  
12 available at human resources. A brochure  
13 from the Department of Fair Employment &  
14 Housing is available in human resources."

15 Q. Thank you.

16 Now, if you'd look at the next page, which is  
17 page -- labeled page 11 of exhibit -- of the Respect  
18 Handbook.

19 Does that also -- does that also address  
20 investigations?

21 A. Yes.

22 Q. Can you read the last paragraph on page -- can  
23 you read the last paragraph of -- on page 11.

24 A. "Discussions will be kept confidential,  
25 to the extent possible. Reasonable efforts

1 will be made to protect the privacy of all  
2 parties. However, because USF takes its  
3 commitment to maintain a harassment-free  
4 workplace/academic setting seriously,  
5 confidentiality cannot be guaranteed at the  
6 expense of a prompt and thorough  
7 investigation of all reports of harassment."

8 Q. I would also like you now, if you would, to  
9 take a look at page 8 of the Respect Handbook, if you  
10 would.

11 A. Yes.

12 Q. And does that paragraph also contain  
13 information concerning the university's commitment to do  
14 investigations of complaints of harassment?

15 A. Yes.

16 Q. And what does that -- does that -- can you read  
17 the last paragraph on page 8 of the Respect Handbook.

18 A. "Each harassment complaint is taken  
19 seriously and investigated promptly and  
20 thoroughly. Retaliatory action against the  
21 employee/student who reports harassment will  
22 not be tolerated."

23 Q. Now, when you received -- after you received  
24 Exhibit 31, which is the email, did you make any -- was  
25 there any response made to Ms. Peugh-Wade's email that's

1 Exhibit 31?

2 A. Yes.

3 Q. Would you please take a look at Exhibit 32.

4 A. Yes.

5 (Plaintiff's Exhibit 32

6 marked for identification.)

7 MR. KATZENBACH: Q. Can you tell me what --  
8 tell the jury what Exhibit 32 is.

9 A. This is an email from yourself, dated Friday,  
10 June 20<sup>th</sup>, 2008.

11 Q. And does it concern -- was it in response to  
12 Ms. Peugh-Wade's email on Friday, June 20<sup>th</sup>?

13 A. Yes.

14 Q. At this point, I'd like to --

15 Did you -- are you familiar with the contents  
16 of Exhibit 32?

17 A. Yes.

18 Q. And does that state your position in response  
19 to Ms. Peugh-Wade's email to you?

20 A. Yes.

21 MR. KATZENBACH: I'd like to move Exhibit 32  
22 into evidence.

23 THE COURT: Any objection?

24 MR. VARTAIN: Objection to hearsay -- as  
25 hearsay. No objection to the authenticity of the

1 document. It's an out-of-court statement by Mr.  
2 Katzenbach that appears to be introduced to prove the  
3 truth of his statement.

4 THE COURT: Is that accurate, Mr. Katzenbach?

5 MR. KATZENBACH: No, Your Honor. It's just  
6 being introduced -- not for the truth, but merely for  
7 what is said in the email itself, just as part of the  
8 correspondence between the parties on the part of Dr.  
9 Kao's verbal requests to the university. Introduced  
10 only for those purposes, not for its truth.

11 THE COURT: All right. It will be received for  
12 the purposes stated, not for the truth.

13 (Plaintiff's Exhibit 32  
14 received in evidence.)

15 MR. KATZENBACH: Q. Now, taking a look at  
16 Exhibit 32. Can you read Exhibit 32 to the jury.

17 MR. VARTAIN: Your Honor, I would like to  
18 object to reading this exhibit. If it's not offered for  
19 its truth, as Mr. Katzenbach just said, then it's not  
20 relevant to read it.

21 THE COURT: Overruled.

22 MR. KATZENBACH: Q. Could you please read  
23 Exhibit 32.

24 A. "Ms. Peugh-Wade, your email today did  
25 not provide any additional information as to

1 the allegations against Professor Kao. I  
2 simply cannot understand your statement,"  
3 quote, "'I do not believe providing that  
4 information would be productive,'" end  
5 quote. "You are asking Professor Kao to  
6 agree to a detailed medical/psychological  
7 examination and to produce all his medical  
8 records for that purpose. It is not  
9 unreasonable," parentheses, "(or  
10 unproductive)," parentheses, to ask the  
11 university to give more detail as to the  
12 events apparently underlying that request so  
13 that Professor Kao can evaluate the  
14 university's demand in light of the evidence  
15 asserted to justify it. The university  
16 cannot seriously expect me to be able to  
17 advise Professor Kao on this matter when the  
18 university withholds the information  
19 necessary to provide such advice. To date,  
20 all we have is a series of undated events  
21 presented largely in terms of persons'  
22 subjective reactions or concerns rather than  
23 any detail as to what actually transpired.  
24 All we know for certain is that none of the  
25 events involve students or concern Professor

1           Kao's teaching duties, that nothing that  
2           Professor Kao is accused of interfered with  
3           any of the university's or the department's  
4           operations, and that all these events have  
5           occurred since about January 2008."

6           Q.    And could you continue.

7           A.    "With regard to your June 23<sup>rd</sup>  
8           deadline, telling us Friday of a Monday  
9           deadline is totally unreasonable.  The  
10          university has already waited months before  
11          advising Professor Kao of any of these  
12          allegations and, at our meeting Wednesday,  
13          gave no indication that June 23<sup>rd</sup> would be  
14          a potential deadline.  To the extent we can  
15          respond, I hope to do so, but I can make no  
16          commitment that any response will be  
17          submitted by your newly-created Monday  
18          deadline."

19          Q.    Thank you.  Now, are you aware of any  
20          response -- any -- sorry, strike that.

21                    What time of day was this email sent?

22          A.    This email is time-stamped 4:53 in the  
23          afternoon.

24          Q.    Now, could you please took a look at Exhibit  
25          33.



1 A. Yes.

2 (Plaintiff's Exhibit 33

3 marked for identification.)

4 MR. KATZENBACH: Q. Can you -- taking a look  
5 at the top of Exhibit 33, can you tell me the email  
6 address that appears on the top of Exhibit 33.

7 A. This is Ms. Peugh-Wade's email address.

8 Q. Okay. And does Exhibit 33 -- and what's the  
9 timestamp on Exhibit 33?

10 A. June 20<sup>th</sup>, 2008, at 4:53 p.m.

11 Q. And who is this email in response to?

12 A. Yourself.

13 Q. And does this email appear to be in response to  
14 the email that's Exhibit 32?

15 A. Yes.

16 MR. KATZENBACH: I'd like to move Exhibit 33  
17 into evidence.

18 MR. VARTAIN: No objection.

19 THE COURT: It's received.

20 (Plaintiff's Exhibit 33

21 received in evidence.)

22 MR. KATZENBACH: Q. Please take a look at  
23 Exhibit 33. And if you would, could you read Exhibit 33  
24 to the jury.

25 A. "Subject, out of the office. This is

1 an automatic reply. I am out of the office  
2 during the week of June 23<sup>rd</sup> and will be  
3 accessing email infrequently. If you need  
4 immediate assistance, please contact Miguel  
5 Yrure" -- I'm not sure how to pronounce his  
6 name -- "Yrure at" -- his email address --  
7 "or Maye-Lynn Gon-Soneda" -- her email  
8 address. "Thank you."

9 Q. I'd like you to now, Dr. Kao, take a look at  
10 what we previously marked as Exhibit 34.

11 A. Yes.

12 (Plaintiff's Exhibit 34  
13 marked for identification.)

14 MR. KATZENBACH: Q. Can you identify Exhibit  
15 34.

16 A. This is a letter --

17 Q. No, I'm sorry. Sorry. I apologize.

18 Can you identify Exhibit 34.

19 A. This is a letter dated June 24<sup>th</sup>, 2008.

20 Q. And does this concern the university's demand  
21 for a mental examination of you?

22 A. Yes.

23 Q. And who is this letter signed by?

24 A. Ms. Peugh-Wade.

25 MR. KATZENBACH: I'd like to move Exhibit 34

1 into evidence.

2 THE COURT: Any objection?

3 MR. VARTAIN: None, Your Honor.

4 THE COURT: Received.

5 (Plaintiff's Exhibit 34

6 received in evidence.)

7 MR. KATZENBACH: Q. Taking a look at Exhibit  
8 34, and taking a look at the second paragraph of Exhibit  
9 34, does that include a list of allegations against you?

10 A. Yes.

11 Q. Now, I'd like you just to briefly -- in looking  
12 at those allegations, can you tell me -- did you read  
13 Exhibit 34?

14 A. Yes.

15 Q. When you looked at these allegations, did you  
16 notice anything in particular?

17 A. It's different from the list of allegations  
18 presented on June 28<sup>th</sup>, the prior week.

19 Q. You mean June 18<sup>th</sup>?

20 A. I mean June 18<sup>th</sup>, yes. Pardon me.

21 Q. Thank you.

22 Now, in what way is this different?

23 A. They appear to have added allegations.

24 Q. Can you point out the allegations that they  
25 appear to have added.

1 A. "Inappropriate closeness."

2 Q. And where is that?

3 A. It's about in the middle of the paragraph,  
4 towards the right.

5 Q. All right. And any other -- any other  
6 allegations that they added?

7 A. "Fists clenched." That's in connection with  
8 "contorted facial expressions" and "yelling."

9 Q. Okay.

10 A. So whereas before one of the allegations was  
11 yelling, it now reads:

12 "There are reports of your yelling,  
13 exhibiting highly-contorted facial  
14 expressions, with fists clenched, that  
15 suggest unfeigned anger."

16 Q. Thank you.

17 Now, did this letter also make demands of you  
18 as to what you were to do?

19 A. Yes.

20 Q. Take a look at the first paragraph, paragraph  
21 numbered 1 in this letter. What is -- what does that  
22 say?

23 A. "Effective today, you're on a leave of  
24 absence without duties. You are deemed to  
25 have requested this leave, per section

1           26.3.4 of the collective bargaining  
2           agreement, and you may draw sick pay. All  
3           of your health and welfare benefits remain  
4           in effect."

5           Q.     Okay. A few questions on that.

6                     Did you ever make a request for a leave of  
7           absence under section 26.3.4 of the collective  
8           bargaining agreement?

9           A.     No.

10           Q.     Did you make any request for leave of absence  
11           under any provision of the collective bargaining  
12           agreement?

13           A.     No.

14           Q.     Now, it notes that you are -- that you may draw  
15           sick leave or may draw sick pay.

16           A.     Yes.

17           Q.     Are you familiar with the sick pay process at  
18           the University of San Francisco?

19           A.     Yes.

20           Q.     What would you have had to do to draw sick pay?

21           A.     I would have had to file an application with  
22           their insurance company for medical insurance.

23           Q.     And in connection with that, what would you  
24           have to do in connection with establishing your right to  
25           sick pay?

1 A. I'd have to document that I was sick.

2 Q. Were you sick?

3 A. No.

4 Q. Did you apply for sick pay?

5 A. No.

6 Q. Why not?

7 A. 'Cause I was not sick. I didn't see how I  
8 could submit evidence to that effect to an insurance  
9 company.

10 Q. Thank you.

11 Now, taking a look at paragraph 2. What does  
12 that say?

13 A. "You must participate in a  
14 fitness-for-duty evaluation by an  
15 independent physician," parentheses, quote,  
16 "'IP,'" end quote, "selected by the  
17 university. You must provide all medical  
18 information the IP requests. (The IP will  
19 not release your confidential medical  
20 information to the university)."

21 That's in parentheses.

22 Q. Now, at any time prior to this direction to go  
23 to a fitness-for-duty evaluation by an independent  
24 physician selected by the university, did the university  
25 ever offer to negotiate with you the identity of any

1 evaluating physician?

2 A. No.

3 Q. Take a look at -- this also directs that you  
4 must provide all medical information the IP requests.

5 Did that concern you?

6 A. Yes.

7 Q. Why did that concern you?

8 A. It seemed like an invasion of privacy that I  
9 would have to produce all medical records with no  
10 limitations whatsoever. That might include my general  
11 practitioner, any psychiatrist or therapist that I might  
12 have seen in the entirety of my life.

13 Q. At the time they were making this demand, were  
14 you actually seeing a psychiatrist?

15 A. Yes.

16 Q. And who were you seeing?

17 A. Dr. Lenore Terr.

18 Q. How long have you been seeing Dr. Terr?

19 A. I had regular therapy with her from early in  
20 2005 up to this day, 2008. I had a therapist prior to  
21 her, with a interim of one year where I didn't have a  
22 therapist. But I had seen her before, I guess is what  
23 I'm trying to say. There was a period with my prior  
24 doctor where I had treatment -- therapy from her and  
25 also treatment from this other doctor. And that would

1 have been in 2004 -- or early -- late 2003, early 2004.

2 Q. Did you understand that the information in your  
3 discussions with Dr. Terr were confidential?

4 A. Yes.

5 Q. Did they involve -- were you candid with Dr.  
6 Terr when you talked to her?

7 A. Absolutely candid with her.

8 Q. And did those discuss personal issues in your  
9 life that were private?

10 A. Yes.

11 Q. Did you want that information disclosed to the  
12 doctor the university had selected?

13 A. No.

14 Q. Why not?

15 A. It was a violation of my privacy, all those  
16 personal details that we discussed during therapy. I  
17 mean, that covers the entirety of my life, from when I  
18 was five through the time that I had my first  
19 consultation with her, and then further on, issues with  
20 relationships, issues with family. Private information.

21 Q. Thank you.

22 I would like you to now take a look at  
23 paragraph 4. Can you read that to the jury.

24 A. "Your attending the appointment, as  
25 well as any follow-up meetings, and fully



1 cooperating with Dr. Reynolds in a timely  
2 manner is a condition of your continued  
3 employment."

4 Q. And does this letter list -- direct you to go  
5 to any particular -- well, does this letter actually  
6 provide an appointment time for you?

7 A. Yes.

8 Q. Taking a look at the second page, paragraph --  
9 well, we'll get to that in a minute. But let's just  
10 take a look at paragraph number 5.

11 Can you read that to the university -- to the  
12 jury.

13 A. "The IP will provide the university a  
14 report setting forth his opinion as to your  
15 condition and fitness to perform your  
16 faculty functions in a manner that is safe  
17 and healthy for you, your faculty colleagues  
18 and others in the university community."

19 Q. Now, at any time during the spring 2008, had  
20 anyone told you that you were unable to perform your  
21 faculty functions at the university?

22 A. No.

23 Q. Had you performed, to your knowledge, every  
24 faculty duty that was required of you?

25 A. Yes.

1 Q. You taught all your courses?

2 A. Yes.

3 Q. You'd gotten and ultimately received the  
4 student evaluations that we've already testified --  
5 you've already testified about?

6 A. Yes.

7 Q. Did you do math club?

8 A. Yes.

9 Q. Faculty teas?

10 A. Yes.

11 Q. Attended faculty meetings?

12 A. Yes.

13 Q. Did anyone tell you you shouldn't be doing any  
14 of those things?

15 A. No.

16 Q. Did anyone tell you that you'd been doing any  
17 of those things improperly?

18 A. No.

19 Q. Did anyone tell you that you hadn't been able  
20 to perform those faculty functions fully and completely?

21 A. No.

22 Q. Did anyone tell you that you had not -- you had  
23 not been performing your faculty functions in a manner  
24 that is safe and healthy for your colleagues or others  
25 in the university community?

1 A. No.

2 Q. Thank you.

3 Now, I'd like to -- if you would go to the next  
4 page of Exhibit 34. I'd like to direct your attention  
5 to the paragraph on the top of the page, first  
6 paragraph, numbered 6.

7 A. Okay.

8 Q. Does that give the date and time that the  
9 university is instructing you to see Dr. Reynolds?

10 A. Yes.

11 Q. First of all, what -- taking -- can you read to  
12 the jury what paragraph 6 says.

13 A. "The IP is Dr. Norman Reynolds. Dr.  
14 Reynolds is a licensed medical doctor  
15 experienced in performing employment-related  
16 fitness-for-duty evaluations. You will not  
17 be Dr. Reynolds' patient and he will not  
18 provide you with medical treatment. To my  
19 knowledge, Dr. Reynolds has no prior  
20 association with the university  
21 administration. Your initial appointment  
22 with Dr. Reynolds is 8:30 to 5:30 on  
23 July 1<sup>st</sup>, 2008 at his office at 1730  
24 Hamilton Avenue between Leigh and Meridian,  
25 San Jose, California," and some more

1           specifics as to the location.

2           Q.    Where did you live?

3           A.    In San Francisco.

4           Q.    How long was it going to take you to drive to  
5 San Jose for this medical evaluation?

6           A.    Hour and a half at rush hour.

7           Q.    And how much to come back?

8           A.    Hour and a half at rush hour.

9           Q.    So that means you're going to be going to this  
10 evaluating -- so that -- how many hours a day on your  
11 first day does that mean you were going to be having to  
12 devote to this medical -- this mental evaluation?

13          A.    Three hours in transit.  8:30 to 5:30, so --  
14 four plus five -- nine hours of evaluation.  So that  
15 means 12 hours total for the initial appointment.

16          Q.    I'd like to direct your attention to paragraph  
17 8 of this letter.

18          A.    Yes.

19          Q.    Could you read that to the jury.

20          A.    "While you are on leave, you may not  
21 come on campus and you must refrain from any  
22 of the above-described behaviors or any  
23 other behaviors that would likely cause  
24 anyone to have safety concerns.  If you have  
25 a special need to be on campus or need

1 assistance in temporarily relocating  
2 anything from your office to your home,  
3 please call me or Maye-Lynn Gon-Soneda in  
4 advance. We can also be reached at,"  
5 telephone numbers following, "respectively."

6 Q. Now, following your meeting on June 18<sup>th</sup>, had  
7 anyone instructed you not to come on campus?

8 A. No.

9 Q. During the entire spring semester of 2008 when  
10 these events were allegedly transpiring, had anyone  
11 instructed you not to come on campus?

12 A. No.

13 Q. Had anyone told you to stay away from campus  
14 because you were threatening to anybody?

15 A. No.

16 Q. The -- thank you.

17 Now, in terms of staying -- being banned from  
18 campus --

19 A. Yes.

20 Q. -- from the date you received this letter to  
21 the present date, are you -- have you been banned from  
22 campus?

23 A. Yes.

24 Q. Have you ever gone onto the campus at any time  
25 during that period?

1 A. No.

2 Q. Why not?

3 A. They've instructed me in no uncertain terms not  
4 to come on campus.

5 Q. And did you honor that instruction?

6 A. Yes.

7 Q. Why did you honor that instruction?

8 A. Well, they instructed me not to. I don't want  
9 to violate that instruction.

10 Q. Did you think it was a fair instruction?

11 A. No.

12 Q. But you honored it anyway?

13 A. Yes.

14 Q. Okay. Thank you.

15 Now, did you on occasion, during this period of  
16 time, try to get mail and other things from your office?

17 A. Yes.

18 Q. How did you do that?

19 A. I was in contact with two people in the  
20 department by telephone and email, Dr. Wolf and Ms. Liu,  
21 both of whom I've always been friendly with. Dr. Wolf  
22 in particular. We socialized off campus prior to my  
23 discharge. We spent a lot of time. We had  
24 conversations around the office when we were working  
25 late, and then on the weekends.

1           And a couple -- maybe two times in the fall  
2 while I was banned and there were -- there was  
3 correspondence exchanged between myself and the  
4 university during that period, I -- actually, Ms. Liu  
5 was concerned that mail was piling up for me. And she  
6 offered to bring it out to me.

7           I told her I wasn't comfortable coming into the  
8 building. She told me -- she didn't mention anything  
9 that there was an announcement to the department that I  
10 was not allowed on campus. But I just gave her the idea  
11 that -- why I didn't want to come on campus; I conveyed  
12 that to her. And she came out to meet me on the corner  
13 of Golden Gate and Chabot, opposite Harney Science, to  
14 give me my mail.

15           Dr. Wolf came out to talk to me. He wanted to  
16 see me. He also indicated that there had been no  
17 announcement that I was not allowed on campus, but --  
18 and I didn't tell him directly my reasons why I didn't  
19 want to come into the building -- but he wanted to meet  
20 with me and chat.

21           And so he came out. And we spoke for 15  
22 minutes each time, just talking about personal things.  
23 I didn't give him any details as to why I wasn't working  
24 that semester, other than there was some issue with  
25 human resources and general counsel.

1 Q. Thank you.

2 I'd like you, if you would now -- oh, one --  
3 one other item before we press on.

4 Both the June 18<sup>th</sup> and the June 24<sup>th</sup> letter  
5 remark on your laughing. Do you recall that?

6 A. Yes.

7 Q. Did you laugh?

8 A. Yes.

9 Q. Did you laugh in your office at times?

10 A. Yes.

11 Q. Why?

12 A. I -- I had bought -- purchased an iPod, I  
13 believe around Christmastime. And I was listening to  
14 music, and I downloaded comedy on my iPod. And so that  
15 semester, from time to time when I was relaxing, I would  
16 listen to comedy. I know I had Chris Rock, a few other  
17 well-known comedians. It was a new toy and, you know, I  
18 was taking advantage of it. But when I did listen to  
19 comedy, I had the door closed.

20 Q. Thank you.

21 Now, if you'd please take a look at Exhibit 35.

22 (Plaintiff's Exhibit 35  
23 marked for identification.)

24 MR. KATZENBACH: Q. And can you identify  
25 Exhibit 35.



1 A. Yes.

2 Q. What is it?

3 A. This is a letter from your office dated  
4 June 26, 2008.

5 Q. And taking a look at the copy of Exhibit 35 in  
6 your possession, does that have a date-stamp on it?

7 A. It appears to have been received on  
8 June 30<sup>th</sup>, 2008.

9 Q. By what entity?

10 A. Office of the Vice President, Academic Affairs,  
11 USF.

12 Q. And who is this letter addressed to?

13 A. Ms. Peugh-Wade.

14 Q. And what does it concern?

15 A. The issues arising in the prior week -- weeks.

16 MR. KATZENBACH: All right. I'd like to move  
17 Exhibit 35 into evidence.

18 THE COURT: Any objection?

19 MR. VARTAIN: No objection to authenticity.  
20 Once again, like the other exhibits, no objection unless  
21 it's offered to establish the truth of what Mr.  
22 Katzenbach is saying. Otherwise --

23 THE COURT: It's received, then, for limited  
24 purposes, which we'll identify to the jury.

25 MR. VARTAIN: Thank you, Your Honor.

1 (Plaintiff's Exhibit 35  
2 received in evidence.)

3 MR. KATZENBACH: Q. Taking a look at Exhibit  
4 35, does that address -- strike that.

5 THE COURT: Ladies and gentlemen, remember the  
6 admonition. Do not form or express any opinion on this  
7 case until it's finally submitted to you for your  
8 decision. Do not discuss among yourselves or others  
9 until that time. Please be back in your places at 10:10  
10 according to the courtroom clock.

11 (Recess taken.)

12 THE COURT: Jurors and alternates are all  
13 present. Counsel for both sides are present. Dr. Kao  
14 is on the stand.

15 Mr. Katzenbach, you may continue your inquiry.

16 MR. KATZENBACH: Thank you, Your Honor.

17 Q. Now, Dr. Kao, we were looking at Exhibit 35.  
18 You have that in front of you?

19 A. Yes.

20 Q. And I'd like you, if you could, to turn to the  
21 next to last page of Exhibit 35.

22 A. Yes.

23 Q. Could you read to the jury the last paragraph  
24 on that page.

25 A. "Indeed, you have been inconsistent" --

1 Q. No, no, I'm sorry. I'm looking at the page  
2 numbered 5 at the top.

3 A. Oh, I see. I'm sorry. The last paragraph?  
4 Pardon me.

5 Q. Yes.

6 A. "The university's actions appear to be  
7 in retaliation for Professor Kao's internal  
8 grievances that have alleged, among other  
9 things, discrimination and violation of  
10 university policies. Indeed, Professor Kao  
11 recently filed an informal grievance  
12 regarding the department's recent hiring  
13 process and had informed your office that he  
14 would be making this grievance a formal  
15 one."

16 Q. Thank you.

17 Now, would you please take a look at an exhibit  
18 that's been marked as Exhibit 36.

19 A. Yes.

20 (Plaintiff's Exhibit 36  
21 marked for identification.)

22 MR. KATZENBACH: Q. Tell us what -- tell the  
23 jury what that is.

24 A. This is a letter from Ms. Peugh-Wade dated  
25 June 30<sup>th</sup>, 2008.

1 MR. KATZENBACH: Thank you.

2 Your Honor, this letter's been previously  
3 admitted, I believe, as Exhibit 219. Just for  
4 continuity, I would like to have it admitted as Exhibit  
5 36 as well.

6 THE COURT: Any problem with that, Mr. Vartain?

7 MR. VARTAIN: No problem, Your Honor.

8 THE COURT: Then the answer is yes.

9 MR. KATZENBACH: Thank you, Your Honor.

10 (Plaintiff's Exhibit 36  
11 received in evidence.)

12 MR. KATZENBACH: Q. Taking a look at Exhibit  
13 36, does that repeat the demand to go to the mental  
14 examination?

15 A. Yes.

16 Q. Now, did you go to the mental examination?

17 A. No.

18 Q. Why not?

19 A. There are a variety of reasons.

20 Q. Can you please tell them to the jury.

21 A. Well, most importantly, the descriptions  
22 couldn't be true. It's impossible, as expressed in the  
23 original letter, albeit it changed from one  
24 correspondence to another.

25 But if I just look at the June 18<sup>th</sup> letter,

1 there's a reference to a time frame of several weeks.  
2 Commencement was May 20<sup>th</sup>. I turned in my grades  
3 shortly thereafter. So we're looking at one month since  
4 the end of the semester.

5 We're responsible for nine months of teaching.  
6 That's the way that the handbook is written. After  
7 that, we delivered our responsibilities to the  
8 university for the academic year.

9 During the summer, we're off duty. We don't  
10 have to be on campus. I was, because Dr. Wolf and I  
11 were working on a project for the business school and  
12 the mathematics department.

13 So when I read "several weeks," I'm thinking it  
14 can't be more than a month. So let's look at that time  
15 frame. Was there any kind of disagreement with anybody,  
16 was there any kind of debate with anybody, did I make  
17 any presentation to students? And there were none of  
18 these. The only people I had talked to in the past  
19 several weeks, as of June 18<sup>th</sup>, were my friends, would  
20 be -- Dr. Wolf, Ms. Liu.

21 Dr. Yeung was around the department, but I  
22 hadn't had any conversations that I could recall.  
23 Certainly no disagreements.

24 So it's simply impossible for that time period,  
25 and impossible, frankly, for the prior semester as well,

1 because no one told me "Stop doing this. Are you  
2 feeling -- do you feel well," in reference to facial  
3 expressions or that kind of thing.

4 No one told me "Please lower your voice," for  
5 instance. I couldn't recall any occasion of yelling, or  
6 anything of that nature.

7 The only -- I racked my mind as to any kind of  
8 bumping incident. I could recall one instance, which I  
9 testified to yesterday, where Dr. Cruse bumped into me  
10 in a crowded hallway. He apologized first. I also said  
11 "I'm sorry." So that was the only thing I could  
12 conceive of in that regard.

13 So the descriptions were impossible. And the  
14 letter makes it sound as if human resources had done an  
15 investigation and come to this determination. And this  
16 determination is being sent to the doctor. So, I mean,  
17 if I go see that doctor and then I say that "Well,  
18 these -- this is impossible," how's that going to sound  
19 to him?

20 I don't have any specifics as to these  
21 incidents, so I can't bring in evidence. For instance,  
22 if something was alleged to have happened on a certain  
23 date, I might bring evidence that I wasn't there on that  
24 date or I was in class on that date and therefore I  
25 could not have been meeting with someone else at that

1 particular time.

2           There would be no way to convince the doctor or  
3 any other -- well, convince Dr. Reynolds that that  
4 hadn't happened. It's an impossible situation.

5           So that was the most significant, I think,  
6 reason.

7           Q.    Can you -- were there other things that you  
8 were concerned about?

9           A.    Yes.

10          Q.    What were those?

11          A.    Well, I was concerned about the privacy issue.  
12 I would -- I would have to disclose to this doctor  
13 everything from any therapist that I had seen in my  
14 entire life, to the extent I allowed access to it. That  
15 seemed a violation of privacy.

16                This person is evaluating me and is being paid  
17 by the university. That individual might misinterpret  
18 something or misunderstand something. It seemed  
19 subject -- easily subject to manipulation.

20                That was another reason.

21          Q.    Now --

22          A.    Shall I go on?

23          Q.    Yes.

24          A.    It was very disturbing that there were  
25 inconsistencies, both in terms of the procedures they

1 seemed to be using and in terms of the information I was  
2 being given.

3 First of all, it didn't seem likely that there  
4 was no complaint, given the description is quite serious  
5 and there's a issue of safety being raised. How can  
6 that not arise from a complaint? And yet the letter  
7 says "This does not arise from a complaint."

8 I understood the university's policy with  
9 respect to harassment. The descriptions are consistent  
10 with a form of harassment.

11 And I know the policies identify an  
12 investigation procedure. I would expect, when a  
13 complaint is being made within a relatively short period  
14 of time, I'm supposed to be informed of the complaint  
15 and specifics thereof so I can make a meaningful  
16 response to it. That hadn't happened.

17 The letter says "This is not a disciplinary  
18 action." It certainly looks like a disciplinary action  
19 to me.

20 The allegations were added from the time  
21 June 18<sup>th</sup> to June 24<sup>th</sup>, two very serious  
22 allegations. Introducing "clenched fists" suggests a  
23 threatening gesture. "Inappropriately closely" suggests  
24 threatening behavior. And that wasn't in the  
25 June 18<sup>th</sup> document.



1           In terms of procedure, as of June 18<sup>th</sup>, I was  
2 not banned from campus. And in fact, I had to work,  
3 because I'm involved in this project. At that  
4 particular moment, we had to purchase, on behalf of the  
5 university -- that is to say, myself, Dr. Wolf and  
6 Dr. Huxley -- we had to put in, in a timely fashion, a  
7 textbook order.

8           The business school required us to have a  
9 custom textbook, which was a little complicated. They  
10 wanted chapters from one book from one author and  
11 chapters from another book and another author bound  
12 together. And so that involved creating a contract with  
13 a publisher.

14           I had been sending emails back and forth with  
15 general counsel about the proper procedure for approving  
16 that contract. I had emails back and forth between  
17 myself and Dr. Pacheco, who was the chair. And this had  
18 to be completed shortly. So I was in the office from  
19 June 18<sup>th</sup> to June 24<sup>th</sup>. And then all of a sudden I  
20 was banned from campus. And that didn't seem  
21 consistent, so ...

22           And there's nothing in the official policy  
23 involving a mental exam. So they seemed to be creating  
24 a set of procedures just for me. And that was of  
25 concern.

1 Q. Thank you.

2 I'd like you to take -- I'd like you, if you  
3 would, to briefly just look at Exhibit 30, if you would.

4 A. Yes.

5 Q. And that's the June 18<sup>th</sup> letter?

6 A. Yes.

7 Q. And when you were testifying about the  
8 impossibility of something happening during -- during  
9 the past few weeks, was this -- the opening paragraph of  
10 that letter what you were thinking of?

11 A. Yes.

12 Q. Can you read that to the jury.

13 A. "This letter is to inform you that the  
14 subject of our meeting today is a concern  
15 about your health, which is based on your  
16 behavior and actions during the past few  
17 weeks."

18 Q. Thank you.

19 Now, after you didn't go to see Dr. Reynolds,  
20 did you receive another -- some more correspondence from  
21 the university?

22 A. Yes.

23 Q. Could you please take a look at what's been  
24 marked as Exhibit 37.

25 A. Yes.

1 (Plaintiff's Exhibit 37

2 marked for identification.)

3 MR. KATZENBACH: Q. Can you identify  
4 Exhibit -- can you describe Exhibit 37 --

5 A. This is a letter --

6 Q. -- for the jury. Yes?

7 A. -- dated July 8, 2008. This is from Dean  
8 Turpin to me.

9 Q. And does it concern the demand for a mental  
10 examination?

11 A. Yes.

12 MR. KATZENBACH: I'd like to move Exhibit 37  
13 into evidence.

14 THE COURT: Any objection?

15 MR. VARTAIN: No objection.

16 THE COURT: Received.

17 MR. KATZENBACH: Thank you, Your Honor.

18 (Plaintiff's Exhibit 37  
19 received in evidence.)

20 MR. KATZENBACH: Q. Taking a look at Exhibit  
21 37, does that again demand that you go to see Dr.  
22 Reynolds?

23 A. Yes.

24 Q. And would you please take a look at the second  
25 paragraph of Exhibit 37.

1 A. Yes.

2 Q. And can you read that paragraph to the jury.

3 A. "I have been notified that you  
4 willfully failed to attend the IME  
5 appointment, even after Martha Peugh-Wade  
6 reiterated this instruction to you. You are  
7 thus in noncompliance with supervisory  
8 instructions. And under university rules,  
9 your failure to follow the supervisory  
10 instructions constitutes an act of  
11 insubordination."

12 Q. Would you please, then -- does the letter  
13 continue?

14 A. Yes.

15 Q. What does she tell you?

16 A. "I am hereby stating for the final time  
17 the university's instructions as contained  
18 in the attached letter of June 24<sup>th</sup>, 2008.  
19 You should consider all of the instructions  
20 therein as coming from me as your  
21 supervisor. In addition, you are now  
22 instructed to immediately contact the office  
23 of Dr. Reynolds and schedule a new  
24 appointment with him so as to begin the  
25 process right away. The reason for the

1 urgency is so that the university can make  
2 teaching, research and service assignment  
3 decisions as soon as possible and in an  
4 orderly manner before fall semester begins  
5 on August 28<sup>th</sup>, 2008."

6 Q. And then what does the next paragraph say?

7 A. "If you immediately begin the process  
8 in good faith but the process is not  
9 completed when classes resume, through no  
10 fault of your own, you will be on a leave of  
11 absence when your fall teaching duties would  
12 otherwise be scheduled to commence. That  
13 would be sick pay and status, per section  
14 26.3.4 of the USFFA agreement."

15 Q. Does the letter further continue as to the  
16 consequence?

17 A. Yes.

18 Q. What does it say?

19 A. "If, however, you continue to fail to  
20 carry out the instructions, we will need to  
21 reassign your classes for fall semester, and  
22 when classes begin in August, you will not  
23 be placed on sick pay status, and instead,  
24 the university will commence proceedings  
25 under USFFA agreement article 40," quote,

1            "'discipline and discharge,'" end quote.

2            Q.    Thank you.

3                    Now, once again, I ask you, to get sick pay,  
4 what would you have had to do?

5            A.    I would have had to submit an application to  
6 USF's insurance company.

7            Q.    And what would that application have to state?

8            A.    I would have to document that I was sick.

9            Q.    Were you sick?

10          A.    No.

11          Q.    Now, were you immediately fired?

12          A.    No.

13          Q.    When did -- what was the next thing that you  
14 recall happening concerning your employment at  
15 University of San Francisco?

16          A.    I received correspondences in the month of  
17 August.

18          Q.    After -- and at some point, did you have a  
19 meeting with a David Philpott?

20          A.    There -- one of those correspondences made a  
21 request for a meeting with myself, representatives of  
22 me, which would be from your office, a Mr. David  
23 Philpott, who is -- his title is director of labor  
24 relations, and Dr. Neaman, who was president of the  
25 faculty union.

1 I agreed to attend the meeting or arrange a  
2 meeting -- attend whatever meeting they wanted arranged.

3 Q. All right. And did you do so?

4 A. Yes.

5 Q. And do you recall roughly when that -- do you  
6 recall approximately when that meeting was?

7 A. October 10<sup>th</sup>.

8 Q. And at that meeting, did you attempt to present  
9 information to Mr. Philpott concerning the situation?

10 A. Yes.

11 Q. Could you take a look at Exhibit 42.

12 (Plaintiff's Exhibit 42  
13 marked for identification.)

14 MR. KATZENBACH: Q. I'd like to -- can you  
15 tell -- can you -- can you tell the jury what  
16 information you gave to Dr. -- to Mr. Philpott at this  
17 meeting.

18 A. This is a list --

19 Q. Well, without describing what Exhibit 42 is,  
20 just begin with just telling -- what do you -- what do  
21 you recall giving him?

22 A. Let's see. Starting at the top, then:

23 "Binder, report and addendum submitted  
24 through assistant vice president for human  
25 resources."

1 Q. And what was that document?

2 A. That was the formal complaint I submitted in  
3 2007, which was inclusive of the prior informal  
4 complaint.

5 Q. All right. What was the purpose of giving him  
6 that?

7 A. This was evidence that -- that I had filed a  
8 complaint, and it was possible that the complaints filed  
9 against me were retaliatory -- were retaliatory in  
10 motive.

11 Q. Did you provide him -- during the course of  
12 this meeting, did you provide Mr. Philpott other  
13 documents?

14 A. Yes.

15 Q. What did you provide him?

16 A. Let's see. A letter from Ms. Peugh-Wade from  
17 August 2008.

18 Q. At some point in -- let me just -- let me do  
19 this: At some point, did you see -- did the university  
20 produce, in discovery, a list of documents that you  
21 provided to Mr. Philpott?

22 A. Yes.

23 Q. Taking a look at what has been marked as  
24 Exhibit 42 and -- taking a look at Exhibit 42 --

25 A. Yes.



1 Q. -- is that, as far as you can tell, an accurate  
2 list of the document you provided?

3 A. Yes.

4 Q. In other words, you provided all the documents  
5 that are on that list?

6 A. Yes.

7 MR. KATZENBACH: All right. Your Honor, I'd  
8 like to move Exhibit 42 into evidence.

9 THE COURT: Any objection?

10 MR. VARTAIN: None, Your Honor.

11 THE COURT: It's received.

12 MR. KATZENBACH: Thank you.

13 (Plaintiff's Exhibit 42  
14 received in evidence.)

15 MR. KATZENBACH: Q. Taking a look in  
16 particular at -- I'd like to direct your attention in  
17 particular, Dr. Kao, on Exhibit 42, to a category -- to  
18 a couple of categories; in particular, the category  
19 called "Invitations To Social Events."

20 A. Yes.

21 Q. Can you describe to the jury what that category  
22 contains.

23 A. Those are invitations to parties that took  
24 place within the mathematics department from May, which  
25 was late in the semester, up through the meeting in

1 October. The meeting, with my memory refreshed, was  
2 October 28<sup>th</sup>.

3 Q. Okay. Let me just ask you about a few of  
4 those. Did you -- first of all, did you -- you provided  
5 these documents to Mr. Philpott?

6 A. Yes.

7 Q. What was the purpose of providing those  
8 documents to Mr. Philpott?

9 A. Well, the allegations included that people were  
10 frightened of me. At that point in time, I did not know  
11 who those people were, whether they were administrators  
12 or people in my department or people who were in the  
13 hallway around my office or others.

14 However, I'd been invited to the homes of  
15 several faculty members from late in the semester up to  
16 the time of the meeting. So I wanted to provide  
17 evidence that people in my department were not  
18 frightened of me.

19 Q. Okay. I'd like to ask you a few questions  
20 about specific -- specific emails. You'll note the last  
21 one in the list is dated 5/7/08, "Tristan Needham evite  
22 for 5/9/09 Jim Finch retirement party."

23 Do you see that?

24 A. Yes.

25 Q. What was the Jim Finch retirement party?

1           A.     That academic year, Dr. Finch was retiring.  
2     And we ordinarily have some kind of event at which we  
3     honor faculty members' retirement.  Sometimes it's in a  
4     restaurant; sometimes it's in a faculty member's home.

5           Dr. Needham sent me an invitation in late  
6     May -- I mean late June -- April -- late April of 2008  
7     inviting me to his house for the retirement party that  
8     the department decided to organize for Dr. Finch that  
9     year.

10          Q.     And did you go to that party?

11          A.     Yes.

12          Q.     Okay.  After that party, did anyone come to you  
13     and say that there was any problem concerning your  
14     behaviors at that party?

15          A.     No.

16          Q.     Did anyone come to you and say that anyone at  
17     that party had been frightened about anything you'd  
18     done?

19          A.     No.

20          Q.     Did anyone come to you after that party and say  
21     that anyone was concerned about your health because of  
22     something that happened at that party?

23          A.     No.

24          Q.     Okay.  Now, I'd like you also, if you could --  
25     while keeping Exhibit 42 in front of you, I'd also like

1 you to take a look, if you would, at Exhibit 110.

2 A. 110?

3 Q. 110.

4 (Plaintiff's Exhibit 110

5 marked for identification.)

6 MR. KATZENBACH: Q. Do you have Exhibit 110 in  
7 front of you?

8 A. Yes.

9 Q. It's a multipage exhibit. Can you describe  
10 what Exhibit 110 is.

11 A. These are email party invitations involving  
12 members of the department.

13 Q. And are these the party invitations that you  
14 provided to Mr. Philpott at your meeting?

15 A. They include all the invitations I provided Dr.  
16 Philpott -- Mr. Philpott. There's some other party  
17 invitations. So there are parties that I was invited  
18 to, including some that I attended, that I didn't  
19 include in this original --

20 Q. And are all --

21 A. -- list.

22 Q. Yes. And the invitations in Exhibit 110 span  
23 what period of time?

24 A. Oh, wait, I'm sorry. Let's see. Inclusive of  
25 later in that same semester. So we're talking about the

1 fall, after the meeting with Mr. Philpott and  
2 Dr. Neaman, up through December of 2008.

3 MR. KATZENBACH: I'd like to move Exhibit 110  
4 into evidence.

5 THE COURT: Any objection?

6 MR. VARTAIN: No objection.

7 THE COURT: It's received.

8 MR. KATZENBACH: Thank you.

9 (Plaintiff's Exhibit 110  
10 received in evidence.)

11 MR. KATZENBACH: Q. So would it be accurate  
12 to -- strike that.

13 Now, you also -- going back to Exhibit 42, you  
14 also provided other information to Mr. Philpott,  
15 correct?

16 A. Yes.

17 Q. Taking a look at the next category. This is a  
18 category labeled "Office Hours" and describes three  
19 emails that you provided to Mr. Philpott. What was  
20 that -- what were the issues concerned there [sic]?

21 A. Well, the issue was that I was frightening  
22 people. And it was a fact that no one raised any kind  
23 of safety issue with me during the spring semester,  
24 notwithstanding that I'm meeting with students during my  
25 office hours and, particularly around final exam

1 periods, in the evenings and on weekends.

2 And so I provided some email correspondences  
3 with my students setting up makeup exam times, extra  
4 time for office hours, like special office hours if a  
5 student needed time on the weekend to help prepare for  
6 the final, ask questions about the final exam.

7 And so these correspondences are responsive to  
8 that -- that issue.

9 Q. All right. And now you look -- take a look at  
10 the next category, which is "SOBAM first meeting."

11 A. Yes.

12 Q. What is that category about?

13 A. Well, I mean, again, the issue was that I was  
14 frightening people. And those are fairly -- those are  
15 serious allegations. I wanted to provide evidence that  
16 the department had vested in me the authority to  
17 negotiate and meet with representatives of the business  
18 school throughout that semester, up to June of 2008, and  
19 that I was conducting the administrative  
20 responsibilities with no statement of concern from the  
21 department.

22 Q. Just for the record, S-O-B-A-M, what does SOBAM  
23 stand for?

24 A. School of Business and Management.

25 Q. Thank you.

1           And during the entire quarter where you were --  
2           entire semester where you were engaged in this activity,  
3           did anyone question anything about your mental health  
4           concerning these negotiations with the business school  
5           in developing a curriculum and a textbook for that  
6           business school?

7           A.    No.   And Dr. Wolf and I reported to the  
8           department during department meetings.   So everybody --  
9           all the full-time faculty were aware that we were  
10          conducting this administrative duty on behalf of them.

11          Q.    And the next category concerns a number of  
12          emails under the heading "Search Meeting."   Can you  
13          describe what those emails -- why you were providing  
14          those emails to Mr. Philpott.

15          A.    Well, it -- it seemed to be that the complaints  
16          against me were in response or were retaliation for my  
17          informal complaint.   And so I wanted to provide some  
18          information in relation to the date at which I had  
19          filed, and the nature of that formal complaint for  
20          spring 2008.   And there's some other items under that  
21          heading.

22          Q.    Taking a look at the email exchange dated  
23          1/12/08, referring to the "USA boxing championship."  
24          What was that -- what was the purpose of providing that?

25          A.    Well, I think -- I think the date -- I mean,

1 this is -- this list is -- is -- appears to be written  
2 by Mr. Philpott.

3 Q. Right.

4 A. And the date is incorrect, I believe. Oh,  
5 wait, wait. I'm sorry. No, I'm sorry. I'm thinking of  
6 something else.

7 No, no, this is a invitation from Dr. Lehmann.  
8 Dr. Lehmann, who is an emeritus professor currently at  
9 USF, I was friends with him. And his wife, Millianne  
10 Lehmann, she was a faculty member in mathematics up  
11 until 2004. They both retired in 2004. But Dr. Lehmann  
12 continues to teach as emeritus.

13 But Dr. Lehmann and I were friendly, and we  
14 would attend sporting events around -- in the Bay Area.  
15 In particular, we went to boxing meets. Dr. Lehmann is  
16 a big boxing fan. We went to the Golden Gate -- Golden  
17 Gloves tournaments almost every year.

18 So this is a invitation from him regarding a  
19 boxing tournament at USF that we attended --

20 Q. And the next --

21 A. -- in the spring, the prior spring.

22 Q. And what -- the last one in this category is an  
23 email regarding "SAMS social event."

24 A. Yes.

25 Q. What's that about?



1           A.     SAMS was our official name for the math club,  
2     Student Association For The Mathematical Sciences.  And  
3     so I'm indicating that I was the math club advisor and  
4     that I'm supervising groups of students at -- late in  
5     the afternoon by myself during the spring, and no one  
6     raised any concerns about that responsibility, that duty  
7     that I fulfilled for the department.

8           Q.     The next category refers to "department  
9     meetings."  What was -- and can you tell the jury what  
10    was the purpose of providing this information to Mr.  
11    Philpott?

12          A.     I provided the minutes of the meetings that  
13    were held in spring of 2008.  The minutes are fairly  
14    detailed, so the minutes reflect that I'm participating  
15    in the department decision-making process fully; I'm  
16    making proposals to the department; people -- the  
17    department are voting on my proposals; for the most  
18    part, my proposals are being approved.

19                 And no concerns were raised as to the  
20    appropriateness of my conducting that professional  
21    obligation on behalf of the university.

22          Q.     And finally, we have a category labeled  
23    "Teaching Evaluations."  What did you provide Mr.  
24    Philpott in that respect?

25          A.     There's ordinarily a delay from the end of the

1 semester when the students fill in the teaching  
2 evaluation forms and the time that we receive them.

3 This is because the forms are -- well, the  
4 teachers aren't allowed to handle the forms, you know,  
5 to avoid any kind of manipulation of the process.

6 So the students place the forms in the  
7 envelope, and a student has to seal it. The student and  
8 the teacher have to sign the seal. Then a designated  
9 student carries that to the Dean's Office. All the  
10 forms are processed by a company in North Carolina.

11 So sometime in the summer, the -- I gather,  
12 from this list, in July of 2008 -- those forms were  
13 transmitted to my mailbox. And Ms. Liu, at some point,  
14 later, carried it out to me and I received them.

15 And so I provided my teaching evaluations from  
16 the spring, which I testified to earlier, for the  
17 purpose of providing evidence that my students didn't  
18 have any issues with my teaching that semester.

19 Q. Now, after this meeting with Mr. Philpott, did  
20 the university's position on demanding you go to a  
21 mental examination change in any respect?

22 A. No.

23 Q. Did the university continue to demand that you  
24 go see Dr. Reynolds?

25 A. Yes.

1 Q. Now, I'd like if you would look at Exhibit 43.  
2 (Plaintiff's Exhibit 43  
3 marked for identification.)

4 MR. KATZENBACH: Q. Can you identify Exhibit  
5 43.

6 A. This is a letter from Mr. Philpott. It's dated  
7 January 23<sup>rd</sup>, 2009.

8 Q. Does it concern the university's demand that  
9 you go to see Dr. Reynolds?

10 A. Yes.

11 MR. KATZENBACH: Like to move Exhibit 43 into  
12 evidence, Your Honor.

13 THE COURT: Any objection?

14 MR. VARTAIN: The only objection is it's a  
15 companion to a prior exhibit which the counsel has not  
16 identified and shown to the jury. So it's like out of  
17 order.

18 There's two letters leading up to this,  
19 Counsel.

20 But I don't have any objection to authenticity  
21 or to its admission, as long as counsel agrees the other  
22 related letters will be admitted. I'll take it up with  
23 Mr. --

24 THE COURT: I think a party can control the  
25 order in which it wants the exhibits identified. So

1 it's received in evidence.

2 MR. KATZENBACH: Thank you, Your Honor.

3 (Plaintiff's Exhibit 43  
4 received in evidence.)

5 MR. KATZENBACH: Q. Taking a look at Exhibit  
6 43. Does that reiterate the university's demand that  
7 you see Dr. Reynolds?

8 A. Yes.

9 Q. Does it also address again your -- your  
10 alternative proposals?

11 MR. VARTAIN: Objection. Mischaracterization  
12 the document.

13 MR. KATZENBACH: You're right. I don't think  
14 it does, but let me just read it, because that's -- let  
15 the jury make its own decision.

16 MR. VARTAIN: I'm going to reiterate my  
17 objection that the letter cannot be understood without  
18 the previous letter to which it's responding.

19 MR. KATZENBACH: That's not an objection, Your  
20 Honor; that's an argument.

21 THE COURT: All right. You're not under oath.  
22 So if you want the letter read, you can have Dr. Kao  
23 read it.

24 MR. KATZENBACH: Yes.

25 Q. Dr. Kao, could you please read the paragraph in

1 Exhibit 43 that begins "Your attorney [sic] once again."

2 A. "Your attorney has once again suggested  
3 that the university resolve this matter by  
4 accepting a letter from you or allowing you  
5 to attended a meeting in which you would  
6 assure the university you intend no harm to  
7 anyone. While it is undeniably true that  
8 the university seeks such assurance and has  
9 sought such assurance since it first  
10 directed you to participate in the  
11 evaluation, in light of your behavior, you  
12 are not the one who can provide the level of  
13 assurances the university requires. The  
14 assurance the university requires must come  
15 from someone with the necessary expertise,  
16 i.e., an independent physician."

17 Q. After receiving Exhibit 43, did you go to see  
18 Dr. Reynolds?

19 A. No.

20 Q. And why not?

21 A. For the reasons that I testified to earlier.

22 Q. Had anything the union done -- I'm sorry.

23 Had anything the university had done addressed  
24 any of your -- in your mind, addressed any of your  
25 concerns that you identified?

1 A. No.

2 Q. Now, during the early part of 2009, did there  
3 come a time when you spoke on the telephone with  
4 Professor Yeung?

5 A. Yes.

6 Q. How did that come about? Sorry.  
7 When did that occur?

8 A. That would be in January of 2009, prior, I  
9 believe, to receipt of this letter.

10 Q. Okay. Now, what prompted -- can you tell us  
11 how that telephone call came about.

12 A. Well, I was, as I've testified to, in  
13 communication with Ms. Liu and Dr. Wolf. And there was  
14 a search under way that academic year, '08/'09, for a  
15 new position in mathematics. And I was curious as to  
16 how many applicants they had that year.

17 As I've testified to, Ms. Liu was in habit --  
18 or -- or -- habit, in prior searches, of writing the  
19 number of applicants week by week, as it changed, on the  
20 corner of the whiteboard in the math office.

21 So in January, I called her and asked her  
22 "Well, what was the result," because the search would  
23 have concluded -- I mean the search -- the number of --  
24 the applicant acceptance phase of the -- of the search  
25 would have wrapped up mid December. So by that time,

1 the final number would have come in.

2 And so I called Ms. Liu. Ms. Liu said -- told  
3 me that she wasn't comfortable giving me that  
4 information, so would she [sic] mind if she transferred  
5 the call to Dr. Yeung, who was the chair that year of  
6 the search committee.

7 So I said "Well, that's okay with me."

8 And I -- so they -- the telephone call was  
9 transferred to Dr. Yeung.

10 Q. Okay. And what did you say to Dr. Yeung, and  
11 what did he say to you?

12 A. I asked -- I told Dr. Yeung I was curious as to  
13 the number of applicants this year, and so, you know,  
14 "if you could let me know."

15 And he told me that that information is  
16 confidential; he wouldn't provide it -- he would not be  
17 able to provide me that information.

18 Q. Did you discuss this matter further with Dr.  
19 Yeung?

20 A. Yes.

21 Q. What did you say? What did he say?

22 A. I said I didn't understand why it was  
23 confidential this year because in the prior years, it's  
24 never been confidential, not even to students. I mean,  
25 Ms. Liu was writing the number of applicants on the

1 whiteboard.

2           Also, I told Dr. Yeung "Well, even though I'm  
3 not teaching, I'm still officially a department member.  
4 And we would have announcements reflected in the meeting  
5 from the search committee as to the number of  
6 applicants, and that would be to members of the  
7 department who weren't on the committee." So I didn't  
8 understand why it was confidential this year, when it  
9 had never been confidential before.

10           And Dr. Yeung repeated that, well, it was  
11 confidential information. If I wanted to, I could  
12 contact the new associate dean of sciences, Dr. Camperi,  
13 and ask him for the information.

14           And I said "Okay, that's fine with me."

15           That was the end of the telephone call.

16           Q. All right. Now, did you do anything in that --  
17 did you threaten Dr. Yeung during that telephone call?

18           A. No.

19           Q. Did you yell at him?

20           A. No.

21           Q. Did you do anything that, in your mind, could  
22 create any apprehension of danger to Dr. Yeung?

23           A. No.

24           Q. Did you intend to -- did you do anything that  
25 could cause Dr. Yeung to fear you?



1 A. No.

2 Q. Now, did you follow up and call Dr. Camperi?

3 A. No.

4 Q. Why not?

5 A. Well, I -- the reason I called, to begin with,  
6 Ms. Liu was I was curious. At that point, Dr. Yeung had  
7 already told me no, so I didn't see any point in  
8 pursuing it further.

9 Q. Thank you.

10 Now, were you then -- were you fired?

11 A. Yes, shortly thereafter.

12 Q. I'd like you to take a look, if you would, at  
13 Exhibit 44.

14 (Plaintiff's Exhibit 44  
15 marked for identification.)

16 MR. KATZENBACH: Q. Can you identify Exhibit  
17 44.

18 A. This is a letter from Dean Turpin. It's dated  
19 February 3<sup>rd</sup>, 2009.

20 Q. And does this concern your employment?

21 A. Yes.

22 MR. KATZENBACH: I'd like to admit Exhibit 44.

23 THE COURT: Any objection?

24 MR. VARTAIN: No objection.

25 THE COURT: Received.

1 (Plaintiff's Exhibit 44  
2 received in evidence.)

3 MR. KATZENBACH: Q. Can you read Exhibit 44 to  
4 the jury.

5 A. "I am writing to notify you that  
6 because you failed to carry out the  
7 work-related instruction of the university  
8 to cooperate with an independent medical  
9 evaluation, the university hereby gives you  
10 notice of termination of employment with the  
11 university, effective today."

12 Q. And what's the last paragraph on the letter  
13 say?

14 A. "The university regrets that your  
15 decision to refuse these instructions has  
16 caused this situation."

17 Q. Now, after your discharge, had you continued to  
18 be banned from campus?

19 A. Yes.

20 Q. Tell me about the USF campus. What -- other  
21 than teaching students, are there other things on the  
22 campus that are open to the public?

23 A. Yes.

24 Q. What sort of things?

25 A. Well, for instance, the buildings on campus are

1 of a historical nature for the city of San Francisco.  
2 They have a beautiful cathedral. Tourists come and  
3 visit the church. I brought -- when I've had visitors,  
4 I've always given them tours. And the church is one of  
5 the focal points of those. So that would be one  
6 example.

7           There's sort of a park area on the -- on campus  
8 where people who are residents of the neighborhood come  
9 in and they play sports or walk -- not walk -- have  
10 picnics.

11           There are basketball -- sporting events, like  
12 basketball games. Of course, those were broadcast on  
13 local television, but residents of San Francisco and Bay  
14 Area will come and purchase tickets and watch those  
15 games.

16           There are other sporting events, like soccer --  
17 football, that is, European football -- that is very  
18 popular. I know the women's soccer team's quite strong.  
19 And so residents, people in the Bay Area, come to watch  
20 those types of sporting events.

21           Also, like boxing -- for instance, the boxing  
22 tournament. The one that I'm referring to, I believe  
23 that invitation from Dr. Lehmann, was a special boxing  
24 event involving a sort of --

25           THE COURT: Ladies and gentlemen, remember the

1 admonition. Do not form or express any opinion on this  
2 case until it's finally submitted to you for your  
3 decision. Do not discuss among yourselves or with  
4 others until that time. Please be back in your places  
5 at 11:10 according to the courtroom clock.

6 (Recess taken.)

7 THE COURT: Jurors and alternates are all  
8 present. Counsel for both sides are present.  
9 Plaintiff, Dr. Kao, is on the stand.

10 Mr. Katzenbach, you may continue your inquiry.

11 MR. KATZENBACH: Thank you, Your Honor.

12 Q. Dr. Kao, has the ban from campus affected your  
13 willingness to apply for jobs?

14 MR. VARTAIN: Leading. Objection.

15 THE WITNESS: Mr. Katzenbach --

16 THE COURT: The court hasn't had time to rule  
17 on the objection.

18 MR. KATZENBACH: I think it's directing him to  
19 a subject area of inquiry.

20 THE COURT: Okay. I don't need to argue with  
21 you. The objection is overruled.

22 MR. KATZENBACH: Thank you.

23 THE WITNESS: Mr. Katzenbach, I have a  
24 question. May I finish completing my answer from the  
25 last --

1           MR. KATZENBACH: Oh, I'm sorry. If you're --  
2           yes, of course.

3           THE WITNESS: Yeah, so as I was expressing --  
4           as I was saying, the boxing event that was referred -- I  
5           testified to earlier was -- involved -- the Olympic team  
6           from the Philippines made a special visit to the United  
7           States. There was a exhibition event organized at USF.

8           These kind of things happen every year. It was  
9           important within the Filipino-American community. So  
10          there were a lot of community representatives that were  
11          interested in attending that kind of special event.

12          There's a gymnasium called the Koret Gymnasium.  
13          My understanding, when I was an employee there and also  
14          with -- in conversations with residents of San Francisco  
15          that aren't employees, the university has a special  
16          charter with the city whereby they're required to allow  
17          residents of San Francisco access to the gym at a fee.  
18          I have friends that use that gymnasium under that  
19          provision.

20          There are professional meetings that are held  
21          at USF, conferences, for instance, in mathematics and  
22          computer science. I assisted Dr. Pacheco sometime  
23          around 1997 in organizing such a conference. So  
24          scientists from around the Bay Area, prominent ones,  
25          attended that meeting.

1           There are sort of political -- important  
2 political events that take place there. You have  
3 ambassadors -- political leaders come and give  
4 presentations at USF. Those are attended by  
5 professionals within San Francisco and the Bay Area.

6           I know my sister attended one such event on  
7 behalf of the Asian Art Museum. I can't recall  
8 specifically the speaker, but she was asked by her  
9 department to attend.

10           There are special programs for students; for  
11 instance, mathletes-type programs, contests for high  
12 school students, sporting camps. So the university  
13 rents its space to a lot of -- to many individual --  
14 outside organizations when -- when those spaces aren't  
15 being used for classes; for instance, in the summertime.  
16 Those events are typically open for -- open to the  
17 public.

18           Also, there are special courses that are  
19 offered. So even if a person -- an individual is not a  
20 full-time student, you are invited to, at a fee, take  
21 these special courses.

22           And those are the kinds of things that are open  
23 to the public on campus.

24           MR. KATZENBACH: Q. Has this been -- affected  
25 your willingness to apply for jobs?

1 A. Yes.

2 Q. How?

3 A. Well, most importantly, particularly in  
4 teaching, I don't see how I cannot disclose that I'm  
5 banned from campus indefinitely to any prospective  
6 employer.

7 And I would have to disclose, I think -- I  
8 believe -- to be not dishonest, that -- the reason for  
9 the ban. For instance, were I to teach high school, I  
10 might be asked to chauffeur groups of students to one of  
11 these programs. And I would have to explain why I would  
12 not be available to do that.

13 I understand that employers, if you're  
14 discharged, would be -- would inquire into the reason of  
15 the discharge. I don't see any way of not giving full  
16 disclosure of that information to the employer.

17 I'm also concerned that the education community  
18 in the Bay Area is pretty tightknit, and gossip travels  
19 within people in the profession. And once this  
20 information is transmitted, then I would be forever  
21 stigmatized as someone who's banned from a campus after  
22 having taught there for 17 years.

23 Q. Thank you.

24 Now, just to pursue a little bit on the same  
25 area, are you generally familiar with the requirements

1 necessary to get a job teaching at the university level?

2 A. Yes.

3 Q. Have you reviewed classified advertisements for  
4 such positions?

5 A. Yes.

6 Q. And what do they typically require in the way  
7 of references?

8 A. Three to four letters of recommendation. In  
9 aggregate, those letters need to address the areas of  
10 teaching, research and service.

11 Q. Thank you.

12 Now, in terms of your own job experience, have  
13 you taught -- have you had any job experience outside of  
14 teaching?

15 A. No.

16 Q. Have you had any job experience working for the  
17 government?

18 A. No.

19 Q. Have you had any job experience working as a  
20 mathematician for private businesses?

21 A. No.

22 Q. Thank you.

23 Now, I would like to ask you directly, how has  
24 your discharge affected you emotionally?

25 A. I'm devastated.



1           Q.    Well, easy to say. Can you tell the jury  
2 exactly how you feel and why.

3           A.    From -- from a -- on a practical level, I would  
4 say that my biggest concern and worry is future  
5 employment. I'm concerned that -- as to what kind of  
6 position I can obtain, given the nature of what has  
7 happened and the record that it created. So many jobs  
8 require careful consideration of safety, and -- and the  
9 particular set of circumstances seem prohibitive of  
10 obtaining that kind of position.

11                     Within something technical, like mathematics, I  
12 mean, the obvious -- the straightforward inference is if  
13 I can't be trusted not to hurt people, I'm not sure how  
14 people can have trust in any calculation that I do. I  
15 don't know how else -- how -- what better way to express  
16 it than that.

17                     So, you know, a future employer or prospective  
18 employer would have to consider, first of all, you know,  
19 my access to sensitive information. There would be  
20 questions to what extent they can trust the scientific  
21 work that I conduct, if I conduct such.

22                     There'd be issues of -- for instance, I mean,  
23 most people with -- most people I know with math  
24 Ph.D.s who work in the industry perform work in some way  
25 related to national defense. One of the big employers

1 of math Ph.D.s, mathematics Ph.D.s, is the National  
2 Security Agency. For that kind of position, you need a  
3 security clearance. I don't see how I can obtain a  
4 security clearance. If I were to apply for security  
5 clearance and then was denied, that would be another  
6 black mark on my record.

7 So, I mean, on a very practical level, this  
8 seems to impact the entirety of my working life. So as  
9 to how I'm going to -- how I would make a living with  
10 this record is -- there's a lot of questions that arise.

11 On an emotional level, the biggest issue for me  
12 is the sense of shame that this brings to my person and  
13 to my family.

14 Q. Thank you.

15 I'd like to go over a few other items, Dr. Kao.  
16 First of all, following your discharge, did you file  
17 charges with the EEOC?

18 A. Yes.

19 Q. And can you take a look at Exhibit 71.

20 A. Yes.

21 (Plaintiff's Exhibit 71  
22 marked for identification.)

23 MR. KATZENBACH: Q. Can you tell the jury what  
24 71 is.

25 A. This is a letter from myself to the U.S. Equal

1 Opportunity Commission. It's dated April 29<sup>th</sup>, 2009.

2 MR. KATZENBACH: I'd like to admit Exhibit 71.

3 THE COURT: Any objection?

4 MR. VARTAIN: Same objection on the hearsay,  
5 Your Honor. And I don't see any relevance to it if it's  
6 not being offered for its truth. The parties stipulate  
7 that Dr. Kao exhausted his administrative remedies.

8 THE COURT: Give me a moment to look at it.

9 Objection is sustained.

10 MR. KATZENBACH: Your Honor, it's my  
11 understanding the parties are -- counsel's willing to  
12 stipulate that Dr. Kao exhausted his administrative  
13 remedies.

14 MR. VARTAIN: Sure, Chris. We've already done  
15 that.

16 MR. KATZENBACH: I'm not sure we have, but if  
17 we're stipulating to that, that's fine.

18 Q. Now, Dr. Kao, I'd like to direct your attention  
19 to a few other matters, then. During the course of --  
20 well, strike that.

21 At some point during your employment, did you  
22 overhear Professor Needham make any remarks about  
23 mathematicians?

24 A. Yes.

25 Q. What did he say?

1           A.    He made recurring references to "crazy  
2 mathematicians."

3           Q.    In what sort of context did he make that?

4           A.    At gatherings within the department.  For  
5 instance, when we have a department meeting, it's  
6 scheduled in a particular, you know, conference room,  
7 and there'd be sort of a time prior to the meeting where  
8 people are sitting around.  That would be one example.

9                    At math teas, that would be another example.

10                   So with groups of us, colleagues around me, he  
11 would make that kind of reference.

12           Q.    Did he ever make any -- and during -- when he  
13 made the remarks about crazy mathematicians, did he  
14 refer to any mathematician in particular?

15           A.    Typically he would raise the issue of John  
16 Nash, who's a professor at Princeton University.  He  
17 suffers from schizophrenia.  There's a movie that was  
18 made called "The Beautiful Mind" that came out in the  
19 '90s, I believe, and a book that it was based upon.

20           Q.    And when did these comments by Professor  
21 Needham begin, to your recollection?

22           A.    He -- he returned to the faculty from the  
23 Dean's Office in fall of 2004.  That's when they  
24 started.

25           Q.    And did they end?

1 A. Yes.

2 Q. When did they end?

3 A. After I filed my formal complaint in May of  
4 2006.

5 Q. And did your formal complaint make reference to  
6 these remarks?

7 A. Yes.

8 Q. Thank you.

9 Now, during the course of this litigation, have  
10 you learned more about some of the incidents that the  
11 university is apparently asserting to justify this  
12 demand for a mental examination?

13 A. Yes.

14 Q. I'd like to ask you about a few of them. First  
15 of all, do you recall an incident involving Jennifer  
16 Turpin?

17 A. Yes.

18 Q. Can you tell us about that.

19 A. I had a conversation with Dean Turpin towards  
20 the end of April. I was outside Harney Science having a  
21 cigarette. It was permitted on campus at that time.

22 There was a cement ashtray somewhat removed  
23 from the entrance -- side entrance of Harney Science.  
24 Typically if I smoked, I would smoke right next to the  
25 ashtray.

1           There's a walkway coming out from the building  
2 to the ashtray, where it ends. There's a fairly large  
3 walkway running perpendicular to it and then a short  
4 path from there down into a special parking lot for  
5 plant services and executives. That parking lot, maybe  
6 for ten, 15 cars, that's adjacent to Gleeson Library,  
7 which is the building next to Harney Science.

8           Q.    So what -- can you tell us what happened?  
9 Well, start this way: When was this -- when did this  
10 conversation take place?

11          A.    That would be in the afternoon -- my  
12 recollection, that would be around 3:00, in between  
13 classes. I was outside.

14          Q.    And the month and day, if you can recall?

15          A.    Well, I believe Dean Turpin's testified to  
16 April 22<sup>nd</sup>. That's possible. I mean, that seems  
17 about right to me. Roughly around that time, end of  
18 April. But I didn't make note of this conversation in  
19 any of my -- in my notes or my calendar. It wasn't that  
20 memorable to me.

21          Q.    Okay. Can you tell us what happened.

22          A.    Well, I was outside having a cigarette, and  
23 then she comes -- I see her walking -- I would see her  
24 from -- from the Dean's Office, which is a collection of  
25 offices. That was testified to by other witnesses. And

1 that's at the very end of the hallway. And I can see  
2 people coming down the hall from outside because there's  
3 large glass doors there.

4 And I'm outside having a cigarette. And then  
5 she's coming -- I can see her coming down the steps to  
6 the doors. And she comes out. I presumed, at the time,  
7 that she was going to her car. I had seen her parking,  
8 unloading things -- you know, files and so forth -- in  
9 her car in that parking lot.

10 Q. So --

11 A. I recall -- I recall being a little nervous  
12 about the conversation because I know -- you know, by  
13 that time, I already filed the informal complaint. I  
14 didn't know how she felt about it.

15 Q. Okay. And can you tell us what happened.

16 A. Well, I was kind of hoping she'd just wave and  
17 then walk past me, but she stopped to talk. I recall  
18 her saying "How are you doing?"

19 I said "I'm fine."

20 She asked me how my mother was doing. I said  
21 "She's fine."

22 I asked her how her daughter was doing, and she  
23 said "Fine."

24 Q. Had you had -- why did you ask her about how  
25 her daughter was doing?

1           A.    Well, she understood that my mother had been in  
2 the hospital for possible ovarian cancer. She had a  
3 hysterectomy in 2006. And I took some time off at that  
4 time to take care of -- take care of my mother after her  
5 operation.

6                    I filed for paid -- they call it paid  
7 family/medical leave -- for a few weeks, with the  
8 insurance company, for that period of time.

9           Q.    Okay.

10           A.    And Dean Turpin was aware of that. When I was  
11 asking for that paid family/medical leave, Dean Turpin  
12 said "Oh, I understand completely. My daughter is also  
13 in the hospital."

14                    So when she asked me about my mother and how  
15 her recovery -- I mean, implicitly how her recovery was,  
16 I wanted to know how her daughter was doing.

17           Q.    Okay. How did that conversation then continue?

18           A.    She made a remark that seemed strange to me. I  
19 didn't know how to interpret it. But she said "Well,  
20 please let me know if there's anything I can do to help  
21 you with your mother."

22                    And the way she said it, it didn't seem like --  
23 it sounded either -- it sounded condescending or  
24 insincere. But I didn't know exactly what she had in  
25 mind, in terms of her helping me with my mother.



1 Q. Okay. And what did you say in response to  
2 that?

3 A. Well, I said "Well, please let me know if I can  
4 help you with your daughter."

5 Q. Okay. And why did you say that?

6 A. Well, it's a Japanese cultural thing. I mean,  
7 when I feel there's a situation where I'm not sure  
8 whether the other person is being sincere or -- being  
9 sincere or insincere, my habit is just to reflect back  
10 the same statement. So I just repeated the same  
11 statement that she made to me.

12 Usually -- that would be like if somebody says  
13 "Oh, you know, good luck on" something or, you know,  
14 "Have a nice day," and then you're not really sure what  
15 the emotional content of that is, you just say "Have a  
16 nice day or "Good luck to you too."

17 And that's my habit, and that's what I did.

18 Q. What happened next?

19 A. She walked away.

20 Q. All right. Did you follow her after she walked  
21 away?

22 A. No.

23 Q. Did you go down to the parking lot in any way?

24 A. No.

25 Q. Did you enter the parking lot?

1           A.    No.

2           Q.    Did you go anywhere close to her car?

3           A.    No.

4           Q.    What did you do?

5           A.    I remember lighting another cigarette and  
6 having a second cigarette.  And I remember walking out  
7 to the middle of the park -- the walkway that's  
8 perpendicular to the exit of Harney Science.

9                   And I remember finishing my second cigarette  
10 and looking out at the students and faculty that were  
11 working -- that were walking on Golden Gate, because it  
12 was just at the time classes had gotten out.  You know,  
13 they get out at certain times.  And there was a lot of  
14 foot traffic.

15                   I do this because sometimes I'll recognize  
16 students or I'll see faculty members and then, you know,  
17 call them over to have a conversation.

18                   And I remember looking out -- down the  
19 sidewalk, which would have been towards the parking lot.  
20 I didn't specifically see Dean Turpin get into her car,  
21 but, you know, I wasn't -- I was looking in that general  
22 direction.  That's the direction that's not blocked by  
23 Harney Science.  And it's pointing out towards the  
24 gymnasium.

25                   And frequently in the afternoon, if there's a

1 faculty member that I see, I might stop and say hello  
2 and exchange some, you know -- maybe some information.

3 Q. I'd like to go just back briefly, if you could,  
4 Dr. Kao, to your -- you indicated this event in 2006  
5 where Dean Turpin had mentioned her daughter had been in  
6 the hospital, and your mother had been in the hospital  
7 as well.

8 A. Yes.

9 Q. From 2006 up until this conversation in -- at  
10 the end of April 2008, had Dean Turpin ever asked you  
11 how your mother had done in the hospital?

12 A. No.

13 Q. And up -- now, going back again to 2006, can  
14 you tell us what happened after -- you indicate you took  
15 some family leave to take care of your mother; is that  
16 correct?

17 A. Yes.

18 Q. Okay. Did anything happen after that that  
19 prevented you from going back to work?

20 A. Yes.

21 Q. What happened?

22 A. This was at the -- this was concurrent with the  
23 meetings between myself and human resources in  
24 connection with my 2006 formal complaint, which I  
25 testified to earlier.

1           Immediately after my mother was released from  
2 the hospital, I received a correspondence from general  
3 counsel that was disturbing to me. In connection with  
4 that, I was taking care of my mother in her recovery  
5 from her operation.

6           The combination of things created the -- caused  
7 my depression, which is a recurrent depression, to  
8 occur. I was in treatment with Dr. Terr, my  
9 psychiatrist, or my therapist.

10           At that time -- I had not been taking  
11 medication at that time. But I talked to her, and she  
12 prescribed me medication for depression.

13           Q.    When you took that medication, did you have an  
14 adverse reaction?

15           A.    Yes. Generally speaking, the medications for  
16 depression that I've taken have all had bad side effects  
17 of some kind. So -- however, I have taken medications  
18 for depression in spite of that, even though it was  
19 very -- it's uncomfortable to me.

20           But she recommended a medication called  
21 Lamictal, which is not -- which is some kind --

22           Q.    Just --

23           A.    It's -- it's -- she recommended a medication  
24 [sic] for Lamictal. I started that prescription.

25           Q.    And what happened after you started taking it?

1           A.    It worked immediately to relieve the  
2 depression.  It was very effective.  However, she  
3 advised me that there's one side effect I have to look  
4 out for with this particular medication.  It's  
5 life-threatening if you get it.  It involves a rash and  
6 a fever.  It comes on suddenly.  She said if that  
7 happened, I have to go to the hospital right away.

8           Q.    Did that happen?

9           A.    Yes.  About two weeks into that therapy, I  
10 developed a rash over the entire upper half of my body,  
11 and fever.

12          Q.    Did you advise Dean Turpin of this reaction?

13          A.    Yes, I did, after evaluation at the hospital.

14          Q.    And did you ask Dean Turpin for some further  
15 time off?

16          A.    Yes.  Dr. Terr recommended I take two weeks'  
17 leave to recuperate after this.

18          Q.    And what was the outcome of your conversations  
19 with Dean Turpin as to this event?

20          A.    Dean Turpin indicated that it would be better  
21 if I didn't return to the classroom that semester, that  
22 I would be assigned other duties.

23                She wrote me an email.  The reason she gave was  
24 that -- during my leave, they had hired part-time  
25 faculty in my classroom.  The change of instructors at

1 that point in the semester would be complicated for  
2 them, or would be confusing for the students, is the  
3 words that she used.

4 So she advised me to -- or instructed me, I  
5 should say, to consult with Dr. Pacheco, who was chair.  
6 And he would give me alternate -- alternative  
7 assignments for the remainder of the semester.

8 Q. And did you perform those alternative  
9 assignments?

10 A. Yes, I did.

11 Q. Now, during the course of discovery in this  
12 case, have you learned of an apparent incident involving  
13 a day you didn't wear a suit?

14 A. Yes.

15 Q. Can you tell us what you learned about that?

16 A. Apparently several members of my department  
17 became frightened when I came into the office without a  
18 suit on. This was on a day in -- in April, I think,  
19 early April.

20 I had written -- I know that I informed Dr.  
21 Pacheco I needed a day off to take care of my mother.  
22 And he said fine.

23 And -- but I came in in the after- -- I came  
24 in -- after advising him of this, I came in in the  
25 morning to put a sign on my door giving information for

1 my students that, you know -- I mean, after you inform  
2 the chair, they put signs in the classroom. I put a  
3 sign on my door giving them the information as to what  
4 to do and that I'll be back the next -- the next  
5 teaching day.

6 Q. And when you came in to post that note, were  
7 you wearing a suit?

8 A. No.

9 Q. Thank you.

10 During the course of discovery in this case,  
11 have you learned of some incidents involving Stephen  
12 Yeung?

13 A. Yes.

14 Q. What incidents did you learn about?

15 A. There was one incident that they referred to as  
16 theatrical bowing.

17 Q. Can you tell us about that. In fact, did you  
18 do a theatrical bow at some point?

19 A. No.

20 Q. What did you do?

21 A. I made an exaggerated gesture to Dr. Yeung.

22 Q. And how did that come about? Why did you do  
23 it?

24 A. Well, this event -- this event took place in  
25 June. According to the correspondence I received in

1 discovery, the date was June 4<sup>th</sup>, or something like  
2 that, of 2008.

3 My recollection of the incident was that --  
4 throughout the semester, Dr. Yeung did this thing that  
5 was annoying me. It was a small thing. But every time  
6 we passed, you know -- it's fairly crowded in the  
7 math -- area of the math department office. And then,  
8 you know -- so -- and I was working most days, five --  
9 you know, most working days and then often on the  
10 weekends.

11 And Stephen Yeung was working most days, also  
12 on weekends, as was -- Dr. Wolf was around too, and  
13 Christine.

14 But at any rate, we're in the department a lot.  
15 His office is across the alcove from mine. And so  
16 there's a lot of occasion -- there's many occasions  
17 where we would reach a doorway and one of us would have  
18 to proceed through the doorway first. And then Dr.  
19 Yeung always insisted that I go first through the door.

20 And the way that would transpire would be, you  
21 know, he would go like this (indicating), and then I  
22 would go "Please, you."

23 And then "Oh, no, please, you."

24 And then "Please, you."

25 But he always insisted that I go first. And



1 throughout the semester, I always went first because --  
2 but it was annoying to me that he wouldn't just  
3 change -- exchange. I didn't know if he was trying to  
4 suggest that I thought I was more important than him.  
5 But, I mean -- it wasn't bothersome, but it was  
6 annoying.

7           And so I -- what I recall was that I was going  
8 into the copy room, which is also in the same alcove.  
9 And he was coming out of the copy room. And then once  
10 again, you know, it's like this and this (indicating).

11           And so I said like this (indicating), "Please,  
12 you. Really, I insist."

13           And that time, he went first. And I was happy  
14 that he went first. And so I thought after that, we  
15 would exchange, that I had, you know, not directly like  
16 talked to him "Oh, this bothers me so much," you know --  
17 I mean, you know, but rather, just through implication,  
18 that understanding had been reached, that I really  
19 wanted to exchange and take turns.

20           Q. Was there another incident that you learned  
21 about in discovery concerning Dr. Yeung?

22           A. Well, Dr. Yeung complained or expressed concern  
23 to people about an incident that is described as veering  
24 towards him.

25           Q. Do you recall anything like that occurring

1 after you heard Dr. Yeung's testimony?

2 A. Well, in discovery early on, there's reference  
3 to this. And I couldn't figure out -- I couldn't think  
4 of any event that could remotely correspond to it.

5 However, his -- after his deposition, which was  
6 relatively late in the -- in this case, he gave more  
7 details. And -- and then I thought of one event.

8 Q. Can you describe that event.

9 A. Well, my recollection of the event was I was  
10 just -- I was walking down the hall. It was in -- after  
11 the semester was over, in the summertime. He dated it  
12 sometime the end of May, but I don't recall  
13 specifically.

14 But it was after class. And I was walking down  
15 the hallway, going outside to have a cigarette. And I  
16 recall passing the men's room door, which is on the way  
17 to the area that I testified to before where the ashtray  
18 is, right.

19 And I'm walking down the hall, and I -- I  
20 recall the door opening up, and Stephen Yeung -- Dr.  
21 Yeung is standing in the doorway staring at me. And I  
22 wondered, at the time, "Why is he staring at me?"

23 And I recall being about three feet away from  
24 him, and he's looking at me from the frame of the door.  
25 He's got a funny expression on his face. And I'm

1 thinking "What -- what -- what is -- you know, what is  
2 he looking at?"

3 And that's what I recall.

4 Q. When you -- in the past, when you -- can you  
5 describe the location of the men's room and the women's  
6 room bathrooms in Harney.

7 A. Yeah. The ladies' room is across the hall from  
8 the men's room.

9 Q. Which way does the ladies' room door swing?

10 A. The ladies' room door swings out into the  
11 hallway.

12 Q. And when you get -- do you have a habit when  
13 you go down the hallway past the ladies' room door?

14 A. Yes. See, the men's room door opens into the  
15 men's room, right. And the ladies' room door swings out  
16 into the hallway. I gather they designed it that way  
17 for some security reason. Maybe they don't -- you know,  
18 a woman might be trapped in there, or something like  
19 that. But at any rate, for whatever reason, it comes  
20 out into the hallway.

21 And I have a vivid recollection from maybe  
22 19 -- from mid '90s when I was walking to class, and  
23 there were students in the hallway, and I'm carrying a  
24 hot cup of coffee. And this lady comes basically  
25 barreling out of the ladies' room, and then the door

1 swings out into my front, and then this sort of knocks  
2 the cup of coffee all over me.

3 So my habit is to move away from the ladies'  
4 room door as I pass it, particularly if I think  
5 someone's going to come out. I'm always wary around  
6 that area. And if I hear something -- you know,  
7 footsteps or something from that -- I would -- I would  
8 move away from that door.

9 Q. Now, in discovery in this case, do you recall  
10 learning that the university had also -- was also  
11 referencing an incident with a -- the prior  
12 administrative assistant for the department?

13 A. Yes.

14 Q. Can you tell -- who was that prior  
15 administrative assistant?

16 A. Well, from -- in 1991, the program assistant  
17 was a lady by the name of Citas DeGuzman. Then for a  
18 few years, we had a lady by the name of Wing Ng. That  
19 would be prior to Ms. Christine Liu. Ms. DeGuzman was  
20 program assistant from 1991 to 1994, I believe.

21 Q. And did you have some incident involving Ms.  
22 DeGuzman?

23 A. Yes.

24 Q. What happened?

25 A. Well, in 1993 I had a disagreement with her.

1 It involved how the mail was handled in the department.  
2 I was concerned that the mail was being missorted and I  
3 was losing mail. And I raised this over a period of  
4 months.

5 Ms. DeGuzman indicated that the problem was  
6 likely caused by her student assistant, who was also my  
7 teaching assistant in the department. His name was  
8 Stratos Geriakos. I'm not sure exactly ...

9 At any rate, so Stratos was sorting the mail,  
10 and that was the problem. And I complained to Ms.  
11 DeGuzman that the mail was being missorted, could she  
12 please do it instead of Stratos.

13 And the mail kept -- still kept getting lost.

14 And then I talked to Millianne Lehmann, who was  
15 chair at the time. And I asked her "Would you please,  
16 you know, talk with Ms. DeGuzman and ask her -- make  
17 sure -- ensure that the mail is done by her, not  
18 Stratos."

19 And Dr. -- Professor Lehmann said, you know,  
20 she would talk to Citas, Ms. DeGuzman, and, you know, it  
21 would be handled.

22 And then about a week after I had this  
23 conversation with Professor Lehmann, I went to my  
24 mailbox and I found a letter, which was a financial  
25 letter. My bank had sent me some correspondence. It

1 had been opened by Ms. DeGuzman. And she'd written  
2 "Sorry, I opened your mail."

3 And then I was upset because I thought the  
4 issue had been handled. She explained that she had  
5 opened my mail because it had been missorted by Stratos  
6 into Professor Lehmann's mailbox.

7 And Professor Lehmann had an arrangement with  
8 her whereby Ms. DeGuzman would open all of her mail and  
9 sort through it. And by accident, you know, she had  
10 opened this particular envelope.

11 And I raised my voice to her. I shouted at  
12 her. And --

13 Q. What happened after that?

14 A. I left the department and then I, you know,  
15 collected myself and then I came back. When I came  
16 back, Professor Lehmann told -- came to my office and  
17 she said, you know, "You really need to apologize to Ms.  
18 DeGuzman. That was inappropriate."

19 And so I went to Ms. DeGuzman and I apologized.

20 Q. Did anything else -- did -- did you continue to  
21 work with Ms. DeGuzman after that?

22 A. Yes, I did. She stayed -- she was with our  
23 department for about another year, and then she moved to  
24 a different office, the career counsel -- Career  
25 Services Center in -- you know, in the student center.

1           And she was there at the time -- at least in  
2 the time -- a year prior to my discharge, I saw her. I  
3 mean, I would pass her and I would say hello all the  
4 time, you know.

5           May I --

6           Q. Did you -- I'm sorry.

7           A. Yes.

8           Q. Did you -- as a result of that incident, did  
9 you reach any conclusions about your own behavior?

10          A. Yes, I did.

11          May I add something?

12          Q. Sure.

13          A. There was something that followed after this  
14 incident. Dr. Needham, who was present at the time of  
15 this incident -- I remember when I was talking to her,  
16 he had come into the math office, and this had happened.

17                 About a week after I had apologized and I  
18 thought it was smoothed over, Dr. Needham told me that  
19 Ms. DeGuzman was going to file a complaint about this  
20 incident.

21                 So I wrote up -- I wrote up a memo explaining  
22 my side of the story. And I sent that memo to the  
23 Dean's Office.

24          Q. And did you have another discussion -- did you  
25 have a discussion with the dean?

1           A.    Yes, I did. I went to Dean Marin and I  
2 asked -- I asked him, you know, was there -- was there  
3 any problem; you know, he received this memo.

4           Q.    Yes.

5           A.    And he told me that in fact Ms. DeGuzman hadn't  
6 filed -- hadn't -- he told me that there was no -- there  
7 was no complaint. So, I mean, I didn't know whether Dr.  
8 Needham was mistaken, or whether Ms. DeGuzman had talked  
9 about it but then decided not to file one, or -- or she  
10 had said something to Dean Marin and then he looked into  
11 it and she had decided not to continue with it. I  
12 didn't know which of those things had happened.

13                    But Dean Marin indicated that the issue was  
14 resolved; it was over.

15           Q.    Now, just going back to -- how did -- what did  
16 you take away from that event?

17           A.    Well, I was ashamed that I had -- I mean, I  
18 realized after Professor Lehmann talked to me that I had  
19 in fact broken the rules of the institution. And I was  
20 ashamed that I broke the rules. And so I was sensitive  
21 to that afterwards.

22           Q.    Thank you.

23                    Now, I'd like to -- a couple -- just touch on a  
24 couple of other ones.

25                    Do you recall in discovery in this incident --



1 in this case an incident involving you mocking Peter  
2 Pacheco?

3 A. Yes.

4 Q. Can you tell us about that.

5 A. Well, let's see. In -- in May of 2008, we had  
6 a department meeting. And so -- this is at the end of  
7 the semester. And this was towards the end of the  
8 meeting.

9 And what Dr. Pacheco presented to the  
10 department was that -- well, he was chair, right. And  
11 we have these three-year terms of chair. The chair  
12 isn't a supervisor; it's shop steward of the department.  
13 And then the position rotates.

14 And Dr. Pacheco said okay, well, the following  
15 year he's going on sabbatical, so he would prefer not to  
16 be the chair for the next year, even though that's still  
17 the last of his three-year term, right.

18 So he said, you know, would there be anybody  
19 who'd be willing to take over the position of chair for  
20 that year. That way he'd be free; he wouldn't have to  
21 be on campus; and so if he wanted to travel some during  
22 the academic year, he could.

23 And so he put this to the department and he  
24 asked for any volunteers. And I hadn't particularly  
25 thought about being chair the next term, but I waited,

1 and then no one volunteered for the position, and so  
2 then I volunteered to be chair during the interim.

3 Q. And what happened then?

4 A. Well, at that point Dr. Needham said "Well, we  
5 need to have a secret ballot vote." And I responded  
6 that I didn't understand why we needed a secret ballot  
7 vote if we never had this kind of a vote before.

8 I mean, in past years -- I mean, the chair  
9 position isn't exactly a sought-after position. I mean,  
10 it's -- it's a steppingstone for promotion. So if  
11 you're -- you're expected to be chair for at least one  
12 term before you're promoted. But besides that, people  
13 aren't necessarily eager for the position.

14 And so the past time we exchanged the chair,  
15 you know, we sort of talk in the department meeting and  
16 then "Oh, okay," you know, "who wants to do it?"

17 And then somebody says "Okay, I'll do it." And  
18 no one else really, you know, wants to, or wants to  
19 less. And it's just confirmed informally in the  
20 meeting.

21 But for some reason, Dr. Needham was insisting  
22 that we have a vote, a secret ballot vote. And I went  
23 so far to say "Look, I don't want to get in anybody's  
24 way. If anybody else wants to do it, you know, I'll --  
25 I'll withdraw my volunteering for the position."

1           And no one else said anything. And then  
2 someone else said "Well, you know, I mean, it's -- it's  
3 a union policy that we have a secret vote -- or we have  
4 a vote."

5           And at that point, Dr. Pacheco said "No, I  
6 changed my mind. I withdraw the -- I withdraw my  
7 motion, and I'll just -- I'll stay as chair next year."

8           And I was upset because I thought I didn't -- I  
9 mean, I thought I was being singled out. And I said  
10 "Well, thank you, Peter," and I left the meeting.

11           We had about ten minutes left anyway, and, you  
12 know, people leave all the time, classes or other  
13 appointments.

14           Q. After that meeting, did you do anything to mock  
15 Professor Pacheco?

16           A. Yes.

17           Q. Tell us how that came about.

18           A. Well, I was pretty -- I was pretty unhappy that  
19 afternoon, but I thought about it over the night and I  
20 thought "Well, okay, it's not that big of" -- you know,  
21 I mean, I was hurt. I was hurt. It was embarrassing.  
22 But the next day, I went into the office and I thought  
23 "Well, I'll just shake it off."

24           And so I -- I vented a little bit with my --  
25 with Dr. Wolf in the alcove. And I did an impression of

1 Dr. Pacheco in front of Dr. Wolf. I just said something  
2 to the effect of "Well, this is Dr. Pacheco: 'I want to  
3 be chair; I don't want to be chair; I want to be chair;  
4 I don't want to be chair.'" He just can't make up his  
5 mind."

6 And that was my impression of Dr. Pacheco in  
7 front of Dr. Wolf.

8 Q. And did you repeat that impression again?

9 A. Yes. I went and talked with Ms. Liu, who,  
10 again, I was always friendly with in the department.  
11 And I was in -- I went into the math office that morning  
12 and I repeated the same impression to Ms. Liu.

13 As I was doing it, Dr. Needham entered the  
14 math -- no, excuse me, not Dr. Needham -- Dr. Devlin  
15 came into the math office. And Dr. Yeung, I believe,  
16 was standing outside in the hallway. So they both saw  
17 me doing this.

18 THE COURT: Ladies and gentlemen, remember the  
19 admonition. Do not form or express any opinion on this  
20 case until it's finally submitted to you for your  
21 decision. Do not discuss among yourselves or with  
22 others until that time. Please be back in your places  
23 at 1:30 according to the courtroom clock. Please  
24 remember to leave your notebooks and instructions  
25 behind.

1 (Jurors left the room.)

2 THE COURT: Jurors and alternates have departed  
3 the courtroom. Counsel for both sides and the plaintiff  
4 remain.

5 Anything you want on the record, Mr.  
6 Katzenbach?

7 MR. KATZENBACH: Your Honor, I am still -- I  
8 will be making, this afternoon, the statement about  
9 admitting by stipulation without need for further  
10 testimony as to Exhibit 68 and 69. I am, however, still  
11 uncertain as to what we're doing about Exhibit 4, which  
12 is the addendum to the report of race-based  
13 discrimination. That was not admitted subject to, I  
14 think, voir dire, or something, of -- by Mr. Vartain.  
15 And I sort of want to check on the status of that.

16 THE COURT: I have a blank. Not acted on.

17 MR. KATZENBACH: Excuse me?

18 THE COURT: My notes don't have anything to  
19 indicate that it was admitted.

20 Mr. Vartain, was that one that you wanted to  
21 cross-examine on?

22 MR. VARTAIN: Yes, Your Honor.

23 THE COURT: All right. That's where we are.

24 MR. KATZENBACH: Okay.

25 THE COURT: Exhibit 4.

1           MR. KATZENBACH: All right. Your Honor, I just  
2 would -- I'm happy to allow Mr. Vartain to cross-examine  
3 on it. But at some point, I would like to move the  
4 admission, once he does that.

5           THE COURT: I won't prevent you.

6           MR. KATZENBACH: Thank you, Your Honor.

7           I think there's some other exhibits that we may  
8 stipulate to, and we can advise the --

9           Do you want to do that now, Mr. Vartain, or  
10 would you prefer to do that as a group after lunch?

11          MR. VARTAIN: Yeah, my list -- whatever you can  
12 do would be fine.

13          I don't have any more activity before lunch. I  
14 know your staff wants to kick us out.

15          THE COURT: Okay.

16          MR. KATZENBACH: Okay.

17          THE COURT: Out of session. Off the record.

18          (Lunch recess from 12:03 to 1:30.)

19

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1 AFTERNOON SESSION

1:31 P.M.

2 THE COURT: Jurors and alternates are all  
3 present. Counsel for both sides are present. Plaintiff  
4 is personally present and making his way back to the  
5 witness stand.

6 Mr. Katzenbach, you may continue your inquiry.

7 MR. KATZENBACH: Thank you, Your Honor.

8 DIRECT EXAMINATION BY MR. KATZENBACH (RESUMED)

9 MR. KATZENBACH: Q. Dr. Kao, this morning you  
10 described a -- an incident where you imitated Professor  
11 Pacheco. And Mr. -- Professor Wolf was also present  
12 when you were doing that, right? Do you recall that?

13 A. Yes.

14 Q. What was Professor Wolf's reaction?

15 A. He laughed.

16 Q. Now, I'd like to direct your attention to  
17 Exhibit 110. Those are the emails that you had received  
18 concerning parties.

19 A. Yes.

20 Q. Okay. I'd like to ask you about a couple of  
21 emails in connection with the end of the semester of  
22 2008. First of all, was there a invitation in Exhibit  
23 110 to a baby shower?

24 A. Yes.

25 Q. Can you tell us about that.

1           A.     Well, there was a joint baby shower held prior  
2 to actual delivery of the two babies.  There's two --  
3 there's a faculty member in our department; her name is  
4 Reneé Brunelle.  She was expecting around in June.  And  
5 then another faculty member, Dr. Wolf, his wife, Holly,  
6 was expecting also in June.

7                     And so the department decided to have a joint  
8 party in honor of the two new children at Dr. Devlin's  
9 house.  If I can find the invitation ...

10           Q.     If you look at approximately the fifth page of  
11 the exhibit titled "Forward Re Sunday, June 8<sup>th</sup>."

12           A.     I'm sorry.  The fifth page?  Oh, sixth page.

13           Q.     Yes.

14           A.     Yes.

15           Q.     Does that contain -- what's the date -- that's  
16 an email chain?

17           A.     Yes.

18           Q.     And what's the date of the original email that  
19 you received?

20           A.     The original email is dated May 16<sup>th</sup> of 2008.  
21 Subject is "Sunday, June 8<sup>th</sup>."

22           Q.     Did you actually attend that baby shower?

23           A.     I didn't.

24           Q.     And, now, was there also at that point a --  
25 and --



1           A.     But this message is the one that I sent as a  
2     RSVP.  It's date June 2<sup>nd</sup>, 2008.  I thanked Dr. Devlin  
3     for the invitation, but I apologize I won't be able to  
4     attend because I'm taking care of my mother.

5           Q.     All right.  In addition to this email -- the  
6     baby shower we just discussed, was there an  
7     end-of-math -- was there an end-of-semester math party  
8     invitation?

9           A.     For 2008?

10          Q.     Yes, for May 2008.

11          A.     Yes.

12          Q.     And what was that -- what was that?

13          A.     Typically at the end of the semester, the  
14     department holds a party at a restaurant for faculty and  
15     also students.

16          Q.     Okay.  And did you receive an invitation to  
17     that end-of-semester party?

18          A.     Yes.

19          Q.     And did that party happen?

20          A.     Yes.

21          Q.     And when did it happen?

22          A.     May 8<sup>th</sup> of 2008.

23          Q.     And who was in attendance at that party?

24          A.     There were maybe ten students.  I attended.  
25     The specific faculty there -- I mean, there were about

1 eight faculty. I can't recall specifically who, right  
2 at the moment. I know I spent most of the time talking  
3 with the students at that particular party.

4 Q. Now, in addition, if you look at the first page  
5 of Exhibit 110 --

6 A. Yes.

7 Q. -- does that concern an invitation to another  
8 end-of-semester party?

9 A. Yes.

10 Q. And what semester was that an end-of-semester  
11 party for?

12 A. That's fall of 2008.

13 Q. And did you receive that invitation?

14 A. Yes.

15 Q. And did anyone contact you and tell you you  
16 shouldn't go to that?

17 A. No.

18 Q. Did you actually go to that?

19 A. No.

20 Q. Why not?

21 A. Well, I was banned from campus and so I felt it  
22 would be inappropriate for me to attend.

23 Q. Okay. Now, early -- earlier in your  
24 deposition, you -- or earlier in your testimony here,  
25 you testified about that you took, on occasion,

1 medications for depression; is that right?

2 A. Yes.

3 Q. Are you currently taking any medications for  
4 depression?

5 A. No.

6 Q. When did you stop taking medications?

7 A. Dr. Terr started tapering me off of medication  
8 early last summer. So about nine months ago. And I  
9 stopped the prescription entirely in August. So that's  
10 about six months.

11 Q. All right.

12 A. I should add I do maintain a prescription for a  
13 mild tranquilizer called lorazepam for help when I have  
14 insomnia, for anxiety. So to help me sleep.

15 Q. Thank you.

16 Your Honor, in this connection, we had, I  
17 think, an earlier stipulation that Exhibits 68 and 69  
18 would be admitted by stipulation without the need for  
19 further testimony.

20 THE COURT: Correct.

21 MR. KATZENBACH: Thank you.

22 THE COURT: So they're in evidence now.

23 MR. KATZENBACH: Thank you, Your Honor.

24 (Plaintiff's Exhibits 68-69

25 received in evidence.)

1           MR. KATZENBACH: That is all I have for this  
2 witness, Your Honor.

3           THE COURT: Mr. Vartain, would you like to  
4 cross-examine?

5           MR. VARTAIN: I would, Your Honor. Would you  
6 like me to begin now?

7           THE COURT: Sure.

8           MR. VARTAIN: I just need to get out a few of  
9 the whiteboards. May I have -- and get a little bit of  
10 furniture moved. And then I can start. May I have one  
11 minute?

12          THE COURT: Sure. Minute and a half if you  
13 need it.

14          (Recess taken.)

15                   CROSS-EXAMINATION BY MR. VARTAIN

16          MR. VARTAIN: Q. Okay, Mr. Kao.

17          A. Yes.

18          Q. When you got ready to give your trial  
19 testimony, did you go and read the depositions that you  
20 gave as testimony in this case?

21          A. I read my deposition transcript once.

22          Q. You did. Good. And all volumes? You were  
23 giving testimony, I think, on parts of a number of  
24 different days last year. Did you read all of the  
25 testimony in getting ready for your trial today?

1           A.    About two and a half weeks ago, I read the  
2 deposition transcript once.

3           Q.    Okay. Did you read all of the deposition  
4 transcript? That is, did you read what the court  
5 reporter took down of everything you said in that whole  
6 deposition?

7           A.    I read the deposition transcript that's  
8 provided to me by the court reporter once.

9           Q.    Once. And I just want to make sure there  
10 wasn't any part of the transcript that you left out when  
11 you read it and got yourself ready for trial. That you  
12 know of.

13          A.    Yes, it -- the -- for two and a half days I was  
14 deposed, those volumes I read once.

15          Q.    Okay. And you read all of them; is that what  
16 you're saying?

17          A.    Yes.

18          Q.    Okay, good. And those depositions were a  
19 question-and-answer session under oath in the law  
20 offices, correct? You knew that at the time you --

21          A.    Yes. I should add I was deposed afterwards for  
22 half a day, and I read that transcript once.

23          Q.    Okay. In giving your deposition testimony, you  
24 were represented by your attorney there, correct, Mr.  
25 Katzenbach? Is that right?

1 A. Yes.

2 Q. And in giving your testimony over those days  
3 last year, you had the opportunity to prepare yourself  
4 and give your -- to get yourself ready to answer my  
5 questions at that deposition, correct?

6 A. Yes.

7 Q. During the course of those days of deposition,  
8 you had the opportunity to take timeouts, confer with  
9 Mr. Katzenbach pretty much anytime you wanted, correct?

10 A. No.

11 Q. Did you take time -- was there any time you  
12 asked for a time-out that within a few minutes  
13 thereafter you got to take a time-out?

14 A. We had breaks hourly, scheduled breaks.

15 Q. And was there any time you asked for a break  
16 during the deposition, when you didn't get what you  
17 wanted?

18 A. No.

19 Q. And in your breaks, you were free to confer  
20 with your counsel on, you know, how you were answering  
21 the questions and so on, correct?

22 A. Yes.

23 Q. Now, do you recall in the deposition I asked  
24 you a lot of questions about your colleagues -- these  
25 particular professors. Maybe I didn't ask you too much

1 about Mrs. Needham. And I also asked you about  
2 Associate Dean Brandon Brown as well. Remember that?

3 A. Yes.

4 Q. And you remember that I asked you whether any  
5 of these people at any time -- that is -- any of these  
6 people had expressed any kind of negative statements to  
7 you in connection with you having depression. Remember  
8 that? Did I ask you that?

9 A. There were questions along those lines. You  
10 asked it several different ways.

11 Q. Right. And how -- and it is true that at no  
12 time did Professor Yeung ever say anything to you  
13 negative about the fact that you have this particular  
14 health condition? Correct?

15 A. Yes.

16 Q. At no time did Professor Paul Zeitz say  
17 anything to you negative about your having this health  
18 condition, correct?

19 A. Yes.

20 Q. At no time did the dean, Dean Jennifer Turpin,  
21 did say anything negative to you about having the  
22 condition of depression, correct?

23 A. Yes.

24 Q. In fact, you testified that you thought that  
25 Dean Turpin was actually acting compassionately towards

1 you whenever that issue of your condition came up  
2 between you and her, correct?

3 A. She's compassionate generally. She's been  
4 compassionate generally towards me.

5 Q. In connection --

6 A. In general.

7 Q. She -- there's no exception. She has not  
8 lacked --

9 A. She -- she seems like a compassionate person in  
10 general.

11 Q. Okay. We'll put two check marks.

12 A. But certainly there's -- there's --

13 Q. Go ahead. You can finish. It's fine.

14 A. There's decisions that she made while I was  
15 working that I disagreed with in connection with myself.

16 Q. Okay. And we'll talk about that in a minute.

17 But overall, whenever your health condition  
18 issues came up, Dean -- it was your belief that Dean  
19 Jennifer Turpin was acting from a perspective of  
20 compassion, correct?

21 A. No. I -- I -- the incident that I testified to  
22 earlier where she asked that I not continue teaching, I  
23 agreed with. But I don't know -- I mean, I can't speak  
24 to what her emotional orientation towards me was at the  
25 time.



1 Q. Well, I'll come back to that 'cause you did  
2 speak to that point in your deposition. So let's --

3 MR. KATZENBACH: Objection, Your Honor.  
4 Argumentative.

5 MR. VARTAIN: I'll just --

6 THE COURT: Sustained. And now the question,  
7 then, is stricken.

8 MR. VARTAIN: We'll put a little X there and  
9 come back to it.

10 Q. Professor Needham, he never directed any  
11 negative words towards you because of your depression,  
12 did he, sir?

13 A. Repeat the question.

14 Q. Professor Tristan Needham -- let's just take  
15 the year we're talking about. In the year 2007/2008, he  
16 never directed any derogatory words towards you based on  
17 your having depression, did he?

18 A. No.

19 Q. And in the year -- the year before, he didn't  
20 then either, did he?

21 A. That's 2006/2007 you're referring to?

22 Q. Yes.

23 A. No.

24 Q. Nor in 2005/2006?

25 A. I testified to remarks that he made. The word

1 "depression" was never used.

2 Q. He never said to you something which led you to  
3 believe that he was trying to ridicule you for having  
4 depression, did he?

5 A. Could you repeat the question.

6 Q. Did Professor Needham ever say to you anything  
7 about your health condition of depression that led you  
8 to believe that when he was saying that, he was trying  
9 to ridicule you or be derogatory towards you based on  
10 having depression?

11 A. He never used the word "depression."

12 Q. I didn't ask you if he did. But regardless of  
13 whether he used the word -- whatever the particular  
14 words were, did he ever say something that you took to  
15 mean "Oh, he's saying something ridiculing of me having  
16 depression"?

17 A. He made recurring remarks about crazy  
18 mathematicians.

19 Q. Right. And he never said it about you, did he?  
20 He was talking about the math professors in general,  
21 correct?

22 A. Could you repeat the question.

23 Q. I said didn't -- when -- when, periodically,  
24 Tristan Needham -- who is a math professor himself, is  
25 he not?

1 A. Yes.

2 Q. He'd make those jokes about crazy  
3 mathematicians in the company of a meeting of all the  
4 math professors, a group of you; he never made it about  
5 you in particular, did he?

6 A. He never used -- he never said words to the  
7 effect "John, you are crazy."

8 Q. That wasn't my question, sir. He actually  
9 never said it about you in particular, did he?

10 A. He never called me crazy.

11 Q. Okay. He -- whenever he made it, he was  
12 referring to the group of you all, the math professors,  
13 correct? Whoever was in the room at the time, right?

14 A. No.

15 Q. Did he ever single you out for that?

16 A. He never said "John, you are crazy."

17 Q. Did he ever single you out, using the term  
18 "crazy mathematicians," regardless of whether he ever  
19 said "John, you are crazy"?

20 A. No. He never used my name specifically,  
21 directing the remarks about crazy mathematician, whereby  
22 I could say that he was directing the comment directly  
23 at me, in the sense of "John, you are crazy."

24 Q. And whenever he said it, he was saying it in  
25 jest about the group -- the department of professors

1 that were present in whatever meeting, correct --

2 A. No.

3 Q. -- as far as you understood it?

4 A. No.

5 Q. Did he ever say it in a one-on-one conversation  
6 with you?

7 A. No. These were in groups of my colleagues, in  
8 my presence.

9 Q. Tristan Needham never used the term "crazy  
10 mathematicians" when he was in a conversation with just  
11 you, correct?

12 A. I had very few conversations with --

13 Q. That wasn't my question, sir. My question was  
14 very simple. Did Professor Needham ever use the term  
15 "crazy mathematician" when just you and he were talking?

16 A. No.

17 Q. Did Professor Peter Pacheco ever say anything  
18 derogatory about you in connection with your health  
19 condition?

20 A. No.

21 Q. Did Associate Dean Brandon Brown ever say  
22 anything to you in connection with your health condition  
23 of depression?

24 A. No.

25 Q. We'll come back to -- Mrs. Mary Needham is

1 Tristan Needham's spouse, correct? She's not a  
2 professor at the school, right?

3 A. Yes.

4 Q. Let's put Martha Peugh-Wade's name, the HR  
5 person, up here. Did she ever -- did she ever say  
6 anything to you negative, derogatory, insulting about  
7 depression?

8 A. No.

9 MR. KATZENBACH: It's compound, Your Honor.

10 THE COURT: Beg your pardon?

11 MR. KATZENBACH: I'm sorry. The objection is  
12 compound.

13 THE COURT: Overruled. The answer will stand.

14 MR. VARTAIN: Excuse my handwriting, but that's  
15 Martha Peugh-Wade.

16 Q. Mr. Philpott, he had those meetings with you  
17 where he was trying get you to go for a medical  
18 evaluation, when Mr. Katzenbach was there. Did he say  
19 anything negative about depression?

20 MR. KATZENBACH: Objection, Your Honor. He's  
21 testifying about Mr. Philpott's purposes. Object to the  
22 form.

23 THE COURT: I'll sustain the objection and  
24 invite a new question.

25 MR. VARTAIN: Q. Did Mr. Philpott, at the

1 meetings that you had with him where the  
2 fitness-for-duty evaluation was discussed -- did he say  
3 anything about your depression in any sort of a negative  
4 way?

5 A. In the one meeting I had with Mr. Philpott, no.

6 Q. You've known Mr. Philpott for years, haven't  
7 you?

8 A. Yes.

9 Q. You've had more than one meeting with him. Has  
10 he ever -- in fact, you've socialized with him, correct?

11 A. Prior to my suspension, yes.

12 Q. Has he ever said anything negative about the  
13 condition of depression, whether it's your condition or  
14 someone else's?

15 A. No.

16 Q. In all -- I think we pretty much got everybody  
17 that's pertinent to this case.

18 Now let's talk about employment complaints,  
19 because you told the jury about the different employment  
20 complaints you've made. And in particular, you were  
21 telling the jury that you presented information in 2008  
22 to Mr. Philpott because you thought perhaps the  
23 university was having you go to the doctor as a  
24 retaliation for that you were going to make another  
25 employment complaint. So I want to ask about that.

1           MR. KATZENBACH:  Objection, Your Honor, this is  
2 not a question of his testimony.  Ask it be stricken.

3           THE COURT:  Motion to strike is granted.

4           MR. VARTAIN:  Q.  In the fall of 2008, you had  
5 a meeting with Mr. Philpott correct?

6           A.  Yes.

7           Q.  And in that meeting, you presented a list of  
8 documents to him, correct?

9           A.  No, I presented the documents themselves.

10          Q.  You presented no list, just the documents.  The  
11 list he made?

12          A.  He generated that list.

13          Q.  Okay.  Fair enough.

14                 And the document you presented to him, you did  
15 so because you were trying to persuade him that the  
16 university was using the medical evaluation as a form of  
17 retribution, correct?

18          A.  Not necessarily.  I presented it to indicate  
19 that the complainants may have retaliatory motive.  I  
20 didn't know that the administrators may have retaliatory  
21 motive.  I didn't know.

22          Q.  Okay.  What I think --

23          A.  The possibility was there.  That was my intent,  
24 to provide evidence.

25          Q.  So would it be fair to say that you presented

1 that information to suggest the possibility that these  
2 faculty members here, or whoever -- whoever it was that  
3 was making the concerns known about your behavior, might  
4 have retaliatory motives? Correct?

5 A. Whoever was concerned about my behavior, as  
6 indicated in the letter, might have retaliatory motives.

7 Q. Okay. And that was part of the reason you were  
8 presenting information to Mr. Philpott in October of  
9 2008, correct?

10 A. Yes.

11 Q. Did Professor Stephen Yeung -- as long as you  
12 have known him, had he ever said anything bad to you  
13 about you filing employment complaints, or any kind of  
14 complaints?

15 A. No.

16 Q. Did Professor Paul Zeitz ever say anything bad,  
17 derogatory, negative to you about the fact that you had  
18 filed employment complaints?

19 A. Yes, as I testified.

20 Q. What's the "yes"? Tell us about that.

21 A. When I expressed my complaint about the search  
22 in the meeting of February 6, 2008, at the end of the  
23 meeting, he said that "John, I hope when the new faculty  
24 member arrives that you treat that person with respect."

25 Q. That's what -- that's what he said.



1 A. Yes.

2 Q. He did not say anything about you filing  
3 employment-related complaints; he just said "I hope when  
4 the new professor comes, you'll treat him with respect,"  
5 correct?

6 A. That's what he said.

7 Q. Okay. So he didn't mention employment  
8 complaints by you in that statement, did he? Did he,  
9 Professor Kao?

10 A. I mean, I -- that meeting -- at the very  
11 beginning of the meeting, I complained about how the  
12 search was conducted.

13 Q. That wasn't my question. My question was when,  
14 after the meeting, Professor Paul Zeitz said to you "I  
15 hope you'll treat the new professor with respect," he  
16 didn't say anything whatsoever about your employment  
17 complaints, did he?

18 A. Well, that was during the meeting.

19 Q. When -- whatever -- whenever he said it, when  
20 he said "I hope you'll treat the new professor with  
21 respect," he didn't add any words whatsoever that had to  
22 do with your employment complaint, correct?

23 A. He didn't add any words to what I testified to.

24 Q. But the words that he said to you, "I hope  
25 you'll treat the new professor with respect," you

1 interpreted as being him angry about you making an  
2 employment complaint; is that correct?

3 A. What I said is I interpreted it as having to do  
4 with what I said at that meeting, which was complaining  
5 about the search.

6 Q. I'm asking you a little different question,  
7 Professor Kao. I'm asking you, when Professor Zeitz  
8 said to you "John, I hope you'll treat the new professor  
9 with respect," you, in your mind, thought of that, in  
10 your mind, that Professor Zeitz was acting hostile  
11 towards you because you had an employment complaint; is  
12 that right?

13 A. That's what I thought.

14 Q. Okay. Other than that one comment, which is  
15 your -- what -- did Professor Zeitz ever make any other  
16 comment to you that you took as derogatory about making  
17 an employment complaint?

18 A. No.

19 Q. What about Dean Jennifer Turpin; did she ever  
20 make any derogatory comments to you about you making  
21 employment complaints?

22 A. No.

23 Q. Professor Tristan Needham -- you told the jury  
24 that in 2006 you made that 400-page complaint. And the  
25 first page of it was "Tristan Needham is discriminating

1 and harassing." Remember that part?

2 A. Yes.

3 Q. Did you ever tell Professor Tristan Needham  
4 that you had made an employment complaint -- that is,  
5 that 2006 complaint -- where you mentioned him as being  
6 a discriminator or a harasser? Did you ever tell him  
7 that?

8 A. I never told anybody about the complaint,  
9 beyond submitting it to human resources and copying the  
10 Dean's Office.

11 Q. Which "anybody" would include Professor  
12 Needham. So you -- you have no -- you never told him "I  
13 filed a complaint against you," correct?

14 A. Yes.

15 Q. And he never said anything to you to suggest  
16 that he even knew you filed that complaint against him,  
17 did he?

18 A. No, he didn't say anything in reference to that  
19 complaint.

20 Q. Including that he didn't -- he never said  
21 anything to suggest that he even knew you had filed a  
22 complaint against him, correct?

23 A. Yes.

24 Q. And he never said anything to you in any way  
25 derogatory that you had filed those employment

1 complaints, correct?

2 A. Yes.

3 Q. Let's go to Professor Peter Pacheco. He never  
4 said anything -- he never said boo to you negative about  
5 employment complaints about you, correct?

6 A. Yes.

7 Q. Associate Dean Brown, same question. You were  
8 in his office there right after the holidays. You went  
9 right up to his office; you made your complaint.

10 By the way, you know from being at his  
11 deposition that's the meeting he says you scared him,  
12 right?

13 A. He said that at his deposition.

14 Q. Right. But in that meeting, he did not say  
15 anything negative to you that you were coming to the  
16 dean to present a complaint about how the hiring process  
17 was going, you know, in the math department, correct?

18 A. Yes.

19 Q. And he never thereafter, even after you were  
20 escalating those complaints --

21 MR. KATZENBACH: Objection, Your Honor.

22 MR. VARTAIN: Q. -- thereafter --

23 THE COURT: When there's an objection, please  
24 pause; let me rule.

25 MR. VARTAIN: I was -- I meant to withdraw it,

1 Your Honor. I apologize.

2 MR. KATZENBACH: He's testified --

3 THE COURT: Go ahead and withdraw it, then.

4 MR. VARTAIN: Q. And thereafter -- that is,  
5 after that January meeting where you went up to Dean  
6 Brown's office and were saying whatever you were saying  
7 about the hiring and making your oral complaint known --  
8 he never, ever thereafter said to you words to the  
9 effect of "I don't want you to make a complaint; you  
10 shouldn't make a complaint; you don't have a right to  
11 make a complaint," none of that, correct?

12 A. Yes.

13 Q. He, like all these other people, never, ever  
14 told you the university didn't want you to make  
15 complaints?

16 MR. KATZENBACH: Objection. Argumentative in  
17 form.

18 THE COURT: A bit compound too. Sustained.

19 MR. VARTAIN: Q. Did Dean Brown ever say  
20 anything to you that he didn't want you to file  
21 employment complaints?

22 A. No.

23 Q. Did Dean Turpin ever say anything to you along  
24 those lines?

25 A. No.

1 Q. Neither of those deans ever suggested to you  
2 that they were hurt by the fact that you were filing  
3 those complaints, correct? Is that correct?

4 A. That they were hurt by filing my -- those  
5 complaints? Yes, that's correct. They never said that.

6 Q. Mr. Philpott and Mr. Peugh [sic], the human  
7 resources people, the labor relations people, they never  
8 said anything, wrote anything, did anything to  
9 suggest -- bad question.

10 They never said anything negative about that  
11 you had made employment complaints?

12 MR. KATZENBACH: That is compound, Your Honor.  
13 Objection.

14 MR. VARTAIN: I forgot to say "I withdraw it."

15 Q. Neither -- neither Mr. Philpott nor Ms.  
16 Peugh-Wade ever said anything to indicate to you they  
17 felt you didn't have -- did not have a right to file an  
18 employment complaint?

19 MR. KATZENBACH: Again, that is compound.  
20 Objection.

21 THE COURT: I can live with it. Overruled.

22 THE WITNESS: They never said anything to me.

23 MR. VARTAIN: Q. They never said anything to  
24 you negative about your having filed employment  
25 complaints or that you were intending to file more

1 employment complaints, correct?

2 A. Yes.

3 Q. Now, let's talk about the complaints a little,  
4 because you had -- you told -- you told us about there  
5 was a 2000 -- year 2000 complaint, which you said was  
6 settled. Remember that?

7 A. Yes.

8 Q. And by that, you were claiming that  
9 Professor -- then Dean -- Needham, back in 2000, had  
10 written a letter to Professor Zeitz which you thought  
11 was negative towards you, correct?

12 MR. KATZENBACH: Objection, Your Honor.  
13 We're -- I think that's argumentative in form.

14 MR. VARTAIN: Q. Did you --  
15 I'll withdraw it, Your Honor.

16 Q. Did you at that time, in 2000, file that  
17 grievance on the basis that you thought that a letter  
18 Tristan Needham addressed to Professor Zeitz was  
19 negative as to you?

20 A. Could you repeat the question. I'm sorry.

21 Q. Did you in 2000, year 2000, file a grievance  
22 under the union because you felt that there was a letter  
23 from Tristan Needham addressed to Professor Zeitz  
24 that -- then the chairman of the department -- a letter  
25 that you thought had negative stuff in it about you?

1 A. Yes.

2 Q. And then that went through the union, and  
3 Tristan Needham wrote you that email where he said "I  
4 didn't mean to hurt your feelings; I really didn't mean  
5 to be negative; I'm retracting that letter." Remember  
6 that?

7 A. Yes.

8 Q. And that was the settlement of the grievance.  
9 And you then said "Fine, the grievance is over. I  
10 accept that," correct?

11 A. No.

12 Q. Didn't you -- didn't you send a letter to the  
13 union that said "Thank you -- thank you, union, I'm  
14 happy with the result"?

15 A. No. The settlement wasn't in response to Dean  
16 Needham's email; the settlement was in response to --  
17 concluded with Dean Nel, who at that time was Dean  
18 Needham's supervisor. He provided me with a signed  
19 statement of retraction. That was the settlement.

20 Q. Before that point, Professor -- then Dean --  
21 Needham had issued you the email of the nature that I  
22 just said, namely "I really didn't mean to hurt your  
23 feelings; I'm withdrawing that letter -- the part of the  
24 letter that hurt your feelings"; is that true?

25 A. Yes.



1 Q. Okay.

2 A. He sent me an email, but he refused to sign it.

3 Q. And you told the jury that you were unhappy  
4 that he didn't sign it with his signature. But it was  
5 on his email legend, correct?

6 A. Yes. The grievance meeting was the absence of  
7 the signature, a signed statement.

8 Q. The only thing I'm trying to make sure we're on  
9 the same page on, before there was even a grievance  
10 settlement, the dean -- the then Associate Dean  
11 Needham -- had already sent you an email saying "Sorry,  
12 John, that I hurt your feelings; I didn't mean to,"  
13 correct?

14 A. Yes, he sent me an email.

15 Q. Okay. So that email then led to a settlement  
16 of the grievance because the big dean said "Okay, I'll  
17 sign something," Dean -- the "big dean" being Dean Nel,  
18 correct?

19 A. Correct.

20 Q. Okay.

21 A. Dean Nel signed it -- signed the statement.

22 Q. So that -- so we're talking about different  
23 complaints you made. And the 2001 -- I'm sorry -- the  
24 2000 grievance got settled to your satisfaction by the  
25 university, correct?

1 A. Yes.

2 Q. Then we have -- the next time you filed a  
3 grievance is what we call this formal thing in 2006,  
4 right?

5 A. Yes.

6 Q. And that's the one where you sort of did a big  
7 reach-back in time, didn't you? You went back to 2002,  
8 right, and you made a complaint about the leave of  
9 absence that had to do -- that happened in 2002, right?

10 A. That was part of my complaint, yes.

11 Q. Okay. So in that respect, would you agree that  
12 there was a settlement proposed by the university on  
13 that grievance as well, correct?

14 A. We had meetings to find a way to settle my  
15 complaint. That was part of my complaint.

16 Q. And there was a settlement proposal made by the  
17 university, correct? And that's in writing.

18 And Mr. Katzenbach and I have agreed that we  
19 won't have a lot of --

20 A. I'm sorry, I -- I -- I -- because I understood  
21 that there was some problems with admissibility, so  
22 that's why I'm hesitant as to --

23 Q. No, that's okay. I was just going to tell  
24 you --

25 A. I don't know what -- I didn't get instructions

1 on this matter.

2 Q. That's fine.

3 A. So I --

4 Q. What I was going to tell you is I can't ask  
5 questions about it because we've agreed that the  
6 back-and-forth between the settlement proposals are in  
7 writing, and they can be discussed with the jury later.

8 But all I'm asking you is to confirm there was  
9 proposals made by the university to settle that 2006  
10 grievance. Correct?

11 A. Meetings were conducted; proposals were made,  
12 yes.

13 Q. Including proposals to settle by the  
14 university, correct?

15 A. Yes.

16 Q. But for reasons that we don't need to talk  
17 about --

18 A. I'm sorry. Pardon me.

19 Q. Okay. That's okay.

20 For reasons we don't need to talk about, the  
21 proposals didn't result in a final agreement, correct?

22 A. Yes.

23 Q. So then -- so then the next complaint comes  
24 about in 2008. And that's in February. You and Mr.  
25 Katzenbach's associate attorney, Ms. Hancock, go to the

1 human resources department and have a meeting at the  
2 informal stage of the complaint process, correct?

3 A. That wasn't my next complaint. There was the  
4 addendum --

5 Q. Oh, yeah, you're right.

6 A. -- that it was in 2007.

7 Q. But --

8 A. But in February, yes, I --

9 Q. Well, let's go -- let's -- you corrected me.

10 A. Okay. Yeah.

11 Q. So let's go back and cover that, because you  
12 made an addendum to the 2006 -- you did a complaint in  
13 2007, correct?

14 A. Yes.

15 Q. And that's the one where Ms. Peugh-Wade wrote  
16 you a letter and she essentially denied the addendum  
17 complaint. She said it wasn't a proper -- a meritorious  
18 complaint, correct?

19 A. Yes. I testified to the letter that I received  
20 from her.

21 Q. Yes. So then we got 2008. And that's the  
22 February one. You had the meeting with HR, Ms. -- I  
23 think you said her name was Gon-Soneda. We'll call her  
24 Maye-Lynn, for her first name. She had that meeting  
25 with you and Mr. Katzenbach's attorney, correct?

1           A.    My attorney, Ms. Hancock, attended that  
2 meeting --

3           Q.    Okay.

4           A.    -- with Ms. Gon-Soneda and Ms. Verde.

5           Q.    Ms. Verde being another human resources person,  
6 correct?

7           A.    Yes.

8           Q.    They did not say anything negative whatsoever  
9 to you about the fact that you wanted to bring another  
10 complaint, did they?

11          A.    No.

12          Q.    They actually scheduled -- or they actually  
13 promised to give you something in writing by the end of  
14 March, and they did so, correct?

15          A.    Ms. Gon-Soneda did make a commitment to me  
16 along those lines, yes. Ms. Verde didn't participate.  
17 She was a observer.

18          Q.    And Ms. Gon-Soneda did pretty much meet her  
19 stated time target of giving you that letter by sometime  
20 in March, correct?

21          A.    She sent me a email, as I testified to. I  
22 can't recall the date right now, but --

23          Q.    Whatever she did --

24          A.    -- within about a month -- about a month.

25          Q.    -- she did it timely. She fulfilled her -- she

1 committed to you by a certain date she'd give you  
2 information, and she did so, correct?

3 A. She sent me a response within a month.

4 Q. And in that response, she indicated that the  
5 next step, if you wanted to pursue this issue, would be  
6 through the union collective bargaining agreement,  
7 correct?

8 A. Yes.

9 Q. And she even told you how -- in some ways, how  
10 to go about doing it, correct? She said "Here's the  
11 collective bargaining agreement. Here's the  
12 provisions"?

13 A. I can't recall specifically right at the  
14 moment --

15 Q. Okay.

16 A. -- what -- she referred me to the union  
17 grievance procedure under the collective bargaining  
18 agreement.

19 Q. Which was something you already knew how to  
20 handle because you had done it before, correct?

21 A. Broadly I knew how to file a union grievance  
22 generally.

23 Q. But you never -- that is, after March, the HR  
24 people said the way -- the next step is to go through  
25 the union. You never did start that union grievance,

1 did you?

2 A. No. I -- I testified that I had discussion as  
3 to how to file such a grievance with Dr. Neaman. But I  
4 didn't officially start any grievance, yes.

5 Q. You did not unofficially start a grievance  
6 either?

7 A. No. I -- that was strictly informational.

8 Q. Okay.

9 A. Yes.

10 Q. So we don't know what would have happened with  
11 that grievance 'cause it didn't get launched? In other  
12 words, we don't know if the university would have given  
13 you a settlement proposal or what would have happened,  
14 'cause it didn't go forward, correct?

15 MR. KATZENBACH: Objection. Argumentative.

16 THE COURT: Overruled. Witness may answer.

17 THE WITNESS: Yes. I have no idea what would  
18 have happened if I had filed a union grievance, because  
19 I didn't.

20 MR. VARTAIN: Q. Now, when it came to pass as  
21 this case was going on, your attorney took -- had the  
22 opportunity, as we've heard, to take the depositions of  
23 all these professors and the deans, correct? And you  
24 were there.

25 A. So you're eliminating Mrs. Needham --

1 Q. Yeah, 'cause --

2 A. -- from the list. So I was -- yes, I attended  
3 the depositions of Dr. Yeung, Dr. Zeitz, Dean Turpin,  
4 Dr. Needham, Dr. Pacheco, Dr. Brown. I attended those  
5 depositions, yes.

6 Q. I want to go -- I sort of got ahead of myself.  
7 So pretend I didn't ask you about the depositions,  
8 'cause I'm going to come back to that.

9 I just -- I want to ask you another set of  
10 questions about all these people. First about Mr.  
11 Philpott. We'll start at the top. The question is --

12 A. Oh, yes.

13 Q. -- Mr. -- yeah, I sort of --

14 A. Yeah, he didn't have a deposition. I'm sorry.

15 Q. Yeah, he didn't. But I'm skip -- I'm going --  
16 I'm ignoring the depositions. I'm asking you a  
17 different bunch of questions, okay?

18 A. Yes.

19 Q. Okay. Mr. Philpott -- you can just run his  
20 line over here. The question for him is did he ever  
21 give you any cause whatsoever to think he was prejudiced  
22 based on race or gender?

23 A. No.

24 Q. Ms. Peugh-Wade, in all your dealings with her,  
25 did she ever give you any cause to believe that she was



1 prejudiced on the basis of race or gender?

2 A. In my dealings with her or in respect -- with  
3 respect to the information that I obtained through  
4 discovery? Are you making a distinction between that  
5 or ...

6 Q. Well, you know, I --

7 A. I don't understand your question, I guess.

8 Q. That's fair.

9 A. If you could help, please.

10 Q. It wasn't a great question.

11 Did she ever say anything to you during the  
12 time you were an employee of the university which gave  
13 you cause to think she was prejudiced against people  
14 based on their race, Asian-American, or on gender?

15 A. No. While I was employed at the university,  
16 no.

17 THE COURT: Ladies and gentlemen, I received a  
18 couple notes from jurors during the course of the  
19 cross-examination now under way. I'll share them with  
20 counsel during the break.

21 In general, save your questions until both the  
22 attorneys have had a chance to ask theirs. But these  
23 two notes have to do with understanding what's going on  
24 with the whiteboard that's being used. So I'll show  
25 them to the attorneys during the break, and they can

1 cope.

2 Remember the admonition. Do not form or  
3 express any opinion on this case until it's finally  
4 submitted to you for your decision. Do not discuss  
5 among yourselves or with others until that time. Please  
6 be back in your places at 1:40 according to the clock --  
7 2:40 according to the courtroom clock.

8 (Recess taken.)

9 THE COURT: Jurors and alternates are all  
10 present. Counsel from both sides are present.  
11 Plaintiff is personally present, still on the witness  
12 stand.

13 Mr. Vartain, you may continue your inquiry.

14 MR. VARTAIN: May I address the jurors'  
15 questions first, Your Honor?

16 THE COURT: Yes, sure.

17 MR. VARTAIN: Two jurors had questions about my  
18 sloppiness on my chart, so I want to show what I did to  
19 clean it up.

20 First of all -- excellent question -- Philpott  
21 and Peugh-Wade, are they people with personal safety  
22 worries? And the answer is I didn't mean to do that, so  
23 I'm going to take them off.

24 I was using this chart for an extra purpose,  
25 and I -- so -- so these are the people. And -- and so

1 then I -- when I -- I checked this box when I asked the  
2 questions as to whether these people said anything bad  
3 about depression. So I checked the box.

4 Then I asked the questions -- complaint  
5 questions, did they say anything bad about Professor  
6 Kao's complaints. When he said no, I checked the box.

7 And now I'm about to ask questions about bias.  
8 So that's what that means there.

9 And then -- so we'll just take Philpott and  
10 Peugh-Wade off of this chart. They really don't belong  
11 here. So thank you.

12 The other thing that I should mention is it's  
13 the testimony that's the evidence. It's the exhibits.  
14 This chart is for illustration. It's not evidence, in  
15 itself. It's just to help along.

16 So I think I -- I think I did my mea culpa.  
17 May I proceed, Your Honor?

18 THE COURT: You may.

19 MR. VARTAIN: Okay.

20 Q. So what I was starting to ask you, Professor  
21 Kao, was -- and I'll go back and sort of redo it.

22 This question's first about Professor Stephen  
23 Yeung. In all the business about the hiring of new  
24 faculty members, did Professor Stephen Yeung ever give  
25 you cause to believe that he was personally biased

1 against applicants based on their gender, race or any  
2 other reason?

3 A. No.

4 Q. Did Professor Paul Zeitz ever give you good  
5 cause to believe that he was personally biased against  
6 any applicant based on their gender, race, et cetera?

7 A. No.

8 Q. Did Dean Turpin -- and as long as you've known  
9 her, in connection with all the different issues with  
10 the hiring of faculty, did she ever give you good reason  
11 to think that she was biased against any people based on  
12 their race or gender or any other characteristic?

13 A. In hiring?

14 Q. In hiring.

15 A. No.

16 Q. We're talking about the hiring of new faculty.  
17 Professor Tristan Needham, he participated in  
18 the 2008 search as well, right? He was back in the  
19 department. He had stopped being an associate dean,  
20 correct?

21 A. Yes.

22 Q. How many hirings were there in the math  
23 department after Professor Needham stopped being a dean  
24 and came back into the math department?

25 A. Well, let's see. '04, '06 -- I'm sorry, my

1 contact ...

2 Let's see. '04, '06, '08 was the search. If  
3 you don't include the '08/'09 search when I was on  
4 suspension, then there was three when I was on campus --

5 Q. But --

6 A. -- in the department. There were three  
7 searches during which Dr. Needham -- let's see.

8 Pardon me. '03/'04, he was still dean. And  
9 that search was the one that's mentioned in my complaint  
10 with respect to the search meeting. So he was dean  
11 during that search.

12 He was in the department in '05/'06 when Dr.  
13 Yeung was hired and '07/'08, which was the search that I  
14 filed the formal complaint concerning. So those two  
15 searches.

16 As of spring 2008, I was on suspension and I  
17 was banned from campus, so I have no knowledge of what  
18 Dr. Needham said or did that semester for that search --  
19 with respect to that search.

20 Q. I think you're telling me that there were two  
21 hirings in the math department that Professor Needham  
22 was involved in from the time he stopped being a dean  
23 and came back as a math professor.

24 A. Yes, when I was teaching --

25 Q. Okay.

1 A. -- at USF.

2 Q. Yeah, we're not -- we're not interested in  
3 what's happened since you stopped teaching.

4 A. Since I was suspended, yes.

5 Q. Okay.

6 A. Yeah.

7 Q. And those two hirings that Professor Needham  
8 was involved in, one was when Professor Stephen Yeung  
9 was hired, right?

10 A. Yes.

11 Q. And the other was when Professor Cornelia Van  
12 Cott was hired, correct?

13 A. Yes.

14 Q. Was it your understanding, from listening to  
15 Professor Needham in the meetings where those two people  
16 being hired was talked about, that Professor Needham was  
17 in favor of hiring Professor Stephen Yeung, who would be  
18 the second Asian-American professor in that department?  
19 Is that right?

20 A. Yes.

21 Q. And was it your understanding that Professor  
22 Tristan Needham was in favor of hiring Cornelia, which  
23 would be the -- the second female professor in that  
24 department? Correct?

25 A. I should -- not exactly. I mean, I should say

1 that the committee -- individual faculty members on the  
2 committee -- Dr. Needham was on the committee -- didn't  
3 express their personal opinion as to the final rankings  
4 that the committee put forward to the department.

5 So as to Dr. Needham's personal opinion, I have  
6 no knowledge.

7 Q. Well --

8 A. In terms of the -- pardon me.

9 Q. No, I'm sorry. Go ahead.

10 A. In terms of the committee, it's not -- it's not  
11 accurate to say that Dr. Van Cott was the first choice.  
12 I mean, there was a ranking produced by the committee.

13 So -- but -- so in other words, the committee  
14 forwarded a list, ordered, to the Dean's Office. The  
15 Dean's Office decided what to do with that list. The  
16 Dean's Office had the authority to change the order.

17 My understanding was that they adhered to the  
18 order that the search committee presented to us at that  
19 meeting that I testified to. That list had the -- had  
20 Dr. Van Cott as the second. Dr. Duchin was the first;  
21 Dr. Jones was the third; and Dr. Treneer was the fourth  
22 on that list, in that order.

23 Q. Making it a little simpler for me. And I  
24 appreciate that information.

25 Would it be fair to say that Professor Tristan

1 Needham in no manner gave you any reason to believe that  
2 he had anything but support for the hiring of Professor  
3 Stephen Yeung, who would be the second Asian-American in  
4 the department?

5 A. In the search that you're referring to in 2006,  
6 the department, together with the search committee, took  
7 a vote. Tristan Needham supported Dr. Yeung as the  
8 first choice.

9 Q. Okay. That's my -- so you know that Professor  
10 Tristan Needham wanted the university to hire Professor  
11 Stephen Yeung and voted to support that, correct?

12 A. Yes.

13 Q. When Professor Cornelia Van Cott was hired, who  
14 was then -- would have been the second female ever hired  
15 as -- in the full-time professorship, did Professor  
16 Needham, from what you could tell, support her hiring?

17 MR. KATZENBACH: Objection. That question is  
18 compound.

19 THE COURT: Overruled.

20 THE WITNESS: I don't know if there was a  
21 female professor before I -- full-time tenure track  
22 faculty member before I arrived at USF. I have no  
23 knowledge of that. That would be 1991.

24 In the years 1991 to 2000--and -- so I have no  
25 knowledge as to whether or not that's accurate that she



1 was the second --

2 MR. VARTAIN: Maybe I'll -- maybe I'll clear  
3 that up, because I think I phrased my question sloppily  
4 for the jury.

5 Q. You had told me that Mrs. Lehmann was the --  
6 was the chairperson of the math department, and she  
7 retired in 2004, correct?

8 A. Professor Lehmann was chair at one time.

9 Q. Okay.

10 A. And she retired in 2004.

11 Q. She was the only female full-time professor in  
12 the math department from the time you were hired in '91  
13 till the time she retired in 2004, correct?

14 A. Yes.

15 Q. So that's why I sloppily said Cornelia Van Cott  
16 was going to be the second female professor ever in the  
17 department. And you were saying, well, you're not sure  
18 ever, 'cause it could have been -- there could have been  
19 a female --

20 A. Yes.

21 Q. -- before.

22 A. I have no knowledge.

23 Q. Okay. But the real question I had was that  
24 Professor Needham, from what you could tell, supported  
25 the hiring of Cornelia?

1           A.    I don't have knowledge as to Dr. Needham's  
2 opinion.  I mean, the search committee presented its  
3 collective opinion to the department.  So in  
4 deliberation -- you know, within deliberations of the  
5 search committee, whether Dr. Needham supported Dr.  
6 Jones as the first choice -- Dr. Jones is a white  
7 male -- I have no knowledge.

8           Q.    Okay.  I think you're saying what I thought you  
9 would say.  You don't have any reason to believe  
10 Professor Tristan Needham was against the hiring of  
11 Professor Van Cott because it's a woman; is that  
12 correct?

13          A.    I have no knowledge of Dr. Needham's opinion --

14          Q.    Okay.

15          A.    -- as to the ranking of those candidates.  I  
16 just know what -- what was told to me in terms of the  
17 collective opinion of the search committee.

18          Q.    Has Professor Tristan Needham ever said  
19 anything to you or in your presence to suggest he wants  
20 to hold down the number of women in the full-time  
21 faculty of the math department?

22          A.    No.

23          Q.    Professor Pacheco, same questions about bias.  
24 Did he ever give you any good reason to believe that he  
25 was making his decisions about who would be hired in the

1 department based on gender or race -- in a negative way  
2 based on gender or race?

3 A. No.

4 Q. Associate Dean Brown, in all the years you've  
5 known him and he's been involved in hiring -- helping to  
6 hire professors in the math department, same question.  
7 Did he ever give you good reason to believe he was  
8 trying to hold down the numbers of women or Asians?

9 A. No.

10 Q. Now, I put a little X here next to "Dean  
11 Turpin." When you were telling me she never said  
12 anything negative about depression -- 'cause you started  
13 to talk about the time you went on -- you were on  
14 medical leave in 2006, and I said "Okay, we'll come back  
15 to that." So now we're going to come back to that.

16 That was the time in the fall of 2006 when your  
17 mother had surgery and then you needed to take some time  
18 off teaching that fall to be with your mom. You took  
19 family leave, right?

20 A. I took paid family/medical leave.

21 Q. Okay. And that was the time when you, as you  
22 told the jury -- having to deal with mom exacerbated  
23 your depression, and then you -- the doctor prescribed  
24 that one medicine for you. You called it Lamictal,  
25 right?

1 A. I was prescribed Lamictal.

2 Q. But that was in this time -- we're talking  
3 about October of --

4 A. In October of 2006, I was prescribed Lamictal  
5 for depression.

6 Q. And the depression came out of your situation  
7 with your mom and your concerns about your mom?

8 A. The concerns about my mother was a contributing  
9 factor.

10 Q. Okay. And down that path of taking -- and then  
11 you got -- I'm sorry.

12 You got the medication -- bad reaction from the  
13 Lamictal; you had to go to the emergency room; and then  
14 your doctor took you off that medicine, correct?

15 A. Yes.

16 Q. By then, you had been out of teaching for  
17 several weeks and the university had hired up some  
18 part-time replacements for you; is that right?  
19 Teachers?

20 A. Not exactly. I -- I had returned from the  
21 medical leave after -- I was -- I had been teaching -- I  
22 was teaching for about a week when the reaction took  
23 place.

24 Q. Okay. So --

25 A. So I returned -- so yes, there were -- there

1 were -- there were faculty that were assigned to take  
2 over my classes during the medical -- during the paid  
3 family/medical leave for my mother.

4 And then I returned to teaching, and about a  
5 week or so -- over a week of teaching, then I had the  
6 reaction. So -- yeah, so I -- if that answers the  
7 question. I'm sorry.

8 Q. I think you did. I mean, I'm going to try to  
9 clean it up so the jury understands the chronology,  
10 'cause the chronology's very important 'cause it has to  
11 do with what Dean Turpin was trying to do.

12 MR. KATZENBACH: Object.

13 MR. VARTAIN: Q. So let me break it apart.

14 MR. KATZENBACH: Your Honor, objection. I  
15 don't like counsel testifying before he asks questions.

16 THE COURT: All right. Is that an objection?

17 MR. KATZENBACH: Yes, it is. Move to strike.

18 THE COURT: It's sustained.

19 MR. VARTAIN: Q. Let me back up, then, sir,  
20 'cause I want to go through the chronology.

21 School starts in August, late August typically,  
22 correct?

23 A. Yes.

24 Q. You came back to school for the fall. You  
25 started teaching your classes that August of 2006,

1 correct?

2 A. Yes.

3 Q. At what point did you need to go on leave of  
4 absence for your -- to help with your mom?

5 A. Well, there were meetings that I testified to.  
6 And at the second meeting --

7 Q. I'm just interested --

8 A. -- in connection -- well, it was at that  
9 meeting, is what I'm trying to say, I asked -- at that  
10 very meeting informed Dean Turpin that -- in August, my  
11 mother was at -- was told she needed an operation. And  
12 so it was at that meeting that I made the request for  
13 the PF -- paid family/medical leave.

14 Q. So --

15 A. And she agreed that that would be fine if I  
16 took that leave. So -- and the date of that meeting was  
17 mid September --

18 Q. Okay.

19 A. -- or so. I -- it's on a document.

20 Q. Close enough.

21 So you came back to teaching in late August.  
22 But then come September, you asked Dean Turpin to let  
23 you off work so you could take care of your mom's --  
24 help her with her surgery. Dean Turpin said "Fine,  
25 sure," correct?

1 A. Yes, she approved the medical --

2 Q. Okay.

3 A. -- paid family/medical leave.

4 Q. And how much leave did you request of her, and  
5 how far did she give you so you could help your mom?

6 A. About two weeks.

7 Q. Okay.

8 A. Maybe a little more than two weeks. It's on a  
9 document.

10 Q. That's fine.

11 When the two -- when you were done helping your  
12 mom and you were ready to come back to work, did Dean  
13 Turpin take you back to work?

14 A. At the end of the paid family/medical leave  
15 period, I returned to work --

16 Q. Okay.

17 A. -- as planned.

18 Q. As planned. So Dean Turpin didn't do anything  
19 but to facilitate your return back to work after you  
20 were finished with your mom, correct?

21 A. Yes.

22 Q. But then lo and behold, unfortunately within a  
23 week thereafter, you got your own medical issue with the  
24 medication -- bad medication reaction, correct?

25 A. I was teaching a week. And at the end of the

1 week -- or maybe a little longer than that -- a week,  
2 ten days -- it's on a document --

3 Q. Okay. But during the two weeks you were off  
4 with your mom taking care of her, had Dean -- that Dean  
5 Turpin approved you for -- had she arranged or had her  
6 office arranged for the university to hire some  
7 part-time instructors to take care of your courses while  
8 you were off helping your mom?

9 A. I didn't -- I gather yes from the document.  
10 She wrote me an email explaining that yes, part-time  
11 faculty had been hired.

12 Q. Well, sir, you -- you knew -- somebody had to  
13 teach the students, so you knew that they had gotten  
14 faculty members to fill in for you, right?

15 A. I wasn't involved in what -- somebody was  
16 filling in in my classes. Whether that was a  
17 part-time -- yes, I found out after I returned. In the  
18 email, she made -- she told me that -- that they had  
19 hired part-time faculty as replacements for my paid  
20 family/medical leave.

21 Q. Okay. So -- but --

22 A. If that's responsive.

23 Q. It is. Thank you.

24 So then when you got done helping your mom, you  
25 came back; the dean sent the fill-in teachers away; and



1 you got to go back in your courses. But then lo and  
2 behold, a week later you took sick yourself, right?

3 MR. KATZENBACH: Objection, Your Honor. That  
4 is compound. I believe it's asking a number of  
5 questions.

6 THE COURT: Sustained.

7 MR. VARTAIN: Q. When you came back from  
8 taking care of your mom, the dean put you back in the  
9 classroom and the part-time faculty members no longer  
10 taught your courses, correct?

11 A. Yes.

12 Q. Was it then about a week later, after you were  
13 back teaching your courses, that you went on your own  
14 medical leave?

15 A. Yes.

16 Q. And that was the medication snafu you were  
17 telling us about --

18 A. Yes.

19 Q. -- correct?

20 A. Yes.

21 Q. So when you went back on -- when you went on  
22 your own medical leave, how long did you stay out of  
23 work for?

24 A. I believe two weeks --

25 Q. Okay.

1 A. -- is what the doctor recommended --

2 Q. Okay.

3 A. -- and what I asked for.

4 Q. Did the dean, Dean Turpin, approve you to be  
5 out for those two weeks for your own medical issues?

6 A. Yes.

7 Q. Did she go and get the part-time faculty  
8 members back into the school to take care of your  
9 classes?

10 A. Somebody took -- took over my classes. I don't  
11 know if it was the same faculty members that were hired  
12 for the two weeks that I would be off for the paid  
13 family/medical leave. I don't know how exactly. But  
14 yes, part-time faculty were teaching the classes I was  
15 assigned during my own medical leave.

16 Q. Okay. So then altogether, how long -- how many  
17 school weeks were you out for your own medical problems,  
18 out of work?

19 A. It's on a document. I believe two -- two  
20 weeks.

21 Q. Okay.

22 A. Before, yeah.

23 Q. Okay. And by that time in the school  
24 calendar -- was it about the end of October, somewhere  
25 in there?

1 A. Approximately.

2 Q. Yeah. And the school term ends somewhere in  
3 early December, correct?

4 A. Yes.

5 Q. So when you were then ready to come back from  
6 the second leave of absence for that fall, the dean told  
7 you that she was a little concerned about having a  
8 second interruption for the students and maybe we should  
9 just leave the students with the part-time faculty for  
10 them -- for the students to finish out with them for the  
11 rest of the semester; is that correct?

12 A. She wrote me an email. Those aren't the exact  
13 words that she used, but she said it would be confusing  
14 for the students.

15 "For that reason, I ask that you  
16 conduct other activities on behalf of the  
17 university for the remainder of the  
18 semester."

19 Q. Okay. The reason that she told you she thought  
20 maybe now that it's late October, you shouldn't come  
21 back into those -- into the courses was it would be  
22 confusing for the students in your courses, correct?

23 A. I recall that those were the words that she  
24 used in her email. The exact words are on a document.

25 Q. Okay. That's -- what you understood from the

1 email was she wants to have continuity for the students,  
2 correct?

3 A. Those -- that was my interpretation of the  
4 words --

5 Q. Okay.

6 A. -- that she used on her email.

7 Q. And then you wrote her an email back, didn't  
8 you?

9 A. Yes.

10 Q. And then your email said -- you said, and I  
11 quote:

12 "I understand your concerns as to the  
13 interruption of teaching for these courses.  
14 I do not wish to inconvenience the new  
15 instructors."

16 That's what you said, correct?

17 A. That's my recollection. I don't -- I don't  
18 have the document in front of me.

19 Q. And it's true that you accepted the dean's  
20 decision to keep the part-time faculty members teaching  
21 your courses so as not to interrupt the teaching for the  
22 students, correct?

23 A. Yes. I did not challenge her decision.

24 Q. You didn't express any objection whatsoever to  
25 the dean's decision to leave the fill-in instructors

1 there, correct?

2 A. When she wrote me, I made that reply. It  
3 doesn't -- I didn't -- I accepted what -- her  
4 instructions in that regard.

5 Q. You never said to the dean "I object, I  
6 disagree," or any words by which she could understand  
7 that you weren't happy with her decision, correct?

8 A. There was a email. But generally, yes, I --  
9 you know ...

10 Q. You stated in your --

11 A. I believe there was a email -- yes. I -- there  
12 was an email exchange. And that was the last email. So  
13 yes.

14 Q. It is true, sir, that you did not express any  
15 objection whatsoever to the dean when she told you  
16 "Let's leave the part-time instructors there"?

17 A. When she gave me that directive, I didn't -- I  
18 didn't challenge it. But there were prior emails.

19 Q. Sir, I'm not that concerned about this email or  
20 that email. I'm concerned about isn't it true that in  
21 no manner did you tell the dean, whether in an email, in  
22 person or in any manner, "I object to you taking me out  
23 of my teaching duties and leaving the part-time people  
24 there," or words to that effect?

25 A. I recall an email asking to go back -- to

1 return to teaching. But when she wrote that second  
2 email explaining that it would be confusing to students  
3 if I returned to teaching, I did not challenge it.

4 Q. Okay. I think what you're telling the jury is  
5 once the dean explained to you what her thinking was as  
6 to why she wanted to leave the part-time instructors  
7 there, given it was late October, you accepted her  
8 decision and you did not object. Is that true?

9 A. Yes. After I received that email, I did not  
10 challenge it -- or -- I did not challenge it.

11 Q. You didn't tell her, after that, "I want to  
12 come back"?

13 A. Not after that email.

14 Q. In your -- in your attorney's time line in  
15 opening statement -- let me ask you that. You did  
16 review your attorney's time line before it was put on  
17 the screen, did you not?

18 A. From the opening statement?

19 Q. Yes.

20 A. I --

21 MR. KATZENBACH: I object, Your Honor. This is  
22 really seeking attorney/client communications.

23 THE COURT: I don't think so. The witness may  
24 answer "yes" or "no."

25 THE WITNESS: Yes, the night before -- yes, I

1 looked at it.

2 MR. VARTAIN: Q. Did you look at it to  
3 determine if it was in your --

4 A. No, actually, that's not correct. No, not in  
5 the final form.

6 Q. In some form or another, did you review it  
7 before the jury got to see it, so that it could -- you  
8 could verify that it was accurate insofar as the facts,  
9 as you know them to be?

10 A. In some form or another ... I'm sorry.

11 I -- I -- the night before the opening  
12 statements, I looked at a draft PowerPoint document  
13 briefly. I didn't check my attorney's -- I didn't check  
14 the information on it. I looked at it briefly, and then  
15 there were changes made to it.

16 When I -- when my attorney was presenting it in  
17 court, I noticed that it was not the same as the  
18 document that I looked at the evening before.

19 Q. Okay, then, fine. I won't hold you to what he  
20 said in his opening statement 'cause you didn't look at  
21 the last draft. That's fair.

22 Can -- I'm going to take that away for a second  
23 here.

24 I've put up on the screen -- and I just broke  
25 my glasses.

1           May I have a moment to get my spare pair out of  
2 my ...

3           THE COURT: Sure.

4           MR. VARTAIN: I just broke my glasses.

5           MR. KATZENBACH: There's a lens right there.

6           MR. VARTAIN: Yeah, but I can't pop it back in.

7           MR. KATZENBACH: No, I just don't want you to  
8 step on it. Or at least I don't want people to think I  
9 want you to step on it.

10          MR. VARTAIN: They're two for a dollar.

11          So I have put up on the --

12          Can the jury see that? Is there anybody that  
13 cannot see it?

14          JUROR 8: I can't see it.

15          MR. VARTAIN: Q. Can you see it, Professor  
16 Kao?

17          A. If you could refer to me as Dr. Kao, I'd  
18 appreciate it. I'm not a professor anymore.

19          But no, I can't. If you can refer me to the  
20 exhibit, however, I'll work off the binders and then  
21 I'll face the jury.

22          Q. Okay. I'll call you "Doctor."

23          A. If you don't mind.

24          Q. This is from the June 24<sup>th</sup> letter that Ms.  
25 Peugh-Wade gave you, which is in evidence as Exhibit 34.



1 A. If you give me a moment.

2 Q. You may look at --

3 A. I'll work off -- because I can't -- my vision  
4 sight-line is blocked. But I'll work off a binder, if  
5 you don't mind.

6 MR. VARTAIN: The witness will put Exhibit 34  
7 in front of him. Exhibit 34 is published to the jury.

8 THE WITNESS: Yes.

9 MR. VARTAIN: Q. And, of course, you read  
10 Exhibit -- this exhibit when you received it from Ms.  
11 Peugh-Wade -- that is, around June 24<sup>th</sup>, 2008 --  
12 correct?

13 A. Yes.

14 Q. Did it in any manner concern you that Ms.  
15 Peugh-Wade was telling you that you had colleagues that  
16 were frightened by you?

17 THE COURT: Mr. Vartain, don't lean on the  
18 bench.

19 MR. VARTAIN: Sorry.

20 THE WITNESS: She doesn't say who the  
21 individuals are, so I don't know who they are, whether  
22 they're colleagues or administrators or students or  
23 other people.

24 MR. VARTAIN: Q. You knew they were university  
25 people, though, did you not?

1           A.    To be honest, no, because there's no specifics  
2 as to you saw me where and doing what.  So for all I  
3 know, it could be somebody on the street or in another  
4 part of San Francisco.  I have no idea.  There's no  
5 specifics to indicate one way or the other.

6                   Some of the descriptions, "in the hallways,"  
7 yes.  But others, I have no -- I have no way -- I have  
8 no -- I would -- I didn't have any knowledge, at that  
9 time, as to what has been referred to.

10           Q.    Are you -- are you testifying that when you and  
11 your attorney met with Ms. Peugh-Wade and she went  
12 through the letter with you and you had that meeting,  
13 that you did not believe -- or -- that this concerned  
14 your behaviors at the university and involved with  
15 university employees?

16                   MR. KATZENBACH:  Objection.  That's compound  
17 and argumentative.

18                   THE COURT:  Sustained.

19                   MR. VARTAIN:  Q.  When you read this letter,  
20 did you believe that she was explaining behavior by you  
21 that she thought concerned university employees?

22           A.    I had no knowledge as to whether the  
23 individuals were employees or not, students or not.

24           Q.    You had knowledge that they were people who  
25 were on the campus of the university, though, correct?

1           A.    I had no knowledge one way or the other of  
2   that, because there's no specifics.  I mean, some of it,  
3   yes, when -- if -- I examined the letter.  And at that  
4   time, "in the hallways," that component of the  
5   description would be on campus.

6           Q.    Sir --

7           A.    The others -- I mean, bear in mind, you know,  
8   these are very general descriptions.  They're broad;  
9   they're vague; they're subjective.

10                  People connected to the university see each  
11   other off campus, in restaurants, bars, on the street,  
12   walking in the neighborhood.  There were no specifics in  
13   the descriptions for me to conclude one way or the  
14   other.

15                  But some of them -- some of the items, yes,  
16   identify some part of campus, "hallways."  And it  
17   suggests that that particular item was somewhere on  
18   campus in a hallway.

19           Q.    Well, Ms. Peugh-Wade -- let's just take one  
20   item, the "fists clenched" that's in line 3 there.  You  
21   see that?

22           A.    Yes.  That was added from the draft -- the  
23   other document.

24           Q.    Right.  That was in the June 24<sup>th</sup> letter?

25           A.    That was -- that was added, yes.  And it's in

1 this document, this exhibit that I'm looking at, which  
2 is Exhibit 34.

3 Q. Did you at any time in the spring of 2008 have  
4 meetings or conversations with people when you held your  
5 fists clenched up in the air?

6 A. No.

7 Q. Did you clench your fists at any time in the  
8 spring of 2008 when you were in the company of other  
9 faculty members?

10 A. Clench my fists in what sense? I mean, there  
11 were times when my hand may be -- I mean, if I'm smoking  
12 a cigarette, right --

13 Q. I'll show you --

14 A. -- my hand --

15 Q. I'm sorry.

16 A. What do you mean by --

17 Q. I'm sorry. Go ahead. I'm interrupting you. I  
18 apologize.

19 A. I guess it would depend on what you mean by "a  
20 clenched fist."

21 Q. And that's what you asked me, in what sense.  
22 And I'll show you on the screen.

23 Could you help with that? You want to take --  
24 you can take the letter off.

25 You remember I -- when I asked --

1 (Playing video clip as follows:

2 MR. VARTAIN: Q. Let me ask it this  
3 way: When you went to see Dr. Brown in his  
4 office on January 3<sup>rd</sup>, 2008, did you  
5 modulate your voice in a higher manner than  
6 you usually use?

7 ANSWER: No, ordinary speaking tone.

8 QUESTION: So what did you mean by  
9 asking me what I meant by modulation of your  
10 voice?

11 ANSWER: You didn't use the word  
12 "modulation."

13 QUESTION: I used the word "raise your  
14 voice." Did you raise your voice to Dr. --

15 ANSWER: The volume of my voice changes  
16 in every conversation.

17 QUESTION: I see you have your hand  
18 clenched in a fist right now. Is that the  
19 way you -- is that the way you displayed  
20 your hands at faculty meetings in the spring  
21 of 2008?

22 ANSWER: I don't recall doing so. I'm  
23 kind of nervous, so I'm --

24 QUESTION: Okay.

25 ANSWER: I mean, I tend to, like, lean

1       like this when I'm thinking. That's what  
2       I'm doing.

3               QUESTION: Well, actually, you weren't  
4       leaning on your fist, but your fist --

5               ANSWER: Well, I don't want to do this  
6       in front of the video, but that's my natural  
7       tendency. So I'm trying to concentrate.

8               QUESTION: I understand. And I'm not  
9       accusing you. But --

10              ANSWER: I guess what I'm trying to  
11       say, I don't mean to be rude by doing this.  
12       If it bothers you, I'll put my hands down.

13              QUESTION: No, it doesn't bother me.  
14       But what I was -- what I was relating to you  
15       was that in Martha Peugh-Wade's June 24<sup>th</sup>  
16       letter, she -- she told you that the faculty  
17       observed you being very angry and clenching  
18       your fists in the spring of 2008.

19              I'm asking you if you actually did  
20       clench your fists at faculty meetings in --  
21       in the spring of 2008, just like you were  
22       doing on the video just now.

23              ANSWER: No.

24              QUESTION: How do you know that, sir?

25              ANSWER: Because --

1           *QUESTION: You said you do that when*  
2           *you get nervous.*

3           *ANSWER: No, I didn't say that. I said*  
4           *I'm nervous now; that's why I'm doing it.*  
5           *But I don't recall any instance of doing*  
6           *this in a faculty meeting.*

7           *I mean, part of it has to do with the*  
8           *chairs. I mean, these have kind of like*  
9           *high -- you know, high arm rests.*  
10          *Ordinarily the -- the meeting -- the -- the*  
11          *meeting rooms where we have department*  
12          *meetings don't have any arm rests, so I*  
13          *wouldn't normally do like this (indicating).*  
14          *I mean, I would sit normally like this*  
15          *(indicating), as I had up to this point.*

16          *So, I mean, it has to do with the*  
17          *furniture here that I made this kind of*  
18          *thing (indicating). I mean, I'm trying to*  
19          *concentrate.*

20          *QUESTION: Were there some faculty --*  
21          *well, let's go back to Professor Brown.*

22          *You said you did change your tone of*  
23          *voice from its normal tone when you went to*  
24          *see him in his office on or about January 3,*  
25          *2008.)*

1 MR. KATZENBACH: Your Honor, at this point,  
2 I'm --

3 (Video clip continues as follows:

4 ANSWER: No.

5 QUESTION: You didn't? You just used  
6 your normal tone --

7 ANSWER: Normal speaking voice. And  
8 normal voice modulation, yes.

9 QUESTION: You were angry about  
10 something that day, weren't you?

11 ANSWER: I was angry about something,  
12 but I thought I was appealing for his help  
13 when I went to Brandon Brown's office.

14 QUESTION: Sir --

15 ANSWER: So I was angry about  
16 something. I wasn't angry at Dean Brown --

17 QUESTION: Was it --

18 ANSWER: -- in any way.)

19 MR. VARTAIN: Bill, would you go back to the  
20 beginning and just stop it where Dr. Kao has his fist up  
21 in the air during the video deposition.

22 (Playing video clip as follows:

23 MR. VARTAIN: Q. In his office on  
24 January 3<sup>rd</sup>, 2008) --

25 MR. VARTAIN: Stop.



1 (Video clip continues as follows:

2 MR. VARTAIN: Q. -- did you modulate  
3 your voice in a --)

4 MR. VARTAIN: Right there. Stop.

5 MR. KATZENBACH: Your Honor, I'm going to  
6 object to that. If he wants to run it again -- he's  
7 taking one slide where Dr. first initially -- I'm  
8 sorry -- where Dr. Kao first initially leans as if he's  
9 going to put his hand -- head on his fist and then, you  
10 know, straightens up again. I mean, it's very  
11 misleading to stop it at this point.

12 MR. VARTAIN: I'll play it again. I wanted to  
13 show -- I'll play it -- I wanted to -- Professor -- Dr.  
14 Kao asked me to explain in what manner my question had  
15 to do with holding his fist. And I wanted to him to see  
16 that on the screen so that I can reask him the question,  
17 was he holding his fists and making those kinds of faces  
18 at any time he was at the faculty meetings or with the  
19 faculty in the spring of 2008.

20 MR. KATZENBACH: Well --

21 THE COURT: Counsel, hold your answer while I  
22 rule on the objection.

23 The ruling is the objection is overruled.  
24 However, it's overruled only so long as I think that the  
25 evidence should not be excluded under Evidence Code

1 Section 352.

2 MR. KATZENBACH: Your Honor, we would also make  
3 a motion on that particular question that he asked.  
4 It's compound. He asked two things in that last  
5 question.

6 MR. VARTAIN: I'll fix the question. I'll  
7 withdraw the question. It's a very plain question.

8 THE COURT: Question withdrawn. New question  
9 pending.

10 MR. VARTAIN: Q. Dr. Kao, do you see the -- do  
11 you see the photo, the clip, the still of your video  
12 deposition? Do you see that?

13 A. Yes.

14 Q. Do you see how your fist is clenched?

15 A. My fist is closed -- my hand is closed.

16 Q. Okay. Let's call it your hand is closed. Do  
17 you see how your hand is closed?

18 A. Yes.

19 Q. Do you see how your face looks?

20 A. Yes.

21 Q. The question I have now is do you -- did you  
22 behave in that manner at any time with your colleagues  
23 in the fall -- in the spring of 2008 semester?

24 A. Behave in what manner? I look pretty normal in  
25 that picture. That looks --

1 Q. Well, let's play it through.

2 A. In what sense -- I'm looking down at the table.  
3 My hand is closed. It -- I testified that the chairs,  
4 that I recall, in the department meeting don't have the  
5 high arm rests.

6 Q. Sir.

7 A. So --

8 Q. I gotta -- I need to stop you. I have a  
9 question pending. You're not -- I don't believe  
10 you're -- the question was, what you're seeing, did  
11 you -- on that screen -- did you do anything like that  
12 in the presence of the faculty in the spring of 2008?  
13 Chairs or no chairs.

14 A. What do you mean "like that"? Looking exactly  
15 like that or -- what part -- in what sense "like"? In  
16 what sense approximate to that exact photograph are you  
17 referring to? The angle of my head, the position of my  
18 eyes? What specifically "like that" do you mean?

19 Q. Let's start with your hand clenched or closed,  
20 whatever words you want to use.

21 A. Well, I mean, if I'm smoking and my hand's to  
22 my side, my hand would be closed sometimes.

23 Q. Sir, you don't smoke in the faculty -- in  
24 interior buildings in the university, do you?

25 A. No. You said at any time in --

1 Q. In a faculty meeting or with the faculty at the  
2 university.

3 A. Or with the faculty. So that's outside the  
4 meetings. Could you be more specific, please. I'm  
5 sorry. I mean, I want to be responsive to the question,  
6 but ...

7 Q. I'd like to play it through.

8 A. It's a little vague.

9 Q. I'm going to play it through, and then I'm  
10 going to ask the question once more, and then we'll be  
11 done with it.

12 Can I do that, Your Honor?

13 THE COURT: How long's it going to take?

14 MR. VARTAIN: Three minutes.

15 THE COURT: Yes.

16 (Playing video clip as follows:

17 MR. VARTAIN: *Q. Let me ask it this*  
18 *way: When you went to see Dr. Brown in his*  
19 *office on January 3<sup>rd</sup>, 2008, did you*  
20 *modulate your voice in a higher manner than*  
21 *you usually use?*

22 *ANSWER: No, ordinary speaking tone.*

23 *QUESTION: So what did you mean by*  
24 *asking me what I meant by modulation of your*  
25 *voice?*

1           ANSWER: You didn't use the word  
2           "modulation."

3           QUESTION: I used the word "raise your  
4           voice." Did you raise your voice to Dr. --

5           ANSWER: The volume of my voice changes  
6           in every conversation.

7           QUESTION: I see you have your hand  
8           clenched in a fist right now. Is that the  
9           way you -- is that the way you displayed  
10          your hands at faculty meetings in the spring  
11          of 2008?

12          ANSWER: I don't recall doing so. I'm  
13          kind of nervous, so I'm --

14          QUESTION: Okay.

15          ANSWER: I mean, I tend to, like, lean  
16          like this when I'm thinking. That's what  
17          I'm doing.

18          QUESTION: Well, actually, you weren't  
19          leaning on your fist, but your fist --

20          ANSWER: Well, I don't want to do this  
21          in front of the video, but that's my natural  
22          tendency. So I'm trying to concentrate.

23          QUESTION: I understand. And I'm not  
24          accusing you. But --

25          ANSWER: I guess what I'm trying to

1       *say, I don't mean to be rude by doing this.*

2       *If it bothers you, I'll put my hands down.*

3               *QUESTION: No, it doesn't bother me.*

4       *But what I was -- what I was relating to you*  
5       *was that in Martha Peugh-Wade's June 24<sup>th</sup>*  
6       *letter, she -- she told you that the faculty*  
7       *observed you being very angry and clenching*  
8       *your fists in the spring of 2008.*

9               *I'm asking you if you actually did*  
10       *clench your fists at faculty meetings in --*  
11       *in the spring of 2008, just like you were*  
12       *doing on the video just now.*

13               *ANSWER: No.*

14               *QUESTION: How do you know that, sir?*

15               *ANSWER: Because --*

16               *QUESTION: You said you do that when*  
17       *you get --)*

18               *MR. VARTAIN: All right.*

19               *THE COURT: Ladies and gentlemen, remember the*  
20       *admonition. Do not form or express any opinion on this*  
21       *case until it's finally submitted to you for your*  
22       *decision. Do not discuss among yourselves or with*  
23       *others until that time. Please be back in your places*  
24       *at 3:40 according to the courtroom clock.*

25               *(Recess taken.)*

1 THE COURT: Jurors and alternates are all  
2 present. Counsel for both sides are present. Plaintiff  
3 is personally present on the witness stand.

4 Mr. Sin, I got your note. Could you please  
5 stay after the other jurors leave for the day, and we'll  
6 discuss the problem.

7 JUROR 8: Yes.

8 THE COURT: And, Mr. Vartain, you may continue  
9 your inquiry.

10 MR. VARTAIN: Thank you, Your Honor.

11 Q. So Dr. Kao, do you have Exhibit 4 in front of  
12 you? It's published on the screen, but I'm not sure you  
13 can see it.

14 A. Yes.

15 Q. So I -- I wanted to direct your attention to  
16 the third line of the second paragraph after the words  
17 "fists clenched" and over by the words "staring" and  
18 "glaring." Do you see that, "staring," slash,  
19 "glaring"?

20 A. Yes.

21 Q. Did you do any of that behavior towards the  
22 deans or your fellow faculty members in the spring of  
23 2008?

24 MR. KATZENBACH: Your Honor, I'm going to  
25 object. That's vague. Perhaps he could refer to the

1 specific language he's referring to.

2 MR. VARTAIN: The specific language is in  
3 parentheses, "staring," slash, "glaring."

4 THE COURT: Overruled.

5 THE WITNESS: Well, I don't -- I don't --  
6 grammatically, I don't understand the sentence -- or I  
7 should say the grammar seems vague to me.

8 "There are reports of your yelling,  
9 exhibiting highly-contorted facial  
10 expressions with fists clenched," comma,  
11 "that suggest unfeigned anger," parentheses,  
12 "(staring/glaring)" --

13 Q. Did you do --

14 A. -- comma, and with an "e.g.," right.

15 So in what -- what's the connection you wish to  
16 make? I mean, so -- staring and glaring that suggest  
17 unfeigned anger. Your question is did I stare and/or,  
18 slash, glare in a way that suggested unfeigned anger?  
19 Is that your question?

20 Q. I'm going to make it easier.

21 Did you glare at your colleagues or the deans  
22 at any time in the spring of 2008 when you were feeling  
23 angry?

24 A. Did I glare at them? I'm sure that I looked at  
25 them.



1 Q. Did you --

2 A. And I -- I might have been upset when I looked  
3 at them. I don't recall glaring in a way that I  
4 intentionally, by the expression on my face, was trying  
5 to frighten anybody. I don't recall any such incident.

6 But, I mean, I may have been looking at an  
7 individual and been upset at the time. I can't -- I  
8 don't have any specific recollection, but I don't -- I  
9 mean, it's possible that I was looking at somebody and,  
10 at the time that I was looking at them, I was upset  
11 about something.

12 But I certainly didn't make any expression with  
13 the intent of frightening somebody or intimidating  
14 somebody. Certainly that did not happen.

15 Q. With the intent. You didn't do so with the  
16 intent to frighten them; is that your testimony?

17 A. Yes.

18 Q. Okay.

19 A. I didn't -- I didn't intend to frighten anybody  
20 at any time that semester.

21 Q. Let's talk about the part of the letter that  
22 has to do with impeding or attempting to impede others'  
23 physical movements, e.g., sudden movements in the  
24 hallway that caused people to believe you were -- you  
25 would suddenly run into them or block their way.

1           Did you do anything like that, sir, that  
2           spring?

3           A.    I didn't intentionally try to cause any --  
4           block -- I didn't intentionally try to block anybody's  
5           way at any time that semester. The description is vague  
6           and subjective to me, so, I mean, it's --

7           Q.    Next --

8           A.    It's a little difficult to be responsive to  
9           that. I mean, you know, if you -- if you're trying to  
10          move out of somebody else's way and you move suddenly,  
11          then you might move into someone else's path, then move  
12          away from that person's path.

13          I mean, the hallways are quite crowded in  
14          between classes. It's more or less the same as Union  
15          Square during holiday season. So that kind of thing.

16          It's possible. I have no specific recollection  
17          one way or the other.

18          Q.    Well, Dr. Kao, you were in the room when the  
19          professors gave their depositions and talked about what  
20          they perceived you to be doing. You were in the  
21          deposition room with -- when Professor Zeitz testified,  
22          correct?

23          A.    I attended Dr. Zeitz's deposition.

24          Q.    You attended Professor Needham's deposition,  
25          correct?

1 A. Yes.

2 Q. And you attended Professor Yeung's deposition,  
3 correct?

4 A. Yes.

5 Q. Each one of them testified about things that  
6 happened in the hallways or around the bathrooms of a  
7 physical nature with you, correct?

8 A. Yes. They remarked on -- yes.

9 Q. Did you do any of the things that they said in  
10 their depositions you did?

11 A. I don't recall the incidents that they  
12 described. Dr. Zeitz said that at one point in the  
13 semester -- he didn't provide a date -- in the men's  
14 room, while we were washing our hands, there was some  
15 kind of trivial touching.

16 Q. Dr. Kao, they're going to come in --

17 A. I don't recall that.

18 Q. Okay. I think you've answered the question. I  
19 appreciate it.

20 They will come in and testify to whatever they  
21 testify. I just wanted to ask you if you ever did what  
22 they have said you did. And you heard what they said in  
23 their sworn depositions. And I think you're saying "I  
24 don't recall doing that." Is that --

25 A. I don't recall the incidents they described in

1 their deposition.

2 Q. Okay.

3 A. The three incidents.

4 Q. "Inappropriate closely." You see that term in  
5 the letter?

6 A. Yes.

7 Q. I want to talk with you a bit about the  
8 incident in the parking lot with the dean of the College  
9 of Arts and Sciences, Jennifer Turpin.

10 Did your body get within six inches of her body  
11 at some point during that incident?

12 A. Well, my recollection from Dr. Turpin's  
13 deposition --

14 Q. No, I don't want you to -- sir, I don't want  
15 you to say what she testifies to. I'm asking you --

16 A. I don't --

17 Q. I'm asking -- I'm sorry. I apologize for  
18 speaking over you. I just want your own testimony.

19 Did you or did you not get that close to her  
20 body during any time of that incident, yes or no?

21 A. Could you repeat the question? I guess my  
22 problem is that both Dr. Turpin and myself testified  
23 that --

24 Q. No, I don't want you to --

25 A. I -- there was no -- there was no encounter

1 with her in the parking lot. It was -- it was -- we had  
2 a conversation; it was outside Harney Science, some  
3 distance from the parking lot, at least 30 feet, 40 feet  
4 from the parking lot, when we spoke with each other.  
5 That was both of our testimony.

6 Q. I stand corrected. It didn't actually happen  
7 inside the square of the parking lot. So let me  
8 rephrase the question, then.

9 Did your body get within six inches or so of  
10 Dean Turpin's body during the incident near the Harney  
11 parking lot?

12 A. No.

13 Q. Did any part of your body get within a foot or  
14 so of her body?

15 A. I don't --

16 Q. Yes --

17 A. I don't have a specific recollection of how  
18 close we were, but I -- my -- I testified that it's  
19 possible that some part of my body, as I was putting out  
20 my cigarette, may have come within a foot -- around a  
21 foot. But I don't have any specific recollection.

22 I was putting out my cigarette at the time.  
23 She had already passed me. That's my recollection. She  
24 had already passed by me, past the -- the cement  
25 ashtray. She walked past me. She was past me. I

1 wasn't getting in her way. I reached forward because  
2 the cigarette was about to burn my hand. I put out the  
3 cigarette in the -- in the ashtray.

4 My recollection is that my body would have been  
5 maybe a foot away from hers, my arm. My left arm, as  
6 I'm putting out the cigarette, was about a foot away.  
7 That's -- that's my recollection.

8 Q. Did you glare at her at any time during that  
9 incident?

10 A. No.

11 Q. Did you glare in her direction as she was  
12 pulling out of the parking lot? You know, she testified  
13 that she saw you with your hands clenched. Is that true  
14 that your hands were clenched and you were staring at  
15 her as she was pulling out of the parking lot?

16 MR. KATZENBACH: Compound. Objection.

17 MR. VARTAIN: I'll withdraw it.

18 Q. Is it true --

19 May I withdraw it, Your Honor?

20 THE COURT: Sure.

21 MR. VARTAIN: Q. Is it true that you were  
22 staring towards Professor -- towards Dean Turpin's car  
23 with your fists clenched while she was pulling out of  
24 the parking lot?

25 A. No. I was looking -- I -- I recall having a

1 second cigarette. I walked to the middle of the  
2 walkway. It runs perpendicular to the exit path from  
3 Harney Science.

4 From that position, I was smoking a second  
5 cigarette. It's possible that my hands were cupped or  
6 closed as I'm smoking it. Dean Turpin testified that my  
7 hands were at my side when she saw me. I don't have a  
8 specific recollection of seeing Dean Turpin.

9 I can't recall specifically what her car looks  
10 like. Her car would have been 50 to a hundred feet from  
11 where I was standing at that point. I don't have a  
12 specific recollection of her car.

13 I remember there were a lot of people around  
14 and I was looking in the direction of the parking lot,  
15 out towards Golden Gate Avenue, at foot traffic. I was  
16 looking to see if any of the students or faculty that  
17 were walking between the Koret Gymnasium and Harney  
18 Science were somebody that I knew. That would be the  
19 direction that was not blocked by Harney Science.

20 If I turned in the other direction looking  
21 towards Golden Gate Avenue, I wouldn't see any people  
22 because Harney Science would have blocked my vision.  
23 And so I was looking out in that general direction,  
24 smoking a cigarette.

25 Q. The general --

1           A.    Her car may -- she may have been -- she may  
2 have been pulling out from her parking lot space at that  
3 time.  I don't really know what her car looks like.

4           Q.    I think you've said that.

5           A.    So I don't --

6           Q.    You said that, Dr. Kao.  And I appreciate that.

7                    The question really I wanted to ask was weren't  
8 you staring in the direction of her car as it was  
9 leaving the university?

10          A.    No.

11          Q.    Okay.

12          A.    I was looking in that direction.

13          Q.    I've got --

14          A.    I was looking in that direction.  I was looking  
15 in that direction.  I wasn't staring at --

16          Q.    Okay.

17          A.    -- any particular person.  There was people  
18 walking on the sidewalk that I was looking at -- that  
19 were walking on the sidewalk that I was looking at as I  
20 was smoking my cigarette.  So no.

21          Q.    Let's go to the line that says "Rapidly  
22 repeating the same words during meetings and  
23 conversations."

24                    You heard the professors -- Professors Yeung,  
25 Zeitz, Needham and Pacheco -- testify in their



1 depositions that that's what you were doing. You were  
2 there, weren't you?

3 MR. KATZENBACH: Objection, Your Honor.  
4 Compound question.

5 THE COURT: Sustained.

6 MR. VARTAIN: Q. Were you at any of those  
7 depositions at the time when any of those people said  
8 that you were rapidly repeating the same words over and  
9 over?

10 THE WITNESS: I don't recall what they said  
11 specifically. I attended the depositions of the  
12 individuals I testified to already. I don't recall what  
13 each individual person said in their deposition.

14 MR. VARTAIN: Q. Fair enough. Fair enough.  
15 Did you do that, though -- when you were at any of the  
16 faculty meetings in the spring of 2008, did you rapidly  
17 repeat the same thing over and over again?

18 A. No. I did testify in my own deposition that  
19 sometimes I use colloquial expressions like "cool-cool"  
20 or "yes-yes." I mean, that's just in an informal  
21 manner.

22 Q. Did you --

23 A. Sometimes.

24 Q. Did you do that?

25 A. But I wouldn't say that kind of thing in a

1 department meeting.

2 Q. Right. That's not --

3 A. I mean, in the hallway I might say "Yeah,  
4 cool-cool."

5 Q. Precisely. But that's not what we're talking  
6 about, sir. We're talking about did you rapidly repeat  
7 the same phrases over and over again in the faculty  
8 meeting in spring of 2008?

9 A. The same phrase over and over again, no.

10 MR. VARTAIN: Could you scroll up a little bit.  
11 I'm done with that part.

12 THE WITNESS: And to clarify my answer, I don't  
13 recall that that's what they testified to. I don't  
14 specifically recall what they said in their deposition.

15 MR. VARTAIN: Q. If you'd return to the  
16 portion of Exhibit 34 in front of you that says:

17 "For those [sic] reasons, following is  
18 the university's nondisciplinary course of  
19 action."

20 You see that portion?

21 A. Could you direct me to a paragraph.

22 Q. It's the fourth paragraph down.

23 A. Of the same exhibit, 34?

24 Q. Please.

25 A. Okay. So "For these reasons" -- which item --

1 which numbered item do you mean?

2 Q. Just that -- just that sentence right there.

3 A. Could you give me a number, please.

4 Q. "For these reasons, following is the  
5 university's" --

6 A. Oh, I'm sorry. The heading of that. Yes. I'm  
7 sorry.

8 "Following is the university's  
9 nondisciplinary course of action."

10 Q. When -- my question is, when you read that and  
11 when you had the meetings with Ms. Peugh-Wade and Mr.  
12 Philpott, did you understand that they were telling you  
13 that they were not going to terminate you for what  
14 happened in the past -- that is -- or what they said  
15 happened in the past, all these behaviors? Did you  
16 understand that?

17 A. No, I didn't understand that.

18 Q. When they said "nondisciplinary course of  
19 action," didn't you understand that the thing they were  
20 telling you to do, the medical evaluation, wasn't a form  
21 of discipline or discharge?

22 A. No. I didn't -- that wasn't my understanding  
23 or my belief. That may have been their belief, but it  
24 appeared to be disciplinary to me. This statement  
25 appeared inconsistent.

1 Q. Well, you knew that under the collective  
2 bargaining agreement, if there's a discipline, you have  
3 the right to challenge it through the grievance  
4 procedure and have an arbitrator decide if it's right or  
5 wrong, correct?

6 A. No. I don't -- it depends on -- I understand  
7 that you may file a grievance under a specific provision  
8 of the collective bargaining agreement.

9 Q. Sir --

10 A. So if there was a disciplinary action that was  
11 not connected to a specific provision, I'm not sure what  
12 my rights are under the collective bargaining agreement  
13 one way or the other.

14 Q. Weren't you sure in the year 2000, when you  
15 filed a grievance over that letter by Tristan Needham --  
16 weren't you sure that you could file a grievance to  
17 challenge a letter?

18 A. To challenge a inaccurate letter of reprimand,  
19 I felt that I had grounds under the collective  
20 bargaining agreement. And that's the statement that I  
21 made during the step zero, they called it -- at that  
22 time, they called it a step zero phase of a grievance.

23 I had a union representative. The union  
24 representative Dr. Toya, and I met with Dean Nel and --

25 Q. I'm sorry to cut you off, sir. But we've been

1 over that. And all I wanted to get from you is yes, you  
2 filed a grievance; you know what that is; you filed it  
3 and got a letter. And didn't you know that you could  
4 file a grievance over this letter if you chose to do so?

5 A. I can file a grievance.

6 Q. Okay. But you did not, correct?

7 A. I did not file a grievance.

8 Q. And in some subsequent letters, the dean and  
9 the other people -- Mr. Philpott -- reminded you that  
10 you could file a grievance if you disagreed with what  
11 the university was doing, correct?

12 A. Yes.

13 Q. But you never did that, correct?

14 A. Yes.

15 Q. I want to address you, Dr. Kao, to paragraph 2,  
16 the portion where it says:

17 "You must participate in a  
18 fitness-for-duty evaluation by an  
19 independent physician selected by the  
20 university."

21 You see that part?

22 A. Yes.

23 Q. When Mr. Katzenbach asked you "Did the  
24 university ever say that they would be open to a  
25 different physician," you said "No, the university never

1 said that." Do you remember that?

2 A. Yes.

3 Q. Is it true that neither you nor Mr. Katzenbach  
4 ever said to the university, whether in letters or in  
5 these meetings, "We'd like somebody other than Dr.  
6 Reynolds; we'd like to negotiate a different doctor"?  
7 Isn't that true?

8 A. Yes.

9 Q. Isn't it true that neither Mr. Katzenbach nor  
10 you ever said you had any doubts about the independence  
11 or fairness of Dr. Reynolds? Isn't that true?

12 A. I don't recall the content of all of the  
13 correspondence that was -- that were -- all the  
14 correspondences --

15 Q. Fair enough.

16 A. -- that were exchanged between my attorney and  
17 the university.

18 Q. Fair enough. But based on the recollection  
19 that you have right now, isn't it true that neither you  
20 nor your attorney, Mr. Katzenbach, either at the  
21 meetings or in the letters, ever said that you had  
22 doubts about the independence and impartiality of Dr.  
23 Reynolds?

24 A. I don't recall the specific content of the  
25 letters that were exchanged between my attorney, Mr.

1 Katzenbach, and the administration during the -- from  
2 June to February. So that's six months', eight  
3 months' --

4 Q. But did --

5 A. -- time the correspondence were going back and  
6 forth on this matter. I don't recall the content.

7 Q. Okay. But do you -- did you yourself ever pick  
8 up the phone, send a letter, or in any way get ahold of  
9 Ms. Peugh-Wade or anyone else at the university and say  
10 words to the effect of "I'd like to get a different  
11 doctor. I don't trust that he'll be impartial"? Did  
12 you do that?

13 A. No. I made no telephone call. I -- all  
14 correspondences were authored by Mr. Katzenbach.

15 Q. Did you send an email to Ms. Peugh-Wade? You  
16 didn't make a call. Did you send an email to her to  
17 that effect, "I don't like Dr. Reynolds; I don't trust  
18 his independence," or anything like that? Did you do  
19 that?

20 A. No, I did not send any email to Ms. Peugh-Wade.

21 Q. Did you see any email from your attorney to  
22 that effect?

23 A. I don't recall the -- I mean, the documents are  
24 in evidence, I think. I don't recall -- if you could  
25 remind me of a specific document, I might be able to --

1 Q. I didn't see any documents, sir. That's why  
2 I'm asking you do you know of any time that you did that  
3 that is not in the documents -- that is, you made --  
4 you --

5 A. I mean, I should clarify that item number 2  
6 says -- reads:

7 "You must participate in a  
8 fitness-for-duty evaluation by an  
9 independent physician selected by the  
10 university."

11 So the reading of this letter indicates that's  
12 not a point of negotiation; it's that you must  
13 participate by an IP selected by the university.

14 Q. I understand you, sir. And in fact, the rest  
15 of the letter says it's Dr. Reynolds who's the  
16 physician, correct?

17 A. Yes, it identifies Dr. Reynolds as the  
18 physician I must --

19 Q. You never --

20 A. -- be evaluated by.

21 Q. You never came back and proposed a different  
22 physician, correct?

23 A. Correct.

24 Q. I'd like to stay on number 2 where it says:

25 "You must provide all medical



1 information the IP requests."

2 You see that?

3 A. Yes.

4 Q. Then it goes on to say: "The IP," the  
5 physician, "will not release your  
6 confidential medical information to the  
7 university."

8 You see that?

9 A. Yes.

10 Q. Did you ever say to the university in either of  
11 those meetings, the one in June or October, or in any  
12 letter, words to the effect of "I don't believe you," or  
13 "I don't believe that they will not release my  
14 confidential medical information to the university"?  
15 Did you ever say that?

16 A. I mean, the issue of privacy was raised in some  
17 of the correspondences.

18 Q. I -- I do know there were lawyers writing cases  
19 and statutes. But did you ever say, either your lawyer  
20 or you, that you -- you -- you feared that your  
21 confidential medical information would actually get back  
22 to the university?

23 A. I don't recall the specific language that was  
24 used in the letter.

25 Q. I'll accept that, sir.

1 A. But --

2 Q. I'll accept it.

3 A. I mean, the issue of medical privacy was raised  
4 in those documents.

5 Q. Did you ever contact Dr. Reynolds to ask him  
6 "Dr. Reynolds, what are you going to ask me to give  
7 you?"

8 A. No, I didn't -- I did not contact Dr. Reynolds  
9 at any time.

10 Q. You told the jury this morning that you had a  
11 fear that he would ask for all -- you know, all your  
12 records, all your information, and you had personal  
13 information. But did you ever actually inquire of him  
14 as to what he really would ask of you to give him?

15 A. No, I did not contact Dr. Reynolds.

16 Q. When you made your decision to refuse over the  
17 June, July, August, September, October, November,  
18 December, January -- when you made your decision to give  
19 up your job 'cause of this, you didn't know exactly what  
20 information he would have asked you for --

21 MR. KATZENBACH: Objection, Your Honor.

22 MR. VARTAIN: Q. -- correct?

23 MR. KATZENBACH: Objection, Your Honor. That's  
24 argumentative.

25 THE COURT: It is. Sustained.

1 MR. VARTAIN: Q. At any time during those  
2 months, did you have any information from Dr. Reynolds  
3 as to what kind of medical information he was going to  
4 actually ask for if you went down to San Jose and met  
5 with him?

6 A. I received no information from Dr. Reynolds at  
7 all.

8 Q. I know you didn't. But did you ask him for any  
9 information?

10 A. I did not contact Dr. Reynolds at all.

11 Q. Did anybody on your behalf contact Dr. Reynolds  
12 to see what exactly he would need in the way of  
13 background medical information?

14 A. No one on my behalf contacted Dr. Reynolds at  
15 all.

16 Q. So would it be fair to say that when you  
17 decided in the end to not have the evaluation, you did  
18 not know what medical information he was going to ask of  
19 you if you went down there to San Jose?

20 A. I did not know what he was going to ask me  
21 about anything.

22 Q. Including what --

23 A. I did not -- I had no knowledge of what he  
24 would have asked me about anything, had I gone to see  
25 him --

1 Q. And in --

2 A. -- in any particular context, whether that's  
3 the evaluation or otherwise.

4 Q. But --

5 A. I don't know what he would do.

6 Q. But I want to -- you're answering me generally,  
7 and I appreciate that. I want to be a little more  
8 specific and close out this inquiry -- this subject of  
9 inquiry.

10 Isn't it true that when you made the final  
11 decision you weren't going to see Dr. Reynolds, you did  
12 not know specifically what medical information he was  
13 going to require you to give to him? Is that so?

14 A. Yes.

15 Q. You never asked the university -- Ms.  
16 Peugh-Wade, Mr. Philpott or anybody else -- to tell you  
17 precisely what medical information the university  
18 thought Dr. Reynolds was going to ask you to give him;  
19 isn't that correct?

20 A. Could you repeat the question. I'm sorry.

21 (Record read as follows:

22 *QUESTION: You never asked the*  
23 *university -- Ms. Peugh-Wade, Mr. Philpott*  
24 *or anybody else -- to tell you precisely*  
25 *what medical information the university*

1           *thought Dr. Reynolds was going to ask you to*  
2           *give him; isn't that correct?)*

3           THE WITNESS: Yes. I did not ask anybody at  
4 the university what they thought --

5           MR. VARTAIN: Q. What they --

6           A. -- as to what Dr. Reynolds would ask me.

7           Q. You never considered that Dr. Reynolds was  
8 lacking in the qualifications to do this evaluation, did  
9 you? In other words, you did assume what is -- what was  
10 said, that Dr. Reynolds has the qualifications to do  
11 this kind of evaluation?

12          A. I didn't research Dr. Reynolds. I did read --  
13 there was a pamphlet that Dr. Reynolds, I presume,  
14 publishes as a kind of advertisement of his services. I  
15 did read that. But I didn't do any research as to Dr.  
16 Reynolds' reputation at that time.

17          Q. The pamphlet that you read, Dr. Kao, was that  
18 on his Web site?

19          A. I recall that he didn't have a Web site in  
20 2008.

21          Q. How did you get ahold of the pamphlet that  
22 you're speaking --

23          A. That was included in the correspondence. I  
24 don't recall specifically which correspondence, whether  
25 it was this June 24<sup>th</sup> letter or subsequent or prior.

1 But one of the correspondences, there was a pamphlet  
2 that Dr. Reynolds -- I presume that's his advertising  
3 pamphlet. It was included in one of the  
4 correspondences. When I received it, I did read it.

5 Q. That was a pamphlet that described that he  
6 performs employment fitness-for-duty evaluations as well  
7 as other medical work, correct?

8 A. That's what the pamphlet indicates, that he  
9 does do that as part of his work.

10 Q. So did you form the opinion or did you --  
11 better said, did you reach the conclusion that he  
12 actually is experienced in doing the kind of work the  
13 university was asking him to do for you, the evaluation  
14 work?

15 A. I didn't particularly reach -- I didn't reach a  
16 conclusion one way or the other from the pamphlet.

17 Q. Did you ever -- did you ever tell the  
18 university that you didn't think he was qualified?

19 A. I don't recall a statement of that nature in  
20 any of the correspondences that were sent by Mr.  
21 Katzenbach on my behalf.

22 Q. Did you think he was unqualified?

23 A. I didn't research it at that time. Are we  
24 speaking of that time or after discovery in this case?

25 Q. Well, no, I'm talking about at --

1 A. Are we speaking about at that time?

2 Q. Yeah, at the time that you made the final  
3 decision you weren't going to go see him, and in those  
4 seven months over which you had that time to decide, did  
5 you consider him to be unqualified?

6 A. At that time, I had no -- I didn't form an  
7 opinion one way or the other. I did not research his  
8 background or check on-line to see if there were any  
9 complaints or malpractice issues.

10 I mean, that kind of information is available  
11 if one takes the time to research it. I did not perform  
12 that research on Dr. Reynolds at that time.

13 Q. Next page.

14 Thank you, Ms. Adler.

15 That's -- paragraph 6 is where the university's  
16 telling you that he is qualified, correct?

17 A. Paragraph 6 states that: "Dr. Reynolds  
18 is a licensed medical doctor experienced in  
19 performing employment-related  
20 fitness-for-duty evaluations."

21 That's what the document states.

22 Q. You accepted the university's statement as  
23 true, correct?

24 A. No, I didn't make -- I did not form an opinion  
25 one way or the other --

1 Q. Okay.

2 A. -- in this particular matter.

3 Q. Did you accept as true the university's  
4 statement that Dr. Reynolds has no prior association  
5 with the university administration?

6 A. No, I did not.

7 Q. At any time up until you were terminated, did  
8 you investigate whether he had any prior association  
9 with the university administration at that time?

10 A. I did not perform that investigation. If we're  
11 speaking of at that time, I didn't investigate that  
12 particular issue.

13 Q. Now --

14 A. If we're speaking of after that time --

15 Q. You've answered my question, sir.

16 I want to direct your attention to the end of  
17 the letter where it says:

18 "I want to reiterate that the  
19 university, including the dean of the  
20 college who has approved this letter, is  
21 concerned for you."

22 I want to ask you a question about that. You  
23 told us before that the dean of the college was -- to  
24 you, seemed to be a compassionate person. Remember that  
25 testimony?



1           A.     That statement was -- there was a date for that  
2 statement.  But generally -- I mean, at what time are we  
3 speaking of, you know?  You mean right this minute, or  
4 do you mean at the time I received this letter?  What  
5 are we speaking of?

6           Q.     I don't know that I asked you a very  
7 intelligent question.  I was asking you if you recalled  
8 your testimony earlier today that Dean Turpin was a  
9 compassionate person.

10          A.     Generally -- while I was employed at USF, I had  
11 only brief and very limited interactions with Dean  
12 Turpin.  At the time I received this letter, based on  
13 those interactions, generally she seemed compassionate.

14          Q.     Well, did --

15          A.     But I didn't have sufficient experience at that  
16 time to make a conclusion with any kind of confidence.  
17 I tend to give people the benefit of the doubt.

18          Q.     Well, did you give her the benefit of the doubt  
19 when it was said in this letter that she's concerned  
20 about you?  Did you actually believe that Dean Turpin,  
21 who you've known for years, really was feeling concerned  
22 about your health?

23          A.     Well, I mean, at that -- at the time I received  
24 this letter, the opinion that I formed was that if Dean  
25 Turpin were concerned about me, she would give me

1 specifics that I could respond to in an equal way.

2 So at that time, I had some concerns about  
3 whether she was truly concerned.

4 Q. Okay.

5 A. I did testify that -- in my deposition -- that  
6 when I received this letter, which is from Ms.  
7 Peugh-Wade, I did not know who was making the decision  
8 with respect to this particular evaluation.

9 Q. But, sir --

10 A. And I couldn't --

11 Q. It says right there that the dean of the  
12 college has approved this letter. So you did know that  
13 this was coming from the dean, Dean Turpin.

14 A. That's what it says, but, you know -- I mean,  
15 at USF -- I mean, the administration -- the  
16 decision-making is pretty obscured. An administrator  
17 may be instructed -- just as I've been instructed to do  
18 something, they might be instructed to do something, and  
19 they might do it.

20 Q. Okay. I do --

21 A. Ms. Peugh-Wade may not be truthful completely  
22 when she writes -- when she wrote that letter. I -- at  
23 that time, I had no knowledge. Dean Turpin is cc'ed.

24 Q. I think I understand what --

25 A. But whether she preapproved it, I mean, I --

1 Q. I think I understand what you're saying.

2 So what I'd like to ask you, sir, in the few  
3 minutes we have remaining, isn't it true that you  
4 actually were having health issues in that spring  
5 semester? That is, when Ms. Peugh-Wade said she -- she  
6 was concerned for your health, isn't it true you  
7 actually were having some health issues that semester?

8 A. No.

9 Q. Isn't it true that you were taking five or six  
10 different medications that semester?

11 A. Yes, I was taking medications --

12 Q. Isn't it --

13 A. -- that semester.

14 Q. Isn't it true that starting in the fall of  
15 2007, but never before then, and working into September  
16 of 2008, Dr. Terr had put you on five or six different  
17 medications and that you were having some difficulties  
18 coping with those?

19 A. Oh. If that's what you mean by "health  
20 issues," no. The fall -- there was no substantial  
21 change in the prescriptions. I -- I --

22 Q. Let me see if I can --

23 A. In fall, Dr. Terr prescribes a combination of  
24 medications, most of them in low doses. In the spring,  
25 January of 2007 --

1 Q. You mean 2008?

2 A. No, in January 2007 was when we started a  
3 particular combination of medications, most of them in  
4 low doses. And --

5 Q. Sir, can I --

6 A. Some of the medications were lowered slightly  
7 in the beginning of the fall, the dosages. But the  
8 prescription --

9 Q. Let me see --

10 A. -- that I was given, my recollection is that it  
11 was the same from maybe August of 2007, continuing on  
12 into 2009, beginning of 2009.

13 So there was a combination of medications that  
14 I was prescribed. I had some discomfort and side  
15 effects from that combination of medications. If that's  
16 what you mean by "health issues," that --

17 Q. That is, sir. And I did want to explore that  
18 just a little. I don't want get too far into that, but  
19 wasn't that -- that school year, '07/'08, was the very  
20 first school year you were on these -- this five or  
21 six -- group of medications; isn't that true?

22 A. That's not my recollection. I mean, there's a  
23 prior academic year, which would be '06/'07 --

24 Q. You --

25 A. My recollection is that in January of 2007,

1 there were a combination of medications that Dr. Terr  
2 prescribed to me. I think some of those medications,  
3 the dosages were decreased during the summer. But the  
4 specific combination, I believe it was started the prior  
5 academic year.

6 Q. Okay.

7 A. Around January.

8 Q. We'll get that from Dr. Terr when she  
9 testifies. But the question I was going to ask you was,  
10 isn't it true that one or more of those medications in  
11 the spring of 2008 was causing you to have trembling in  
12 your legs and arms and other parts of your body?

13 A. From the time that I was prescribed these  
14 medications, there were some side effects --

15 Q. But --

16 A. -- through that combination of medications.  
17 That was not changed in spring of 2008.

18 One of the side effects of the medication was  
19 from time to time there would be some tremors. But that  
20 started in January of 2007. And I didn't think anybody  
21 noticed.

22 Q. I didn't --

23 A. And I tried my best to not --

24 Q. I wasn't --

25 A. -- display those.

1 Q. I'm sorry.

2 THE COURT: Mr. Vartain, it would be better if  
3 you didn't cut off the answer.

4 MR. VARTAIN: I thought he'd stopped. I'm  
5 sorry, Your Honor.

6 THE COURT: Have you finished your answer, Dr.  
7 Kao?

8 THE WITNESS: Actually, no, but, I mean --

9 THE COURT: Go ahead and finish.

10 THE WITNESS: -- I'm prepared -- and certainly  
11 nobody, including my friends, Dr. Wolf and Ms. Locsin  
12 and -- I was friendly with Ms. Liu. We didn't socialize  
13 outside conversation in the department. But none of my  
14 friends mentioned that they noticed any tremors or  
15 trembling, either before or after I was suspended, and  
16 including in their depositions. No student ever  
17 mentioned that they were concerned that I was trembling.

18 I did notice that when I started that  
19 combination of medications in January of 2007 and I was  
20 teaching, that in the initial -- you know, when I was  
21 getting used to the medications, that my handwriting on  
22 the blackboard was a little shaky. I wasn't pleased  
23 with my blackboard penmanship. It took me a little  
24 while to adjust and figure out how to position my body  
25 in such a way that, you know, my penmanship was really

1 clear. It took me a few months to figure that out.

2 But after I figured that out, I felt satisfied  
3 with my blackboard penmanship, or -- you know, however  
4 you want to term it. And no student ever complained to  
5 me that they couldn't read my handwriting.

6 But I -- I did notice when I first started the  
7 medications in, I believe, January of 2007 that my  
8 handwriting wasn't as clear as it used to be. And when  
9 I'm teaching, I try to be sensitive to the students'  
10 reactions. I'm always looking out into the classroom  
11 and looking for their facial expressions and -- to see,  
12 you know, if I'm -- if I'm making my point to them, or  
13 if they're frustrated, or if they look like they don't  
14 understand my explanation.

15 And I did notice in the beginning of that  
16 semester that the students seemed to be like having  
17 trouble like maybe, you know, clearly reading what I was  
18 writing on the board. So I made an effort to correct  
19 that.

20 I did find that if I positioned -- if I looked  
21 more towards the blackboard rather than, you know, as  
22 we're taught, teachers, to not look at the board, but  
23 look out into the classroom, but if I changed that and I  
24 looked towards the board, that that seemed to fix the  
25 problem.

1           MR. VARTAIN: Q. In the spring of 2008 -- not  
2 2007, Dr. Kao -- weren't you having difficulty walking  
3 because of tremors in your legs, and you were also  
4 having shakes in your arms?

5           I know you said that nobody asked you about it.  
6 I know you said you didn't tell anybody about it. But  
7 isn't that actually what was happening in the spring of  
8 2008?

9           A. Not as you describe it, no.

10          Q. Well, tell me in the way you can describe it  
11 how the lithium and the other medications, to your mind,  
12 were affecting your -- your extremities, your arms and  
13 your legs.

14          MR. KATZENBACH: Your Honor, I'm going to  
15 object. The witness is once again -- I mean counsel is  
16 once again testifying as to the medications involved.

17          THE COURT: Assuming a fact not in evidence.  
18 Sustained.

19          MR. VARTAIN: Q. Did you have a belief at that  
20 time that the medications were causing you to have  
21 difficulties with trembling in your extremities?

22          A. I'm sorry, could you repeat the question.

23          Q. Did you, in the spring of 2008, believe that  
24 your medications were having -- were causing you  
25 difficulties in the way of trembling in your



1 extremities, your legs and arms?

2 A. The medications had a side effect. From time  
3 to time, there would be tremors or trembling in my legs  
4 and arms, from time to time.

5 Q. And was that happening from time to time in the  
6 spring of 2008?

7 A. I would feel that -- from time to time, I would  
8 feel that there's some tremors and trembling. Just as  
9 for writing on the chalkboard, I had by that time  
10 developed techniques by which I could avoid that  
11 trembling and not be embarrassed by it.

12 Q. You remember in your deposition --

13 A. I wouldn't -- I wouldn't describe that as  
14 having difficulty walking. I walked differently so as  
15 not to be embarrassed by the trembling.

16 Q. And I understand that. You changed -- you had  
17 to change the way you walk 'cause you didn't want to  
18 seem like your legs were trembling; is that true?

19 A. Yes.

20 Q. When Ms. Peugh-Wade asked you if you wanted to  
21 give her any information -- in the letter, she said "If  
22 there's any information you would like to give me."

23 Did you ever tell her you would like her to  
24 speak to your doctor or you would like your doctor to  
25 speak with her? Did you ever say that to the

1 university?

2 A. No, I did not -- I do not recall --

3 Q. Did you ever --

4 A. -- anything like that in the correspondences  
5 exchanged by Mr. Katzenbach and --

6 Q. In response --

7 A. -- the university.

8 Q. I'm sorry.

9 In response to Ms. Peugh-Wade inviting you to  
10 provide her with any information that you would like,  
11 did you direct your doctor to give her a call or give  
12 anybody at the university a call?

13 A. No, I did not tell Dr. Terr to contact the  
14 university.

15 Q. Did you ask your doctor to send a letter to Ms.  
16 Peugh-Wade or anybody at the university to tell them  
17 information about your medication problems?

18 A. Well, I didn't think the medication problems  
19 had anything to do with this -- these allegations. The  
20 allegations don't list trembling as an issue --

21 THE COURT: Ladies and gentlemen --

22 THE WITNESS: -- or shaking.

23 THE COURT: Excuse me. Go ahead, Dr. Kao.

24 THE WITNESS: Or shaking. There's nothing  
25 about shaking or trembling in this list that I was

1 provided on June 24<sup>th</sup>, or the different list of  
2 behaviors that I was provided prior to June 18<sup>th</sup>.

3 There's nothing about trembling or shaking.

4 THE COURT: Ladies and gentlemen, remember the  
5 admonition. Do not form or express any opinion on this  
6 case until it's finally submitted to you for your  
7 decision. Do not discuss among yourselves or others  
8 until that time. Please be back in your places at 9:00  
9 tomorrow morning. Please remember to leave your  
10 notebooks and instructions behind.

11 Will juror number 8, Jason Sin, please remain  
12 when the others go.

13 (Judge and counsel confer privately.)

14 THE COURT: Back in session. On the record.

15 The regular jurors and alternates have  
16 departed. Counsel for both sides remain.

17 And juror number 8, Mr. Sin, we are  
18 appreciative of your problem, and you are excused as a  
19 juror in this case. Leave your notebook and your  
20 instructions behind. You're free to go.

21 Thank you for your service so far.

22 JUROR 8: Thank you, Your Honor.

23 (Juror 8 left the room.)

24 THE COURT: Mr. Sin's left the courtroom.

25 Counsel for both sides remain.

1                   Anything you want put on the record, Mr.  
2 Katzenbach?

3                   MR. KATZENBACH: No, Your Honor.

4                   THE COURT: Mr. Vartain?

5                   MR. VARTAIN: Be happy to see you tomorrow at  
6 9 a.m.

7                   THE COURT: All right. Off the record. Out of  
8 session.

9                   (Proceedings adjourned at 4:36 p.m.)

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## REPORTER CERTIFICATE

1  
2 I hereby certify that the foregoing  
3 proceedings were taken at the time and place herein  
4 named; that this transcript is a true record of the  
5 proceedings, as reported to the best of my ability by  
6 me, a duly certified shorthand reporter and a  
7 disinterested person, and was thereafter transcribed  
8 under my direction into typewriting by computer.

9 I further certify that I am not interested in  
10 the outcome of said action, nor connected with, nor  
11 related to any of the parties in said action, nor to  
12 their respective counsel.

13 IN WITNESS WHEREOF, I have hereunto set my  
14 hand this 23rd day of September, 2012.

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16 \_\_\_\_\_  
17 HOLLY MOOSE, CSR NO. 6438  
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COURT OF APPEALS OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

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JOHN S. KAO,

Plaintiff/Appellant,

vs.

Appellate No. A135750  
SUPERIOR COURT CASE  
No. CGC-09-489576

UNIVERSITY OF SAN FRANCISCO,  
ET AL.,

Defendants/Respondents.

\_\_\_\_\_ /

ON APPEAL FROM THE JUDGMENT  
OF THE SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

THE HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE

REPORTER'S TRANSCRIPT ON APPEAL

February 10, 2012

Volume 4 (Pages 675 - 899)

For Plaintiff/Appellant:

KATZENBACH & KHTIKIAN  
1714 Stockton Street, Suite 300  
San Francisco, CA 94133  
(415)834-1778  
BY: CHRISTOPHER W. KATZENBACH, Attorney at Law  
CONOR MACK, Attorney at Law

For Defendants/Respondents:

VARTAIN LAW GROUP  
601 Montgomery Street, Suite 540  
San Francisco, CA 94111  
(415)391-1155  
BY: MICHAEL J. VARTAIN, Attorney at Law  
LINDA K. ADLER, Attorney at Law

REPORTED BY: HOLLY MOOSE, RDR-CRR-CCRR, CSR NO. 6438

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

BEFORE THE HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE

DEPARTMENT NUMBER 318

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JOHN S. KAO,

Plaintiff,

vs.

Case No. CGC-09-489576  
Jury Trial

UNIVERSITY OF SAN FRANCISCO,  
ET AL.,

Pages 675 - 899

Defendants.

\_\_\_\_\_ /

REPORTER'S TRANSCRIPT OF PROCEEDINGS

February 10, 2012

APPEARANCES OF COUNSEL:

For Plaintiff:

KATZENBACH & KHTIKIAN  
1714 Stockton Street, Suite 300  
San Francisco, CA 94133  
BY: CHRISTOPHER W. KATZENBACH, Attorney at Law  
CONOR MACK, Attorney at Law

For Defendants:

VARTAIN LAW GROUP  
601 Montgomery Street, Suite 540  
San Francisco, CA 94111  
BY: MICHAEL J. VARTAIN, Attorney at Law  
LINDA K. ADLER, Attorney at Law

REPORTED BY: HOLLY MOOSE, RDR-CRR-CCRR, CSR NO. 6438

I N D E X

Friday, February 10, 2012

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| 14 | 230                | January 16, 2009          |           |             |             |
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1 San Francisco, California

2 Friday, February 10, 2012, 9:01 A.M.

3 Department No. 318

4 The Honorable Wallace P. Douglass, Retired Judge

5 ---o0o---

6 THE COURT: Jurors and alternates are all  
7 present. Counsel for both sides are present. Plaintiff  
8 is personally present on the stand.

9 As you will all appreciate from the slight  
10 change in seating, former juror number 8 has been  
11 discharged from service on this case. Wanda Lee has  
12 become juror number 8. The remaining three alternates  
13 have been shifted one seat to your right so that  
14 Ms. Onacavo doesn't have to sit on a hard seat jammed up  
15 against the side of the tray box. And I trust you'll  
16 all be more comfortable.

17 Mr. Vartain, you may continue your inquiry.

18 MR. VARTAIN: Thank you, Your Honor.

19 Good morning everybody, and good morning Dr.

20 Kao.

21 THE WITNESS: Morning, Mr. Vartain.

22 CROSS-EXAMINATION BY MR. VARTAIN (RESUMED)

23 MR. VARTAIN: Q. I want to ask some questions,  
24 if I may, about the people who were hired into the math  
25 department. So what I would like to do -- you were

1 hired in, I believe, 1991.

2 A. Yes.

3 Q. Okay. And the people who were hired after you  
4 were Stillwell; is that correct?

5 A. Pardon me, but I believe your -- there's  
6 inaccuracies in that chart.

7 Q. Okay.

8 A. You're missing one individual.

9 Q. Who's that?

10 A. Allan Cruse.

11 Q. Was he there in '08/'09?

12 A. Yes.

13 Q. Okay. So we'll put him in here.

14 A. It's double L --

15 Q. Double L?

16 A. -- A-N, C-R-U-S-E.

17 Q. As in Tom Cruise?

18 A. Similar to.

19 Q. Yeah, I forget how he spells that. Okay.

20 So I --

21 A. And then -- I mean, if the academic year is  
22 '08/'09, Dr. Chubb was not a member at that time.

23 Q. She was not hired in during that year?

24 A. She was hired that year.

25 Q. Okay.

1 A. For the following --

2 Q. Okay.

3 A. -- '09/'10 academic year.

4 Q. What I'm most concerned is who was hired. So I  
5 hear you -- we'll put a little asterisk next to her.  
6 Okay. Otherwise it seems accurate?

7 A. Yes.

8 Q. Okay.

9 A. To the extent -- I was still employed as of  
10 '08, but not in '09, after February. But I guess if you  
11 consider February -- the beginning of February as a  
12 portion of that semester --

13 Q. Yeah. That's why --

14 A. Certainly I wasn't on campus, but ...

15 Q. But you were still an employee in the  
16 university math department at some point during this  
17 academic year, correct?

18 A. Yes.

19 Q. Okay. That's why we have you on here.

20 Okay. The people who were hired after John Kao  
21 was hired are John Stillwell, correct?

22 A. Yes.

23 Q. Stephen Devlin, correct?

24 A. Yes.

25 Q. Stephen Yeung, correct?

1 A. Yes.

2 Q. Cornelia Van Cott, correct?

3 A. Yes.

4 Q. And Jennifer Chubb, with that little asterisk  
5 that she was hired that year but she didn't really start  
6 till the end of the --

7 A. After I was --

8 Q. -- the start of the new --

9 A. After I was discharged, yes.

10 Q. Okay. So -- so it's correct we have one,  
11 two -- number of hires are one, two, three, four,  
12 five -- and Devlin. Where's Devlin?

13 Okay. So we have -- so including you, we have  
14 six hires starting in 1991 when you were hired, right?

15 A. Yes.

16 Q. Let's put that down here for a second. So the  
17 first one is Dr. Kao.

18 A. Oh, pardon me. Dr. Zeitz, he was hired after I  
19 was hired.

20 Q. He was hired after you?

21 A. Yes.

22 Q. Okay.

23 A. So you should mark --

24 Q. What's that?

25 A. You should put a X or annotation.

1 Q. When was he hired in relation to you?

2 A. I -- he was hired -- I was on the search  
3 committee when he was hired my first year. So he would  
4 have been -- started in '92/'93 academic year.

5 Q. So we've got seven people who are hired in the  
6 department, starting with you, not six. These are  
7 full-time faculty members?

8 A. Yes.

9 Q. Okay. So we got Dr. Kao. And you're obviously  
10 male. Put an M for male. And you're obviously  
11 Asian-American.

12 Okay. So we have -- then we have -- I guess  
13 the next one is Zeitz, right?

14 A. Yes.

15 Q. Dr. Z. He's male, and he's -- we'll call him  
16 nonminority. Mind if I change this to minority, and  
17 we'll put Zeitz nonminority? I think it'll be easier  
18 that way.

19 Then we have -- next one was Devlin, right?

20 A. No.

21 Q. Oh, Stillwell.

22 A. Yes.

23 Q. Dr. S. He's male. And I don't know -- how  
24 would you characterize him. He's from Australia, right?

25 A. Yes.

1 Q. So he's not -- would you agree he's not a  
2 minority?

3 A. Yes.

4 Q. Okay. And then we have -- Devlin was the next  
5 one, correct?

6 A. Yes.

7 Q. Okay. Dr. D, same thing, male, nonminority.  
8 Then we have Dr. Yeung. So he's 2006, right?

9 A. Yes.

10 Q. Yeah. So he's male, and he's minority.

11 A. Yes.

12 Q. Okay. Sorry for the bad ...

13 Then we have Cornelia -- Dr. Van Cott. She's  
14 female and she's nonminority.

15 A. Yes.

16 Q. Okay. You were part of the interviewing, so  
17 you met her, right?

18 A. Yes.

19 Q. Okay. So nonminority.

20 And then we have Jennifer -- Dr. Chubb. She  
21 was the one who was hired for the search where you  
22 were -- while you were on leave. You were calling Dr.  
23 Yeung and asking "What's going on with that search,"  
24 right? She's the one who came out of that search,  
25 right?

1 A. Yes.

2 Q. Okay.

3 A. I spoke with Dr. Yeung in connection with that.

4 Q. Okay. So we got female, nonminority, right? I  
5 believe. Would you agree?

6 A. Yes.

7 Q. Okay. So -- so we've got seven -- I'll come  
8 back if anybody wants to see it again.

9 We got seven jobs filled, and four of those  
10 jobs were filled by either a woman or a minority person;  
11 would you agree?

12 A. Yes.

13 Q. And those -- those are -- the minority and the  
14 women were the ones that -- in math departments  
15 historically in the country, there's an  
16 underrepresentation of faculty members that are either  
17 women or minority, correct?

18 A. Yes.

19 Q. Okay. So we would agree that they hired four  
20 of the seven from underrepresented pop- -- you know,  
21 people. We'll just say it that way.

22 And three positions were hired from fully  
23 represented people or population, right?

24 A. Yes.

25 Q. Okay. I want to talk now -- after I've



1 demonstrated actually how the hiring went in the  
2 department, I'd like to talk a little bit about Dr.  
3 Yeung, okay, 'cause you talked a little bit about him  
4 when you answered Mr. Katzenbach's questions.

5           Now, did you -- you were telling the jury that  
6 when there's a hiring for a new professor where there's  
7 a vacancy announced by the dean and there's going to be  
8 a solicitation for applications, that when the -- the  
9 applicants dropped down to semifinalists, like four or  
10 six people, eventually they -- the math department  
11 invites people -- the final pool to come to the campus  
12 for interviews. Is that the way it worked?

13           A. There would be a group of semifinalists. From  
14 the group of semifinalists that were -- information to  
15 be provided to the department, we could look at their  
16 resumé's. The search committee would select a smaller  
17 group of finalists.

18           Those finalists would make site visits prior to  
19 the decision by the committee and the department.

20           Q. Okay. By the committee of the department of  
21 mathematics. They're the ones who recommend to the dean  
22 who's -- who's the best -- first choice, second choice,  
23 third choice?

24           A. The search committee forwards a ranking to the  
25 Dean's Office. The search committee is, according to

1 the rules, supposed to consult with the department to  
2 get their feedback.

3 Q. That is --

4 A. The rules are vague as to what that means,  
5 but ...

6 Q. When you say "the search committee" -- let's  
7 sort of explain the terms here so the jury -- we don't  
8 try to -- we're not too ambiguous.

9 There's the whole department, which is all the  
10 full-time faculty members of the math department. So  
11 that's -- that would be -- would that be everyone on  
12 here? I mean, not at every point in time, but these are  
13 full-time faculty members?

14 A. Yes. Those individuals identified on that  
15 chart would be participants in this process.

16 Q. Okay. So we call them the department.

17 And then when we call "the search committee,"  
18 that's a smaller group of these people who are working  
19 on who to hire for that particular job vacancy,  
20 whatever -- whenever it is, right?

21 A. Yes. I should -- I should clarify that there's  
22 a Ms. Brunelle, who's a term faculty. So she has a  
23 contract -- three-year contract sometimes -- I believe  
24 three years is the maximum contract. I don't know what  
25 her contract was --

1 Q. Yeah.

2 A. -- at the time. She participates in department  
3 meetings. She's a member of the union. But she would  
4 not participate in search procedures.

5 Q. Right.

6 A. So that would be one area where she didn't have  
7 as much responsibility.

8 Q. Okay. I didn't put --

9 A. Whereas part-time faculty do not participate in  
10 department meetings generally.

11 Q. Okay. I didn't put Dr. Brunelle on there  
12 because she's sort of this other category. She's really  
13 not the full-time tenure or tenure track professor; is  
14 that right?

15 A. Yes. And --

16 Q. So we'll put --

17 A. That's appropriate. I was just pointing that  
18 out to the court.

19 Q. Okay. So we can just put Dr. Brunelle, woman,  
20 female, over here, okay. But we don't need to talk  
21 about her.

22 Okay. So the search committee in any given  
23 job-hiring is a subsection of this whole group, right?

24 A. Yes, with -- since 2000, there would be another  
25 faculty added from a different department to --

1 Q. Get a different point --

2 A. Yes, to provide some outside input.

3 Q. Okay. Yeah, I do remember you mentioning that.

4 So I want to come back to the hiring of Stephen

5 Yeung. That's the hire that you objected to, correct?

6 A. I didn't object at the time he was hired, but  
7 after he was hired, although I did not mention anything  
8 about this issue to anybody in the department, I did  
9 incorporate my concern in my formal complaint.

10 Q. Right. And that -- I think you pretty much  
11 captured what I was going to ask you, but I'd like to  
12 just unravel the yarn just a little bit.

13 You actually had an opportunity to be at the  
14 interviews when Dr. Yeung came from New York to  
15 interview for the job; is that right?

16 A. Yes.

17 Q. Did you --

18 A. Utah.

19 Q. What?

20 A. Never mind.

21 Q. Okay.

22 A. Utah.

23 Q. Oh, he came from Utah? He wasn't living --

24 A. He had a position in Utah.

25 Q. That's right. He went to Cornell, but then he

1 was living in Utah?

2 A. Yes.

3 Q. Okay. So did you actually meet Dr. Yeung when  
4 he was interviewing?

5 A. Yes.

6 Q. Did you go to his presentation when he -- isn't  
7 it the applicant -- the finalist has to do a  
8 presentation of his or her mathematical genius, so to  
9 speak?

10 A. I attended both his teaching talk and his  
11 research talk.

12 Q. Okay. And after doing so, did you have an  
13 opportunity to participate in the meetings of the math  
14 department that talked about where to rank Dr. Yeung on  
15 the pecking order of choice -- best choices?

16 A. Yes. I attended the second -- what was  
17 referred to as the second meeting of the search  
18 committee department.

19 Q. Okay. And was he the top pick?

20 A. Of mine or the group?

21 Q. Good -- I'm sorry. Of the group.

22 A. There was a vote. The -- that year, the  
23 procedure was, as announced by the chair of the search  
24 committee, the department, together with the search  
25 committee, would vote after the search committee made

1 its representations to the department, whereas in the  
2 following year, we didn't vote.

3 Q. Okay.

4 A. In the following search.

5 Q. I'm only -- I'm sorry, go ahead.

6 A. Yes. The search committee expressed the  
7 opinion that of the three candidates that visited  
8 campus, Dr. Yeung was the only viable candidate.

9 Q. Okay. So the search committee recommended to  
10 the whole department that Dr. Yeung be forwarded to the  
11 Dean's Office as the number one?

12 A. Yes. And the other two candidates were -- were  
13 not viable. That was the terms that they used.

14 Q. Okay.

15 A. So if Dr. Yeung took a position at another  
16 institution, a position would not be offered to either  
17 of the other candidates.

18 Q. Okay. The major point I want to make -- and I  
19 think you're telling me this -- is that the subgroup,  
20 the search committee, told the big group, the  
21 department, "We want the dean to offer the job to Dr.  
22 Yeung," right?

23 A. Yes.

24 Q. And then the big group, the department, the  
25 whole group of faculty, how did they vote? Did they

1 vote to ask the dean to offer the job to Dr. Yeung?

2 A. For that meeting, the votes that took place are  
3 in the minutes of that meeting. My recollection is we  
4 voted first on the issue of viability. It was not  
5 unanimous that Dr. Yeung was the only viable candidate.  
6 There were a couple -- I think myself -- well, it was a  
7 long time ago. I'd have to refer -- the department did  
8 not unanimously agree that Dr. Yeung was the only viable  
9 candidate.

10 Q. Okay. But -- but did the department, by  
11 majority vote say "We want to send a letter to the dean  
12 and say we want to hire Dr. Yeung"?

13 MR. KATZENBACH: That's compound, Your Honor.

14 MR. VARTAIN: I'll withdraw it.

15 Q. Did the department take a vote to ask the dean  
16 to hire Dr. Yeung?

17 A. Well, the result of the vote on viability  
18 pretty much settled the issue. With the search  
19 committee being six or seven people and maybe three  
20 people dissenting on the issue of viability, it was  
21 decided by that vote of a majority that Dr. Yeung was  
22 the only viable candidate.

23 Q. Okay. And by this so voting by majority, Dr.  
24 Yeung's name was forwarded to the dean with the request  
25 that the dean hire Dr. Yeung; is that correct?

1 A. Yes.

2 Q. Okay. And I think -- let me ask you, were you  
3 one of the votes against Dr. Yeung's name being sent to  
4 the dean and asking the dean to hire him?

5 A. Well, as I say, there were two votes, one on  
6 viability and then the other one on the ranking. My  
7 position at that department [sic] was that all three  
8 candidates were viable.

9 Then, in addition to the viability, they asked  
10 my opinion as to how I ranked the candidates. I did not  
11 rank Dr. Yeung as the first choice, but rather,  
12 Dr. McMillan -- I think -- I don't think I'm recalling  
13 her name correctly, but it's something like McMillan --  
14 as my first choice, but ...

15 Q. Where did you rank -- you yourself, Dr. Kao --  
16 rank Dr. Yeung in your numbering?

17 A. At that time, I -- at the time of the meeting,  
18 I believe I ranked Dr. Yeung second.

19 Q. Okay. That's what I thought.

20 A. I believe, yes. But I can't recall. I'm not  
21 sure.

22 Q. Other people ranked -- the majority ranked him  
23 first. You ranked him second among all the finalists;  
24 isn't that true?

25 A. I believe that's correct, yes.



1 Q. Okay. Before -- and then -- well, withdraw  
2 that start of a question.

3 It came to pass that the dean announced, Dean  
4 Turpin, that she had made an offer of the position to  
5 Dr. Yeung, correct?

6 A. Yes.

7 Q. And Dean Turpin announced to the math  
8 department that Dr. Yeung had accepted her, Dean  
9 Turpin's, offer. So -- correct?

10 A. Yes.

11 Q. So sometime in around 2006, everybody knew  
12 "We've got a new colleague coming, Dr. Yeung," right?

13 A. Yes.

14 Q. That would have been announced -- bad question.

15 That was announced sometime in the spring  
16 semester of that year 2006, right?

17 A. Yes. I'd say mid February.

18 Q. Mid February, exactly.

19 A. Maybe late February.

20 Q. 'Cause the guy's gotta get his family moved and  
21 be in time to start in August. So that's when the jobs  
22 are filled, in February and March, right?

23 A. Typically February is --

24 Q. Okay.

25 A. -- the time that a decision is made and offers

1 forwarded.

2 Q. So you knew in February or March of 2006 that  
3 Dr. Yeung was going to be your new colleague, true?

4 A. Yes.

5 Q. At any time before you knew that, did you send  
6 a letter to the Dean's Office saying you don't believe  
7 that Dr. Yeung has the qualifications for the job?

8 A. No. I didn't -- I didn't check his CV -- I  
9 mean his resumé -- until after he was hired.

10 Q. Okay.

11 A. I didn't scrutinize it.

12 Q. What's that?

13 A. I didn't scrutinize his resumé until after he  
14 was hired.

15 Q. That was my point, is that you missed it, Dr.  
16 Yeung [sic]. He came out here before February 2006 and  
17 he interviewed, right?

18 A. Yes.

19 Q. That would have been in the previous winter,  
20 like November/December 2005, right?

21 A. No, it would have been in February or -- or  
22 late January -- early February or late January --

23 Q. Okay.

24 A. -- that he --

25 Q. But --

1 A. -- visited campus.

2 Q. It's at that time when Dr. Yeung came from Utah  
3 in January and interviewed -- or early February -- his  
4 resumé, his paperwork, where he got his degree, what his  
5 degree is in, is all out there for all of your other  
6 professors to read and study, correct?

7 A. Yes. We're given those materials at the first  
8 meeting of the search committee --

9 Q. Okay.

10 A. -- in the department. And that takes place mid  
11 January.

12 Q. So you had all of the material about Dr. Yeung,  
13 as to where he went to school, what he studied, where  
14 [sic] his degrees, you know, were in -- you had that  
15 when he came out for the interview, right?

16 A. I had his resumé, correct.

17 Q. And that resumé had all the information on it  
18 that I just listed out, correct?

19 A. Yes.

20 Q. And you had all that information about his  
21 degrees, his schooling and his other qualifications  
22 before the department took their democratic vote on who  
23 would get put up to the dean for a recommendation; is  
24 that correct?

25 A. Yes.

1 Q. After he was hired, you then did a little  
2 investigation of your own; is that right?

3 A. Yes, after I discovered that his degree was not  
4 in mathematics.

5 Q. Okay. Well, when was it that you started your  
6 investigation into his -- where you -- you know, his --  
7 where he -- what he studied when he was in school?

8 A. After he was hired and after I caught on his  
9 resumé that his degree was not in mathematics. That  
10 would have been probably very end of February.

11 Q. At the very end --

12 A. Very end. So he was hired, and then I had -- I  
13 was reorganizing the materials. And I put the  
14 candidates' resumé that were not hired in one folder,  
15 and the one -- I had -- I had a folder for university  
16 business and I had a folder for sort of extraneous  
17 materials. And I was -- I separated out his resumé.  
18 And then I was looking at it more closely, and then I  
19 caught that his degree, doctorate, was not in  
20 mathematics.

21 Q. Well, we'll talk --

22 A. And at that point, I checked -- tried to check  
23 that information.

24 Q. Right. 'Cause I have some of what -- your  
25 checking was going on-line. And we'll bring out those

1 documents in a second.

2 But the question I have is, you knew Dr. Yeung  
3 had already been offered the job and had accepted the  
4 job and made his plans to come to San Francisco, and  
5 then it was that you filed your complaint about that he  
6 was hired?

7 A. Well, I did not know that his degree was not in  
8 mathematics at the time --

9 Q. At the time --

10 A. -- he was interviewed.

11 Q. Right.

12 A. It wasn't disclosed to us by the department --  
13 by the search committee. The search committee didn't  
14 disclose to the department or announce to the department  
15 that "In this search, we're considering a person who's  
16 not -- whose doctorate was not in mathematics."

17 Q. Sir --

18 A. That wasn't something that was discussed.

19 Q. Isn't it true, like I just asked you, that all  
20 of his degrees, his schooling, his education -- it was  
21 out there on his resumé when he came for the interviews,  
22 right?

23 A. Yes.

24 Q. So why are you saying that the department  
25 didn't disclose something?

1           A.    Well, in prior searches, no candidate -- no  
2 finalist had ever been considered that didn't have a  
3 degree in mathematics.

4           Q.    I'm going to --

5           A.    And the search committee didn't tell us that  
6 "Well in, this particular search, we're making an  
7 exception."

8                    I mean, we were given the resumés, and my  
9 assumption was that everybody had a degree in  
10 mathematics, as in prior searches. So I didn't check  
11 carefully --

12          Q.    Okay.

13          A.    -- whether he had the right --

14          Q.    His --

15          A.    -- background.

16          Q.    His Ph.D. didn't have the word "mathematics"  
17 next to it; is that correct?

18          A.    It did not have the word "mathematics" next to  
19 his Ph.D., correct.

20          Q.    It had the word "applied physics" next to it,  
21 correct?

22          A.    No.

23          Q.    What did it have?

24          A.    "Theoretical and applied mechanics."

25          Q.    Okay. When he came to do his interviews, did

1 he -- did he put on a presentation for the students?

2 A. Yes.

3 Q. Was the presentation in math?

4 A. It was a course in calculus. He took one  
5 lecture.

6 Q. Okay, which is a math course, right?

7 A. It's a math course, yes.

8 Q. Did he present it -- did he present his course  
9 materials in calculus in a manner that he seemed to know  
10 his stuff?

11 A. Yes.

12 Q. Did everybody in the department pretty much say  
13 "This guy knows his stuff in math"?

14 A. We didn't have a discussion as to whether he  
15 knows calculus. I mean --

16 Q. Okay. Did you --

17 A. But there was no issue raised with respect to  
18 his teaching talk --

19 Q. Okay.

20 A. -- in discussion.

21 Q. When you made your ranking known to the  
22 committee that you ranked him second, not first, did you  
23 explain or did you take the position that he's not --  
24 he's not knowledgeable in math?

25 A. I never said that Dr. Yeung is not

1 knowledgeable in mathematics.

2 Q. Okay. And even today, you would agree he's an  
3 excellent mathematics teacher, so far as you know?

4 A. I have little basis to form an opinion one way  
5 or the other.

6 Q. Okay. Well --

7 A. I didn't see his teaching evaluations.

8 Q. Okay. Fair enough.

9 A. And I wasn't on campus for part of that time.

10 Q. But insofar as you participated in the  
11 interviews and had seen his presentations, you would  
12 agree he seemed to really know his math?

13 A. I'm not sure -- I mean, I -- I had no problem  
14 with his teaching talk. I thought it was a fine lecture  
15 to the students.

16 Q. And his teaching talk was in calculus math?

17 A. Calculus, yes.

18 Q. So when you then did your investigation -- that  
19 is, after he was hired -- you did your investigation  
20 into his educational background; isn't that true?

21 A. Yes.

22 Q. And you went to the Web site of Cornell  
23 University, where he had earned his Ph.D.; is that  
24 correct?

25 A. Yes.



1 Q. And weren't you happy he was hired? I mean --

2 A. When? At what point in time?

3 Q. Weren't you hired [sic] -- you had been -- you  
4 had been saying for some years that it would be good if  
5 the math department had more minorities, true?

6 A. Yes.

7 Q. Weren't you really happy when the math  
8 department hired another minority person who's a  
9 brilliant man?

10 MR. KATZENBACH: Objection. The --

11 MR. VARTAIN: I'll take out the "brilliant."  
12 Okay. You don't want me to have that word.

13 MR. KATZENBACH: No, I don't want you to  
14 testify, sir.

15 MR. VARTAIN: I don't want to testify.

16 Q. Weren't you really, really happy for the  
17 university that he was coming?

18 A. I had mixed feelings about his appointment  
19 after I discovered that his doctorate was not in  
20 mathematics.

21 Q. Did you ever --

22 A. So I was happy there was a underrepresented  
23 group further -- better represented within the  
24 department. I was unhappy that the search committee had  
25 apparently broken the rules.

1           I mean, the advertisement was stated that  
2 candidates should have a doctorate in mathematics by the  
3 time they started teaching in the fall. In stating so,  
4 they basically identified a group of people who've  
5 already graduated or nearly graduating, right, in the  
6 spring.

7           So that would be people who just finished their  
8 graduate work and then want to start teaching right away  
9 as opposed to doing a postdoctoral position of some  
10 kind.

11           But at any rate, it was clearly stated in the  
12 advertisement that "This is the criteria: Should have a  
13 doctorate in mathematics by spring" -- "by fall of" --

14       Q.    Okay.

15       A.    -- "2007." And I was concerned that Dr. Yeung  
16 didn't fit that basic criteria.

17       Q.    Understood. That was your opinion that he --

18       A.    So I had mixed feelings.

19       Q.    I hear you. It was your opinion that he didn't  
20 have a Ph.D. in mathematics, right? That was --

21       A.    Yes.

22       Q.    Okay.

23       A.    That was my conclusion, yes.

24       Q.    And then when you did the investigation, you  
25 went on the Web site of the Cornell University graduate

1 school; is that correct?

2 A. Yes. I downloaded the catalog and the  
3 curricula information.

4 Q. Right. And then you -- you went to the Web  
5 site for the program in theoretical and applied  
6 mechanics, correct?

7 A. Yes.

8 Q. That's the program that was listed as where Dr.  
9 Yeung had done his studies, correct?

10 A. Yes.

11 Q. And you read that this program has on its Web  
12 site that it, quote, "provides a strong background in  
13 engineering science and applied mathematics," correct?

14 A. Yes.

15 Q. It went on to say that "The coursework provides  
16 a broad education in" -- number of things -- "including  
17 applied mathematics," correct?

18 A. I'm pausing because it's been a long time since  
19 I looked at the document.

20 MR. VARTAIN: May I approach the witness?

21 THE WITNESS: I don't have the document in  
22 front of me, but, I mean, it sounds reasonable to me. I  
23 downloaded a lot of materials from the Cornell Web site  
24 and ...

25 MR. VARTAIN: Q. When you did do your

1 investigation, you determined that it must be the case  
2 that Dr. Yeung had done his studies, at least in part,  
3 in applied mathematics, correct?

4 A. The curriculum included mathematics, which was  
5 important for engineering, yes.

6 THE REPORTER: Which was what?

7 THE WITNESS: Important for engineering.  
8 Engineering relies heavily on mathematical techniques.

9 MR. VARTAIN: Q. It actually said that the  
10 program has a concentration in applied mathematics,  
11 correct?

12 A. Is that the what it says? I --

13 MR. VARTAIN: May I approach the witness, Your  
14 Honor, show him --

15 THE WITNESS: I don't have the document in  
16 front of me, so --

17 THE COURT: Make sure Mr. Katzenbach has seen  
18 it.

19 MR. VARTAIN: He's seen it. He gave it to me.

20 MR. KATZENBACH: Is this part of an exhibit?

21 MR. VARTAIN: It's part of his -- yes.

22 THE COURT: Yes, you may approach.

23 MR. VARTAIN: Thank you, Your Honor.

24 Q. Is the document that I've handed you a clipping  
25 from the Web site of the Cornell program that Dr. Yeung

1 studied at?

2 A. Yes.

3 Q. Does -- did your reading of that Web site give  
4 you reason to believe that Dr. Yeung studied applied  
5 mathematics as part of his Ph.D.?

6 A. He studied mathematics as part of his Ph.D.

7 Q. And it -- does it not use the term "applied  
8 mathematics" in describing the concentration of that  
9 program?

10 A. I don't see the word "concentration."

11 Q. Does it describe --

12 A. It says: "Provides a strong background  
13 in engineering science and applied  
14 mathematics."

15 Q. Okay. And isn't it true, Dr. Kao, that  
16 that's -- applied mathematics is the actual field that  
17 you studied when you got your Ph.D. at Princeton?

18 A. Yes. I have a -- I have a doctorate in applied  
19 mathematics.

20 MR. VARTAIN: May I approach the witness --

21 THE COURT: Yes.

22 MR. VARTAIN: -- and reclaim ...

23 Q. After you filed the grievances wherein you  
24 wrote to the dean that Dr. Yeung was not qualified to  
25 have this position, did you ever tell Dr. Yeung that you

1 were making grievances to the dean about him?

2 A. No.

3 Q. Did you ever tell any of these other people --  
4 that is, the faculty members of the math department --  
5 that you were filing grievances against the fact that  
6 Dr. Yeung had been hired?

7 A. No.

8 Q. When it came to pass in the spring of 2008 that  
9 Ms. Peugh-Wade told you that in that past semester there  
10 had been unnamed people with concerns about your  
11 behavior, by that point of time, had you ever told any  
12 of the math department faculty members that you were  
13 filing or had filed grievances against Dr. Yeung's hire?

14 A. I did not tell anybody about my formal  
15 complaint.

16 Q. Did you tell anybody in the math department  
17 that you were taking it to the Dean's Office to complain  
18 that Dr. Yeung had been hired?

19 A. Say again. I didn't tell anybody about my  
20 formal complaint. My formal complaint was submitted to  
21 the Office of Human Resources. A copy was sent to the  
22 Dean's Office, but --

23 Q. The formal complaint that you're talking about,  
24 as part of it, had your issue with the hiring of Dr.  
25 Yeung, correct?

1 A. Yes.

2 Q. And that's why -- I hear you that none of these  
3 people knew you filed a formal complaint. They didn't  
4 know even in the spring of 2008 -- so far as you know,  
5 they didn't know that you had filed that formal  
6 complaint, correct?

7 A. So far as I know, correct.

8 Q. And even more specifically, they didn't know --  
9 that is, your colleagues in the math department -- so  
10 far as you could tell, they didn't know that part of  
11 that formal complaint was your objection to the hiring  
12 of Dr. Yeung, correct?

13 A. As far as I know.

14 Q. Now, let's go to Dr. Van Cott. She was the one  
15 who was hired at the time of the spring of 2008, this  
16 time when we're so -- we're concerned in this case with  
17 that point in time, right?

18 A. Yes.

19 Q. Now, like with Dr. Yeung, did you have the  
20 opportunity to meet Dr. Van Cott when she came to the  
21 campus to do her interviews?

22 A. Yes.

23 Q. Did you actually meet her?

24 A. Yes.

25 Q. Did you actually attend her academic

1 presentations to the other faculty members and the  
2 students?

3 A. Yes. I believe I attended all the research  
4 talks. Some of the teaching talks I missed because I  
5 had a class myself --

6 Q. Okay.

7 A. -- at that same time. So I can't recall  
8 specifically --

9 Q. Were you impressed --

10 A. -- in her case --

11 Q. I'm sorry.

12 A. In her case, I can't recall specifically  
13 whether I attended both.

14 Q. Did you attend at least one of Dr. Van Cott's  
15 scholarly presentations?

16 A. Yes.

17 Q. That is, at the time she was interviewing?

18 A. Yes.

19 Q. Were you impressed with her?

20 A. I thought she was a good candidate, yes.

21 Q. So when it came to pass that in February of  
22 that year the search committee had a meeting, did the  
23 search committee rank Dr. Van Cott among their top  
24 three?

25 A. She was second -- ranked second by the search



1 committee.

2 Q. Okay. The number one ranking person eventually  
3 fell off because they sort of withdrew their candidacy;  
4 is that correct?

5 A. Yes.

6 Q. Okay.

7 A. She took a position at a different place.

8 Q. Such -- and who was that?

9 A. Dr. Duchin.

10 Q. Right. Another female, correct?

11 A. Yes.

12 Q. Two females had the two top rankings for that  
13 job; is that right?

14 A. Yes.

15 Q. Didn't you agree with the rest of the search  
16 committee that they were the best qualified for the job?

17 A. I think they were qualified. I didn't bother  
18 to rank the candidates because my recommendation to the  
19 search committee was that they postpone the search.

20 Q. That's what I was going to get to in a second.

21 But you didn't -- you had the opportunity to  
22 give your views to the search committee as to where you  
23 ranked them. You chose not to do so; isn't that true?

24 A. Yes. I didn't -- I didn't even bother to rank  
25 them for myself, I think, because -- although I could be

1 wrong on that. When I ranked the candidates, I was  
2 pretty careful. I looked at a lot of different factors.

3 Q. Well, when --

4 A. But when asked about it as to what my  
5 recommendation was to the search committee, I said I --  
6 I simply said "I think we should postpone the search  
7 until it's advertised and the pool is broadened" --

8 Q. Okay.

9 A. -- "to get more minority candidates."

10 Q. But you knew that the pool already had two very  
11 highly-qualified, underrepresented candidates, right,  
12 Ms. -- Dr. Duchin and Dr. Van Cott? You knew that?

13 A. Yes.

14 Q. Okay. And when you made the recommendation to  
15 cancel, you knew that if they were to go ahead and  
16 cancel, they'd have to start all over again, correct?

17 A. Something would have to be done. I mean, they  
18 could have put a ad later in the spring and then more  
19 candidates added. Of course, the danger would be that  
20 perhaps Dr. Van Cott would take a position at another  
21 place.

22 Q. Isn't --

23 A. But then again, we might have even more  
24 candidates coming in who were also female. So that  
25 would have been one possibility, would have been to, you

1 know, try to get an ad in, say, in April, leave the four  
2 candidates still in the pool for consideration, perhaps  
3 get in another four people, and then make a decision.

4 Q. But, Dr. Kao, you know that if you have top  
5 people like Dr. Duchin and Dr. Van Cott, you're actually  
6 competing against other colleges for their services. If  
7 you don't pick the fruit off the tree when it's ripe and  
8 you leave it on the tree to go for weeks and months  
9 while you do other stuff, the fruit's not going to be  
10 ripe; you're not going to be able to pick it; and you  
11 won't get those top people, right?

12 A. I don't fully understand your metaphor.

13 Q. Well --

14 A. I mean, you know, it's possible that Dr. Van  
15 Cott would not be available --

16 Q. Okay.

17 A. -- by the end of the spring. I mean, on the  
18 other hand, we might have more candidates. I mean, if  
19 you have -- we dropped from 300 to 200. So maybe there  
20 were highly-qualified people among the 100 that were  
21 missed that could have come in and filled that slot.

22 Q. And that's my question. Maybe, could have,  
23 would have. But right now we had a really  
24 highly-qualified woman. We were underrepresented in  
25 women. If we were to cancel the search, you would agree

1 there would be a real risk that we would lose the  
2 opportunity to hire Cornelia Van Cott, correct?

3 A. Yes.

4 Q. And you wouldn't have known whether there would  
5 be another highly-qualified woman or minority. That's  
6 hit or miss. We had a bird in the hand right then. You  
7 know what -- the metaphor "bird in the hand is worth two  
8 in the bush"?

9 A. I've heard that.

10 Q. We had a bird in the hand right then and there,  
11 correct, Cornelia Van Cott?

12 A. We had a bird in the hand.

13 Q. Okay. So you weren't surprised when the search  
14 committee outvoted you and said "No, we're not going to  
15 cancel the search. We want to hire her. We don't want  
16 to lose her," correct?

17 A. I wasn't surprised --

18 Q. Okay.

19 A. -- that the department didn't support my  
20 suggestion.

21 Q. 'Cause if truth be known, Dr. Kao, if they had  
22 cancelled the search, there was a high probability that  
23 that position would be vacant for one whole 'nother  
24 school year?

25 A. It was possible.

1 Q. Yeah. And that would mean that all the other  
2 teachers -- well, it would mean the math department  
3 would be down one teacher for a whole 'nother year,  
4 correct?

5 A. It was possible.

6 Q. Yes. And didn't I hear you say that -- in your  
7 testimony here -- that sometimes if you don't fill the  
8 job when the dean gives you the money to do it, the dean  
9 might decide "Well, you don't really need that position;  
10 I'll take the money away"?

11 So maybe if you wait -- "you" being the math  
12 department -- you won't even have a job to fill, with a  
13 minority, woman or anybody; isn't that true?

14 A. That possibility existed --

15 Q. Yeah.

16 A. -- I suppose.

17 Q. But with all those --

18 A. I don't know how the Dean's Office makes those  
19 decisions, so ...

20 Q. Yeah. But with all those potential bad things  
21 that could happen if they did what you wanted, you still  
22 wanted them to cancel that search and not hire Dr. Van  
23 Cott, correct?

24 A. Well, I mean, I considered that it was also  
25 possible that we could find a highly-qualified female

1 minority.

2 Q. And I did hear you say that, sir. But you  
3 already had the bird in the hand, but you didn't know if  
4 there would be two in the bush, right?

5 A. I didn't know there would be two in the bush,  
6 yes. I didn't know there wouldn't be either, but ...

7 Q. Fair enough. I'd like to go to a slightly  
8 different subject, which has to do with what you've been  
9 doing since you're not working at the University of San  
10 Francisco anymore.

11 Have you done any -- well, let me withdraw  
12 that.

13 Have you been employed in any capacity  
14 anyplace, anywhere, since that day when you no longer  
15 were employed at the university?

16 A. No.

17 Q. Have you done any consulting work for any  
18 government, university, foundation during this time?

19 A. No.

20 Q. Have you, on your own, done any mathematical  
21 work, such as doing your research, keeping up in your  
22 profession, writing articles?

23 In the three years since you've been not at the  
24 university officially -- February 2009 till now,  
25 February 2012 -- have you done anything of that sort?

1 A. No.

2 Q. Have you done anything of any sort to keep your  
3 skills sharp, your knowledge base up to speed in your  
4 area of profession in the way I've described it, writing  
5 articles --

6 A. I don't understand your question.

7 Q. Okay.

8 A. I haven't published anything, if that's what  
9 you mean.

10 Q. Have you applied for any jobs whatsoever of any  
11 kind, type or nature?

12 A. No.

13 Q. Have you engaged a headhunter, consultant or  
14 any kind of a professional advisor to give you help in  
15 how to get a job when you have this difficulty that you  
16 lost the job that you had?

17 A. No.

18 Q. Have you made contacts with your professional  
19 colleagues to learn of opportunities and vacancies?  
20 Have you done any networking?

21 A. I've not done any networking.

22 Q. Have you done anything of a professional nature  
23 in the last three years, other than working on your  
24 lawsuit?

25 A. I don't understand what you mean by "of a

1 professional nature." Could you be more specific.

2 Q. I don't think it was a great question, Dr. Kao,  
3 so I think I'll withdraw it.

4 Have you done anything to consult with people  
5 in the higher education field, such as deans, to figure  
6 out how you maybe could present your resumé to  
7 universities in a positive light, notwithstanding that  
8 you lost your job at the university?

9 A. No, I've not consulted with deans or university  
10 administrators on that matter.

11 Q. Have you -- have you ever seen anything in  
12 writing where the University of San Francisco put out  
13 in -- to people who might consider you for employment --  
14 that is, colleges and universities -- put out in writing  
15 that you're unemployable?

16 A. Well, the cross-complaint for this lawsuit is  
17 on-line. It's public record. The cross-complaint is  
18 that I should be banned from campus indefinitely at the  
19 risk of -- with the penalty of arrest by SFPD should I  
20 step onto any portion of the campus. So if that  
21 counts --

22 Q. Do you know of any person in higher education  
23 that has examined the lawsuit papers in this case; that  
24 is, outside of the University of San Francisco and  
25 yourself?



1           A.     I have not had conversations about my lawsuit  
2 case in one way other another with any faculty member  
3 outside USF.

4           Q.     Do you know of any people at colleges and  
5 universities that have been contacted by the University  
6 of San Francisco and told that the university thinks of  
7 you as unemployable?

8           A.     No.

9           THE COURT: Ladies and gentlemen, remember the  
10 admonition. Do not form or express any opinion on this  
11 case until it's finally submitted to you for your  
12 decision. Do not discuss among yourselves or with  
13 others until that time. Please be back in your places  
14 at 10:10 according to the courtroom clock.

15                     (Recess taken.)

16           THE COURT: Jurors and alternates are all  
17 present. Counsel on both sides are present. Dr. Kao is  
18 on the witness stand.

19           Mr. Vartain, you may continue your inquiry.

20           MR. VARTAIN: Thank you, Your Honor.

21           Q.     Dr. Kao, when you were answering Mr.  
22 Katzenbach's questions, you talked about letters of  
23 reference.

24           A.     Yes.

25           Q.     And I remember that you said that it's normal

1 for applying for professor jobs in colleges and  
2 universities to need to provide at least three or four  
3 letters of reference with your application.

4 A. Yes.

5 Q. And is -- have you ever asked any of your  
6 colleagues at the university, whether in the math  
7 department or in other departments -- that is, other  
8 professors -- for a letter of reference?

9 A. My attorney wrote a letter requesting names of  
10 people who I could contact at the university for letters  
11 of reference.

12 Q. Sir, I didn't ask you what your attorney did.  
13 I asked you what you did. Did you -- you still are on  
14 good terms with several of your former coworkers, are  
15 you not? Sir?

16 A. I am friendly with one person. But --

17 Q. Dr. --

18 A. -- we don't socialize. I mean, I'm friendly in  
19 the sense that we sometimes exchange an email --

20 Q. This is the gentleman --

21 A. -- maybe once a month. To that extent, I'm  
22 friendly. But we have -- we ceased to socialize after  
23 my discharge.

24 Q. Was that cessation --

25 A. I consider him -- I consider him a friend.

1 Don't get me wrong, but ...

2 Q. Is that Dr. Wolf?

3 A. Dr. Wolf, yes.

4 Q. He's the one that your attorney's going to  
5 bring to testify here, right?

6 A. I believe he's a witness in this case.

7 Q. And you're also still on good terms with  
8 Professor Huxley of the business school, who I saw out  
9 in the hall yesterday; is that the case?

10 A. No. I'm not necessarily on bad terms with --

11 Q. Okay.

12 A. -- Dr. Huxley, but we have not communicated  
13 since June 2008.

14 Q. Has he refused to communicate with you? That  
15 is --

16 A. I was never particularly friendly with Dr.  
17 Huxley. Neither friendly nor unfriendly. I mean, we  
18 worked together, the three of us, Dr. Wolf, myself, Dr.  
19 Huxley, on this one project in the spring. Prior to  
20 that, I had no significant contact with him. I knew of  
21 him. I mean, he's a fairly prominent member of the  
22 faculty at USF.

23 Q. Have you asked either Professor Wolf or  
24 Professor Huxley if they would be willing to provide you  
25 the kind of letter of reference you will need to apply

1 for other jobs?

2 A. No. But I should add that Dr. Huxley has -- I  
3 have very little connection with Dr. Huxley, other than  
4 this one project that we worked on.

5 Q. Whatever connection you have with him, you've  
6 asked him to come and testify to the jury about it,  
7 correct?

8 A. He's called as a witness.

9 Q. He did work on a academic project with you,  
10 correct?

11 A. Just one project, yes, in the spring 2008.

12 Q. And I would imagine he had an opportunity to  
13 observe your academic skills, correct?

14 A. No.

15 Q. He did not. Okay.

16 A. It was a service project. I mean, it's a  
17 project. It's not academic, per se. I suppose if you  
18 say "academic," inclusive of teaching, then in that  
19 sense, academic. But if you mean academic in terms of  
20 research, no, he would have no knowledge.

21 Q. Well, let me ask the question slightly  
22 differently because you told me that letters of  
23 reference have to cover these three fields of teaching,  
24 research and service. Not every letter, but when you  
25 get your letters of reference together for applying for

1 a job, it's good to have a letter that covers at least  
2 one of each of those three fields, and actually cover  
3 all of them, right?

4 A. Yes, all three areas are important.

5 Q. Dr. Huxley has knowledge of at least one of  
6 those three areas of your professional work, correct?

7 A. Very limited knowledge, but knowledge.

8 Q. Okay. I guess we'll ask him when he comes.

9 Professor Wolf has knowledge of at least one of  
10 those three areas of your work. He's been your  
11 colleague for 15 or more years, right?

12 A. Yes.

13 Q. Neither one of those individuals have you asked  
14 to write you a letter of reference so you could get  
15 another job; is that true?

16 A. Yes.

17 Q. Do you have friends in the higher education  
18 world at other universities from your 19 years of  
19 working in this field?

20 A. After I was discharged, I did not maintain  
21 connections with my colleagues in mathematics.

22 Q. But as of the time that you were on leave of  
23 absence, when the university put you on leave of absence  
24 as of June 2008, did you not have colleagues, friends,  
25 other professors out at other campuses that knew you?

1           A.     Yes.

2           Q.     And among those people that worked -- that you  
3 knew who worked in your field, had you kept in contact  
4 with them, were there any who you would have considered  
5 writing to them to ask for a letter of reference?

6           MR. KATZENBACH: Your Honor, I'm going to  
7 object at this point. Mr. Vartain is showing the  
8 witness -- the jury a board which we believe is  
9 argumentative, not demonstrative. There's no  
10 demonstrative purpose for this other than perhaps for  
11 closing argument. So we're going to object to that,  
12 Your Honor.

13           THE COURT: That's more than six words.

14           Overruled.

15           THE WITNESS: Could you repeat the question.

16           (Record read as follows:

17           *QUESTION: And among those people that*  
18 *worked -- that you knew who worked in your*  
19 *field, had you kept in contact with them,*  
20 *were there any who you would have considered*  
21 *writing to them to ask for a letter of*  
22 *reference?)*

23           THE WITNESS: No, because if I did contact  
24 them, I would feel it would be dishonest not to explain  
25 that I'd been discharged and that I'd been discharged

1 for dangerousness, potential, and that I'm banned from  
2 USF campus.

3 MR. VARTAIN: Q. Well, sir, you actually  
4 weren't discharged for dangerousness, were you?

5 A. Potential dangerousness, it appears.

6 Q. Actually, the letter of discharge said you were  
7 discharged because you refused, over this period of  
8 time, to go to the doctor for the assessment; isn't that  
9 true?

10 A. The letter uses specific words as to the nature  
11 of my discharge. However, I'm banned from campus. That  
12 appears to be more than insubordination. So, I mean,  
13 the inference is that I was discharged for potential  
14 dangerousness.

15 Q. Sir, I'm not that focused on your inferences;  
16 I'm focused on what the university said to you,  
17 therefore what a person of integrity would need to say  
18 to their prospective employer.

19 Wasn't it true that you -- if you were to tell  
20 the truth to a prospective employer, you would have to  
21 say "I was unwilling to follow an instruction that I  
22 disagreed with, and that's why I lost my job"?

23 A. No.

24 Q. Nothing that the university ever said to you,  
25 in writing, stated that you were being fired 'cause

1 you're dangerous; isn't that true?

2 A. No letter used those words, that I received.

3 Q. No person in authority -- the dean never told  
4 you you were being fired because you're dangerous; isn't  
5 that the case?

6 A. I had no communications with the dean directly.

7 Q. Whether they were direct or indirect --

8 A. She never spoke to me.

9 Q. -- direct or indirect, Dr. Kao, the dean, the  
10 provost, the president, HR, whosoever, nobody ever said  
11 to you that you were fired 'cause you're dangerous;  
12 isn't that true?

13 A. I had no -- I had no conversations with any of  
14 the people mentioned.

15 Q. Therefore, they never said you were fired  
16 because you're dangerous, correct?

17 A. Yes, therefore.

18 Q. Therefore, you would not have to tell -- even  
19 being as honest as you want to be -- and I respect  
20 that -- but you -- being that the university never told  
21 you that you were fired 'cause you're dangerous, you  
22 wouldn't be compelled to tell a prospective employer  
23 that you were fired because your employer thought you  
24 were dangerous?

25 MR. KATZENBACH: Objection. Argumentative.



1 THE COURT: Overruled. Witness may answer.

2 THE WITNESS: No.

3 MR. VARTAIN: Could I have that question read  
4 back, and then the answer, Your Honor?

5 THE COURT: Why?

6 MR. VARTAIN: 'Cause I forgot my question.

7 THE COURT: Yes.

8 MR. VARTAIN: You made me admit it, Your Honor.

9 (Record read as follows:

10 *QUESTION: Therefore, you would not*  
11 *have to tell -- even being as honest as you*  
12 *want to be -- and I respect that -- but you*  
13 *-- being that the university never told you*  
14 *that you were fired 'cause you're dangerous,*  
15 *you wouldn't be compelled to tell a*  
16 *prospective employer that you were fired*  
17 *because your employer thought you were*  
18 *dangerous?)*

19 MR. VARTAIN: Answer?

20 (Record read as follows:

21 *ANSWER: No.)*

22 MR. VARTAIN: I think I asked a bad question.

23 I want to make sure I ask you a more clear question, get  
24 the answer.

25 Q. Is it your feeling that to be honest with a

1 prospective employer, you would have to say that the  
2 university fired you because you are a dangerous person?

3 A. For potential dangerousness, yes.

4 Q. Even though the university never said that to  
5 you, orally or in writing, that you were being fired for  
6 potential dangerousness, correct?

7 A. Yes. Even though they did not use those words  
8 in the correspondences to me in 2008/2009, yes.

9 Q. Did you yourself ever contact any other faculty  
10 members at the university -- we talked about Dr. Wolf;  
11 we've talked about Professor Huxley, who's going to come  
12 here -- did you ask any of the other many faculty  
13 members that you've worked with at the university if  
14 they would be willing to write a reference?

15 A. I did not ask any member of the university for  
16 a letter of recommendation.

17 Q. And I think that -- the thing that I felt that  
18 I wanted to ask you was, you told the jury yesterday  
19 that Professor Wolf, when you met him after you were put  
20 on leave, he didn't even know why you weren't working at  
21 the university; nobody told him, correct?

22 A. Yes, he did not know why I was suspended and  
23 that I was banned from campus.

24 Q. And you went through telling the jury that  
25 there were a number of other people that didn't seem to

1 have heard from the university all the stuff about what  
2 led to you not being around?

3 A. Yes. No one in the department -- well, from  
4 what I gathered from Dr. Wolf, no one in the department  
5 knew that I was banned from campus during fall 2008.

6 Q. Did it seem to you that the university was  
7 trying to make an effort to keep this as confidential as  
8 possible, that they were not trying to spread the word  
9 that you were in a conflict over this medical  
10 evaluation?

11 MR. KATZENBACH: Objection. It's compound.

12 THE COURT: Sustained.

13 MR. VARTAIN: Q. Did it seem to you that the  
14 university was trying to keep the information about your  
15 employment to the fewest number of people?

16 A. I didn't know what to make of it, frankly.

17 Q. Did it ever --

18 A. I didn't know what to make of it. I did not  
19 know what to make of it. I didn't know why --

20 Q. But you --

21 A. -- what their motive was to not tell the people  
22 in the department that I was banned from campus when I  
23 was banned from campus.

24 Q. Well, I'm not so much interested in the motive;  
25 I'm interested in your understanding.

1           During this period of time when you were -- you  
2 know, June, you went on a leave, down to when you were  
3 terminated in February -- during all this time, did you  
4 ever learn that the university told somebody about your  
5 personnel disputes as to the medical evaluation conflict  
6 that -- who shouldn't know?

7           A.    I spoke -- during that time, I spoke with Ms.  
8 Liu and Dr. Wolf, and they told me that they didn't know  
9 anything as to why I was not teaching.  And in  
10 conversations with other people in the department, other  
11 people in the department seemed not to know anything.

12          Q.    So did --

13          A.    That's what they told me.

14          Q.    Did you draw an inference that the university  
15 was keeping this matter as confidential as it could?

16          A.    No.

17          Q.    But you never learned of any person who heard  
18 about this?

19          A.    Well, in discovery in this case, I learned  
20 later that people did -- there were people in my  
21 department who knew some things about this that --  
22 notwithstanding those remarks by Ms. Liu and Dr. Wolf.

23          Q.    At the time in question -- 'cause I'm looking  
24 at why you didn't apply for jobs when you got  
25 terminated.  Once -- as of the time you got terminated,

1 you -- you didn't know of any person who knew about this  
2 stuff that shouldn't have known -- should not have  
3 known, correct?

4 A. Could you repeat the question.

5 Q. You did not know of even one person who the  
6 university told as to why you were terminated, other  
7 than the persons who actually were involved in the  
8 decision, correct?

9 A. I didn't know who was told and who was not  
10 told.

11 Q. Was there not a point in time before all this  
12 business happened back in 2005 and 2006 when the  
13 university approved you to be on a -- what's called a  
14 sabbatical leave for one whole year?

15 A. I was on sabbatical leave in 2005/2006.

16 Q. For one whole school year, correct?

17 A. Yes.

18 Q. And the university deans approved that at  
19 75 percent of your full salary, correct?

20 A. Yes. I received 75 percent of my salary that  
21 year.

22 Q. And you got -- you received all of your health  
23 benefits, retirement benefits, all of that stuff as  
24 well, correct?

25 A. Yes.

1 Q. And it was the dean who first -- it was the  
2 dean who approved your request to go on a sabbatical for  
3 a year, correct?

4 A. Yes.

5 Q. And the dean approved that request even  
6 though -- let me withdraw that.

7 The dean approved that request even after you  
8 had earlier filed complaints and grievances, correct?

9 A. I had filed one grievance in 2000.

10 Q. And even after you had that conflict with  
11 Associate Dean Needham in 2000, the sabbatical that you  
12 requested was approved, correct?

13 A. Yes.

14 Q. And the conditions of the approval were that  
15 you finish a certain research and publication project,  
16 correct?

17 A. No.

18 Q. Did you say "no"?

19 A. Yes.

20 Q. When you -- you applied for this sabbatical in  
21 2004, correct?

22 A. Yes. 2005 --

23 Q. December?

24 A. December -- yeah, December 2004 perhaps. Right  
25 around the change of the calendar year.

1 Q. In that request --

2 A. '04/'05.

3 Q. I'm sorry, I spoke over you. I apologize.

4 Did you want to finish your answer, Dr. Kao?

5 A. No, I think it's been clarified. Around  
6 December '04. The reason I say '05 is because it's  
7 around the change of the calendar year.

8 Q. Okay. You requested the sabbatical leave for  
9 the entirety of academic year 2005 to 2006, correct?

10 A. Yes.

11 Q. You requested the dean to approve that, and you  
12 told him that it -- the purpose of the sabbatical was,  
13 quote, "to facilitate completion of this project  
14 according to the schedule set by Dr. Nel," correct?

15 A. There was a schedule that was established by  
16 Dr. Nel that I hoped to meet.

17 Q. The project that you promised the dean that you  
18 would hope to meet the schedule for was the project  
19 called a monograph project, correct?

20 A. Yes. I hoped to complete a monograph by the  
21 end of the sabbatical year.

22 Q. When you asked for the leave, you told the dean  
23 that you had started that project back at the time of  
24 your last sabbatical, which was in 1999, correct?

25 A. I had a sabbatical year -- I mean, we received

1 sabbatical years every seven years. Every seven years,  
2 we get one year that we're entitled to take either a  
3 semester leave or -- at full pay -- or an entire  
4 academic year at three-quarters pay.

5 My prior sabbatical year, I taught at  
6 Princeton. I conducted research at Princeton. This  
7 monograph project was established in connection with  
8 some of the research that I did during that sabbatical  
9 year.

10 Q. But when you asked the dean "Can I go away for  
11 this year in 2005 and 2006," you told the dean, in  
12 writing, that you were going to pick up and make  
13 progress on the same project that you had been working  
14 on at the time of your last sabbatical; that is, in  
15 1999, correct?

16 A. Yes. I wanted to work on that project.

17 In the interim period, there were other  
18 projects that I worked on. But that was a project that  
19 I started in 1999, and I hoped to finish it in 2006. I  
20 hoped to.

21 Q. The monograph project?

22 A. The monograph project.

23 Q. And this is the project that you told the dean  
24 "If you give me the sabbatical leave, I will work on  
25 this, and I'll hope to finish it during my sabbatical



1 leave," correct?

2 A. Yes, I hoped to finish it.

3 Q. The dean had already -- was a little bit on  
4 your back, wouldn't it be fair to say? Dr. Nel, the  
5 dean before Dean Turpin, wasn't he sort of on your back  
6 that you weren't publishing things?

7 A. No, he never wrote me any letter to that  
8 effect, that he was concerned.

9 Q. He put you on a schedule, did he not? You just  
10 mentioned that.

11 A. Well, I'm not sure that the metaphor "on my  
12 back" is -- carries the same meaning as setting a  
13 schedule. I mean, all faculty members are required to  
14 set schedules with the dean.

15 Q. In one way or another, the dean had expressed  
16 to you you weren't getting papers written, books  
17 written. And at -- didn't he at some point --

18 A. No.

19 Q. Didn't he express -- in fact, you hadn't  
20 written anything in the last several years; isn't that  
21 true?

22 A. After my sabbatical year, I published a paper  
23 in 2000. After that, I did not publish.

24 Q. From 2000 to 2005, there wasn't one thing that  
25 you had published, correct?

1 A. Yes.

2 Q. And during that time, didn't the dean say to  
3 you "I would really, really, really like it if you  
4 finished this monograph and published it"?

5 A. No. We set a schedule.

6 Q. And the schedule was to have it completed by  
7 when?

8 A. 2006.

9 Q. Right.

10 A. That was our schedule. I hoped to complete  
11 this book by 2006.

12 Q. The book wasn't completed by 2006, even though  
13 he gave you a year to do it, correct?

14 A. Yes. I did not meet the schedule that we had  
15 set.

16 Q. It wasn't completed in 2006. It wasn't  
17 completed in 2007. It wasn't completed in 2008,  
18 correct?

19 A. Yes.

20 Q. In fact, no progress was made of any  
21 substantial nature that whole year you were on the paid  
22 sabbatical, correct?

23 A. There was progress, but -- and I did work on  
24 the book during that sabbatical year -- but it would be  
25 accurate to say that a large fraction of my time, I was

1 working on the complaint.

2 Q. On -- you spent that year working on the formal  
3 grievance, the 400-page thing we talked about, correct?

4 A. That was part of my activities that sabbatical  
5 year.

6 Q. You --

7 A. A large part of the time was spent working on  
8 that formal complaint.

9 Q. You told the dean that you were going to go to  
10 Princeton that year, if he gave you the sabbatical, and  
11 work with Professor Erhan Cinlar, C-I-N-L-A-R, on this  
12 book, and that Professor Cinlar was going to help you  
13 with it, correct?

14 A. No.

15 Q. Did you not, when you applied for the  
16 sabbatical, tell him that you were going to continue  
17 your -- your collaboration with Professor Cinlar?

18 A. It's "Chinlar."

19 Q. "Chinlar"?

20 A. It's a Turkish name.

21 That -- the book was a collaboration with Dr.  
22 Cinlar. I didn't say that I was going to travel to  
23 Princeton.

24 Q. You did indicate to him that you were going to  
25 continue that collaboration, and out of that

1 collaboration, you were hoping to finish the book by the  
2 end of the sabbatical?

3 A. It was a joint project with Dr. Cinlar. I  
4 hoped that it would be completed by 2006.

5 Q. Professor Kao, you didn't even contact  
6 Professor Cinlar in the weeks, months leading up to the  
7 sabbatical, and in that whole year, you never even  
8 emailed him, called him or asked him for any  
9 collaboration; isn't that true?

10 A. That's correct.

11 Q. And even --

12 A. In a prior correspondence, he indicated to me  
13 that I should take the lead on the project. And so no,  
14 I did not, that academic year, contact him.

15 Q. And you didn't make any substantial progress on  
16 that project that sabbatical year; isn't that true?

17 A. I made progress, but not as much as I had  
18 hoped.

19 Q. Sir, you didn't write one chapter of the -- of  
20 the however many chapters were supposed to be written,  
21 correct?

22 A. There are not completed draft chapters of the  
23 book. I did background work, collected materials.

24 Q. Nothing was written?

25 A. No draft chapters were written on that book.

1 Q. Nothing was written for the book during that  
2 whole year; isn't that true?

3 A. No.

4 Q. Isn't that true?

5 A. No, because in mathematics you're doing  
6 calculations. And I did calculations, collected  
7 materials.

8 Q. Okay. So --

9 A. And so -- but no actual draft chapters have  
10 been produced.

11 Q. Okay. And in the years following that, you  
12 never wrote anything -- any draft chapters, even  
13 though -- is that true?

14 A. Yes. I was too preoccupied with the  
15 negotiation meetings and subsequent issues after  
16 submitting my formal complaint.

17 Q. At the end of a sabbatical, it's a rule at the  
18 university -- it's in the union contract, is it not --  
19 that the professor has to write up a report and tell the  
20 university what was accomplished with all that money  
21 that the university paid the professor, correct?

22 A. Are you referring to the sabbatical report?

23 Q. Yes.

24 A. I recall --

25 Q. Isn't it true, sir --

1           A.     There is a sabbatical report.

2           Q.     And you committed -- when you took the  
3 sabbatical, you committed to the dean that when the  
4 sabbatical was over, you would do -- you would follow  
5 that rule and write the report of everything you  
6 accomplished, correct?

7           A.     I wanted to write the report.

8           Q.     I didn't ask you if you wanted to; I asked you  
9 isn't it true that you promised -- before you went on  
10 the sabbatical, you promised the university that at the  
11 end of that year, you would write a report of what you  
12 accomplished?

13          A.     Yes.  I mean, my -- my -- my problem was that  
14 the project had been delayed because I spent time  
15 working on the formal complaint.

16          Q.     I'm going to get --

17          A.     Within the negotiation meetings, there were  
18 issues as to the confidentiality.  There were some  
19 conditions added in the negotiation meetings that made  
20 it difficult to assess whether I could say that or not  
21 in that report.

22                   When the Dean's Office contacted me for that  
23 report, and also the annual report that we're meant to  
24 file, I replied to the Dean's Office, through the  
25 assistant, that there were issues with general counsel,

1 and for that reason, I was not filing the report,  
2 because these issues hadn't been resolved yet.

3 So in other words, I wanted to write that the  
4 project schedule was delayed, substantially because of  
5 the formal complaint, but there seemed to be a directive  
6 from human resources that I couldn't mention my formal  
7 complaint in the -- and that would be part of the  
8 document called "Release And Arbitration Agreement" that  
9 was sent to me in October of 2006 -- September -- yes.

10 Q. The question I asked you, sir --

11 A. And that's the explanation I gave to the Dean's  
12 Office. The Dean's Office gave me a document which  
13 appeared to give me permission not to file those  
14 reports.

15 Q. Let's break that down, "they appeared to do"  
16 and so on. I want to break that down.

17 The first question I had was, isn't it true you  
18 promised the dean, and you did so in writing, that when  
19 you finished the sabbatical year, you would write a  
20 report of the things you accomplished, what you did with  
21 your sabbatical year?

22 A. No, I did not write a separate contract beyond  
23 what's in the faculty handbook in terms of what the  
24 procedures are that a faculty member is supposed to  
25 follow at the completion of a sabbatical year.

1 Q. But you knew --

2 A. There was no separate agreement. I mean,  
3 within the faculty handbook, at the end of a sabbatical  
4 year-end, every year we're supposed to file a report as  
5 to our activities in the prior year.

6 Q. But, sir, I'm not talking about the every year.  
7 Don't -- I'm talking about the sabbatical.

8 It is in the contract that when the university  
9 gives you a sabbatical, when you come back you have to  
10 write a report in writing, give it to the dean, correct?

11 A. Yes, that's in the faculty handbook.

12 Q. Okay. You didn't do that. And I'm -- I know  
13 you have some reasons you want to explain to the jury  
14 for that. But I want to just take it step-by-step, if I  
15 may.

16 Is it true that you never wrote that report  
17 that you were obliged to do?

18 A. Yes. I never submitted the report.

19 Q. Is it true that the dean -- at the point in  
20 time that you didn't do what you were supposed to do,  
21 the dean was Dean Turpin?

22 A. Yes.

23 Q. Is it true that Dean Turpin never said to you  
24 "John, you don't have to write that report"?

25 A. No. She sent me a form that indicated that we



1 didn't have to meet that year in connection with the  
2 annual report. And so implicitly, the annual report,  
3 which would be reporting on the sabbatical year --

4 Q. Sir --

5 A. -- would be equivalent. So that document with  
6 her signature, I read to carry the meaning that I did  
7 not have to submit the report. She was giving me  
8 permission --

9 Q. Let's --

10 A. -- because I had contacted -- I mean, she had  
11 sent me an email. The email's requesting the report. I  
12 call her program assistant, Ms. Locsin. I tell her I  
13 would like to submit it, but there's issues with general  
14 counsel; that's why I'm not submitting the report.

15 And then I received this document with her --  
16 with Dean Turpin's signature saying that "We don't have  
17 to meet in connection with this report that you were  
18 meant to -- that we're -- that's named in the handbook  
19 as something that's required every year."

20 Q. The thing that the dean said "We don't need to  
21 meet" about was the thing that is an annual meeting with  
22 the faculty member and the dean, correct?

23 A. Not every year, but -- in some years, it was  
24 deferred. But for probationary faculty, the meeting  
25 takes place annually, yes.

1 Q. It wasn't the sabbatical report that the dean  
2 said "We don't need to meet" about; isn't that correct?

3 A. The dean never sent me a correspondence that  
4 there was a problem with my not submitting the  
5 sabbatical report.

6 Q. I understand that your position is that the  
7 dean never -- and I'm going to -- that's really where  
8 I'm going. The dean never dinged you for not submitting  
9 the sabbatical report?

10 A. Yes.

11 Q. She never disciplined you for doing that,  
12 correct?

13 A. Yes. She never wrote me any --

14 Q. She --

15 A. -- reprimand.

16 Q. She knew at the time in question that you were  
17 supposed to write the sabbatical report, you had that  
18 whole problem with your mom with the cancer; you had  
19 that whole problem with your own medical -- medicine  
20 going bad, correct?

21 A. Yes.

22 Q. It was --

23 A. Those things happened --

24 Q. It was that --

25 A. -- early in the semester.

1 Q. It was that fall when your sabbatical report  
2 was due on the dean's desk, the fall when your mom had  
3 the cancer surgery -- or the precancer surgery and you  
4 had the medication, right?

5 A. Yes, that was the same semester.

6 Q. The dean sort of forgave you for not writing  
7 the sabbatical report. She never came to you and said  
8 "John, you're out of line. You -- you've -- you know,  
9 you've not followed your -- the rules," right?

10 A. Well, I received an email from the Dean's  
11 Office saying, you know, "You didn't submit your  
12 reports."

13 Q. But that wasn't the sabbatical report; that was  
14 the annual report that the --

15 A. Well, I mean, the distinction's lost on me, Mr.  
16 Vartain. The annual report is reporting -- includes  
17 reporting on what you did the prior year. The  
18 sabbatical report is duplicative of that.

19 So my prior year being the sabbatical year, if  
20 I submitted the annual report, I would just take the  
21 sabbatical report and just paste it into that document.

22 So the two are really the same document.

23 Q. In your mind, I can see why you thought they  
24 were. But the dean never said in her mind they were one  
25 and the same, correct?

1 A. She never made a statement of that nature.

2 Q. And given -- and in that semester when you had  
3 all those medical problems, the dean never took action  
4 against you for not presenting your sabbatical report,  
5 and she even excused you from not -- from having to file  
6 your annual report, correct?

7 A. Yes. It was never made an issue at any time.

8 Q. And even after that semester when you had your  
9 depression exacerbated with your mom and then the  
10 medication, and when you had family leave with your mom,  
11 even after that, Dean Turpin never, even after the fact,  
12 came at you and said "Okay, now I want you to write that  
13 sabbatical report" or "Now I'm going to discipline you  
14 for not doing that," correct?

15 A. Yes. It was never an issue while I was  
16 employed at the university.

17 Q. Even when you kept filing all those  
18 grievances -- the formal grievance, the addendum  
19 grievance, and the informal -- the dean never -- the  
20 dean left the slate wiped clean; she never brought up  
21 that you hadn't done what you were supposed to do,  
22 correct?

23 A. Yes.

24 Q. Isn't that one of the reasons why you refer to  
25 her as a person of compassion?

1           A.    No.  I mean, I inferred that she had given me  
2 approval because I had given a legitimate reason to her,  
3 through her assistant Ms. Locsin --

4           Q.    I'm trying to --

5           A.    -- that I was not filing the report because I  
6 had issues with general counsel that were under way.

7           Q.    I'm trying to understand, Dr. Kao, if you ever  
8 had --

9           A.    That had nothing to do with compassion  
10 specifically.  It doesn't mean she's not compassionate,  
11 but ... I mean, that's her administrative decision.  
12 That's a decision that she made.

13          Q.    In the -- you were telling the jury yesterday  
14 that in this time period right before school ended in  
15 June of 2008, before the university put you on medical  
16 leave, there were some invitations sent out by the math  
17 department to some functions, and they included you in  
18 the invitations, correct?

19          A.    Yes.

20          Q.    Did you think that was something inappropriate,  
21 for them to include you in the invitations?

22          A.    No.

23          Q.    In fact, the math faculty, they don't have any  
24 authority to put you on leave.  Only the dean could do  
25 that, right?

1           A.    I wasn't -- which social events are you  
2 referring to?

3           Q.    There was one in May.  There was a baby shower  
4 in May.  Remember that?

5           A.    Yes.  I wasn't on leave at that time.

6           Q.    That's right.  So my point is that you were  
7 still part of the department and they were still  
8 including you in the department activity, correct?

9           A.    Yes.

10          Q.    And I think your point was if they were unsafe  
11 around you, why would they have included you in those  
12 social events.  Correct?

13          A.    Yes.  If they were frightened of me, why would  
14 they invite me to their home?

15          Q.    And they'll come here and -- you heard their  
16 explanations in the depositions, correct?

17          A.    I attended the depositions.  I can't recall  
18 specifically what they testified.

19          Q.    They didn't -- as far as you knew, because the  
20 department faculty are just coworkers -- even the  
21 chairperson is your coworker.  He doesn't have the  
22 authority to exclude you from activities -- social  
23 activities of the department when you're still -- still  
24 working there, correct?

25          A.    No.  It depends on the event.  I mean, there

1 were events that took place that I wasn't invited to  
2 prior -- in prior years.

3 Q. Official events, sir? These are official  
4 events where all the faculty members were invited.

5 A. There was one event I was not invited to.

6 Q. The year before?

7 A. The year before, which was -- there was an  
8 event that took place. And from what I can infer, I was  
9 the only full-time faculty that was not invited to that  
10 event.

11 Q. And you don't know if that was an accident or  
12 an intentional thing, right?

13 A. I don't know why I was not invited to that  
14 event.

15 But to be responsive to your question,  
16 apparently, yes, they have the authority not to invite a  
17 full-time faculty member --

18 Q. So I take --

19 A. -- to an event -- to an event.

20 Q. Okay. I stand corrected.

21 Down here in October, you said there were some  
22 more email invites to you to some activities of the math  
23 department that is while you were on leave of absence.

24 A. While I was on leave of absence, I was invited  
25 to several --

1 Q. Okay.

2 A. -- social events connected to the department.

3 Q. Those were by the email distribution to the  
4 whole department, correct? It was an all-hands email?

5 A. One event was at Dr. Pacheco's house. I can't  
6 recall if every -- which faculty members were invited or  
7 not. I don't know, for instance, whether part-time  
8 faculty were included.

9 Q. You didn't go to those -- those events,  
10 correct?

11 A. I did not attend social events in the fall of  
12 2008.

13 Q. And you're aware that they were cancelled, that  
14 the party at Pacheco's -- Professor Pacheco's house was  
15 cancelled?

16 A. Yes, after I RSVP'ed saying I was interested to  
17 attend.

18 Q. And then they cancelled?

19 A. And after -- yes, they cancelled it.

20 Q. After they -- after you RSVP'ed that you were  
21 going?

22 A. Yes. The reply came back "We're happy to have  
23 you, John." And then the party was cancelled. So I had  
24 said I would attend, but ...

25 Q. When you --



1           A.     That was off campus, I should add.  That was at  
2 his home, so ...

3           Q.     When you had this meeting with -- June 18<sup>th</sup>,  
4 Martha Peugh-Wade met with you and Mr. Katzenbach.  We  
5 talked a lot about that the other day.

6           A.     Yes.

7           Q.     Ms. Peugh-Wade told you that these things had  
8 happened during the previous semester, that there had  
9 been these reports during the previous semester?

10          A.     The letter identifies several weeks -- "past  
11 several weeks," which would not have included the  
12 semester.

13          Q.     I know the letter said that, sir.  But Martha  
14 Peugh-Wade, when she talked to you, indicated that this  
15 had been happening over the course of the semester,  
16 correct?

17          A.     I think what happened was we asked -- I asked  
18 for clarification as to a time frame, and then she said  
19 that there was something in January.

20          Q.     And she indicated that the --

21          A.     But -- but I don't think she -- she --

22          Q.     I --

23          A.     -- was clear on whether there was a series of  
24 events running from January to the past several weeks.

25          Q.     Fair enough.

1           A.     She just -- I believe I asked "Well, you know,  
2 does this go beyond the past several weeks?"

3                     And she said some remark of "Well, there was a  
4 incident in January."

5           Q.     She --

6           A.     But the letter identifies "past several weeks."

7           Q.     I -- I remember the June 24<sup>th</sup> letter said  
8 that. But when she met with you, she took the situation  
9 back to January of 2008 in one way or another; is that  
10 correct?

11          A.     In some way, she said --

12          Q.     Okay.

13          A.     -- that there was an incident in January.

14          Q.     Now, in -- I want to take you through this  
15 chart. And then when we get to down in January, I want  
16 to -- I'm going to get out these two letters and I'm  
17 going to talk about them with you with more specificity.

18                     THE COURT: Ladies and gentlemen, remember the  
19 admonition. Do not form or express any opinion on this  
20 case until it's finally submitted to you for a decision.  
21 Do not discuss among yourselves or with others until  
22 that time. Please be back in your places at 11:10  
23 according to the courtroom clock.

24                     (Recess taken.)

25                     THE COURT: Jurors and alternates are present.

1 Counsel for both sides are present. Dr. Kao is on the  
2 stand.

3 Mr. Vartain, you may continue your inquiry.

4 MR. VARTAIN: Thank you, Your Honor.

5 Q. Dr. Kao, when the university put you on the  
6 leave of absence pending the medical evaluation, how  
7 long did you stay having full pay?

8 A. Well, our contract is a nine-month contract. I  
9 mean, we -- we can -- we're responsible for the academic  
10 year starting in August and then ending in May.

11 We can elect to have that block sum distributed  
12 either over the nine-month period of the academic  
13 calendar or throughout the 12-month period. But we're  
14 responsible -- we are responsible for duties during the  
15 academic year, and then we're paid for those duties.

16 That year of '07/'08, I had elected to have  
17 payment spread throughout the 12-month period as opposed  
18 to ending in May. So the pay for work which I conducted  
19 prior to May was sent to me throughout the summer.

20 Q. Actually, you're still supposed to be doing  
21 work in the summer too, right? You don't teach, but --

22 A. The language in the contract states that you're  
23 responsible for the nine months and the work therein.

24 Q. You kept on getting your paychecks June, July,  
25 August. When did the paychecks stop?

1           A.     Well, I mean, I elected to have the pay  
2 distributed over a 12-month period instead of a  
3 period -- from -- I elected to have the pay distributed,  
4 instead of August to May, August to August. So those  
5 payments kept arriving, as -- as I specified.

6           Q.     When did your paychecks stop?

7           A.     In August.

8           Q.     So right around August 30, right around here,  
9 August --

10          A.     Would be the last paycheck.

11          Q.     Okay.

12          A.     I think the last paycheck would be less an  
13 amount because I'm --

14          Q.     Okay.

15          A.     -- it's a payment for the ...

16          Q.     Follow me if you would, please.

17          A.     Oh, actually, no, I take that back. It would  
18 be the same because it's the same -- it's a nine-month  
19 block payment; I'm just spreading it over 12 months. So  
20 you just divide it by 12. It would be the same every  
21 month.

22          Q.     The dean told you that she would pay you sick  
23 pay in the summertime if you elected to go for the  
24 medical evaluation. You could draw sick pay, right?

25          A.     I don't recall exactly what the letter says. I

1 mean --

2 Q. The fair --

3 A. -- in the summer, I'm being paid, actually, for  
4 the work I conducted in the prior -- prior to May. So,  
5 you know, no matter what was happening, I don't see how  
6 they could block those payments.

7 Q. I think I hear you telling the jury that you  
8 would have -- regardless if this whole problem hadn't  
9 arised [sic], you would have still been getting your  
10 paychecks in the summertime.

11 A. Yes.

12 Q. Okay.

13 A. Say, for instance -- say -- were I discharged  
14 on June 20<sup>th</sup>, I would still get three months of  
15 paychecks. I'd be entitled to that.

16 Q. 'Cause that's the way you had sort of arranged  
17 it.

18 A. Because of the way the contract's written.

19 Q. Okay.

20 A. The collective bargaining agreement.

21 Q. But when the dean said to you -- Martha  
22 Peugh-Wade and the dean wrote these letters, they said  
23 if you want to collect sick pay, they'll approve it, as  
24 long as you go for the medical evaluation, correct?

25 A. I'm not sure exactly how the letter is stated.

1 Perhaps if we could examine the exhibit.

2 Q. We can. I'm just -- I want to sort of finish  
3 up.

4 The effect of the letter was you told your  
5 attorney "I thought I would have to file an application  
6 for sick pay; it would go through the insurance  
7 company." Remember all that?

8 A. Yes. We're speaking, then, of starting in  
9 August.

10 Q. Okay.

11 A. I'm not --

12 Q. You --

13 A. I was entitled to those three paychecks for  
14 work that I'd done prior to May, no matter what. So, I  
15 mean, the issue of pay, whether that comes from the  
16 university or from the insurance company, that is only  
17 relevant as of late August when the new semester begins.

18 Q. 'Cause your paycheck stayed in effect till late  
19 August?

20 A. Yes. So when I received this letter referring  
21 to three months and I'm receiving it in June, I was  
22 confused because I -- it seemed to me that I get -- I'm  
23 entitled -- even if I'm discharged, I'd be entitled to  
24 those checks.

25 Q. I see what you're saying. You said --

1           A.     So I didn't know exactly what -- what meaning  
2 they meant to convey in that three months, talking about  
3 three months of --

4           Q.     In the three months of June, July, August, you  
5 basically said to yourself "What do I need sick pay for?  
6 I'm already getting my paychecks"?

7           A.     Well, I'm off duty in those months. I'm not --  
8 technically, I'm not responsible for any work in the  
9 summertime.

10          Q.     Okay. But in any event, you are responsible  
11 for work starting in late August. If you weren't on  
12 leave of absence, you would be, correct?

13          A.     Late August is when classes start. And then  
14 that would be -- the new round of the contract would  
15 initiate at that point.

16          Q.     But the dean said to you -- the HR said to you  
17 "even though you haven't gone all this time in June,  
18 July, August, even though you violated your  
19 instructions, if you'll go now, you can claim sick pay,"  
20 right?

21          A.     I was entitled to file for sick pay with the  
22 insurance company.

23          Q.     The dean told you that you could file for sick  
24 pay starting in late August, as long as you went for the  
25 medical evaluation, correct?

1 A. No. No.

2 Q. What was -- what's incorrect about what I said?

3 A. I could file for sick pay -- I mean, there's --  
4 there was some -- well, there's two different letters.

5 So one letter says that if I went to the doctor  
6 and the doctor would take some time in evaluating me --  
7 I mean, I believe that's the meaning conveyed in the  
8 letter -- for instance, if I went, okay, for one week  
9 and then the doctor says "Well, you have to come back in  
10 another week for more evaluation, another week for  
11 another evaluation," and that this dragged on over a  
12 period of three, four months, during those three, four  
13 months while I was being evaluated, I could get pay  
14 through the insurance company.

15 Q. I see. And you --

16 A. That was one -- one correspondence.

17 And then later on, I believe there was another  
18 correspondence where, after I said I wouldn't attend the  
19 exam, there was an issue of some meeting to decide --  
20 you know, a meeting with Philpott.

21 They weren't specific as to what the purpose of  
22 that meeting was, but they asked could myself and my  
23 representative meet with labor -- director of labor  
24 relations.

25 And so it appeared there was a negotiation



1 going on. And that second letter suggested that during  
2 that negotiation period, irrespective of whether I  
3 started -- I had already told them I'm not seeing --  
4 I -- I -- I'm not going to this medical evaluation. So  
5 when the issue of this negotiation period arose, I think  
6 there was another correspondence saying that during that  
7 period, I could file for disability with their insurance  
8 company, if I so choose.

9 Q. The bottom line is the university gave you some  
10 options for keeping your pay going, at least in some  
11 way, during this period of time. Would that be a good  
12 summary?

13 A. Yes, some options.

14 Q. Okay. Would you kindly open to exhibit --  
15 Plaintiff's Exhibit 43, which is the letter that Mr.  
16 Philpott sent you one week before you were -- ten days  
17 before you left employment January 23<sup>rd</sup>, 2009.

18 A. Yes.

19 Q. This is the letter in which Mr. Philpott said  
20 he was disappointed that you had rejected the  
21 university's compromise, correct?

22 A. Yes.

23 Q. He stated in this letter that he was hoping  
24 that you would, even now, take part in the medical  
25 evaluation by the independent physician, correct?

1 A. Yes.

2 Q. He told you that your attorney had offered to  
3 have a meeting between you and the people at the  
4 university to clear the air, correct?

5 A. Yes.

6 Q. He told you that the university did want  
7 reassurances but that the university didn't believe that  
8 you were the one who can provide the level of assurance  
9 that the university required, correct?

10 A. Yes.

11 Q. He told you that the university required that  
12 the assurances come from someone who had expertise, like  
13 an independent physician, right?

14 A. Yes.

15 Q. The compromise that the university had proposed  
16 was to have a retired judge come in and decide the issue  
17 as to whether you should be required to go for the  
18 evaluation or not, correct?

19 A. Yes. The prior correspondences --

20 Q. And --

21 A. -- specify some kind of appointment of a  
22 retired jurist, paid by the university, to make some  
23 kind of ruling on the issue of the medical exam.

24 I mean, perhaps if we looked at the  
25 document ...

1 Q. We will do -- yeah, I -- the university told  
2 you that the university would be bound by whatever the  
3 retired judge said, correct?

4 A. That was the second --

5 Q. Yeah.

6 A. -- offer. There was a first offer whereby it  
7 would be binding -- final and binding, the ruling by the  
8 retired jurist.

9 Q. And your attorney --

10 A. And then it changed.

11 Q. Your attorney objected. Then the university  
12 said "Okay, the university will be bound by whatever the  
13 retired judge says. But if you don't like what the  
14 judge says and you still want to sue, you can do that,"  
15 correct?

16 A. There was language that carried that sentence,  
17 yes --

18 Q. Right. And still you --

19 A. -- in the second -- in the second letter, yes.

20 Q. And still you rejected that, correct?

21 A. Yes, I rejected that proposal.

22 Q. Did you consult with anybody in the course of  
23 making the decision to reject this compromise?

24 A. Yes.

25 Q. Who -- who did you consult with in making the

1 decision to reject the compromise?

2 A. Who did I consult with in this matter of the  
3 letter?

4 Q. In the matter of rejecting the university's  
5 compromise to have a retired judge come in and sort it  
6 out.

7 A. I consulted with my attorney.

8 Q. Mr. Katzenbach?

9 A. Yes.

10 Q. Other than Mr. Katzenbach, was there anyone  
11 else that you consulted with to help you make the  
12 decision to reject the university's compromise?

13 A. On that particular proposal, no, no one else.

14 Q. And when you rejected that compromise, you knew  
15 that from what the university had told you over these  
16 woe many months that what was the likely consequence was  
17 that the university was going to let you go?

18 A. If I rejected that compromise, I would be  
19 discharged?

20 Q. Well --

21 A. Is that what --

22 Q. Not because you rejected the compromise, but  
23 because there was no other options left. You knew that  
24 that's what was likely to happen?

25 A. I -- that was my expectation; at this point, I

1 would be shortly discharged.

2 Q. But you also knew that if you took the  
3 compromise to have the retired judge come in, the  
4 university would freeze-dry everything for a while; they  
5 would just hold off on firing you and wait for -- to  
6 have the retired judge decide the matter, correct?

7 A. Yes, this -- the process which had been ongoing  
8 for the past six months, during which I wasn't paid,  
9 would be extended further while the details of this  
10 proceeding by the retired jurist would take place.

11 Q. You knew that when --

12 A. And -- and my discharge would be postponed.

13 Q. And that your discharge would never happen if  
14 the retired judge said the university was wrong; that  
15 the university said they -- in effect, they wouldn't  
16 fire you if the retired judge said that the university  
17 should not be making you go to the medical, correct?

18 A. Could you repeat the question.

19 (Record read as follows:

20 *QUESTION: And that your discharge*  
21 *would never happen if the retired judge said*  
22 *the university was wrong; that the*  
23 *university said they -- in effect, they*  
24 *wouldn't fire you if the retired judge said*  
25 *that the university should not be making you*

1           go to the medical, correct?)

2           THE WITNESS: Was that my understanding?

3           MR. VARTAIN: Yes.

4           THE WITNESS: No, because in the prior set of  
5 negotiations that took place, meetings, after I filed my  
6 formal complaint, certain promises were made to me,  
7 and -- and those promises were broken. So I don't know  
8 that the university would have adhered to what protocols  
9 they were putting forth in this document.

10          MR. VARTAIN: Q. Okay. I hear you. But in  
11 fact, the university was putting in writing, in letters  
12 to your attorney, that if this whole thing got submitted  
13 to the retired judge -- the university put in writing  
14 that they would not fire you if the judge said what they  
15 were doing was not correct, true?

16          A. They wrote a letter. I mean, we could examine  
17 the content of the letter. I had difficult really  
18 interpreting the legal meaning of that letter. For that  
19 reason, I consulted with my attorney as to its legal  
20 interpretations.

21          Q. In any event --

22          A. If a layperson read that letter that was sent  
23 to me, it might have that interpretation. But it was --  
24 it's a little complicated, so --

25          Q. Let's keep it simple, Dr. Kao. It's late.

1           You understood that the university was  
2 proposing to have this dispute sorted out by a retired  
3 judge, correct?

4           A.    Something of that nature, yes.

5           Q.    And the university was proposing that if that  
6 happened, the university wouldn't go ahead and fire you  
7 until after they got a ruling from the retired judge as  
8 to what to do, correct?

9           A.    My discharge would be postponed until after  
10 this proceeding was completed.

11          Q.    And --

12          A.    However long that took.

13          Q.    And the discharge wouldn't happen if the judge  
14 said the university was doing it wrong, correct?

15          A.    I'm not sure what -- how to interpret that  
16 letter. I mean, the -- there was specific language. It  
17 was kind of legal --

18          Q.    I know.

19          A.    -- of nature. And I had -- I -- what meaning  
20 to assign to it --

21          Q.    Is that --

22          A.    This proposal was a little bit difficult for  
23 me.

24          Q.    Was it your understanding that if the judge  
25 ruled against the university, then the university had

1 agreed to be bound by whatever the judge said?

2 A. I had difficulty really understanding what -- I  
3 mean, you know, as -- for a layperson, that  
4 interpretation was possible.

5 Q. Okay. And it was --

6 A. But I don't know exactly if -- I mean, there  
7 were several -- several issues, I mean, sort of  
8 technical issues, with respect to this document.

9 Perhaps if we looked at the document ...

10 Q. Okay. Well, then let's look at it, then.

11 A. It might be easier to --

12 Q. That's good. That's good.

13 Would you please open to Exhibit 230 of the  
14 university ...

15 (Defendants' Exhibit 230  
16 marked for identification.)

17 MR. VARTAIN: Q. Is that the one we're talking  
18 about, June -- January 16?

19 A. Yes, this is the second proposal.

20 Q. Right. This is also coming from Mr. Philpott,  
21 correct?

22 A. Yes.

23 Q. To you?

24 A. Yes. This is a letter dated January 16<sup>th</sup>,  
25 2009, from Mr. Philpott.



1 Q. And in this letter, Mr. Philpott is telling you  
2 that the judge procedure does not need to be final and  
3 binding on you, Professor Kao, and you will not be  
4 required to sign any waiver of lawsuit, and you can have  
5 whatever discovery the retired judge says. You see  
6 that?

7 A. Yes.

8 Q. Also, Mr. Philpott said "We agree the retired  
9 judge would be advisory to you but binding on the  
10 university." You see that?

11 A. Yes.

12 Q. Mr. Philpott said to you that means, quote:

13 "The university would abide by the  
14 judge's opinion if it were against the  
15 university."

16 You see that?

17 A. Yes, that's -- that's the meaning.

18 Q. He even went on to say: "But if the  
19 judge ruled against you, you would not have  
20 to abide by it; you could still your" --  
21 "retain your rights to sue or file a  
22 grievance under the collective bargaining  
23 agreement."

24 You see that?

25 A. Yes. "We would agree that a jurist

1 procedure would be advisory to you and  
2 binding only on the university."

3 Q. You rejected that, correct?

4 A. Yes.

5 MR. VARTAIN: No further questions.

6 Offer -- I'll offer that Exhibit 230 into  
7 evidence, Your Honor.

8 THE COURT: Any objection?

9 MR. KATZENBACH: No, Your Honor.

10 THE COURT: It's received.

11 (Defendants' Exhibit 230  
12 received in evidence.)

13 REDIRECT EXAMINATION BY MR. KATZENBACH

14 MR. KATZENBACH: Q. Taking -- Dr. Kao, did you  
15 respond to the letter that was just introduced in  
16 evidence?

17 A. Yes.

18 Q. Could you please take a look at Exhibit 231.

19 A. Yes.

20 (Defendants' Exhibit 231  
21 marked for identification.)

22 MR. KATZENBACH: Q. Is that the response to  
23 the letter Exhibit 230?

24 A. Yes. This is a letter dated January 22<sup>nd</sup>,  
25 2009 from yourself.

1 Q. Can you please --

2 We'd like to move Exhibit 231 into evidence,  
3 Your Honor.

4 THE COURT: Any objection?

5 MR. VARTAIN: No objection.

6 THE COURT: Received.

7 (Defendants' Exhibit 231  
8 received in evidence.)

9 MR. KATZENBACH: Q. Could you read the first  
10 paragraph -- second paragraph of the letter entitled  
11 paragraph -- "First." Could you read that to the jury.

12 A. "First, Professor Kao must reject this  
13 offer, as it would only add additional time  
14 and expense in asserting his legal rights.  
15 The nonbinding advisory arbitration  
16 procedure prevents Professor Kao from  
17 receiving the full benefits and protections  
18 of a court action. Your assertion that  
19 Professor Kao," quote, "'may have discovery  
20 of whatever the retired jurist approves,'"  
21 end quote, "only highlights his concern that  
22 he will be denied full discovery rights as  
23 to the underlying events the university is  
24 relying upon and that the procedure confers  
25 undue power on the retired jurist to

1 prejudice Professor Kao's legal rights."

2 Q. Stop there.

3 Now, in connection with this case in court,  
4 have you engaged in discovery?

5 A. Yes.

6 Q. In connection with that discovery, what sort of  
7 information have you been able to obtain?

8 A. Well, for instance --

9 MR. VARTAIN: Objection.

10 MR. KATZENBACH: That's probably a little  
11 vague. Let me rephrase.

12 Q. In connection with this discovery, have you  
13 obtained documents showing notes of interviews with  
14 various people by Martha Peugh-Wade?

15 A. Yes.

16 Q. Have those -- have those interview notes been  
17 obtained because we filed a court action?

18 A. Yes.

19 Q. Now, have you been able to ask Martha  
20 Peugh-Wade about those interview notes?

21 A. Yes.

22 Q. Do those interview notes contain -- now,  
23 earlier in this case in your examination, the doctor --  
24 Mr. Vartain asked you concerning -- about whether you  
25 had any reason to believe that people were hostile to

1 your complaints at the time in the spring of 2008.

2 Do you recall those questions?

3 A. Yes.

4 Q. Since that time, since you've engaged in  
5 discovery in this matter, have any of the discovery in  
6 this case led you to think that -- presently think that  
7 individuals had hostility to your complaints?

8 A. Yes.

9 Q. What do you -- what are you referring to?

10 A. Well, in one of the interview notes, Ms.  
11 Peugh-Wade is interviewing Dr. Zeitz, and Dr. Zeitz says  
12 something to the effect of:

13 "Dr. Kao thinks we all hate him, and we  
14 do, because we think he's preparing a  
15 lawsuit against us."

16 Q. Do you recall any other notes that -- in --  
17 that you received in discovery that concerned people's  
18 attitudes toward you?

19 A. Yes.

20 Q. What else?

21 A. Can you be more specific.

22 Q. Do you recall any other comments about  
23 Professor Zeitz trusting you?

24 A. Yes. He said something to the effect of:

25 "We can't talk to him or we can't trust

1           him because he might be filing a lawsuit."

2           Q.    Now, do you recall Dean Brown expressing  
3 anything that indicated some concern about the nature of  
4 the complaints you're making?

5           MR. VARTAIN:   Leading.

6           THE COURT:   Overruled.  Witness may answer.

7           THE WITNESS:  Yes, something to the effect of  
8 he's very concerned about a lawsuit.  He's afraid --  
9 Dean Brown states that Ms. Peugh-Wade is afraid of a  
10 lawsuit.

11          MR. KATZENBACH:  Thank you.

12          Q.    Now, in connection with the allegations against  
13 you learned through discovery, did you also learn  
14 information about some of these allegations that made  
15 [sic], for example, that you had been bumping into  
16 people?

17          A.    Yes.

18          Q.    Can you tell us what you learned about that in  
19 discovery.

20          A.    Can you be a little more specific.

21          Q.    Sure.  Just directing your attention to --  
22 there were interview notes of Professor Zeitz and  
23 Professor Pacheco -- and Professor Needham.

24                Did you review those -- did we obtain those in  
25 discovery?

1           A.     Yes.

2           Q.     In the initial interviews with Martha  
3 Peugh-Wade reflected in her interview notes of Dr. Zeitz  
4 and Dr. Needham, did they say anything about any  
5 physical contacts with you?

6           A.     In the original interview, which took place in  
7 very end of April, maybe April 28<sup>th</sup> or April 30<sup>th</sup>  
8 and May 1<sup>st</sup>, Dr. Needham makes no mention of bumping  
9 or contact.

10                     Dr. Zeitz mentions in some notes that are --  
11 that -- the page numbers are strange. You know, the  
12 notes go 1, 2, 3, 4, 5, 6, 7, and then there's a 4A, B,  
13 C, D.

14                     So if you look at the 1, 2, 3, 4, 5, 6, 7  
15 alone, without the A, B, C, D notes added, Dr. Zeitz  
16 starts with "Nothing ever physical, but we have these  
17 issues about Dr. Kao."

18                     And then when you read the A, B, C, D, there's  
19 a item there of "Dr. Kao brushes against me." And he  
20 mentions the bathroom and -- the men's room, excuse me,  
21 and the math office. And that's the first set of  
22 interviews.

23           Q.     And in discovery in this action, have you also  
24 been able to take depositions of some of these  
25 individuals who purport to be making complaints against

1 you?

2 A. Yes.

3 Q. Do you recall a deposition of Dr. Yeung?

4 A. Yes.

5 Q. And do you recall him being asked about this  
6 incident of veering?

7 A. Yes.

8 Q. Do you recall what he said about that?

9 A. Well, he said he was coming out of the men's  
10 room and then he saw me change direction towards him.  
11 He testified that he wasn't sure whether I saw him or  
12 not.

13 Q. Thank you.

14 Now, you were also asked -- oh, just finish up  
15 on one of -- taking a look back at Exhibit 231, if you  
16 might.

17 A. Yes.

18 Q. And if you take a look at the third page of  
19 that exhibit.

20 A. Yes.

21 Q. Could you please take -- read the jury the  
22 paragraph on that page.

23 A. "Third, at our June 18<sup>th</sup>, 2008  
24 meeting, we proposed some form of letter or  
25 meeting to," quote, "clear the air," end



1 quote, "over the university's stated  
2 concerns about Professor Kao. If anyone  
3 believes that Professor Kao has acted  
4 improperly or in a manner they perceived as  
5 intimidating or threatening, Professor Kao  
6 is entirely willing to assure them that he  
7 intended and intends no harm to anyone.  
8 Professor Kao renews that proposal as an  
9 appropriate and effective resolution for the  
10 university's asserted concerns."

11 Q. And did the university ever accept that  
12 proposal?

13 A. No.

14 Q. At any time during any of these negotiations or  
15 discussions with the university, did the university ever  
16 tell you anything specific about what it was you were --  
17 you were accused of?

18 A. No, no specifics were ever provided.

19 Q. Now, did the university ever give you a reason  
20 why it couldn't provide you specifics?

21 A. No.

22 Q. Did it ever say that "We can't tell you any of  
23 these details because people are just too afraid to let  
24 you know"?

25 A. No.

1 Q. And during these negotiations, you were banned  
2 from campus, weren't you?

3 A. Yes.

4 Q. In fact, did you ever come on campus during  
5 this period of time?

6 A. No.

7 Q. So -- thank you.

8 Now, during the questioning that -- by Mr.  
9 Vartain, he also asked you whether, during the time you  
10 were considering the university's demand to see Dr.  
11 Reynolds, whether you had any reason to doubt Dr.  
12 Reynolds' impartiality.

13 Do you recall those areas of questioning?

14 A. Yes.

15 Q. Subsequently, have you come to some conclusions  
16 about whether or not to doubt Dr. Reynolds'  
17 impartiality?

18 A. Yes.

19 Q. Tell me what has made you doubt Dr. Reynolds'  
20 impartiality.

21 A. Well, in connection with this case, during the  
22 discovery phase, I found that there was a Dr. Missett  
23 that was hired by the university. His name was not  
24 provided to me anytime prior to after we filed a motion  
25 with the court to get this information.

1           And there were also two other doctors, a  
2 Dr. Chang and a Dr. Good, that were hired before Dr.  
3 Missett. Dr. Chang and Dr. Good appeared to have  
4 recommended that someone talk to me about these  
5 behaviors. The university chose not to follow those  
6 recommendations by those two doctors.

7           Sometime in May, a Dr. Missett was hired. Dr.  
8 Missett was given a report called the "Summary Of Three  
9 Faculty Interviews," which is five or six pages long,  
10 quite a bit longer than the paragraph that I read in  
11 either of the June 18<sup>th</sup> letter and the June 24<sup>th</sup>  
12 letter, describing allegations that appear to go back  
13 seven and a half years.

14           And -- and that information was given to Dr.  
15 Missett, along with further allegations transmitted  
16 orally by Ms. Peugh-Wade. On the basis of this  
17 information, Dr. Missett recommended that I undergo a  
18 fitness-for-duty exam with Dr. Reynolds.

19           So I -- at the time I received these letters, I  
20 had no knowledge of Dr. Missett at all. But Dr. Missett  
21 was the expert that the university was relying on to  
22 demand a mental exam with Dr. Reynolds. Dr. Missett had  
23 done work with the university prior to this time.

24           Q.     Now --

25           A.     And -- yes.

1           And then -- and then Dr. Missett and Dr.  
2 Reynolds were currently working -- at the time I  
3 received these letters in January of 2009, Dr. Missett  
4 and Dr. Reynolds were involved in a lawsuit together,  
5 both for -- on behalf of Mr. Vartain's office.

6           Q.    When you say they were involved in a lawsuit  
7 together, what lawsuit was that?

8           A.    The lawsuit was Lau versus Menlo College.

9           Q.    And how do you know about that lawsuit?

10          A.    I found the lawsuit on-line and then I ordered  
11 the transcript for that lawsuit.

12          Q.    And were both Dr. Reynolds and Dr. Missett  
13 appearing on behalf of the university in that lawsuit?

14          A.    Yes.

15          Q.    And who was the attorney representing the  
16 university in that lawsuit?

17          A.    The attorneys were Mr. Vartain and Ms. Adler.

18          Q.    And do you know that -- what Dr. Reynolds' role  
19 was in that lawsuit?

20          A.    Dr. Missett had evaluated a faculty member at  
21 Menlo College and found her unfit for duty -- or -- yes.  
22 Excuse me, that's not quite accurate.

23                There was issues with the fitness-for-duty exam  
24 that Dr. Missett performed. And Dr. Reynolds' role was  
25 to testify that Dr. Missett had performed best practices

1 in connection with that fitness-for-duty exam which the  
2 faculty member was calling into question.

3 Q. And was there a trial in that case?

4 A. Yes.

5 Q. When was that trial going on?

6 A. The trial was under way during fall of 2008.

7 Q. Thank you.

8 Now, in connection with discovery in this  
9 action, were you able to take the deposition of Dr.  
10 Missett?

11 A. Yes.

12 Q. Now, in the deposition that you took of Dr.  
13 Missett, did he tell you what information the university  
14 had given him about you on which he was basing his  
15 medical opinions?

16 A. Yes.

17 Q. Can you tell the jury what sort of information  
18 that he described the university giving him.

19 A. Well, there was that report from human  
20 resources, "Summary Of Three Faculty Interviews."

21 Q. Yes.

22 A. He was given -- he testified to having  
23 conversations and meetings with people at USF and  
24 information transmitted.

25 He -- during his deposition, he elaborated on

1 some of that information. That information corroborates  
2 with Ms. Peugh-Wade's notes of telephone calls with him.  
3 He was given a copy of my complaints.

4 Q. Okay. In the depositions, were -- did Dr.  
5 Missett describe anything about being given information  
6 concerning student complaints against you?

7 A. No. Oh, wait, wait. Yes, but -- and that's  
8 also mentioned in the "Summary Of Three Faculty  
9 Interviews."

10 Q. What did Dr. Missett indicate the university  
11 had told him about student complaints?

12 A. That students had mutinied in one of my  
13 classes.

14 Q. Did he -- did Dr. Missett testify about  
15 anything the university had told him about people's  
16 efforts to talk to you about these issues that they had?

17 A. Dr. Missett testified that he was told by the  
18 university that people had talked to me many times, or  
19 several -- a number of times over the years.

20 Q. Was that true?

21 A. No.

22 Q. People had not talked to you at all about this,  
23 right?

24 A. Yes. Not at all.

25 Q. Thank you.

1           Now, I'd like to go back over a few other items  
2 that --

3           A.    I should -- may I add something or ...

4           Q.    Sure.  Go ahead.  Complete your answer.

5           A.    Well, in connection with those materials that  
6 were transmitted, I should add that when you read the  
7 human resources report, every item in my formal  
8 complaint appears to be nullified by an item in this  
9 report by human resources.

10           So if one -- if one takes the human resources  
11 report as the genuine investigated and final  
12 determination by human resources, then my complaints  
13 look completely invalid.

14           Q.    Thank you.

15           I'd like to just shift, if we could, to --  
16 let's go back and look at your complaints that you were  
17 asking [sic] about.

18           Now, Mr. Vartain asked you a number of  
19 questions concerning whether you thought any of these  
20 people, these various individuals on the faculty, had  
21 bias on the basis of race or gender.

22           Do you recall those questions?

23           A.    Yes.

24           Q.    Were your complaints concerning the actual  
25 bias -- the actual bias or hostility of these

1 individuals to women or minorities?

2 A. In terms of adverse treatment -- that is to  
3 say, in the sense of malicious intent -- no.

4 Q. What were your complaints about?

5 A. That there was implicit discrimination, in the  
6 sense of adverse impact.

7 Q. And in terms of the search process, were you  
8 seeking only -- was all -- were you looking to --  
9 were -- how were you looking to -- when you were raising  
10 these issues with the search procedures, what did you  
11 hope would happen overall?

12 A. I hoped the university would follow the rules  
13 that were in place, the rules that were authored, as I  
14 understand it, by stakeholders throughout the  
15 university.

16 As I understand it, student input even was --  
17 in terms of the university rules, student input was  
18 given back in 1991. The college rules reflect the  
19 university rules. And those rules are meant to embody  
20 the principles of equal opportunity.

21 So I thought as a first step, if one is serious  
22 about equal opportunity and antidiscrimination, the  
23 institution should follow the rules.

24 Q. Now --

25 A. In any particular instance, I think it's



1 incorrect to -- it is incorrect to say that I wanted an  
2 individual fired. But what I wanted was the same  
3 mistakes wouldn't be made in the future, or the rules  
4 were altered; for instance, in the case of Stephen  
5 Yeung. If the department were to open up all of its  
6 applicants to different degrees besides mathematics so  
7 that we'd have kind of a interdisciplinary department,  
8 then in the next round of hiring, we would consider, for  
9 instance, statisticians, which were always precluded.

10           A statistics Ph.D. is a separate doctorate than  
11 a mathematics doctorate. Prior to 2006, we never had a  
12 finalist with a doctorate in statistics, for instance.  
13 So if -- if the department wanted to open the door to  
14 people with doctorates in -- in theoretical and applied  
15 mechanics and also open the door to people with  
16 doctorates in physics and theoretical chemistry and  
17 statistics, all subjects that heavily involve the use of  
18 mathematics as applied to other areas, I think that's a  
19 valid course of action.

20           It would require a policy within mathematics to  
21 determine what degrees were mathematical enough, perhaps  
22 a policy as to how many publications in mathematics  
23 journals would be required, before an applicant were to  
24 be considered. I think we would get a very large pool  
25 of applicants and we would probably get a very diverse

1 pool of applicants.

2 And that would be one way the department could  
3 proceed, which is to say, change its own rules --  
4 departmental, that is -- you know, and then proceed  
5 accordingly, according to the college rules, for the  
6 searches.

7 Q. Thank you.

8 Now, Mr. Vartain also talked about the number  
9 of jobs -- can you see this chart?

10 A. Yes.

11 Q. -- number of jobs --

12 A. Oh, actually, I can, if you move slightly.

13 Q. -- the number of jobs for people hired.

14 Your first complaint was the informal complaint  
15 filed in January 2006; is that right?

16 A. Yes.

17 Q. All right. At that time, had Professor Yeung  
18 been hired?

19 A. No.

20 Q. At that time, had Professor Van Cott been  
21 hired?

22 A. No.

23 Q. At that time, had Professor -- I'm sorry,  
24 what's the third -- the woman that was more recently  
25 hired?

1 A. Professor Chubb.

2 Q. -- had Professor Chubb been hired?

3 A. No.

4 Q. So would it be accurate to say that the  
5 university -- the math department's hiring of minority  
6 Dr. Yeung and the additional -- and the women all  
7 followed your initial complaint complaining -- that  
8 addressed the lack of diversity in the department?

9 A. Yes.

10 Q. Thank you.

11 Now, Mr. Vartain also asked you a number of  
12 issues about, you know, get -- trying to get another  
13 job.

14 A. Yes.

15 Q. First of all, how do you -- what -- if you  
16 were -- first of all, if you were able to get your job  
17 back at USF, would you go back to them?

18 A. Absolutely.

19 Q. Is that something you'd actually want to do,  
20 given everything that's happened here?

21 A. Yes.

22 Q. And why?

23 A. 'Cause I love my job. I love teaching. I  
24 think I'm good at it. It's all I've ever done. Yes, so  
25 I would go back.

1 Q. And if you were able to get this job back as a  
2 result of this lawsuit, how would that make you feel?

3 A. Well, I'd be very happy.

4 Q. You indicated also -- you referenced a  
5 cross-complaint in this action. Do you recall that?

6 A. Yes.

7 Q. What -- to your understanding, what does this  
8 cross-complaint seek to achieve?

9 A. The cross-complaint asks for an injunction as  
10 to the ban which is currently in effect. The injunction  
11 adds to the ban that if I violate that directive not to  
12 step foot on USF campus, I would be arrested -- or I  
13 could be arrested by SFPD.

14 Q. And just because it may not be clear, who filed  
15 that cross-complaint against you?

16 A. That would be USF.

17 THE COURT: Ladies and gentlemen, remember the  
18 admonition. Do not form or express any opinion on this  
19 case until it's finally submitted to you for your  
20 decision. Do not discuss among yourselves or with  
21 others until that time. Please be back in your places  
22 at 1:30 this afternoon. Please remember to leave your  
23 notebooks and instructions behind.

24 (Lunch recess from 11:57 to 1:30.)

25

1 AFTERNOON SESSION 1:28 P.M.

2 THE COURT: Jurors and alternates are all  
3 present. Counsel for both sides are present. Dr. Kao  
4 is on the stand. And his attorney may continue his  
5 inquiry.

6 MR. KATZENBACH: Thank you, Your Honor.

7 REDIRECT EXAMINATION BY MR. KATZENBACH (RESUMED)

8 MR. KATZENBACH: Q. When -- you testified  
9 about circumstances under which Professor Needham made  
10 remarks about "crazy mathematicians." Have you heard  
11 that?

12 A. Yes.

13 Q. Whenever he made those remarks, did he couple  
14 those remarks with reference to a particular  
15 mathematician?

16 A. Yes.

17 Q. And who was that?

18 A. John Nash.

19 Q. And where did John Nash teach?

20 A. At Princeton.

21 Q. And what university did you go to?

22 A. Princeton.

23 Q. And what's your first name?

24 A. John.

25 Q. And during any of those comments, did he -- did

1 Mr. Needham ever refer to any crazy mathematicians at  
2 Oxford, where he went to school?

3 A. No.

4 Q. Did he refer to any crazy mathematicians at any  
5 other school?

6 A. No.

7 Q. Did he refer to any other crazy mathematicians  
8 by name?

9 A. No.

10 Q. Thank you.

11 Now, when we were talking about the offers of  
12 jobs 2006, 2008, 2009 -- do you recall that?

13 A. Yes.

14 Q. Now, in the 2008 search, the -- as I understand  
15 it, at some point the dean decided to make two offers.

16 A. Yes.

17 Q. Okay. And the first offer went to whom?

18 A. Dr. Van Cott.

19 Q. And Dr. Van Cott is a female?

20 A. Yes.

21 Q. And was at that time as well. All right.

22 Sorry.

23 The -- the second offer went to whom?

24 A. Dr. Jones.

25 Q. And Dr. Jones was -- and as far as we know

1 is -- a ...

2 A. Male.

3 Q. Thank you.

4 Now, Dr. Jones turned that offer down, correct?

5 A. Yes.

6 Q. Now, there was a fourth viable candidate in  
7 that search, wasn't there?

8 A. Yes.

9 MR. VARTAIN: You're leading. Objection.

10 THE COURT: Objection is well founded, but I'll  
11 let the answer stand.

12 MR. KATZENBACH: Thank you, Your Honor.

13 MR. VARTAIN: What was answer?

14 THE COURT: Answer was "yes."

15 MR. VARTAIN: Thank you, Your Honor.

16 MR. KATZENBACH: Q. To your knowledge, was an  
17 offer made to that fourth viable candidate in 2008?

18 A. No.

19 Q. And what gender was that fourth viable  
20 candidate?

21 A. Female.

22 Q. Thank you.

23 Mr. Vartain asked you a bit about publications  
24 since 2000 -- since the year 2000. Do you recall that  
25 testimony -- that -- those questions?

1           A.    Yes.

2           Q.    Are you familiar with the publications produced  
3 by other faculty members in the math department?

4           A.    Yes.

5           Q.    Can you tell us how you're familiar with that.

6           A.    Well, in -- they have a process called the  
7 program review process.  What this involves is every  
8 decade -- once every decade, there are external  
9 reviewers that -- faculty members get together in the  
10 department and produce a preliminary report.

11                   This report is sent to these external  
12 reviewers.  They analyze the materials we submit to  
13 them.  Then they come and visit campus.  Typically there  
14 are three external reviewers that make the visit.

15                   They visit campus.  They look at materials  
16 provided to them by the Dean's Office.  They meet with  
17 students, sit in on classes, interview students and  
18 faculty.

19                   And then at the end of their visit, which is a  
20 few days, they get together and they write a report.  
21 That report becomes part of the official record of the  
22 university.

23           Q.    And did you -- in connection with any of those  
24 reviews, have you had any role?

25           A.    Yes.



1 Q. Can you describe what your role was.

2 A. Well, there was a program review in 2004 --  
3 that finished in 2004. The prior review would have been  
4 ten years before, 1994. I recall in '94 I wrote one  
5 section with Professor Lehmann.

6 In 2004, we decided, in producing the  
7 preliminary report, to use a slightly different  
8 procedure. Of course, it's an entirely different group  
9 of faculty. So the roles that we played in preparation  
10 of that report was different.

11 I was assigned the task of compiling statistics  
12 for the research and other scholarly publications on  
13 behalf of the department.

14 Q. And in connection with that, did you learn sort  
15 of how much other professors had published?

16 A. Yes.

17 Q. And can you describe in general terms, were  
18 there any other professors that had not published in  
19 recent years?

20 A. Yes.

21 Q. Can you tell us what you recall about those  
22 other professors that didn't have any recent  
23 publications?

24 A. Well, for the period between 1994 and 2004,  
25 there were three faculty members who had not published

1 during that time.

2 Q. And who were they?

3 A. Allan Cruse, James Finch, Robert Wolf.

4 Q. Okay. And when does the -- when was the last  
5 publication -- sorry, strike that.

6 What was the publication rates of other  
7 professors in the math department?

8 A. It depended on the individual. Some published  
9 quite a bit, some sporadically.

10 Q. Now, in particular, did you look at the  
11 publication rates for Tristan Needham?

12 A. Yes.

13 Q. And what were those?

14 A. Well, in 2004 -- as of 2004, his latest  
15 publication was a book, a textbook. That was published  
16 in 1997.

17 Q. All right. In connection with this lawsuit,  
18 have you attempted to research what publications  
19 Professor Needham has had since 2004?

20 A. Since 2004, I checked on-line in several  
21 databases to see if there have been any publications  
22 since '97, and I didn't find any.

23 Q. Thank you.

24 Now, has anyone at the university ever come to  
25 you and asked you -- well, and told you that the fact

1 that you had not published anything since 2000 put your  
2 job in jeopardy in any fashion?

3 MR. VARTAIN: Objection. Irrelevant. That was  
4 never hit.

5 THE REPORTER: That was never what?

6 MR. VARTAIN: Hit.

7 THE COURT: Overruled. Witness may answer.

8 THE WITNESS: No.

9 MR. KATZENBACH: Could you please take a look  
10 at Exhibit 90.

11 THE CLERK: Which exhibit did you say?

12 MR. KATZENBACH: 90.

13 THE CLERK: 90.

14 MR. KATZENBACH: Nine-zero.

15 THE WITNESS: Yes.

16 (Plaintiff's Exhibit 90  
17 marked for identification.)

18 MR. KATZENBACH: Q. Can you just, in rough  
19 terms -- can you describe what Exhibit 90 is.

20 A. This is an email. It's dated May 14<sup>th</sup>, 2007,  
21 from Dean Turpin to Ms. Locsin.

22 Q. And does it contain a copy of an earlier email  
23 from Ms. Locsin to Dean Turpin?

24 A. Yes.

25 Q. Does this email reflect the conversations that

1 you testified about concerning not filing your report --  
2 reports or sabbatical reports because of the issues  
3 concerning the disputes over settling your agreements?

4 A. Yes. Oh, I should add that it's cc'ed to  
5 general counsel, Ms. Davis.

6 Q. Okay, thank you.

7 And does -- does Mr. Vartain say anything about  
8 what Ms. Locsin should do with this information?

9 A. Yes. This is in connection with the ACP; that  
10 would be the annual report, which I did not file in  
11 2006/2007 academic year.

12 The reason I gave to Ms. Locsin, when she  
13 contacted me about it, was that there were issues with  
14 general counsel -- involving general counsel. And I  
15 wanted to wait until that was resolved before filing the  
16 form.

17 Q. All right. And what does -- what does Ms.  
18 Turpin say that Ms. Locsin should do about this  
19 information in this email?

20 A. Dean Turpin writes, in relationship to the  
21 meeting that -- the meeting that we would have about the  
22 report:

23 "Liza, please send John the form that  
24 allows him to opt out of the meeting, but  
25 also keep a note in the file that John

1 failed to file his ACP, as required by the  
2 collective bargaining agreement."

3 Q. Now, at any time from May 2007 to the date of  
4 your discharge, did anyone ask you to file this or any  
5 other ACPs?

6 A. No. Well, I -- correction.

7 I did get the standard solicitation for the  
8 ACPs the following year and a follow-up phone call from  
9 Ms. Locsin. And I told her, when she spoke to me, that  
10 please transmit to Dean Turpin that the issues that I  
11 gave the last time were still ongoing. "So for that  
12 reason, I'm not filing this year."

13 And I didn't receive any reply.

14 Q. Thank you.

15 Now, you were also asked about letters of  
16 recommendation.

17 A. Yes.

18 Q. For an employee faculty member moving from one  
19 institution to another, what's your understanding of who  
20 would have to write your letters of recommendation?

21 A. Typically at least one letter would be from a  
22 supervisor, someone who would have access to your  
23 personnel file, could look at the aggregate of your  
24 teaching evaluations, could evaluate your service  
25 activities on behalf of the institution.

1 Q. And for purposes of filing an application for a  
2 new job, who would that person be at the present time?  
3 Strike that.

4 At the time you were fired, who was -- what  
5 position -- strike that.

6 Who would have been the supervisor that you  
7 would have expected to write your letter?

8 A. Associate Dean Brown, or alternatively, Dean  
9 Turpin.

10 Q. All right. And those would be the two levels  
11 of deans that you would expect to write a letter for  
12 you?

13 A. Yes.

14 Q. Now, Mr. Vartain also asked you a number of  
15 questions concerning -- well, strike that.

16 He asked you whether or not you could ask for a  
17 letter from Professor Wolf. Now, I -- what would be --

18 A. Yes.

19 MR. VARTAIN: Object --

20 MR. KATZENBACH: Strike that.

21 I'll rephrase the question.

22 Q. Would you normally expect a letter from a mere  
23 professor to be sufficient for a job application?

24 MR. VARTAIN: Objection. Calls for speculation  
25 and lacks foundation.

1 THE COURT: Overruled. Witness may answer.

2 THE WITNESS: If -- by itself, no. It could be  
3 added to -- you know, for instance, if you had three  
4 letters, it could be an added piece.

5 If -- if a colleague were well known in a  
6 particular area and that would be someone who could  
7 speak authoritatively on behalf of the research work in  
8 your same area, that would be helpful in the area -- in  
9 terms of establishing the quality of past work and  
10 research.

11 MR. KATZENBACH: Q. Okay. Now, if you were to  
12 be filing a job application somewhere, what sort of  
13 information would you feel obliged to tell any  
14 prospective employer and why?

15 A. Well, I mean, if I -- normally one submits a  
16 resumé that details their work experience. My work  
17 experience ended as of February of 2009, so I would have  
18 to explain why I left a tenured position.

19 I would feel obliged to disclose that I was  
20 discharged, that it wasn't a resignation. Natural  
21 question would be for what -- on what basis was I  
22 discharged.

23 I, at that point, would feel obliged to also  
24 disclose that in connection with this discharge, I've  
25 been banned from campus indefinitely.

1 Q. And would you feel obliged to explain more than  
2 just the reasons the University of San Francisco stated  
3 to you formally?

4 A. Yes, because the campus ban, that's a pretty  
5 extraordinary measure. I think it would be better to  
6 give a direct answer than allow whomever I was telling  
7 it to to leave it to their imagination.

8 I should add that if I were to apply for a  
9 teaching position or scientific position or industry  
10 position in the Bay Area, many companies perform  
11 business with USF at some point. Teaching institutions  
12 send representatives to attend professional meetings,  
13 school -- special events, that -- things of that nature.

14 And were something like that to arise, I would  
15 have to explain why I would not be able to perform those  
16 duties.

17 Q. Now, showing you a little chart that -- the  
18 chart that Mr. Vartain put up for the jury. And I'd  
19 like to just ask you which of these people were involved  
20 in the search process that you were complaining about in  
21 2008.

22 Let's start with Professor Stephen Yeung.  
23 How's -- was he involved in the search process?

24 A. Yes.

25 Q. What was his role?



1 A. He was a member of the search committee.

2 Q. Professor Paul Zeitz, was he involved in the  
3 search process?

4 A. Yes.

5 Q. What was his role?

6 A. He was chair of the search committee.

7 Q. Dean Jennifer Turpin, was she involved in the  
8 search process?

9 A. Yes.

10 Q. What was her involvement?

11 A. She was officially responsible for the outcome  
12 and the -- as I understand -- understood later, after I  
13 examined the documents in connection with this case,  
14 Dean Turpin was ultimately responsible for the outcome  
15 and the procedures in connection with that search.

16 Q. And Professor Tristan Needham, did he have any  
17 involvement in that search process?

18 A. Yes.

19 Q. What was his involvement?

20 A. He was a member of the search committee.

21 Q. And Professor Peter Pacheco, did he have any  
22 involvement in that search process?

23 A. Yes.

24 Q. What was his involvement?

25 A. He was chair of the department.

1           Shop steward representative of the mathematics  
2 department to the administration.

3           In the summer, he was a member of the search  
4 committee. That would be the time at which a ad would  
5 have been placed in a professional journal. I think in  
6 the beginning of fall semester, September or October, he  
7 apparently resigned from the search committee. So by  
8 the time we met to discuss finalists, he was not a  
9 member of the search committee.

10          Q.    And does the chair of the department also have  
11 any role in appointing the search committee?

12          A.    No direct administrative role, other than  
13 representing the department. I believe the search  
14 committee is appointed -- officially approved by the  
15 Dean's Office.

16          Q.    Okay. Thank you.

17                And Associate Dean Brandon Brown, did he have  
18 any role in the search?

19          A.    He was directly administering the search on  
20 behalf of Dean Turpin. But Dean Turpin had the ultimate  
21 responsibility and authority.

22          Q.    At any time, did Dean Brown indicate to you  
23 that he had any involvement in the decision of how to  
24 advertise the job?

25          A.    Dean Brown himself did not express that to me

1 directly. When I read documents that semester, I noted  
2 in the published rules it is the associate dean's  
3 responsibility to make sure that it's advertised  
4 appropriately.

5 Q. Thank you.

6 Finally, I'd like to direct your attention to  
7 the meeting you had with Mr. Philpott. Do you recall  
8 that meeting?

9 A. Yes.

10 Q. Where did that meeting take place?

11 A. It took place in a conference room in a  
12 building downtown in the Financial District. It's one  
13 floor below the Vartain Law Group office.

14 Q. Has that build- -- has that same conference  
15 room been used at all in connection with this  
16 litigation?

17 A. Yes.

18 Q. How has it been used?

19 A. Depositions were conducted there. For  
20 instance, my deposition and my sister's deposition --

21 Q. And who --

22 A. -- was held.

23 Q. And who conducted those depositions?

24 A. Mr. Vartain.

25 MR. KATZENBACH: Thank you. That's all I have.

1 THE COURT: Further cross-examination?

2 MR. VARTAIN: Just a few, Your Honor, if I may.

3 RECROSS-EXAMINATION BY MR. VARTAIN

4 MR. VARTAIN: Q. Dr. Kao, before the lunch  
5 break, you mentioned something to the effect of the  
6 university told this Dr. Missett that you had had some  
7 issues with students. Remember that testimony?

8 A. Yes.

9 Q. In fact, it is true, sir, that you have had --  
10 and I'm not saying any more than any other professor --  
11 but you have had a situation with students that you  
12 described as a mutiny, correct?

13 A. I used that term to describe a situation that  
14 arose in the early '90s, outside of the  
15 seven-and-a-half-year time frame identified in this case  
16 by Dr. Missett.

17 Q. You have had your share, just like any other  
18 professor, of problems with students, correct? You  
19 haven't been exempt from that?

20 A. I've had a few problems.

21 Q. Okay. I wanted to clear that up.

22 You also told the jury, I believe, that you had  
23 never in your history been counseled about how you treat  
24 people.

25 A. But I should add that I've never had a formal

1 student complaint filed with my supervisor. The  
2 instance of a mutiny, that was an expression I used with  
3 my colleagues in a joking fashion.

4 Q. It wasn't true? Was it true?

5 A. That I used that term, "mutiny"? It wasn't --  
6 that's the term I used, joking to my colleagues.  
7 Apparently they recalled that and --

8 Q. But it wasn't --

9 A. But there were no student complaints, either to  
10 the chair or to the Dean's Office --

11 Q. Okay.

12 A. -- in connection with that course. I mean,  
13 there was a discipline problem with two students. One  
14 student withdrew towards the end of the semester. The  
15 other student completed the course. But they were  
16 unhappy with me and my disciplinary measures that  
17 semester. And that's what I meant by "a mutiny."

18 Q. Okay. When I inquired of your publications,  
19 Dr. Kao, I wasn't insinuating that you had fewer or  
20 less. But it is true you never published the monograph  
21 that you had promised the dean that you would work on  
22 during your sabbatical, correct?

23 A. No, I never promised the monograph. But I did  
24 not publish the monograph that we had set a schedule  
25 for, that I hoped to publish by 2006. That was never

1 accomplished.

2 Q. And the fact that you didn't publish that and  
3 that you didn't write a report about the sabbatical, as  
4 the contract says, was never made the subject of any  
5 retaliation or discipline by Dean Turpin; is that  
6 correct?

7 A. Could you repeat the question. I'm sorry.

8 (Record read as follows:

9 *QUESTION: And the fact that you didn't*  
10 *publish that and that you didn't write a*  
11 *report about the sabbatical, as the contract*  
12 *says, was never made the subject of any*  
13 *retaliation or discipline by Dean Turpin; is*  
14 *that correct?)*

15 MR. KATZENBACH: I'll object. That is  
16 compound, I think.

17 THE COURT: Overruled. Witness may answer.

18 THE WITNESS: Dean Turpin never made -- drew to  
19 my attention any problem in connection with that  
20 monograph.

21 MR. VARTAIN: Q. Now --

22 A. If that's responsive to your question.

23 Q. It is. Thank you. I appreciate that.

24 Now, pardon me for being a little humorous.

25 And I'm going to wind down now. And I appreciate you

1 answering all my questions yesterday and today.

2 But the questions about the professor -- the  
3 movie was made about the professor from Princeton, The  
4 Beautiful Mind. Isn't that what Professor Needham was  
5 referring to, the professor about whom the movie was  
6 made?

7 A. A Beautiful Mind is a movie about John Nash.

8 Q. And John --

9 A. Princeton professor.

10 Q. And in the movie -- did you see the movie?

11 A. No.

12 Q. Okay. But you do know --

13 A. I've seen parts of the movie, but not the  
14 entire movie.

15 Q. Oh, you've seen --

16 A. Scenes of the movie. I've seen parts of the  
17 movie. But I never saw the entire movie.

18 Q. So the movie was in the movie theaters, and it  
19 was a popular movie, right?

20 A. At one point, yes.

21 Q. Yes, in the '90s, right, or the early 2000s,  
22 right?

23 A. Yes.

24 Q. And Professor Needham, from time to time, would  
25 make a joke about the professor who was in the movie The

1 Beautiful Mind, John Nash, correct?

2 A. Yes.

3 Q. And then your attorney made the point that  
4 he --

5 A. Remarks or jokes, yes.

6 Q. Your --

7 A. Referring to John Nash, who was the subject of  
8 the movie A Beautiful Mind, yes.

9 Q. Who was -- in the movie, he was a Princeton  
10 professor, and also in real life he was as well, right?

11 A. The movie was about a Princeton professor named  
12 John Nash.

13 Q. And your attorney asked you if Professor  
14 Needham ever referred to any professor from his own  
15 university, namely Oxford, in that same joking manner,  
16 "crazy mathematicians."

17 You heard that question.

18 You said no, of course. But there was no movie  
19 ever made about a mathematician from Oxford, that you  
20 know of, correct?

21 A. Yes.

22 Q. So you took that -- don't you think you had  
23 sort of a persecution complex with respect to that  
24 issue? You took it personally that he was talking about  
25 you, sir?



1 A. It was annoying.

2 Q. You thought, although he never said -- Tristan  
3 Needham never said that he was talking about John Kao,  
4 you assumed he was talking about you when he used the  
5 term "crazy mathematicians," plural, did you?

6 A. Because they recurred --

7 Q. No, that one, I want a "yes" or "no." I have  
8 had -- I --

9 A. Could you repeat the question.

10 Q. May I have an answer? Will you give me a "yes"  
11 or "no" to that?

12 A. If you repeat the question.

13 Q. Okay. It's a deal.

14 (Record read as follows:

15 *QUESTION: You thought, although he*  
16 *never said -- Tristan Needham never said*  
17 *that he was talking about John Kao, you*  
18 *assumed he was talking about you when he*  
19 *used the term "crazy mathematicians,"*  
20 *plural? Did you?)*

21 THE WITNESS: Yes. I thought at some point,  
22 after several of these, that that -- he had something in  
23 mind of that nature. I thought that.

24 MR. VARTAIN: Q. Do you remember you were at  
25 the deposition of the program assistant, Christine Liu?

1 A. I attended --

2 Q. Yes.

3 A. -- Ms. Liu's deposition.

4 Q. And didn't -- and she's sort of someone who you  
5 had a friendly relationship with, correct?

6 A. Yes.

7 Q. Don't you remember her saying something to the  
8 effect of "John Kao, from my experience, had a  
9 persecution complex"?

10 A. I don't recall that.

11 Q. Would you like --

12 A. But I don't -- I don't -- I'm not saying that  
13 that's not what she said. I don't recall -- if you --  
14 perhaps if you provided the transcript of the deposition  
15 to remind me ...

16 MR. VARTAIN: May I have a break to do that,  
17 Your Honor, since the witness has asked, or would you  
18 like to take your break now?

19 THE COURT: How long's it going to take to dig  
20 out the transcript?

21 MR. VARTAIN: It'll take me beyond the  
22 two-minute-second ticker there -- the 2 -- the 2:00  
23 ticker, I'm sorry.

24 THE COURT: Ladies and gentlemen, remember the  
25 admonition. Do not form or express any opinion on this

1 case until it's finally submitted to you for decision.  
2 Do not discuss among yourselves or others until that  
3 time. Please be back in your places at 2:10 according  
4 to the courtroom clock.

5 (Recess taken.)

6 THE COURT: Jurors and alternates are all  
7 present. Counsel for both sides are present. Plaintiff  
8 is personally present on the stand.

9 Mr. Vartain, you may continue your inquiry.

10 MR. VARTAIN: Q. Dr. Kao, would you tell the  
11 jury a little bit of who Ms. Christine Liu is and how  
12 many years you've known her.

13 A. Ms. Liu is the program assistant. She started  
14 working for the department -- let's see. I'm not sure  
15 if it was as early as '98, but she was in the department  
16 as program assistant in 2000, at least, I think.

17 Q. Throughout your year --

18 A. So -- yeah, so by the time -- at the time of my  
19 suspension, at least eight years.

20 Q. Throughout your years, did you have a decent  
21 working relationship with her?

22 A. We were always friendly.

23 Q. And you were at the deposition that Mr.  
24 Katzenbach took of her in this lawsuit, you said.

25 A. Yes.

1 Q. And you asked me to refer you to the portion  
2 wherein she indicated something about a persecution  
3 complex.

4 A. Yes. I read that page and the following page.

5 Q. She said under oath that she thought that you  
6 behaved a little as if you had a persecution complex,  
7 correct?

8 A. No.

9 Q. Could you read her -- would you read to the  
10 jury Mr. Katzenbach's question at page 168, line ten and  
11 down.

12 A. Line ten. "Okay. Did you ever" --  
13 This is Mr. Katzenbach. "Okay. Did  
14 you ever hear anyone state that Dr. Kao was  
15 delusional?"

16 Answer, "No, not in so many words."

17 Question, "What words do you recall?"

18 Answer, "I recall myself saying -- I  
19 forget to whom -- that I felt John, Dr. Kao,  
20 behaved a little as though he had a  
21 persecution complex."

22 MR. VARTAIN: Thank you. No further questions.

23 THE COURT: Further direct?

24 MR. KATZENBACH: No, Your Honor.

25 THE COURT: Jurors, have you questions for Dr.

1 Kao? Yes.

2 THE CLERK: Which juror number was this?

3 JUROR 9: Me, juror 9.

4 THE CLERK: Number 9. Thank you.

5 JUROR 4: We have another question over here.

6 THE CLERK: Number 4. Okay. Thank you.

7 (Judge and counsel confer privately.)

8 THE COURT: There were some questions here  
9 about filing a claim with the Equal Opportunity  
10 Employment -- Equal Employment Opportunity Commission  
11 and the Department of Fair Employment & Housing.

12 Mr. Vartain will tell you of the stipulation  
13 which he and Mr. Katzenbach's have reached.

14 MR. VARTAIN: We agreed that the correct answer  
15 to that question is what I'm going to say. To make a  
16 lawsuit, any former employee has to file a Department of  
17 Fair Employment & Housing complaint and/or an Equal  
18 Opportunity Commission complaint.

19 So in order to do this lawsuit, Dr. Kao had to  
20 do so, and he did do so. And then if the -- if he has  
21 an attorney and they want to file a suit, then they can  
22 ask those government agencies to issue a letter called  
23 "Right To File A Lawsuit." And that's what happened.  
24 And that's the ordinary procedure.

25 Would that be fair, Chris?

1 MR. KATZENBACH: Yes.

2 MR. VARTAIN: So --

3 THE COURT: So would it be accurate to say that  
4 the status of the claims is that they drop out of the  
5 picture because there's a lawsuit?

6 MR. VARTAIN: Yeah, exactly.

7 Would that be --

8 MR. KATZENBACH: That'd be accurate.

9 MR. VARTAIN: That'd be accurate.

10 So they just sort of die on the vine once the  
11 lawsuit starts.

12 Do you agree with that, Chris?

13 MR. KATZENBACH: Well, the lawsuit -- in order  
14 to file the lawsuit, they have to issue a "right to  
15 sue." Once they issue a "right to sue" --

16 MR. VARTAIN: They stop --

17 MR. KATZENBACH: -- the administrative  
18 procedure stops.

19 THE COURT: Okay, Dr. Kao. Ready for a  
20 question from the jurors?

21 THE WITNESS: Yes.

22 QUESTIONS FROM THE JURORS

23 THE COURT: "Why did you think the search  
24 committee didn't advertise in the journal?"

25 THE WITNESS: I -- I would have to speculate.

1 But I have formed an opinion. I suspect that there was  
2 some manipulation of the process. I think Dr. Jones was  
3 a favored candidate, and there was some manipulation to  
4 achieve that. By not advertising in the journal, you  
5 make that manipulation easier, because you'd have fewer  
6 applicants. That would be one possible case.

7 But that -- another possible case is that it  
8 was deemed too expensive to advertise in the journal. I  
9 think that's a little hard to justify, given the amount  
10 of expense involved in flying candidates to campus,  
11 putting them in hotels, taking time away from students  
12 who attend these lectures, faculty members who attend  
13 these lectures. All of those are a kind of expense.  
14 And to me, those expenses mount up far in excess of a  
15 few hundred dollars for an advertisement in a  
16 classified.

17 So it's hard for me to really see a good reason  
18 for not putting it in a professional journal and  
19 following the rules.

20 But in terms of just the pure financial cost,  
21 saving a few hundred dollars, in comparison, as a  
22 fraction of the total expense, both explicit and  
23 implicit, of all the people involved, all the  
24 stakeholders in that decision, it's quite a bit more  
25 than the few hundred dollars that it would cost to put

1 the ad. And the rules mandate that. So ...

2 But, I mean, other than forming this opinion, I  
3 can't go further. I don't have the evidence to -- to  
4 make that conclusion. But I do -- I do felt -- I did  
5 feel there was something a little strange about starting  
6 looking -- start -- the way the process was conducted  
7 that specific year, in that originally we wanted -- the  
8 department stated that there would be one position. And  
9 all of a sudden, late in the process, they indicate that  
10 it was possible to add a position.

11 That's not the typical procedure. So I thought  
12 that was a little bit strange. If they -- if they  
13 really wanted to -- to sort of endeavor to find some  
14 diversity and get this person who they wanted, then it  
15 would be a consistent story.

16 THE COURT: Here's a follow-up question.

17 "Could it be because it was an outdated  
18 system?"

19 THE WITNESS: Well, the rules require  
20 advertisement in a professional journal. If they want  
21 to change the rules and then look for alternatives to a  
22 professional journal, I think that's a legitimate thing  
23 to look into and research.

24 Certainly the College of Professional Studies,  
25 that same academic year, placed and paid for a large



1 classified advertisement. When I looked at the  
2 publication cost for a classified ad in the Chronicle of  
3 Higher Education, I noted that it was more expensive to  
4 put, for instance, a photograph, a picture, into the ad.  
5 And there was a sort of a size cost.

6 So certainly in other colleges at USF at that  
7 same time, they were willing to spend extra money to put  
8 an ad that would be visible to -- to a large group of  
9 people.

10 I think if there were alternatives to a  
11 professional journal, some research could be conducted  
12 and find out what those alternatives are.

13 I was concerned that the number of applicants  
14 had dropped from 300 and 300, then suddenly down to 200.  
15 Part of my presentation to the department were  
16 statistics showing that the number of qualified  
17 candidates hadn't changed.

18 You know, I mean, certainly a drop in the  
19 number of applicants could be due to a variety of  
20 factors; for instance, fewer available candidates, fewer  
21 qualified candidates, also more jobs, more academic  
22 positions, right.

23 So it comes down to supply versus demand. And  
24 if there were a significant shift along those lines,  
25 that might be something statistically that you could

1 look at as an alternative explanation to not circulating  
2 the ad widely enough.

3 But in fact, when I examined the data that I  
4 obtained from the AMS Web site and other reference  
5 materials, I found that there was no significant change  
6 from the prior years to that year, '07/'08 that would  
7 explain the drop in the number of applicants.

8 THE COURT: "What relationship, if any, exists  
9 between the issues with the filed complaint and your not  
10 filing a sabbatical summary?"

11 THE WITNESS: Could you repeat the question,  
12 I'm sorry.

13 THE COURT: "What relationship, if any, exists  
14 between the issues with the filed complaint and your not  
15 filing a sabbatical summary?"

16 THE WITNESS: That, I think, is a legal  
17 question. I don't -- I mean, that's not part of -- I'm  
18 not sure I perceive the relationship.

19 My understanding of what attorneys referred to  
20 as the theory of the case, I mean, that's something  
21 that's presented on my behalf, not -- not something that  
22 I can -- I, as a witness, can present.

23 But I think -- I think, if I were pressed to do  
24 so, I would say "Well, I had filed complaints of  
25 discrimination and harassment. And in sequel to those

1 complaints, retaliation took place."

2 That's not really related directly to the issue  
3 of filing forms with -- with the university. That's not  
4 something that -- if I -- if I were my own attorney,  
5 that's not something that -- that's not any inference I  
6 would make. But if Mr. Vartain wants to make some  
7 inference, then I suppose he would have to explain it.

8 THE COURT: Mr. Katzenbach, follow-up  
9 questions?

10 MR. KATZENBACH: No, Your Honor.

11 THE COURT: Mr. Vartain?

12 MR. VARTAIN: Just one -- a couple that -- just  
13 to follow up on that juror's question.

14 RECROSS-EXAMINATION BY MR. VARTAIN (RESUMED)

15 MR. VARTAIN: Q. I'm really repeating a set of  
16 questions that I asked previously, Dr. Kao. So I don't  
17 want to take you by surprise. But I think if we go  
18 through those questions and answers again, we may be  
19 able to directly answer that juror's question without  
20 you playing lawyer, which I appreciate that you don't  
21 want to do that.

22 A. I prefer not to.

23 Q. Yeah. I wouldn't want to be in your chair, and  
24 you don't want to be in mine.

25 You filed a formal complaint in May of 2006,

1 correct?

2 A. Yes.

3 Q. That was right around the time you were  
4 finishing up your sabbatical period, correct?

5 A. Yes.

6 Q. And it was in the next couple months that you  
7 were supposed to be filing your sabbatical report,  
8 correct?

9 A. The sabbatical report was due -- that's  
10 probably correct, yes. I -- October.

11 Q. September/October?

12 A. September/October, something of that -- around  
13 then.

14 Q. But you didn't file the sabbatical report. You  
15 thought you had an implicit okay to do that from the  
16 dean. And you talked about, well, she said you didn't  
17 have to come for the meeting about the annual report.  
18 You took that as an implicit okay that you not file the  
19 sabbatical report, the written report, correct?

20 A. Yes.

21 Q. She never -- even though you had just filed  
22 this formal complaint, she never took it upon herself to  
23 take any adverse action against you for not doing what  
24 the contract says you're supposed to do, which is file  
25 the sabbatical report, correct?

1           A.     Yes.

2           MR. VARTAIN:   Okay.  My point was not to so  
3 much impugn Dr. Kao 'cause he didn't file the sabbatical  
4 report, although he wasn't -- while he was supposed to,  
5 he says he wasn't -- but to make the point that the dean  
6 didn't use that as a reason to discipline him, even  
7 though he had just filed the formal complaint.  That's  
8 what the point of the questioning was.

9           THE WITNESS:  Perhaps to clarify for the jury,  
10 some of the -- some of the confusion may lie in that I  
11 was unable to -- or that -- I did not testify as to the  
12 meetings that took place after filing the formal  
13 complaint and there were some kind of settlement  
14 negotiation.

15           I could not explain the delay, because of the  
16 way the negotiations were.  And so I had a reason for  
17 not filing the report.

18           MR. KATZENBACH:  Let me see if I can ask you  
19 some questions so that you can get your point over to  
20 the jury.  I'm not -- I don't want you to not have that  
21 chance.  So see if I can -- I'm not acting against you  
22 now.  I'm going to see if I can --

23           THE WITNESS:  I was trying to stop from talking  
24 too much about those meetings.

25           MR. VARTAIN:  And that's fine.

1 Q. But I think it's your -- it was your feeling at  
2 that time -- that is, in the fall of 2006 -- that there  
3 were discussions, negotiations, going on between your  
4 attorneys and the university attorneys trying to work  
5 out a compromise agreement about your formal complaint,  
6 right?

7 A. Yes.

8 Q. And you thought, rightly or wrongly, that that  
9 gave you some implicit permission not to file the  
10 sabbatical report; is that fair, what I'm saying?

11 A. I -- if I were to file the report as to the  
12 progress on that project, I would have to indicate that  
13 there had been a delay in the schedule, and I would have  
14 to indicate the reason for the delay.

15 However, there seemed to be some instruction  
16 from the administration that I not mention that I had  
17 filed a complaint. So that puts me in a catch-22, in  
18 terms of writing the report.

19 Q. You know, I'm not going to --

20 A. And that's why I didn't file the report, is  
21 all. There was a delay in the schedule. That delay was  
22 created in part because I spent a lot of time preparing  
23 the formal complaint document.

24 If I were to try to explain to the  
25 administration why -- the reason for the delay, it

1 seemed necessary to make mention of that formal  
2 complaint and outcomes of negotiations.

3 And part of those negotiations involved a kind  
4 of gag order on the complaint. So I felt I was in a  
5 catch-22 with respect to that particular report.

6 MR. VARTAIN: So I'm not going to go into the  
7 pros and cons. Just wanted to give the jury a sense of  
8 how that happened. And the point for my question was  
9 that the dean didn't use that -- your failure to file  
10 the report as a reason to react adversely to your  
11 complaint.

12 Thank you.

13 Did you want to ask some questions, Chris?

14 MR. KATZENBACH: No, I don't have any  
15 questions.

16 THE COURT: All right. Dr. Kao, you may step  
17 down.

18 THE WITNESS: Thank you.

19 MR. KATZENBACH: Your Honor, we had -- Exhibit  
20 4 was being delayed admission to allow Mr. Vartain to  
21 voir dire on that exhibit during his examination, if he  
22 chose to do so. The examination's done. I'd like to  
23 move Exhibit 4 into evidence.

24 MR. VARTAIN: Can I look at it just one second?

25 MR. KATZENBACH: That's the addendum -- the

1 addendum to the formal complaint.

2 MR. VARTAIN: I have no objection, except as  
3 to -- if it's offered for the limited purpose, not for  
4 its truth.

5 THE COURT: So add Exhibit 4 to the list that  
6 you're going to give me. It's received in evidence.

7 (Plaintiff's Exhibit 4  
8 received in evidence.)

9 MR. KATZENBACH: And I think, Your Honor, we  
10 had the same question with the calendar notes on Exhibit  
11 14. Let me see.

12 MR. VARTAIN: Same -- that's fine, Chris.

13 MR. KATZENBACH: Okay.

14 MR. VARTAIN: Received with the limitation it's  
15 not received to prove the truth of what's on the  
16 calendar.

17 MR. KATZENBACH: That's fine.

18 THE CLERK: What number was that?

19 MR. VARTAIN: 4.

20 MR. KATZENBACH: 14.

21 MR. VARTAIN: 14.

22 THE CLERK: 4 and 14?

23 THE COURT: 4 and 14, yes.

24 (Plaintiff's Exhibit 14  
25 received in evidence.)



1 THE COURT: Plaintiff may call his next  
2 witness.

3 MR. KATZENBACH: Yes, Stephen -- Dr. Stephen J.  
4 Huxley.

5 (Witness sworn.)

6 STEPHEN J. HUXLEY,  
7 having been first duly sworn, testified as follows:

8 THE CLERK: Have a seat. Will you please state  
9 your name and then spell it for the record.

10 THE WITNESS: Stephen J. Huxley.

11 THE CLERK: And spell it, please.

12 THE WITNESS: S-T-E-P-H-E-N; last name is  
13 H-U-X-L-E-Y.

14 THE CLERK: Thank you.

15 THE COURT: Mr. Katzenbach, you may inquire.

16 MR. KATZENBACH: Thank you.

17 DIRECT EXAMINATION BY MR. KATZENBACH

18 MR. KATZENBACH: Q. Professor Huxley, can you  
19 tell me where you're employed.

20 A. University of San Francisco.

21 Q. In what capacity?

22 A. Professor.

23 Q. In what school?

24 A. School of Management.

25 Q. And I'd like to just direct your attention, if

1 you could, to the 2007/2008 school year.

2 Did you -- were you engaged in a project in  
3 which you consulted with Dr. Kao?

4 A. I was.

5 Q. Can you describe that project to the jury.

6 A. Yes. We were having some trouble with a class  
7 that is prerequisite to one of the classes that I teach,  
8 which is quantitative business analysis.

9 And the prerequisite, that is a class that's  
10 called Math 106. I can't remember its formal title.  
11 But the students were coming in with not quite the kind  
12 of training that we needed to have for that  
13 prerequisite.

14 We wanted them to have more training on  
15 spreadsheets, and they were coming in more with  
16 theoretical mathematics as opposed to the spreadsheet  
17 training. And so that was causing some troubles for us.

18 Q. And so what did you -- what did you do with  
19 Dr. -- I believe Dr. Kao and -- I believe another  
20 doctor -- another professor was involved.

21 A. Yes, Professor Wolf, Bob Wolf.

22 Q. So what was the purpose of consulting the math  
23 department for this course?

24 A. It was primarily to see if we could get the  
25 topics -- the topical coverage to be more uniform with

1 regard to the inclusion of spreadsheet material. We  
2 wanted the class to be half spreadsheets and half  
3 introductory statistics.

4 And that was being taught in some of the  
5 sections, but not in all of the sections. And so that  
6 was what was causing a significant number of students  
7 not to have the proper tools when they entered the  
8 course that I and my colleagues were teaching.

9 Q. And how did you get -- how did you get the --  
10 sorry, strike that.

11 How did the process start? Who did you contact  
12 through the math department to sort of get some help?

13 A. I believe I contacted Paul Zeitz because I've  
14 known Paul for so many years. So he was the primary  
15 person, as I recall. Again, I'm in a lot of committee  
16 meetings, and I can't remember exactly, but I think  
17 that's who it was.

18 Q. And ultimately did you understand that Dr. Kao  
19 and Dr. Wolf were being referred to you by the math  
20 department for this work?

21 A. Yes. And I think I also talked to Peter  
22 Pacheco, but I can't -- it's a long -- was a long time  
23 ago.

24 Q. How was working with Dr. Kao?

25 A. Well, we only had just a couple of meetings,

1 and I don't remember anything particularly distinctive  
2 about it.

3 Q. All right. Was he easy to work with, as far as  
4 you could tell?

5 A. In the -- in the committee meetings we had,  
6 there seemed to be no problem, as far as I was  
7 concerned.

8 Q. And did he seem to be cooperative with you?

9 A. Yeah.

10 Q. Did he seem to take your concern seriously?

11 A. Yes.

12 Q. And did you have any problems working with him  
13 at all on this project?

14 A. No. I don't remember. The only thing is, is  
15 it seemed like the problem -- the problem never really  
16 got resolved.

17 That was just the year -- I went away on  
18 sabbatical the following year. And so as a result, I  
19 didn't really have a chance to check firsthand what was  
20 actually occurring with regard to that.

21 So -- but when I came back from my sabbatical,  
22 it appeared to me the problem had not been resolved.  
23 And I was totally unaware of the issues involved with  
24 the math department.

25 Q. Okay. When Dr. Kao began working with you, did

1 anyone give you warnings about Dr. Kao getting angry, or  
2 anything like that?

3 A. No.

4 Q. Have you ever heard anything negative about Dr.  
5 Kao at the university?

6 A. No.

7 MR. KATZENBACH: Okay. That's all I have for  
8 you. I think counsel may have a few questions.

9 THE COURT: Mr. Vartain?

10 MR. VARTAIN: Thank you.

11 Just a few, Professor Huxley.

12 CROSS-EXAMINATION BY MR. VARTAIN

13 MR. VARTAIN: Q. You're not part of the  
14 College of Arts and Sciences; is that correct?

15 A. That is correct. They're two independent  
16 things. We rarely cross paths.

17 Q. So that -- you're what used to be known as the  
18 business school?

19 A. Correct.

20 Q. So you don't really have any occasion to be in  
21 and about the math department, which is in the College  
22 of Arts and Sciences?

23 A. That is correct. We're in separate buildings;  
24 we have separate curriculums; we're separate schools.  
25 So it's a completely autonomous sort of operation.

1 Q. This case is about things that primarily  
2 happened in the spring of 2008 in the Harney Science  
3 Building, part of the College of Arts and Sciences.

4 Is it correct that you were not, on any kind of  
5 a regular basis, over there in the Harney Building in  
6 the College of Arts and Sciences in the spring of 2008?

7 A. That'd be correct.

8 Q. Would it be correct that you were not present  
9 in any math department meetings in that spring?

10 A. That'd be correct.

11 Q. Would it be correct that these professors here  
12 that are listed -- Yeung, Zeitz, Turpin, Needham,  
13 Pacheco, Brown -- you were not in any meetings with them  
14 where Professor Kao was?

15 A. No.

16 Q. Is that correct?

17 A. That's correct.

18 MR. VARTAIN: No further questions.

19 MR. KATZENBACH: Just one follow-up.

20 REDIRECT EXAMINATION BY MR. KATZENBACH

21 MR. KATZENBACH: Q. The School of Business, I  
22 think called the business school, that's located on the  
23 campus, isn't it?

24 A. It is located [sic], yes.

25 MR. KATZENBACH: Thank you.

1 THE WITNESS: Yes.

2 MR. KATZENBACH: That's all I have for the  
3 witness.

4 THE COURT: Jurors, do you have questions for  
5 this witness?

6 I see no hands.

7 May Professor Huxley be excused?

8 THE WITNESS: Thank you, Your Honor.

9 MR. KATZENBACH: Yes, Your Honor.

10 THE COURT: Professor Huxley, thank you very  
11 much. You're free to go.

12 Plaintiff may call his next witness.

13 MR. KATZENBACH: Yes, Your Honor. We'll be  
14 calling Dr. Lenore Terr. One second.

15 (Witness sworn.)

16 LENORE C. TERR, M.D.

17 having been first duly sworn, testified as follows:

18 THE CLERK: Have a seat. Please state your  
19 name and spell it for the record.

20 THE WITNESS: Lenore, L-E-N-O-R-E, Terr,  
21 T-E-R-R.

22 THE COURT: Mr. Katzenbach, you may inquire.

23 MR. KATZENBACH: Thank you, Your Honor.

24 DIRECT EXAMINATION BY MR. KATZENBACH

25 MR. KATZENBACH: Q. Dr. Terr, do you know the

1 plaintiff, John Kao?

2 A. Yes, he's my patient.

3 Q. And how long has he been a patient of yours?

4 A. Since October 2003.

5 Q. And what is your profession?

6 A. I'm a psychiatrist.

7 Q. And does that mean you have a medical degree?

8 A. It does.

9 Q. Could you please take a look at what we've  
10 previously identified at Exhibit 105.

11 And if I might approach, Your Honor?

12 THE COURT: You may.

13 MR. KATZENBACH: Right here.

14 THE WITNESS: Thanks.

15 MR. KATZENBACH: No problem.

16 THE WITNESS: I have it.

17 (Plaintiff's Exhibit 105

18 marked for identification.)

19 MR. KATZENBACH: Q. Can you identify what  
20 Exhibit 105 is.

21 A. It's my curriculum vitae, which is the same  
22 thing as a resumé, only in medicine, you call it that.

23 Q. Okay. And what does that -- just tell us  
24 briefly what Exhibit 105 describes about you.

25 A. Well, it tells about my education; and then it



1 tells about what I did after my education; and then it  
2 tells about my research and my interests; and then it  
3 tells about awards and things like that.

4           And then there's a lot of -- bibliography of 72  
5 different kinds of things that I've written over my  
6 career.

7           MR. KATZENBACH: Okay. At this point, I'd like  
8 to move Exhibit 105 into evidence.

9           THE COURT: Any objection?

10          MR. VARTAIN: No objection.

11          THE COURT: It's received.

12          MR. KATZENBACH: Thank you.

13                   (Plaintiff's Exhibit 105  
14                   received in evidence.)

15          MR. KATZENBACH: Q. Dr. Terr, I'd like to go  
16 over, briefly, some of the items on your CV.

17                   First of all, where did you go to college and  
18 medical school?

19           A. I went to a college called Western Reserve  
20 University, which is now called Case Western Reserve.  
21 And that's in Cleveland, Ohio.

22                   And then I went to the University of Michigan  
23 Medical School in Ann Arbor.

24           Q. And did you have -- did you have any  
25 internships and residencies or fellowships following

1 that?

2 A. Yes. After I graduated from medical school, I  
3 did my internship in pediatrics at the University of  
4 Michigan in Ann Arbor.

5 And then I did two years of general psychiatry  
6 at the Neuropsychiatric Institute, which was the  
7 University of Michigan in Ann Arbor.

8 And then I did two years of child and  
9 adolescent psychiatry, and that was also at the  
10 University of Michigan in Ann Arbor.

11 Q. And do you have any academic appointments in  
12 medical schools?

13 A. Yes. After I finished my training, I went to  
14 Western Reserve University again, which was still  
15 Western Reserve -- it became Case Western Reserve  
16 afterwards -- and I became a -- I guess I was called an  
17 assistant -- no, first I was an instructor in  
18 psychiatry. And I was on the tenure track. And I  
19 was -- I spent five years moving up from instructor to  
20 assistant professor in psychiatry at that university.

21 Q. And where did you go after that?

22 A. I also taught in the law school at Western  
23 Reserve. I -- I had an appointment as a teacher in the  
24 law school, and I would teach psychiatric aspects of --  
25 of legal issues, mainly insanity and criminal issues.

1 Q. And at some point, did you change universities?

2 A. I changed my whole life. At the end of 1970, I  
3 decided, with my husband, to move to San Francisco. And  
4 so -- we really wanted to get out of full-time academic  
5 medicine and wanted to set up a practice, which we did,  
6 at 450 Sutter in San Francisco.

7 And -- but at the same time, because we already  
8 had academic careers, we decided to teach part-time.

9 And at that time, I went to teach part-time at  
10 UCSF, which is the medical school here in San Francisco.  
11 And my husband went to Stanford.

12 Q. Thank you.

13 And how long did you continue teaching at UCSF?

14 A. I'm still doing that. I'm still on their  
15 faculty and I'm still teaching there.

16 I also -- just a year or two later, I got a job  
17 as -- teaching the same kind of criminal law that I was  
18 teaching at Western Reserve -- which I was still doing;  
19 they were sending me back, and I was teaching it for a  
20 week a year -- but I also took on Boalt Hall, which  
21 was -- which is the law school of UC Berkeley.

22 And I taught in two different directions there.

23 I taught with Sandy Kadish; I taught criminal  
24 law with him. So for -- three or four times a year, I  
25 would come over and teach with Sandy.

1           And then I taught family law with Herma Kaye.

2           And I taught with her, as well, three or four times.

3           And then one of my students from that law  
4           school started teaching family law at Davis, and so I  
5           started going to Davis for -- three or four times a year  
6           and taught with her. Her name is Carol Brook. And she  
7           was the professor of family law there at Davis.

8           Q.    And as part of your career, have you served on  
9           any boards or psychiatric associations -- psychological  
10          or psychiatric associations?

11          A.    Well, in psychiatry we have something called  
12          the American Board of Psychiatry and Neurology, Inc.  
13          And it's the governing body of psychiatry, as far as  
14          standards and what subspecialties will be allowed in  
15          psychiatry and what would be the way that psychiatrists  
16          are supposed to perform.

17                And it gives exams. It's like the Bar  
18          Association, or something like that. And it's one  
19          board. And there are eight psychologists and eight  
20          psychiatrists that govern the field.

21                And I was -- between 1988 and 1996, I was  
22          the -- one of eight directors of that board. And I -- I  
23          was the president of the psychiatry part of the board  
24          the last year I was there. So I was -- they called me  
25          the chairman.

1 Q. Thank you.

2 Now, have you received any particular honors  
3 for your work in psychiatry?

4 A. Yeah. Well, I won the Blanche Idelson award  
5 for research in child psychiatry. It's the biggest  
6 award given for doing research.

7 The research I did was on the children of  
8 Chowchilla, who were kidnapped and buried alive in  
9 California. And I did that in 1977, which was the year  
10 following their kidnapping. And then I did it again  
11 five years after the kidnapping, for five years after  
12 the kidnapping.

13 And it was the first study of a whole group of  
14 children who had exactly the same horrible thing happen  
15 to them. And because you had a group of children having  
16 one horrible thing happening to each of these 26  
17 children, you could look at all of the children really  
18 hard and see what commonalities they had. And you could  
19 tell what trauma does to kids.

20 And so it became -- actually, the papers that I  
21 wrote, one of them is the most cited paper in the  
22 American literature in psychiatry. It's looked at more  
23 by people than any other paper that's ever -- so far.

24 I won --

25 Q. Recently.

1           A.     Just to show you that I'm not dead yet, I -- I  
2 won a prize in child psychiatry, the biggest prize in  
3 national child psychiatry, this year from the American  
4 Psychiatric Association. It's the big one of, you know,  
5 making contributions and having taught and having made  
6 just general contributions to the field. So that was  
7 real nice.

8           Q.     And you indicated, I believe -- I don't want to  
9 go through your entire CV, but I'd like to just touch on  
10 a few of them.

11                     If you'd look at your CV, starting on page 7,  
12 if you could, and going on through page 12.

13           A.     Yes.

14           Q.     What is that? It's entitled "Bibliography,"  
15 but what is reflected in that?

16           A.     Well, these are all papers that -- professional  
17 papers that were new pieces of work that I did from the  
18 time -- it starts on page 7 with 1962, when I was just  
19 finishing -- I had I just finished my residency.

20                     And it goes on to -- oh, I hadn't finished my  
21 residency; I'd just finished medical school in '62.

22                     And then it -- it's goes on to things that I --  
23 that I'm writing now, and things that I've just finished  
24 and that have just been published.

25           Q.     And how many separate articles or books are

1 listed on your bibliography?

2 A. There's 72.

3 Q. And what are the types of journals, for  
4 example, that you -- these articles are published in?

5 A. Well, the main one I like to put things into is  
6 American Journal of Psychiatry, which is the journal of  
7 the American Psychiatric Association.

8 I also put a lot into the Journal of Child and  
9 Adolescent Psychiatry. And that's from the American  
10 Academy of Child and Adolescent Psychiatry.

11 Some of the stuff I publish is -- if I'm trying  
12 to go deeper into the psychology of something, I  
13 sometimes publish a longer paper in something called  
14 "The Psychoanalytic Study Of The Child." And that's  
15 just like a deeper probing thing about what goes on in  
16 children's minds.

17 But those -- those, I think, are the main  
18 places. Textbooks -- most of the textbooks on childhood  
19 trauma, you know, I've written the chapters for them.

20 Q. Thank you.

21 Now, in addition to the work that's reflected  
22 on your CV, I'd like -- do you ever get referrals for  
23 work from law enforcement agencies?

24 A. Well, I do, because there was -- because I had  
25 seen all these kidnapped kids, the FBI was really

1 interested in what do you do about rescuing people, and  
2 how do they act when they're right in a situation like  
3 this, and how do you talk to them, and what do you do  
4 when you're suddenly invading an area that there are a  
5 bunch of hostages.

6 And so there -- at that time, the FBI had a  
7 psychologist and a psychology team. His name was Ken  
8 Lanning. And he invited me to come to Quantico and talk  
9 to the FBI agents about how to plan for things like  
10 that.

11 And then Ken Lanning and I stayed in contact a  
12 lot. And so then when the FBI would have problems with  
13 agents, like -- they had an agent who was planted in a  
14 secret place and who couldn't show the real identity of  
15 the agent. And the agent was getting really depressed  
16 but had to stay in the secret place. So then I was  
17 doing psychotherapy on the agent to keep the agent going  
18 under -- under cover. So I've worked with that.

19 I've worked with agents who were afraid  
20 suddenly. One guy who's in charge of a bunch of SWAT  
21 teams suddenly got scared. And he was in charge of the  
22 SWAT teams. And so I -- I turned him around. And, I  
23 mean, things like that. So I've done that forever.

24 I -- some of the agents that I worked with in  
25 the olden days are retired now, and they still come in



1 once a year to check in and say hi, and stuff like that.  
2 I have a good relationship with -- I think -- with the  
3 FBI.

4 Q. Okay. Thank you.

5 Let me just now turn to another area. Are you  
6 familiar with psychiatrists' obligations under what's  
7 called the Tarasoff rule?

8 A. I am.

9 Q. Can you tell the jury what the Tarasoff rule  
10 is.

11 A. Well, it's a rule that originated in  
12 California, but it's now widespread around the United  
13 States. There was a girl at UC Berkeley named Tatania  
14 Tarasoff. And her boyfriend went to Cowell Hospital,  
15 the clinic at Berkeley, which is where they go. And he  
16 said he was going to murder Tatania. And the people who  
17 heard the story from him didn't do anything. And so he  
18 killed her.

19 And so what happened was that a rule was made  
20 in the state of California after several -- after there  
21 was a lawsuit and an appeal. And it became known as the  
22 Tarasoff rule, in honor of this poor girl.

23 And what it meant was that any psychiatrist who  
24 has knowledge that a patient is going to harm someone  
25 else, that the psychiatrist has to make two reports:

1 The psychiatrist has to report to the victim -- the  
2 purported victim and tell the victim that a person is  
3 talking about killing her or him. And so that's the  
4 first part of a Tarasoff report. And the second part of  
5 a Tarasoff is to call the police.

6 And this overrides the confidential  
7 relationship which all doctors and patients have. This  
8 is an override because of the needs of society over that  
9 of the -- of the patient.

10 Q. All right. Now, you talked briefly -- let me  
11 just ask you, on any -- how long have you been seeing  
12 John Kao?

13 A. Well, I saw John in October of '03, is when I  
14 first started seeing him. And I did an evaluation of  
15 him in the fall of '03. And I started seeing him for  
16 treatment directly after that. And I was seeing him  
17 about once a week.

18 And then John left me for about 15 months  
19 between 2004 and July of 2005. And then he came back.  
20 And since that time, he's come approximately once a week  
21 and is still my patient.

22 Q. Now, at any time when Dr. Kao was your patient,  
23 have you ever seen the need -- strike that.

24 That's the first question. Have you ever  
25 issued a Tarasoff report regarding Dr. Kao?

1 A. No.

2 Q. Is it your understanding if Dr. Kao had been a  
3 threat to people at an institution just generally, would  
4 you have a Tarasoff obligation?

5 MR. VARTAIN: Objection. Calls for  
6 speculation. I think --

7 THE COURT: Overruled. Witness may answer.

8 THE WITNESS: Yes, I think that one has an  
9 obligation to an institution. If someone were  
10 threatening an institution in general, or the professors  
11 at an institution, or the English department at an  
12 institution, that one would have to issue a Tarasoff  
13 warning both to the San Francisco police and to the part  
14 of the institution that he was threatening.

15 MR. KATZENBACH: Q. At any time Dr. Kao has  
16 been your patient, have you seen any need whatsoever to  
17 issue any type of warning to any individual or any  
18 institution concerning Dr. Kao?

19 A. No.

20 Q. Now, I'd like to ask you about a few other  
21 things.

22 First of all, you indicated earlier about the  
23 confidential nature of the psychiatrist/patient and the  
24 patient relationship. Could you describe that to the  
25 jury and why that's important.

1           A.     Well, there -- there are three really important  
2 confidential relationships: the relationship one has  
3 with one's doctor -- and a psychiatrist is one who's a  
4 doctor -- the relationship one has to one's clergyman if  
5 one's making confessions and stuff, and the relationship  
6 one has with one's own lawyer.  And those are three  
7 protected relationships in our society.

8                     And that means that in order to talk frankly  
9 with your psychiatrist, with your doctor, you don't have  
10 to worry that that doctor is going to put out an ad in  
11 the newspaper and say "That's what your problem is," or  
12 get on television and tell your problem, or gossip about  
13 your problem with other psychiatrists or -- you can know  
14 that you have the comfort of talking to the psychiatrist  
15 without it running into the risk of having that known to  
16 people around San Francisco, or whatever.

17           Q.     How important is that confidentiality to  
18 treatment?

19           A.     It's the backbone of treatment because why  
20 would anybody go for treatment if they thought that they  
21 went to a blabbermouth for a doctor, who was going to  
22 tell somebody else their secrets.

23           Q.     Thank you.

24                     Now, I'd also like to ask you about a few other  
25 items.  First, did you become aware at some point that

1 the University of San Francisco was asking Dr. Kao to  
2 see a psychiatrist called Dr. Reynolds?

3 A. Yes.

4 Q. Did you come to learn anything about the nature  
5 of that -- of the proposed evaluation that concerned  
6 you?

7 A. Yes.

8 Q. What -- why don't you tell the jury what you  
9 learned and why it concerned you.

10 A. Well, there was a letter from the university to  
11 Dr. Kao. And Dr. Kao showed me this letter. And it  
12 came in the summer of '08, and it was written by a woman  
13 named Martha P. Wade, who was the -- the human  
14 services -- the human resource person at USF.

15 And at the beginning of the letter was a series  
16 of things that were said to be Dr. Kao's problem. And  
17 there was a list of things. And it said numbers of  
18 people had complained of these, but it didn't have any  
19 names of people or -- and the things were things that I  
20 had never seen in Dr. Kao, after knowing him since '03.

21 And this letter had come in '08. So I already  
22 knew him five years, almost once a week -- or usually  
23 once a week.

24 Anyway, it accused Dr. Kao of bumping into  
25 people and jostling them, veering into them. It accused

1 him of staring at them and looking funny at them, making  
2 funny eyes at them, or some kind of facial gesture,  
3 which I had never seen. I think it said that he  
4 drooled. I -- I could look at it and -- but these were  
5 all things that I had never encountered in my time with  
6 Dr. Kao.

7           And he had talked about heavily emotional  
8 things to me. So I had not seen him -- I mean, if he  
9 was talking about being upset about something or angry  
10 about something, he didn't drool and he didn't -- and he  
11 didn't look crazed.

12           And so the beginning of the letter was suspect.  
13 I didn't understand why they had never spoken to him  
14 about this and why it was all in letter form, why, if he  
15 bumped into people and really hurt them or something,  
16 they hadn't just fired him, or whatever you do to people  
17 who are knocking people down.

18           And I -- it made no sense to me, the first --  
19 the first part of it. Why -- why were we hearing about  
20 it now in a letter?

21           And then there was the issue of what they  
22 wanted to do about it. And what they said they wanted  
23 to do about it was to keep him away from his office and  
24 off the campus and suspended from teaching.

25           And they wanted him to go to a Dr. Reynolds.

1 So -- and they wanted him to see this Dr. Reynolds very  
2 shortly, within a few days. And they -- and this was  
3 going to be a nine-hour examination, from 8:30 until 5,  
4 something like that. 8:30 to 5:30, he was to be  
5 available in San Jose.

6 Now, when you --

7 Q. Go ahead. What troubled you about that?

8 A. When -- well, when you're psychiatrically  
9 evaluating a new person, you don't put them in there for  
10 nine hours. That's just not done.

11 If you're trying to get a CIA agent or an FBI  
12 agent ready to be questioned by the enemy, you might do  
13 that. It's sort of like waterboarding. You know, if  
14 you're going to -- if you're going to practice  
15 waterboarding maybe then if they torture you, you won't  
16 crack.

17 And the same thing -- you know, an exam for  
18 nine hours is the same thing as waterboarding somebody,  
19 only it's emotional; it's mental. You can't ask them  
20 psychiatric questions about themselves for nine hours  
21 and not have them undergo terrible stress.

22 And if this isn't a trained agent, or something  
23 like that, that you're trying to train to be a Navy  
24 Seal, or something or other, I -- you know, then -- you  
25 can't do that to people.

1           So what was being proposed was undoable. I --  
2 I -- I would say that, you know, in my opinion it's too  
3 stressful.

4           And the other thing that I didn't get about  
5 this was that Dr. Reynolds' Web site advertised him as a  
6 forensic psychiatrist, which meant that the university  
7 wanted him to see not just a psychiatrist/psychiatrist,  
8 but a psychiatrist who does testimony in courts and  
9 feels comfortable taking on legal problems.

10           And that meant that Dr. Kao had a legal problem  
11 with the university and that the university was getting  
12 ready for some type of legal problem with him.

13           So that didn't seem kosher to me either.

14           Q. Thank you.

15           Now, finally, I'd just like to ask you a little  
16 bit about medication, if you could.

17           During the course of your treatment with Dr.  
18 Kao, have you prescribed him various medications?

19           A. Yes.

20           Q. For what condition?

21           A. He has what we would call double D, or double  
22 depression. He has a major depressive disorder, which  
23 comes and goes. He had one episode in 1999. He had  
24 another episode in 2001, just before he came to me in  
25 2003.



1           And he would get these episodes and have to  
2 have medication. You -- you can get that kind of  
3 depression where you're not sleeping, you're not eating,  
4 you're losing a lot of weight, you cry occasionally at  
5 times you don't want to cry, you have trouble facing the  
6 world, you don't feel really good -- some people with  
7 major depression start thinking about what would happen  
8 if they died and it all just went away.

9           This is not a good disease. And the reason I  
10 call it double D is that at times, he would get  
11 depressed on top of his major depression. He would get  
12 a reactive depression.

13           Like when his mother had ovarian surgery, he  
14 got a reactive depression. And that was on top of the  
15 fact that he also had a biological depression that was  
16 rotating whenever. It would just come on.

17           So that he would get reactive depressions. And  
18 the ones I can think about are his mother's -- she had a  
19 major ovarian -- operation for ovarian cancer. And it  
20 turned out, you know, it was -- it was a benign tumor of  
21 the ovary. That's very unusual. Ovarian cancers are  
22 terrible diseases and ... awful killer.

23           And so he was all ready for this, and then it  
24 turned out okay after they got the path report and  
25 everything back. That was one of his reactive

1     depressions.

2             Another one was that he was recently engaged to  
3     a girl named Amy. And he had to break the relationship  
4     up because it just wasn't working as well as it should  
5     have for a real engagement, and getting married shortly,  
6     and all that.

7             So he got reactively depressed again.

8             And I've had to give him medication to try to  
9     settle the depression down. And that's a problem with  
10    Dr. Kao because he is very sensitive to medication.  
11    He -- he had been on Prozac and had visual illusions,  
12    strange visual phenomenon on Prozac, which is my  
13    favorite drug for depression. So I couldn't give him  
14    that.

15            Then he had been on Paxil, which he had taken  
16    with the doctor just before me. And that was -- he took  
17    it for about a year and a half. And I don't think it  
18    was doing him any good anymore. And so I had to find  
19    one. And so when I started giving him medication for  
20    depression in '06, I had to fish for the right  
21    medication.

22            I started with one which is slightly different,  
23    called Effexor, or venlafaxine. And that didn't -- he  
24    didn't respond well to it.

25            I tried Cymbalta, which is like venlafaxine, in

1 the same family. He didn't respond well to it. His  
2 mother was looking up, in libraries, other pills that he  
3 could try. And she told him she thought he might do  
4 well on a pill called Celexa. So we tried that one, and  
5 it worked for a while, but it didn't last long.

6 And so then I got the idea, which is a standard  
7 of practice today with biological depressions, is -- I  
8 got the idea of putting him on one medication, but then  
9 starting to augment it with other things.

10 So I got him on Lexapro, which is the mirror  
11 image of Celexa.

12 And I supplemented it with lithium, which was  
13 to -- just a little lithium to boost the Lexapro.

14 I supplemented it with Synthroid, which is  
15 thyroid hormone. I gave him tiny doses of that to  
16 supplement the Lexapro.

17 And I also gave him -- oh, at one time, I gave  
18 him another -- a second antidepressant called bupropion,  
19 which is Wellbutrin. And I gave him that one to  
20 supplement the Lexapro. Not because -- not -- it was  
21 two antidepressants of different families, to try to  
22 supplement the Lexapro.

23 There was one other thing I did to supplement  
24 the Lexapro. Let's see. So there was lithium -- oh,  
25 and I gave him a drug which is now advertising all over

1 the map, but at the time, in '06, it was -- it was  
2 available, and it was known as a supplement, Abilify.

3 Now Abilify has come out, and it's on the TV  
4 all the time now; take it for your depression. But it's  
5 an antipsychotic that helps depression. And I don't  
6 know why it works, but it did help John.

7 So he was on Lexapro as the base drug, when we  
8 finally arrived at it, which took some arrival because I  
9 had to try a whole bunch of other antidepressants.

10 And then to supplement that, he was on bits of  
11 Synthroid; he was on bits of lithium, not a whole dose  
12 of lithium that you would take if you were manic or  
13 something like that, but a smaller dose, like  
14 300-milligram; he was on -- he was on -- did I say  
15 Synthroid? -- Abilify, five milligrams, not what you  
16 would give to a really psychotic person, just a small  
17 amount to, again, supplement the Lexapro; and -- and  
18 Wellbutrin at one time.

19 Q. Thank you.

20 Now, during the course of time you were  
21 prescribing these medications for Dr. Kao, was he seeing  
22 you approximately one time a week?

23 A. Yes. Occasionally he'd come twice in a week.  
24 Occasionally he wouldn't see me for two weeks 'cause he  
25 was doing something or something was going on.

1           So it -- you know, I can't say it's clearly  
2 once a week for -- you know, exactly like a clock.  
3 But -- but it would average out about once a week.

4           Q.    And were you, throughout that period,  
5 monitoring his use of the medications?

6           A.    I was.

7           Q.    And did you see anything unusual or disturbing  
8 in that regard?

9           A.    He took one medication called Lamictal, and he  
10 got a rash, which can be a fatal thing. And we took him  
11 right off, and so it went away.

12          Q.    Other than that, did you see any other  
13 problems?

14          A.    No. I watched his lithium levels on occasion,  
15 just when it would occur to me. It turned out to be  
16 about once a year. And they were okay. They were  
17 usually very low. They were too low if he had -- if he  
18 had been manic, the lithium levels would have been too  
19 low. But they -- they were never poisonous. They were  
20 never over.

21          Q.    Finally, you indicated -- you talked about some  
22 incidents of reactive depression. Do you recall that?

23          A.    Yes.

24          Q.    Did anything -- did -- did Dr. Kao show any  
25 reactive depression from anything that happened at USF?

1 A. Yes.

2 Q. Can you describe that to the jury.

3 A. Well, I think the first one was before I ever  
4 saw him. He had had a problem because he had taught at  
5 the art school for USF. It was a combined program. And  
6 he got unfairly criticized at the end of completing a  
7 very hard schedule of teaching this math at the art  
8 school. It's not easy, necessarily, to teach art  
9 students math.

10 And anyway, he got criticized. And he had to  
11 go to the university and correct the criticism. And  
12 this happened before I had ever seen him. It was when,  
13 I think, he was working with Dr. Parris.

14 Q. Yeah.

15 A. But I think that that had bothered him. And he  
16 did mention it early in the time that I got to know him.

17 Then he had a problem again with Dr. Parris.  
18 And I had the letter from Dr. Parris, which -- Dr.  
19 Parris wrote a letter to the university saying that John  
20 had to take a week or two off because he had put him on  
21 Prozac and he was having illusions; he was seeing  
22 things. And it was a side effect of the Prozac.

23 And so John told me that what happened was that  
24 rather than let him come back to teach his class after  
25 two weeks -- he was all finished with the illusions, and

1 he was all finished with the Prozac, and there was no  
2 more problem -- the university -- the dean wouldn't let  
3 him come back and said that, in fact, if he wanted to  
4 come back, he would have to be monitored by another math  
5 professor, who would come to his class and make sure  
6 that he wasn't acting weird.

7 And also, he would have to have a personal  
8 interview with this dean -- who's not a psychiatrist or  
9 anything, but -- in order to be allowed back.

10 So it was a strange combination of things. And  
11 I think John was depressed about that.

12 And then when I started working with John, he  
13 had a number of things at the university that were  
14 depressing him. He was the only -- he's  
15 Chinese-Japanese. He was the only Asian in an all-white  
16 department. There were no women in his department at  
17 that time. He felt that he was too alone, too secluded,  
18 that not enough people were friendly or tried to know  
19 him or tried to communicate with him. He felt isolated  
20 in a way.

21 When everybody would be having a baby shower  
22 for somebody, he would pitch in and pay his amount, and  
23 then they would leave his name off the card or -- just  
24 slights like that. And they were beginning to get him,  
25 I think, depressed about things.

1           And in the process of this, in the process of  
2 reacting to it, I think he wanted to write, within the  
3 university rules, some kind of a complaint that could  
4 set in motion an investigation so that the university  
5 would fix itself or somehow do better.

6           Q.    You -- did -- at some point, you were aware  
7 that -- we talked about Dr. Reynolds' examination.  At  
8 some point, you became aware that Dr. Kao was terminated  
9 from USF?

10          A.    Yes.

11          Q.    How did that affect him?

12          A.    Well, that really depressed him and -- I mean,  
13 I'm an optimistic person.  And I would say "Well, you  
14 know, you're a great mathematician.  Maybe you can get  
15 another math job."

16                "No, I'm finished with math.  I can't do  
17 anything more with math.  I'm done.  They killed me in  
18 math."

19                I would -- I would say "Why don't you write a  
20 math book now and get famous or something, and -- and  
21 maybe you could do that."

22                "No, nobody would ever believe my book because  
23 I've been fired from a university and I've been knocked  
24 off the tenure track."

25                And I couldn't -- I mean, I've been trying to



1 work with Dr. Kao about restructuring his life. And I  
2 really do think that what happened at the university got  
3 between him and his fiancée. He didn't feel he was an  
4 adequate kind of person to raise children or have a  
5 family and to take on this marriage.

6 It was a very, very nice Asian family that he  
7 was involved in. And he didn't think that he was worthy  
8 of that kind of a relationship.

9 THE COURT: Ladies and gentlemen, remember the  
10 admonition. Do not form or express any opinion on this  
11 case until it's finally submitted to you for a decision.  
12 Do not discuss among yourselves or with others until  
13 that time. Please be back in your places at 3:30  
14 according to the courtroom clock.

15 (Recess taken.)

16 THE COURT: Jurors and alternates are all  
17 present. Counsel for both sides are present. Dr. Terr  
18 is on the stand.

19 MR. KATZENBACH: I have a few more questions,  
20 Your Honor.

21 THE COURT: Pose them.

22 MR. KATZENBACH: Q. Dr. Terr, just to clarify,  
23 is the Tarasoff warning limited to cases where somebody  
24 just would kill somebody, or is it broader that?

25 A. I think it's broader than that. If one

1 attempts to -- if one intends to do serious harm to  
2 somebody -- you're going to throw acid in their face, or  
3 something like that -- one -- I would have to do a  
4 Tarasoff warning.

5 Q. Okay. And in addition, have you seen anything  
6 in your treatment of John Kao that indicates that he's a  
7 danger to anyone at University of San Francisco?

8 A. I've seen absolutely nothing that would  
9 indicate that he's a danger.

10 MR. KATZENBACH: Thank you.

11 Finally, Your Honor, at this point -- I didn't  
12 formally ask, I'm sorry -- I didn't formally ask the  
13 court to qualify Dr. Terr as an expert. And I would so  
14 move.

15 THE COURT: All right. Define the field of  
16 expertise that you want.

17 MR. KATZENBACH: Psychiatry.

18 THE COURT: Any objection?

19 MR. VARTAIN: No objection that she's a  
20 qualified psychiatrist.

21 THE COURT: Declare Lenore Terr, then, to be an  
22 expert qualified to offer opinions in her area of  
23 expertise: psychiatry.

24 MR. KATZENBACH: Thank you, Your Honor.

25 MR. VARTAIN: Actually, Dr. -- may I proceed,

1 Your Honor?

2 THE COURT: Go ahead.

3 CROSS-EXAMINATION BY MR. VARTAIN

4 MR. VARTAIN: Q. Actually, Dr. Terr, you're  
5 not just a psychiatric; like Dr. Reynolds, you're a  
6 forensic psychiatrist, aren't you?

7 A. Well, yes.

8 Q. In fact -- in fact, you even have that on  
9 your -- not the CV you brought today, but other of your  
10 materials. It says that you are a forensic  
11 psychiatrist.

12 A. Well, I do forensic psychiatry. I teach it.

13 Q. Are you a forensic psychiatrist, Dr. Terr? Yes  
14 or no.

15 A. I am not a board-certified forensic  
16 psychiatrist.

17 Q. But you are a forensic psychiatrist, in the  
18 sense that you work in that area of law, in psychiatry?

19 A. Yes.

20 Q. In fact, you teach at law schools, correct?

21 A. Yes.

22 Q. So you and Dr. Reynolds have something in  
23 common, don't you? You're both forensic psychiatrists.  
24 Isn't that --

25 A. No, I'm not --

1 Q. Isn't that true?

2 A. No, that's not true, and I'll tell you why not.

3 Q. You've answered my question, Dr. Terr.

4 THE COURT: Dr. Terr can give an explanation of  
5 her answer.

6 THE WITNESS: I don't practice forensic  
7 psychiatry as the main thing I do. I do one case at a  
8 given time, and I'm seeing patients -- other kinds of  
9 patients all the time. So I do it as a very small  
10 aspect of what I do.

11 Over the years, it mounts up. If you see one  
12 forensic case at any given time, then over the years,  
13 you've seen a number of them. But nothing like a person  
14 who's doing full-time forensic psychiatry being hired by  
15 lawyers and not seeing patients.

16 MR. VARTAIN: Q. Dr. Terr, you are hired by  
17 lawyers from time to time, aren't you?

18 A. From time to time. One at a time.

19 Q. You were hired by -- I'm sorry.

20 You were hired by Mr. Katzenbach to do a legal  
21 case, weren't you?

22 A. No. Not this case. Is that what you're  
23 talking about?

24 Q. Not this case, no. Isn't -- weren't you hired  
25 by Mr. Katzenbach to do a legal case --

1 A. No.

2 Q. -- back in the --

3 A. No.

4 Q. -- 2000- --

5 A. I wound up having to do it. But it was a  
6 person who came to me for treatment and then happened to  
7 be going to Dr. -- to Mr. Katzenbach for some legal  
8 work. And I wound up having to go to court on that  
9 case.

10 Q. Okay.

11 A. But I was not hired by Mr. Katzenbach in any  
12 way to do that case.

13 Q. But you are hired from time to time by lawyers  
14 to testify as an expert witness?

15 A. One at a time, yes.

16 Q. One at a time, as in one case at a time,  
17 correct?

18 A. Yes.

19 Q. Okay. And you told me in your deposition --  
20 you did describe yourself as a forensic psychiatrist,  
21 didn't you?

22 A. Well, yeah.

23 Q. Okay.

24 A. But not as -- it's just not the main thing I  
25 do.

1 Q. That's fine. You also are a child  
2 psychiatrist?

3 A. That's true.

4 Q. And wouldn't that be sort of the main thing you  
5 do?

6 A. It's the main thing I do research in.

7 Q. Now, Dr. Terr, you remember that we spent quite  
8 a bit of time in Mr. Katzenbach's office where you gave  
9 your deposition in this case? You remember that?

10 A. Yes.

11 Q. And giving depositions is something that you're  
12 pretty familiar with, correct?

13 A. Yes.

14 Q. In your practice in forensic psychiatry, being  
15 an expert witness and actually being a psychiatrist, you  
16 have given many depositions, correct?

17 A. Yes.

18 Q. Now, in that particular deposition that you  
19 gave in this case, I actually asked you some questions  
20 about whether from what Dr. Kao told you in the period  
21 of June 2008, when he got that letter from the  
22 university that said there were reports that he was  
23 bumping people -- do you remember that you testified in  
24 that deposition that from what Dr. -- from what Dr. Kao  
25 told you, that well could have been true that he was

1 bumping people? You remember that?

2 A. That I said that that well could be true that  
3 he was bumping people?

4 Q. Yes. You said that under oath, didn't you?

5 A. I don't know where I said that, really.

6 Q. So is it that you don't recall whether you said  
7 that under oath?

8 A. I said that he had a lithium tremor. I said  
9 that he may not have been aware that people felt bumped.  
10 I said that the halls were -- were narrow and that there  
11 was bumping and jostling there, but that I did not feel  
12 that he had intentionally -- and I think I was pretty  
13 clear about it -- that he had intentionally bumped into  
14 people.

15 But I did have him on medications that could  
16 have made him a little awkward. Lithium causes a  
17 tremor, and Abilify is connected with, in some people, a  
18 little awkwardness as well, while they're taking it.

19 And so there are two medications that he was  
20 taking that could have caused him to be a little  
21 awkward. But I --

22 Q. Okay.

23 A. In a frightening way, to be bumping people, I  
24 never said that I agreed with that.

25 Q. Well, would you -- let me read you -- see if I

1 can refresh your recollection.

2 Would you like to read along with me in your  
3 deposition?

4 A. If you can find it.

5 MR. VARTAIN: Mr. Katzenbach, I'm going to read  
6 page 95, line 15.

7 Q. I asked you the question, Dr. Terr, but you  
8 told me just now that in fact -- that in fact that could  
9 well have been true that he was bumping or nearly  
10 bumping into people in a manner that suggests intent.

11 You answered: "I mean, if there's one  
12 truth in that letter, does that make -- does  
13 that mean the whole letter's true? I don't  
14 understand this. You're saying that because  
15 I go over with him and I find one thing in  
16 this letter that potentially could have some  
17 truth in it, that therefore the rest of the  
18 letter's true?"

19 Question, "No, I'm not saying that.  
20 I'm just trying to get" --

21 Answer, "Well, I don't know what you're  
22 saying."

23 Question, "I'm just trying to get it  
24 clear that your testimony is that the part  
25 of the bumping into people was something



1           that, based on what Dr. Kao told you, could  
2           very well have been true."

3           Answer, "That could have been true."

4           A.    I didn't say it was true.  I used a qualifying  
5           verb.  "Could" means it could be.

6           I don't know.  He was not aware of it.  And I  
7           knew that I had him on some medicine that made him a  
8           little bit bumpy.

9           Q.    Okay.

10          A.    But --

11          Q.    I'll accept that.

12          A.    -- I used a qualifying verb.  And the meaning  
13          of my sentence is in the qualifier.

14          Q.    I'll accept that.  It could have been true.  
15          The bumping reports could have been true, from what you  
16          said.  I'll accept that.

17                 Now, Dr. Terr, remember you told me in that  
18          deposition that Dr. Kao had something called an  
19          obsessive-compulsive personality?

20          A.    Yes.

21          Q.    He's had that since you became his patient --  
22          became his doctor and he your patient, correct?

23          A.    Well, personality is something that -- is just  
24          something that characterizes your personality.  It's not  
25          a disease; it's just what kind of a person you are.  If

1 you're meticulous and perfectionist, if you -- you're  
2 obsessive-compulsive, you have that type of trend in  
3 your personality. That's all I meant.

4 Q. Exactly. That personality trait is one that  
5 comes with you from young years, and you take [sic]  
6 through it in your childhood, like many personality  
7 traits, correct?

8 A. Yes.

9 Q. But remember you told me in the deposition that  
10 one of the things about a person with  
11 obsessive-compulsive personality is that they have  
12 trouble in recognizing their own levels of anger.

13 Didn't you tell me that?

14 A. Yes.

15 Q. And remember I told you in the deposition that  
16 one of the issues was the university didn't know if Dr.  
17 Kao was understanding how angry he was acting.

18 Remember I told you that?

19 A. No, I don't remember you telling me that.

20 Q. But -- but you told me that a person with the  
21 personality trait of Dr. Kao, obsessive-compulsive,  
22 generally has trouble -- quote, "have trouble in  
23 recognizing the levels of their own anger," close quote.

24 Is that true?

25 A. That's true.

1 Q. So if a person has trouble recognizing the  
2 levels of their own anger, then it would be hard to take  
3 their word for it when they say "I wasn't enraged" or "I  
4 wasn't very angry"?

5 A. Not so.

6 Q. Hmm. Maybe phrase the question a little  
7 differently than "take their word for it."

8 If you were their employer and you were worried  
9 as to how enraged they truly were inside, if you knew  
10 that Dr. Terr told you that this person has a particular  
11 personality trait that, quote, gives them, quote,  
12 "trouble in recognizing the levels of their own anger,"  
13 close quote, as their employer, you'd want to get some  
14 more information than just what they're telling you,  
15 correct?

16 A. Not necessarily.

17 Q. Okay. I'll accept --

18 A. I -- you know, I need to explain something  
19 here.

20 People with obsessive-compulsive personality  
21 don't walk around seething with anger. They use  
22 intellectualization or they use perfectionism to cope  
23 with it. And so you never see that they have ambivalent  
24 feelings.

25 And I did explain in my deposition to you that

1 they feel both love and anger at the same time. And so  
2 they have -- they have a sort of a balance about them.  
3 And they do not walk around enraged.

4 There's another kind of personality called the  
5 impulsive personality that does walk around, sometimes,  
6 on terrible impulses of rage.

7 But John does not have that. He -- he's a  
8 perfectionist. He's intellectual. He's cool. And he  
9 doesn't recognize sometimes when he needs to recognize,  
10 to himself, about anger. But not because he's walking  
11 around seething. Obsessive-compulsive people are very  
12 controlled and very cool.

13 Q. Well, that was a different question, is  
14 whether -- how much anger he has. I haven't gotten  
15 there yet.

16 You've answered the first question, which is,  
17 he is a person who doesn't recognize the level of  
18 whatever anger he has. Fair enough? Is that correct?

19 A. Yes.

20 Q. Okay. We'll get later to the issue of how much  
21 anger he had against these people.

22 But you yourself -- I want to make this clear,  
23 Dr. Terr, because you're making opinions, but you  
24 actually were never at the university. You personally  
25 didn't observe the interactions between your patient,

1 Dr. Kao, and Professor Stephen Yeung, correct?

2 A. Correct.

3 Q. You personally didn't observe the interactions  
4 between your patient and Professor Zeitz, did you?

5 A. Correct.

6 Q. Nor with -- between him and Dr. Turpin?

7 A. True.

8 Q. You don't know what exactly happened in that  
9 parking lot, correct?

10 A. I knew the week that it happened that something  
11 had happened. And John told me his version of what  
12 happened.

13 Q. Okay. But you weren't --

14 A. And so at the time that this event happened, I  
15 knew that an upsetting event to John had happened.

16 Q. Okay.

17 A. And he related it to me.

18 Q. Okay. You weren't present with [sic] any of  
19 the incidents between Professor Needham and your  
20 patient, Dr. Kao?

21 A. That's right.

22 Q. Nor with any incidents between Professor  
23 Pacheco and Dr. Kao?

24 A. That's correct.

25 Q. Nor Brandon Brown?

1 A. That is correct.

2 Q. Nor Mrs. Mary Needham, Tristan's wife, correct?

3 A. Correct.

4 Q. You don't know if these people genuinely had  
5 personal safety worries because of things Professor Kao  
6 did, correct?

7 A. I don't know those people, and so I can't know  
8 about their own worries.

9 Q. Right. That's fair enough.

10 Now, you told the jury about the Tarasoff rule.  
11 But let's finish the rule, because the rule only allows  
12 the psychiatrist of the patient to break the privacy in  
13 certain limited situations; isn't that true?

14 A. Yes.

15 Q. You just -- as a psychiatrist, you just can't  
16 go around calling up University of San Francisco and  
17 telling them whatever you want about your patient,  
18 correct?

19 A. Of course.

20 Q. And you have to -- you, the psychiatrist, have  
21 to make a personal assessment whether there is a genuine  
22 threat from your patient, John Kao, to either the campus  
23 as a whole or to a specific person, before you can break  
24 privacy and call the university?

25 A. That's correct.

1 Q. So let's talk to the jury about what it is has  
2 to happen before you can break the privacy.

3 You -- isn't it true you have to believe in  
4 your heart of hearts that your patient is going to do  
5 something physically harmful to that person or persons?  
6 And it has to be specifically, correct?

7 A. A psychiatrist doesn't get heart beliefs. I  
8 can't go --

9 Q. Okay.

10 A. -- with your language, Mr. Vartain.

11 Q. I'll change it.

12 A. I -- there are a group of things that indicate  
13 to a psychiatrist, in a scientific way, whether or not  
14 somebody is really dangerous, violent.

15 Q. But didn't you --

16 A. And in that situation, a psychiatrist does not  
17 go by his heart of hearts or her heart of hearts; the  
18 psychiatrist goes by putting together a whole group of  
19 things which are known to be connected with violence and  
20 then decides whether to make the warning.

21 Q. Did you -- did you ever get a list of the  
22 people from the university, from Dr. Kao -- Yeung,  
23 Zeitz, Turpin, Needham, Pacheco, Brown -- and ask him  
24 point-blank --

25 THE COURT: Mr. Vartain, don't lean on the

1 bench.

2 MR. VARTAIN: I'm sorry. Sorry.

3 Q. -- "Do you intend any physical harm on that --  
4 each person"?

5 A. I received this list of people when the lawsuit  
6 was filed and after a -- it was a demand that the names  
7 of these people somehow come out, so that it would be  
8 possible to understand what their gripe was.

9 And it wasn't until long after 2008 and there  
10 was a lawsuit. And then there was a -- they have to get  
11 the evidence ahead of time. And they ask for materials  
12 and things.

13 And when that happened, we had a number of  
14 conversations about what could have happened with these  
15 people, what these people might have misconstrued, or  
16 construed, or whatever it was. But we never knew this  
17 in 2008. We only found out sometime perhaps in 2010.

18 And among the conversations that I've had with  
19 John have been conversations about "What was your  
20 situation with this person" or "that person" or "this  
21 person?"

22 And -- and it's interesting that some of the  
23 little incidents that he had had where he was telling me  
24 things in therapy back in '7 and '8 -- '07 and '08 were  
25 just so blown up and so different from the standpoint of



1 these other reports, that it was really hard to see how  
2 they were the same thing.

3 Q. Dr. Terr, exactly. The version Dr. Kao gave  
4 you turned out to be very different from the versions of  
5 these six people, correct?

6 A. Yes.

7 Q. And did he tell you that he thought all six of  
8 them were lying?

9 A. Yes.

10 Q. Hmm.

11 A. I --

12 Q. You've answered my question.

13 A. I want to say something.

14 There is such a thing as mass hysteria.  
15 There's a school that just has an episode right now,  
16 where a lot of people are having tics. I don't know if  
17 you've been hearing it on television. But everybody --  
18 all these teenagers in high school are having tics. And  
19 now somebody else in the community has tics.

20 There are situations where people get  
21 hysterical and feed each other. And they aren't  
22 necessarily lying; they're just all upset.

23 And so there are other interpretations to the  
24 way that everybody created a story about Dr. Kao that he  
25 doesn't see as having anything to do with his behavior.

1           And so I can't stand here and say that they  
2 were lying.

3           Q.    Fine.  And you can't also stand here and tell  
4 this jury that these six mature professors, who had  
5 worked there for years, are symptomatic of mass  
6 hysteria?  You can't say that either?

7           A.    I say that there are a number of different  
8 things that could -- gossip can do this; the game of  
9 telephone can do this.

10          Q.    But, Dr. Terr, you're not saying -- it is  
11 not -- you're not saying that it's your opinion that  
12 these particular people are a product of this mass  
13 hysteria you're talking about; isn't that true?

14          A.    I'm saying I don't know these people.

15          Q.    Fine.

16          A.    But I know how people work as groups.  And  
17 there have always been mass hysterias among people.  
18 There's one that's right -- in the news right now, if  
19 you want to see it.

20                But there always have been.  And there always  
21 have been people who have fed each other with stories  
22 and get very excited about them.  And that is one  
23 possible explanation.

24          Q.    And there are others, namely, that it's true,  
25 that they actually do have personal safety worries.

1 That's a possible explanation, true -- as well; isn't it  
2 true?

3 A. From my observations of Dr. Kao over a long  
4 period of time, from '03 until now, he is not a bumper.  
5 He's not a -- he doesn't do these things. He's not a  
6 wild-eyed maniac. He is not a drooler. He doesn't do  
7 the things that he was accused of doing.

8 Q. Ma'am, did you --

9 A. I'm not "ma'am."

10 Q. Doctor, did you ever see him with his fists  
11 clenched, like we saw in the video of his deposition?  
12 Have you ever seen him like that?

13 A. I have not seen the video --

14 Q. Okay.

15 A. -- of his deposition.

16 Q. Okay. Have you ever seen him in a situation  
17 where he was very, very angry at you?

18 A. At me?

19 Q. Yes.

20 A. No.

21 Q. Have you ever seen him in a situation -- that  
22 is, observe what happens to his face and his hands --  
23 when he's very, very angry at someone else?

24 A. He has not shown that kind of behavior at my  
25 office.

1 Q. Okay. You have not seen him outside of your  
2 office; isn't that true?

3 A. In my waiting room, he has to deal with other  
4 patients. He has to deal with my receptionist, of whom  
5 there are some aggravations at times. And he has never  
6 lost it with anybody in my office.

7 And there are times when somebody forgot an  
8 appointment, or something happens. As you all know,  
9 when you go to the doctor's office, it doesn't always  
10 work out successfully.

11 He has never been reported by any of the people  
12 who work for me to have lost his temper.

13 Q. Okay. I appreciate that.

14 But you -- you don't have any firsthand  
15 information of his losing his temper or not in the  
16 workplace, correct?

17 A. That's right.

18 Q. You have mentioned that you've been his doctor  
19 since --

20 A. '03.

21 Q. -- '03. And then you stopped for, I think, Dr.  
22 Terr, for a period of about a year?

23 A. He stopped for a year and three months.

24 Q. Okay. So then you resume in 2005?

25 A. Yes, in the fall -- or I guess it was the

1 summer -- summer of '05.

2 Q. Okay. And you've been continuously seeing him  
3 from '05 till the present?

4 A. Yes.

5 Q. Six years?

6 A. Yes.

7 Q. How many appointments would you say there's  
8 been per year?

9 A. I --

10 Q. Thirty?

11 A. This would be a guess, but I would say  
12 something like between maybe 40 -- maybe 45 -- with  
13 vacations and stuff, maybe averaging 40.

14 Q. What is the fee that you charge?

15 A. \$225 an hour.

16 Q. Do you expect to continue to serve as his  
17 doctor in the future?

18 A. What was that question? I --

19 Q. I said do you expect to continue to be his  
20 doctor in the future?

21 A. I don't know.

22 Q. Okay. Now, you told the jury that you thought  
23 that his depression episode in 2002 was caused by  
24 something that happened in year 2000.

25 Did I hear that correctly?

1           A.    I said that part of his depression in 2002 was  
2 probably precipitated by it, but it sounded like his  
3 depression in 2002 was also biological.

4           Q.    Do you know that his doctor -- you weren't his  
5 doctor in 2002; isn't that true?

6           A.    That's correct.

7           Q.    You weren't treating him at the point in time  
8 that you're saying that probably his depression was  
9 partially caused -- or his depression exacerbation was  
10 partially caused by my client, the university; isn't  
11 that true?

12          A.    I'm saying that by his history, he had a  
13 depression which had a couple of precipitants. One was  
14 his own biological cycling depression --

15          Q.    So --

16          A.    -- and the other was that he had gone through  
17 what he considered a very disturbing episode at the  
18 university.

19          Q.    But, Dr. Terr, my point is, you weren't his  
20 doctor in the 2002 time period when you're saying that  
21 the university caused that problem where he was on leave  
22 of absence.

23          A.    I'm saying that he attributed the cause to be  
24 the university.

25          Q.    Okay.

1           A.    I'm not saying that I knew -- he gives a  
2 history.  And medicine is based on the patient's  
3 history.

4           Q.    But --

5           A.    If you say that you ate a bad banana and now  
6 you're vomiting, and you're in my office, I have to take  
7 your word that you ate a bad banana.  It may turn out  
8 that I check out some things and I find out that you  
9 have a parasite and that it wasn't a bad banana.  But  
10 that would be the advantage I would have if I was  
11 working directly with you.

12                         But two years from now, if you come to me and  
13 say you ate a bad banana and you had to go to the  
14 hospital, I'll buy it.  I'll buy your history.  That's  
15 part of your history.  You give it to me, and then I  
16 work with it.

17           Q.    'Cause you're the doctor; you need to accept  
18 what the patient says?

19           A.    The doctor takes the patient's history --

20           Q.    Okay.

21           A.    -- and uses it, yes.

22           Q.    But you don't know on your own that in fact the  
23 university gave Dr. Kao a bad banana in 2002; isn't that  
24 the case?

25           A.    I take a patient's history and then look for

1 objective findings that back it up. But --

2 Q. But you weren't even his doctor in 2002.

3 A. No.

4 Q. Therefore, you didn't look for the evidence  
5 back then.

6 A. A doctor doesn't deliver a baby, let's say,  
7 gets -- the pediatrician gets the baby the day after  
8 it's delivered. Has to take the word of others about  
9 how the delivery went. It's -- the pediatrician isn't  
10 there. So all medicine depends on other aspects of  
11 medicine.

12 I talked to Dr. Parris, who had been his  
13 doctor. And -- and I had a pretty good idea of what the  
14 problem was before he came to me.

15 Q. But you read Dr. Parris's letter, didn't you?  
16 He wrote a letter about what happened in 2002, remember?

17 A. Yes, he did.

18 Q. And he said in the letter that Dr. Kao's  
19 problem was two things: One, he had a problem taking  
20 care of his mom. His mom exacerbated his depression  
21 back then, correct?

22 A. That's not the letter I saw.

23 Q. Really. And -- we'll get it out.

24 But the other thing was that he had a bad  
25 medication episode, correct?



1           A.    He had a side effect to a medication.  That's  
2 what I saw in the letter.

3           Q.    Now, either way, you would agree with me, as  
4 you weren't the doctor in 2002?

5           A.    I certainly agree that I wasn't his doctor in  
6 2002.

7           Q.    And that because you weren't his doctor, then  
8 you don't really know what was going on to cause his  
9 depression at that point; we'd have to ask Dr. Parris,  
10 right?

11          A.    No.  I take a history from a patient and I  
12 assume that a patient is giving me a correct history.

13                   He was not in any way having a law fight with  
14 the university.  Nothing was going on between him and  
15 the university.  And in his perspective, he had gotten  
16 upset about something at the university.

17          Q.    So your -- your view is that in year 2002, he  
18 was still upset about a grievance that happened in year  
19 2000?

20          A.    Watch yourself.  You're stumbling.  You're  
21 bumping into things.  I'm going to --

22          Q.    I'm not bumping into people.

23          A.    I'm going to get very afraid.

24          Q.    I'm not bumping into people.

25          A.    Making a lot of noise here.

1 I -- um ...

2 Q. Let me ask the question again.

3 Are you telling the jury that in year 2002,  
4 when you weren't the doctor, Dr. Kao was still upset  
5 about something that happened in 2000?

6 A. Mildly upset, yes.

7 Q. Okay. You know, though, that the grievance he  
8 had in 2000 was settled in his favor?

9 A. It was.

10 Q. Okay.

11 A. However, he also mentioned that he looked for  
12 it in his record, and it had been expunged. And he was  
13 the only one now holding a record of it.

14 Q. Okay. I want to just do a little more with the  
15 Tarasoff.

16 When in 2008 Dr. Kao brought you the letter  
17 from the university that talked about the bumping and  
18 the angry faces and all that, you weren't able to  
19 actually do a Tarasoff conversation with him as to any  
20 specific people 'cause you didn't have any names of  
21 specific people; is that true?

22 A. Well, I could have a Tarasoff conversation with  
23 him without the specific names: "Did you do these  
24 things?" And I -- "with anybody?"

25 And I -- I did have that conversation. But I

1 couldn't get specific about "Did you do it with Dr.  
2 Yeung" or "Did you do it with Jennifer Turpin?"

3           The conversation was "Have you done this with  
4 anybody?" And Dr. Kao was not aware of having done it  
5 with anybody.

6           Q.    That's not a Tarasoff question, is it, Doctor,  
7 bumping people or being angry? The Tarasoff question is  
8 as follows: Do you intend to kill that person or cause  
9 them some grievous harm? Isn't that the key question?

10          A.    No.

11          Q.    You don't have to ask the person -- the patient  
12 "Do you intend to harm that person physically"?

13          A.    Not in that way. I don't think that you would  
14 get that information. I think you would -- you would  
15 say -- and I couldn't narrow it down to any specific  
16 people -- but "Have you done these things, and have you  
17 done worse than these things or less than these things,  
18 or is there any way that there's a misunderstanding  
19 here?" I was looking for violence.

20          Q.    And he --

21          A.    And --

22          Q.    He denied any violence?

23          A.    And he denied any violence.

24          Q.    Okay. And did you then inform the university  
25 of your opinion that he denied violence?

1 A. That's not a Tarasoff warning. That is --

2 Q. Dr. Terr, I didn't ask you if it was a Tarasoff  
3 warning. I asked you if you -- 'cause it's the  
4 opposite. If you felt he wasn't a threat, did you  
5 notify the university that he wasn't a threat?

6 A. So you're saying that I should break his  
7 confidentiality and just --

8 Q. No.

9 A. -- call up the university, "Hello, University.  
10 I'm calling about John Kao." What are you telling me?

11 Q. What I'm asking you -- I'm not telling you  
12 anything.

13 A. Well, you're sort of telling me that I should  
14 be calling the university. And I'm saying I have a  
15 confidential relationship with this patient, who I've  
16 determined is not violent.

17 So if the university wants to know something  
18 from me, is he violent, they know who I am because they  
19 have my name in their files. John had been very open  
20 that he had seen a psychiatrist. They knew who I was,  
21 where I was. And if they called me, I would have asked  
22 John's permission to talk to them if they were curious  
23 about what I what I found.

24 But I don't think they wanted to know anything  
25 from me. I had written them a letter in '06, and they

1 never responded to that. They never had any  
2 communication with me or seemed interested in anything I  
3 would have to say. So why -- why would I do that?

4 I -- I don't understand how I would break  
5 confidentiality with a patient to go to a university who  
6 didn't care at all what I had to say and -- and then --  
7 and somehow try to clarify for them a bunch of -- a  
8 bunch of stories that they don't have any names  
9 connected with and don't sound like they're doing  
10 anything but imagining somebody's crazy.

11 Q. Dr. Terr, the question I asked you was a very  
12 limited one, and then we'll get to all the others.

13 Did you tell the university that you thought  
14 Dr. Kao was not a threat to any person?

15 A. No. The university didn't ask, so I didn't  
16 tell.

17 Q. Did you know that the university sent a letter  
18 to Dr. Kao where it said "If you have any information,  
19 please let us know"?

20 A. The letter --

21 Q. Did you --

22 A. -- said a lot of things.

23 Q. No. I --

24 A. The letter was a setup.

25 Q. It was a setup?

1           A.     It was a setup for a doctor to see him for nine  
2 hours and do a stress interview.

3           Q.     Is that what you're saying, that the  
4 university -- this was all a setup?

5           A.     Well, there's a piece of it that could have  
6 very, very well been a setup.

7           Q.     I didn't ask you "could have." I said is it  
8 your opinion that this was all a ruse to set up Dr. Kao?  
9 I'd really like a yes or no, if you can.

10          A.     I can't answer "yes" or "no."

11          Q.     Okay, I'll accept that.

12                     Now, did you ever go to Dr. Kao and say "Dr.  
13 Kao, would you authorize me to call up the university or  
14 write a letter to the university giving them information  
15 that I don't think you're a threat"?

16          A.     I think we discussed it, but it wasn't put the  
17 way you're putting it at all. I think I -- we discussed  
18 whether it would be any help.

19                     And I think we both felt it would be no help.  
20 We felt the university had deaf ears to me, for whatever  
21 its reason was. It was not -- my name was in its files.  
22 Dr. Parris's name was in its files, because he had  
23 written them a letter. He didn't hear from them either.

24                     And the university was just ignoring whoever  
25 the current treating doctors were, and the university

1 was going its own way.

2 Q. Dr. Terr, it was two years earlier that you had  
3 sent a letter to the university, correct?

4 A. They had it.

5 Q. Two years earlier. You had had no contact with  
6 the university from 2006 to 2008; isn't that true?

7 A. That's true.

8 Q. Okay. So you're assuming that in this big  
9 university, they remembered that you're the doctor and  
10 that they should call you?

11 A. They have a record of Dr. Kao. And my name and  
12 Dr. Parris's name would be in his record.

13 Q. But you know that nobody can -- the university  
14 is not allowed to call you and ask for medical  
15 information on Dr. Kao. It has to come by authorization  
16 from Dr. Kao, correct?

17 A. If the university --

18 Q. Ma'am -- Dr. --

19 A. -- is sending him --

20 Q. Could you answer that question. I would like  
21 an answer to that question. I'm going to have it read  
22 back. It's an important one.

23 Madam Reporter ...

24 (Record read as follows:

25 *QUESTION: But you know that nobody can*

1       -- the university is not allowed to call you  
2       and ask for medical information on Dr. Kao.  
3       It has to come by authorization from Dr.  
4       Kao, correct?)

5               MR. KATZENBACH: That's compound. Objection.

6               THE COURT: Sustained.

7               MR. VARTAIN: Q. Isn't it true that the  
8       university is not allowed to call you without Dr. Kao's  
9       consent?

10              A. That's not true. The university can call me.  
11       I won't answer them until I get that --

12              Q. Oh, okay.

13              A. -- Dr. Kao's consent.

14              Q. Okay. So the university can pick up the phone  
15       and call you, but they can't get any information from  
16       you without Dr. Kao's consent?

17              A. For a day or two. They'll get an answer in a  
18       day or two.

19              Q. But --

20              A. Because I have to get a consent from Dr. Kao.

21              Q. Exactly.

22              A. Who I will call, and I will ask him to sign the  
23       permissions, and then we'll get them consent.

24              Q. But in actuality, Dr. Kao never asked you to  
25       give your medical opinions to the university in 2008;



1 isn't that true?

2 A. We discussed it. I don't know if he asked it,  
3 said "Please give this information to the university,"  
4 because I would have had him -- we would have -- we  
5 discussed it.

6 Q. Let me refer you to your sworn testimony in the  
7 deposition. Would you go to page 23, line 16 --

8 A. Is this the same one?

9 Q. -- please. Yes. Appreciate it, Dr. Terr.

10 Would you let me know, Dr. Terr, when you've  
11 located that place, page 23, line 16.

12 A. I see it.

13 Q. Where I asked you the question as follows:

14 "And it's your testimony that Dr. Kao  
15 neither asked you to give your medical  
16 opinions to the university in 2008, nor did  
17 he authorize you to do so, correct?"

18 And what was your answer, Dr. Terr?

19 A. I said "That's correct." But I did not explain  
20 that we discussed it.

21 Q. No, your answer wasn't that. Your answer was  
22 simply "That's correct." Isn't that so?

23 A. That's what -- my answer in the deposition.  
24 And I'm saying that -- I am explaining that we discussed  
25 the issue.

1 Q. Okay.

2 A. He didn't ask, in your words, and your words  
3 are correct. But we did discuss the issue.

4 Q. And I'm happy that you discussed it because it  
5 shows -- doesn't it show that Dr. Kao made an informed  
6 decision not to authorize you to give your opinion to  
7 the university?

8 MR. KATZENBACH: Objection. Argumentative.

9 THE COURT: Overruled.

10 THE WITNESS: When you talk about something, it  
11 isn't about being authorized or not authorized. You  
12 just talk about what is this about, what is this letter  
13 about, and what are -- what is going on here.

14 MR. VARTAIN: Q. Dr. Terr, you're -- you know  
15 the law. You said you lecture at law schools.

16 A. I lecture on psychiatry at law schools.

17 Q. Right.

18 A. I do -- I am not a lawyer, and I don't attempt  
19 to be a lawyer.

20 Q. I know that. And I -- and I --

21 A. And I do not know the law.

22 Q. I accept that. But you do know the very fact  
23 is that for you to have given your medical opinion to  
24 the university, you would have to get the explicit okay  
25 from your patient, Dr. Kao, correct?

1 A. Yes.

2 Q. But you did not get the explicit okay from Dr.  
3 Kao to give your medical opinion to the university,  
4 correct?

5 A. Yes.

6 Q. And even -- but you and he discussed it and  
7 there was a consensus reached, correct? Isn't that  
8 correct?

9 A. Yes.

10 Q. Okay. So the university never had the benefit  
11 of your medical opinion?

12 A. The university did not ask for the benefit of  
13 my medical opinion.

14 Q. But the -- you did see the letter where the  
15 university asked Dr. Kao to give the university whatever  
16 information he would like. You saw that letter, didn't  
17 you?

18 A. In addition to going for a nine-hour exam.

19 Q. Dr. Terr --

20 A. And being told that a lot of people are  
21 complaining about him that don't have names, and that  
22 the complaints are things which don't sound right about  
23 him.

24 Q. Dr. --

25 A. So this letter is a whole -- it's a Gestalt.

1 It's a whole thing.

2 Q. But there was a very -- there was a line right  
3 in the letter, and it said -- Martha Peugh-Wade said "If  
4 you have any information that you would like to give me,  
5 please do so."

6 I'm not interested in Gestalts; I'm  
7 interested -- didn't you read that letter?

8 A. Well, I'm very interested in Gestalts. I'm  
9 very interested in whole things instead of one line out  
10 of a thing. And I know that some lawyers will go after  
11 a line. I was not interested in that particular line --

12 Q. Okay.

13 A. -- because the whole letter was wrong.

14 Q. But -- the whole letter was wrong, but the  
15 point that I'm making, and I want you to focus on, is  
16 you read the letter that said -- where the university  
17 reached out and said "If you have any information, give  
18 it to us." You did read that, didn't you?

19 A. They reached out. I mean, they said "You're  
20 off our campus; you don't have a job." This is reaching  
21 out?

22 Q. Okay.

23 A. I -- I don't understand your sentence.

24 Q. Okay. Let me -- let me make it more  
25 understandable to you.

1           You read the line in the letter from Martha  
2 Peugh-Wade to your patient that said "If you have any  
3 information that you would like to give me, please do  
4 so." You did read that?

5           A.    Yes, I read the letter.

6           Q.    Okay. And you read that line at the time that  
7 you and Dr. Kao were discussing whether he should  
8 authorize you or not to give the information to the  
9 university, correct?

10          A.    We were having a full discussion about  
11 everything in the letter.

12          Q.    Okay. I'll accept that.

13                    Have you ever been in the medical practice of  
14 doing fitness-for-duty evaluations of employees?

15          A.    No.

16          Q.    That's not a field that -- of medicine that  
17 you've ever practiced, correct?

18          A.    It's not a field of medicine.

19          Q.    It's -- it's work that physicians like Dr.  
20 Reynolds do, correct?

21          A.    I don't know what Dr. Reynolds does exactly. I  
22 mean, his Web site says he's a forensic psychiatrist.  
23 Doesn't advertise that he does fitness-for-duty exams,  
24 as far as I remember.

25          Q.    Did you ever contact Dr. Reynolds and ask him

1 exactly how he does a fitness-for-duty evaluation?

2 A. No.

3 Q. Did you ever ask him how many hours he spends  
4 in a question-and-answer session with the employee?

5 A. With which employee?

6 Q. Any employee, what his procedure is.

7 A. His procedure was to see Dr. Kao for nine  
8 hours. I didn't have to ask him what his procedure was.

9 Q. And how did you know that, ma'am?

10 A. Because the letter said -- I'm not "ma'am."

11 Q. Doctor. I'm sorry, I apologize. Did the  
12 letter --

13 A. You erase something like four years of medical  
14 school off of my life when you do that.

15 Q. I definitely don't want to do that, Doctor,  
16 because you're very experienced beyond the four years.

17 Dr. Terr, the letter didn't say that Professor  
18 Kao was going to be in a room like a CIA for eight or  
19 nine hours under question-and-answer, did it?

20 A. It said "You are to report at 8:30 and you'll  
21 be finished at 5:30."

22 Q. Okay.

23 A. It didn't say any other plans that were made,  
24 like "You will have a luncheon at blah, blah time" or  
25 that "You will have testing by Dr. So-and-so at another

1 time." It just said "You will be there."

2 Q. Isn't it true, Dr. Terr, that you never told  
3 your patient, Dr. Kao, that going to this  
4 fitness-for-duty evaluation would be harmful to his  
5 health?

6 A. I don't remember telling him that in that way.

7 I said that is a stress exam that is something  
8 that can be extremely stressful, that ordinarily  
9 psychiatrists see people for 45 minutes or for two  
10 45-minute sessions. A lot of times it's divided so that  
11 they don't have to just sit there and sit there and --

12 Q. The question I had, Dr. Terr --

13 A. So the conversation we had was that it was  
14 called a stress exam.

15 Q. The question I had, Dr. Terr, was did you tell  
16 Dr. Kao that if he went to do this fitness-for-duty  
17 evaluation by Dr. Reynolds, it would be harmful to his  
18 health?

19 A. I don't think I used those words.

20 Q. What, if anything, did you tell Dr. Kao would  
21 be the negative health effects on him if he were to  
22 spend eight hours with Dr. Reynolds?

23 Isn't it true you said nothing about that to  
24 Dr. Kao?

25 A. That's not true.

1 Q. Would you open up to page 374 of your  
2 deposition, at page -- at line 7 to 11 --

3 A. This goes as far as 200-something and you're  
4 going to have to find me another one.

5 Q. Okay. I'll find the second volume. I  
6 apologize. Thank you.

7 -- where I ask you the following question:

8 "What did you tell Dr. Kao, if  
9 anything, would be the deleterious -- that  
10 is, the negative -- health effects on him if  
11 he were to spend eight hours with Dr.  
12 Reynolds in a question-and-answer session?"

13 Answer, "I said nothing about that."

14 Did you -- so my next question, Dr. Terr, is  
15 did you ever say anything to Dr. Kao to suggest he'd  
16 have -- he'd have some kind of breakdown or it'd be  
17 somehow harmful to him if he were to go see Dr.  
18 Reynolds? Did you?

19 A. On line 16, I go on to say that I told him that  
20 it was known as a stress exam and that -- I used the  
21 word "stress" with him.

22 Q. And I asked you the question: "Did you  
23 say anything to suggest to Dr. Kao that it  
24 would cause him a nervous breakdown?"

25 You said "No."



1           And I said: "Did you believe it would  
2           cause a nervous breakdown?"

3           You said "No."

4           I asked you if it would cause a panic attack;  
5           you said no.

6           I asked you if it would cause him any relapse  
7           of his depression; you said no.

8           And -- and then I also asked you --

9           A.    And I did not explain my answers, and I will  
10          now. Dr. Kao has never been near a breakdown or a  
11          nervous breakdown or having to go off for months to a  
12          place.

13          He has never been that way. Even in his  
14          depressions, he knows when he's getting depressed. He  
15          knows to go on medication and he knows what to do about  
16          it.

17          So I did not believe that he was going to have  
18          a psychotic break, which I assume to be your "nervous  
19          breakdown," sir. I don't use that word. But I didn't  
20          assume that he was going to become psychotic because he  
21          is not schizophrenic.

22          He has major depressive disorder but never with  
23          psychosis. He has never been psychotic. And so there  
24          would be no reason to think that he would become  
25          psychotic.

1           Then you get funny and you ask about heart  
2 attacks and other stuff. And I have no idea whether  
3 he's going to have a heart attack, but that's not for me  
4 to predict anyway.

5           I knew it was a stress exam; it would be highly  
6 stressful for him; that people go through exams like  
7 this in preparation to be spies. But that I didn't  
8 think necessarily that going through a stress exam was  
9 going to be to his benefit, or the university's benefit  
10 either, to find out what was wrong with him.

11          Q.    But that was the university's decision as to  
12 hiring Dr. Reynolds as an independent physician,  
13 correct? They -- they made that decision, correct?

14          A.    Well --

15          Q.    Isn't that true?

16          A.    My understanding of it, actually, is that Dr.  
17 Reynolds had worked with you before and with Dr.  
18 Missett, and that you all had that arrangement --

19          Q.    Where'd you get --

20          A.    -- together, and that you had worked on other  
21 cases together, so that it was a trio.

22          Q.    A trio. Just like it was -- this -- the word  
23 you used about the university; this was a setup for Dr.  
24 Kao?

25          A.    Well --

1 Q. Is that what --

2 A. -- from what I've learned more recently, since  
3 this case has been going on, I know that you have done  
4 other cases all together and have tried to fire other  
5 teachers from other schools, so ...

6 I --

7 Q. Whoa.

8 A. You know ...

9 Q. You're talking about me?

10 A. There's a case called Blau.

11 Q. You're talking about me --

12 A. Yes.

13 Q. -- or you?

14 A. You.

15 Q. Let's -- let's go to your testimony about Dr.  
16 Reynolds, because that's the doctor the university  
17 picked.

18 Isn't it true you've never had a patient that  
19 ever went for an evaluation by Dr. Reynolds? Correct?

20 A. None of my patients have gone to Dr. Reynolds.

21 Q. You've never met Dr. Reynolds, correct?

22 A. That's true.

23 Q. You have no experience whatsoever by which you  
24 could question the integrity of Dr. Reynolds, correct?

25 A. No, not correct. I learned about the Blau

1 case.

2 Q. You --

3 A. I learned that --

4 Q. Your own experience. You don't have any --

5 A. My experience is what I learn.

6 THE COURT: Mr. Vartain --

7 MR. VARTAIN: Yes.

8 THE COURT: -- please don't interrupt.

9 MR. VARTAIN: I have a -- I have -- I do  
10 apologize, Your Honor.

11 THE COURT: All right. Go ahead.

12 MR. VARTAIN: Q. The question was, did you --  
13 had you had anybody in the community of psychiatrists  
14 tell you that Dr. Reynolds is a physician who cannot be  
15 counted on to do an impartial evaluation of your  
16 doctor -- of your patient, at the time you were talking  
17 to your patient about whether to go see Dr. Reynolds or  
18 not?

19 A. At that time, no.

20 Q. Did you speak with any of your colleagues to  
21 ask them whether Dr. Reynolds was a person who could be  
22 counted on to do an employee fitness evaluation with  
23 integrity?

24 A. I did not ask around about Dr. Reynolds. He's  
25 in a different community from me. He's in San Jose,

1 which is an hour and a half away. They have a different  
2 medical group.

3 Northern California psychiatrists are not with  
4 the San Jose psychiatrists. So we don't really know  
5 each other. And there would be no way for me to  
6 personally check him out.

7 Q. Now, you were -- you testified before this jury  
8 about Dr. Kao's difficulties after he was -- lost his  
9 job at the university, after he was terminated.

10 A. Yes.

11 Q. Were you his doctor during all this time in  
12 2008 when he was trying to decide if he was going to go  
13 for the fitness-for-duty evaluation?

14 A. I was his doctor during that time.

15 Q. Did you ever recommend to him that he not go  
16 for the fitness-for-duty evaluation?

17 A. I just told him it was a stress exam.

18 Q. You've said that. But did you ever recommend  
19 to him that he not go?

20 A. I recommended that he talk to his lawyer --

21 Q. Okay.

22 A. -- who recommended to him that he not go.

23 Q. Okay. I don't want to get into the lawyer and  
24 the patient -- and the client. The lawyer's not on the  
25 witness stand. I can only ask you. Did you ever advise

1 Dr. Kao that he should not go for the fitness-for-duty?

2 A. Not per se. But I set certain chains in  
3 motion, such as telling him "This is the sort of thing  
4 you better talk to your lawyer about" and --

5 Q. Okay. I accept that.

6 THE COURT: Ladies and gentlemen, remember the  
7 admonition. Do not form or express any opinion on this  
8 case until it's finally submitted to you for your  
9 decision. Do not discuss among yourselves or with  
10 others until that time. Please be back in your places  
11 this coming Tuesday, February 14<sup>th</sup>, Saint Valentine's  
12 Day, 9:00. Remember to leave your notebooks and your  
13 instructions behind.

14 (Proceedings adjourned at 4:28 p.m.)

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## REPORTER CERTIFICATE

1  
2 I hereby certify that the foregoing  
3 proceedings were taken at the time and place herein  
4 named; that this transcript is a true record of the  
5 proceedings, as reported to the best of my ability by  
6 me, a duly certified shorthand reporter and a  
7 disinterested person, and was thereafter transcribed  
8 under my direction into typewriting by computer.

9 I further certify that I am not interested in  
10 the outcome of said action, nor connected with, nor  
11 related to any of the parties in said action, nor to  
12 their respective counsel.

13 IN WITNESS WHEREOF, I have hereunto set my  
14 hand this 23rd day of September, 2012.

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17 HOLLY MOOSE, CSR NO. 6438  
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COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

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JOHN S. KAO,

Plaintiff/Appellant,

Appellate No. A135750

vs.

UNIVERSITY OF SAN FRANCISCO,  
et al.,

SF Superior Court Case  
No. CGC-09-489576

Defendant/Respondent.

/

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

Tuesday, February 14, 2012

Volume 5

Pages 900 through 1103

Reported by:

KIMBERLEE SCHROEDER, CSR, RPR, CCRR

License No. 11414

Holly Moose & Associates  
Certified Shorthand Reporters  
236 Spencer Avenue  
Sausalito, CA 94965  
(Phone) 415-332-4959  
(Fax) 415-332-4943



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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN FRANCISCO  
HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE  
DEPARTMENT 318

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JOHN S. KAO,  
Plaintiff,  
vs. No. CGC-09-489576  
UNIVERSITY OF SAN FRANCISCO,  
et al.,  
Defendant.

/

JURY TRIAL  
REPORTER'S TRANSCRIPT OF PROCEEDINGS  
Tuesday, February 14, 2012  
Volume 5  
Pages 900 through 1103

Reported by:  
KIMBERLEE SCHROEDER, CSR, RPR, CCRR  
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APPEARANCES

For the Plaintiff:

KATZENBACH & KHTIKIAN  
By: CHRISTOPHER W. KATZENBACH  
CONOR D. MACK  
Attorneys at Law  
1714 Stockton Street  
San Francisco, California 94133  
Ph: 415-834-1778  
E-mail: ckatzenbach@kkcounsel.com  
cmack@kkcounsel.com

For the Defendants:

VARTAIN LAW GROUP  
By: MICHAEL J. VARTAIN  
LINDA K. ADLER  
Attorneys at Law  
601 Montgomery Street  
San Francisco, California 94111  
Ph: 415-391-1155  
E-mail: charissa@vartainlaw.com

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I N D E X

EXHIBITS

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| 75  | Notes of Paul Good, 01/22/08,<br>USF 2747-2748                              | 999  | 1000 |
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| 113 | Chief of Police Policy and<br>Guidelines for Fitness of Duty<br>Evaluations | 1015 | 1101 |
| 114 | United States Post Office<br>Fitness for Duty Manual                        | 1019 | 1101 |

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DEFENDANT'S

| No. | Description  | ID  | EVD |
|-----|--|-----|-----|
| 207 | E-mail dated 04/29/2008 from<br>Dean Turpin re: John Kao's<br>latest outburst, USF 2781-2783 | 956 |     |

1 P R O C E E D I N G S

2 Tuesday, February 14, 2012

9:04 o'clock a.m.

3 ---oOo---

4 THE COURT: The Jurors and Alternates are all  
5 present. Counsel for both sides are present. The  
6 Plaintiff is personally present.

7 Dr. Terr is on the stand.

8 LENORE TERR,

9 called as a witness by the Plaintiff, after having been  
10 previously duly sworn, was examined and testified  
11 further as follows:

12 THE COURT: Dr. Terr, the oath you took last  
13 week is still in effect this week. You're still under  
14 oath.

15 And Mr. Katzenbach, you were questioning; were  
16 you not?

17 MR. KATZENBACH: No. Mr. Vartain.

18 THE COURT: Shut my mouth.

19 MR. VARTAIN: It was that memorable for you,  
20 your Honor?

21 THE COURT: Well, as one of age advances, one's  
22 capacity --

23 MR. VARTAIN: You must have been forecasting  
24 what was in my mind because I don't have anymore  
25 questions of the Witness. So you must have been looking

1 into my mind and my heart. So...

2 THE COURT: Mr. Katzenbach, you want to take  
3 another turn?

4 MR. KATZENBACH: One second, your Honor.

5 MR. VARTAIN: If you wait too long,  
6 Mr. Katzenbach, I'm going to change my mind.

7 I'm just joking. I'm just joking.

8 MR. KATZENBACH: I have no further questions.

9 THE COURT: Jurors, do you have any questions  
10 for Dr. Terr? Yes. I see several hands.

11 (Whereupon, the Court received four written  
12 questions from Jurors, and a discussion at sidebar  
13 was held: 9:06 a.m. - 9:11 a.m.)

14 THE COURT: Questions from the Jurors: Your  
15 career as a psychiatrist, how many times have you issued  
16 Tarasoff warnings?

17 THE WITNESS: I didn't do an actual one. I had  
18 one patient who I thought her husband was going to  
19 murder her, and I issued a Tarasoff warning to her. He  
20 had taken out a life insurance policy on her that week.  
21 She had a very, very, um, lucrative business. And um, a  
22 couple of other things had happened, and there was a gun  
23 in the house. And so I issued one to her.

24 But I didn't call the police on that, and it  
25 wasn't exactly a Tarasoff warning. It was just a

1 patient that I knew might be in danger. And so I issued  
2 one and told her it was a Tarasoff warning.

3 In another case, I testified against the  
4 VA Hospital who had not told the family of a patient  
5 that he was extremely suicidal and was going to kill  
6 himself, and that was an attempt, a legal attempt to  
7 widen Tarasoff to include suicide. And it didn't work.  
8 But I did testify in that case.

9 So those are the only two times I've been  
10 involved in Tarasoff dealings, but it wasn't warning a  
11 victim in the way that Tarasoff says and calling the  
12 police to ensure that the victim was protected.

13 MR. VARTAIN: Could I ask a follow-up question  
14 to that?

15 THE COURT: Let's not break it down. Take a  
16 turn.

17 MR. VARTAIN: Okay.

18 THE COURT: Segue to the next question: Would  
19 you say that suicide is a violent act?

20 THE WITNESS: Well, it's a special kind of act.  
21 It's not violent against anyone except one's self.  
22 It's, I mean, I don't -- I don't consider it the same.  
23 The assessment of violence against others I think is  
24 different than suicide although there are people who  
25 commit violence against others and then kill themselves



1 in the same act. So that would be definitely a violent  
2 act.

3 But I think that there are gray areas about  
4 suicide that are different and are not exactly the same.

5 THE COURT: Do people with depression tend to  
6 feel persecuted or mildly paranoid?

7 THE WITNESS: The question is do people who  
8 are --

9 THE COURT: Do people with depression tend to  
10 feel persecuted or mildly paranoid?

11 THE WITNESS: Well, I think, um, some people  
12 who are depressed feel that way and some don't. I mean,  
13 individuals are so individual and even though you have a  
14 depression and you get grouped into that group, it  
15 doesn't mean that everything about everybody is the  
16 same.

17 And so each of these are very individual  
18 things. So some people who are depressed get paranoid  
19 that they have what we call a psychotic depression, and  
20 they may actually feel they are being followed or  
21 something like that. But most people who are depressed  
22 don't have that happen to them. So it's an individual  
23 thing.

24 THE COURT: Did Dr. Kao ask you for your input  
25 on how to restructure the University's directive mental

1 health examination to meet the needs of Dr. Kao and the  
2 University?

3 THE WITNESS: Could you repeat the question for  
4 me so that I could better understand?

5 THE COURT: Sure.

6 Did Dr. Kao ask you for your input on how to  
7 restructure the University's directive mental health  
8 examination to meet the needs of Dr. Kao and the  
9 University?

10 THE WITNESS: No. I didn't talk to Dr. Kao  
11 about fixing up an exam that would somehow meet  
12 everybody's needs.

13 Maybe I should clarify. There were questions  
14 last time too about this. I don't tell a patient what  
15 to do. I work on alternatives with a patient. The  
16 patient tells me several alternatives. These are  
17 grown-up patients, and they have to make up their own  
18 mind what to do. I can't instruct them exactly what to  
19 do.

20 I talked about the examination with Dr. Kao.  
21 We talked about various things about this, this letter  
22 and what it was saying. But -- and but, I couldn't set  
23 up an examination for him that would work for him and  
24 work for everybody because it wasn't my function as a  
25 psychiatrist to an adult. The adult has to make

1 decisions and has to work things out, and we talk about  
2 all the alternatives.

3 THE COURT: Did you ever recommend Dr. Kao to  
4 stop or find an alternative to his complaints at USF due  
5 to it was compounding his depression which was having an  
6 effect on his overall health?

7 THE WITNESS: I did talk a number of times to  
8 him about whether he felt that these complaints were in  
9 his best interest, whether or not making these  
10 complaints would serve him well would help the  
11 University straighten things out, and we did discuss it  
12 on a number of occasions.

13 THE COURT: All right. This last question  
14 counsel have agreed they can ask by stipulation.

15 What was the date of Dr. Kao's father dying?  
16 Was Dr. Terr his treating doctor then?

17 MR. KATZENBACH: The answer is she was not his  
18 treating doctor. And Dr. Kao's father died some  
19 approximately 30 years ago or so.

20 THE COURT: Follow-up questions,  
21 Mr. Katzenbach?

22 MR. KATZENBACH: Yes

23 MR. VARTAIN: You want to come here?

24 MR. KATZENBACH: Yes.

25 /////

1 REDIRECT EXAMINATION

2 BY MR. KATZENBACH:

3 Q. Did Dr. Kao ever indicate to you an intention  
4 to commit suicide?

5 A. No. He said -- he was engaged. This is after  
6 the University put him on leave and dismissed him, and  
7 he was engaged to a woman, and they broke up. And he  
8 had a feeling -- he said he had a suicidal feeling.

9 But when I asked him did he have any plan, did  
10 he have any instrument, did he have any way that he was  
11 going to do this, he said no. And so he really did not  
12 check out as being suicidal. He just felt awful and  
13 sort of wanted to die.

14 Q. The time that you recall him raising this --  
15 having this discussion with him, that was after he had  
16 already been suspended from the University, and was it  
17 after his termination as well?

18 A. Yes. It was in 2010. And I think he was  
19 terminated at the University in 2008.

20 Q. Thank you. At any time in your diagnosis of  
21 Dr. Kao with depression, did he ever show any paranoid  
22 tendencies?

23 A. He said he felt paranoid, but when he -- when I  
24 checked him out for it, he wasn't paranoid. He said he  
25 felt paranoid, but he actually wasn't paranoid.

1 I mean, paranoid is that you have an  
2 unrealistic idea about people coming after you and  
3 people doing things to you or people scheming against  
4 you and plotting. And all of those things he checked  
5 out negative for.

6 MR. KATZENBACH: Okay. That's all I have.

7 THE COURT: All right. Questions for the  
8 defendant?

9 RE CROSS-EXAMINATION

10 BY MR. VARTAIN:

11 Q. Dr. Terr, you have never given a Tarasoff  
12 warning; isn't that correct?

13 A. Not an official one.

14 Q. Well, a Tarasoff warning is one where your  
15 patient is telling you, the doctor, that they have some  
16 physical harm intentions against another person?

17 A. That's correct.

18 Q. You have never given a warning to any other  
19 person or university or an employer or a corporation to  
20 the effect of, "My patient might do you harm"; isn't  
21 that correct?

22 A. That's right.

23 Q. When did Dr. Kao tell you that he felt  
24 paranoid?

25 A. I'm going to have to check my notes for a

1 moment.

2 Q. Could you identify the notes that you're  
3 checking? Is this your -- basically, your medical chart  
4 on Dr. Kao?

5 A. This is my medical chart on Dr. Kao, and the  
6 beginning of it are my own notes.

7 Q. Thank you.

8 A. (Reviewing document.)

9 I know the word shows up once in my notes. And  
10 I'm not sure -- I don't see it just scanning it. It  
11 wasn't really an important thing.

12 Q. When was it, if you know, Doctor, that you did  
13 an evaluation of whether in your opinion Dr. Kao met the  
14 criteria for paranoia?

15 A. I evaluated Dr. Kao all through the time I  
16 worked with him, and not only am I working with him, but  
17 I'm watching him. And I have never evaluated him for  
18 the total problem of paranoia because he mentioned the  
19 word once, and he mentioned it in a lay way, and he just  
20 said he was getting a suspicious feeling.

21 But he didn't need an evaluation for paranoia  
22 or paranoid schizophrenia or any of the paranoid  
23 conditions because he didn't have them.

24 Q. Dr. Terr, the condition of paranoia, that is  
25 actually stated in the psychiatric manual, DSM-III; is

1 that true?

2 A. I don't use DSM-III. I use DSM-IV Revised.

3 Q. Is it stated in issues --

4 A. There are a group of paranoid conditions.

5 Paranoid conditions, there is a paranoid personality;  
6 there is paranoid schizophrenia; and there is a type of  
7 paranoia, just general suspiciousness. He doesn't meet  
8 the criteria for any of those in DSM-IV, which is the  
9 current DSM.

10 Q. Dr. Terr, did you ever take out the manual  
11 where it lists all the different indicators of the  
12 different kinds of paranoia and put Dr. Kao through an  
13 assessment of asking him the questions that go, that fit  
14 with those conditions?

15 A. No. That would have been a waste of time.

16 MR. VARTAIN: I would like to offer Dr. Terr's  
17 medical chart into evidence, which is Exhibit 250.

18 MR. KATZENBACH: Your Honor, we're going to  
19 object to that. We think that that is both irrelevant,  
20 contains irrelevant and private information, privileged,  
21 and both by doctor/patient, psychiatrist/patient  
22 privilege, and Dr. Kao's right of privacy.

23 I don't think that whole chart is appropriate  
24 to introduce. If he has particular questions, we can  
25 take it on a question-by-question basis.

1 THE COURT: Sustained.

2 MR. VARTAIN: It's not that important for me to  
3 take anymore time up on that, your Honor. We'll take  
4 that up in private.

5 Thank you, Dr. Terr, for answering my  
6 questions.

7 THE COURT: Any questions from you,  
8 Mr. Katzenbach?

9 MR. KATZENBACH: No, your Honor. I'm fine.

10 THE COURT: Is Dr. Terr being excused?

11 THE WITNESS: Thank you.

12 THE COURT: Please, may Dr. Terr be excused?

13 MR. KATZENBACH: Yes.

14 MR. VARTAIN: Yes, your Honor. Thank you.

15 THE COURT: Dr. Terr, thank you very much.

16 You're free to go.

17 THE WITNESS: I'll pack up and go.

18 (Witness excused.)

19 THE COURT: Plaintiff may call their next  
20 witness.

21 MR. KATZENBACH: Yes. Mr. Lawson was going to  
22 be here.

23 MR. VARTAIN: No. Ms. Adler said he will be  
24 here at 10:00 o'clock. He'll be here at 10:00 o'clock,  
25 the time Ms. Adler told you on Friday.



1 MR. KATZENBACH: All right.

2 Your Honor, can we have a conversation off the  
3 record?

4 THE COURT: Sure.

5 (Discussion off the record at sidebar.)

6 THE COURT: It's one of the difficulties that  
7 sometimes crop up in trial, the orchestration of the  
8 arrival of witnesses. Apparently Dr. Terr took less  
9 time than anticipated. And so we have a witness who is  
10 scheduled to be here at 10:00.

11 Counsel are going to try to get in touch with  
12 the witness by phone and see how soon is reasonable for  
13 us to expect the witness to arrive.

14 Is Mr. Mack calling?

15 MR. KATZENBACH: I believe he's trying to -- at  
16 this point, actually, your Honor, I believe he's trying  
17 to see if we can get the witness that was going to  
18 follow the next witness here earlier as well.

19 THE COURT: Okay. We'll sit tight and see what  
20 results his efforts --

21 MR. KATZENBACH: Yes.

22 THE COURT: -- bring to fruit.

23 MR. KATZENBACH: Your Honor, I believe  
24 Ms. Adler is checking to see if the witness from the  
25 University is on her way. Your Honor, if I might step

1 out for a minute.

2 THE COURT: Feel free.

3 (Pause in proceedings: 9:32 a.m. - 9:39 a.m.)

4 THE COURT: Mr. Katzenbach, have you developed  
5 an opinion when we might expect another witness?

6 MR. KATZENBACH: We understand the witness will  
7 be here -- maybe is in transit -- and I understand from  
8 Ms. Adler by 10 minutes of. I would, your Honor, just  
9 advise the Court we did have actually this witness  
10 subpoenaed here for 9:00 a.m. It was in the convenience  
11 and at Counsel's request that we agreed to have him here  
12 at 10:00 in anticipation of Dr. Terr taking longer.

13 THE COURT: Might as well take a 10-minute  
14 break. I apologize, ladies and gentlemen, to be kept  
15 waiting.

16 JUROR 9: Unforeseen human predicament.

17 THE COURT: Ladies and gentlemen, remember the  
18 admonition. Do not form or express any opinion on this  
19 case until it's finally submitted to you for your  
20 decision. Do not discuss among yourselves or with  
21 others until that time.

22 Please be back in your places at 9:50, ten  
23 minutes to 10:00 according to the courtroom clock.

24 (Recess taken: 9:53 a.m. - 9:58 a.m.)

25 THE COURT: Jurors and Alternates are all

1 present. Counsel for both sides are present. Plaintiff  
2 is personally present.

3 Mr. Katzenbach, you may call your next witness.

4 MR. KATZENBACH: Yes. Dan Lawson.

5 DANIEL L. LAWSON,

6 called as a witness by the Plaintiff, after being first  
7 duly sworn, was examined and testified as follows:

8 THE CLERK: Please be seated.

9 State your name and spell it for the record,  
10 please.

11 THE WITNESS: My name is Daniel L. Lawson,  
12 L-a-w-s-o-n.

13 THE COURT: Mr. Katzenbach, you may inquire.

14 MR. KATZENBACH: Thank you, your Honor.

15 DIRECT EXAMINATION

16 BY MR. KATZENBACH:

17 Q. Mr. Lawson, who are you currently employed by?

18 A. The University of San Francisco.

19 Q. In what position?

20 A. I'm the director of Public Safety.

21 Q. And how long have you held that position?

22 A. It will be nine years in October.

23 Q. So eight and a half years today?

24 A. That's correct.

25 Q. And prior to holding the position of director

1 of Public Safety at the University of San Francisco,  
2 where were you employed?

3 A. I was with the San Francisco Police Department  
4 for about 33 years.

5 Q. Can you describe as director of Public Safety  
6 what do you do for the University?

7 A. Well, I'm involved with working collaboratively  
8 with the community to maintain safety and prevention,  
9 crime prevention, and emergency preparedness.

10 Q. Okay. Who do you report to?

11 A. I report to Vice Provost Peter Novac.

12 Q. As director of Public Safety, do you have any  
13 employees working under you?

14 A. Yes, I do.

15 Q. How many are those?

16 A. Well, we have approximately 30 full-time  
17 employees, about 40 to 50 part-time employees.

18 Q. Okay. What do those employees do?

19 A. The employees are armed uniformed officers  
20 patrol the campus. We have a full-time dispatch center.  
21 We have five dispatchers, one of them being a  
22 supervisor. They receive all the calls 24/7. And  
23 dispatch calls for service response to emergencies.

24 And we have a community service officers.  
25 Those community service officers provide for parking on

1 campus, orderly parking and help in events. We have  
2 students who work in our front office. They work as  
3 call takers in our dispatch center. They also drive  
4 shuttles, work our gates. We have working booths, two  
5 parking booths on campus. They work the gates.

6 Q. Okay. Now, University of San Francisco has --  
7 there are events that are open to the public on the  
8 University of San Francisco; isn't that correct?

9 A. That is correct.

10 Q. What sort of events?

11 A. We have basketball games. We have forums,  
12 discussions, academic events, social events.

13 Q. All right. And does the public need to check  
14 in with Public Safety to attend any of those events?

15 A. No. We have a wide open campus.

16 Q. Okay. Now, are you aware that Dr. John Kao has  
17 been banned from the USF campus?

18 A. Yes. I am aware of.

19 Q. Since he's been banned, has there been any  
20 occasion where anyone from Public Safety has found  
21 Dr. Kao on campus?

22 A. No. There has not.

23 Q. I believe on one occasion, you had a report  
24 that someone thought Dr. Kao was on campus?

25 A. Near campus, that is correct.

1 Q. Who was that report for?

2 A. That was from now Provost Jenny Turpin.

3 Q. And Public Safety investigated that?

4 A. Yes.

5 Q. And could not locate Dr. Kao on campus?

6 A. That is correct.

7 Q. Are you aware of any occasion -- are you aware  
8 of any occasion that Dr. Kao has ever come onto the  
9 campus after he had been banned?

10 A. No. I am not aware of any occasion.

11 Q. And now, if someone has been -- strike that.  
12 Do you know what a BOLO is?

13 A. Yes.

14 Q. What is a BOLO?

15 A. It's an acronym for be on the lookout.

16 Q. And does the Public Safety Department create  
17 BOLOs for any reason?

18 A. Yes, we do.

19 Q. For what reason?

20 A. The reasons are for our officers to be aware of  
21 descriptions and -- physical description and a short  
22 synopsis of the reason why an individual is banned from  
23 campus.

24 Q. All right. Now, is the normal practice to  
25 create a BOLO for someone who is banned from campus?

1 A. Generally, it is.

2 Q. Have you searched for any BOLOs for Dr. Kao?

3 A. Yes.

4 Q. Can you find any?

5 A. I don't believe we came up with any.

6 Q. Now, I would like, if you would, in the books  
7 in front of you, ones marked Plaintiff's Exhibits, if  
8 you could look at Exhibit 91. I believe there are tabs  
9 on the side. 91.

10 Can I approach, your Honor?

11 THE COURT: Yes.

12 (Plaintiff's Exhibit No. 91 was  
13 marked for identification.)

14 MR. KATZENBACH: Q. Taking a look at  
15 Exhibit 91, can you tell us what that is?

16 A. It is a description of threatening and violent  
17 behavior.

18 Q. All right. And is that a policy that USF has  
19 adopted?

20 A. Yes, it is.

21 Q. And was that policy in effect in 2008?

22 A. Yes, it was.

23 Q. And particularly in the spring of 2008?

24 A. Yes, it was.

25 Q. How long has that policy been in effect?

1           A.   Probably as long as I've been there.   About  
2 nine years, eight and a half years.

3           Q.   Thank you.

4                   Now, I would like to move Exhibit 91 into  
5 evidence.

6           THE COURT:   Any objection?

7           MR. VARTAIN:   No objection.

8           THE COURT:   It's received.

9                   (Plaintiff's Exhibit No. 91 received  
10 in evidence.)

11           MR. KATZENBACH:   Q.   Now, I would like to  
12 direct your attention if you would to the -- well, in  
13 general, in general is it your understanding of the  
14 policy and procedures at USF, USF normally takes prompt  
15 action in response to any reports of threats or  
16 threatening behavior?

17           A.   Yes.   Once we're made aware of them, yes, we  
18 do.

19           Q.   All right.   And if you take a look at the -- if  
20 you take a look at the policy, taking particularly a  
21 look at the second column, I would like to direct your  
22 attention, if you would, to the first numbered paragraph  
23 where it says, "If the threat isn't immediate, consult  
24 appropriate resources for help in assessing the level of  
25 danger, determining intervention and choosing safety



1 measures."

2 Do you see that?

3 A. Yes, I do.

4 Q. What does the word "intervention" refer to?

5 A. It could involve -- let me read this here.

6 (Reviewing document.)

7 Okay. It will involve determining whether  
8 there needs to be some discussion with both parties  
9 involved.

10 Q. And when you say "both parties," what do you  
11 mean? The person making the threat and --

12 A. The person making the threat and the person who  
13 is a victim of the threat.

14 Q. And who would that intervention be done by?

15 A. It could be done by us. Sometimes the  
16 individual who is making the complaint feels that they  
17 may be able to intervene and resolve the issue without  
18 having to come to Public Safety.

19 Q. Uh-huh.

20 A. Or even if they make a report with Public  
21 Safety, there may be the decision to resolve that issue  
22 within, within that department, within that unit in the  
23 University.

24 Q. All right. In your experience, does  
25 intervention usually involve talking to the person who

1 is alleged to have committed the threat?

2 A. Sometimes it does, yes.

3 Q. All right. Now, if you look -- if you continue  
4 down with your policy, it refers to two such scenarios.  
5 Scenario A deals with a situation if the threat is  
6 serious. Do you see that?

7 A. Yes, I do.

8 Q. Now, and that recalls various -- the threat is  
9 serious, it involves a number of steps to take; is that  
10 right?

11 A. That's correct.

12 Q. And then in plan B -- I'm sorry, number B is if  
13 the threat is not serious and unlikely to result in  
14 danger to any members of the University community, there  
15 is another series of actions to take. Correct?

16 A. That is correct.

17 Q. And I would like to look, if you would, at the  
18 second bullet point under plan B, under section B, can  
19 you read that to the Jury?

20 A. "In consultation with your administrator,  
21 determine who will convey to the individual that it is  
22 not acceptable to make such threats."

23 Q. Thank you. Now, are you aware of -- strike  
24 that.

25 Did anyone from Public Safety at any time speak

1 to Dr. Kao about any alleged behaviors of his?

2 A. Not that I'm aware.

3 Q. Are you aware of anyone before mid-June of 2008  
4 who spoke to Dr. Kao about any of his alleged behaviors?

5 A. I am not aware of that.

6 Q. Now, I would like to go back to a few events  
7 involved in this matter.

8 It's my understanding that in January of 2008,  
9 you conducted some foot patrols in Harney?

10 A. Correct.

11 Q. And how long were you conducting foot patrols?

12 A. I couldn't remember exactly how long. I  
13 believe it was at least a week though. Anywhere from  
14 three to seven days.

15 Q. Okay. And then it stopped?

16 A. As far as, as far as I know it did, yes.

17 Q. Okay. And during that time, after the foot  
18 patrols -- sorry, strike that.

19 During the -- when you created these foot  
20 patrols, was Dr. Kao identified to you as someone of  
21 concern?

22 A. Yes.

23 Q. When?

24 A. It was either by telephone or e-mail. I can't  
25 recall. From Dr. Turpin, Jenny Turpin.

1 Q. And do you recall when Jennifer Turpin told you  
2 that?

3 A. I believe in refreshing my memory and reviewing  
4 the incident, it was in January.

5 Q. What did you do to refresh your memory that it  
6 was in January?

7 A. We reviewed the deposition that I made.

8 Q. And the deposition that you made when you  
9 testified in your deposition, you stated you didn't  
10 recall Dr. Kao being identified; isn't that right?

11 A. No.

12 Q. I would like to show the Witness, your Honor,  
13 his deposition, page 67, lines 14 through 19.

14 THE CLERK: Counsel, do I have the deposition?

15 MR. KATZENBACH: Yes, your Honor. We should  
16 have that.

17 MR. VARTAIN: Counsel, if you're going to read  
18 that far, I would ask you to read the related parts,  
19 please. And I could give you the page and line numbers  
20 of those.

21 MR. KATZENBACH: What's the related part that  
22 you would like me to read?

23 MR. VARTAIN: I'll give you the page and line  
24 numbers.

25 MR. KATZENBACH: Yes. That's fine.

1 MR. VARTAIN: Pages 65, 18 through page 66,  
2 line 9, as well as page 59, line 4 to line 8.

3 MR. KATZENBACH: Well, I think let's first  
4 address the -- do we have his deposition?

5 THE CLERK: The Judge has the transcript. He's  
6 looking at it right now.

7 MR. KATZENBACH: Your Honor, I would like to  
8 address the Witness to the questions on page 67, lines  
9 14 through 19.

10 MR. VARTAIN: I have no objection as long as  
11 the related parts that came before that as well.

12 THE COURT: Go for it, Mr. Katzenbach.

13 MR. KATZENBACH: Thank you. Should I show --

14 Q. I would like to read to you from your  
15 deposition at page 67, starting at line 14, continuing  
16 through line 19.

17

18 "Question: Okay. In January of 2008, at the  
19 time of these foot patrols, do you know if Dr. Kao  
20 was identified as the person causing fear?

21 "Answer: Could you repeat the dates on that  
22 again?

23 "Question: January 2008.

24 "Answer: I don't recall that at all."

25 MR. KATZENBACH: And Counsel asked me to read

1 65, 18 through 66, 9. Is that correct, Counsel?

2 MR. VARTAIN: The first one, 66, 5 through 9.

3 MR. KATZENBACH: I'm going to read, your Honor,  
4 page 66. Put that in context, I would like to read  
5 through line 23, starting 66.

6 MR. VARTAIN: I have no objection.

7 MR. KATZENBACH: 66 starting at line 5 says:

8 "Question: So talking about turning your  
9 attention to January 9th, 2008, you indicated there  
10 were increased foot patrols at Harney at Dean  
11 Turpin's request for three to five days; is that  
12 right?

13 "Answer: Correct.

14 "Question: Is there now in terms of when a  
15 Dean or someone else asks for increased Public  
16 Safety presence in an area at some point, does the  
17 department get billed for those extra services?

18 "Answer: Does the department get billed?

19 "Question: Yes.

20 "Answer: Generally not.

21 "Was there any explanation given to you in  
22 January of 2008 why these increased foot patrols  
23 should cease after three to five days?

24 "Answer: That, I don't recall.

25 "Question: Did anyone ask you to continue any

1 longer than three to five days?

2 "Answer: Not that I remember."

3 MR. VARTAIN: Would you finish to the next  
4 three lines, Counsel?

5 MR. KATZENBACH: Certainly.

6 Continue on to line -- all right.

7 "Prior to January 9, 2008, did you ever have  
8 any other occasion to receive a report concerning  
9 Dr. Kao?

10 "Answer: Prior to January of 2008?

11 "Question: Yes.

12 "Answer: I don't recall."

13 Q. Now, you did at some point however do a  
14 criminal records check for Dr. Kao or your office did?

15 A. Yes.

16 Q. And did that -- how did that come back?

17 A. It came back negative.

18 Q. And what does that mean?

19 A. That means there's no criminal record.

20 Q. And does that include when you do a criminal  
21 records check, does that include any, whether the  
22 individual has any firearms?

23 A. Correct.

24 Q. And that came back negative?

25 A. Correct.

1 Q. Does that include any history of arrests or  
2 incarceration?

3 A. That is correct.

4 Q. And that came back negative?

5 A. Correct.

6 Q. And does that include -- what other things does  
7 a criminal background check include?

8 A. Well, you've covered just about everything.

9 Q. Is there anything else that you can recall?

10 A. Well, it's often and it might not be in the  
11 criminal record unless somebody was arrested for or  
12 placed into custody for 5150, which is a Health & Safety  
13 Code which is a commitment for short period of time of  
14 psychiatric evaluation.

15 Q. Right.

16 A. That could possibly also be in it. The unit  
17 that we worked with was the psychiatric unit at S.F.P.D.

18 Q. And again, that came back negative for any  
19 psychiatric commitments?

20 A. As far as I can remember, yes.

21 Q. All right. Now, in the period January through  
22 April of 2008, did anyone ask you to do anything about  
23 Dr. Kao?

24 A. Through April? I believe there was an incident  
25 in April. Was that not the incident? I would have to



1 refresh my memory. I think that might be the incident  
2 in which Dr. Turpin believed that she saw Professor Kao  
3 in the neighborhood.

4 Q. Let me rephrase the question.

5 Do you recall that there was an incident  
6 involving Dean Turpin sometime in April?

7 A. Correct.

8 Q. Prior to that incident -- from the period of  
9 January, where we talked about the foot patrols, through  
10 the period where Dr. Turpin identified an incident to  
11 you, did Public Safety do anything at all regarding  
12 Dr. Kao?

13 A. No.

14 Q. And that would include you didn't send any  
15 officers to attend his classes?

16 A. No.

17 Q. Didn't ascend any officers to go attend the  
18 Math Club?

19 A. No. From my understanding, there wasn't an  
20 issue with students.

21 Q. You understood no issue with students?

22 A. M-hm.

23 THE COURT: The Witness nodded as he said  
24 "m-hm."

25 MR. KATZENBACH: Q. I'm sorry. There was no

1 issue with students?

2 A. Yes. There was no issue with students.

3 Q. Now, I would like to direct you again to this  
4 incident I referred to Dean Turpin. In approximately  
5 April of 2008, you received a report from Dean Turpin of  
6 some incident involving Dr. Kao; correct?

7 A. Correct.

8 Q. Did Public Safety do an investigation?

9 A. Yes. I think we drove by the area, looked for  
10 Professor Kao and came up with no Professor Kao.

11 Q. Okay. This is not a report -- this is a report  
12 of Dr. -- Dean Turpin expressing that she had some  
13 encounter with Dr. Kao. Do you recall that?

14 A. Oh, okay. Yes. Yes, I do recall. Yes.

15 Q. Okay.

16 A. That was the one where she was walking to her  
17 car, I believe, and Dr. Kao had -- she had made some  
18 comments to Dr. Kao how he was doing, and then he  
19 responded back to her.

20 Q. That's the incident.

21 A. She became fearful, yes.

22 Q. And did Public Safety do an investigation of  
23 that incident?

24 A. We -- I believe we responded to the area, and  
25 there was no Professor Kao. Or she may have -- I can't

1 remember. I can't recall what exactly what happened.  
2 But I do know that I became aware of this later.

3 Q. Okay.

4 A. If it was happening, I just can't recall. I  
5 would have to review the deposition, but usually when  
6 these things happen if the person who is afraid for some  
7 reason gives us a call right then, we can respond  
8 immediately. If it's later on, then obviously it's a  
9 different procedure that we take. Party is already  
10 gone. It's not the -- any immediate threat.

11 Q. All right. Did Public Safety make a  
12 determination that there was no viable threat in that  
13 incident?

14 A. No criminal threat, correct.

15 Q. No viable threat; isn't that correct?

16 A. A viable threat would be a criminal threat.

17 Q. Well, all right. Now, but you did make a  
18 determination there was no criminal threat?

19 A. Correct.

20 Q. Right. So that in your understanding of the  
21 violence policy, that would mean a policy that an event  
22 that fell under subsection B; is that correct?

23 A. Subsection B as in boy, did you say?

24 Q. Yes. At the bottom half of the second column  
25 on Exhibit 91.

1 A. Correct. Correct.

2 Q. So to your understanding, did anyone from --  
3 did anyone from Public Safety convey to Dr. Kao that it  
4 was not acceptable to whatever behavior he engaged in?

5 A. No, we did not.

6 Q. Concerning that incident?

7 A. No.

8 Q. Did anyone -- to your knowledge, did anyone at  
9 the University convey to Dr. Kao anything about his  
10 behavior not being acceptable in connection with the  
11 incident with Dean Turpin in April?

12 A. I was not privy to that.

13 Q. You are not aware that anything like that  
14 happened?

15 A. No.

16 Q. Now, at any time did Public Safety advise  
17 faculty or staff that there was any risk from Dr. Kao?

18 A. We did not speak to any faculty or staff.

19 Q. At any time did Public Safety investigate  
20 whether there was any risk to staff or faculty from  
21 Dr. Kao?

22 A. If we thought there was a viable threat, we  
23 have a responsibility to -- and that could have been a  
24 felony -- to report that to the San Francisco Police  
25 Department, and at that particular time, we did not

1 believe there was a viable threat, a criminal threat.

2 Q. And at that point in time, it also includes --  
3 did you do anything under paragraph B concerning to  
4 advise anyone in the math faculty or staff that there  
5 was any concerns about Dr. Kao at all?

6 A. No.

7 Q. All right.

8 A. I did not.

9 Q. Now, at any time, other than the incident we  
10 discussed with Ms. Turpin, have you ever conducted any  
11 investigation of any other incident involving Dr. Kao?

12 A. Yes. In June of that same year, we were asked  
13 by the human resources department at the University of  
14 San Francisco to stand by because they were going to  
15 have a meeting with Dr. Kao in the Lone Mountain  
16 offices, and they were concerned to the point that after  
17 the meeting, they believed that they were fearful that  
18 something may occur; that Dr. Kao possibly could be  
19 angry, could come back to the University.

20 So at that point, we subcontract with a private  
21 investigator. We don't have the resources to do that.  
22 So on occasion, we'll subcontract with a private  
23 investigator. We have a trusted private investigator  
24 that we ask to be on the scene and to follow Dr. Kao and  
25 make sure that he, after the meeting, that he didn't

1 come back to the University, go into the math department  
2 or anywhere in Harney and cause harm.

3 That was the request.

4 Q. Now, actually, you assigned no Public Safety  
5 people to actually be in the building; did you?

6 A. I don't recall if we were actually in the  
7 building or not. I can't recall that.

8 Q. The individuals that you contracted for, they  
9 were located outside the building; weren't they?

10 A. Correct.

11 Q. In fact, they had a video camera?

12 A. That's correct.

13 Q. And they were filming Dr. Kao?

14 A. That's correct.

15 Q. They never went inside the building to protect  
16 anyone inside; is that correct?

17 A. That's correct.

18 Q. All right. So the purpose of hiring these  
19 investigators was to film Dr. Kao; wasn't it?

20 A. No. It was to follow him and to advise us if  
21 Dr. Kao -- that was part of it obviously. But part of  
22 it also and the primary cause and reason was for them to  
23 follow him to ensure that he didn't come back to campus.  
24 If he was to come back to campus, they were to advise us  
25 immediately, and obviously then we would have our

1 officers respond to the location he was returning to.

2 Q. Did you understand that Dr. Kao was going to be  
3 banned from campus at that meeting?

4 A. I had no idea.

5 Q. Why couldn't he be on campus?

6 A. From -- well, he could have.

7 Q. So it wasn't the fact that you were filming  
8 Dr. Kao to see what his reaction to being told that he  
9 might be put out -- that he might have to go to a  
10 fitness-for-duty examination? Isn't that the purpose  
11 you were filming him?

12 A. We never instructed him for doing that for that  
13 purpose. In fact, that's their standard procedure.

14 Q. To film people?

15 A. To film somebody who they're following.

16 Q. So this was a request by Martha Peugh-Wade;  
17 wasn't it?

18 A. The request?

19 Q. The video surveillance?

20 A. Is surveillance was by Dr. Peugh-Wade.

21 Q. That was surveillance of Dr. Kao outside the  
22 building; correct?

23 A. Correct.

24 Q. That was to photograph him to see if he did  
25 anything after this meeting; correct?

1 A. If he returned to campus, correct.

2 Q. Did you understand he was banned from campus as  
3 a result of that meeting?

4 A. I can't remember or recall at that time whether  
5 I knew that or not. The purpose was if he was angry and  
6 came back, they were fearful that he may obviously do  
7 something or create some physical harm to people or to  
8 the property at USF.

9 Q. So they filmed him doing this; correct? They  
10 filmed him going into the building and then coming out  
11 of the building; correct?

12 A. Correct.

13 Q. Did they follow him the rest of the day?

14 A. Not the rest of the day, no.

15 Q. Just coming in the building and going out of  
16 the building?

17 A. They followed him as he exited and got in his  
18 car and left the area.

19 Q. Did he do anything?

20 A. No.

21 Q. Did he do anything after that?

22 A. Not as far as I know.

23 Q. In fact, you're not aware of Dr. Kao doing  
24 anything on the campus of physical assault on anybody?

25 A. No.



1 Q. Never heard Dr. Kao actually make a threat to  
2 anybody; isn't that right?

3 A. I never heard Dr. Kao make a threat to anybody.

4 Q. Even when you filmed him, he didn't do anything  
5 physical to anybody?

6 A. That's correct. He did not.

7 Q. Even when the investigators were following him,  
8 he didn't do anything physical to anybody?

9 A. That's correct. He did not.

10 Q. Did you understand that hiring these  
11 investigators with this video surveillance was designed  
12 to see if Martha Peugh-Wade's meeting with Dr. Kao would  
13 provoke him into something?

14 A. No, sir. I was not aware of that.

15 MR. KATZENBACH: That's all I have.

16 THE COURT: Mr. Vartain, would you like to  
17 examine?

18 MR. VARTAIN: I would like to, but I don't  
19 think I have any questions, your Honor. I would like to  
20 -- well, I have a couple questions.

21 CROSS-EXAMINATION

22 BY MR. VARTAIN:

23 Q. Do you teach at City College, Director Lawson?

24 A. Yes, I do.

25 Q. Is that where you were today?

1 A. Yes, I was.

2 Q. What were you teaching today?

3 A. Criminal law.

4 Q. And to whom do you teach?

5 A. To community college students.

6 Q. Would you tell the Jury a little bit about your  
7 experience at the San Francisco Police Department for  
8 some 33 years?

9 A. Sure. I've had the opportunity to work in  
10 San Francisco for 33 years. Retired as a police  
11 captain. I was involved in patrol obviously.  
12 Investigations. I worked in the general work detail  
13 which was assigned to assaults and domestic violence. I  
14 worked night investigations, lieutenant. That's all  
15 serious crimes committed after 7:00 at night and 7:00 in  
16 the morning our unit would handle.

17 I taught at the academy. I was the captain in  
18 charge of the academy for five years. And I retired as  
19 a captain from the park station which is near the  
20 Golden Gate Park, Qzar Stadium, Haight/Ashbury, areas  
21 like that.

22 Q. What, if any, skills did you develop in  
23 assessing whether and when an individual is sincerely  
24 reporting feeling threatened with physical harm, that is  
25 during your years at S.F. police?

1           A. Right. Most of my years was involved in just  
2 that. When I was involved in patrol and investigations,  
3 creating relationships with people, that's part of the  
4 good police work and creating collaborative  
5 relationships, listening, trying to understand their  
6 needs and their fears, and then responding in a way to  
7 help console them as well as to prevent further crime if  
8 crime had been committed or to help them in better  
9 understanding how they can prevent themselves from being  
10 a victim in the future, especially in assault  
11 situations, violence situations, domestic violence  
12 situations, issues like that.

13           Q. In the spring of 2008, around April, did Dean  
14 Turpin talk to you about her experience out in the  
15 Harney parking lot?

16           A. Yes, she did.

17           Q. And would you tell us, generally speaking, what  
18 she said to you had happened?

19           MR. KATZENBACH: I'm going to object.

20           MR. VARTAIN: We'll stop right there.

21           MR. KATZENBACH: That's hearsay.

22           THE COURT: Sounds like it. That's sustained.

23           MR. VARTAIN: It's going to explain something  
24 else, your Honor, as to what he -- what steps he took  
25 thereafter, and that falls in the exception of a hearsay

1 rule.

2 THE COURT: You're relying on hearsay exception  
3 to explain someone's actions?

4 MR. VARTAIN: Yes.

5 THE COURT: All right. Overruled.

6 MR. VARTAIN: Q. What did she say to you?

7 A. She was fearful. She was fearful of the  
8 behavior.

9 MR. KATZENBACH: Object.

10 MR. VARTAIN: Q. And did she tell you what the  
11 behavior was that she had experienced?

12 A. Yes, she did.

13 Q. What did she tell you?

14 A. Well, she said that she had mentioned something  
15 to him. She -- I believe I was checking to see how he  
16 was doing. And he replied in an unusual way, kind of a  
17 strange way, very with halting language and very strong  
18 language. Nothing threatening at the time  
19 language-wise. But then came very close to her, came up  
20 behind her and got very close to her, within inches of  
21 her face.

22 And she said -- described that he was -- his  
23 face looked angry, and he was holding his fists clenched  
24 like this, and he was shaking. And I can't remember the  
25 exact words, but it was something that truly frightened

1 her.

2 Q. And as a result of hearing that, did you  
3 determine that you would participate in further meetings  
4 at the University regarding Dr. Kao?

5 A. Yes, I did.

6 Q. And what further meetings did you participate  
7 in the University because of hearing Dr. Turpin report  
8 of her experience with Dr. Kao?

9 A. It was a meeting in Martha Peugh-Wade's office.

10 Q. Was that a meeting to discuss what were the  
11 proper ways to assess next steps regarding Dr. Kao?

12 A. That's correct. These are complicated cases  
13 for law enforcement. It's also very complicated where  
14 an individual goes so far, will not commit a crime but  
15 yet still appear to people to be a threat. And they  
16 won't cross that line, but there's never the -- never  
17 the knowledge or the foresight to know when that  
18 crossing of the line might occur.

19 And that's something we struggle with in law  
20 enforcement is trying to protect the right of the  
21 individual who has made the threats as well as the  
22 victim. And so trying to resolve these issues in a  
23 humane way is important. And so that's one of the  
24 reasons why we were involved.

25 We wanted to provide protection when there was

1 that belief of a threat. But then also be involved in  
2 resolving it and trying to prevent further threats from  
3 occurring.

4 Q. Did Dean Turpin there in that point in time in  
5 April 2008, did she ask you to provide additional  
6 security for her and/or around her office?

7 A. Yes. And subsequent to that, they had  
8 department meetings. There was a department meeting.  
9 There was a convocation. The School of Arts and  
10 Sciences will have a convocation, that is come together  
11 before the semester starts, the new year starts. And we  
12 were asked in plainclothes to be, myself, I attended one  
13 at least, a couple of my colleagues attended some of  
14 these meetings, and convocations and were a part of the  
15 convocation because her fear that Dr. Kao may show up  
16 and create some kind of a problem.

17 Q. "Her" being who?

18 A. Dr. Turpin.

19 Q. That stems from the April incident in the  
20 Harney parking lot that you said she expressed to you  
21 her fear?

22 A. Correct.

23 Q. In your professional -- you said that you've  
24 developed the skills to be able to assess whether a  
25 person is sincerely expressing fear arising from an

1 incident. You developed those skills while you were a  
2 captain in the San Francisco Police Department?

3 A. Correct. And part of developing the skills  
4 would be hopefully had some history. And so I have  
5 obviously known Dr. Turpin and Martha Peugh-Wade. I've  
6 known Martha Peugh-Wade.

7 Q. What is knowing the history or knowing these  
8 two women, how does that feed into what you're going to  
9 testify to?

10 A. Their credibility and how, how credible. I  
11 believe both of them to be reasonable people. I didn't  
12 see any reason that they were overreacting. In fact, it  
13 was my impression that they were trying to not overreact  
14 but not under react either in a situation like this  
15 because of the threat to their staff and fellow  
16 teachers, professors.

17 Q. Did you make an assessment as to whether Dean  
18 Turpin when she was reporting the incident in Harney  
19 truly did feel fear coming from that incident?

20 A. She certainly appeared to.

21 Q. And what was it that suggested to you that she  
22 certainly appeared to feel fear?

23 A. Just the tone. And I believe it was the e-mail  
24 that -- I can't remember whether it was phone or e-mail.  
25 I still, my memory as I'm getting older isn't quite as

1 good as it used to be.

2 Q. So you heard from her the same day basically?

3 A. Yes, yes. But that fear, you could sense the  
4 fear. Obviously, I don't -- she doesn't communicate  
5 with me very often, and if she does, it's usually  
6 because it's, you know, a serious problem. The same  
7 with Martha Peugh-Wade. I'm not called on insignificant  
8 matters, generally speaking. There's usually some basis  
9 for their fear, and there's usually -- and again, it's  
10 based on my understanding of their behavior and their  
11 credibility and their reasonableness.

12 MR. VARTAIN: Thank you, Director Lawson.

13 THE COURT: Does Counsel have any further  
14 questions?

15 MR. KATZENBACH: Yes, I do.

16 REDIRECT EXAMINATION

17 BY MR. KATZENBACH:

18 Q. I think you just indicated or you testified  
19 that you couldn't recall if you spoke to Ms. Peugh-Wade  
20 or you received some e-mail from her?

21 A. Martha Peugh-Wade?

22 Q. I'm sorry. Jennifer Turpin.

23 A. Yes. That's correct.

24 Q. So if you received an e-mail, you obviously  
25 wouldn't be hearing her tone of voice; correct?



1 A. No.

2 Q. So you don't recall whether you spoke to her  
3 and formed this impression or formed an impression from  
4 some e-mail?

5 A. I don't remember.

6 Q. All right. Do you recall ever interviewing her  
7 about this incident?

8 A. No, I do not.

9 Q. Do you recall having her questions about it?

10 A. No, I do not.

11 Q. You indicated that she said Dr. Kao got close  
12 to her from behind and was just inches from her face?

13 A. From what I understand and remember, yes.

14 Q. So he was both behind her and in front of her  
15 at the same time?

16 A. He approached from behind, and then I think she  
17 turned around, and he was in her face, yes.

18 Q. So she turned around. Is that what you  
19 understand, or are you just -- is that what she told  
20 you?

21 A. I can't recall.

22 Q. You didn't take any report on this?

23 A. Did we make a public safety report?

24 Q. Did you take any notes on this conversation  
25 with Dean Turpin?

1 A. Not that I recall.

2 Q. Did anyone else?

3 A. Not that I recall.

4 Q. Did you send an officer to investigate?

5 A. No.

6 Q. Did you ask any officer to go back to the  
7 Harney Sciences and see if there were any witnesses?

8 A. No.

9 Q. Did you ask Dean Turpin if she thought there  
10 might be any witnesses?

11 A. No.

12 Q. Did you ask Dr. Kao what about this incident?

13 A. Didn't speak to Dr. Kao.

14 Q. Did you ask anyone else to speak to Dr. Kao?

15 A. No.

16 Q. Did you ask any officers to speak to Dr. Kao  
17 about this?

18 A. No.

19 Q. At any time from the date you heard of this  
20 incident until today, are you aware of anyone at USF who  
21 interviewed Dr. Kao to get his version of what this  
22 incident was about?

23 A. I'm not aware of that, and I'm not privy to  
24 that, no.

25 Q. No one has given you a report of any interview

1 with Dr. Kao?

2 A. No.

3 Q. This incident happened at the end of May -- I'm  
4 sorry, the end of April?

5 A. I believe so.

6 Q. Okay. Was there any incident -- strike that.  
7 Was Dr. Kao asked to leave the campus as a  
8 result of this, in May?

9 A. No.

10 Q. So he continued on the campus through the  
11 remainder of the school year?

12 A. I believe so.

13 Q. All right. Would it be accurate to say that  
14 the only information that you have concerning anyone  
15 being fearful of Dr. Kao came from either Jennifer  
16 Turpin or Martha Peugh-Wade?

17 A. I believe so.

18 Q. You've never interviewed a single professor in  
19 the math department about their fears or alleged fears?

20 A. Correct.

21 Q. You never interviewed any of the staff in the  
22 math department about any fears or alleged fears?

23 A. That is correct.

24 Q. You never interviewed other professors in the  
25 department to see if they would confirm any of the

1 statements of fear that some other professor might be  
2 making?

3 A. That is correct.

4 Q. And you're aware of that -- are you aware that  
5 anyone has interviewed -- strike that.

6 During your 33 years of experience in  
7 San Francisco Police Department, have you interviewed  
8 witnesses?

9 A. Yes.

10 Q. Have you interviewed alleged perpetrators?

11 A. Yes.

12 Q. Have you interviewed victims?

13 A. Yes.

14 Q. When you conduct a police investigation, do you  
15 try to interview everyone who is a potential witness?

16 A. Yes.

17 Q. Try to get a statement from the person accused?

18 A. Correct.

19 Q. If they'll tell you, that's just great?

20 A. Correct.

21 Q. I'm sorry. We've all seen the cop shows.

22 A. Yes.

23 Q. That would be true the officers you have under  
24 your command at Public Safety, they also have experience  
25 in investigations; correct?

1 A. Yes, they do.

2 Q. And they've also interviewed people?

3 A. That's correct.

4 Q. They've also made reports?

5 A. That's correct.

6 Q. And it's the normal practice if you do an  
7 investigation to make a report of what you're  
8 investigating?

9 A. That's correct.

10 Q. And normal practice would be to interview every  
11 witness that might have some information to bear on the  
12 subject; correct?

13 A. That is correct.

14 Q. And often, you ask for witness statements;  
15 wouldn't you?

16 A. That is correct. In criminal situations,  
17 correct, yes.

18 Q. In any situation, you might ask for a witness  
19 as part of your investigation to sign a statement;  
20 right?

21 A. Generally in the police department, we wouldn't  
22 get involved unless it was a criminal issue, right.  
23 Here, it's somewhat similar in that, you know, with  
24 reports, you know, how far are we going to go? Do we  
25 believe it's a criminal issue? That sometimes will

1 dictate how far we go with investigations.

2 Q. All right. At this meeting with human  
3 resources that you remember attending --

4 A. Yes.

5 Q. -- did anyone from Public Safety to investigate  
6 this issue further?

7 A. No, they did not.

8 Q. Did anyone ask Public Safety to talk to  
9 Dr. Kao?

10 A. No, they did not.

11 Q. And didn't ask Public Safety to talk to anyone  
12 else in the department either; correct?

13 A. That is correct.

14 MR. KATZENBACH: Thank you. That's all I have.

15 THE COURT: Further questions?

16 MR. VARTAIN: Please.

17 THE COURT: Go ahead.

18 RE CROSS-EXAMINATION

19 BY MR. VARTAIN:

20 Q. Director Lawson, did any individual file a  
21 criminal complaint against Dr. Kao?

22 A. No, they did not.

23 Q. So as a result, is it true that you did not  
24 undertake to do a criminal investigation nor did you  
25 direct any of your subordinates to undertake a criminal

1 investigation; is that correct?

2 A. That is correct. It was considered an  
3 administrative matter.

4 Q. Okay. You said that as of the spring of 2008,  
5 there had not yet been a criminal threat; is that true?

6 A. Correct.

7 Q. Okay. You didn't do an analysis of whether  
8 there had been a nonverbal threat under the University's  
9 policy, only analyze whether there had been a criminal  
10 threat; correct?

11 A. That is correct.

12 Q. Now, Mr. Katzenbach asked you if you did or did  
13 not interview any of the math department faculty. You  
14 said you did not?

15 A. Correct.

16 Q. Did Ms. Peugh-Wade tell you at any time that  
17 she had done the interviews of the math department,  
18 faculty members, or at least some of them?

19 A. My understanding was that was what was being  
20 done during this process.

21 Q. Okay.

22 A. During these months.

23 Q. During the spring, you were informed that the  
24 human resources office was doing the interviewing of  
25 different people in the math department; correct?

1 A. Correct.

2 Q. And you also knew that they were not contacting  
3 Dr. Kao, however; correct?

4 A. That is correct.

5 Q. And did someone inform you as to why they  
6 weren't contacting Dr. Kao?

7 A. Well, I believe they didn't want him to become  
8 angry and possibly, you know, threaten or commit some  
9 physical assault upon somebody.

10 Q. Ms. Peugh-Wade explained that to you?

11 A. Correct.

12 Q. Did you -- would you look at Exhibit 207 in  
13 your witness binder?

14 Don't put that up there until we have that. It  
15 goes to 100 on this one.

16 May I approach the Witness?

17 THE COURT: Yes.

18 MR. VARTAIN: I put Exhibit 207 in front of the  
19 Witness.

20 (Defendant's Exhibit No. 207 was  
21 marked for identification.)

22 MR. VARTAIN: Q. Would you examine that  
23 document, please? I notice it is addressed to you,  
24 among other people.

25 A. Yes.



1 Q. Is that an e-mail?

2 A. That is correct.

3 Q. Is that an e-mail that Dean Turpin sent to you  
4 on or about April 28 -- th April 29th?

5 A. It is dated the 29th, yes.

6 Q. Did you review that e-mail?

7 A. Yes. I review all my e-mails.

8 Q. Was this part of the information that you  
9 received from Dean Turpin after which you concluded that  
10 she was in sincere fear?

11 A. That is correct.

12 MR. VARTAIN: Offer 207.

13 MR. KATZENBACH: I think this is hearsay, your  
14 Honor.

15 MR. VARTAIN: Same reservation like the other  
16 testimony. It's offered to explain his subsequent  
17 conduct.

18 THE COURT: He's not the declarant here. The  
19 objection sounds to me -- I'll sustain it, and you can  
20 argue outside the Jury. Okay.

21 MR. VARTAIN: Can we do that now, your Honor?

22 THE COURT: Outside the presence of the Jury.

23 Q. After you read this e-mail, did you grant Dean  
24 Turpin's request for increased security for her and for  
25 Harney?

1 A. Yes.

2 Q. What did that increased security consist of?

3 A. Passing calls. That is, officers will --  
4 during their routine duties will go by a particular area  
5 that the complainant is worried about or concerned about  
6 and to ensure that everybody is doing well. And of  
7 course, the officers will be aware that if they receive  
8 a phone call, what's going on.

9 MR. VARTAIN: No further questions with the  
10 exception of that one discussion, your Honor.

11 THE COURT: Mr. Katzenbach, do you have further  
12 questions?

13 MR. KATZENBACH: Yes a few.

14 FURTHER REDIRECT EXAMINATION

15 BY MR. KATZENBACH:

16 Q. You refer to these passing calls people send  
17 security officers in the building?

18 A. Yes.

19 Q. Right. And you never heard any report of  
20 Dr. Kao doing anything wrong from those officers?

21 A. That is correct.

22 Q. During this entire period of time when these  
23 passing calls were being made, no one interviewed  
24 Dr. Kao about any issues?

25 A. That is correct.

1 Q. No one asked Dr. Kao what's going on from him?

2 A. Nobody from our department.

3 Q. You're not aware of anybody else?

4 A. I'm not aware of anybody else.

5 Q. You're not aware of Martha Peugh-Wade  
6 interviewing Dr. Kao?

7 A. I'm not aware of her interviewing Dr. Kao, no.

8 Q. All right. And -- again, going back to the  
9 section of the Exhibit 91, under B, where it says, "In  
10 consultation with your administrator, determine who will  
11 convey to the individual that it is not acceptable to  
12 make such threats," you're not aware of anyone who  
13 conveyed any information to Dr. Kao that his behavior in  
14 any respect was unacceptable; is that right?

15 A. That is correct.

16 Q. And you're not aware that anyone said, "You're  
17 making implied threats so people are scared of you"?

18 A. That is correct.

19 Q. And this policy applies to implied threats;  
20 doesn't it?

21 A. Yes, it does.

22 MR. KATZENBACH: That's all I have.

23 THE COURT: Further questions from the  
24 defendant?

25 MR. VARTAIN: Yes, your Honor. Thank you.

1                                 FURTHER RECROSS-EXAMINATION

2 BY MR. VARTAIN:

3             Q.    So when Ms. Peugh-Wade told you that she was  
4 not going to interview or had not interviewed Dr. Kao,  
5 did she tell you why?

6             A.    Yes.

7             Q.    What did she tell you?

8             A.    She was afraid that there might be some violent  
9 outburst or reaction.

10            Q.    Okay.

11            A.    Which is usually the fear that people have in  
12 these cases.

13            Q.    And when eventually she did meet with Dr. Kao  
14 in June and Mr. Katzenbach, she asked you to provide for  
15 some security at that time; is that correct?

16            A.    That is correct.  I couldn't remember whether  
17 somebody was inside or not.  Generally, we do have  
18 somebody inside, and we just had one yesterday where we  
19 provided somebody inside.

20            Q.    So it's possible but you're not certain that  
21 you did have a patrol officer in and around  
22 Ms. Peugh-Wade's office and the human resources  
23 department?

24            A.    Correct.  I could not tell you that, you know,  
25 from my memory that we did.  All I can answer is by our

1 practice if we ever get a request like that generally,  
2 unless we're asked otherwise, we have somebody stand  
3 nearby in another room. I can't remember whether we did  
4 or not.

5 Q. When Ms. Peugh-Wade comes, we'll ask her that  
6 question.

7 A. Okay.

8 MR. VARTAIN: Thank you, your Honor.

9 FURTHER REDIRECT EXAMINATION

10 BY MR. KATZENBACH:

11 Q. Throughout this entire period of time, you had  
12 Public Safety officers available to Martha Peugh-Wade?

13 A. I'm not clear on the question.

14 Q. Did Martha Peugh-Wade ever ask a Public Safety  
15 to come with her to interview Dr. Kao?

16 A. On that particular date?

17 Q. No. Ever?

18 A. Ever? I can't remember. I'm not aware of.

19 Q. You're not aware that she ever asked a Public  
20 Safety officer to accompany her in interviewing Dr. Kao  
21 regarding any of these alleged allegations against him?

22 A. Again, I'm not sure whether we had somebody  
23 inside that day or not. Martha Peugh-Wade could  
24 probably best answer that.

25 Q. I'm sorry. Perhaps you misunderstood my

1 question.

2 A. All right.

3 Q. Throughout the spring semester of 2008, at no  
4 time did Martha Peugh-Wade ask a Public Safety officer  
5 to accompany her while she interviewed Dr. Kao about any  
6 allegation against him?

7 A. I can't remember that, no.

8 Q. The first time you can recall anything about  
9 this was when you indicated you hired the private  
10 investigators in June of 2008; is that right?

11 A. Correct.

12 Q. And prior to that, Ms. Peugh-Wade never said to  
13 you if you can assign an officer to come with her to  
14 talk to Dr. Kao?

15 A. I don't recall that. I don't recall. I  
16 don't -- I don't recall.

17 Q. You would have a note of that if you thought it  
18 was true that it happened; wouldn't you?

19 A. Possibly, yes.

20 Q. All right. Now, would it be accurate to say  
21 throughout this period of time if anyone was scared to  
22 speak to Dr. Kao, Public Safety was always available to  
23 accompany them in an interview?

24 A. That's correct.

25 Q. And in fact, Public Safety could have

1 interviewed Dr. Kao without them having to be present?

2 A. Could you repeat?

3 Q. Sure. Public Safety could have conducted the  
4 interview itself; couldn't it?

5 A. If they asked us to, that's correct.

6 MR. KATZENBACH: Thank you. Oh, strike that.

7 Q. Did they ever ask you to?

8 A. No.

9 MR. KATZENBACH: Thank you.

10 THE COURT: Mr. Vartain, any further questions?

11 MR. VARTAIN: No further questions.

12 THE COURT: Jurors, do you have any questions?

13 Yes.

14 (Whereupon, the Court received one written  
15 question from Jurors, and a discussion at sidebar  
16 was held: 10:58 a.m. - 10:59 a.m.)

17 THE COURT: Couple questions.

18 What exactly is a foot patrol?

19 THE WITNESS: Foot patrol is when the officer  
20 is actually on their feet. They're not in a vehicle.  
21 They're not on -- we have Segways. We have motorcycles,  
22 bicycles; that they actually get off whatever device  
23 they are on and they walk through a particular building  
24 or in an area, outside area or inside area.

25 We prefer our officers to be on foot all the

1 time so they can make contact with employees and create  
2 relationships.

3 THE COURT: Sir, after the foot patrol, was  
4 there a concern placed to you regarding Dr. Kao?

5 THE WITNESS: I'm sorry. Other than the foot  
6 patrol?

7 THE COURT: So after the foot patrol, was there  
8 a concern voiced to you regarding Dr. Kao.

9 THE WITNESS: The -- yes. There was. It was  
10 during the -- I think I mentioned this. It was during a  
11 convocation. Whenever the departments would meet, the  
12 School of Arts and Sciences, whenever they would meet,  
13 they would have a convocation. I think I went to a  
14 Christmas party once also. I think there were three,  
15 four times that we actually went to events where we had  
16 requests to have a plainclothes officer there present.  
17 So that those times, and then the other time was when --  
18 in June of that year, when we had hired the private  
19 investigator per request of Martha Peugh-Wade.

20 THE COURT: Mr. Katzenbach?

21 MR. KATZENBACH: Yes. Just quickly.

22 FURTHER REDIRECT EXAMINATION (Resumed)

23 BY MR. KATZENBACH:

24 Q. The officers doing the foot patrols, did they  
25 report any concerns to you?



1 A. No, they did not.

2 Q. And the events you described where you had  
3 undercover officers, were those after Dr. Kao was banned  
4 from campus?

5 A. I can't recall that over the period of that  
6 year. I can't recall whether it was after he was -- I  
7 think some were from my memory. Some were maybe before.  
8 I would have to --

9 Q. You don't recall?

10 A. I don't recall, yeah.

11 THE COURT: Mr. Vartain, do you have any  
12 follow-up?

13 MR. VARTAIN: I have no further questions, your  
14 Honor. Thank you.

15 THE COURT: May Mr. Lawson be excused?

16 MR. VARTAIN: Yes. By me.

17 MR. KATZENBACH: Yes, he may.

18 THE COURT: Mr. Lawson, thank you very much.  
19 You're free to go.

20 (Witness excused.)

21 THE COURT: Ladies and gentlemen, remember the  
22 admonition. Do not form or express any opinion on this  
23 case until it's finally submitted to you for your  
24 decision. Do not discuss among yourselves or with  
25 others until that time. Please be back in your places

1 at 11:10 according to the courtroom clock.

2 (Recess taken: 11:02 a.m. - 11:12 a.m.)

3 THE COURT: Jurors and Alternates are all  
4 present. Counsel and all sides are present.

5 I heard Tony Bennett is going to be performing  
6 at City Hall at noon if anyone is interested in breaking  
7 early so you could attend.

8 I think there's enough, so we should do it.  
9 One juror raised both hands. We'll quit at 11:50 to  
10 accommodate those of you who would like to attend.

11 Plaintiff may call his next witness.

12 MR. KATZENBACH: Plaintiff may call Robert  
13 Wolf.

14 THE CLERK: Mr. Wolf, if you would please stand  
15 and raise your right.

16 THE WITNESS: Yes.

17 ROBERT WOLF,  
18 called as a witness by the Plaintiff, after being first  
19 duly sworn, was examined and testified as follows:

20 THE CLERK: Please be seated. State your name  
21 and spell it for the record.

22 THE WITNESS: My name is Robert Wolf, W-o-l-f.

23 DIRECT EXAMINATION

24 BY MR. KATZENBACH:

25 Q. Dr. Wolf, do you have a -- who are you employed

1 by?

2 A. USF.

3 Q. And in what capacity?

4 A. Well, as an assistant professor mathematics.

5 Q. Do you have tenure?

6 A. Yes.

7 Q. And where did you go to school?

8 A. Undergraduate was at MIT and graduate school  
9 was at U.C. Berkeley.

10 Q. And do you have a doctorate?

11 A. Yes.

12 Q. In what is your field?

13 A. Mathematics.

14 Q. And any particular area that you specialize in?

15 A. No.

16 Q. Now, how long have you been teaching at the  
17 University of San Francisco?

18 A. Over 40 years.

19 Q. Do you know Dr. John Kao?

20 A. Yes.

21 Q. How long have you known him?

22 A. I guess about 20 years, from the very first he  
23 was hired.

24 Q. And at the University of San Francisco, the  
25 math department has a number of -- math professors each

1 have offices?

2 A. Yes.

3 Q. Where is your office located?

4 A. On the main floor.

5 Q. All right?

6 A. It's 216, I don't know if that's informative,  
7 but it's on the main floor. We have, there are two  
8 alcoves of offices for the math offices on that floor.  
9 I'm in one of them.

10 Q. Okay. Just directing your attention to the  
11 spring semester of 2008, who were the professors in the  
12 alcove where your office was?

13 A. It's hard for me to be sure. I think John Kao  
14 was in the alcove. I'm pretty sure he was. I believe  
15 next to my office was Stephen Yeung. I don't remember  
16 exactly. Millie Lehman, she probably retired before  
17 that.

18 Q. Okay. Do you recall when -- where Professor  
19 Needham's office was?

20 A. At present, it's a couple doors from mine.  
21 Then -- he would have been there, yes, a couple doors  
22 from mine then because I believe Millie Lehman retired  
23 before that, and he took her office.

24 Q. And Dr. Kao's office, was that the same alcove?

25 A. I think so, yes.

1 Q. Okay. Now, have you ever observed behavior by  
2 Dr. Kao that you perceived as threatening?

3 A. No.

4 Q. Have you ever perceived actions by Dr. Kao that  
5 gave you concern that he was deranged?

6 A. No.

7 Q. Did you ever see actions by Dr. Kao that gave  
8 you concern that he was unstable in any way?

9 A. No.

10 Q. Now, has anyone -- during the spring 2008, did  
11 you have an occasion -- strike that.

12 During the spring 2008, how frequently would  
13 you have been on campus?

14 A. A lot.

15 Q. Why so?

16 A. Well, I'm there a lot. Always there a lot,  
17 yes.

18 Q. Okay. During the spring of 2008, did you have  
19 an opportunity to observe Tristan Needham,  
20 Professor Needham?

21 A. I guess, I'm sure.

22 Q. Did his behavior in any way indicate to you in  
23 any way that he was afraid of Dr. Kao?

24 A. No.

25 Q. You also indicated that Stephen Yeung was also

1 in the same alcove you were; is that correct?

2 A. Yes.

3 Q. Did you observe any behavior by Professor Yeung  
4 that indicated to you he was afraid of Dr. Kao?

5 A. No.

6 Q. During the spring of 2008, did  
7 Professor Needham say anything to you that indicated to  
8 you that he was afraid of Dr. Kao?

9 A. No.

10 Q. How about Professor Yeung? Did he say anything  
11 to you that indicated that he was afraid of Dr. Kao?

12 A. No.

13 Q. Let's just broaden that to the math department  
14 as a whole.

15 Did anyone in the math department state to you  
16 anything that indicated to you that they were afraid of  
17 Dr. Kao?

18 A. No.

19 Q. Did they find him frightening?

20 A. No.

21 Q. Did they find him deranged?

22 A. No.

23 Q. That they found him upsetting to them in any  
24 way?

25 A. No.

1 Q. Now, do you consider yourself a friend of  
2 Dr. Kao's?

3 A. Yes.

4 Q. Do you think that your friendship with Dr. Kao  
5 is well known?

6 A. Well, I think it's fairly well known. Yes. I  
7 think in particular it's well known to  
8 Professor Needham.

9 Q. Why do you think that?

10 A. Just I think he knows I like John Kao. Yeah.

11 Q. All right. During the spring of 2008, did  
12 anyone come to you and ask you if you could talk to  
13 John Kao about any behavior?

14 A. No.

15 Q. Do you recall working with Dr. Kao on a project  
16 for the business school in the spring of 2008?

17 A. Yes.

18 Q. What was that project about?

19 A. We met -- John and I met several times with  
20 Steve Huxley from the School of Business, which has  
21 changed its name. I forgot what it is now. And we were  
22 discussing with Steve Huxley the mathematics 106 which  
23 is the math course that the department teaches for  
24 business students.

25 Q. Okay. And how did those meetings go?

1 A. Quite well.

2 Q. Was there anything in Dr. Kao's behavior in  
3 those meetings gave you any cause for concern?

4 A. No.

5 Q. Did he behave inappropriately in any way that  
6 you could see?

7 A. Not at all.

8 Q. How, in fact, did he behave?

9 A. Very professionally.

10 Q. Has anyone at USF ever given you an explanation  
11 as to why Dr. Kao is no longer teaching there?

12 A. No.

13 Q. Other than from Professor Kao, have you ever  
14 heard from anyone that Dr. Kao is banned from the USF  
15 campus?

16 A. Only from John.

17 Q. Now, have you ever discussed with Dr. Kao his  
18 concerns about affirmative action?

19 A. No. I don't think I have, although I'm aware  
20 that he's very insistent that proper procedures be  
21 followed with respect to affirmative action.

22 Q. Has anything, whenever you observed Dr. Kao  
23 discussing his concerns about proper procedure and  
24 things like that, has he done anything that made you  
25 feel that -- feel that he was scary, frightening,



1 threatening, anything like that?

2 A. No.

3 Q. Have you ever seen Dr. Kao glaring at anybody?

4 A. No.

5 Q. Have you ever seen him standing with his fists  
6 clenched in any manner?

7 A. No.

8 Q. Have you ever seen him yelling at anybody?

9 A. No.

10 Q. Have you ever seen him getting inappropriately  
11 close to people?

12 A. No.

13 Q. Have you ever seen him bumping people?

14 A. No.

15 Q. Have you ever seen him veering or charging at  
16 people?

17 A. No.

18 Q. Has anyone complained to you at any time that  
19 he engaged in any of those behaviors?

20 A. No.

21 MR. KATZENBACH: All right. Now -- that's all  
22 I have for this Witness.

23 THE COURT: Questions on behalf of the  
24 defendant?

25 MR. VARTAIN: Thank you, your Honor.

1 CROSS-EXAMINATION

2 BY MR. VARTAIN:

3 Q. Hi, Professor Wolf. I'll be just as nice as he  
4 is.

5 A. Good.

6 Q. As I know you don't make a custom of coming to  
7 court.

8 A. Lately, I have.

9 Q. I saw you here last week.

10 A. Several times.

11 Q. Hopefully today is your last time, and you  
12 won't have to come back.

13 Professor Wolf, you have not ever been the  
14 chairman of the math department or at least not in the  
15 last 10 years; is that true?

16 A. That's true.

17 Q. And you've not been the chairperson of a  
18 faculty search committee, at least not within the last  
19 10 years?

20 A. That's true.

21 Q. Have you ever been a Dean or held any position  
22 in authority over Professor Kao?

23 A. No.

24 Q. Have you had any position even as a committee  
25 chairperson where Dr. Kao had to follow your rules or

1 abide by the procedures that you were implementing?

2 A. No.

3 Q. Were you present when Dr. Kao was in Professor  
4 Sites SPELL office in the first week of January 2008?

5 A. No.

6 Q. Were you present when Dr. Kao was in Dean  
7 Brown's office in the first week of January 2008?

8 A. No.

9 Q. Were you present at the search committee  
10 meeting in early February 2008 when Dr. Kao, among other  
11 things, handed out a calculation about how that search  
12 was going to search which resulted in the hiring of  
13 Cornelia Van Cott?

14 A. No.

15 Q. Were you present in the Harney parking lot when  
16 there was an incident between Dr. Kao and Dean Turpin?

17 A. No.

18 Q. Did you ever ask Dr. Kao to tell you about that  
19 incident?

20 A. Well, actually, I never even heard of it till  
21 sitting here in the courtroom.

22 Q. Did you ever have to take a position on a  
23 matter at the University, a business matter, where you  
24 were directly objecting to what Dr. Kao was doing?

25 A. No.

1 Q. Did you ever observe him when he was angry with  
2 you?

3 A. No.

4 Q. Have you ever had the experience of him being  
5 angry with you?

6 A. No.

7 Q. Did you ever observe him when he was displaying  
8 anger towards Professor Needham?

9 A. No. But I'm aware that there's considerable  
10 friction between them.

11 Q. Did you ever see Dr. Kao when he was exhibiting  
12 anger towards Professor Needham?

13 A. Well, let's see. I guess I can't -- I mean,  
14 um, I know they don't like each other.

15 Q. What is it -- how is it that you know that  
16 Dr. Kao doesn't or hasn't liked Professor Needham? Is  
17 that something that's been the case over the years?

18 A. Yeah. I think it's mutual between them.

19 Q. Has Professor Needham ever said anything  
20 negative about Dr. Kao's race in your presence?

21 A. No.

22 Q. Or about his medical condition?

23 A. No. In fact, I really even wasn't aware of any  
24 medical condition.

25 Q. So you've not heard of anything particularly

1 negative from Dr. -- from Professor Needham about  
2 Dr. Kao?

3 A. No, I haven't. That's right.

4 Q. But you've heard Dr. Kao say negative things  
5 about Professor Needham? Have you?

6 A. He once referred to something that  
7 Professor Needham had written or done. I don't remember  
8 what it was. And he didn't approve of it.

9 Q. Dr. Kao did not approve?

10 A. Yeah.

11 Q. And Dr. Kao told you that fact?

12 A. Yes.

13 Q. That he did not approve of something that  
14 Professor Needham had done?

15 A. Yeah, a long time ago.

16 Q. Okay. I won't get into it.

17 You stated that Professor -- you stated that no  
18 one at the University told you why Dr. Kao is no longer  
19 employed at the University?

20 A. That's true. No one told me.

21 Q. The question is: Did you ask anyone in  
22 authority at the University to tell you why Dr. Kao no  
23 longer works there?

24 A. I didn't ask anyone in authority. I did ask  
25 Professor Needham once.

1 Q. Okay. Did you ever -- did there come a point  
2 in time in that same year, 2008, after the point in time  
3 when Dr. Kao was no longer working and was no longer at  
4 the building on the premises that Dr. Kao told you he  
5 wasn't supposed to be on campus?

6 A. Yes.

7 Q. Was that in the fall of 2008 that Dr. Kao told  
8 you out on the sidewalk, you know, on the street that  
9 he's not supposed to be on campus?

10 A. I don't remember the year. I remember we did  
11 meet across the street from -- actually, I don't  
12 remember exactly when I became aware that he was not  
13 allowed on campus. But we did meet once across the  
14 street. I was giving him his mail from -- that's about  
15 it.

16 Q. Did he tell you why he was across the street  
17 from campus and not on campus?

18 A. Well, I -- he may have told me explicitly, but  
19 I don't remember whether it was explicit, but I knew he  
20 was not allowed on campus.

21 Q. He told you that?

22 A. Yeah. I think he's the only one who's ever  
23 told me that.

24 Q. Has anybody at the University ever told you  
25 anything private regarding Dr. Kao and his private life,

1 his employment, his health or anything else that you  
2 consider private?

3 A. No, no.

4 Q. In the spring of 2008, spring of 2008, did  
5 Dr. Kao tell you he was having trouble with walking  
6 because of medication issues?

7 A. He's never told me that.

8 Q. Okay. Did Dr. Kao tell you that he was swaying  
9 or walking in a strange sort of way, that is, in 2008?

10 A. Not then or ever.

11 Q. Okay. Were you present at any of the math  
12 department meetings of the search committee that led to  
13 the hiring of Dr. Cornelia Van Cott?

14 A. Well, I might -- I would be present at a  
15 regular department meeting. I wasn't present at any  
16 special meeting.

17 Q. The special meetings are the meetings of the  
18 search committee?

19 A. Yeah.

20 Q. That's a subset of the department?

21 A. Yeah. I never was present at those.

22 Q. So you didn't have the opportunity to observe  
23 Professor Kao's behavior at the search committee  
24 meetings related to Dr. Van Cott; is that true?

25 A. That's true.

1 Q. Were you present at the departmental meeting  
2 when Dr. Kao slammed his briefcase shut and walked out  
3 when he was denied the chairmanship of the department?

4 A. Yes. The slamming wasn't especially violent.  
5 But he did. He was upset.

6 Q. Okay. He slammed his briefcase closed?

7 A. "Slam" is a powerful word. He was, you know,  
8 he wasn't gentle.

9 Q. It was noticeable?

10 A. It was noticeable.

11 Q. And you could hear it?

12 A. Yes.

13 Q. And you could see it?

14 A. Yes.

15 Q. And he was making a statement clearly?

16 A. Yes. He was upset.

17 Q. But it appeared to you that Dr. Kao was trying  
18 to make a statement by how he was doing his physical  
19 behaviors of how he walked out of the meeting and  
20 closing up his briefcase?

21 A. Well, I don't know if he was trying to make a  
22 statement as opposed to just feeling dissatisfied. I  
23 don't know which it was.

24 Q. Fair enough.

25 You don't attend all of the monthly



1 departmental meetings; is that correct?

2 A. Yeah. I attend them all except today I'm here.

3 Q. I see. You're not attending today?

4 A. Today.

5 Q. Do they generally happen once a month?

6 A. Yes. Second Tuesdays.

7 Q. Did you ever hear Professor Yeung say anything  
8 negative about Dr. Kao?

9 A. No. I've never heard anybody say anything  
10 negative about Dr. Kao.

11 Q. Would that be fair --

12 A. Well, yeah. I've never heard anybody say  
13 anything.

14 Q. None of the professors, none of the Deans have  
15 ever spoken to you in a manner that you regard as  
16 negative towards Dr. Kao; is that the case?

17 A. Yes. That's the case.

18 Q. That would include all these people here?

19 A. That's, that's the folks, yeah.

20 Q. Chubb, Needham, Van Cott, Yeung, Zeitz, Wells,  
21 Pacheco, Devlin, Stillwell, yourself, Finch, none of  
22 those people have ever said anything negative about  
23 Dr. Kao in your presence or to you?

24 A. Not that I can remember. Not that I can  
25 remember.

1 Q. Have they ever said anything that gave you good  
2 cause to believe they were trying to exclude or limit  
3 the number of women faculty members?

4 A. No.

5 Q. Have any of the departmental faculty ever given  
6 you any good cause to believe they were trying to limit  
7 the number of Asian-American faculty members?

8 A. No. I'm quite sure that they would never feel  
9 that way.

10 Q. Have they, the math department faculty, ever  
11 given you any good cause to think that they in any way  
12 discriminate on the basis of disability, gender or race?

13 A. No, not at all.

14 Q. What about the Deans? You know Dean Turpin?

15 A. Yes.

16 Q. How do you know her?

17 A. She's the -- was the Dean.

18 Q. These are the two people I'm concerned in this  
19 case, Dean Turpin and Brandon Brown, the associate Dean.  
20 She's now moved up to higher or lower, whatever we want  
21 to look at it, a different position.

22 Have either of these two people, Dean Turpin or  
23 Dean Brown, ever given you any reason to think that they  
24 are looking to limit the number of Asian-American  
25 professors or the number of female professors, whether

1 in the math department or anywhere else?

2 A. No.

3 Q. You mentioned that you've never had any  
4 position that put you in authority over Professor Kao?

5 A. That's right.

6 Q. Whether as a chairperson or a Dean or even  
7 informally, you've never had to say no to him?

8 A. That's right.

9 Q. Right?

10 A. That's right.

11 Q. Or to disagree with him. You've not been in  
12 that position where you've had to take a stance in  
13 opposition to him because you felt differently; is that  
14 true?

15 A. Well, not in any formal way, no.

16 Q. You might have a disagreement over an opinion  
17 just talking?

18 A. That's right.

19 Q. Okay. You said that in the spring of 2008,  
20 Professor, that Professor Needham, Professor Yeung, they  
21 didn't say to you that they had a fear of Professor Kao  
22 during --

23 A. That's right.

24 Q. -- that semester?

25 A. No one has ever said that to me.

1 Q. They've not even said it since then? Since  
2 he's been fired, they've never come up to you and shared  
3 with you what their, if any, what their concerns were  
4 back in the spring of 2008; correct?

5 A. That's correct.

6 Q. And I take it you've never asked them, even  
7 after you heard about this lawsuit and what the issues  
8 are, you've never gone up to them and asked them to  
9 share that information with you?

10 A. Share what information?

11 Q. What their feelings were about Professor Kao in  
12 the spring of 2008.

13 A. No. I've never asked about their feelings  
14 towards him, no.

15 Q. And Professor Zeitz, in the spring of 2008, he  
16 didn't say to you that he had a personal safety worry  
17 about Professor Kao; did he?

18 A. No. No one has ever expressed such a concern  
19 to me.

20 Q. Including Professor Pacheco did not either?

21 A. No, no. That's right.

22 Q. Are you in the habit of socializing with  
23 Professor Pacheco on an off-site basis?

24 A. No.

25 Q. What about with Professor Needham?

1 A. No.

2 Q. What about with Professor Zeitz?

3 A. No.

4 Q. What about Professor Yeung?

5 A. No.

6 Q. So in that period of time, 2008, you were not  
7 on a regular basis or any kind of basis having lunch and  
8 coffee with those four people; is that correct?

9 A. That's correct, yeah.

10 Q. So -- and you were not in their office? You  
11 didn't go in and chit-chat with them on a regular basis  
12 either, those four professors; correct?

13 A. Well, I didn't regularly show up and chit-chat.  
14 But I would go into their office sometimes.

15 Q. Okay. You've never had occasion to ask them  
16 about how they felt about Dr. Kao in the spring  
17 semester?

18 A. That's right.

19 Q. And they never opened up to you about what, if  
20 anything, was going on in their world vis-a-vis Dr. Kao?

21 A. That is correct. I was completely in the dark.  
22 That's true.

23 Q. You've never had occasion to make Professor Kao  
24 angry; have you?

25 A. No.

1 Q. You've never had to be on a search committee?  
2 You've never been in a position of authority?

3 A. That's correct.

4 Q. Have you ever been in his home?

5 A. No.

6 Q. MR. VARTAIN: No further questions.

7 THE COURT: Thank you, Mr. Vartain,.

8 Mr. Katzenbach, do you have any further  
9 questions?

10 MR. KATZENBACH: I do.

11 REDIRECT EXAMINATION

12 BY MR. KATZENBACH:

13 Q. I believe in response to Mr. Vartain's  
14 question you referred to you did have some conversation  
15 with Professor Needham about why John Kao was not there?

16 A. That's right.

17 Q. When did that happen?

18 A. Well, I guess about a year ago, I think. We  
19 were in the hall walking along or something, and I  
20 asked, "What's John" -- something like, "What's John's  
21 case about?" I had no idea. And he said -- he said,  
22 Professor Needham said, "I have a guess."

23 Q. Uh-huh. And did Professor Needham say anything  
24 more?

25 A. No. He didn't say anything more. And, you

1 know, I assumed that he didn't know any more than I did,  
2 but I think now I believe that he was quite heavily  
3 involved with the case.

4 Q. Why do you say that?

5 A. Well, I think he had a grudge against John. I  
6 don't know whether that's -- I suspect that's some  
7 aspect of this case. And he -- so you ask why do I  
8 think now that he's heavily involved, I see him with --  
9 I am pretty sure he's heavily involved. Maybe I'm not  
10 answering very well. I'm sorry.

11 Q. That's okay. Who do you see him hanging out  
12 with?

13 A. Well, I've seen him a few times with Mike  
14 Vartain.

15 Q. Uh-huh.

16 A. So that causes me to suspect, you know, that  
17 has raised some suspicion that Needham was heavily  
18 involved with this case against John.

19 Q. Okay. And just going back to the situation as  
20 it was in spring of 2008, the -- in your observations of  
21 the various faculty members and staff of the department,  
22 did any of them appear to be nervous around John?

23 A. No.

24 Q. Did any of them appear to be frightened around  
25 John?

1 A. No.

2 Q. Was John frequently on the campus?

3 A. A lot because he really liked his office, and  
4 he was around a lot. Weekends and such, yes.

5 Q. All right. And you also indicated that you  
6 didn't think any of these individuals would  
7 intentionally discriminate against women or minorities;  
8 is that correct?

9 A. That's correct.

10 Q. Do you think they would be upset if John  
11 accused them of engaging in discrimination in connection  
12 with the search?

13 MR. VARTAIN: He's asking him to speculate.

14 MR. KATZENBACH: I'll withdraw that question.  
15 I'll withdraw that question.

16 Q. Following the -- now, you were at regular  
17 faculty meetings?

18 A. That's right.

19 Q. And other than the meeting that you've  
20 described involving the issue of the chair, did John  
21 behave appropriately during those meetings?

22 A. I don't quite understand. You said the issue  
23 of the chair?

24 Q. Where there was an issue with John --

25 A. Oh. Oh, yeah.



1 Q. Other than that meeting which you described  
2 what happened, at the other meetings do you recall John  
3 yelling?

4 A. No.

5 Q. Do you recall John participating in the  
6 meetings?

7 A. Oh, yes. He definitely participates. He's  
8 very good at participating in that sort of thing.

9 Q. Do you recall any manner in which John was  
10 participating that seemed inappropriate to you?

11 A. No.

12 Q. Okay. Following the -- you weren't at the  
13 search committee meeting?

14 A. No, I wasn't.

15 Q. Following that search committee meeting, did  
16 anyone come to you and tell you that John had done  
17 something inappropriate during that meeting?

18 A. No.

19 MR. KATZENBACH: Thank you. That's all I have.

20 THE COURT: Mr. Vartain, any cross?

21 MR. VARTAIN: Yes. May I stay here, your  
22 Honor?

23 THE COURT: Of course.

24 /////

25 /////

1 RE CROSS-EXAMINATION

2 BY MR. VARTAIN:

3 Q. Professor, it is still your testimony that  
4 Professor Needham has never said anything negative about  
5 Professor Kao nor have any of the other math professors;  
6 is that true?

7 A. That's true.

8 Q. Yet you suspect that Professor Needham has a  
9 grudge or had a grudge?

10 A. Yes.

11 Q. Have you ever read any portions of  
12 Professor Kao's personnel file?

13 A. No.

14 Q. Have you ever read any portions of his  
15 grievances with the University?

16 A. No.

17 Q. And you've never read anything that  
18 Professor Needham has said in response to any  
19 grievances; correct?

20 A. That's correct.

21 Q. And again, Professor Needham has never said  
22 anything negative about Professor Kao; correct?

23 A. As far as I can recollect, he's never said  
24 anything negative.

25 Q. Now, you actually were involved in this case

1 before today. You gave a deposition; is that true?

2 A. That's true.

3 Q. And you actually had the I will say, quote,  
4 misfortune, close quote, of coming to my office to give  
5 a deposition and meeting Ms. Adler and me?

6 A. That's right.

7 Q. And you, I would imagine, know or assume that  
8 all the other math professors have had to give their  
9 depositions in this case including Professor Needham?

10 A. That's true, yes.

11 Q. So when you asked Professor Needham to tell you  
12 why Professor Kao wasn't working at the University, all  
13 Professor Needham said was, "I have a guess"?

14 A. That's correct.

15 Q. Did you get the impression that maybe  
16 Professor Needham was feeling like he shouldn't talk  
17 about that with you?

18 A. Yeah.

19 Q. In other words, it seemed like he might have  
20 started to say something, but then he didn't want to  
21 say; correct?

22 A. I think that's correct.

23 Q. Okay. So it isn't that you're accusing  
24 Professor Needham of lying to you, are you, when he  
25 said, "I have a guess"?

1 A. Not lying.

2 Q. As you sit here today, Professor, you don't  
3 know if Professor Needham has ever read the letters from  
4 the University to Professor Kao that said why he's no  
5 longer working at the University?

6 A. That's correct. I don't know.

7 Q. Nor have you read any letters from the  
8 University that said to Professor Kao why he should or  
9 shouldn't do some things, that is, before he was  
10 terminated?

11 A. That is correct.

12 Q. Nor has any of the Dean's or the math  
13 professors told you what they know, if anything, about  
14 what's in those letters?

15 A. That's correct.

16 THE COURT: Ladies and gentlemen, remember the  
17 admonition. Do not form or express any opinion on this  
18 case until it's finally submitted to you for your  
19 decision. Do not discuss it among yourselves or with  
20 others until that time. Please be back in your places  
21 at 1:30 according to the courtroom clock. Remember to  
22 leave your notebooks and instructions behind.

23 MR. VARTAIN: Your Honor, that was my last  
24 question. Just to say --

25 MR. KATZENBACH: I have no follow-up, your

1 Honor.

2 THE COURT: Let me ask the Jurors now. Have  
3 you any questions for Professor Wolf? No. Okay.  
4 Great. Thanks for volunteering that.

5 See you all at 1:30.

6 Mr. Wolf, you're free to go. Thank you.

7 THE WITNESS: Thank you.

8 (Witness excused.)

9 (Whereupon, the Jurors left the courtroom at  
10 11:51 a.m.)

11 THE COURT: Jurors and Alternates have left the  
12 courtroom. Counsel for both sides and the Plaintiff  
13 remain.

14 Let's stick with the hearsay objection to  
15 Exhibit 207, I also noted that that exhibit is  
16 explicitly labeled as within the attorney/client  
17 privilege. That gives me some concern.

18 MR. VARTAIN: Yeah. No, we produced that in  
19 discovery, your Honor. And we did not assert the  
20 privilege regarding that exhibit. It was -- it's  
21 actually I think in both parties' exhibit binders.

22 So the reason I offered that was to explain the  
23 Witness's -- he read it and to explain his subsequent  
24 behavior, namely, that he dispatched foot patrols to  
25 Harney and took other security steps. And so that's why

1 it should be offered. It should be received, I  
2 proposed, but not for the truth as we've done with some  
3 of the exhibits.

4 THE COURT: Explain the behavior exception to  
5 the hearsay rule applies to the declarant. In this  
6 case, it wasn't the declarant. In this case, it wasn't  
7 the declarant. I don't know if I said it on the record,  
8 but I'll say it now. I said it last week.

9 If you, Counsel, will give me a list of  
10 exhibits that you would like that otherwise would be  
11 hearsay, admitted for a limited purpose, I can link  
12 those up with the instructions, instruction 206, is  
13 clear as to what's being admitted for what.

14 MR. KATZENBACH: Very well. We'll work on  
15 that, your Honor.

16 THE COURT: And there are plenty of things that  
17 can be admitted for things such as states of mind and  
18 intentions.

19 MR. KATZENBACH: Yes.

20 THE COURT: And harbors malice, seeking to  
21 retaliate, lots of things that it can be probative of.  
22 Okay.

23 Anything else you would like on the record?

24 MR. KATZENBACH: Yes, your Honor. We have a  
25 dispute concerning one of our witnesses that we had

1 scheduled for this afternoon. And that would be  
2 Christine Liu, the department administrative assistant.

3 We have been, you know, we served her with a  
4 subpoena in connection with the last trial. We've had  
5 agreements with her she would be here. Defendants  
6 appear to be saying she's not going to appear. We've  
7 had communications with her in e-mail, both to  
8 coordinate her and other math department persons  
9 appearing. And we had e-mails with her in the last week  
10 or so about her appearance.

11 Now it is our understanding that defendants  
12 believe she is not properly served, and she won't be  
13 appearing. I want to just confirm whether that's the  
14 case and whether we need to serve her again or whether  
15 we need to make some other arrangements with her.

16 MR. VARTAIN: This is a person by the name of  
17 Christine Liu as to whom we received a letter on Monday  
18 or Sunday from Counsel saying that they intend to call  
19 her today. Apparently they've been in touch with her,  
20 "they" being counsel.

21 She contacted Ms. Adler and informed Ms. Adler  
22 that she's not under subpoena, and she feels odd and  
23 difficult about appearing here. I informed  
24 Mr. Katzenbach this morning that she said she has no  
25 subpoena, and she has no agreement that the subpoena

1 from the last scheduled trial which never happened in  
2 September, suffices.

3           So I don't think it's our problem. She's not a  
4 managerial employee. She's not a supervisorial  
5 employer.

6           THE COURT: What I hear you saying, as far as  
7 you know, this Witness is not going to appear without  
8 further effort on behalf of the plaintiff.

9           MR. VARTAIN: As far as I know. Counsel has --  
10 he has not subpoenaed people. He's been sending e-mails  
11 to people who work at the University. And I guess some  
12 of them come and some of them don't want to come. So,  
13 you know, it's his problem. It's not my problem.

14           MR. KATZENBACH: We subpoenaed all these  
15 witnesses, your Honor. We all reached agreements with  
16 them that they would appear at this trial on the basis  
17 of subpoenas we last served upon them at the last trial.  
18 That includes Ms. Liu.

19           THE COURT: All right. Mr. Vartain has made it  
20 apparent he doesn't consider it his problem. You can  
21 try and persuade him to help you get the witnesses in or  
22 you can left to your own devices. I'm not particularly  
23 inclined to issue body attachments in a civil case. So  
24 don't count on that.

25           MR. KATZENBACH: Very well, your Honor. I



1 understand that. I wanted to advise you of the issue,  
2 and we'll see what we can do over the lunch break.

3 THE COURT: Okay. Anything further for the  
4 record? Okay. I see Mr. Vartain is shaking his head.

5 MR. VARTAIN: In the negative, no, I don't have  
6 any other issues, your Honor. Thank you.

7 THE COURT: It's not the negative. It's the  
8 positive. That means it's a nod, not a shake.

9 All right. Off the record; out of session.  
10 See you at 1:30.

11 MR. KATZENBACH: Yes, your Honor.

12 (Whereupon, the lunch recess was taken at  
13 11:57 a.m.)

14 AFTERNOON SESSION

15 (Time noted: 1:33 p.m.)

16 ---oOo---

17 THE COURT: Jurors and Alternates are all  
18 present. Counsel for all sides are present. Plaintiff  
19 is personally present.

20 Mr. Katzenbach, would you call your next  
21 witness.

22 MR. KATZENBACH: Yes. We would like to call  
23 Dr. Paul Good.

24 PAUL GOOD,  
25 called as a witness by the Plaintiff, after being first

1 duly sworn, was examined and testified as follows:

2 THE WITNESS: Yes, I do.

3 THE CLERK: Please be seated. State your name  
4 and spell it for the record, please.

5 THE WITNESS: Paul Good, G-o-o-d.

6 THE COURT: Mr. Katzenbach, you may inquire.

7 MR. KATZENBACH: Thank you.

8 DIRECT EXAMINATION

9 BY MR. KATZENBACH:

10 Q. Dr. Good, what is your profession?

11 A. I'm a clinical and forensic psychologist.

12 Q. And what does a clinical and forensic  
13 psychologist do?

14 A. A clinical psychologist is trained in the  
15 techniques of psychology to treat individuals with  
16 emotional and mental problems. The forensic  
17 psychologist takes those skills into the legal arena and  
18 does evaluations of criminal defendants or individuals  
19 involved in civil litigation having to do with  
20 psychological damages or Workers' Compensation cases,  
21 fitness-for-duty evaluations.

22 Q. All right. Have you done fitness-for-duty  
23 evaluations?

24 A. Yes, I have.

25 Q. In connection with fitness-for-duty

1 evaluations, can you tell the Jury a little bit about  
2 what sort of -- what fitness for duty examinations  
3 entails?

4 A. In this kind of examination, an employer will  
5 call a psychologist and after certain events or  
6 incidents have happened in the workplace, the employer  
7 may feel that there are sufficient grounds to have an  
8 employee evaluated psychologically to determine if they  
9 can perform their duties, the duties listed in their job  
10 description in a psychologically sound manner.

11 Q. All right. And I would like to direct your  
12 attention to -- strike that.

13 At some point in 2008, were you contacted by  
14 the University of San Francisco?

15 A. Yes, I was.

16 Q. And do you recall when you were contacted?

17 A. I was contacted January 22nd, 2008, by  
18 Ms. Turpin.

19 Q. All right. Could you please take a look at  
20 Plaintiff's Exhibit 75? I'm sorry. It's in one of the  
21 binders there. Plaintiff's Exhibit, and I think they're  
22 numbered, so it would be 75. The cover sheet should  
23 indicate the numbers.

24 A. Yes.

25 (Plaintiff's Exhibit No. 75 was

1 marked for identification.)

2 MR. KATZENBACH: Q. Taking a look at what's  
3 been marked as Plaintiff's Exhibit 75, can you tell us  
4 what that exhibit is?

5 A. These are my notes from a telephone  
6 conversation that I had with Jennifer Turpin on  
7 January 22nd, 2008.

8 MR. KATZENBACH: At this point, I would like to  
9 move Exhibit 75 into evidence.

10 THE COURT: Any objection?

11 MR. VARTAIN: Could I ask one question of the  
12 Witness on voir dire?

13 THE COURT: Yes.

14 VOIR DIRE

15 BY MR. VARTAIN:

16 Q. Dr. Good, did you take these notes at or around  
17 the time you talked to Dr. Turpin?

18 A. At the time.

19 MR. VARTAIN: No objection.

20 THE COURT: Received.

21 (Plaintiff's Exhibit No. 75 was  
22 received in evidence.)

23 DIRECT EXAMINATION (Resumed)

24 BY MR. KATZENBACH:

25 Q. Now, based on taking a look at what's been

1 marked -- what has been admitted as Exhibit 75, I would  
2 like to ask you about some of your notes. I think I'm  
3 going to have to ask you to see if you can read those to  
4 the Jury.

5 MR. VARTAIN: He's a doctor, Mr. Katzenbach.

6 MR. KATZENBACH: Huh?

7 MR. VARTAIN: He's a doctor. How can he read  
8 his own notes?

9 MR. KATZENBACH: Obviously he's a doctor.

10 MR. VARTAIN: Now the real test comes.

11 THE WITNESS: I hope I can read my own notes.

12 MR. VARTAIN: You should have given him a  
13 notice can you interpret the hieroglyphics.

14 MR. KATZENBACH: I have great trust.

15 MR. VARTAIN: Well --

16 MR. KATZENBACH: Q. I'm sorry. In your  
17 conversation -- I'm sorry. In your conversation with  
18 Ms. Turpin, did you understand Ms. Turpin's function at  
19 the University?

20 A. Yes. I knew she was a Dean.

21 Q. Okay. In your conversation with Dean Turpin,  
22 what did she tell you about the reason for contacting  
23 you?

24 A. She said there was a faculty member that was  
25 causing concern to the University; that he had been

1 evidencing some behaviors that were frightening to other  
2 individuals. There had been no written or verbal threat  
3 expressed, but there were behaviors, nonverbal behaviors  
4 that were of concern.

5 Q. Did she describe those nonverbal behaviors to  
6 you?

7 A. Yes, she did.

8 Q. What did she say about those?

9 A. She gave as examples the fact that Dr. Kao  
10 could be very intensely angry. He could stare  
11 aggressively. He could raise his voice; tremble as if  
12 he were in a rage; that he might stand too close to  
13 individuals and so there was a concern about him  
14 violating boundaries of individuals; that he frothed at  
15 the mouth on occasion.

16 These were the kinds of behaviors she  
17 mentioned.

18 Q. Did she also mention any medical history of  
19 his?

20 A. She mentioned that he had a history of  
21 depression and that there may have been one episode of  
22 hallucinations.

23 Q. Did she describe the circumstances under which  
24 those hallucinations occurred?

25 A. No.

1 Q. Did she say -- tell you that those  
2 hallucinations were induced by taking Prozac?

3 A. I don't remember her saying that.

4 Q. Okay. Now, you also, taking a look at your  
5 notes, I would like to direct you to a comment. I'm  
6 going to mark a point here. You see what I'm referring  
7 to?

8 A. Yes.

9 Q. What does that say?

10 A. That says "perpetual complaint about procedural  
11 issues."

12 Q. How does that continue?

13 A. "In what he believes" -- "in what he believes  
14 he's been slighted and overlooked."

15 Q. And what's the next two words?

16 A. "Minor issues," question mark.

17 Q. Did she describe what these issues were?

18 A. No.

19 Q. Did she tell you that these issues concerned  
20 Dr. Kao's concerns about discrimination at USF?

21 A. I don't remember her saying that.

22 Q. Okay. And if she had said something like that,  
23 do you think you would have noted it down in your notes?

24 A. It's possible. I was -- you know, it's  
25 sometimes hard to get things down when you're trying to

1 listen. So it's possible, but I don't know for sure.

2 Q. But you do recall her using the phrase "minor  
3 issues"?

4 A. That may have been her term or it might have  
5 been -- well, I wouldn't have known if it was a minor or  
6 a major. No. I think that must have been her term.

7 Q. Thank you.

8 As she described these procedural issues, she  
9 referred to them as a situation wherein Dr. Kao had been  
10 slighted and overlooked?

11 A. Yes, I believe so.

12 Q. Thank you. Now, at that time -- does she also,  
13 taking a look at the next line on your notes, does that  
14 refer to -- can you tell us what that says?

15 A. It says, "He's even brought in an attorney. No  
16 lawsuit yet."

17 Q. Thank you. Again, that was something that was  
18 told to you by Ms. Turpin?

19 A. Yes.

20 Q. Dean Turpin. Sorry.

21 Now, did you have any subsequent conversations  
22 with anyone from -- did you have any -- sorry, strike  
23 that.

24 What did you understand your role -- after  
25 speaking to Dean Turpin, what did you understand your



1 role was going to be?

2 MR. VARTAIN: Objection. Lacks foundation.

3 THE COURT: Overruled. The Witness may answer.

4 THE WITNESS: I understood my role to be that  
5 at this point, there was no interest in a  
6 fitness-for-duty evaluation, but that the University was  
7 looking for some input on an educational level about  
8 markers for violence or things to look for that might  
9 suggest an escalation of hostilities, and there was some  
10 -- and how best for the institution to respond.

11 MR. KATZENBACH: Q. All right. And did you  
12 have -- after speaking to Dean Turpin, did you have any  
13 subsequent conversations with anyone from the  
14 University?

15 A. Since I knew that we were talking about a  
16 meeting with a group of administrators, I said to Dean  
17 Turpin that it would be helpful to me if I could speak  
18 to one or two of the other Deans who might be coming to  
19 the meeting so that I could get a feel for the issues  
20 that they wanted to talk about at the meeting.

21 And so as a way of just preparing myself for  
22 the meeting, I obtained two phone numbers of two of the  
23 Deans, Dean Peugh-Wade -- Dean Wade and Dean Brown and  
24 called them the next day or two to have a short  
25 conversation with them about the issues as they saw

1 them.

2 Q. All right. Take a look at the second page of  
3 Exhibit 75.

4 A. Yes.

5 Q. What is that?

6 A. These are my notes from my telephone  
7 conversation with Dean Wade on January 30th, 2008.

8 Q. Okay. And was that a telephone call that you  
9 initiated?

10 A. Yes.

11 Q. And taking a look at the first line in the  
12 second page, the first phrase says, "Pre fit for duty,"  
13 I believe; correct?

14 A. Yes. What I meant by that, this is prior to  
15 any fitness-for-duty evaluation. This is my preliminary  
16 inquiry with one of the Deans.

17 Q. All right. Now, taking a look -- I would like  
18 to direct your attention to the line that begins down  
19 here something it says, "He makes complaints." Do you  
20 see that?

21 MR. VARTAIN: I'm going to object. The Witness  
22 -- Counsel, to be fair, you need to read the whole  
23 thing, Counsel. Not just pick out one word.

24 MR. KATZENBACH: I'm asking about this line and  
25 what his --

1 THE COURT: Okay, folks. What's the objection?  
2 What's the ground?

3 MR. VARTAIN: I'm going to withdraw the  
4 objection.

5 THE COURT: I'm sorry?

6 MR. VARTAIN: I'm withdrawing the objection,  
7 your Honor.

8 THE COURT: Okay.

9 MR. KATZENBACH: Q. Direct your attention to  
10 that line, can you read what that line says?

11 A. "He makes complaints re sexual harassment  
12 policy."

13 Q. Can you read the rest of those notes?

14 A. "Legal counsel says it's futile to do an  
15 informal evaluation. And then human resource would like  
16 an informal evaluation."

17 Q. Did you have any understanding what those  
18 comments meant?

19 A. Essentially that there was some conflict  
20 between these two entities within the University  
21 administration over how to proceed.

22 Q. Okay. Now, take a look at the line that's next  
23 below that. What does that say?

24 A. That says, "No. 3, have someone talk to him."

25 Q. Now, was that something that Ms. Peugh-Wade

1 told to you or you told to Ms. Peugh-Wade?

2 A. No, that she told to me. There were three  
3 items here. The first one, "No. 1, do we have the duty  
4 to take a step to keep him off campus," that was the  
5 option she was saying we could remove him from campus.

6 Q. Okay.

7 A. The second option, "He makes complaints and  
8 maybe an evaluation should be done," that was a second  
9 option, to do an evaluation. And the third option was  
10 someone should talk with him.

11 Q. All right. And below that, there's some other  
12 notes. Can you read what those notes say?

13 A. "The Assistant Dean had dealt with him. And  
14 the employee had shuddered," and I wrote "foam."

15 Q. Okay. Right. And then the next one is?

16 A. "Professor to professor."

17 Q. And what did that mean?

18 A. I think that was my notation about the  
19 possibility of a professor-to-professor conversation  
20 that could be had.

21 Q. All right.

22 A. And then the last was, "Faculty chair," a note  
23 about the possibility of the chairman of that department  
24 talking with him.

25 Q. All right. Now, during these conversations

1 that you had with Ms. Peugh-Wade, do you recall her  
2 objecting to any of this discussion about somebody  
3 talking to him?

4 A. No.

5 Q. Okay. Now --

6 A. No. However, I did get the feeling that there  
7 was concerns about talking with him. I should say that.  
8 I should correct that.

9 Q. Okay. But there is nothing noted, no specific  
10 concerns you noted in your notes?

11 MR. VARTAIN: Objection. Leading the Witness.

12 MR. KATZENBACH: Q. I'm sorry. Looking at  
13 your notes, is there anything in there you would note as  
14 a specific concern?

15 A. No.

16 Q. Now, you also talked to -- you indicated you  
17 also talked to a Dean Brown?

18 A. Yes.

19 Q. Okay. Could you please take a look at  
20 Exhibit 76?

21 A. Yes.

22 Q. And can you identify what Exhibit 76 is?

23 A. These are my contemporaneous notes from my  
24 telephone conversation with Dean Brown on January 31st,  
25 2008.

1 MR. KATZENBACH: All right. At this point,  
2 your Honor, I would like to move Exhibit 76 into  
3 evidence.

4 THE COURT: Any objection?

5 MR. VARTAIN: No objection, your Honor.

6 THE COURT: It's received.

7 (Plaintiff's Exhibit No. 76 was  
8 marked for identification and  
9 received in evidence.)

10 MR. KATZENBACH: Q. Now, taking a look at your  
11 notes, there is -- it appears at the bottom of something  
12 a comment, "Shooter adrift with anger." That wasn't  
13 part of your original notes?

14 A. No.

15 Q. The original notes you have is just the stuff  
16 that's above that?

17 A. Yes.

18 Q. Okay. Thank you.

19 Now, in your conversation looking at your --  
20 what did Dean Brown tell you about Dr. Kao?

21 A. Well, my first note is a question that I -- I  
22 wrote down from Dean Brown. "If an employee is  
23 paranoid, displaying nonverbal behavior that is  
24 frightening others, what could worsen this to become  
25 violence?"

1 Q. Okay. And what -- is there any further comment  
2 on that issue?

3 A. No.

4 Q. And what's No. 2?

5 A. No. 2 is, "How can he be reached?"

6 Q. What did that involve?

7 A. That was I believe a question as to how can one  
8 reach out and connect with him.

9 Q. All right. Then you have a comment, "Not a  
10 great route." What is that, Doctor?

11 A. That was, I believe, Dean Brown's sentiment  
12 that a formal fitness-for-duty evaluation was not a  
13 great route to take at that point in time.

14 Q. In the course of your conversation with  
15 Dean Brown, did you have any discussions with him that  
16 people were too afraid to talk to Dr. Kao?

17 A. Well, I think I may have asked the question how  
18 has he been approached.

19 Q. Uh-huh.

20 A. And that is a line in my notes there. And  
21 Dean Brown said with kindness and openness. And then I  
22 have written, "Nothing -- nothing said that your  
23 behavior disturbs people."

24 Q. So in this conversation, you understood that  
25 Dr. Brown had indicated that people had approached

1 Dr. Kao?

2 A. I believe so.

3 Q. But no one has said that "your behavior  
4 disturbs anyone"?

5 A. I believe so.

6 Q. Did Dr. Brown give any explanation as to why no  
7 one had raised that issue?

8 A. Well, there was a concern that if he was  
9 approached, that it might feed his paranoia.

10 Q. All right. Is that Brown's only comment on  
11 that issue?

12 A. Yeah. That further approaches might stimulate  
13 more suspiciousness on Dr. Kao's part.

14 Q. All right. Did you ultimately go to a meeting  
15 at the University of San Francisco?

16 A. Yes, I did.

17 Q. Do you recall when that meeting was?

18 A. That meeting was on February -- February 12th,  
19 2008.

20 Q. And do you recall who was present at that  
21 meeting?

22 A. I didn't make a formal list, and I am not great  
23 at names. But I believe Dean Wade and Dean Brown were  
24 there perhaps, and Dean Turpin was there. And there may  
25 have been one or two others.



1 Q. All right. Could you please take a look at  
2 Exhibit 77?

3 A. Yes.

4 (Plaintiff's Exhibit No. 77 was  
5 marked for identification.)

6 MR. KATZENBACH: Q. Can you identify what  
7 Exhibit 77 is?

8 A. Prior to the meeting with the Deans, I put  
9 together a talk.

10 Q. Okay.

11 A. An outline of the things that I thought would  
12 be responsive to the questions that they had.

13 Q. Okay. And what is Exhibit 77?

14 A. These are my notes, an outline about predicting  
15 violence, explaining risk factors such as psychopathy  
16 and narcissism and other risk prediction schemes that  
17 might be related to their issues with Dr. Kao in terms  
18 of looking at predictors or markers.

19 Q. All right. And did you distribute any  
20 materials to people at this meeting.

21 A. Yes. I distributed three handouts. One on  
22 psychopathy, one on narcissism, and one on violence  
23 predictors.

24 Q. And at this meeting, did you also discuss  
25 standards that are commonly used to evaluate

1 fitness-for-duty evaluations?

2 MR. VARTAIN: Objection. Ambiguous. Evaluate  
3 fitness for duty?

4 MR. KATZENBACH: I'm sorry. I'll rephrase the  
5 question.

6 Q. A discussion about fitness-for-duty evaluation.

7 A. Yes.

8 Q. What did that discussion consist of?

9 A. Well, I explained that there were resources  
10 that laid out policies and procedures for when and how  
11 to institute a fitness-for-duty evaluation as well as  
12 what to look for and how to respond if a person was  
13 considered violent or potentially violent in the  
14 workplace.

15 Q. Can you tell us what particular procedures you  
16 identified during that meeting?

17 A. I mentioned that the international association  
18 of the chiefs of police, which is an association of  
19 police chiefs, have a good policies and procedures for  
20 when to conduct a fitness-for-duty evaluation. Also,  
21 the U.S. Postal Service I thought in my review of the  
22 literature those are two good manuals, so to speak, that  
23 the people at USF, if they hadn't seen it, might find  
24 useful.

25 MR. KATZENBACH: Your Honor, I would like to

1 have this marked next in order as Plaintiff's 113. It's  
2 not in the binder, your Honor.

3 THE COURT: Thank you.

4 (Plaintiff's Exhibit No. 113 was  
5 marked for identification.)

6 MR. KATZENBACH: We've supplied a copy to the  
7 other side.

8 May I approach the Witness, your Honor?

9 THE COURT: You may.

10 MR. KATZENBACH: Q. Showing the Witness what's  
11 been marked as Plaintiff's Exhibit 113 and ask the  
12 Witness if he can identify that document.

13 A. Yes. This is the Chief of Police sort of  
14 policy on and guidelines for starting a fitness-for-duty  
15 evaluation.

16 Q. Are these the guidelines you identified in your  
17 meeting?

18 A. Yes. I didn't provide them with a copy of  
19 this, but I mentioned this.

20 MR. KATZENBACH: All right. I would like to  
21 move Exhibit 113 into evidence.

22 THE COURT: Any objection?

23 MR. VARTAIN: If he didn't provide it, I don't  
24 see the relevancy.

25 THE COURT: There's an objection. We can

1 discuss it later.

2 MR. KATZENBACH: All right.

3 Q. Did you discuss the -- did you discuss the  
4 definition of a psychological fitness-for-duty  
5 evaluation as reflected in the International Association  
6 of Chiefs of Police guidelines?

7 A. I didn't -- I didn't discuss the definition of  
8 it.

9 Q. Okay. Did you discuss the purpose of it?

10 A. I think the purpose was clear.

11 Q. Okay.

12 A. So, no, I don't believe we discussed the  
13 purpose of it.

14 Q. All right. Did you have any discussion of what  
15 sort of information was needed before a psychological  
16 fitness-for-duty examination would be justified?

17 A. Yeah. I mentioned that the evidence that is  
18 necessary for a referral for a fitness-for-duty  
19 evaluation needs to be objective in the sense that the  
20 employee, you know, has to have a problem performing  
21 their job and that the -- there has to be something  
22 observable and identifiable to lead to a referral.

23 Q. All right. Thank you.

24 Did you have any further discussion -- any  
25 discussion of exhaustion of other options before a

1 fitness-for-duty examination would be justified? Let me  
2 just rephrase that.

3           Was there any discussion of what other options  
4 might be taken before a fitness-for-duty examination?

5           A. Yeah, in the sense that there could be  
6 discussions with the employee prior to formally  
7 requesting that they submit to a fitness-for-duty  
8 evaluation.

9           Q. In that regard, do you recall -- in regards to  
10 discussions with the employees, do you recall any more  
11 about -- any further discussions on that issue  
12 concerning what could be done concerning Dr. Kao?

13           A. My memory is just that there had been some  
14 discussion, but that it had not been profitable, and I  
15 didn't know the particulars of those discussions. I  
16 didn't know who had tried to talk, and I didn't know --  
17 I didn't have a timeline to know when the talks had  
18 occurred and how much time had elapsed. So I didn't  
19 know any details about the actual process that the  
20 University and Dr. Kao had gone through prior to my  
21 showing up.

22           Q. Did you go -- when you were having a  
23 discussion, did you have any discussions as to how the  
24 University might approach Dr. Kao to have such a  
25 discussion?

1           A. Well, I said at the meeting, I remember saying  
2 if the University wanted to talk with Dr. Kao, if they  
3 decided that that was appropriate given the process,  
4 then here's one way that the conversation could be  
5 framed to try to engender Dr. Kao's cooperation in the  
6 discussion.

7           Q. What sort of suggestions do you recall making?

8           A. Well, in general, I suggested perhaps that if  
9 they were going to have a conversation, maybe the  
10 department chair could approach Dr. Kao because, in a  
11 sense, a department is like a family. And so maybe that  
12 would be one route and to try to say some positive  
13 things to Dr. Kao first before saying what the concerns  
14 about his behavior were.

15          Q. Did anyone at that meeting after this  
16 discussion tell you that they were unwilling to talk to  
17 Dr. Kao?

18          A. No.

19          Q. Did anyone at that meeting say to you that  
20 talking to Dr. Kao would be impossible?

21          A. I don't remember anyone saying that. I do  
22 remember a feeling that it was unlikely that it would be  
23 successful. There was some sense of "we don't think  
24 this is a very good option" was my feeling.

25          Q. Uh-huh. And did they express to you and do you

1 recall any expression why they thought this wasn't a  
2 good option?

3 A. I don't believe anyone explicitly said why it  
4 wasn't a good option. My sense was if there was an  
5 assessment that Dr. Kao was suspicious or rigid in his  
6 ways, that that's why such a conversation might not  
7 work.

8 Q. Okay. Was there also -- you indicated earlier  
9 that -- strike that.

10 At this meeting, was there any discussion about  
11 fitness-for-duty evaluations?

12 A. No. It was clear at every juncture that I was  
13 not going to be doing a fitness-for-duty evaluation.  
14 The Deans had made it clear that they were not ready at  
15 this point to do that, and that my role was going to be  
16 simply to offer some information, some something about  
17 the research, something about my professional experience  
18 in general.

19 MR. KATZENBACH: Okay. Just so I can get this  
20 on the record, I would like to have this marked as  
21 Plaintiff's 114.

22 (Plaintiff's Exhibit No. 114 marked  
23 for identification.)

24 THE COURT: Thank you.

25 MR. KATZENBACH: May I approach the Witness,

1 your Honor?

2 THE COURT: Yes.

3 MR. KATZENBACH: Q. Dr. Good, I'm handing you  
4 Exhibit 114 and ask that you identify that.

5 A. That's the United States Postal Service's  
6 fitness for duty manual or instructions to management.

7 Q. Is this another document that you identified at  
8 the meeting?

9 A. Yes.

10 MR. KATZENBACH: And at this point, your Honor,  
11 I would like to make a motion to introduce Exhibit 114.

12 THE COURT: Any objection?

13 MR. VARTAIN: Same objection as before. I  
14 don't think the Witness testified that he gave it to the  
15 University. It's not relevant.

16 THE COURT: The objection is sustained.  
17 Discuss it further outside the presence of the Jury.

18 MR. KATZENBACH: Thank you, your Honor.

19 Q. Now, at any time after this meeting, did anyone  
20 call you from the University -- did anyone from the  
21 University of San Francisco call you and ask for copies  
22 of either Exhibits 113 or Exhibit 114?

23 A. No.

24 Q. Did anyone from the University call you and ask  
25 you for any further advice or consultation?



1 A. No.

2 Q. Did anyone call you and -- did you receive any  
3 communication of any nature from the University of  
4 San Francisco after the meeting in February?

5 A. No.

6 MR. KATZENBACH: That's all I have for the  
7 Witness, your Honor.

8 THE COURT: Okay. Questions from the  
9 defendant?

10 MR. VARTAIN: Thank you, your Honor.

11 CROSS-EXAMINATION

12 BY MR. VARTAIN:

13 Q. Hi, Dr. Good. I've had the pleasure of meeting  
14 you before. You've met Ms. Adler?

15 A. Yes. Thank you.

16 Q. Sounds like your engagement with the University  
17 was purely educational. Would that be fair to say?

18 A. Yes.

19 Q. The University was looking to be educated about  
20 this world of violence assessment and fitness for duty?

21 A. Yes.

22 Q. You were never engaged to actually assess  
23 Dr. Kao's behaviors and advise the University as to what  
24 to do about them; is that true?

25 A. That's correct.

1 Q. At this early stage of January and February,  
2 all you were doing was trying to give general  
3 information to the University about something that they  
4 said they didn't quite know enough about?

5 A. Correct.

6 Q. Is that fair?

7 A. Yes.

8 Q. When the people at the University spoke with  
9 you on the phone and spoke with you in person, did you  
10 get a sense as to whether they were trying to proceed in  
11 an intelligent fair manner?

12 A. Yes.

13 Q. Did you get a sense as to whether the  
14 University was trying to be fair to both Dr. Kao and to  
15 the employees who had the safety concerns?

16 A. Yes.

17 Q. Did you get a sense that the University was  
18 trying to do this right and not provoke Dr. Kao  
19 unnecessarily?

20 A. Yes.

21 Q. You said that you, yourself, are sometimes  
22 engaged by employers to do fitness for duty assessments  
23 of employees?

24 A. Correct.

25 Q. And would it be fair to say that having been of

1 an educational resource to the University, it was  
2 entirely proper that the University not come to you and  
3 ask you to do the fitness for duty assessment?

4 A. Yes. That would be entirely proper.

5 Q. Okay. So keeping you out of it for the later  
6 stages was something that was proper for the University  
7 to do, at least from your vantage point?

8 A. I think so.

9 Q. When I notice in your notes of your -- you  
10 brought some notes, and you had an agenda for what you  
11 were going to present in the way of general information  
12 to the University when you met with them there in  
13 February.

14 Do you have that in front of you, Dr. Good?

15 A. Yes, I do.

16 Q. I notice there is a part here about that has  
17 the term "threat assessment."

18 Would you explain to the Jury what that part of  
19 your educational seminar for the University people was  
20 intended to teach them?

21 A. The FBI has put together a threat assessment.  
22 This was, I believe, after the 2007 Virginia Tech  
23 shooting which had happened about eight or nine months  
24 prior to this meeting that I had with the University.  
25 And I believe that the FBI had put together a manual for

1 looking at threats in schools.

2           And so I mentioned that this document existed.  
3 It might have been of interest for the University to  
4 look at. I also mentioned that there were risk  
5 assessment teams that have been developed at  
6 universities where an interdisciplinary group is  
7 assembled in advance of some incident so that the  
8 institution was ready to jump into action if there was  
9 some incident: A counselor, someone from security,  
10 someone from administration.

11           Q. I notice that part of your educational talk to  
12 the University had referred to a guide that was put out  
13 by the U.S. Secret Service and the U.S. Department of  
14 Education.

15           A. Yes.

16           Q. Did you mention that to the University; that  
17 is, that they should, if it gets to that, look at having  
18 an assessment done of whether this is a genuine threat  
19 and resort to the kind of people and the guidelines that  
20 are out there for how to assess threats?

21           A. Yes.

22           Q. Do you know Dr. Missett?

23           A. I have had opportunities where we were on the  
24 same side of cases and on different cases of criminal  
25 cases.

1 Q. Are you aware that he's actually a well-known  
2 lecturer to the Secret Service and other government  
3 agencies on how to assess threats?

4 A. Yes. I knew that he has worked for the  
5 government in that respect.

6 Q. He is someone who is reputable in the field of  
7 how to advise institutions of education, government  
8 institutions on how to responsibly evaluate behaviors in  
9 the workplace?

10 A. Yes.

11 Q. I heard you use the word "may," m-a-y, several  
12 times in conjunction with the question of the University  
13 may want to talk to Dr. Kao, and you said they seem to  
14 be somewhat wary of doing that. They thought he was  
15 already very suspicious. But this was all -- this was  
16 in February.

17 I'm going to show you a timeline that we've --  
18 you were not involved with educating the University in  
19 March, April, May and June; is that right?

20 A. Correct.

21 Q. Are there situations from your perspective  
22 where it would be inadvisable for human resources people  
23 or other untrained people to approach the person who is  
24 reportedly making other people feel fearful?

25 A. Yes. I can imagine so.

1 Q. Could you give me some examples where it would  
2 be unwise for a University to take a layman or a lay  
3 woman and approach a faculty member who is exhibiting  
4 behaviors of the kind that were reported about Dr. Kao?

5 MR. KATZENBACH: Objection. Assumes facts not  
6 in evidence.

7 THE COURT: Overruled. The Witness can answer.

8 THE WITNESS: I think when a -- when there's --  
9 when an employee is sufficiently agitated, then -- and  
10 to some extent out of control, then you, you may want to  
11 have a professional doing the intervention rather than  
12 another layperson on the faculty or in the  
13 administration.

14 If things have progressed to a point where  
15 there's a more serious situation, then you may not want  
16 to try to remedy the situation at that point.

17 MR. VARTAIN: Q. So you don't find it  
18 irrational if the University had decided that they  
19 themselves didn't want to -- that they didn't want the  
20 colleagues or the Deans to sit down with Professor Kao?

21 A. You know, I was never given enough detail about  
22 what actually was the circumstances to be able to advise  
23 them either way.

24 Q. Okay.

25 A. But in a general sense, I could imagine that

1 there might be a situation where the University would  
2 feel it was not appropriate to approach.

3 Q. And that the University would reasonably feel  
4 that it was not appropriate to approach Dr. Kao? There  
5 could be such a situation? Just that you aren't that  
6 knowledgeable of the facts; correct?

7 A. Correct.

8 Q. And in fact, I hear you saying, Dr. Good, that  
9 you never advised the University to go and approach  
10 Dr. Kao; is that true?

11 A. That's true. I said to them if they decided  
12 that that made sense to do, and here's how the  
13 conversation might be structured.

14 Q. Because you have said that you were not in the  
15 position of being an advisor, you were just a general  
16 educator at this point?

17 A. That's correct.

18 Q. Or at all points?

19 A. That's correct.

20 Q. Did anybody at the University -- I think you  
21 actually had a total of three people you either talked  
22 to on the phone or met in that meeting in February:  
23 Brown, Peugh-Wade and Turpin?

24 A. And then there were maybe one or two others at  
25 the meeting that I can't quite place.

1 Q. Okay. Did anybody say anything to the effect  
2 that, "We would like to have Professor Kao returned to  
3 normalcy and stay with us," or words to that effect?

4 A. The words to that effect were, "We would like  
5 to resolve this without, you know, a lawsuit. We would  
6 like to resolve it in an amicable way."

7 Q. Amicable with Professor Kao?

8 A. Yes. That's my word.

9 Q. And they told you he was a tenured professor?

10 A. I believe I knew that, yes.

11 Q. Did they -- they didn't tell you they wanted to  
12 get rid of him as a tenured professor; did they?

13 A. Oh, no. That was not said.

14 Q. Or in any way have him stop being an employee.  
15 That was not their goal as they represented it to you;  
16 is that true?

17 A. Correct.

18 Q. Is there anyone who expressed any anger on the  
19 basis that Professor Kao had repeatedly filed  
20 complaints?

21 A. No. I didn't feel anyone expressed anger.

22 Q. That was just part of the profile and the  
23 history of Professor Kao that they were describing to  
24 you; is that fair?

25 A. The very limited profile and very limited



1 history that they provided.

2 Q. When the Dean mentioned that Dr. Kao had  
3 depression, did she say anything that showed that she  
4 saw that as stereotypically bad or that that meant he  
5 was not employable at the University?

6 A. No. It was just one bit of data.

7 Q. Was it data that it was the right thing to  
8 mention to you if you were trying to get a picture of  
9 the situation? Is it good to know what the employer  
10 knows about the medical status of the employee?

11 A. Sure. I would have had lots more questions,  
12 but it was clear that they didn't want to share anymore  
13 details with me about the specifics.

14 Q. Who's the "they"? The University people?

15 A. Yes.

16 Q. They were trying to be as limited in medical  
17 information as they could be; is that what you're  
18 saying?

19 A. Yes.

20 Q. Do you know Dr. Norman Reynolds?

21 A. Yes. We had one case together in the Moreland  
22 School District years ago.

23 Q. Is he someone that's well known as a reputable  
24 fitness for duty evaluator?

25 A. I believe so.

1 Q. Do you find any fault with the University that  
2 they ended up selecting Dr. Reynolds to do the fitness  
3 for duty assessment of Dr. Kao?

4 A. No. I enjoyed working with him when I did that  
5 case.

6 Q. Did you find him to be appropriately fair to  
7 the employee as well as the employer?

8 A. Yes, I did.

9 Q. Did he seem to you to be a person who is  
10 skillful and knows how to do those kinds of evaluations  
11 in a way that is scientific and also fair?

12 A. Yes.

13 MR. VARTAIN: No further questions, your Honor.

14 THE COURT: Mr. Katzenbach, do you have further  
15 questions?

16 MR. KATZENBACH: Yes, I do.

17 REDIRECT EXAMINATION

18 BY MR. KATZENBACH:

19 Q. You indicate you testified, Doctor, that you do  
20 fitness-for-duty evaluations?

21 A. Yes.

22 Q. Where is your office located?

23 A. In San Francisco on Union Street.

24 Q. Are you the only psychologist or psychiatrist  
25 -- sorry. Rephrase it.

1           Are you the only person in San Francisco that  
2 does fitness-for-duty evaluations?

3           A. No.

4           Q. Are there other psychiatrists that do it?

5           A. I, I would think so. I mean, I couldn't right  
6 off the bat tell you who, but I would believe so.

7           Q. Do you think there are other psychiatrists that  
8 do fitness for duty examinations closer than San Jose?

9           A. I would think so.

10          Q. By the way, do you know the name of  
11 Dr. Reynolds' website?

12          A. No.

13          Q. Okay. Now, in response to questions by  
14 Mr. Vartain, you describe a little bit -- he went over  
15 certain things that were mentioned to you when you were  
16 first contacted by the University. The University first  
17 contacted you, and then you also had follow-up  
18 conversations?

19          A. Yes.

20          Q. And in those follow-up -- in those  
21 conversations, the things that, if you take a look at  
22 Exhibit 75 and 76, if you look at 75 --

23          A. Yes.

24          Q. -- in the information that Jennifer Turpin  
25 volunteered to you, she volunteered the information

1 about the perpetual complaints regarding procedural  
2 issues; right?

3 A. Yes.

4 Q. And she's the one who volunteered the  
5 information that these were about -- where he felt  
6 slighted and overlooked; isn't that right?

7 A. Yes.

8 Q. And again, she didn't volunteer the information  
9 that these complaints concern issues of discrimination;  
10 did she?

11 A. I think I learned about the discrimination in a  
12 later conversation when Dean Wade mentioned that the  
13 complaints were about the sexual harassment policy.

14 Q. So Dean Wade told you the complaints concerned  
15 sexual harassment?

16 A. Yes.

17 Q. But she didn't tell you these complaints  
18 concerned discrimination in the hiring process at the  
19 University?

20 A. No, I never knew that.

21 Q. Didn't tell you these complaints concerned  
22 Dr. Kao's concerns that the department was -- that had  
23 insufficient minorities, insufficient females in the  
24 mathematics department?

25 A. No.

1 Q. She never told you anything like that?

2 A. Correct.

3 Q. And they volunteered to you, did they not, that  
4 Dr. Kao had an attorney, but there was no lawsuit?

5 A. Correct.

6 Q. That was, again, something that Dean Turpin  
7 volunteered to you; correct?

8 A. Yes.

9 Q. And the -- and in describing the things that  
10 were concerning with Dr. Kao, Dean Turpin identified --  
11 indicated that there was no written or verbal threats?

12 A. Correct.

13 Q. And it was all nonverbal behavior?

14 A. Correct.

15 Q. All right. And she -- now, you also had a  
16 conversation with Dean Brown on the 31st, and that's  
17 Exhibit 76.

18 A. Yes.

19 Q. In that conversation, did he mention anything  
20 to you of any individual experiences he had had with  
21 Dr. Kao?

22 A. No, he didn't.

23 Q. Okay. And at the meeting that you held on the  
24 12th of February, did anyone tell you that Dr. Kao had  
25 behaved recently in a faculty meeting in a way that

1 anyone thought was inappropriate?

2 A. There were some comments that other faculty  
3 members were feeling alarmed or fearful around him and  
4 that there was a -- the faculty were withdrawing from  
5 him.

6 Q. Okay. Did they mention anything that occurred  
7 at a faculty meeting?

8 A. I don't remember a specific incident. I  
9 remember the general comment.

10 Q. Would you please take a look at Exhibit 78?

11 A. Yes.

12 (Plaintiff's Exhibit No. 78 was  
13 marked for identification.)

14 MR. KATZENBACH: Q. Can you tell us what  
15 Exhibit 78 is?

16 A. 78 is the notes that I prepared for my talk on  
17 violence prediction, psychopathy, narcissism,  
18 predictors, things like that.

19 Q. Does it also contain notes of what you  
20 discussed at the meeting?

21 A. Yes. These were the points that I made in my  
22 presentation at the meeting.

23 Q. I'm sorry. I think you're looking at  
24 Exhibit 77?

25 A. Oh, I'm sorry. Okay. Yeah. I'm sorry.

1           So these are notes that I made in advance of  
2 the meeting.

3           Q.   Okay.  All right.

4           A.   And it was a -- sort of notes about how to  
5 frame some conversation between the department chair  
6 let's say or a faculty member and Dr. Kao.

7           Q.   And did you go over this, these notes about  
8 framing such a conversation at the meeting?

9           A.   Yes.

10          Q.   And could you just sort of tell us how, how the  
11 issue of -- framing the issue of talking to Dr. Kao was  
12 discussed at the meeting?

13          A.   Well, at some point in the discussion, I  
14 offered that if the administration felt that it would be  
15 worthwhile, if it was appropriate, then here's how to  
16 set up the conversation with Dr. Kao to try to minimize  
17 his feeling suspicious or defensive.

18           THE COURT:  Ladies and gentlemen, remember the  
19 admonition.  Do not form or express any opinion on this  
20 case until it's finally submitted to you for your  
21 decision.  Do not discuss among yourselves or with  
22 others until that time.  Please be back in your places  
23 at 2:40 according to the courtroom clock.

24           (Recess taken:  2:32 p.m. - 2:42 p.m.)

25           THE COURT:  Jurors and Alternates are all

1 present; counsel for all sides are present; plaintiff is  
2 personally present; the Witness is on the stand.

3 Mr. Katzenbach, you may continue your inquiry.

4 MR. KATZENBACH: Thank you, your Honor.

5 Q. Now, at this meeting or in your conversations  
6 with the University -- with the persons from the  
7 University of San Francisco, did anyone state to you  
8 that they were personally afraid of Dr. Kao?

9 A. No.

10 Q. In the context when you were meeting with the  
11 University of San Francisco at this meeting and in your  
12 phone calls, did you form an impression that it was  
13 Dr. Kao's intensity that concerned people?

14 A. That was a piece of it.

15 Q. Okay. Would it be accurate to say that it was  
16 -- all right.

17 Would it be accurate to say that during the  
18 course of these meetings, no one indicated to you,  
19 described any particular incident involving Dr. Kao?

20 A. That's correct.

21 Q. Okay. No one indicated that they had been  
22 involved in any particular incident with Dr. Kao?

23 A. No. That -- you're asking me about the members  
24 at the meeting?

25 Q. Right.



1           A. I don't believe any of them said that they  
2 personally were involved.

3           Q. All right. Now, before referring an employee  
4 for fitness-for-duty evaluation, is there normally an  
5 investigation by the employer?

6           A. Yes.

7           Q. All right. Do you usually understand that that  
8 investigation would be a thorough and complete  
9 investigation?

10          A. Yes.

11          Q. When you accept -- when an employer refers an  
12 employee for a fitness for duty, is it the standard that  
13 the assumption would be -- is it the general assumption  
14 that the employer's investigation has concluded?

15          A. Not necessarily.

16          Q. Okay. Is it generally an assumption that what  
17 the employer informs the examiner about is something  
18 that the employer has verified?

19               MR. VARTAIN: Objection. Ambiguous. Whose  
20 assumption?

21               MR. KATZENBACH: Let me rephrase it. I'll  
22 rephrase it.

23          Q. In your experience when you've been referred  
24 for -- employees have been referred for fitness-for-duty  
25 examination by you, has the employer explained the

1 reason for that referral?

2 A. Yes.

3 Q. And if that involved behavior by the employee,  
4 will the employer typically describe that behavior?

5 A. Yes.

6 Q. And when you receive that information, do you  
7 assume that the employer has verified the truth of the  
8 descriptions that are being given?

9 A. Yes. But I have to qualify. For example, in a  
10 situation where a supervisor and an employee get into an  
11 argument --

12 Q. Right.

13 A. -- and let's say it goes on for a significant  
14 period of time, the employer usually through the human  
15 resource department will say to me, "We've -- we have  
16 complaints from the supervisor. We have write-ups by  
17 the supervisor."

18 Now, when you ask is it true, I don't know  
19 absolutely what happened between the supervisor and the  
20 employee, and the employer is passing on to me the  
21 documentation about the conflict. Sometimes there's a  
22 clear incident in which the employee did something, and  
23 that's clear. At other times in a psychological sense,  
24 there can be conflicts in personality that can't be  
25 quite as easily verified.

1 Q. All right. But would it be a general matter  
2 that somebody performing an evaluation for fitness for  
3 duty would assume that what the employer was saying was  
4 true?

5 A. Generally, that's the case, yes.

6 Q. Would it also be generally the case that when  
7 an employer refers someone for a fitness-for-duty  
8 evaluation, that the examiner would assume that the  
9 employer had a substantial reason for that referral?

10 A. Yes. That would be part of the referral.  
11 We're sending this person because their work performance  
12 has deteriorated or they're getting into arguments with  
13 other employees or they've been missing work or alcohol  
14 was smelled on their breath, things like that.

15 Q. All right. And thank you.

16 Now, a fitness-for-duty examination is not a  
17 subject for disciplinary action; is it?

18 A. No.

19 Q. For example, somebody assaulted -- if somebody  
20 assaulted -- one employee assaults somebody with a  
21 crowbar, right, then normally that would be a  
22 disciplinary matter?

23 A. Yes.

24 Q. In other words, you send them to the  
25 unemployment line, not to a psychiatrist?

1 A. Yeah. I see what you're saying.

2 Q. That would be typical; wouldn't it?

3 A. Yeah. I mean, if they assault someone in the  
4 workplace, I assume that would be grounds for dismissal,  
5 yeah.

6 Q. Or disciplinary action of some sort?

7 A. Some sort.

8 Q. And fitness-for-duty evaluation isn't a  
9 substitute for that procedure; is it?

10 A. No.

11 Q. If somebody is harassing somebody, like for  
12 example, just in a more common instance, if someone is  
13 engaged in sexual harassment against another female  
14 employee, a male employee sexually harassing a female  
15 employee, that would typically be grounds for  
16 disciplinary action; isn't it?

17 MR. VARTAIN: Objection. "Typically"? The  
18 question is ambiguous.

19 MR. KATZENBACH: I'll withdraw the question.  
20 Let me rephrase it slightly different.

21 MR. VARTAIN: I'm going to object to the line  
22 of questioning. The kind Doctor has not been qualified  
23 as an employer or human resources expert. Let's not put  
24 him in that position.

25 MR. KATZENBACH: All right. I'll ask a

1 different question.

2 Q. You indicated that after your meeting with USF  
3 -- strike that.

4 During the course of any of your meetings or  
5 any of these discussions with USF, did USF tell you that  
6 any of the incidents involving Dr. Kao directly occurred  
7 in the context of him making complaints about  
8 discrimination?

9 A. I'm not sure I understand.

10 Q. All right. When they describe his intensity or  
11 facial expression or any other events that he described,  
12 did they say at the time that Dr. Kao displayed these  
13 things he was complaining about discrimination?

14 A. No. I don't remember what the context was when  
15 those behaviors were observed.

16 Q. The University never told you that those were  
17 in the context of making complaints about  
18 discrimination?

19 A. No, not specifically.

20 Q. All right. And finally, you indicated after  
21 this meeting the University didn't call you again?

22 A. Correct.

23 Q. Did they call you for a referral for someone to  
24 do a fitness-for-duty evaluation for Dr. Kao?

25 A. It's four years now. I'm not absolutely sure.

1 Q. Do you recall referring them to anyone for a  
2 fitness-for-duty evaluation?

3 A. I don't remember. I'm sorry.

4 Q. Would you -- is that something you would take a  
5 note of if you had?

6 A. Um, I think I would have remembered. But it's  
7 possible I could have forgotten.

8 Q. All right. Finally, one other thing, you  
9 indicated that you had done some fitness-for-duty  
10 evaluations on the same case that Dr. Missett had done?

11 A. Yes.

12 Q. And you reached opposite conclusions?

13 A. No, not on that one. Well, oh, yes.

14 Dr. Missett was on the other side on that case, yes.

15 Q. And those are both psychological evaluations?

16 A. Yes.

17 Q. Okay. So thank you.

18 By the way, is there any standard, those were  
19 both for purposes of a trial; is that correct?

20 A. No.

21 Q. I'm sorry. Criminal proceeding?

22 A. Those, yes. Those were criminal cases.

23 However, he was involved in the Moreland School District  
24 case as a representative for the individual who we were  
25 evaluating.

1 Q. Okay. Is that where you reached opposite  
2 conclusions?

3 A. Well, I don't know what his conclusion was. He  
4 was simply there as a witness for the individual who was  
5 being evaluated.

6 Q. Is that Dr. Reynolds or Dr. Missett?

7 A. That was Dr. Missett.

8 Q. Okay. Thank you.

9 That's all I have.

10 THE COURT: Mr. Vartain, have you questions?

11 MR. VARTAIN: Please, your Honor. Just a few.  
12 Thank you.

13 RE CROSS-EXAMINATION

14 BY MR. VARTAIN:

15 Q. Dr. Good, but your experience with Dr. Missett  
16 whom the University had asked to assist them in this  
17 case, your experience with him is, I take it, has been  
18 nothing but that he's a high-quality professional?

19 A. Yes.

20 Q. And impartial, not biased in any way? Has that  
21 been your experience?

22 A. I don't know about his bias. I know he does a  
23 lot of work for the District Attorney. I've seen him in  
24 more cases for the District Attorney than for the  
25 defense.

1 Q. But you've not seen him in any situation where  
2 he seemed to be arbitrary in his opinions; is that true?

3 A. That's true.

4 Q. You mentioned that when you, yourself, are  
5 retained by employers to do a fitness for duty  
6 assessment of an employee, typically the employer gives  
7 you some type of write-up of what are the behaviors that  
8 are causing them concern. Is that often the case?

9 A. Yes.

10 Q. Because in this case, Mr. Katzenbach is saying  
11 the University should not have done that, but it's your  
12 testimony --

13 MR. KATZENBACH: Objection, your Honor. I  
14 think that's a little argumentative.

15 MR. VARTAIN: Oh, you're not saying that. I  
16 thought you were saying that in your opening.

17 THE COURT: Sustained.

18 MR. VARTAIN: Q. That is the norm though that  
19 the employer will furnish a write-up to the doctor of  
20 what's the concerns.

21 A. You know, sometimes it's not done. But I would  
22 prefer to see in writing what the supervisor said, you  
23 know, what are the actual complaints about the employee.

24 Q. And is there anything wrong where the employer  
25 actually gives the copy of that write-up to the attorney



1 for the employee and the employee himself? Anything  
2 wrong in doing that?

3 A. No. I think that the more openness in that  
4 regard, the better.

5 Q. Exactly. I want to re-ask a question because  
6 Mr. Katzenbach is asking a number of questions about  
7 what the University told you factually about  
8 Professor Kao. But it is the case that you weren't  
9 doing an assessment of Dr. Kao or the facts; is that  
10 true?

11 A. That's true.

12 Q. You didn't ask the University to disclose facts  
13 about Dr. Kao. You were just providing education about  
14 the general feel. Is that true?

15 A. Correct.

16 MR. VARTAIN: No further questions.

17 THE COURT: Mr. Katzenbach, further questions?

18 FURTHER REDIRECT EXAMINATION

19 BY MR. KATZENBACH:

20 Q. Doctor, when I asked you what the University  
21 told you, in other words, that's what the University  
22 voluntarily gave information? The University  
23 voluntarily gave to you?

24 A. Yes.

25 Q. When they described Dr. Kao was paranoid,

1 that's something they voluntarily told you?

2 A. Yes.

3 Q. When they referred to his complaints, that's  
4 something they voluntarily told you?

5 A. Yes.

6 Q. When they referred to his complaints, didn't  
7 mention the fact that he's involved in discrimination  
8 hiring, that was an omission they voluntarily made;  
9 isn't that right?

10 A. Yes.

11 MR. KATZENBACH: Thank you.

12 THE COURT: Mr. Vartain?

13 MR. VARTAIN: I'm going to give him the last  
14 word and end it right there. I could have objected to  
15 irrelevance, but I'm not.

16 Thank you, Dr. Good. Thanks for coming.

17 THE COURT: Jurors get the last word. Jurors  
18 have you questions?

19 (Whereupon, the Court received four written  
20 questions from Jurors, and a discussion at sidebar  
21 was held: 2:56 p.m. - 3:00 p.m.)

22 THE COURT: A few juror questions, Dr. Good.

23 Under what circumstances in your experience is  
24 a fitness for duty exam recommended or warranted?

25 THE WITNESS: First, if there's a significant

1 deterioration in an employee's performance or unusual  
2 behavior that's outside the norm and if there is  
3 reasonable belief that it's psychologically related. So  
4 in other words, there has to be some performance  
5 impairment and some reasonable belief that that's  
6 connected to a psychological issue.

7 THE COURT: How long does the typical fitness  
8 for duty exam last?

9 THE WITNESS: My experience is that there are  
10 potentially three components. Four actually. The first  
11 is taking the referral from the employer. That can take  
12 anywhere from 15 minutes to an hour where you are  
13 discussing as much of the details of the problem at the  
14 workplace that led to the referral.

15 The second part involves the clinical interview  
16 with the employee. That typically will take three to  
17 four hours in my experience. In that interview, you're  
18 doing a complete psychosocial history so that you know  
19 the entire background of the person. You do a mental  
20 status exam which tells you the person's current mental  
21 state at this particular moment that you're doing the  
22 evaluation. And you then do an interview in which you  
23 find out all about the conflicts at work, what were the  
24 issues from the point of view of the employee.

25 That's the clinical interview, that whole

1 process.

2           Then I typically do two hours of psychological  
3 testing. I use psychological testing as an adjunct to  
4 my interview because it gives me another source of data  
5 to put together with my interview data.

6           Finally, if some period of time has elapsed  
7 while the person has been off duty, essentially been off  
8 work, if there's a period of time that they are in the  
9 community out of work, then I will reevaluate them prior  
10 to my giving them the go ahead to go back to work. So  
11 that could be a second interview at a later point in  
12 time. Usually for only about an hour.

13           THE COURT: Would a fitness-for-duty  
14 examination which the interview lasted for eight hours  
15 be extraordinary or ordinary?

16           THE WITNESS: I think you would call that long.  
17 It's the upper limits to what I've heard, but I could  
18 see that it would be reasonable. I could imagine that  
19 the interview process might go slower than expected if  
20 the employee was reluctant. There might be a lot of  
21 incidents in the referral that have to be looked at with  
22 the employee, and that would take time.

23           And in some circumstances where you might not  
24 want to trouble the employee to come back for a second  
25 visit, you might say let's do it all in one long day and

1 get it done with.

2           So while this eight hours sounds like it's on  
3 the upper end of the continuum, I wouldn't at that point  
4 say it was extraordinary.

5           THE COURT: How about splitting an exam so it's  
6 not one big long day, but happens overnight, come back  
7 for a second day?

8           THE WITNESS: Would that be extraordinary? Is  
9 that the question?

10          THE COURT: Same question, yes, for that.

11          THE WITNESS: If the employee was coming from a  
12 long distance away, that might be reasonable to try to  
13 get it in consecutive days.

14          As I say, it's on the longer side for what I've  
15 heard. But I don't think I would say it's -- it's out  
16 of line assuming that the person doing the interview was  
17 in good faith and just it was taking that amount of  
18 time.

19          THE COURT: Would it be reasonable to  
20 characterize the fitness-for-duty evaluation as a,  
21 quote, stress test, close quote?

22          THE WITNESS: No. I don't think that's fair.  
23 I wouldn't want to simply put a person through a fitness  
24 for duty just to see if they could handle the stress.  
25 That's not humane. There are other ways to evaluate

1 stress.

2 But I do look at a person's capacity to handle  
3 the interview and the stress of the interview. It's  
4 naturally going to be stressing. I do look at their  
5 capacity to handle that, and if they are unable to  
6 handle that or they show signs of being unable to handle  
7 that, then that might say to me that they might not be  
8 able to handle the stresses in the workplace.

9 So it would be input for my, my  
10 decision-making.

11 THE COURT: Would someone experiencing  
12 depression be potentially harmed by undergoing a  
13 fitness-for-duty evaluation?

14 THE WITNESS: Certainly it's possible.  
15 Depression would tend to weaken a person. A person who  
16 is depressed is emotionally and physically weaker, and  
17 so to go through an arduous process like a fitness for  
18 duty would be taxing. It would be emotionally draining.  
19 It could be upsetting. It could cause, you know,  
20 sleeplessness. It could create appetite disturbances,  
21 yes. So there could be symptoms.

22 THE COURT: Follow-up questions,  
23 Mr. Katzenbach?

24 MR. KATZENBACH: Yes.

25 /////

1 FURTHER REDIRECT EXAMINATION (Resumed)

2 BY MR. KATZENBACH:

3 Q. So would it be correct to say that typically  
4 you do the fitness-for-duty examination of three to four  
5 hours of interview plus approximately two hours of psych  
6 testing, that's five to six hours, that's your typical  
7 examination?

8 A. Yes. The person would be at my office for,  
9 yeah, potentially six, six hours.

10 Q. Right. And that would be then, unless there's  
11 something that came up, that would normally be done?  
12 You would be through?

13 A. Yes.

14 Q. You wouldn't be -- in the normal case, you  
15 wouldn't be coming back for a second day?

16 A. That's correct. Now, the more complex the  
17 issue is at work, the longer the interview process will  
18 take. I think that's a fair statement.

19 Q. I think that would be. But the question, how  
20 does someone find out -- how would the doctor find out  
21 that there were a large number of issues?

22 A. Well, if the -- the referral would indicate the  
23 basic nature of the problem. And then I would want to  
24 know, well, what are the particular incidents that are  
25 concerning the administration. And I would have -- I

1 would line up all of those incidents, and I would want  
2 to know about each one, what the employee felt and  
3 thought so that I could have their perspective  
4 juxtaposed against the administration's perspective.

5 Q. Normally what you expect is the administration  
6 to inform you either in writing or in an oral  
7 conversation details about each of these incidents?

8 A. Yes. The more details the better I think.

9 Q. In other words, the identity of individuals who  
10 are expressing concerns?

11 A. That would be important, one important piece.

12 Q. The approximate dates when these events  
13 happened?

14 A. Yes.

15 Q. The sort of description of the events?

16 A. Yes.

17 Q. And when the employer's providing you this  
18 information, do they generally provide you the  
19 information in a sort of -- strike that.

20 Is it provided to you in a manner of, "Well,  
21 Bob said to Bill who told me that," or do you ask for  
22 something better, more direct than that?

23 A. I ask for the best data I can get. And then I  
24 see what I get.

25 Q. So if somebody was saying, "Well, we heard a



1 rumor that he had done this," would you typically want  
2 better confirmation than that?

3 A. I would say, "What's the basis of the rumor?  
4 Is there any truth to it? Did you check it out?"  
5 Questions like that.

6 Q. Okay. And if -- would you also ask, for  
7 example, is there a history of conflict between these  
8 individuals?

9 A. Yes. And you remind me of another point for  
10 why an evaluation can take a long time.

11 If a person -- if the presenting issue was  
12 conflict with other workers, then I might want to ask  
13 the employee all about their previous work history and  
14 find out in other jobs that they've had, had these same  
15 kinds of conflicts come up. That's why it can take a  
16 long time.

17 Q. Okay. In this interview, would the employee be  
18 given specifics to respond to?

19 A. Well, remember, as a psychologist or a  
20 psychiatrist, I'm not conducting a legal hearing.

21 Q. Right.

22 A. And so I don't necessarily feel I have to  
23 present the data to the employee that I might have  
24 received from the institution. I might say to the  
25 employee, "You know, what I've been told is thus and

1 such."

2 Q. Okay.

3 A. "Now, what was your feeling about that? What  
4 happened from your point of view?"

5 Q. Okay. When you tell the employee, "I was told  
6 such and such," that would mean something more, "Well,  
7 at this meeting occurring on this date, I heard you were  
8 reported to have thrown papers at somebody?"

9 A. Correct.

10 Q. So that it would typically be more than, "I  
11 heard that at some department meeting at sometime over  
12 the last year you yelled"?

13 A. Yeah. Doing a fitness for duty, I would want  
14 to really be sure, as clear as I could as the evaluator  
15 of what the specifics were that were being cited against  
16 this employee.

17 Q. Okay. So that would enable the employee to,  
18 for example, respond and say, "I recall that. We were  
19 discussing an issue of discrimination, and I was pretty  
20 intense about it, and the other guy was pretty  
21 dismissive of it."

22 You would want that dialogue; is that right?

23 A. I would want that level of detail, yes.

24 Q. Okay. And if somebody would have said, well,  
25 gave you a detail of there's -- strike that.

1           If somebody was supposed to -- if the  
2 allegation was that somebody was showing unfeigned  
3 anger, you would want to know the dates so you could  
4 understand why that employee was angry?

5           A. Yes.

6           Q. For example, so the employee could say, "Yeah,  
7 he just insulted my sister, so yeah, I was angry about  
8 that"?

9           A. Yes. You would want to know the basis for the  
10 anger.

11          Q. That would be important in understanding  
12 whether the anger was reasonable, excessive or  
13 entirely -- sort of entirely understandable?

14          A. Yes.

15          Q. Would you want to know also as an evaluator  
16 whether or not the scope of how many people were  
17 observing these behaviors?

18          A. I would want to know that.

19          Q. For example, we have here, I think you  
20 understand, a department of say ten people, eight to ten  
21 people; right?

22          A. Okay.

23          Q. Would you want to know if everyone saw this or  
24 only some?

25          A. Yes. I would want to know who the immediate

1 interacting people were.

2 Q. Would you also want to know if other people who  
3 are in that same area observed the same thing?

4 A. Yes. That would be important.

5 Q. Because it would be important in assessing what  
6 occurred; is that right?

7 A. Yes.

8 Q. And it would also be important in assessing how  
9 each person was perceiving these events?

10 A. Yes. Now, of course the problem is everybody  
11 is going to see it a little bit differently.

12 Q. Fair enough.

13 A. But you try to -- you try to find the truth  
14 within all those different perceptions.

15 Q. All right. So you would expect that the  
16 information, again, provided to you by the employer,  
17 would try to reflect that, that spectrum of observation?

18 A. I would try to get that from the employer.

19 Now, look, I understand that employers, there  
20 are certain laws that govern how much information can be  
21 given out on an employee.

22 Q. That's true.

23 A. And I've run into those laws when I asked human  
24 resource people, I say, "Can you give me more," and they  
25 say, "No, I can't give you more. You're going to have

1 to do it just on this piece of stuff that I've given  
2 you."

3           So as an evaluator, I've got to go forward with  
4 that limitation.

5           Q. Have you ever run into occasion where the  
6 employer informed -- it says, "Well, there are other  
7 people at that meeting, but I have some objection to  
8 telling you what those other people saw?"

9           A. Yes. I've said to a human resource person, I  
10 said, "I would like to talk to the supervisor." He  
11 said, "I'm sorry. I can't let you talk to the  
12 supervisor."

13           Q. I'm not really so much asking about whether you  
14 could directly talk to the supervisor but whether you  
15 would hope that the employer would provide you  
16 information that they obtained from the supervisor?

17           A. I try to get it when I can. Sometimes I've  
18 only gotten a summary of what happened between the  
19 supervisor and the employee.

20           Q. All right.

21           A. So not the direct write-up by the supervisor.

22           Q. All right. Just assuming there are no direct  
23 write-ups, you would expect the employer to give you a  
24 full and fair summary of what occurred?

25           A. Yes. I would want that.

1 Q. You expect when an employer gave you their  
2 description of the events, that this followed a full and  
3 fair investigation of the matter?

4 A. I would hope so.

5 Q. You normally expect that; wouldn't you?

6 A. Yes, I think so.

7 Q. I mean, to be candid, it would not be useful to  
8 do a fitness-for-duty evaluation if somebody is making  
9 things up?

10 A. I agree.

11 MR. VARTAIN: Objection.

12 MR. KATZENBACH: I'll withdraw.

13 MR. VARTAIN: Argumentative.

14 MR. KATZENBACH: That is an argumentative  
15 question, yes.

16 THE COURT: The question is withdrawn.

17 MR. KATZENBACH: That's all I have. Thank you.

18 MR. VARTAIN: May I have just a few wrap-up,  
19 please, your Honor?

20 THE COURT: Yes.

21 FURTHER RECROSS-EXAMINATION

22 BY MR. VARTAIN:

23 Q. Dr. Good, is it sometimes the case you get a  
24 report from the employer requesting you to do a  
25 fitness-for-duty evaluation, comes in a letter to you?

1 Is that sometimes the way it comes?

2 A. Yes.

3 Q. And sometimes that letter may describe to you  
4 the behaviors that are being observed on the part of the  
5 employee, and the request is, "Please take this as your  
6 jumping-off point"?

7 A. Yes. And my instinct would be to try to get  
8 more before I start.

9 Q. Exactly. My question was going to be, if you  
10 get a letter and you want more information, you pick up  
11 the phone and you call the HR person, "Can you give me  
12 more about this? Can you give me more about that?"  
13 Right?

14 A. Yes.

15 Q. You don't necessarily live and die with the  
16 first letter you get from the employer. You may say, "I  
17 need a little on this. I need a little blue here, a  
18 little green here. I need to see the paint by number."

19 A. Yeah.

20 Q. Painting; right?

21 A. Yes, correct.

22 Q. You mention your five- to six-hour  
23 fitness-for-duty evaluation period can run over when  
24 there's more -- a lot more details, a lot more history  
25 to cover; right?

1 A. Yes.

2 Q. Could get closer to eight hours if there's a  
3 whole big history of complaints, disputes and conflicts;  
4 correct?

5 A. It's possible, yeah.

6 MR. VARTAIN: That's all I have, your Honor.

7 THE COURT: Further questions, Mr. Katzenbach?

8 FURTHER REDIRECT EXAMINATION

9 BY MR. KATZENBACH:

10 Q. Now, is it accurate to say in your experience  
11 that there's usually some triggering event that leads to  
12 a fitness-for-duty evaluation?

13 A. Yes.

14 Q. Okay. So we have several different levels of  
15 detail here. One would be details about particular  
16 events; right?

17 A. Yes.

18 Q. In other words, did this event occur in a  
19 meeting? Did it occur in the hallway? Did it occur in  
20 the parking lot? Did it occur in the wood shed? Right?  
21 That would be one level of detail?

22 A. Correct.

23 Q. Then you might have another level of detail  
24 where somebody says, "You know, I've been complaining  
25 about things at the University for years and years and



1 years just about these general subjects"; right?

2 A. M-hm.

3 Q. Would that be something they necessarily have  
4 to go into great detail about?

5 A. Well, to the extent that it gave me information  
6 about this particular employee and what he had said in  
7 the past and how it had been responded to, that would  
8 have helped me understand the current context.

9 Q. So somebody said to you, "Well, I've been  
10 complaining about, you know, the fact that these guys  
11 won't follow their own procedures, and they keep, you  
12 know, they won't meet their affirmative action  
13 obligations and their anti-diversity obligations for  
14 years. I get nowhere," that is something you might want  
15 to ask about?

16 A. Yeah. I may well.

17 MR. VARTAIN: I'm going to object. Now he's  
18 doing his closing argument for this Witness asking for  
19 speculation.

20 MR. KATZENBACH: Your Honor, he's answered my  
21 question.

22 THE COURT: Motion to strike implicit in the  
23 objection is denied. Answer will stand.

24 MR. KATZENBACH: That's all I have, your Honor.

25 THE COURT: Questioning for the Plaintiff.

1 Mr. Vartain, any further for the Defendant?

2 MR. VARTAIN: No. I'll let the last word be  
3 with Mr. Katzenbach.

4 THE COURT: May Dr. Good be excused?

5 MR. KATZENBACH: Yes.

6 THE COURT: Mr. Vartain?

7 MR. VARTAIN: Great. Excuse the Witness.

8 THE COURT: Was that a yes?

9 MR. VARTAIN: That was a yes, your Honor.

10 THE COURT: Dr. Good, thank you very much, sir.  
11 You're free to go.

12 (Witness excused.)

13 Plaintiff may call his next witness.

14 MR. KATZENBACH: We would like to call  
15 Christine Liu.

16 CHRISTINE LIU,  
17 called as a witness by the Plaintiff, after being first  
18 duly sworn, was examined and testified as follows:

19 THE CLERK: Please be seated. State your name  
20 and spell it for the record.

21 THE WITNESS: My name is Christine Liu spelled  
22 C-h-r-i-s-t-i-n-e, L-i-u.

23 THE COURT: Mr. Katzenbach, you may inquire.

24 /////

25 /////

1 DIRECT EXAMINATION

2 BY MR. KATZENBACH:

3 Q. Good afternoon, Ms. Liu. Are you employed by  
4 anybody?

5 A. I am.

6 Q. Who are you employed by and what do you?

7 A. The University of San Francisco as the program  
8 assistant to mathematics.

9 Q. As program assistant to the -- is it the  
10 department of mathematics?

11 A. Correct.

12 Q. What do you do as program assistant?

13 A. I support the department is clerical matters,  
14 and I support students in various matters.

15 Q. Okay. Do you have a desk or an office in the  
16 mathematics department at University of San Francisco?

17 A. Yes.

18 Q. Where is that? I'm sorry. Is there an office  
19 that you sit in?

20 A. Yes.

21 Q. Is it called the math office?

22 A. Yes.

23 Q. And can you briefly just describe how that --  
24 what's in the math office?

25 A. My desk, a social area, faculty and student

1 mailboxes. That's in my office proper.

2 Q. You have a desk in your office?

3 A. I do.

4 Q. Are you always at your desk? That's a bad  
5 question.

6 The answer is yes, I'm a dedicated employee.

7 What I mean by that, Ms. Liu, I understand that  
8 there's also some faculty offices of the math office?

9 A. Sort of interior to the main math office, yes.  
10 There are two faculty offices.

11 Q. And who do those offices belong to?

12 A. John Stillwell and Paul Zeitz.

13 Q. That was the case in 2008 as well?

14 A. Yes.

15 Q. Mr. -- Professor Stillwell is not always there;  
16 right?

17 A. Correct.

18 Q. He teaches I believe one semester a year?

19 A. Yes.

20 Q. When he's not teaching, do you move into his  
21 office?

22 A. No. Seldom.

23 Q. Okay. So you usually are -- so in the --  
24 strike that.

25 Do you have any involvement in faculty

1 searches?

2 A. I do.

3 Q. What is your involvement?

4 A. On a clerical basis. I process applications.

5 Q. What does that mean processing an application?

6 A. I receive most applications via e-mail, and I  
7 upload documents that are attached to those e-mails --

8 Q. Okay.

9 A. -- to a system which the committee members can  
10 access to view the documents.

11 Q. All right. Do you review the documents in any  
12 way for compliance with the advertisement?

13 A. I don't review them, but in the process of  
14 uploading them, I can see that some applicants don't  
15 submit everything.

16 Q. All right. Has there been an occasion when  
17 you've also noticed that there was an issue with the  
18 applicant's degree?

19 A. As I recall, there have been one or two  
20 occasions where when I look for the year the applicant  
21 completed or will complete his or her math PhD, I notice  
22 sometimes that that information is not there.

23 Q. Do you know Professor Yeung?

24 A. I do.

25 Q. At any time did there become a question -- did

1 you raise an issue with search -- I'm sorry.

2           When you do this work, are you reporting to the  
3 search committee?

4           A. Yes.

5           Q. A search committee is a faculty committee from  
6 the math department and usually one outside person?

7           A. Yes.

8           Q. Now, in connection with the search involving --  
9 which resulted in Dr. Yeung being hired, did you raise  
10 any question concerning his degree with any members of  
11 the math, with the search committee?

12          A. I don't remember doing so at that time. But I  
13 remember this topic came up after Dr. Yeung was hired.

14          Q. How did that come up?

15          MR. VARTAIN: Objection. Not relevant.

16          THE COURT: Overruled. The Witness may answer.

17          THE WITNESS: I was told by Dr. Yeung and the  
18 search committee of which he was a part at that time  
19 after Dr. Yeung was hired that I had asked the committee  
20 whether I should write the year that Dr. Yeung completed  
21 his PhD, which it turns out was not in mathematics.

22          MR. KATZENBACH: Q. Okay. Did you have any  
23 conversation with Dr. Yeung about that?

24          A. In the sense that he came to me and said thank  
25 you for calling him to the attention of the search

1 committee when he was an applicant.

2 Q. Thank you.

3 Let's just talk a little bit about the  
4 searches. As applications are received, you keep a  
5 running total of how many applications are coming in?

6 A. Not myself. But the system that I used to  
7 upload those application documents to keep the running  
8 total, and I just look at that system.

9 Q. In other words, you don't count them yourself?

10 A. I do not.

11 THE COURT: Ladies and gentlemen, remember the  
12 admonition. Do not form or express any opinion on this  
13 case until it's finally submitted to you for your  
14 decision. Do not discuss among yourselves or with  
15 others until that time.

16 Please be back in your places at 3:40 according  
17 to the courtroom clock.

18 (Recess taken: 3:30 p.m. - 3:41 p.m.)

19 THE COURT: Jurors and Alternates are all  
20 present. Counsel for all sides are present. Plaintiff  
21 is personally present. Ms. Liu is on the stand.

22 Mr. Katzenbach, you may continue your inquiry.

23 MR. KATZENBACH: Q. I think I asked you as we  
24 were closing about whether you counted the number of  
25 applicants, and you indicated you didn't. But the

1 number was kept on the computer.

2 A. Correct.

3 Q. Was the number of applicants in the search also  
4 given out to the faculty members?

5 A. If I was asked, I would answer with the number,  
6 yes.

7 Q. Did you write it on any boards?

8 A. I don't recall doing so.

9 Q. Do you recall faculty members at meetings  
10 asking you about the number of applicants in the search?

11 A. I think I recall the question being asked in  
12 general.

13 Q. Uh-huh.

14 A. Yes.

15 Q. And when the question was asked in general, did  
16 you give faculty an update of what the number was?

17 A. Yes.

18 Q. All right. And if the faculty member came to  
19 you and asked, you would give them the number?

20 A. Yes.

21 Q. All right. And up until the spring of 2008, at  
22 any time had the number of applications in a math search  
23 been a piece of confidential information?

24 A. Not that I understood it to be.

25 Q. Okay. Now, do you recall in connection with



1 the search that was being conducted in 2007 and 2008,  
2 individuals raising questions about the number of  
3 applicants?

4 A. I don't have a good memory of that time. I  
5 think I recall Dr. Kao feeling it was a low number.

6 Q. Do you recall any other members of the faculty  
7 indicating they felt it was a low number?

8 A. I, I think I recall the faculty discussing the  
9 numbers of applicants.

10 Q. Okay. And in that context, did any other  
11 faculty members express concern that the number of  
12 applicants appeared low?

13 A. I think I recall faculty members speculating as  
14 to why the number was as it was.

15 Q. In other words, why it was low?

16 A. I think I recall people saying -- speculating  
17 why the number seemed lower than in previous searches.

18 Q. In 2007, 2008, do you recall the number of  
19 applicants ultimately received?

20 A. Right at the moment, I don't recall.

21 Q. Do you recall it being approximately 195?

22 A. It may have been 195 or somewhere around 205,  
23 somewhere around that number.

24 Q. Okay. And do you recall in the prior two  
25 searches that the number of applicants was substantially

1 larger than that?

2 A. I recall the first search that took place in  
3 2002 to 2003 resulted in over 300 applicants, and the  
4 subsequent search was more than 200, but I can't  
5 remember the exact number.

6 Q. Okay. At some point -- now at some point did  
7 Dr. Kao ask you what the final number of applicants was?

8 A. I don't remember specifically.

9 Q. Okay. Do you recall -- were you present when  
10 Dr. Kao spoke to Dr. Zeitz about the 2007, 2008 search  
11 in early January 2008?

12 A. I don't remember the date, but I remember one  
13 instance when Dr. Kao approached Dr. Zeitz to talk about  
14 the search.

15 Q. And where did that discussion take place?

16 A. Dr. Kao walked through my office, the main math  
17 office, and approached Dr. Zeitz in Dr. Zeitz's internal  
18 office.

19 Q. Okay. And where was Dr. Kao sitting, standing  
20 or positioned when he was speaking to Dr. Zeitz?

21 A. He walked through my office, Dr. Kao that is,  
22 and entered Dr. Zeitz's office. And pretty quickly,  
23 Dr. Zeitz's door was closed.

24 Q. Okay. Did you hear anything?

25 A. I don't remember hearing anything after the

1 door was closed.

2 Q. All right. Do you recall anything happening  
3 after -- when Dr. Kao left Dr. Zeitz's office?

4 A. I remember as Dr. Kao left my -- left  
5 Dr. Zeitz's office and walked through my office.

6 Q. Did you hear Dr. Kao say anything to Dr. Zeitz?

7 A. I do recall he said something, but I don't  
8 remember the exact words.

9 Q. Do you recall was it a statement concerning the  
10 number of applications?

11 A. Yes, it was.

12 Q. Do you recall him saying words "200 is too  
13 low"?

14 A. Something to that effect.

15 Q. All right. And what sort of tone of voice was  
16 Dr. Kao speaking in?

17 A. Agitated.

18 Q. And how did Dr. Zeitz appear?

19 A. He was frowning.

20 Q. Did Dr. Zeitz roll his eyes at you?

21 A. That's how it seemed to me.

22 Q. All right. After this conversation, did  
23 Dr. Zeitz tell you that Dr. Kao had frightened him  
24 during this conversation?

25 A. I don't recall.

1 Q. Okay. I would like to direct your attention,  
2 if you would, to a meeting of the mathematics department  
3 in early February.

4 Now, this was a special meeting to discuss the  
5 search. Do you recall that meeting?

6 A. Somewhat.

7 Q. All right. Back up.

8 Do you attend mathematics faculty meetings?

9 A. Yes.

10 Q. What's your role?

11 A. I take the minutes.

12 Q. Do you take minutes -- strike that.

13 In February 2008, was there a meeting between  
14 the search committee and the faculty to discuss the  
15 candidates?

16 A. I don't remember the exact date, but there was  
17 a meeting.

18 Q. Sometimes that's referred to as the second  
19 meeting of the faculty or something like that?

20 A. I don't know how it's referred to. I remember  
21 a meeting for this purpose.

22 Q. Is that a meeting -- do you arrange for the  
23 meeting space?

24 A. I don't recall specifically, but in looking  
25 through my records, I find that I did.

1 Q. Okay. And do you recall the meeting occurring  
2 in the early part of February 2008?

3 A. It's not in my memory.

4 Q. That's fine.

5 Now, were you present during this meeting?

6 A. Yes.

7 Q. And during this meeting, did Dr. Kao present a  
8 statistical analysis?

9 A. I don't remember. I can't picture it.

10 Q. Okay. Did Dr. Kao have a document that he  
11 distributed?

12 A. I think I remember that, yes.

13 Q. Okay. Did Dr. Kao discuss his concerns about  
14 discrimination?

15 A. I think that's what I remember.

16 Q. Did Dr. Kao explain that he felt the search was  
17 discriminatory?

18 A. That's the gist of what I took from what he  
19 said.

20 Q. Do you recall more specifically how Dr. Kao  
21 described why he felt the search was discriminatory?

22 A. I can't remember right now.

23 Q. Did Dr. Kao indicate that he had an issue with  
24 how the search was advertised?

25 A. I don't remember if he said that at that

1 meeting.

2 Q. He might have said it to you earlier? Is that  
3 what you're saying?

4 A. I have some -- I think I have some memories of  
5 memories at this point, and I can't be entirely sure  
6 what I remember from the meeting specifically, you know,  
7 specific memories of my own.

8 Q. Okay. Let's go to where we are. Let's see how  
9 we do. I appreciate there's been time.

10 You do recall Dr. Kao discussing his issues  
11 with the faculty?

12 A. Yes.

13 Q. And you do recall that he distributed some  
14 piece of paper?

15 A. Yes.

16 Q. Do you recall -- now, did you take minutes of  
17 that meeting?

18 A. I did not.

19 Q. Why not?

20 A. I was asked to desist.

21 Q. In other words, stop taking minutes?

22 A. Yes.

23 Q. Who asked you to do that?

24 A. I recall that it was Dr. Zeitz.

25 Q. And at what point in the meeting did Dr. Zeitz

1 ask you to stop taking the minutes?

2 A. I can't remember exactly.

3 Q. Was it towards the start of the meeting?

4 A. Maybe so.

5 Q. Was it during the time that Dr. Kao was  
6 presenting his issue on discrimination?

7 A. That may have been so.

8 Q. How did Dr. Zeitz inform you that you were to  
9 stop taking minutes?

10 A. I don't remember the exact words.

11 Q. Do you recall him speaking in a low tone of  
12 voice to you?

13 A. Not, I don't remember exactly.

14 Q. Where were you sitting in relation to  
15 Dr. Zeitz?

16 A. At the other end of the table from him.

17 Q. Okay. Did anyone -- did anyone comment on  
18 Dr. Zeitz's instruction to you not to take minutes?

19 A. I don't recall.

20 Q. All right. Now, when you stopped taking --  
21 when you take minutes of a meeting, what sort of -- how  
22 do you take them?

23 A. Usually on a laptop.

24 Q. In other words, it's not handwritten notes;  
25 it's typed? You typed them?

1 A. Yes.

2 Q. Whose laptop do you use?

3 A. Usually that belonging to whoever is chair of  
4 the department at that time.

5 Q. In relationship to the February 6th -- I'm  
6 sorry.

7 The February meeting to discuss candidates  
8 where you stopped taking the minutes, whose laptop were  
9 you using?

10 A. I don't remember.

11 Q. It was not your laptop; right?

12 A. Right.

13 Q. What happened to the laptop after that meeting?

14 A. I don't remember. We might not have been using  
15 a laptop at all.

16 Q. All right. Do you recall how you were taking  
17 minutes up to the point where Dr. Zeitz told you to  
18 stop?

19 A. I don't remember either way.

20 Q. Okay. Do you recall what happened to -- do you  
21 recall what happened to whatever record you had up until  
22 that point in the meeting where Dr. Zeitz told you to  
23 stop?

24 A. I don't remember.

25 Q. Have you looked for that?



1 A. Yes.

2 Q. Have you been able to find it?

3 A. No.

4 Q. Do you know what happened to whatever record  
5 you were keeping?

6 A. I don't know.

7 Q. During the course of this meeting, did Dr. Kao  
8 question whether the search was legitimate?

9 A. I don't remember if he asked a question.

10 Q. Uh-huh. Okay. Did he ask -- do you recall a  
11 discussion between Dr. Kao and Dr. Finch about the  
12 publications?

13 A. About the what?

14 Q. I'm sorry. About how the advertisement had  
15 been placed?

16 A. I don't remember specifically between Dr. Kao  
17 and Dr. Finch.

18 Q. All right. Do you recall that Dr. Kao -- was  
19 Dr. Kao standing or sitting during his presentation?

20 A. It varies. At times I remember he was standing  
21 and walking around or sitting.

22 Q. Okay. What was his tone of voice?

23 A. I remember his voice sounded contentious.

24 Q. Okay. Do you recall other people speaking in  
25 response to Dr. Kao?

1 A. Yes.

2 Q. Who do you recall speaking in response to  
3 Dr. Kao?

4 A. Dr. Needham and Dr. Zeitz.

5 Q. During the course of this meeting, did you  
6 observe that -- this portion of the meeting, did you  
7 observe at times where people may have talked over one  
8 another?

9 MR. VARTAIN: Calls for speculation.  
10 Objection.

11 THE COURT: Overruled.

12 THE WITNESS: I may have.

13 MR. KATZENBACH: Q. Okay. During the course  
14 of this meeting, do you recall anyone asking Dr. Kao to  
15 speak more quietly?

16 A. I don't remember specifically in this meeting.

17 Q. Okay. Now, how long did this discussion of the  
18 search procedures last during this meeting?

19 A. I don't remember exactly.

20 Q. At some point that discussion ended?

21 A. Yes.

22 Q. And at that point, was there some -- was there  
23 further discussion about the candidates?

24 A. I don't remember.

25 Q. Do you remember the search committee asking for

1 the faculty members to rank the candidates?

2 A. I don't really remember.

3 Q. Okay. Do you recall did that meeting break up  
4 because of anything Kao had done, Dr. Kao had done?

5 A. I don't remember.

6 Q. Would you describe Dr. Kao as appearing  
7 displeased and dissatisfied with the search during this  
8 meeting?

9 A. Yes.

10 Q. Okay. Now, do you recall Dr. Kao citing  
11 anything to the effect that the only advertisement for  
12 this job had been online, had been made only available  
13 electronically online and not in print?

14 A. I don't remember if he said that.

15 Q. Okay. Now, did anyone ask you to write-up a  
16 summary of this meeting after it occurred?

17 A. I don't remember that anyone asked me.

18 Q. Now, is it correct that the purpose of this  
19 meeting was for the search committee to convey the  
20 various faculty opinions as to the candidates to the  
21 Dean's office?

22 A. As I recall, yes.

23 Q. And in this particular meeting, do you recall  
24 each faculty member individually ranked the four  
25 remaining candidates?

1           A. I don't remember. I can't tell you from my  
2 memory that the faculty members did this.

3           Q. Okay. Have you seen any document showing how  
4 the various faculty members ranked the candidates?

5           A. No.

6           Q. Do you know how the search committee conveyed  
7 the outcome of this meeting to the Deans?

8           A. I don't know.

9           Q. Did they -- do you know whether it was  
10 something in writing?

11          A. I don't know.

12          Q. They didn't ask you to prepare anything in  
13 writing for them?

14          A. That's right.

15          Q. Did you see any of the other faculty members at  
16 this meeting taking notes at the meeting?

17          A. I don't really remember noticing that.

18          Q. Do you recall any members of the search  
19 committee taking notes of -- at this meeting?

20          A. I don't remember that.

21          Q. Do you recall any members of the search  
22 committee noting -- do you know how the other faculty  
23 members ranked the various candidates?

24          A. I can't remember.

25          Q. After this meeting, did anyone from human

1 resources interview you about what had occurred?

2 A. Not that I remember.

3 Q. After this meeting, did anyone from the faculty  
4 come to you and complain about John Kao's behavior  
5 during that meeting?

6 A. Not that I remember.

7 Q. I would like to direct your attention to a  
8 subsequent meeting of the math department that occurred  
9 in May of 2008. That's where I'm going to be asking  
10 questions. I'll try and describe it better so you might  
11 recall it.

12 Do you recall a meeting where there was an  
13 issue where Professor Pacheco would continue on as  
14 chair?

15 A. Yes.

16 Q. That occurred in a mathematics department  
17 meeting?

18 A. Yes.

19 Q. Was that at the end of the semester?

20 A. I don't recall specifically when it was.

21 Q. Do you recall during the course of that meeting  
22 Professor Pacheco asked if anyone would volunteer to be  
23 chair?

24 A. I don't remember specifically.

25 Q. Do you recall during the course of that meeting

1 Dr. Kao offered to take up the position of chair?

2 A. I seem to recall that.

3 Q. And do you recall that Tristan Needham objected  
4 to that and said there had to be a vote?

5 A. I don't remember that.

6 Q. Do you recall the issue of a vote coming up?

7 A. Yes.

8 Q. Do you recall who raised that?

9 A. I don't remember.

10 Q. All right. Do you recall Dr. Kao leaving that  
11 meeting?

12 A. I don't really remember.

13 Q. Okay. Immediately after that meeting, do you  
14 recall overhearing a conversation between  
15 Professor Needham and Professor Pacheco?

16 A. Yes.

17 Q. Can you tell us who said what -- what was said  
18 and occurred during that conversation?

19 A. All I can really remember was Tristan Needham  
20 asking Professor Pacheco what Professor Pacheco was  
21 thinking.

22 Q. Do you recall Professor Pacheco's response?

23 A. I don't remember.

24 Q. Did he laugh?

25 A. He may have.

1 Q. At the time of this -- that you observed this  
2 interaction between Professors Pacheco and Needham, did  
3 any of them appear frightening? I'm sorry.

4 Did either of them appear frightened?

5 A. No.

6 Q. Now, in your position at the math department,  
7 how often are you there? What are your normal work  
8 days?

9 A. Mondays through Fridays.

10 Q. Normal work hours?

11 A. Yes.

12 Q. And during the course of the day, do math  
13 professors come in and pick up things from your office?

14 A. Yes.

15 Q. And do you interact with the professors?

16 A. Yes.

17 Q. At any time during the spring of 2008, did you  
18 observe -- was there any time during spring of 2008 did  
19 Professor Needham say anything to you that -- in regards  
20 that he was frightened of Dr. Kao?

21 A. I don't remember.

22 Q. Did Dr. Needham express any concerns he had  
23 with Dr. Kao?

24 A. I remember one conversation, but my memory is a  
25 little vague.

1 Q. When do you recall that -- I'm sorry.

2 What do you recall Professor Needham saying in  
3 that conversation?

4 A. He came in my office and asked me if I felt --  
5 if I had observed any behavior from Dr. Kao that  
6 bothered me or made me feel nervous.

7 Q. And what did you tell Professor Needham?

8 A. As I recall, I said I don't really -- I had not  
9 really.

10 Q. Okay. Did Professor Needham express to you any  
11 concerns that he had about how, about Dr. Kao's  
12 attitude?

13 A. I don't remember that he did.

14 Q. Did Professor Zeitz ever come to you and  
15 express any concerns he had about Dr. Kao's attitude?

16 MR. VARTAIN: Objection. When? Lacks  
17 foundation.

18 MR. KATZENBACH: Fair enough. I'll rephrase  
19 it, your Honor.

20 THE COURT: Okay.

21 MR. KATZENBACH: Q. During the semester of  
22 2008, did Dr. Zeitz come to you and express any concerns  
23 he had concerning Dr. Kao?

24 A. He didn't come up to me and express concerns  
25 regarding Dr. Kao.



1 Q. I see. Did you overhear him expressing  
2 concerns about Dr. Kao?

3 A. I didn't overhear him say that to other people.

4 Q. All right. Do you recall Dr. Zeitz saying he  
5 disagreed with Dr. Kao's position?

6 A. I don't remember specifically.

7 Q. Do you recall Dr. Kao saying that he was  
8 unhappy that John took the position that he took and how  
9 he expressed himself on that position?

10 A. I don't remember that.

11 Q. Do you recall Dr. Kao -- I'm sorry.

12 Do you recall Dr. Zeitz -- I'm sorry.

13 At any time, did Dr. Zeitz tell you he was  
14 afraid of Dr. Kao?

15 A. I don't remember his doing so.

16 Q. Let's go back to Dr. Needham.

17 Do you recall Dr. Needham making a comment that  
18 he didn't understand why Dr. Kao should be so loud?

19 A. I can't really remember that.

20 Q. Do you recall telling Dr. Needham that's just  
21 how Dr. Kao talks?

22 A. If someone made a remark to me about the volume  
23 of Dr. Kao's voice, that's what I would have responded.

24 Q. Is it your impression that Dr. Kao just  
25 generally talked loud? Loudly actually, it's an adverb.

1 A. Often.

2 Q. That had been going on for sometime?

3 A. Yes.

4 Q. Did you observe -- now Dr. Zeitz's office was  
5 in the sort of -- you have to go through your office to  
6 get to Dr. Zeitz's office; is that correct?

7 A. Yes.

8 Q. And did you ever observe anything, any  
9 interaction between Dr. Kao and Dr. Zeitz that -- strike  
10 that.

11 Did you ever observe any occasion where Dr. Kao  
12 and Dr. Zeitz bumped into each other going in and out of  
13 the office?

14 A. Not that I remember.

15 Q. Did you ever observe any occasion where Dr. Kao  
16 acted as if he was going to run into Dr. Zeitz?

17 A. Not that I remember.

18 Q. Now, you also -- I would like to direct your  
19 attention to Dr. Yeung. You know Dr. Yeung?

20 A. Yes.

21 Q. Did he ever come to you and say that he was  
22 afraid of Dr. Kao?

23 A. Not that I remember.

24 Q. Did he ever appear agitated or disturbed when  
25 he was in the math department?

1 A. Dr. Yeung?

2 Q. Dr. Yeung. Did Dr. Yeung ever appear agitated  
3 or disturbed when he was in the math department?

4 A. I recall one occasion.

5 Q. When was that?

6 A. When Dr. Kao sat him down in the math office to  
7 talk with him, and I got the impression that it was to  
8 do with the search that took place in 2007 to 2008.

9 Q. And do you recall what Dr. Kao said to  
10 Dr. Yeung and what you overheard Dr. Yeung saying to  
11 Dr. Kao in that?

12 A. I don't recall hearing specifically.

13 Q. Did you observe Dr. Yeung during that  
14 conversation?

15 A. Yes.

16 Q. How did Dr. Yeung appear?

17 A. He seemed to be paying very close attention to  
18 what Dr. Kao was saying. He seemed very intent.

19 Q. And do you recall what -- did you overhear what  
20 Dr. Kao was saying?

21 A. I can't remember exactly now.

22 Q. Was this the same day that Dr. Kao spoke to  
23 Dr. Zeitz about the search?

24 A. I don't remember if it was the same day.

25 Q. Okay. Did you have any conversation -- strike

1 that.

2 Do you recall the committee in the 2007 to 2008  
3 search -- did you attend the committee meetings?

4 A. I don't remember exactly, but I usually don't.

5 Q. Do you recall any of the committee members  
6 expressing concern as to how the job was advertised?

7 A. I don't remember that.

8 Q. Do you recall any of the committee members  
9 indicating that they had checked with the Dean's office  
10 to be sure the advertisement was correct?

11 A. I believe I remember, yes, they did.

12 Q. What do you recall about that?

13 A. That the Dean was cognizant of how the position  
14 was advertised.

15 Q. Okay. And what Dean is being referred to, did  
16 you understand was being referred to?

17 A. Brandon Brown.

18 Q. When you say cognizant of how the position was  
19 being advertised, did you understand that to mean  
20 Dean Brown had approved using an online database --

21 A. Yes.

22 Q. Thank you. And that Dean Brown had approved  
23 not advertising a journal?

24 A. Yes.

25 Q. Do you recall when you -- when that event took

1 place?

2 A. Not exactly.

3 Q. Do you recall it was before or after Dr. Kao  
4 raised the issue?

5 A. It was during the process of the search before  
6 the deadline. It was when applications were being  
7 received and reviewed.

8 Q. Okay. So that would have been before  
9 December 17th?

10 A. If that was the deadline and the day, the final  
11 number of official applicants was determined.

12 Q. Okay. So it was before the final number?

13 A. Yes.

14 Q. Okay. Thank you.

15 There's been testimony about this case about  
16 something Math Tea?

17 A. Math Tea.

18 Q. Math Tea, yes?

19 A. Yes.

20 Q. Is that a weekly event in the math office?

21 A. Yes.

22 Q. Were you usually present when the Math Tea was  
23 going on?

24 A. Yes.

25 Q. Did you observe Dr. Kao during those Math Teas?

1 A. Yes.

2 Q. How did he appear to you?

3 A. Jovial.

4 Q. Did you see him making jokes with people?

5 A. Yes.

6 Q. Faculty and students?

7 A. Yes.

8 Q. Was Dr. Kao typically at Math Teas?

9 A. Yes.

10 Q. Were other faculty members typically there?

11 A. Yes.

12 Q. Who would typically be at Math Teas in 2008?

13 MR. VARTAIN: Objection. You mean spring  
14 semester 2008?

15 MR. KATZENBACH: That's probably correct. I'm  
16 sorry. Spring semester 2008.

17 THE WITNESS: Professor Zeitz, Professor  
18 Devlin, Professor Kao, Professor Needham, Professor  
19 Yeung.

20 MR. KATZENBACH: Q. Did you observe anything  
21 about the interaction between Dr. Kao and these other  
22 professors that indicated to you any of these professors  
23 were uncomfortable around Dr. Kao?

24 A. I don't remember.

25 Q. Okay. Now, do you recall Dr. Yeung, in

1 particular, do you recall during the spring semester of  
2 2008 whether he attended Math Teas on a regular or  
3 infrequent basis?

4 A. I cannot remember.

5 Q. At any point, do you recall Dr. Yeung stopping  
6 coming to Math Teas?

7 MR. VARTAIN: Objection. Lacks foundation.

8 THE COURT: Overruled.

9 THE WITNESS: At some point, he stopped coming  
10 to Math Tea, but I don't remember exactly when.

11 MR. KATZENBACH: Q. Is that after Dr. Yeung  
12 got tenure?

13 A. I think so.

14 Q. Now, there's also an organization referred to  
15 as a Math Club?

16 A. Yes.

17 Q. And Math Club had meetings on a weekly basis?

18 A. Yes.

19 Q. That was also at the math office?

20 A. Yes.

21 Q. During the spring 2008, was Dr. Kao involved in  
22 the Math Club?

23 A. I don't remember specifically, but up until  
24 when he was no longer on campus, I think he was -- he  
25 was the faculty sponsor of the club.

1 Q. All right. That would be a student club;  
2 correct?

3 A. Yes.

4 Q. And did you observe anything about Dr. Kao's  
5 interactions with the students that gave you cause for  
6 concern?

7 A. No.

8 Q. As far as you could tell, Dr. Kao enjoyed being  
9 with the students, and the students enjoyed being there  
10 with him?

11 A. As far as I could tell.

12 Q. Do you recall a time when students and Dr. Kao  
13 conducted experiments with a bottle outside?

14 MR. VARTAIN: I'm going to object. This is  
15 cumulative and irrelevant.

16 MR. KATZENBACH: I'll withdraw the question.

17 Q. Is the Math Club still functioning?

18 A. No.

19 MR. VARTAIN: Objection. Irrelevant.

20 THE COURT: Overruled. The answer will stand.

21 MR. KATZENBACH: I didn't hear the answer.

22 THE WITNESS: No.

23 MR. KATZENBACH: Q. It stopped functioning  
24 after Dr. Kao left?

25 A. Shortly after he left.



1 Q. Okay. Thank you. Do you recall -- strike  
2 that.

3 Apart from conversations you may have had with  
4 Dr. Kao, have you heard any reasons why Dr. Kao is no  
5 longer on the USF campus?

6 MR. VARTAIN: I'm going to object. It may call  
7 for privileged communication.

8 Maybe I could suggest something.

9 MR. KATZENBACH: I'll rephrase the question.

10 MR. VARTAIN: Thank you.

11 MR. KATZENBACH: That's fine.

12 Q. Excluding anything you may have heard from  
13 Dr. Kao or anything you may have heard from any  
14 attorneys or where attorneys were present, did anyone  
15 tell you why Dr. Kao is no longer on campus?

16 A. I don't recall that anyone told me.

17 Q. Do you recall having a conversation with  
18 Dr. Zeitz in the summer of 2008 about Dr. Kao?

19 A. Yes.

20 Q. What happened in that conversation?

21 A. We speculated on why he was asked to leave  
22 campus.

23 Q. All right. And do you recall anything  
24 Dr. Zeitz told you about his speculation why Dr. Kao was  
25 not on campus?

1 A. Vaguely.

2 Q. What did Dr. Zeitz say?

3 A. That Dr. Kao had expressed dissatisfaction  
4 regarding hiring practices.

5 Q. Do you recall was it during this conversation  
6 that Dr. Zeitz mentioned to you that Dr. Kao had also  
7 objected to the hiring of Professor Stillwell?

8 A. Yes. I remember that.

9 Q. Are you good friends with Professor Stillwell's  
10 wife?

11 MR. VARTAIN: I'm going to object. This is  
12 irrelevant. Calls for private information.

13 Why does she have to answer who she's friends  
14 with?

15 MR. KATZENBACH: I'll withdraw the question.

16 MR. VARTAIN: I would like you to apologize to  
17 the Witness, Counsel.

18 MR. KATZENBACH: No. I think it's a fair  
19 question.

20 THE COURT: The question is withdrawn.

21 Next question?

22 MR. KATZENBACH: Q. Has Dr. Kao done anything  
23 that has made you afraid of him?

24 A. Not that I can remember.

25 Q. Have you ever been told that anyone was afraid

1 of Dr. Kao?

2 A. Not that I remember.

3 Q. Have you ever been told that anyone believed  
4 that Dr. Kao might hurt them?

5 A. I can't remember.

6 Q. Have you ever heard anyone saying they were  
7 frightened of Dr. Kao?

8 A. I can't remember hearing that.

9 Q. Have you ever heard anyone saying that Dr. Kao  
10 might hurt them?

11 A. I don't remember hearing that.

12 Q. Do you recall -- sorry.

13 During the conversation you had with Dr. Zeitz  
14 in summer 2008 that we referred to just earlier, did  
15 Dr. Zeitz ask you if you felt concerned over Dr. Kao's  
16 behavior?

17 A. I don't remember.

18 Q. Now, after Dr. Kao left the University, was no  
19 longer on campus, let's put it this way, has anyone told  
20 you other than Dr. Kao or attorneys for the University  
21 has anyone told you Dr. Kao was banned from the campus?

22 A. I don't remember that anyone else has told me  
23 that.

24 Q. All right. Now, during the time Dr. Kao --  
25 after Dr. Kao left the campus, did you take care of the

1 plants in his office?

2 A. Yes.

3 Q. And did you collect his mail?

4 A. Yes.

5 Q. Did you occasionally take the mail out to  
6 Dr. Kao across the street from USF?

7 A. Yes.

8 Q. About how many occasions did you do that?

9 A. Perhaps twice.

10 Q. Okay. And did you pack up anything in his  
11 office?

12 A. Yes.

13 Q. What did you do?

14 A. I moved some things out of his office into  
15 another space.

16 Q. All right. And did that include the games that  
17 he had for the Math Club?

18 A. I seem to recall that.

19 MR. KATZENBACH: Those are all the questions  
20 that I have for her, for the Witness at this time.

21 THE COURT: Mr. Vartain, any questions for  
22 Ms. Liu?

23 MR. VARTAIN: May I remain here in questioning  
24 the Witness?

25 THE COURT: Yes.

1 MR. VARTAIN: I'll try and get us out of here  
2 by 4:30.

3 CROSS-EXAMINATION

4 BY MR. VARTAIN:

5 Q. In the spring of 2008, did you ever see  
6 Dr. Kao in a state where he was trembling or shaking?

7 A. I don't remember specifically in spring of  
8 2008.

9 Q. Do you remember sometime in that academic year,  
10 perhaps fall of '07, spring of '08, seeing Dr. Kao where  
11 his body was trembling or shaking?

12 A. Yes.

13 Q. Did you ever see him in that spring of 2008  
14 where he was foaming at the mouth?

15 A. I can't remember that it was specifically in  
16 spring of 2008.

17 Q. Can you remember as to whether or not it was in  
18 that -- sometime during that academic year that you saw  
19 Dr. Kao on one or more occasions where saliva was coming  
20 out of his mouth?

21 A. I think I may remember that.

22 Q. Would you agree that the faculty members of the  
23 math department in terms of their communications with  
24 you, Ms. Liu, have been very discreet about problems  
25 with Professor Kao?

1 MR. KATZENBACH: Objection. I don't believe  
2 there's any foundation for that statement.

3 THE COURT: Overruled.

4 THE WITNESS: Yes, I would say so.

5 MR. VARTAIN: Q. Would you agree that you  
6 never overheard any of the professors, that is  
7 professors of the math department, speaking ill of  
8 Professor Kao, both while he was working there and even  
9 subsequent to his leaving?

10 A. That's right.

11 Q. Mr. Katzenbach asked you a question in your  
12 deposition -- I'm going to withdraw that.

13 I'm going to keep to my commitment. It's  
14 before 4:30. No further questions.

15 THE COURT: Mr. Vartain, that concludes your  
16 questioning?

17 MR. VARTAIN: Yes, your Honor.

18 THE COURT: Mr. Katzenbach?

19 REDIRECT EXAMINATION

20 BY MR. KATZENBACH:

21 Q. On how many occasions did you observe Dr. Kao  
22 shaking or trembling?

23 A. Quite a few.

24 Q. In what context?

25 A. When he would feel agitated over something.

1 Q. And so when he was agitated, you would see him  
2 shaking; is that correct?

3 A. Yes.

4 Q. And then it would stop; is that correct?

5 A. When he would walk away.

6 Q. So would it be accurate to say whenever Dr. Kao  
7 -- Dr. Kao would often walk away from a situation where  
8 he was being agitated? Would that be correct to say?

9 A. Sometimes, yes.

10 Q. Did any of the faculty members complain --  
11 strike that.

12 Did any of the faculty members express concern  
13 to you that Dr. Kao was trembling or shaking?

14 A. Not that I can recall specifically that they  
15 were concerned over the trembling and shaking.

16 Q. But I think -- were they concerned over the  
17 fact that Dr. Kao was at times agitated over issues?

18 MR. VARTAIN: Objection. Argumentative. You  
19 mean did they tell her that?

20 MR. KATZENBACH: I'm sorry. I'll rephrase  
21 that.

22 Q. Did they indicate that they were concerned over  
23 Dr. Kao being concerned about issues?

24 A. In a sense, sometimes.

25 Q. Okay. And were those issues issues of

1 discrimination in the search process that we've been  
2 discussing?

3 A. It would be in very general terms.

4 Q. Can you be more -- I suppose asking you to be  
5 more specific is a little difficult on that.

6 In general terms, they would express concerns  
7 to you in the context of Dr. Kao's concerns over  
8 discrimination; is that right?

9 A. It was over matters during this time frame.

10 Q. In other words, the time frame of the search?

11 A. Yes.

12 Q. Okay. And do you recall which faculty members  
13 in particular expressed that to you?

14 A. Dr. Finch, Dr. Needham, that I can recall for  
15 now.

16 THE COURT: Ladies and gentlemen, remember the  
17 admonition. Do not form or express any opinion on this  
18 case until it's finally submitted to you for your  
19 decision. Do not discuss it among yourselves or with  
20 others until that time. Please remember to take your --  
21 leave your notebooks and instructions behind.

22 Mr. Katzenbach, do you have any more questions  
23 for this witness?

24 MR. KATZENBACH: I do not believe we do. No,  
25 your Honor.



1 THE COURT: Jurors, any questions?

2 May Ms. Liu be excused?

3 MR. KATZENBACH: Yes.

4 THE COURT: Ms. Liu, thank you very much.

5 You're free to go.

6 (Witness excused.)

7 THE COURT: Ladies and gentlemen, be back in  
8 your places at 9:00 o'clock tomorrow morning, leaving  
9 your notebooks and instructions behind.

10 (Whereupon, the Jury exited the courtroom at  
11 4:32 p.m.)

12 THE COURT: Jurors and Alternates have departed  
13 the courtroom. Counsel and the Plaintiff have remained.

14 Counsel, is there anything further you wish to  
15 address?

16 MR. KATZENBACH: Yes. I would like to renew my  
17 offer of Exhibits 113 and 114 which are the two policies  
18 identified by Dr. Good. I believe these are policies  
19 that are identified to the University in the context of  
20 his presentation, the presentation of information.

21 This is information that these policies were  
22 identified as sources of information for the University.  
23 It appears to me that is relevant information in this  
24 case.

25 THE COURT: Yeah. I agree. It will be

1 received.

2 (Plaintiff's Exhibit Nos. 113 and  
3 114 were received in evidence.)

4 THE COURT: I'll remind you folks if you give  
5 me a list of the things admitted for a limited purpose,  
6 I can work on them for instructions.

7 MR. VARTAIN: You can take the lead on that,  
8 Chris.

9 MR. KATZENBACH: All his evidence has been  
10 introduced for the limited purpose.

11 MR. VARTAIN: They just list all my exhibits.

12 MR. KATZENBACH: I'll try to work on that, yes.  
13 I think we have some roughs of the trial transcripts.  
14 We can go through that and make sure we've gotten  
15 everything.

16 THE COURT: Good. Anything else,  
17 Mr. Katzenbach? Mr. Vartain?

18 MR. VARTAIN: No, your Honor. Thank you.

19 THE COURT: See you tomorrow.

20 MR. KATZENBACH: Thank you, your Honor.

21 THE COURT: Off the record. Out of session.

22 (Whereupon, the proceedings were adjourned at  
23 4:33 p.m.)

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STATE OF CALIFORNIA                         )  
   )                         SS.  
COUNTY OF SAN FRANCISCO                 )

I, KIMBERLEE SCHROEDER, CSR No. 11414, do  
hereby certify that I am a Freelance Certified Shorthand  
Reporter in and for the State of California, and that as  
such, I reported the proceedings had in the  
above-entitled matter at the time and place set forth  
herein;

I further certify that my stenotype notes were  
thereafter transcribed by me, and that the foregoing  
pages numbered 900 to 1103, inclusive, constitute a  
full, true and correct transcription of my said notes.

DATED: This 20th day of September, 2012.



KIMBERLEE SCHROEDER, CSR, RPR, CCRR  
License No. 11414

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

--o0o--

JOHN S. KAO,

Plaintiff/Appellant,

Appellate No. A135750

vs.

UNIVERSITY OF SAN FRANCISCO,  
et al.,

SF Superior Court Case  
No. CGC-09-489576

Defendant/Respondent.

/

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

Wednesday, February 15, 2012

Volume 6

Pages 1104 through 1323

Reported by:

KIMBERLEE SCHROEDER, CSR, RPR, CCRR  
License No. 11414

Holly Moose & Associates  
Certified Shorthand Reporters  
236 Spencer Avenue  
Sausalito, CA 94965  
(Phone) 415-332-4959  
(Fax) 415-332-4943

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN FRANCISCO  
HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE  
DEPARTMENT 318

---oOo---

JOHN S. KAO,  
Plaintiff,  
vs. No. CGC-09-489576  
UNIVERSITY OF SAN FRANCISCO,  
et al.,  
Defendant.

/

JURY TRIAL  
REPORTER'S TRANSCRIPT OF PROCEEDINGS  
Wednesday, February 15, 2012  
Volume 6  
Pages 1104 through 1323

Reported by:  
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APPEARANCES

For the Plaintiff:

KATZENBACH & KHTIKIAN  
By: CHRISTOPHER W. KATZENBACH  
CONOR D. MACK  
Attorneys at Law  
1714 Stockton Street  
San Francisco, California 94133  
Ph: 415-834-1778  
E-mail: ckatzenbach@kkcounsel.com  
cmack@kkcounsel.com

For the Defendants:

VARTAIN LAW GROUP  
By: MICHAEL J. VARTAIN  
LINDA K. ADLER  
Attorneys at Law  
601 Montgomery Street  
San Francisco, California 94111  
Ph: 415-391-1155  
E-mail: charissa@vartainlaw.com

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I N D E X

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I N D E X

EXHIBITS

PLAINTIFF'S

| No. | Description   | ID   | EVD  |
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| 22  | Faculty Recruitment Procedures, May 15, 1991 (identified on 02/08/12)                             |      | 1214 |
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P R O C E E D I N G S

Wednesday, February 15, 2012 9:11 o'clock a.m.

---oOo---

THE COURT: Jurors and Alternates are all present. Counsel for all sides are present. Plaintiff is personally present.

Mr. Katzenbach, you may call your next witness.

MR. KATZENBACH: Yes, your Honor. We'll call Stephen Devlin.

STEPHEN DEVLIN,

called as a witness by the Plaintiff, after being first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

THE CLERK: Please be seated. State your name and spell it for the record.

THE WITNESS: Good morning. My name is Stephen Devlin, D-e-v-l-i-n.

THE COURT: Mr. Katzenbach, you may inquire.

MR. KATZENBACH: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. KATZENBACH:

- Q. Professor Devlin, where are you employed?
- A. Excuse me?
- Q. Professor Devlin, where are you employed?
- A. The University of San Francisco.

1 Q. In what capacity?

2 A. I am an associate professor of mathematics.

3 Q. That's a tenured position?

4 A. Yes.

5 Q. When did you receive tenure?

6 A. I received tenure in 2010.

7 Q. Congratulations, sir?

8 A. Thank you.

9 Q. Now, how long have you been employed at the  
10 University of San Francisco?

11 A. I started in the fall of 2004. So that would  
12 have been probably late August or early September 2004.

13 Q. The fall semester?

14 A. Yeah.

15 Q. And you were in the department of mathematics?

16 A. That's right.

17 Q. Now, when you -- are you familiar with  
18 plaintiff in this action, Dr. John Kao?

19 A. Yes.

20 Q. And he was one of your colleagues?

21 A. Yes.

22 Q. Where was your office in relation to his?

23 A. So, we're in the Harney Science Building and  
24 the math department has two alcoves of offices: One is  
25 on the east side of the hall, and one is on the west

1 side of the hall. And I am in the alcove on the west  
2 side which is across the hall and slightly south of the  
3 alcoves on the east side. So John was in the east  
4 alcove, and I was in the west.

5 Q. Now, when Professor Kao and you were both  
6 employed in the math department, did Dr. Kao do anything  
7 to make you fear for your physical safety?

8 A. No.

9 Q. Have you ever heard anything about Dr. Kao's  
10 teaching abilities?

11 A. I'm trying to remember. I think I've probably  
12 read online rate my professors teaching evaluations,  
13 things like that.

14 Q. Was it generally understood in the department  
15 that everyone thought that John was a good teacher?

16 A. Yes.

17 Q. John was also involved in the Math Club; do you  
18 recall that?

19 A. Yes.

20 Q. John was involved in Math Teas?

21 A. Yes.

22 Q. In fact, John was a frequent attendant for  
23 Math Teas?

24 A. Yes.

25 Q. How about you?

1 A. Yes. I was a frequent attendant.

2 Q. How about Tristan Needham?

3 A. Yes. He was an attendant.

4 Q. Paul Zeitz?

5 A. Yes.

6 Q. And everyone would be able to observe John's  
7 interactions with people at Math Teas?

8 A. Sure, yes.

9 Q. And I think he had interactions with students  
10 at the Math Club that was in the office; right?

11 A. That was, yes.

12 Q. And so people would be able to observe his  
13 interactions there?

14 A. Probably. I didn't go to those meetings and  
15 they were later in the afternoon, so I'm not sure who  
16 was in the office then.

17 Q. During the course of your -- you had also an  
18 opportunity to view Dr. Kao's physical expressions;  
19 right?

20 A. Yes.

21 Q. Would you describe his facial expressions at  
22 times as intense?

23 A. Yes.

24 Q. Now, did you ever see Dr. Kao impeding anyone's  
25 movements in the math department?

1 A. I don't remember.

2 Q. Did you ever see Dr. Kao bump into any people,  
3 anyone?

4 A. I -- honestly, I don't remember.

5 Q. Didn't seem him veer toward anyone as if he  
6 wanted to bump into them?

7 A. Not that I recall.

8 Q. Did you ever hear Dr. Kao laughing or chuckling  
9 in a disturbing manner?

10 A. In the context of a meeting or in the context  
11 by himself?

12 Q. Whatever. Any context?

13 A. It's hard for me to remember. Maybe in a  
14 meeting, not other than that.

15 Q. Okay. Do you recall anyone complaining about  
16 Dr. Kao's laughing or chuckling?

17 A. I don't remember, no.

18 Q. Okay. And do you recall now, I would like to  
19 direct your attention to a faculty search meeting in  
20 around February of 2008. Do you recall that meeting?

21 A. Yes.

22 Q. Were you present?

23 A. Yes.

24 Q. What was the purpose of that meeting?

25 A. My understanding is that that was a meeting

1 where the search committee meets with the faculty to  
2 present their rankings of the finalists for the position  
3 and then get the departments feedback before they make  
4 an official recommendation to the Dean on who to make an  
5 offer to.

6 Q. And do you recall who was on the search  
7 committee that year?

8 A. I think that it was -- I believe it was Paul  
9 Zeitz, Jim Finch and Tristan Needham. I don't  
10 completely remember, but that -- that's my best guess.

11 Q. Do you recall Stephen Yeung was on the search  
12 committee that year?

13 A. Yeah. I'm not sure. I don't remember if  
14 Stephen -- what combination Stephen and Tristan was on  
15 the committee. I wasn't on the committee, so I was much  
16 less involved in it.

17 Q. Okay. Now, at this search meeting in February  
18 of 2008, do you recall Dr. Kao presenting some  
19 statistics?

20 A. I remember John having comments -- having a  
21 strong opinion on the search, but I don't recall whether  
22 he presented statistics.

23 Q. All right. Do you recall that his opinions on  
24 the search were that he felt that the search was  
25 discriminatory?

1 A. Yes. I remember that.

2 Q. Do you recall him explaining why he felt that  
3 way?

4 A. Um, yes. I, I believe my understanding was he  
5 felt that because of how the position had been  
6 advertised, we had fewer candidates than one might have  
7 expected.

8 Q. All right. And did he present that position at  
9 this meeting?

10 A. Yes.

11 Q. And would you describe his -- how would you  
12 describe his affect during that meeting?

13 A. I would say John was extremely upset about it,  
14 and he was quite intense. Other than that, I'm not sure  
15 what to say, yeah.

16 Q. Okay. And during the course of that meeting,  
17 how long -- do you recall how long the discussion about  
18 John's concerns lasted?

19 A. I mean, I really don't remember well enough to  
20 venture a safe guess here. It was awhile ago.

21 Q. I understand, but you appreciate I have to ask  
22 the question.

23 A. No. Sure. I understand.

24 Q. That's fine. But -- strike that.

25 So following -- did the meeting after John made

1 this presentation, did the meeting continue?

2 A. My recollection is that it did in the sense  
3 that we needed, we wanted to get our recommendations.  
4 We wanted -- at least I did -- wanted to get my opinion  
5 on the candidates to the committee before they met with  
6 the Dean. So I recall that I was able to do that, yeah.

7 Q. All right. Wasn't it -- in this meeting, do  
8 you recall the procedure was that each of the faculty  
9 members that weren't on the committee would rank the  
10 candidates?

11 A. Yes. That sounds right.

12 Q. And I believe there were four candidates?

13 A. I believe so.

14 Q. And do you recall each of the professors going  
15 around and giving a ranking?

16 A. Yes. I don't remember the details whether  
17 everyone gave a complete ranking or didn't give a  
18 complete ranking, but that was the gist of the meeting,  
19 yeah.

20 Q. At the time of this meeting, did you understand  
21 there were going to be one or two job offers?

22 A. At the time, my understanding at the time of  
23 that meeting is there would be one.

24 Q. At some point, did that change?

25 A. I think so. There was a search the following



1 year, and they blur together a little bit. But I do  
2 remember that at some point the possibility of a -- of  
3 offering a second position did arise, but I couldn't say  
4 when exactly that happened.

5 Q. Ultimately, only one position was offered in  
6 the 2007/2008 search?

7 A. Well, certainly only one person was hired. I'm  
8 not sure what happened in terms of the offers.

9 Q. Fair enough. During the course of this  
10 meeting, did John make any verbal threats to anybody?

11 A. I don't remember.

12 Q. Did the course of this meeting, did John make  
13 any physical threats to anybody?

14 A. I don't recall.

15 Q. Do you think you would recall something like  
16 that happening?

17 A. Um, yeah. Probably. If it was a, a clear  
18 threat, I suppose I would.

19 Q. Now --

20 A. One thing that I -- the meeting had a very  
21 specific purpose which was important, and so the thing  
22 that I remember most clearly was just wanting to kind of  
23 take care of that business and make our recommendation  
24 to the committee in terms of who they were going to  
25 recommend to the Dean.

1           And I remember the situation with, with John's  
2 opinion in my opinion that was, um, kind of, um, not,  
3 not especially relevant to the task at hand. So that's  
4 kind of my main recollection there is that I just wanted  
5 to kind of get, get to the point of making those, those  
6 recommendations.

7           Q. Do you recall John urging that the search  
8 should be postponed?

9           A. I remember that, yes.

10          Q. So John was basically urging that we should,  
11 that because of his concerns of discrimination, the  
12 search should be postponed until something could be  
13 cured?

14          A. Right.

15          Q. All right. Now, do you recall in about  
16 May 2008 you had a baby shower?

17          A. Yes. Very vaguely. But no, I remember that.

18          Q. First child?

19          A. Second. Second. It was doubly bad. My memory  
20 got worse after that.

21          Q. Do you recall sending an e-mail invitation to  
22 John?

23          A. Yes. I sent an invitation -- as far as I can  
24 remember, I sent an invitation to everyone in the  
25 department, all the full-time faculty members.

1 Q. Did you have any concerns about inviting John  
2 to this baby shower?

3 A. No.

4 Q. Did anyone tell you -- did anyone tell you you  
5 should not invite John?

6 A. No.

7 Q. Now, I also would like to, following the search  
8 committee meeting, do you recall speaking to Tristan  
9 Needham about John?

10 A. Yes.

11 Q. Did Tristan Needham express some concern about  
12 John?

13 A. Yes.

14 Q. What did Tristan Needham say?

15 A. I think that Tristan said the gist of the  
16 conversation was that Tristan was, um, pretty disturbed  
17 by John's actions, um, at the meeting and of late. And  
18 um, that he was concerned, um, I would say he was  
19 concerned.

20 Q. He was concerned?

21 A. Yeah.

22 Q. All right. You were aware that Tristan Needham  
23 and Dr. Kao have some history?

24 A. Yes.

25 Q. Going back to what, about 2000?

1           A. I suppose so. You know, since I came in 2004,  
2 everything I know about the history is just through  
3 conversations with John and Tristan and Paul.

4           Q. Okay. But you are aware that they've had a  
5 dispute for some time?

6           A. Something that predated me, yes.

7           Q. When this conversation we just asked, how close  
8 in time was it to the meeting?

9           A. How close was it from the meeting until I  
10 talked to Tristan?

11          Q. Yeah.

12          A. I'm not, I'm not -- I don't remember that  
13 specifically very well. I would say a reasonable guess  
14 would be within about a week.

15          Q. Okay. Fair enough.

16                 When you spoke to Tristan and he indicated his  
17 concern, at any time did Professor Needham ever say that  
18 John had threatened him?

19          A. I -- I don't really remember.

20          Q. Now, there was another faculty meeting later in  
21 the term. Do you remember that? There were a number of  
22 faculty meetings that term?

23          A. Too many.

24          Q. Once a month?

25          A. Right.

1 Q. And do you recall meeting at the end of the  
2 term in about May?

3 A. Yes. I remember.

4 Q. And an issue came up concerning the chair?

5 A. Right. I remember that.

6 Q. And do you recall -- do you recall at that  
7 meeting Dr. Kao volunteered to be a chair?

8 A. Yes. I remember that.

9 Q. And do you recall in response to that, somebody  
10 said there had to be a vote?

11 A. It's highly possible that's what happened. I  
12 don't remember the exact procedure, yeah.

13 Q. All right. And do you recall Dr. Kao becoming  
14 upset?

15 A. Yes, yes.

16 Q. Do you recall him leaving the meeting?

17 A. I'm sure he left. I don't remember the  
18 details, yeah.

19 Q. So we talked about two meetings in 2008?

20 A. M-hm.

21 Q. That was a special faculty meeting -- special  
22 meeting of the search committee?

23 A. Right.

24 Q. And the May meeting regarding the chair?

25 A. Right.

1 Q. Other than those two meetings, have you ever  
2 seen Dr. Kao upset in a faculty meeting?

3 A. Varying degrees of what upset means, I guess.  
4 I'm not sure that I remember him being as upset as he  
5 was in those two circumstances.

6 Q. But there were a number of other meetings  
7 during that term that you attended?

8 A. Yes.

9 Q. And all of those meetings completed their  
10 business?

11 A. Yes. As far as I can remember, yeah.

12 MR. KATZENBACH: Okay. And -- that's all I  
13 have for this Witness. Thank you.

14 THE COURT: Mr. Vartain, have you questions for  
15 this Witness?

16 MR. VARTAIN: I do, your Honor. Thank you.

17 CROSS-EXAMINATION

18 BY MR. VARTAIN:

19 Q. Good morning, Professor.

20 A. Good morning.

21 Q. Nice to meet you.

22 A. You too.

23 Q. I'm going to ask you some questions that  
24 Counsel did not ask you.

25 A. Sure.

1 Q. He was asking you about a time that's about  
2 four years ago.

3 A. Right.

4 Q. Would it be fair to say that sort of explains  
5 why you don't remember all the ifs, ands and buts?

6 A. Yeah. We have a lot of meetings, and they're  
7 not always the most interesting things in the world.

8 Q. I wonder why.

9 A. I know. It's hard to believe, but it's true.

10 Q. But you did give your deposition about --

11 A. Yes.

12 Q. -- a year, year and a half ago?

13 A. Yes.

14 Q. And things were a little fresher when  
15 Mr. Katzenbach asked you to come and answer all his  
16 questions?

17 A. A little bit probably, yeah.

18 Q. And he asked you at that deposition when you  
19 were under oath?

20 A. Yeah.

21 Q. Do you remember that?

22 A. Sure.

23 Q. He asked you if his client was yelling at that  
24 February search meeting?

25 A. Yes.

1 Q. And what was your answer?

2 A. Yes.

3 Q. Is that your answer today, that Dr. Kao was  
4 yelling?

5 A. Yes.

6 Q. At the first of the two meetings that you were  
7 asked by Mr. Katzenbach to relate?

8 A. Yes.

9 Q. Did you remember Mr. Katzenbach asking you a  
10 year, year and a half ago when you were giving your  
11 testimony in the deposition whether his client, Dr. Kao,  
12 was shaking with anger at that meeting?

13 A. Yes.

14 Q. And what was your answer?

15 A. Yes, he was.

16 Q. And what is your answer today: Was Dr. Kao  
17 shaking with anger at the faculty search meeting in  
18 February 2008?

19 A. Yes.

20 Q. Now, do you remember Mr. Katzenbach asking you  
21 under oath at that time whether from your perspective  
22 Dr. Kao's conduct was disrupting the meeting, the  
23 faculty search meeting?

24 A. Yes.

25 Q. What did you tell Mr. Katzenbach?



1           A. I don't remember what I exactly said in the  
2 deposition. Um, I mean, we certainly took note of  
3 John's behavior.

4           Q. Okay. When you said to this Jury a few minutes  
5 ago that you didn't consider his, Dr. Kao's, opinion as  
6 particularly -- I think you used the word relevant --

7           A. Right.

8           Q. -- to this meeting, setting aside the yelling  
9 and shaking with anger --

10          A. Yes.

11          Q. -- what did you mean to tell the Jury? Was  
12 there something illogical about what he was saying?

13          A. Um, about his objection to the search? Yes. I  
14 mean, in my opinion, um, you know, the number of  
15 applications may have been slightly lower than it had  
16 been in the past, but there are any number of variables  
17 that go into that.

18                 My recollection is that we, we had put in our  
19 job ad that year that we were especially looking for  
20 someone who was willing to teach lower division classes.  
21 That can change the profile of the applicant pool pretty  
22 dramatically. And we had, I think there was no question  
23 at that point that we had a good crop of candidates, and  
24 we had four excellent finalists on campus.

25                 So in my opinion, the search had been

1 successful. And the question was who we were going to  
2 hire, and that's what I wanted to talk about.

3 Q. Did you find anything illogical about Dr. Kao  
4 saying, "Stop, let's cancel the search. Let's do  
5 nothing"?

6 A. Yeah. It's a huge amount of work, a search.  
7 The committee puts in a huge number of hours reading  
8 applications and traveling to meetings and interviewing  
9 people. The process of bringing people on campus is  
10 extremely exhausting.

11 I mean, you spend, you spend a huge amount of  
12 time preparing for that. You spend, um, the entire day  
13 from 8:00 in the morning until 8:00 p.m. with the  
14 candidates when they're on campus. There's a huge  
15 amount of work that goes into it.

16 And you know, like I said, the candidates that  
17 we had were excellent. And so it didn't seem that there  
18 was any reason to not go ahead with the search.

19 Q. Do you remember that at the deposition that  
20 Mr. Katzenbach asked you to come to a year or a year and  
21 a half ago, he was asking you if any of your colleagues,  
22 other math faculty members that semester, that spring  
23 semester of 2008 --

24 A. Right.

25 Q. -- had themselves expressed any concern to you

1 for their own personal safety, even though you didn't  
2 have a particular fear?

3 A. Yes.

4 Q. And do you remember that you told him that  
5 there were at least two or three other faculty members  
6 had told you that they were concerned for their personal  
7 safety?

8 A. Yes. I remember that.

9 Q. And who, who were the faculty members that  
10 spring who came to you and told you that they themselves  
11 were concerned for their personal safety because of what  
12 Dr. Kao was doing or said or whatever?

13 A. Right. I know that Tristan came to me and that  
14 we had a conversation about it and that he was concerned  
15 for his safety. I also know that I had a conversation  
16 with Paul Zeitz about John.

17 I don't recall whether Paul mentioned his  
18 personal safety in that conversation. But I do know  
19 that Paul, you know, we had a conversation where Paul  
20 had said that it was, it was a shame that John's  
21 behavior, in Paul's opinion, had sort of dramatically  
22 changed over time.

23 Q. Did Paul Zeitz tell you in the spring semester  
24 that from his perspective as someone who had been  
25 working with someone for a long time, his perspective,

1 Professor Zeitz's, it had really changed dramatically?

2 A. Yes. Definitely.

3 Q. Did he say in what manner it had changed? Was  
4 he referring to the yelling and facial gestures?

5 A. Yes, yes. And so I think going back to -- I  
6 had a conversation with Paul and Tristan going back  
7 to -- this is before 2008. This would have been in, I  
8 think, 2006 when we were on a different search committee  
9 together. And they had essentially described the  
10 situation where they had, they had been friends with  
11 John, and they had socialized with him.

12 This is before I came in 2004. But I think in  
13 their opinion, John had become more angry for some  
14 reason. And I'm sure that that has something to do with  
15 that incident that we mentioned earlier. But really he  
16 had just become more irascible and more angry to the  
17 point where I think they, you know, certainly had no  
18 longer had any kind of social relationship with John.

19 Q. So "they" being Professor Needham?

20 A. And Zeitz, yes.

21 Q. They were telling you spring of 2008 after this  
22 faculty search meeting?

23 A. Yes.

24 Q. What did Professor Needham say to you was the  
25 nature of his concern for his personal safety? Did he

1 mention his family at all?

2 A. Yes. He -- I mean, I think Tristan was  
3 disturbed at the fact that, you know, at these meetings  
4 John was very angry, and he was red in the face, and he  
5 was shaking.

6 And I think that that bothered Tristan to the  
7 point where he -- I think he said, I mean, my best  
8 recollection of what he said to me was that, you know,  
9 he wasn't sure what John was capable of doing. And he  
10 was nervous, worried about it.

11 Q. Did you talk to professor Stephen Yeung that  
12 semester about Dr. Kao?

13 A. No. I don't believe I talked to Stephen about  
14 it.

15 Q. Had any other professors told you that they had  
16 talked to Professor Yeung that semester?

17 A. Yes. I know that Tristan and Paul had talked  
18 to Steve.

19 Q. And what did they say?

20 A. I think they said Stephen was concerned also.

21 Q. For?

22 A. For his safety.

23 Q. Unlike Professor Zeitz, Professor Needham and  
24 Professor Yeung, did you have any one-on-one incidents  
25 with Dr. Kao either before or after that faculty search

1 meeting where he got angry one-on-one with you?

2 A. No.

3 Q. Did Dr. Kao ever give you the impression that  
4 he was harboring some longstanding grudges against you?

5 A. Yes. I would say when I -- I mean, nothing  
6 dramatic, but when I would pass John in the hallway and  
7 say hello to him, I got the distinct impression that he  
8 was, that he was not -- that he was very cool to me. He  
9 would kind of, um, I mean, it's difficult to describe  
10 these kinds of interactions.

11 Q. Do your best.

12 A. When I passed John in the hallway, I got the  
13 sense that he would kind of, you know, grimace at me and  
14 begrudgingly acknowledge me. He would say hello, but in  
15 a way that was not especially friendly in my opinion.

16 Q. Was this in the spring of 2008 or the academic  
17 year '07/'08?

18 A. Yes. Yes, it was.

19 Q. In previous years, had he been less so towards  
20 you less grimacing?

21 A. Yes. Yes. When I first came, he was less so.  
22 Now, over the course of time, I became friends with  
23 Tristan and Paul. And I didn't think much about it. I  
24 kind of interpreted that as John feeling that I was, you  
25 know, by being friends with Tristan and Paul, that I was

1 in some way on their side or something. So I didn't  
2 think much about it.

3 Q. Did they ever say -- those other professors,  
4 did they ever say anything disparaging about Dr. Kao's  
5 medical condition?

6 A. No. So we had a conversation, just -- so we  
7 had a conversation in 2006 when we were on the search  
8 committee when I arrived at USF in 2004. I had lunch  
9 with John, and he told me that -- he explained his  
10 position on this incident that we were talking about.

11 Q. Can you stop a minute?

12 A. Yeah.

13 Q. Just tell the Jury the incident. I don't mean  
14 to interrupt.

15 A. Sure.

16 Q. It helps the Jury follow the flow.

17 A. For sure.

18 Q. Let me just stop you.

19 A. Sure.

20 Q. I'm going to ask you a few questions, and you  
21 can go back.

22 A. You bet.

23 Q. You're taking the Jury to a point in time when  
24 you were first hired around 2004?

25 A. That's right.

1 Q. And you're taking the Jury to a point in time  
2 when you're having sort of a getting-to-know-you  
3 conversation with Dr. Kao?

4 A. Precisely.

5 Q. Dr. Kao having worked there forever and ever?

6 A. Right.

7 Q. And Dr. Kao is giving you some of his what's  
8 called his historical baggage?

9 A. That's right.

10 Q. Would that be a fair word?

11 A. Yes.

12 Q. By that point in time, had anybody else given  
13 you their historical baggage with Dr. Kao?

14 A. No.

15 Q. He was the first one to sort of lobby you.  
16 Would that be fair to say?

17 A. That's fair to say.

18 Q. When he was doing that, he, Dr. Kao, was he  
19 taking you, the new professor, back to a point in time  
20 years earlier?

21 A. Yes.

22 Q. Like four or five years earlier?

23 A. Yes.

24 Q. So was he telling you about an old grievance he  
25 had against the other professors?



1 A. Yes.

2 Q. That old grievance was back in the year 2000 or  
3 so?

4 A. That's right.

5 Q. Did you have a particular interest in knowing  
6 about that?

7 A. As a new professor, I was trying to understand  
8 the lay of the land and understand the politics of the  
9 department. So yeah, I was interested.

10 Q. Okay. Now did you want to finish telling the  
11 Jury?

12 A. Sure. Thanks.

13 So essentially, we went to lunch, and John  
14 explained to me that when Tristan Needham, he had  
15 previously been in the Dean's office. He had been the  
16 Associate Dean in charge of the sciences. So he told me  
17 that at some point while Tristan had been in the Dean's  
18 office, essentially that Tristan had tried to get John  
19 fired, and that Paul Zeitz, who was the chair of the  
20 department at the time had kind of gone along with  
21 Tristan in that regard.

22 Q. Didn't he characterize some letter --

23 A. Right.

24 Q. Let me finish my question.

25 A. Sure. No problem.

1 Q. Did he characterize a letter of reprimand about  
2 California College of Arts and Crafts as an effort to  
3 get him fired?

4 A. Yes. I believe he said they tried to put a  
5 letter, an official letter of reprimand in his tenure  
6 file.

7 Q. Did he tell you that the letter wasn't even  
8 addressed to him?

9 A. No.

10 Q. Did he tell you the letter was actually  
11 addressed to the chairman of the department?

12 A. No.

13 Q. Did he tell you that the letter actually  
14 complimented Dr. Kao about how well he was teaching at  
15 California College of Arts and Crafts?

16 A. No.

17 Q. Did he tell you that the letter said nothing  
18 whatsoever about firing him, taking away his job, or in  
19 any way changing his working conditions?

20 A. No. That's what -- in 2006, when I was on the  
21 search committee with Tristan and Paul, that's -- I  
22 brought it up then. I hadn't brought it up before that,  
23 again, because of the -- I didn't know what the politics  
24 were.

25 Q. Right.

1           A. They explained in 2006 their side of that  
2 story.

3           Q. This case was mostly about 2008.

4           A. Right.

5           Q. So to the extent I don't ask you to tell us  
6 more and more and more.

7           A. I understand.

8           Q. I appreciate the background.

9           A. Yeah.

10          Q. When you heard Dr. Kao yelling and shaking with  
11 anger in the February search meeting, I take it you  
12 remembered that Dr. Kao had this old grievance against  
13 other people in the department?

14          A. Of course, yeah. And I interpreted it as  
15 largely probably relating to that.

16          Q. So when Professor Needham told you that he was  
17 concerned for his personal safety, did he tell you that  
18 he felt that Dr. Kao was still holding inside some of  
19 these old stuffs, stuff?

20          A. I don't remember whether we discussed that  
21 specifically.

22          Q. Okay. Remember Mr. Katzenbach asking you in a  
23 deposition that he took a year and a half ago whether  
24 you observed his client, Dr. Kao, in the spring of 2008  
25 exhibiting contorted facial expressions?

1 A. Yes.

2 Q. What did you tell Mr. Katzenbach?

3 A. Yes, I remember that.

4 Q. You told him that you actually had observed  
5 Dr. Kao with these contorted facial expressions in the  
6 spring of 2008?

7 A. Yes.

8 MR. VARTAIN: No further questions.

9 THE COURT: Mr. Katzenbach, have you any  
10 further questions?

11 MR. KATZENBACH: I do.

12 REDIRECT EXAMINATION

13 BY MR. KATZENBACH:

14 Q. I want to first ask you a question Counsel  
15 was asking you about what you testified to in your  
16 deposition.

17 A. Right.

18 Q. And I would like to read, if I could, page 55,  
19 lines 1 through 6. Wait for -- the Court has a copy.

20 A. Sure.

21 Q. Question and answer as follows:

22 "Question: Okay. Did you ever see John  
23 shaking with anger.

24 "Answer: I, I think so. I think at that, at  
25 the meeting where he was most upset about the

1 hiring, I think -- I think he was -- he was visibly  
2 upset and was and shaking a little bit or tremoring  
3 slightly."

4 Is that accurate?

5 A. Yes.

6 Q. So he was shaking a little bit and tremoring  
7 slightly?

8 A. Um, yes. He was shaking and tremoring. I  
9 mean, I don't know why I said -- put those qualifiers.  
10 I don't know what I meant by "slightly." But I would  
11 say --

12 Q. A little bit and tremoring slightly?

13 MR. VARTAIN: Let him finish his answer,  
14 Mr. Katzenbach. Objection.

15 THE WITNESS: Um, yes. I recall that John was  
16 very upset, and he was shaking and tremoring. Um, I  
17 would I would say that, um, I'm not sure why I put, why  
18 I said "slightly," um, I don't -- I don't even know what  
19 "slightly" means in the context of shaking and  
20 tremoring, I guess. But I would say that if I had to  
21 say yes or no, I would say yes.

22 MR. KATZENBACH: Q. Those are the words you  
23 used.

24 A. I understand.

25 Q. They weren't words I put in your mouth.

1 A. Right. I know.

2 Q. I just want to be clear on that.

3 A. Sure. I understand.

4 Q. And now, you talked about -- you talked about  
5 this whole CCA incident; do recall that?

6 A. Yes.

7 Q. You heard John's side of the story?

8 A. Yes.

9 Q. And in 2006, Tristan Needham and Paul Zeitz  
10 told you their side of the story?

11 A. Right.

12 Q. Did anyone ever show you the actual letter in  
13 question?

14 A. No.

15 Q. Okay. If you could take a look at Exhibit 4,  
16 sorry, Exhibit 3 in the book.

17 A. Where?

18 MR. KATZENBACH: May I approach the Witness,  
19 your Honor?

20 THE COURT: You may show the Witness Exhibit 3.

21 MR. KATZENBACH: And I'm directing him to a  
22 document marked SD-9.

23 MR. VARTAIN: Counsel, I'm going to object to  
24 this line of questioning. It's not relevant. The  
25 Witness said he never saw the letter.

1 THE COURT: There's no question pending. So  
2 I'm having a hard time figuring out what the objection  
3 was.

4 MR. VARTAIN: That was anticipatory, your  
5 Honor. I'll wait. I apologize.

6 MR. KATZENBACH: Q. Taking a look at the  
7 document marked SD-9, which is part of Exhibit 3, right,  
8 do you see in the third paragraph down starting at the  
9 fourth line.

10 A. M-hm.

11 Q. It directs criticisms specifically at Dr. Kao  
12 in negotiating with John Loomis at CCAC?

13 A. M-hm.

14 THE COURT: Is that an affirmative "m-hm"?

15 THE WITNESS: Yes. Sorry.

16 MR. KATZENBACH: Thank you, your Honor.

17 Q. Could you read that sentence?

18 A. Starting with "specifically"?

19 Q. Yes.

20 A. "Specifically, I was, as you know, very  
21 disturbed to discover that as a result of private  
22 communications between John Kao and John Loomis at CCAC,  
23 it was decided that USF would not deliver this course  
24 for CCAC in spring of 2001 and that John Loomis would  
25 simply have it taught by a CCAC instructor from their

1 department of humanities and sciences."

2 Q. The word "decided" in this letter is put in  
3 quotation marks?

4 A. Yes.

5 Q. And please take a look down at the next  
6 paragraph.

7 A. Okay.

8 Q. Paragraph No. 1, what does that say?

9 A. The bullet?

10 Q. No. 1.

11 A. "Neither John Kao nor you are empowered to  
12 negotiate with CCAC on behalf of USF."

13 Q. If you take a look, if you turn the page and  
14 look at the document marked SD-10.

15 A. Yes.

16 Q. Do you have that?

17 A. Back of the letter, yeah.

18 Q. Yes. And do you see there's a bunch of cc's on  
19 that?

20 A. Yes.

21 Q. Do you know who those cc's are?

22 A. Yes. Not all of them. I know some of them.

23 Q. Do you know who Stanley Nelson is?

24 A. Yes.

25 Q. He was the Dean at that time?



1 A. Yes.

2 Q. And Father Thomas Lucas, do you know who he is?

3 A. I've heard his name. I don't know who he is.

4 Q. He was an administrator at the University of  
5 San Francisco?

6 A. Okay.

7 Q. Do you understand that?

8 A. Yes.

9 Q. Okay. And do you see the last two names refer  
10 to people at CCAC?

11 A. Yes.

12 Q. Did you form the impression from foregoing  
13 events that as of 2006, both -- 2006 and continuing,  
14 that there was a bad blood between Tristan Needham and  
15 John Kao over this incident?

16 MR. VARTAIN: Let him answer.

17 THE WITNESS: Can you just repeat that?

18 MR. KATZENBACH: Q. Sure.

19 As a result of conversations you had with  
20 John Kao in 2004 and Tristan Needham and Paul Zeitz in  
21 2006 --

22 A. Right.

23 Q. -- did you form the impression that there was a  
24 bit of bad blood between Tristan Needham and John Kao  
25 over this incident?

1 MR. VARTAIN: Objection. The question is  
2 vague. Bad blood from whom? On which side is the  
3 question?

4 MR. KATZENBACH: Let me rephrase it, your  
5 Honor.

6 THE COURT: All right. Question withdrawn.

7 MR. KATZENBACH: The question is withdrawn,  
8 right.

9 Q. In your conversations with Tristan Needham and  
10 Paul Zeitz, did they tell you in effect that John was  
11 just blowing this out of proportion?

12 A. Yes.

13 Q. And in your conversation with John Kao, he told  
14 you that Tristan had unfairly criticized him?

15 A. He told me Tristan had tried to get him fired.

16 Q. Do you know that John Kao filed a grievance  
17 over the letter you just read?

18 A. No.

19 Q. Do you know that grievance was settled?

20 A. No.

21 Q. Thank you.

22 Now, when you spoke to Professor Zeitz about --  
23 well, Professor Zeitz told you something about John's  
24 changed behavior, that was in the context -- that was in  
25 about 2008?

1 A. That was in 2008.

2 Q. That was the same time that the search issue  
3 was going on?

4 A. Right.

5 Q. The search issue that John apparently took very  
6 seriously?

7 A. M-hm. Yes.

8 Q. You would agree with me issues of diversities  
9 are important issues at the University of San Francisco?

10 A. Yes.

11 Q. They're important issues in our society as a  
12 whole?

13 A. Yes. I agree.

14 Q. And do you agree with me that it would be  
15 embarrassing if the search committee had to cancel the  
16 2008 search?

17 A. Not especially. Those -- there are lots of  
18 failed searches around the University.

19 Q. So that failed searches happens all the time?

20 A. I don't -- I don't know how often. I know they  
21 happen.

22 Q. Would you agree cancelling a search because it  
23 was having a discriminatory effect would be -- strike  
24 that.

25 Let me put it this way: John asked to have the

1 search canceled or postponed because of discriminatory  
2 effect?

3 MR. VARTAIN: Objection. The question is  
4 argumentative. The question should be could he said  
5 that.

6 THE COURT: Sustained.

7 MR. KATZENBACH: Q. Did John say that he felt  
8 the search should be canceled because of its  
9 discriminatory effect?

10 A. I believe so.

11 Q. And that was -- so that -- did you feel that  
12 that was a significant criticism?

13 A. No.

14 Q. You didn't think it was discriminatory?

15 A. No.

16 Q. Now, the issue that John was raising was where  
17 the search had been advertised; correct?

18 A. Right.

19 Q. Do you recall a subsequent vote of the  
20 department to advertise the next search in the notices?

21 A. I don't remember.

22 Q. Do you know if the next search was advertised  
23 in the notices?

24 A. I don't know.

25 Q. Were you chairman of the department at any

1 time?

2 A. Yes, yes. I am now. I became chair of the  
3 department in 2009 I believe.

4 Q. All right. Were you involved in the search  
5 that happened in 2008, 2009?

6 A. No. I was not on the committee.

7 Q. Who was on the committee in that search --  
8 strike that.

9 Did you appoint the search committee?

10 A. No.

11 Q. Who appointed the search committee?

12 A. The Deans.

13 Q. That would be who?

14 A. Whoever was in the Dean's office at that time.

15 And I'm not -- I don't recall who, who was in the Dean's  
16 office at that time. That would have been Jennifer  
17 Turpin would have been the Dean. So I remember, I  
18 remember that.

19 I don't recall who was the Dean of the sciences  
20 at that point. It probably was Brandon Brown, now that  
21 I'm thinking about it. I think it was Jennifer Turpin  
22 and Brandon Brown were respectively Dean and Associate  
23 Dean.

24 Q. Do you know who made a decision not to  
25 advertise in the notices?

1 A. No.

2 Q. Is that a decision usually made by the search  
3 committee?

4 A. Where to advertise?

5 Q. Let me strike that and let me go back.

6 Going back to the meeting in February of 2008  
7 in response to John's criticism about the advertisement,  
8 did the search committee say anything?

9 A. Did the search committee -- this is going back  
10 to the 2008 search?

11 Q. Yes.

12 A. Did the search committee say anything about  
13 John's criticism?

14 Q. Yes.

15 A. I think -- I believe so. I mean, I think that  
16 the response essentially is that very few ads are --  
17 very few jobs are advertised in print nowadays. It's  
18 almost exclusively done online.

19 Q. Did you say use of an online service had been  
20 approved by the Dean's office?

21 A. I don't remember if anyone said that  
22 explicitly.

23 Q. Have you ever seen the procedures governing  
24 searches?

25 A. I have.

1 Q. Could you take a look at -- strike that.

2 Are you aware that those procedures require  
3 advertising in a professional journal?

4 A. Yes.

5 Q. Okay.

6 A. But my understanding of that is professional  
7 journal means online AMS, the online American  
8 Mathematics Society web page. They have a specific job  
9 resources page which is what I -- when I applied for  
10 jobs, that's what I used exclusively to look for jobs.  
11 My understanding is that's what everybody does.

12 Q. Well, as you understood John's criticism;  
13 right?

14 A. M-hm.

15 Q. He was focused on the failure to advertise in  
16 the publication in the notices?

17 A. In the print version?

18 Q. Yes.

19 A. Right.

20 Q. The online version doesn't contain articles?

21 A. Well, it has -- I mean, the notices of the AMS  
22 is published in print, and it's also published online.  
23 For example, my subscription is online. So I access it  
24 through the AMS web page.

25 Q. The online copy of the journal is the same as

1 the print?

2 A. Yes.

3 Q. But the advertisement for the job was only in  
4 the online database; isn't that right?

5 A. That's my understanding, yeah.

6 Q. So actually, it wasn't even in the online  
7 version of the journal; right?

8 A. Right. The online journal is exactly the print  
9 version. It's an electronic copy of the print version.

10 Q. So if it wouldn't have been in the print  
11 version, it wouldn't have been in the online version?

12 A. It depends what you mean online version.

13 There's the AMS web page, which has lots of stuff. One  
14 of the things on that web page is the actual journal.

15 And so, you know, in my opinion, you would, you  
16 would -- you would go to the journal to read the  
17 journal. And you would go to the employment information  
18 in the mathematics sciences tab, which is on the web  
19 page, to look for job information.

20 THE COURT: Ladies and gentlemen, remember the  
21 admonition. Do not form or express any opinion on this  
22 case until it's finally submitted to you for your  
23 decision. Do not discuss among yourselves or with  
24 others until that time.

25 Please be back in your places at 10:10



1 according to the courtroom clock.

2 (Recess taken: 10:10 a.m. - 10:12 a.m.)

3 THE COURT: Jurors and Alternates are all  
4 present. Counsel for all sides are present. Plaintiff  
5 is personally present.

6 And Mr. Katzenbach is on the seat.

7 MR. KATZENBACH: Yes, your Honor.

8 Q. Just one clarification.

9 A. Sure.

10 Q. You indicated that you felt John was a bit cold  
11 to you because you were friends with Tristan Needham and  
12 Paul Zeitz?

13 A. That was my interpretation, yeah.

14 Q. Is it also the case that Professor Yeung ate  
15 regularly with Professor Zeitz?

16 A. I'm sorry?

17 Q. Do you recall Professor Yeung typically having  
18 lunch with Professor Zeitz as well?

19 A. I'm sure they did, but I don't really remember  
20 specifically.

21 Q. Would you consider that Professor Yeung was --  
22 strike that.

23 That's all I have.

24 THE COURT: Mr. Vartain, anything further for  
25 Professor Devlin?

1 MR. VARTAIN: Yes, your Honor. May I stay  
2 here, your Honor?

3 THE COURT: Sure.

4 RE CROSS-EXAMINATION

5 BY MR. VARTAIN:

6 Q. Professor Devlin, the attorney was reading to  
7 you from some of your deposition, but he stopped at a  
8 certain place. And I want to ask you if you remember  
9 the attorney at the deposition asking you the following:

10 Quote, "Did you ever see him screaming at a  
11 department meeting?"

12 "Answer: Yes, well, at the meeting, at the  
13 search committee meeting."

14 A. Yes.

15 Q. Did you remember testifying in response to  
16 Mr. Katzenbach's questions?

17 A. Yes.

18 Q. And did you -- is it your testimony that  
19 Dr. Kao was screaming at the meeting?

20 A. Yes, it is.

21 Q. Do you still have Exhibit 3 open?

22 A. Yes.

23 Q. Would you read to the Jury the second sentence  
24 of the infamous letter of November 1, 2000, to John Kao  
25 from Tristan Needham? This is a part that

1 Mr. Katzenbach did not ask you to read, the second  
2 paragraph.

3 A. Second paragraph?

4 MR. KATZENBACH: Your Honor, I'm going to  
5 object to that question as essentially testifying.

6 THE COURT: That portion of the question  
7 referring to what Counsel did is stricken.

8 MR. VARTAIN: Q. Would you please read the  
9 second paragraph?

10 A. Yes. Beginning with, "Let," "Let me begin on a  
11 positive note by saying that I very much appreciate the  
12 effort John put into developing at the last minute and  
13 on the fly a version of this course that was  
14 significantly different than the one we have had  
15 delivered at USF, one that better met the special needs  
16 of the CCAC students. The student evaluations attest to  
17 the fact that this was a complete success and that John  
18 did his usual outstanding job in the classroom."

19 Q. Is the "John" that the author is referring to  
20 John Kao?

21 A. Sure seems that way, yes.

22 Q. You said you are the current chairman of the  
23 department?

24 A. Yes.

25 Q. Have you been involved in the hiring of a

1 faculty member in a search that has just concluded?

2 A. Yes. It hasn't exactly concluded, but we're in  
3 the final stages now.

4 Q. Would you tell the Jury what the final stage of  
5 a hiring of a new math faculty member, what's happening  
6 right now? What's going on?

7 A. What's going on right now?

8 Q. Yeah.

9 A. Sure. So we went through the process of  
10 getting down to four finalists who come to campus. We  
11 have a full-day interview with them. Then we meet with  
12 the department, and we get the department's feedback on  
13 their, their ranking of the candidates. Then we, based  
14 on that, go to the Dean, and we make a recommendation as  
15 to who we would like to make an offer to. Then we  
16 discuss backup plan, who's our second choice, third  
17 choice, and so on.

18 Q. Are you currently at the place in a particular  
19 hiring process?

20 A. We are. There's a search that's happening  
21 right now. I'm the chair of the search committee, and  
22 we have -- we've made an offer, and it's being, it's in  
23 the final stages of negotiations with the Dean. And we  
24 should hear back on whether that offer is going to be  
25 accepted any day now.

1 Q. Would you tell the Jury the gender and ethnic  
2 background of the person to whom the offer is being  
3 made?

4 A. The offer was made to um, David Jimenski  
5 (phonetic) is his name. And he is a male. And he is,  
6 um, of Hispanic background.

7 Q. Thank you. No further questions.

8 MR. KATZENBACH: Just a few, your Honor.

9 FURTHER REDIRECT EXAMINATION

10 BY MR. KATZENBACH:

11 Q. Counsel asked you about your deposition.  
12 Why don't you take a look at page 55 of your  
13 deposition?

14 A. I'm sorry.

15 Q. I'm sorry. You don't have that. I would like  
16 to direct the Court to page 55 of the deposition,  
17 starting at line 10. This concerns the question about  
18 screaming.

19 THE COURT: Go ahead.

20 MR. KATZENBACH: Q. Okay. At your deposition,  
21 you testified:

22 "Question: Did you ever see him screaming at a  
23 department meeting?

24 "Answer: Yes. Well, at the meeting the search  
25 meeting.

1           "Question: Okay. Would you describe these  
2 things as screaming or yelling or how would you --

3           "Answer. I would describe it as yelling."

4           Now, I would also like you to take a look, if  
5 you would, at the SD-9 of Exhibit 3. Do you have that  
6 in front of you?

7           A. Yes.

8           Q. You read one paragraph.

9           A. Right.

10          Q. I would like, if you would, to continue reading  
11 from the beginning of the third paragraph.

12          A. Okay. "Less happily, my real reason for  
13 writing is to spell out grave concerns about which you  
14 and I have already spoken in person regarding the  
15 breakdown of both the lines of communication and the  
16 chain of command in connection with the delivery of this  
17 course by USF for CCAC."

18          Q. Continue.

19          A. "Specifically, I was, as you know, very  
20 disturbed to discover that as a result of private  
21 communications between John Kao and John Loomis of CCAC,  
22 it was decided USF would not deliver this course for  
23 CCAC in spring 2001, and John Loomis would simply have  
24 it taught by a CCAC instructor from their department of  
25 humanities and sciences."

1 MR. KATZENBACH: Thank you. That's all I have.

2 THE COURT: Jurors, have you questions?

3 JUROR 1: I would like to make a comment, your  
4 Honor. I was going to ask the Clerk. Can you turn the  
5 sound down a little bit on the Witness, because I can't  
6 stand the loud noise.

7 THE COURT: Okay.

8 JUROR 1: Would you just move away from the  
9 mic.

10 THE WITNESS: Yeah. Sure. Sorry.

11 THE COURT: Okay. Jurors, any questions?

12 (Whereupon, the Court received one written  
13 question from Jurors, and a discussion at sidebar  
14 was held: 10:19 a.m. - 10:20 a.m.)

15 THE COURT: Professor Devlin, a couple of  
16 questions from the jurors.

17 THE WITNESS: Sure.

18 THE COURT: Having to do with the most recent  
19 job search underway now concluding.

20 What method did you use to conduct your search?  
21 Print, online, et cetera?

22 THE WITNESS: So what we did is we worked with  
23 the Dean's office on this. So the Dean's office has  
24 some standard outlets that they use to advertise the  
25 jobs. I believe one is the Chronicle of Higher

1 Education. There are probably others. Then there are  
2 more discipline-specific places to advertise.

3 We advertised in -- so now, there is -- there's  
4 a website called Math Jobs. And this is by far the  
5 default way to advertise for a job. This is a free open  
6 access database of math jobs. I believe it's  
7 cross-listed with the American Mathematical Society's  
8 employment information and the mathematical sciences  
9 page. So --

10 THE COURT: Juror No. 1, is it okay?  
11 John, just a little more.

12 JUROR NO. 9: We're right below the speaker,  
13 and he's getting all the noise.

14 THE WITNESS: I can't hear myself at all. So  
15 I'm sorry.

16 What we did is we advertised our job in Math  
17 Jobs. We also had it in employment information in the  
18 mathematical science, the IMS. The Society For  
19 Industrial and Applied Mathematics, the American  
20 Statistical Association, the AWN, that's Association of  
21 Women in Mathematics.

22 I might be missing one or two. These are all,  
23 these are all online databases where we, um, advertised.  
24 And we certainly got the approval of the Dean's office  
25 to do this, for this to be the way we advertised the



1 job. So there's an outside consulting company who works  
2 with the University now to track how your, how your ad  
3 is viewed.

4 So just out of curiosity, we did that. I  
5 checked in with them just to see where the traffic was  
6 coming to the job essentially. And I -- I don't  
7 remember the number exactly, but it was, it was more  
8 than 90 something percent of the traffic came through  
9 Math Jobs. So it really is the standard way to  
10 advertise now. I think everybody knows that's the place  
11 to go to advertise.

12 THE COURT: How many applications did you get  
13 for this position?

14 THE WITNESS: On time applications, we got 333.

15 THE COURT: Follow-up questions,  
16 Mr. Katzenbach?

17 MR. KATZENBACH: Yes.

18 FURTHER REDIRECT EXAMINATION (Resumed)

19 BY MR. KATZENBACH:

20 Q. Did you see the advertisement in the Chronicle  
21 of Higher Education?

22 A. No. I didn't see the advertisement in the  
23 Chronicle. I saw it on Math Jobs.

24 Q. The Chronicle is usually a print publication?

25 A. I'm not even sure. I know it is a print. I

1 don't know if they have an online version. I'm not  
2 sure.

3 Q. You advertise also in the Society of Industrial  
4 and Applied Mathematics?

5 A. Yes.

6 Q. And you also indicated the American Statistical  
7 Association?

8 A. Yes.

9 Q. In this new job, did you broaden the categories  
10 of qualifications to include statisticians?

11 A. Yes, we did. That was something new. We  
12 hadn't done that in the past, I don't believe.

13 Q. This new job asked for degrees in both  
14 mathematics and statistics?

15 A. I think it was mathematics, applied mathematics  
16 or statistics.

17 Q. And you hadn't advertised specifically in that  
18 way in prior searches?

19 A. I don't believe so.

20 Q. Out of curiosity, the gentleman that was hired,  
21 what is his degree?

22 A. Mathematics.

23 Q. And the --

24 A. He hasn't been hired. He's been offered the  
25 job.

1 Q. I'm sorry.

2 A. That's okay.

3 Q. As soon as I said that, I realized that.

4 That's all I have.

5 THE COURT: Mr. Vartain?

6 MR. VARTAIN: No further questions. Thank you,

7 Professor.

8 THE WITNESS: Thank you.

9 THE COURT: May Professor Devlin be excused?

10 MR. KATZENBACH: Yes, he can.

11 MR. VARTAIN: Yes, he can, your Honor.

12 THE COURT: Thank you very much, Mr. Devlin.

13 You're free to go, sir.

14 THE WITNESS: Thank you, your Honor.

15 (Witness excused.)

16 THE COURT: Plaintiff may call his next

17 witness.

18 MR. MACK: Plaintiffs will call Pete Wells,

19 Benjamin Pete Wells.

20 BENJAMIN WELLS,

21 called as a witness by the Plaintiff, after being first

22 duly sworn, was examined and testified as follows:

23 THE CLERK: Please be seated. State your name

24 and spell it for the record.

25 THE WITNESS: My name is Benjamin Wells. Is

1 the sound appropriate?

2 JUROR 1: Yes, thank you.

3 THE WITNESS: Last name is Wells, W-e-l-l-s. I  
4 am commonly called Pete, but that's not my name.

5 DIRECT EXAMINATION

6 BY MR. MACK:

7 Q. Good morning, Dr. Wells.

8 A. Good morning.

9 Q. You are referred to as Doctor; is that correct?

10 A. By you. Rarely.

11 Q. Okay. Do you have a doctorate?

12 A. Yes, I do.

13 Q. Where did you get your doctorate?

14 A. I got it at U.C. Berkeley.

15 Q. Where did you go to undergrad?

16 A. MIT.

17 Q. Are you currently employed?

18 A. I am not.

19 Q. Were you recently employed?

20 A. Yes.

21 Q. Where were you employed?

22 A. University of San Francisco.

23 Q. And what position did you hold at University of  
24 San Francisco?

25 A. I was professor of mathematics and also

1 professor of computer science.

2 Q. Is that considered a dual appointment?

3 A. It is.

4 Q. Two separate colleges?

5 A. It's two separate departments in the same  
6 college.

7 Q. Okay.

8 A. There's only one administrative unit which is  
9 the college.

10 Q. Okay. Was it a tenured position?

11 A. Yes.

12 Q. When did you get tenure?

13 A. '88, '89. About six years after I started in  
14 '83.

15 Q. So you first became a professor in 1983 at USF?

16 A. Assistant professor, yes.

17 Q. Are you familiar with plaintiff Dr. John Kao?

18 A. Yes.

19 Q. How long did you work with him?

20 A. From the time he came, I don't remember when  
21 that was. Until the time he left, I don't remember when  
22 that was.

23 Q. Are you familiar with Dr. Kao's reputation as a  
24 teacher?

25 A. Not directly, but my impression is that he's a

1 great teacher.

2 Q. And did you ever attend any social functions  
3 within the math department such as Math Club or Math Tea  
4 that John Kao was present at?

5 A. I have been to a number of Math Teas where he  
6 was there. I don't think I ever went to a Math Club  
7 meeting.

8 Q. Okay. Do you regularly attend math department  
9 faculty meetings?

10 A. Yes.

11 Q. Did you also attend commuter science faculty  
12 meetings?

13 A. Yes. I don't go to those anymore.

14 Q. While you were employed?

15 A. Right.

16 Q. I would like to direct your attention to a math  
17 department faculty meeting in February of 2008 where  
18 they discussed the search going on in 2007/2008 for a  
19 new math professor.

20 Do you recall whether you attended that  
21 meeting?

22 A. It would help if I knew who was hired.

23 Q. I believe that the person who was eventually  
24 hired after the 2007/2008 search was Cornelia Van Cott.

25 A. That sticks in my mind also, okay.

1 Q. So do you believe you may have been present at  
2 the February 2008 meeting to discuss the hiring process  
3 that ultimately ended up in the hiring of Cornelia Van  
4 Cott?

5 A. I believe I was there.

6 Q. And do you remember Dr. Kao objecting to the  
7 search procedure at that time during that meeting?

8 A. I do.

9 Q. Can you describe his behavior?

10 A. I don't remember details of it. But he felt  
11 that it was inappropriate because it had not been  
12 advertised as widely as he thought it should be.

13 Q. Okay.

14 A. I recall that directly, yes.

15 Q. And how would you describe his affect during  
16 the meeting?

17 A. He was very upset with that process.

18 Q. Okay. Have you seen people become enraged  
19 during faculty meetings?

20 A. Oh, yes.

21 Q. Would you describe Dr. Kao's behavior as being  
22 enraged during that meeting?

23 A. I can't judge the level of his rage, but he was  
24 excited. He was maybe more than excited. He's not  
25 unique.

1 Q. Okay. And was this something he clearly felt  
2 very passionately about?

3 A. Yes.

4 MR. VARTAIN: You're leading. Objection.

5 MR. MACK: I believe I'm entitled to lead a  
6 former employee of the University.

7 THE COURT: Overruled.

8 MR. MACK: Q. Do you recall any behaviors by  
9 Dr. Kao at that specific meeting to cause you to think  
10 he was behaving inappropriately in any way?

11 A. I cannot recall.

12 Q. Do you remember whether the meeting was able to  
13 conduct its business and achieve what it was set to  
14 achieve that day?

15 A. I believe so because she was hired.

16 Q. Okay. Now, turning your attention to another  
17 meeting later in the semester, spring of 2008, May of  
18 2008, do you recall being at a meeting where Dr. Kao  
19 volunteered to take over the chairmanship from Peter  
20 Pacheco?

21 A. Yes.

22 Q. Was there anything unusual about that?

23 A. I think it's unusual whenever anybody says they  
24 want to be chair. Obviously these people who are chair,  
25 like the previous witness, agree to it and must have at



1 some point indicated to someone that they are willing.  
2 But I guess I've never heard anybody state for the first  
3 time, "I'm willing to do this." It's usually they've  
4 had their arm twisted beforehand.

5 Q. I understand.

6 In your approximate 30 years as a professor at  
7 USF, it was rare for people to actually volunteer to be  
8 a chair of a department?

9 A. Correct.

10 Q. Do you recall whether after Dr. Kao volunteered  
11 to be the chair of the department for the upcoming term  
12 whether he became the chair of the department?

13 A. No. Peter Pacheco stayed.

14 Q. He did. And do you recall how that happened?

15 A. I do not recall the details. There was some  
16 discussion of Peter not remaining as chair. John said  
17 that he would be willing to be chair. I don't know that  
18 anybody else said they would be willing to be chair. I  
19 believe we may have had a break. Later Peter stated he  
20 had decided to continue.

21 Q. Did it seem like this bothered Dr. Kao?

22 A. I don't recall a reaction from him at that  
23 point.

24 Q. Do you recall him exiting the meeting?

25 A. I don't recall.

1 Q. Do you recall him storming out?

2 A. I don't recall.

3 Q. Do you recall him slamming his briefcase?

4 A. I don't recall.

5 Q. Do you recall him yelling during the meeting?

6 A. I don't recall. Yelling during the meeting?

7 No.

8 Q. Okay. Did any faculty members tell you they  
9 were afraid of Dr. Kao as a result of his behavior in  
10 either of these meetings?

11 A. No.

12 Q. Did you ever hear any faculty members state  
13 that they felt that Dr. Kao had acted inappropriately in  
14 any manner during either of these meetings?

15 A. I don't recall a specific statement like that.

16 I mean --

17 Q. Have you ever recalled Dr. Kao exhibiting  
18 contorted facial expressions?

19 A. Animated.

20 Q. How would you describe his facial expressions?

21 A. I would say normally, he has a pretty calm  
22 appearance. But occasionally, he does get excited and  
23 has very animated expression then. But I don't -- I  
24 can't link that to any particular time or utterance of  
25 his.

1 Q. Okay. Thank you.

2 Have you ever seen Dr. Kao with his fists  
3 clenched?

4 A. No.

5 Q. Have you ever seen him walking around in a  
6 manner where he appeared to be angry?

7 A. Well, I think I have seen him at times when he  
8 was angry and appeared to be angry. But I mean walking  
9 the halls, no.

10 Q. Is that uncommon in a university?

11 A. I don't think that's uncommon.

12 Q. Did you ever see Dr. Kao staring or glaring at  
13 any individual?

14 A. No.

15 Q. Did you ever see Dr. Kao get inappropriately  
16 close to anyone?

17 A. No.

18 Q. Did you ever see Dr. Kao brushing up against  
19 anyone?

20 A. No.

21 Q. Did you ever see Dr. Kao intentionally bump  
22 into any one?

23 A. No.

24 Q. In talking to Dr. Kao or overhearing what he  
25 was talking about, has he had a pattern of repeating the

1 same words over and over again?

2 A. I don't recall anything like that.

3 Q. Have you ever heard Dr. Kao laughing or  
4 chuckling?

5 A. Sure.

6 Q. Have you ever talked to Dr. Kao about Monty  
7 Python?

8 A. I have.

9 Q. Did he laugh with you about Monty Python?

10 A. He laughed with me, and he laughed at me.  
11 Should I explain.

12 Q. Go right ahead.

13 A. He brought up Monty Python at some point. I  
14 said I had never seen a Monty Python episode. I've seen  
15 some of these actors in these bits. He was totally  
16 incredulous. He began laughing. "No, that can't be.  
17 You have never seen a Monty Python episode?" "No."

18 This was became sort of a running gag with us  
19 because he would return to it and say, "I just don't  
20 believe it." "Believe it John, it's true."

21 Q. Is it the truth today?

22 A. I've still never seen a Monty Python episode.

23 MR. VARTAIN: And you're a math professor?

24 THE WITNESS: Sorry. Don't see the linkage.

25 MR. VARTAIN: You haven't been in this trial;

1 that's why.

2 THE WITNESS: But John -- I brought this up at  
3 the deposition, and it provided a chance for John to say  
4 that he didn't think it was as funny anymore. So I  
5 didn't know whether that meant he didn't think Monty  
6 Python was funny or that I hadn't seen it wasn't funny.

7 MR. MACK: Q. You've had an opportunity to see  
8 him laughing or chuckling on numerous occasions?

9 A. Well, several occasions based on that, yeah.

10 Q. And did you ever consider Dr. Kao's laughing or  
11 chuckling to be bizarre?

12 A. Not on that, no.

13 Q. Maniacal?

14 A. No.

15 Q. Intimidating in any fashion?

16 A. No. Again, I'm referring to this, these  
17 specific things. I can't say I've seen him laughing or  
18 chuckling normally, faintly or maniacally at other  
19 times. In this regard, that's the way I recall.

20 Q. In a more general sense, have you ever found  
21 anything strange about his laughing or chuckling?

22 A. No. I thought he was a little exercised about  
23 my having not seen Monty Python; seemed kind of normal  
24 to me. I guess from the testimony of the room, I'm  
25 supposed to have seen this.

1 Q. He never laughed or chuckled in a way that made  
2 you fear for your safety?

3 A. No.

4 Q. Did you ever see Dr. Kao foam at the mouth?

5 A. No.

6 Q. Did you ever observe Dr. Kao throw papers at  
7 anyone?

8 A. No.

9 Q. Did Dr. Kao throw papers during the  
10 February 2008 meeting?

11 A. Not that I recall.

12 Q. Do you recall whether he distributed any papers  
13 in any fashion?

14 A. I don't. It's possible.

15 Q. Do you recall him making a statistical analysis  
16 of how he behaved -- or believed the search was  
17 discriminatory?

18 A. Vaguely.

19 Q. Has anyone told you that they've observed or  
20 experienced any behaviors of Dr. Kao that they found  
21 disturbing?

22 A. No.

23 Q. Did anyone ever tell you that Dr. Kao was  
24 disrupting their lives in any way?

25 A. No.

1 Q. Did anyone ever tell you they were afraid to  
2 come to the office because they were afraid of Dr. Kao  
3 being there?

4 A. No.

5 Q. And your office is or was not on the second  
6 floor with the math department but was actually in the  
7 computer science department; is that correct?

8 A. It was on the fifth floor in the computer  
9 science department.

10 Q. And was Peter Pacheco's office also there?

11 A. It moved there a long time ago, yeah.

12 Q. And did Peter Pacheco ever express any concerns  
13 he had about John's behavior in any fashion to you?

14 A. No.

15 Q. Are you aware that Dr. Kao is no longer  
16 employed by the University?

17 A. Yes.

18 Q. How did you become aware of this?

19 A. I don't remember. I do remember that our keys  
20 were changed.

21 Q. Okay.

22 A. That was because of John's leaving.

23 Q. Has anyone ever told you that Dr. Kao was  
24 banned from the USF campus?

25 A. I never had that understanding. Obviously

1 there was an intent in changing the keys that he not be  
2 able to enter offices.

3 Q. Were you ever told to report that you saw him  
4 if you were to see him on campus?

5 A. I don't recall being asked that.

6 MR. MACK: Thank you, Dr. Wells. I have no  
7 further questions.

8 THE COURT: Mr. Vartain, any questions.

9 MR. VARTAIN: Just a few, your Honor. Thank  
10 you.

11 CROSS-EXAMINATION

12 BY MR. VARTAIN:

13 Q. I want to question you about Monty Python at  
14 length.

15 A. We won't be here very long.

16 Q. I won't question you about it then. I want to  
17 get you out of here.

18 You've told the attorney that your office is on  
19 -- up in the computer science department?

20 A. Yes.

21 Q. Has it ever been down in the math department on  
22 the second floor of the building?

23 A. No.

24 Q. So would it be fair to say you aren't -- on a  
25 day-to-day basis, you're not interacting with



1 Professor Needham, Professor Yeung, Professor Kao and  
2 the majority of the math professors; is that true?

3 A. It's true.

4 Q. Okay. So in the spring of 2008, was it correct  
5 that you weren't in and about those professors' offices  
6 on any kind of a daily basis?

7 A. Well, I was certainly in the math department  
8 office on a daily basis.

9 Q. Would you get your mail there?

10 A. I had mail at both the computer science office  
11 and the math office, and I would typically see people.  
12 I might drop in to see people.

13 Q. But your ingress and egress from the building  
14 would be through the fifth floor, and you would come  
15 down the elevator and out the front door of the  
16 building; correct?

17 A. Correct.

18 Q. So normally speaking, you wouldn't be coming to  
19 and from lunch, to and from class by going through the  
20 actual math department; is that correct?

21 A. Well, the math department doesn't have a hall  
22 through it. I mean, in the math department area, not  
23 the math department office, I would have passed there  
24 several times a day.

25 Q. Your office was always up on the fifth floor

1 during the spring semester of 2008?

2 A. True.

3 Q. Okay. Were you socializing in spring of 2008  
4 with Professor Needham?

5 A. Probably.

6 Q. Did you ever ask him if he was having fears of  
7 Professor Kao?

8 A. We never had a discussion about John.

9 Q. Okay. Did you ever ask Professor Zeitz about  
10 his concerns, if any, about Professor Kao?

11 A. At that time, no.

12 Q. So neither of those -- none of those people,  
13 Professor Yeung, Professor Zeitz, Professor Needham,  
14 Professor Pacheco, none of them initiated any  
15 conversation with you about Professor Kao? I'm talking  
16 about the spring of 2008; is that true?

17 A. I don't know subsequent to the meeting, the  
18 faculty meeting where John volunteered to be chair, I  
19 may have had a conversation with Peter. I did have a  
20 conversation with Peter. I did not have a particular  
21 conversation. And none of it related to John's past  
22 behavior. It would just be the fact that it was  
23 somewhat bizarre to volunteer to be chair.

24 Q. Okay. Do you remember that you gave a  
25 deposition your sworn testimony in this case; you

1 actually mentioned that you had done so. And was that  
2 at Mr. Katzenbach's office?

3 A. The deposition was at Mr. Katzenbach's office.

4 Q. Okay. And was Ms. Adler from the University's  
5 attorneys, was she there?

6 A. She was present.

7 Q. And Mr. Katzenbach was questioning you?

8 A. Yes.

9 Q. Do you remember that he asked you if you had  
10 attended this February search committee meeting?

11 A. Probably he did. I have not seen the  
12 transcript.

13 Q. He did not give it to you for purposes of  
14 refreshing your recollection?

15 A. No.

16 Q. Okay. That's the problem. Okay.

17 Do you recall telling Mr. Katzenbach that you  
18 were not at the search committee meeting in February of  
19 2008?

20 A. I remember John Kao being exercised about the  
21 meeting being discriminatory. It is possible I told him  
22 I wasn't at that meeting because I didn't understand  
23 what happened.

24 Q. I see.

25 A. I recall -- typically candidates come, give a

1 talk. We have lunch with them. Cornelia Van Cott did  
2 that. I had lunch with her. I didn't have lunch with  
3 all the candidates. I wasn't on the search committee.  
4 My schedule didn't permit me to see too many people. I  
5 did talk with her. So I had sort of a stake in that  
6 search.

7 Q. I see.

8 A. But other details, I don't recall. I do recall  
9 John's at some point -- maybe it was another search. I  
10 don't know. But I do recall that.

11 Q. I'm worried that maybe you got a confusion,  
12 because let me read from your deposition.

13 A. Please.

14 Q. I'm lodging it with his Honor, and you have it.  
15 I'm reading from page 20 of your deposition  
16 that Mr. Katzenbach -- I'm not trying to embarrass you  
17 about that.

18 A. No.

19 Q. I'm just, you know, he didn't give it to you so  
20 you could read it before today.

21 "Question" -- this is at page 20, line 11. I'm  
22 going to go slow for you and the Reporter.

23 "Do you recall attending" -- this is  
24 Mr. Katzenbach asking you.

25 "Do you recall attending a meeting where the

1 search committee made a report on their ranking of  
2 candidates for a faculty position?"

3 Your answer was a question, which I think is  
4 quite professorial of you. Your answer was:

5 "Would this be this meeting?"

6 Okay. In the deposition, they had just been  
7 talking about spring of 2008.

8 Mr. Katzenbach answered your answer with an  
9 answer, which he said, "Yes."

10 Your answer then was:

11 "This meeting is on a Wednesday, I would not  
12 have been there."

13 Mr. Katzenbach said to you:

14 "Why would you not have been there?"

15 Your answer was:

16 "I don't have a parking pass for Wednesday, and  
17 for me to come in on a Wednesday, it would be  
18 something more important than this."

19 Mr. Katzenbach said, "Okay."

20 You went on to answer:

21 "Because I wasn't on the search committee, I  
22 skipped it."

23 To me, it's not that important whether you were  
24 right or wrong in your deposition. What's more  
25 important to me is whether you are sure you are

1 describing Professor Kao's enraged behavior happening at  
2 the February 2008 search committee or at some other  
3 meeting.

4 A. These are very good questions. And raising the  
5 issue of a Wednesday does make that sound like the  
6 deposition is probably more correct.

7 Q. That's what I thought.

8 A. I can say that I do recall John raising an  
9 issue of discrimination in a search and being forceful  
10 about that. I do not remember him throwing things. I  
11 do not remember him storming out or anything like that.  
12 So that makes me wonder was I -- I do not believe I was  
13 at a meeting where that happened. So...

14 Q. Did you meet with Mr. Katzenbach or the  
15 attorney or talk to them about your testimony today?

16 A. No.

17 Q. So you didn't get a chance to read the  
18 deposition at all to refresh --

19 A. I wasn't offered the deposition.

20 Q. Okay.

21 No further questions.

22 Thanks, Professor.

23 THE COURT: Mr. Katzenbach? Sorry, Mr. Mack,  
24 have you further questions?

25 MR. MACK: Just a couple, your Honor.

1 REDIRECT EXAMINATION

2 BY MR. MACK:

3 Q. Dr. Wells, do you remember when Dr. Kao  
4 raised the search potentially being discriminatory that  
5 he was concerned specifically about the way the search  
6 was advertised?

7 A. I remember John being concerned about the way a  
8 search was advertised. I asked you which search it was.  
9 I do recall being involved. I wrote the Associate Dean  
10 Brandon Brown a strong letter in support of Cornelia  
11 Van Cott. So I know that I was invested in her -- in  
12 the search that resulted in her being hired.

13 But my recollection -- and I don't know where  
14 this goes -- is that John actually complained about two  
15 searches being discriminatory, and it's possible that it  
16 was the previous one where, you know, some of this  
17 recollection lie.

18 Q. Thank you. I understand. That's why I want to  
19 know that because there are various searches that we've  
20 talked about in the course of this case. I wanted to  
21 know that you do remember John's concern when he was  
22 concerned about this search that you are remembering  
23 particularly had to do with the way the search was  
24 advertised?

25 A. He said that it had not been appropriately

1 advertised. I believe others said it had been widely  
2 advertised. I knew nothing about the basis of his  
3 objection and nothing really about the search process  
4 because I wasn't on the search committee. I think the  
5 last mass search committee I was on was in hiring Paul  
6 Zeitz.

7 Q. Did you say you vaguely remembered that John  
8 may have presented a statistical presentation or  
9 distributed some statistics? It's okay if you don't.

10 MR. VARTAIN: Objection. Asked and answered.  
11 He's answered that question.

12 THE COURT: Overruled. The Witness may answer.

13 THE WITNESS: I said that it's possible he  
14 could have handed stuff out because people hand stuff  
15 out. Again, I don't recall. In fact, I don't have such  
16 a document.

17 MR. MACK: Q. Thank you.

18 Were you ever interviewed by HR about Dr. Kao?

19 A. No.

20 Q. Have you ever been interviewed by HR about  
21 either of these meetings?

22 A. No.

23 Q. Were you ever interviewed by HR about any  
24 concerns that anyone in the math department may have had  
25 about Dr. Kao?



1 A. No.

2 MR. MACK: Thank you very much.

3 THE COURT: Mr. Vartain?

4 RE CROSS-EXAMINATION

5 BY MR. VARTAIN:

6 Q. Did Dr. Kao ever ask you to go to HR and  
7 discuss anything with the human resources people?

8 A. No.

9 Q. Did you ever contact HR and indicate that you  
10 would like to give any information?

11 A. No.

12 MR. VARTAIN: Thank you, Professor. No further  
13 questions.

14 THE COURT: Further, Mr. Mack?

15 MR. MACK: No, your Honor.

16 THE COURT: Jurors, do you have questions for  
17 Dr. Wells? I see no hands.

18 May Dr. Wells be excused?

19 MR. MACK: He may, your Honor.

20 MR. VARTAIN: Yes, your Honor. Thank you.

21 THE COURT: Dr. Wells, thank you very much,  
22 sir. You're free to go.

23 THE WITNESS: Thank you.

24 (Witness excused.)

25 THE COURT: Plaintiff may call his next

1 witness.

2 MR. KATZENBACH: Martha Peugh-Wade.

3 MR. VARTAIN: Ms. Adler went to get her, your  
4 Honor. I think she's a floor down or up, somewhere in  
5 the building waiting.

6 THE COURT: We'll take the break while  
7 Ms. Adler rounds up the witness.

8 Ladies and gentlemen, remember the admonition.  
9 Do not form or express any opinion on this case until  
10 it's finally submitted to you for your decision. Do not  
11 discuss among yourselves or with others until that time.

12 Please be back in your places at 11:05  
13 according to the courtroom clock.

14 (Recess taken: 10:58 a.m. - 11:05 a.m.)

15 THE COURT: Jurors and Alternates are all  
16 present. Counsel for all sides are present. Plaintiff  
17 is personally present.

18 Mr. Katzenbach, you may call your next witness.

19 MR. KATZENBACH: Martha Peugh-Wade.

20 THE CLERK: Would you please rise and raise  
21 your right hand.

22 MARTHA PEUGH-WADE,  
23 called as a witness by the Plaintiff, after being first  
24 duly sworn, was examined and testified as follows:

25 THE CLERK: Please be seated. State your name

1 and spell it for the record please.

2 THE WITNESS: Martha Peugh-Wade, P-e-u-g-h,  
3 hyphen, W-a-d-e.

4 THE COURT: Mr. Katzenbach, you may inquire.

5 MR. KATZENBACH: Yes.

6 DIRECT EXAMINATION

7 BY MR. KATZENBACH:

8 Q. Ms. Peugh-Wade, are you currently employed  
9 anywhere?

10 A. Yes, I am.

11 Q. Who are you employed by?

12 A. University of San Francisco.

13 Q. In what capacity?

14 A. Assistant vice president for human resources.

15 Q. How long have you had that position?

16 A. About five years.

17 Q. And when did you start?

18 A. July of '07.

19 Q. All right. Now, I would like, if I could,  
20 there's exhibit books in front of you. They are labeled  
21 a little bit -- they are labeled with the exhibits on  
22 the front, which you can find.

23 If you could please take a look at -- why don't  
24 we start with the one that's right there. Take a look  
25 at Exhibit 6.

1 THE CLERK: Exhibit 6, Counsel, did you say?

2 MR. KATZENBACH: Exhibit 6, yes.

3 Q. Do you have that in front of you?

4 A. Yes, I do.

5 Q. That's a copy of the respect handbook; isn't  
6 it?

7 A. Yes. I wouldn't call it a handbook, but yes,  
8 the respect pamphlets.

9 Q. What would you call it?

10 A. The respect pamphlet.

11 Q. Okay. And is that something distributed to all  
12 professors -- or sorry -- all members of the University  
13 community?

14 A. Yes. I believe so. It was.

15 Q. And that was distributed in about August of  
16 2007?

17 A. I believe so.

18 Q. And was there also an online program that  
19 accompanied the pamphlet?

20 A. On online program? I'm not sure what you're  
21 referring to.

22 Q. Was there a printing program on harassment that  
23 was conducted in connection with the handbook?

24 A. Yes. There was a training program on sexual  
25 and other unlawful harassment.

1 Q. Is that something employees were required to  
2 take?

3 A. Yes. Full-time employees were required to take  
4 it.

5 Q. That would include all the faculty members?

6 A. Full-time faculty. I'll have to tell you, I am  
7 not sure if 2007 we were required all faculty to take  
8 it. I don't know if it's 2007 or 2008 that went into  
9 effect. But sometime around there, yes.

10 Q. Do you recall this online program was required  
11 for all full-time faculty in 2007?

12 A. Sometime around that time, yes.

13 Q. And the respect handbook, Exhibit 6, contains a  
14 procedure for reporting claims of harassment?

15 A. May I look at it?

16 Q. Of course.

17 A. Yes.

18 Q. Is that a procedure that you're familiar with  
19 as head of the human resources department?

20 A. Yes. It's part of our PSOUH policy, Prevention  
21 of Sexual and Other Unlawful Harassment.

22 Q. That Prevention of Sexual and Other Unlawful  
23 Harassment Policy, that's exhibit, if you take a look at  
24 Exhibit 7. I'm sorry. Exhibit 5. I apologize.  
25 That's a copy of the Prevention of Sexual and Other

1 Unlawful Harassment Policy?

2 A. Yes.

3 Q. And that also provides a mechanism for  
4 individuals to make complaints?

5 A. For certain things, yes.

6 Q. As covered by the policy; correct?

7 A. Yes.

8 Q. The policy covers sexual harassment and other  
9 unlawful harassment; isn't that right?

10 A. Yes.

11 Q. And both the respect handbook and the formal  
12 policy both provide for a mechanism for anyone feeling  
13 harassed to make a formal complaint?

14 A. For things that are covered under this policy,  
15 yes.

16 Q. Is there any type of harassment of employees  
17 that these policies don't cover?

18 A. Sure. This comes up actually. If someone is  
19 feeling harassed, but it's not based on one of the  
20 things this covers, for example, I think it's in the  
21 middle of the page where it talks about race, age,  
22 gender, et cetera.

23 Q. Take a look at page 2 of the respect handbook,  
24 if you would. There's a heading entitled, "Respecting  
25 the dignity of every person, a core value at the

1 University of San Francisco."

2 Do you see that?

3 A. Yes.

4 Q. Now, taking a look at the -- taking a look --  
5 taking a look down at the second paragraph on that page,  
6 it begins, "This booklet describes."

7 Can you read that to the Jury?

8 A. Sure. "This booklet describes behavior which  
9 may constitute harassment and provides guidelines on how  
10 to handle such behavior should it occur. While special  
11 emphasis is placed on recognizing and responding to  
12 sexual harassment, the same principles and procedures  
13 apply to all forms of discrimination and harassment."

14 Q. Would you agree with me that this policy --  
15 strike that.

16 Could you please take a look at paragraph  
17 entitled, "Harassment and intimidation" that follows?

18 Do you have that paragraph in front of you?

19 A. Yes, I do.

20 Q. Can you read that paragraph to the Jury?

21 A. "USF is committed to maintaining an environment  
22 that is free of harassment and intimidation. Harassment  
23 includes any behavior which unreasonably interferes with  
24 a person's work/academic performance and/or creates an  
25 intimidating hostile or offense work," slash, "academic

1 environment."

2 Q. Thank you.

3 On the next page, does it give examples of  
4 harassment or discrimination?

5 A. Yes. Well, it gives examples of harassment.

6 Q. Take a look at the first, the title of that  
7 section is what?

8 A. "What is harassment?"

9 Q. What's the first paragraph say?

10 A. "Any behavior which shows a lack of respect for  
11 an individual and individual differences may be a form  
12 of harassment or discrimination."

13 Q. Does it give a number of examples?

14 A. Yes, it does.

15 Q. Could you read all the examples listed on that  
16 page to the Jury?

17 A. Sure.

18 "Examples include racial epithets or slurs,  
19 jokes that disparage someone because of his/her race,  
20 age, religion, gender, national origin, sexual  
21 orientation or other attribute, sabotage," in  
22 parenthesis, "regardless of how subtle, of an employee's  
23 work or student's academic experience, physical abuse or  
24 assault, derogatory posters, cartoons, or drawings  
25 related to age, race, gender, religion, national origin,



1 sexual orientation or other attributes, calling an  
2 adult," and then in quotes, "'boy or girl,' persisting  
3 in the use of any name or term which may be offensive to  
4 that individual, persisting in physical or facial  
5 gestures which may be offensive to the individual,  
6 verbal comments that stereotype a particular group in a  
7 derogatory manner."

8 Q. Thank you.

9 Now, would you agree with me that in order to  
10 protect the dignity of every person, this policy is  
11 intended to be applied broadly?

12 MR. VARTAIN: Objection. Vague and ambiguous,  
13 "broadly."

14 THE COURT: Sustained.

15 MR. KATZENBACH: Thank you.

16 Q. In the complaint procedure -- strike that.

17 If the human resources received a report of  
18 harassment, does human resource act on that report?

19 MR. VARTAIN: Objection. The question is  
20 vague. What kind of harassment?

21 MR. KATZENBACH: Let me just rephrase it then.

22 Q. If you received a report that someone was  
23 engaged in physical assault or abuse, one of the  
24 categories that you just read, would human resources act  
25 on that?

1 A. What I would -- certainly.

2 Q. Would it perform an investigation?

3 A. It depends.

4 Q. Okay. There is a complaint procedure; isn't  
5 there?

6 A. It depends if someone reported that they were  
7 assaulted or abused outside of the workplace, that  
8 doesn't necessarily involve the University. So it all  
9 really depends.

10 Q. Okay. If they reported assault in the  
11 workplace, would you investigate?

12 A. Not necessarily me, but if they complained of a  
13 physical assault in the workplace, we would get Public  
14 Safety involved and then determine the appropriate  
15 steps.

16 Q. All right. Would those steps include an  
17 investigation of what occurred?

18 A. It probably would.

19 Q. If somebody made a threat in the workplace,  
20 would that also involve an investigation?

21 A. It probably would.

22 Q. If somebody complained that somebody was  
23 harassing them in the workplace, would human resources  
24 normally investigate that?

25 A. It depends.

1 Q. All right. There's a procedure in this --  
2 under this policy for investigating complaints of  
3 harassment; correct?

4 A. Complaints of harassment, again, complaints of  
5 harassment that were based on that long list of things,  
6 gender, ethnicity, et cetera?

7 Q. Why don't you read again what it says about  
8 harassment and intimidation on page 2 of the respect  
9 handbook. You see that section, it says, "Harassment  
10 and intimidation."

11 A. But the respect pamphlet really goes back to  
12 our policy, and the policy is what I would read from.

13 Q. Why don't you take a look at the respect  
14 handbook. Read to the Jury what it says about  
15 harassment and intimidation?

16 MR. VARTAIN: You want her to read the same  
17 thing? Objection.

18 MR. KATZENBACH: No. Let me just rephrase the  
19 question.

20 MR. VARTAIN: Well --

21 MR. KATZENBACH: I'll rephrase.

22 THE COURT: The question is withdrawn. New  
23 question.

24 MR. KATZENBACH: Q. There's nothing in the  
25 section that describes harassment and intimidation in

1 the respect handbook that limits it to harassment and  
2 intimidation based on sex, gender or other protected  
3 characteristic; is there?

4 A. I don't know. I would have to read it  
5 carefully.

6 Q. Why don't you carefully read it and answer the  
7 question.

8 A. Can you repeat the question, please?

9 Q. There is nothing in the description of  
10 harassment and intimidation on page 2 of the respect  
11 handbook which is Exhibit 6 that limits it to sex  
12 harassment or harassment based on discrimination, race,  
13 sex or other?

14 A. But it also says, "This booklet is a companion  
15 guide book to the PSOUH policy.

16 Q. That's nice. But answer my question, if you  
17 would.

18 There's nothing in the respect handbook that  
19 states it's limited to discrimination, cases of  
20 discrimination or sexual harassment?

21 MR. VARTAIN: Question. Vague. The whole  
22 handbook or the part you're asking her to look at?

23 MR. KATZENBACH: Q. Looking at the definition  
24 of harassment and intimidation, is that limited to  
25 sexual harassment?

1 MR. VARTAIN: Objection. The question is  
2 vague. Do you mean that particular page or the whole --

3 THE COURT: Sustained. I don't need argument.

4 MR. KATZENBACH: Q. Is it your position --

5 MR. VARTAIN: Objection. "Position" is vague.

6 THE COURT: Your objection is premature. Let  
7 him state the question.

8 MR. VARTAIN: My objection is withdrawn,  
9 therefore, your Honor.

10 THE COURT: Okay.

11 MR. KATZENBACH: Q. Is it your understanding  
12 that the respect handbook is limited to discrimination  
13 based on sex harassment or other forms of unlawful  
14 discrimination?

15 A. The respect handbook was an intent -- was  
16 intended to go along with the policy. But also was  
17 really a reflection of USF's core values of respect and  
18 dignity for everyone.

19 Q. If you please take a look at the second  
20 paragraph of page 2 of the respect handbook which says,  
21 "This booklet." Can you read that to the Jury?

22 A. Yes.

23 "This booklet describes behavior which may  
24 constitute harassment and provides guidelines on how to  
25 handle such behavior should it occur. While special

1 emphasis is placed on recognizing and responding to  
2 sexual harassment, the same principles and procedure  
3 apply to all forms of discrimination and harassment."

4 Q. Thank you.

5 Now, are you aware that Dr. Kao filed  
6 complaints under the policy against discrimination and  
7 harassment?

8 A. Yes. I'm aware he filed complaints.

9 Q. Did you read them?

10 A. Yes, I did.

11 Q. The whole, every page?

12 A. There was one complaint that was particularly  
13 long that was done before I took over, took my current  
14 position. So it was 3 or 400 pages. I didn't read the  
15 whole thing at the time. I skimmed over the parts I  
16 thought were less relevant to the complaint that I was  
17 dealing with at the moment and read in very detail the  
18 parts I thought were most pertinent.

19 Q. Okay. Was it your job to respond to that  
20 complaint?

21 A. Not to the one in 2006, no.

22 Q. Was there any response that you're aware of to  
23 the one that he made in 2006?

24 A. Yes. My predecessor and I believe our legal  
25 counsel as well as the Dean at the time tried to work

1 out an agreement with Dr. Kao and his attorney.

2 Q. All right. Was that the only response?

3 A. I don't know if there were other written  
4 responses.

5 Q. Now, were you aware that one of the issues that  
6 Dr. Kao was raising concerned search procedures?

7 MR. VARTAIN: Objection. The question is  
8 vague. Issues in which of the grievances, Counsel?

9 MR. KATZENBACH: Let me rephrase that question.

10 Q. Can you take a look at Exhibit 70?

11 A. 70?

12 Q. Seven, zero.

13 MR. VARTAIN: Counsel, 70 is what you have on  
14 the screen, I believe. Is that what you want?

15 MR. KATZENBACH: Yes. I want to make sure the  
16 Witness has it. It's hard for the Witness to see it.  
17 It's hard for the Jury. It's harder for me than I would  
18 like it to be. We'll all suffer.

19 THE WITNESS: I can't read it from here.

20 MR. KATZENBACH: That's why I want you to have  
21 it in front of you.

22 Q. Would you take a look at the last paragraph  
23 beginning on the first, starting on the first page and  
24 going over to the last page. Why don't you read that to  
25 the Jury, if you would?

1           A. "Notwithstanding the above, even had you  
2 promptly filed or reactivated a complaint under PSOUH, I  
3 note your report and addendum contains assertions that  
4 other University faculty members were appointed to  
5 positions for which you did not apply. As to these  
6 assertions, I conclude that no adverse employment action  
7 against you took place because the University did not  
8 deny any request, application or petition you  
9 submitted."

10           Q. I would like to direct your attention to that  
11 particular paragraph. Did you understand what you were  
12 responding to there concerned Dr. Kao's complaints about  
13 the faculty search process in the math department?

14           MR. VARTAIN: The question is vague.  
15 Objection.

16           MR. KATZENBACH: Q. Were you intending to  
17 respond in that paragraph to Dr. Kao's complaints about  
18 discrimination in the search process in the mathematics  
19 department?

20           MR. VARTAIN: Same objection. It's vague.

21           THE COURT: Let me ask, Ms. Wade, do you  
22 understand the question?

23           THE WITNESS: No. I'm not sure I do.

24           THE COURT: The objection is sustained.

25           MR. KATZENBACH: Q. All right. Were you



1 intending -- are you aware that Dr. Kao was making a  
2 complaint about the search process?

3 A. Either search or filling of positions, yes.

4 Q. All right. And the filling of positions would  
5 have been the filling of faculty positions; correct?

6 A. Yes.

7 Q. Filling of a faculty position involves a  
8 search; doesn't it?

9 A. Usually.

10 Q. So did you understand again that Dr. Kao's  
11 complaint concerned his -- involved the filling of  
12 faculty positions in the mathematics department?

13 A. Yes. My recollection, though, is that there  
14 may have also been an issue of a dual appointment with  
15 another department.

16 Q. Okay. He also raised that issue as well;  
17 correct?

18 A. Yes.

19 Q. Let's just take the dual appointment issue.

20 Do you recall that Dr. Kao's complaint there  
21 was that there was no procedure by which anyone could  
22 apply for a dual appointment?

23 A. And at the time that he was interested in this,  
24 the Dean at the time did not believe in dual  
25 appointments, so we wouldn't have needed a procedure.

1 Q. Do you recall that in addition to the dual  
2 appointment, there were issues concerning faculty  
3 searches that Dr. Kao raised?

4 MR. VARTAIN: Objection. The question has been  
5 asked twice; answered twice.

6 MR. KATZENBACH: Q. Let me withdraw the  
7 question and ask it this way: Other than what's stated  
8 in the paragraph that you just read, is there anything  
9 in Exhibit 7 that addresses Dr. Kao's concerns with  
10 discrimination in the faculty search process?

11 MR. VARTAIN: Objection. The question is  
12 vague. Which issues of discrimination?

13 THE COURT: I'll ask the Witness. Do you  
14 understand the question?

15 THE WITNESS: No. Could you help me out again?

16 MR. KATZENBACH: Sure.

17 THE COURT: Sustained. Next question.

18 MR. KATZENBACH: Q. Does Exhibit 7 address in  
19 any fashion the issue, any issue concerning faculty  
20 searches?

21 A. It addresses his complaint which is for faculty  
22 searches. If he had concern about how faculty searches  
23 were done, it didn't impact him. He needed to go under  
24 the collective bargaining agreement which is what I say  
25 towards the end of this letter.

1 Q. Is it your understanding that the collective  
2 bargaining agreement covers faculty searches?

3 MR. VARTAIN: Objection. The question is  
4 vague.

5 MR. KATZENBACH: I'll strike that question.  
6 That's a little argumentative.

7 Q. Was it your intending to respond to Dr. Kao's  
8 concern concerning faculty searches by referring him to  
9 the collective bargaining agreement?

10 A. For the things that didn't impact him directly,  
11 yes, because the PSOUH policy really is about  
12 discrimination and harassment that are covered by those  
13 things that we said against the individual placing the  
14 complaint.

15 Q. Did the professors at -- strike that.

16 Did you understand that the search procedures  
17 used in the mathematics department had involved faculty  
18 input?

19 MR. VARTAIN: Objection. The question is  
20 vague. "Faculty input."

21 MR. KATZENBACH: I'll rephrase and be very  
22 specific.

23 Q. Did you understand that search procedures in  
24 the mathematics department involved the appointment of a  
25 committee including members from the mathematics

1 department?

2 A. I think normally that's what happened.

3 I think what you're trying to get at is one  
4 particular faculty member was appointed in a different  
5 way, which is there was -- I believe it was Australian  
6 mathematician that was world-renowned that the former  
7 Dean, not Jennifer Turpin, but the former Dean appointed  
8 without a search. And that was the reason, that we had  
9 this incredible opportunity to get this world-renowned  
10 mathematician on our faculty.

11 Q. Is that the only search issue you can recall  
12 Dr. Kao raising?

13 A. In the 2007 complaint, that's my recollection.

14 Q. That was a nonsearch that didn't happen in  
15 around 2000; isn't it?

16 MR. VARTAIN: Objection. The question is  
17 vague.

18 THE COURT: Sustained.

19 MR. KATZENBACH: Q. You're referring to  
20 Dr. Stillwell's appointment.

21 A. Yes, I am. I don't remember the exact time.

22 Q. Dr. Stillwell was appointed around 2000?

23 A. Somewhere around there, yes.

24 Q. Since that, there have been at least two other  
25 searches in the mathematics department?

1 A. Probably.

2 Q. Do you recall Dr. Kao's complaint raising  
3 issues as to both those other searches?

4 MR. VARTAIN: Which complaint? The question is  
5 vague.

6 MR. KATZENBACH: Q. Do you recall any  
7 complaint about Dr. Kao addressing issues concerning the  
8 search process?

9 MR. VARTAIN: Objection. The question is not  
10 relevant. What's relevant is the complaint she's  
11 addressing in this exhibit.

12 THE COURT: Overruled. The Witness may answer.

13 THE WITNESS: I reviewed the complaint that I  
14 received when I was in this role. So that's what I  
15 remember most.

16 MR. KATZENBACH: Q. All right. When you  
17 reviewed the document called complaint, report and  
18 addendum.

19 A. M-hm.

20 Q. That included not just the addendum but  
21 included the underlying report, the first report that  
22 Dr. Kao filed?

23 A. I can't remember if it came with it or not. I  
24 know I reviewed it.

25 Q. All right. Take a look at the next paragraph

1 -- take a look at paragraph, the two paragraphs, the  
2 second full paragraph on the second page of Exhibit 70,  
3 begins, "Additionally."

4 Do you see where it says, "Additionally, your  
5 report and addendum makes various assertions about  
6 compliance with the ADA?

7 A. Yes.

8 Q. Americans with Disabilities Act?

9 A. Yes.

10 Q. That was only in the first report, the one  
11 filed in 2006; wasn't it? 2006?

12 A. I don't remember.

13 Q. All right. Thanks.

14 Now, in your response, that's Exhibit 70, do  
15 you specifically refer to Dr. Kao's concerns about the  
16 appointment of Professor Stillwell?

17 A. Not specifically.

18 Q. In fact, it doesn't even discuss that issue at  
19 all; does it?

20 A. Dr. Kao was rehashing things that were brought  
21 up in lots of old complaints including the 2000  
22 complaint that he had. So it was trying to cover  
23 everything.

24 Q. Your response was trying to cover everything?

25 A. Yes.

1 Q. So you meant to cover everything he was raising  
2 with searches when you said that "no adverse employment  
3 action against you took place"?

4 A. I'm sorry. Can you say that again?

5 Q. When you stated, "I conclude that no adverse  
6 employment action against you took place because the  
7 University did not deny any request, application or  
8 petition you submitted," was that intended to cover all  
9 of Dr. Kao's complaints about the searches?

10 A. That was intended to cover everything in the  
11 report and addendum.

12 Q. Did that include his complaints about the  
13 searches?

14 A. So the PSOUH policy says that complaints need  
15 to be made within a year of something happening. And/or  
16 if not within a year, that there had to be, you know,  
17 cause or good reason that it was delayed.

18 Pretty much, as I tried to say in this letter,  
19 everything that he was talking about was old. Some of  
20 it as far back as 2000. And a lot of it was in the  
21 January '06 complaint, which again, at this point is too  
22 late.

23 And January of '06, things in that complaint  
24 were as early as 2000, 2002. So not only were things  
25 old, but this letter is also saying even if they weren't

1 old, we didn't find that there was any hurt to you.

2 Q. So my question is again: Was that paragraph  
3 intended to address Dr. Kao's concerns over the  
4 searches?

5 A. Yes. That paragraph was intended -- sorry.  
6 Show me which paragraph again it was.

7 Q. The paragraph that goes from the bottom of the  
8 first page over to the top of the second page which  
9 states at the end, "I conclude that no adverse  
10 employment action against you took place because the  
11 University did not deny any request, application or  
12 petition you submitted."

13 Was that language intended to cover all of  
14 Dr. Kao's complaints about the searches?

15 A. Yes. That was my intent.

16 Q. Okay. Now, was it your intent to convey that  
17 information that faculty members who had complaints  
18 about discrimination in the search process could not use  
19 the PSOUH policy?

20 A. There were a number of different things going  
21 on, as I said. So it was, as you pointed out earlier,  
22 if there was discrimination based on one of the things  
23 that was covered in our policy, then this is the place,  
24 one of the places to do it.

25 Q. Okay. So did you understand that Dr. Kao's,



1 Dr. Kao's concern with the searches concerned  
2 discrimination against women and minorities?

3 A. From what I read, that seemed to be his, part  
4 of his concern.

5 Q. So then bringing the complaint under the PSOUH  
6 policy was the appropriate way to raise that issue to  
7 the University; is that right?

8 A. Not necessarily because, again, it was old,  
9 and there wasn't any harm to him.

10 Q. So is it your statement that a complaint under  
11 the PSOUH policy -- sorry. Strike that.

12 Is it -- strike that. Let me rephrase it.

13 You're aware Dr. Kao raised a new complaint  
14 about the 2008 search?

15 MR. VARTAIN: Objection. The question is now  
16 you've taken her off of this exhibit. This is 2007.

17 MR. KATZENBACH: I understand.

18 MR. VARTAIN: Vague.

19 THE COURT: Ms. Peugh-Wade, do you understand  
20 the question?

21 THE WITNESS: Can you say it again, please?

22 MR. KATZENBACH: Q. Sure.

23 Did you become aware that Dr. Kao raised a new  
24 complaint about the search the mathematics department  
25 was conducting in 2007 and 2008?

1           A. Yes. I was -- I became aware.

2           THE COURT: I take it by the way the Witness  
3 answered, she does understand the question, and the  
4 objection is overruled.

5           MR. KATZENBACH: Q. Can you take a look at  
6 Exhibit 11. Taking a look at Exhibit 11, is that your  
7 e-mail address?

8           A. Yes.

9           Q. At the top.

10          A. Yes.

11          Q. So do you recall receiving Exhibit 11?

12          A. No, I don't. I'm not saying I didn't receive  
13 it though. It was four years ago.

14          Q. I understand.

15                 How did you become aware that Dr. Kao was  
16 raising a new complaint concerning the 2008 search?

17          A. I don't remember exactly.

18          Q. Who told you; do you know?

19          A. I don't remember how I first became aware. I  
20 think my colleague Maye-Lynn would have told me when it  
21 was kind of an official informal complaint. I heard  
22 about his concern from others though.

23          Q. All right. Did you understand his concern was  
24 how the college had applied -- I'm sorry -- how the  
25 College of Arts and Sciences search policies were

1 violated?

2 MR. VARTAIN: Objection. The question is  
3 vague. How he said they were violated?

4 MR. KATZENBACH: I'll rephrase it.

5 Q. Do you understand Dr. Kao's concerns arose from  
6 the fact that he felt that the College of Arts and  
7 Science search policies had been violated?

8 A. What I understood was that he was up all night  
9 calculating, I think it was P value, which I had -- I  
10 think I had to look up to figure out what it was, that  
11 showed that there wasn't a good relationship between how  
12 we were doing the search, how we were advertising and  
13 getting a good representative mix.

14 Q. In other words, you understood that he felt  
15 that the way the job had been advertised had produced a  
16 biased pool? Is that what your understanding was?

17 A. My understanding was that he was upset that we  
18 hadn't used a print advertisement.

19 Q. Didn't you understand that the reason that he  
20 was upset is that he felt that the search was  
21 discriminatory?

22 A. Can you say that again, please?

23 Q. Sure. Did you understand his concern was he  
24 felt the way the search had been conducted it  
25 discriminated against minorities?

1 A. Yes.

2 Q. And did you understand that he offered a  
3 statistical method to determine whether or not the  
4 search was biased?

5 A. Yes. But when I talked to other colleagues who  
6 know much more about statistics and math than I do, they  
7 said it didn't make any sense at all. And when I looked  
8 at kind of from my realm of how I deal with things, I  
9 looked or had someone look at the pool, and they said it  
10 was a very well represented pool.

11 As a matter of fact, we have a history of  
12 hiring in the last, you know, five or ten years a very  
13 large number of women and minorities.

14 Q. And in the pool of semifinalists in this  
15 particular search, how many minorities were there?

16 A. I don't know.

17 Q. In the number of applicants received in that  
18 search, how many minority applicants were there?

19 A. I don't recall.

20 Q. Did you discuss with Dr. Kao his statistical  
21 analysis?

22 A. No, I did not.

23 Q. Who were the people who said his statistical  
24 analysis was wrong?

25 A. The Associate Dean and other colleagues in the

1 math department, including the chair.

2 Q. I see. And so Mr. Pacheco, Professor Pacheco?

3 A. I believe so.

4 Q. Professor Needham?

5 A. I don't remember the specific folks at this  
6 point.

7 Q. You don't remember the specific folks. Okay.  
8 Did you at any point -- strike that.

9 Did you look at the search policies for the  
10 College of Arts and Sciences?

11 MR. VARTAIN: Objection. Vague. At what  
12 point?

13 MR. KATZENBACH: Strike. I'll rephrase.

14 Q. Going to this time frame when you first learned  
15 of Dr. Kao's complaint and thereafter, at any time did  
16 you look at the search policies in the College of Arts  
17 and Sciences?

18 MR. VARTAIN: Objection. Vague. At what point  
19 in time, Counsel? Which complaints? We have multiple.

20 MR. KATZENBACH: I'm sorry.

21 Q. Dr. Kao raised a complaint of discrimination  
22 concerning the 2008 search. Do you have that in mind?

23 A. I was not doing any investigation under that  
24 complaint.

25 Q. I understand.

1           Did anyone under your instructions report to  
2 you that they had looked at the search policies of the  
3 College of Arts and Sciences in connection with  
4 Dr. Kao's complaint over the 2008 search?

5           A. I don't recall.

6           Q. Did you ask anyone to look at those policies in  
7 connection with Dr. Kao's complaint over the 2008  
8 search?

9           A. I was not involved in that level of detail on  
10 this complaint.

11          Q. Did anyone inform you one way or the other  
12 whether Dr. Kao's concerns about the advertising of that  
13 position were supported or not by the written search  
14 policies of the College of Arts and Sciences?

15          A. I was told by the Associate Dean that we were  
16 doing what we needed to do, and we had actually a very  
17 robust pool.

18          Q. That was Dean Brown?

19          A. Yes.

20          Q. So Dean Brown -- are you aware whether  
21 Dean Brown was the person who made the decision not to  
22 advertise in the notices of the American Mathematical  
23 Society?

24          A. I'm not aware.

25          Q. Were you aware whether Dean Brown was the

1 person who decided where the advertisements for the  
2 search should go?

3 MR. VARTAIN: Objection. This line is  
4 argumentative with the Witness.

5 THE COURT: Can I have that in six words or  
6 less?

7 MR. VARTAIN: Argumentation.

8 THE COURT: Overruled.

9 THE WITNESS: I'm sorry. Can you repeat it,  
10 please?

11 THE COURT: Sorry if I miscounted.

12 MR. VARTAIN: Sorry if I went over.

13 MR. KATZENBACH: Q. Were you aware that  
14 Dean Brown was the person who decided where this job  
15 should be advertised?

16 A. No. I don't remember.

17 Q. Now, the University, are you familiar with any  
18 of the search procedures -- I'm sorry.

19 Are you familiar with any of the written search  
20 procedures the University of San Francisco has?

21 A. Some, yes. But staff procedures are different  
22 than faculty procedures.

23 Q. Are you familiar with the faculty procedures?

24 A. To some extent, yes.

25 Q. Could you take a look at Exhibit 21? Do you

1 recognize that document?

2 A. Yes.

3 Q. Those are the College of Arts and Science  
4 procedures; am I correct?

5 A. Yes.

6 Q. Advertisement? Did you look at those  
7 procedures at any time in connection with Dr. Kao's  
8 complaint about the 2008 search?

9 MR. VARTAIN: Objection. Argumentative. The  
10 Witness said she --

11 THE COURT: Overruled. The Witness may answer.

12 MR. KATZENBACH: Q. Did you look at those  
13 procedures in connection with Dr. Kao's complaint?

14 A. I did not for the 2008 complaint, no.

15 Q. Did you ask anyone to look at those, those  
16 procedures?

17 A. The person that was doing this complaint would  
18 have done that on her own. I don't have to tell her  
19 step by step what to do.

20 Q. Who was that person?

21 A. Maye-Lynn Gon-Soneta.

22 Q. Did she ever report back to you anything at all  
23 about what these policies provided?

24 A. I don't recall.

25 Q. In any of your discussions with anyone



1 concerning Dr. Kao's complaint concerning the 2008  
2 search, did anyone discuss with you the language in  
3 Exhibit 21 under job announcement that refers to the  
4 publication -- the advertisement both in the phrase  
5 journal specific to the field?

6 A. I don't recall.

7 Q. Take a look, if you would, at Exhibit 22. Do  
8 you have that in front of you?

9 A. Yes.

10 Q. Can you identify that document?

11 A. It is a document that was put out by a previous  
12 Provost in 1991 in faculty recruitment procedures.

13 Q. As of 2008, had anything in Exhibit 22  
14 governing faculty recruitment procedures changed?

15 A. I don't recall.

16 Q. Taking a look at Exhibit 23, do you recognize  
17 that?

18 A. (Reviewing document.)

19 Q. Do you recognize Exhibit 23?

20 A. Yes.

21 Q. Is that a copy of the faculty recruitment  
22 procedures as published on the USF website?

23 A. It appears to be, yes.

24 Q. Was that -- were those the faculty procedures  
25 in effect in 2008 as far as you're aware?

1 A. As far as I'm aware.

2 MR. KATZENBACH: Can I move Exhibits 22 and 23  
3 into evidence, your Honor?

4 THE COURT: Any objection?

5 MR. VARTAIN: No objection.

6 THE COURT: They're received.

7 (Plaintiff's Exhibit Nos. 22 and 23  
8 were received in evidence.)

9 MR. KATZENBACH: Q. Keeping your focus on  
10 Exhibit 23, if you would, that's the website version, I  
11 would like to direct your attention to the first page of  
12 that document. I would like to direct your attention to  
13 Roman numeral II, subparagraph 3.

14 Do you see that paragraph?

15 A. Yes.

16 Q. I would like you, if you would, to read that  
17 paragraph to the Jury?

18 A. "Advertisements and the appropriate placements  
19 of advertisements will be approved by the Dean and the  
20 search committee in conjunction with the affirmative  
21 action officer. Advertisements will be placed in  
22 approved journals, newsletters, et cetera, by human  
23 resources in coordination with the hiring department."

24 Q. What's the purpose of consulting the  
25 affirmative action officer in connection with

1 advertisements?

2 A. To ensure that we have a fair pool.

3 Q. In other words, it's to increase the ability to  
4 get a diverse campus; is that right?

5 A. It would be to try to ensure that we have as  
6 diverse a pool as we can of appropriately prepared, you  
7 know, and qualified individuals.

8 Q. That's good. And in 2008 -- in 2007/2008, who  
9 was the affirmative action officer that would be in  
10 charge of reviewing --

11 A. In 2007 and 2008, we actually had a change of  
12 people. So there was one -- I can't remember when she  
13 left -- that was here in 2007. And then there was  
14 another one that came in, I think later in 2007, and was  
15 here in 2008.

16 Q. All right. Who was the one that was there in  
17 2007?

18 A. Alice Tamaio (phonetic).

19 Q. When did she leave?

20 A. I don't remember exactly when.

21 Q. In 2008, who was the person?

22 A. Maye-Lynn Gon-Soneta.

23 Q. All right. Are you aware whether or not the  
24 advertisements, the appropriate placement of  
25 advertisements for the 2008 search in the mathematics

1 department --

2 MR. VARTAIN: The question is vague.

3 THE COURT: Sustained.

4 MR. KATZENBACH: Q. Directing your attention  
5 to the search that was conducted in 2007/2008 for a  
6 faculty position in the mathematics department, do you  
7 have that search in mind?

8 A. Okay. I'll put it in mind.

9 Q. Are you aware of either affirmative action  
10 officers reviewing the placement of advertisements for  
11 that search?

12 A. I would not have been aware of their daily  
13 ordinary operations.

14 Q. In connection with this case, have you learned  
15 anything at all that the search, the advertisement for  
16 that position was reviewed or the advertisement and  
17 placement of the job in the mathematics department in  
18 2007/2008 was actually reviewed by the affirmative  
19 action officer?

20 MR. VARTAIN: Objection. Ambiguous.

21 THE COURT: Sustained. I'm having trouble  
22 following that.

23 MR. KATZENBACH: Q. Sure. Back to the  
24 2007/2008 search in the mathematics department, are you  
25 aware of anything -- sorry.

1 Do you know whether or not from anything that  
2 you've learned in this case whether the affirmative  
3 action officer reviewed placement of the advertisement  
4 of the faculty position in the mathematics department?

5 MR. VARTAIN: Objection. Ambiguous.

6 THE COURT: Ms. Peugh-Wade, do you understand  
7 the question?

8 THE WITNESS: Not really, no.

9 MR. KATZENBACH: Q. Fine. I'll rephrase it.

10 Would the human resources department keep any  
11 record of what the affirmative action officer may have  
12 reviewed in connection with the placement of  
13 advertisements for the search?

14 A. Maybe.

15 Q. If there was such a report, that would be in  
16 your possession; wouldn't it? Or in possession of the  
17 human resources department?

18 MR. VARTAIN: Objection. Vague. You mean  
19 today would it be? It's vague as to time.

20 THE COURT: Let's say today. The Witness may  
21 answer.

22 THE WITNESS: We would have kept them for as  
23 long as we were required to, and I'm not sure how long  
24 that is.

25 MR. KATZENBACH: Q. All right. Did you meet

1 with Dean Brown in early January 2008?

2 A. Yes.

3 Q. I would like to direct your attention, if you  
4 would, to Exhibit 51.

5 (Plaintiff's Exhibit No. 51 was  
6 marked for identification.)

7 THE COURT: It's noon. I'll call the lunch  
8 break.

9 Ladies and gentlemen, remember the admonition.  
10 Do not form or express any opinion on this case until  
11 it's finally submitted to you for your decision. Do not  
12 discuss among yourselves or with others until that time.

13 Please be back in your places at 1:30 according  
14 to the courtroom clock. Leave your notebooks and  
15 instructions behind.

16 Let me ask Counsel if there's anything to put  
17 on the record.

18 MR. KATZENBACH: We have one issue we have to  
19 talk to the Court. We can do it at sidebar.

20 JUROR NO. 10: I didn't know that we have to  
21 leave at lunch.

22 THE COURT: Ms. Mack would be happy to keep you  
23 here except she has somewhere else she has to be today.

24 (Whereupon, the Jury exited the courtroom at  
25 12:01 p.m.)

1 THE COURT: Jurors have departed the courtroom.  
2 Counsel for all sides remain.

3 Mr. Katzenbach, there was something you wanted  
4 to put on the record?

5 MR. KATZENBACH: Yes, your Honor.

6 We learned this morning shortly before court  
7 that at midnight we received -- that at midnight we had  
8 been sent and found this morning in an e-mail from one  
9 of the witnesses that we hoped to have today that she is  
10 sick and cannot attend.

11 We also learned this morning that another  
12 witness, Ms. Turpin from the University, Jennifer Turpin  
13 is also sick and cannot attend.

14 MR. VARTAIN: You didn't ask for her to come  
15 today. We're just telling you that she is ill today.  
16 Whether she can come tomorrow we're going to check in  
17 with her. You didn't ask for her today.

18 MR. KATZENBACH: No. We have her under  
19 subpoena.

20 MR. VARTAIN: You did not put her under the  
21 24-hour notice. You did not ask for her to be here  
22 today.

23 MR. KATZENBACH: What I'm advising the Court is  
24 we're uncertain as to the status of both of these  
25 witnesses, whether Ms. Brunelle can testify at all,

1 before we close our case, and whether or not Ms. Turpin  
2 will be available tomorrow.

3           So I'm just -- I would like to advise the Court  
4 of both of those facts. I am concerned that's changed a  
5 little bit of the timing on this particularly not having  
6 Ms. Brunelle available.

7           THE COURT: All right. Is there something you  
8 want me to do?

9           MR. KATZENBACH: No, your Honor, not at this  
10 moment. But I'm advising the Court it is possible if we  
11 finish with Ms. Peugh-Wade early, we will be out of  
12 witnesses today for that reason.

13           THE COURT: You're just giving me a heads up  
14 knowing I'm a person who is somewhat obsessive about  
15 keeping the jury waiting.

16           MR. KATZENBACH: Right. If the Court finds I'm  
17 moving very slowly, perhaps the Court will understand.

18           MR. VARTAIN: Don't do that. That's the worst  
19 of all worlds.

20           MR. KATZENBACH: Probably not until 4:00.

21           THE COURT: All right.

22           MR. KATZENBACH: I think Ms. Peugh-Wade will be  
23 all day, your Honor, but I can't be sure.

24           THE COURT: Mr. Vartain, have you anything else  
25 to put on the record?



1 MR. VARTAIN: No, sir.

2 THE COURT: All right. Have a good lunch. See  
3 you at 1:30.

4 (Whereupon, the lunch recess was taken at  
5 12:04 p.m.)

6 ---oOo---

7 AFTERNOON SESSION

8 (Time noted: 1:32 p.m.)

9 THE COURT: I have a question from Juror No. 1?

10 JUROR NO. 1: Yes. Excuse me. I just want to  
11 say something to the Witness about the microphone there.

12 THE COURT: No.

13 JUROR NO. 1: How it's important -- oh.

14 THE COURT: Fair enough. If you have a comment  
15 about format, you can ask an attorney if you want, but  
16 not the witness.

17 JUROR NO. 1: Can we make sure -- no  
18 disrespect. You don't have to lunge at the microphone.  
19 If you stay away from it, it will be fine. If you get  
20 too close, it's a little loud.

21 MR. VARTAIN: The speaker is right there.

22 JUROR NO. 1: Yeah. And they would be more  
23 comfortable too. Thank you.

24 THE COURT: It's an unusual problem. Usually  
25 we have a problem with people backing away from the

1 microphone and speaking softly.

2 JUROR NO. 1: I get pain from it and headaches.  
3 It's from the MUNI in my neighborhood. No. Got on the  
4 horn once. I went in the fetal position. Ever since  
5 then, now I just notice that I can't stand loud pitchy  
6 sounds. And it really hurts. Anyway, didn't want to  
7 bore the Court with all that information, but you need  
8 to know.

9 THE COURT: I agree. Thank you. I'll know  
10 where to sit if I get on Jury.

11 Jurors and Alternates are all present. Counsel  
12 for all sides are present. Plaintiff is personally  
13 present.

14 Martha, is it?

15 THE WITNESS: Martha.

16 THE COURT: Martha Peugh-Wade is on the stand.  
17 Mr. Katzenbach, you may proceed.

18 MR. KATZENBACH: Thank you.

19 Q. Ms. Peugh-Wade, when we left, I was asking to  
20 you look at Exhibit 51.

21 Do you have that in front of you?

22 A. Yes.

23 Q. Can you identify Exhibit 51?

24 A. These are my notes from my meeting.

25 Q. Is that a meeting with Brandon Brown?

1 A. Yes.

2 Q. And does this meeting concern Dr. Kao?

3 A. Yes.

4 MR. KATZENBACH: Your Honor, I would like to  
5 move Exhibit 51 into evidence, not for the truth of the  
6 matter asserted but rather the information that was  
7 before the University.

8 THE COURT: It will be received for that  
9 limited purpose.

10 I should have inquired is there any objection?

11 MR. VARTAIN: No objection, your Honor.

12 THE COURT: Thanks.

13 (Plaintiff's Exhibit No. 51 was  
14 marked for identification and  
15 received in evidence.)

16 MR. KATZENBACH: Q. Now, taking a look at  
17 Exhibit 51, I would like to direct -- first of all, the  
18 date of this meeting was when?

19 A. January 8th, 2008.

20 Q. Are these your handwritten notes?

21 A. Yes.

22 Q. And who scheduled this meeting, you or  
23 Dean Brown?

24 A. I'm not sure what you mean by "schedule," but  
25 Brown would have requested that we talk.

1 Q. Fair enough.

2 I would like to direct your attention to the  
3 first item on the first page of Exhibit 51. And can you  
4 read what item No. 1 says?

5 A. Um, what it means to me is complaints regarding  
6 search.

7 Q. Okay. Was that a complaint that Dr. Kao was  
8 raising?

9 A. Yes.

10 Q. And that's the complaint we discussed earlier  
11 this morning concerning how the 2007/2008 search in the  
12 math department was being conducted?

13 A. Not necessarily. These are notes of a  
14 conversation that I had with Brandon about John Kao's  
15 behavior, and it was that he was upset about a search  
16 and that he, John Kao, went into Paul Zeitz, another  
17 faculty member's office. And then more description of  
18 that.

19 Q. Let's just start -- basically, did you  
20 understand that Dr. Kao was raising a complaint  
21 concerning the search being conducted in the math  
22 department?

23 A. Yes. But in my mind, these things were two  
24 separate things in that my recollection of the  
25 conversation with Brandon was that John Kao was

1 complaining to Paul Zeitz about the search.

2 Q. Now -- thank you.

3 Looking at No. 2, that describes him going into  
4 Paul Zeitz's office where he was shaking with anger; is  
5 that right?

6 A. Yes.

7 Q. That's what Dean Brown told you?

8 A. Yes.

9 Q. And the next phrase he says, "obviously very  
10 upset." Who was very upset?

11 A. Professor Kao.

12 Q. All right. That's what Dean Brown told you?

13 A. Yes.

14 Q. Now, Dean Brown also says, "He seems to have  
15 lack of logic."

16 A. Yes. But at this point, Dean Brown was  
17 explaining to me the incident. So it may have been that  
18 Paul Zeitz, because, again, this is thirdhand. This is  
19 Paul Zeitz talking to Dean Brown saying that Paul Zeitz  
20 felt that Professor Kao was obviously upset and had lack  
21 of logic.

22 Q. All right. Did you inquire at any time with --  
23 strike that.

24 On or about January 8th, did you speak to  
25 Professor Zeitz about what had occurred in this

1 interaction with Dr. Kao?

2 A. Not on that date, I don't believe.

3 Q. Did you speak to -- at any time before the end  
4 of April 2008, did you speak to Dr. Kao directly about  
5 what happened in this interaction with Dr. Kao?

6 A. Could you repeat that, please?

7 Q. Sure.

8 At any time before the end of April 2008, did  
9 you speak to Dr. Zeitz about what happened in his  
10 interaction with Dr. Kao in the early part of January?

11 A. I know I definitely did towards the end of  
12 April. I don't believe I had a formal meeting prior to  
13 that with Paul.

14 Q. When you were -- is it your habit to take notes  
15 of meetings?

16 A. Yes. Once in awhile, though, I run into  
17 people, you know, like at University convocation or  
18 other events where I don't have paper and pencil, and  
19 yet we end up talking about things that are  
20 business-related. So sometimes I might not take notes,  
21 but it still could be considered important.

22 Q. All right. Now, in this section, you also  
23 describe similar behavior in Dean Brown's office.

24 A. Yes. Brandon described that.

25 Q. All right. Now, do your notes reflect that

1 either Dean Brown or Dr. Zeitz through Dean Brown  
2 expressed any fear of Dr. Kao during -- as a result of  
3 this interaction?

4 A. Because it all kind of runs together, there  
5 were definitely times later on January 8,th I would say  
6 from the top of page 3 where I wrote in parentheses,  
7 "will keep up tonight," that was very much concern.  
8 Whether it's fear --

9 Q. He didn't use the phrase that Dr. Zeitz was  
10 afraid of Dr. Kao during this conversation in early  
11 January; did he?

12 MR. VARTAIN: Objection. Vague. Wait a  
13 minute. Lacks foundation. She didn't say she talked to  
14 Professor Zeitz in January.

15 THE COURT: Sustained.

16 MR. KATZENBACH: Q. Did Dean Brown say that  
17 Dr. Zeitz was afraid of Dr. Kao in this conversation?

18 A. Whether he used those specific words or not,  
19 I'm not sure. But the fact that they were talking about  
20 someone being very upset and having a lack of logic and  
21 that he was shaking and that they had a duty to raise  
22 concerns and they would be kept up at night, I think  
23 that's some fear.

24 Q. Did they use the word "fear," "afraid," any  
25 word like that?

1           A. This was four years ago. I don't remember the  
2 exact wording that they used.

3           Q. You didn't write anything like that down in  
4 your notes; did you?

5           A. I think I did.

6           MR. VARTAIN: Hold it. Objection. "Like that"  
7 is a vague and ambiguous question.

8           THE COURT: It's understandable. Overruled.

9           THE WITNESS: Would you say it again, please?

10          MR. KATZENBACH: Q. You didn't write down  
11 anything like that in your notes?

12          THE COURT: The antecedent to that being fear,  
13 phobia, afraid.

14          MR. KATZENBACH: Right.

15          THE WITNESS: To me when someone says they have  
16 a duty to raise concern and someone is shaking and is --  
17 will keep up tonight, meaning will keep one of them up  
18 at night, I think that's starting to show some at least  
19 severe concern about someone's behavior.

20          MR. KATZENBACH: Your Honor, I'll ask to have  
21 the answer stricken, and the Witness instructed to  
22 answer the question.

23          MR. VARTAIN: May I be heard, your Honor?

24          THE COURT: No. The motion is denied.

25          MR. KATZENBACH: Very well.



1 Q. Did you put down the word "fear" anywhere in  
2 your notes?

3 A. Not in those notes, no.

4 Q. Thank you.

5 Now, you did refer to being kept up all night?  
6 You did note that section in your notes?

7 A. Yes.

8 Q. That's a section that appears on what you have  
9 labeled page 3?

10 A. Yes.

11 Q. Is there a page 2 that you're aware of?

12 A. At this point in time, not that I'm aware of.

13 Q. There's some numbers at the bottom of

14 Exhibit 51. I see USF 0080 on page 2.

15 A. M-hm.

16 Q. And on page 1, what's the number?

17 A. Well, it's not labeled page 1. On the first  
18 page, it's USF 0079.

19 Q. All right. Thank you.

20 Now, taking a look at the top of page 2 of  
21 Exhibit 51, it states, "Brandon is concerned about the  
22 personal ramifications, lawsuit or obsessive attention.  
23 Will keep up tonight."

24 Do you see that language?

25 A. Yes.

1 Q. Are those words that Brandon Brown used to you?

2 A. That would be my recollection.

3 Q. So he stated to you that he was concerned  
4 about, among other things, the personal ramifications of  
5 a lawsuit? Is that what he told you?

6 A. That was part of it, lawsuit or having  
7 obsessive attention drawn to him by Dr. Kao.

8 Q. Obsessive attention was as a result of  
9 Dr. Kao's concern over the search?

10 A. It was actually a reflection of the behavior,  
11 not so much the concern about the search but the  
12 behavior in Dr. Kao's meeting with Dr. Brown and with  
13 Dr. Zeitz.

14 Q. And both those meetings concerned the search?

15 A. Yes.

16 Q. Thank you. Now, other -- isn't it the case  
17 other faculty members also expressed to you concerns  
18 about a lawsuit that Dr. Kao might file?

19 A. I don't know there was concerns about a  
20 lawsuit. But concerns about being involved, about their  
21 personal involvement in anything that was kind of  
22 obsessive.

23 Q. Weren't they also concerned about a lawsuit?

24 A. That was one of their concerns, yes.

25 Q. So other faculty members that were also

1 concerned that they might get involved in a lawsuit that  
2 Dr. Kao might bring; is that correct?

3 A. I don't remember that it was members. I  
4 remember there was at least one.

5 Q. I would like to read from page 226 of your  
6 deposition at lines --

7 A. Can I see that? What tab is it?

8 Q. Excuse me?

9 A. I'm sorry. Nevermind.

10 Q. I just didn't hear you.

11 A. Do you want me to read it?

12 Q. I'll be happy to have you look at it. Why  
13 don't I first show it to you. I'll be happy to have you  
14 look at it first. The Judge has the original. I'm  
15 going to give you my copy.

16 A. Okay.

17 Q. Starting on page 226, line 8 through lines 14.

18 A. (Reviewing document.)

19 Q. Have you had a chance to read that now?

20 A. Yes.

21 Q. Have you read it now?

22 A. Yes.

23 Q. Does that refresh your recollection that there  
24 were other faculty members, that is to say plural, that  
25 were concerned about the ramifications of a lawsuit?

1 A. Yes.

2 Q. Thank you. Which other faculty members were  
3 those; do you recall?

4 A. No, I don't. I'm sorry.

5 Q. Thank you.

6 Now, I would like to direct your attention  
7 again on Exhibit 51, I would like to direct your  
8 attention to the handwritten notes at the bottom of  
9 second page of Exhibit 51 beginning -- appears to read,  
10 "I have complaint."

11 Can you read that to the Jury?

12 A. Sure. It says, "I have a complaint about  
13 conduct of JK. Do you want to file a complaint?"

14 Q. Thank you. Did Dean Brown file a complaint?

15 A. No.

16 Q. Did Dean Zeitz file a complaint?

17 A. When you are saying "file" --

18 Q. Professor Zeitz?

19 A. When you are saying "file a complaint," are you  
20 referring to -- what kind of a complaint are you  
21 referring to?

22 Q. Fair question. Let me rephrase the question.

23 What type of complaint are you referring to on  
24 Exhibit 51?

25 A. It could have been a complaint as in a

1 complaint that is filed with the Public Safety  
2 department as in you're concerned about your safety.

3 Q. Okay. Did anyone file such a complaint? Did  
4 Dean Brown file such a complaint?

5 A. I don't know if he officially filed one, but he  
6 certainly voiced it, yes.

7 Q. He voiced it to whom?

8 A. Public Safety.

9 Q. How do you know that?

10 A. Because I believe I was in meeting with him and  
11 Public Safety.

12 Q. All right. Did Dr. Zeitz file a complaint with  
13 Public Safety?

14 A. I don't know.

15 Q. Okay. Did Tristan Needham file a complaint  
16 with Public Safety?

17 A. I don't know.

18 Q. Did Stephen Yeung file a complaint with Public  
19 Safety?

20 A. I don't know.

21 Q. In addition to filing a complaint with Public  
22 Safety, are there any other complaints that you were  
23 referring to in this language on Exhibit 51?

24 A. That's all I can think of.

25 Q. In other words, you did not intend this to be a

1 complaint under any of the anti-harassment policies?

2 You weren't referring to that; were you?

3 MR. VARTAIN: You meaning PSOUH? Vague.

4 Objection, vague.

5 MR. KATZENBACH: Well, just -- I'll rephrase  
6 it, your Honor.

7 Q. Were you referring to a complaint under the  
8 respect handbook?

9 A. I don't believe so.

10 Q. Was that procedure available to someone who  
11 wanted to file a complaint of harassment?

12 A. Sure.

13 Q. If Dr. Kao had been doing anything that was  
14 causing someone to be fearful of him, do you think that  
15 would be considered harassment or intimidation?

16 A. Again, as I said before, the respect that you  
17 can call handbook, I call pamphlet, was kind of an  
18 accompanying document to our policy. And the policy  
19 prohibits discrimination harassment based on the list of  
20 protected things.

21 Q. We've gone over this a bit. I don't want to go  
22 back over it. But is it your testimony that you didn't  
23 think they would be able to file a complaint under the  
24 procedure described in the respect handbook? Is that  
25 your testimony?

1           MR. VARTAIN:  Objection.  The question is vague  
2 as to whether they would be able to or what would happen  
3 if they did.

4           MR. KATZENBACH:  Let me rephrase that slightly  
5 differently.

6           Q.  Did you tell them at any time that they could  
7 not file a complaint under the procedures set out in the  
8 respect handbook?

9           MR. VARTAIN:  Objection.  Vague.  Who is  
10 "them"?

11          MR. KATZENBACH:  Good question.

12          Q.  Did you tell Dr. Brown he could not file a  
13 complaint under the respect handbook?

14          A.  Not that I recollect.

15          Q.  Did you tell Dr. Needham he could not file a  
16 complaint under the respect handbook?

17          A.  No.  But if someone brings a complaint to me,  
18 what I usually say is that does or doesn't sound like  
19 it's covered by our policy about sexual and other  
20 unlawful harassment; however, here it is.  Please read  
21 it yourself.  And if you feel it comes under this  
22 policy, you have a right to file a complaint.

23          Q.  Good.  All right.  Did you have such a  
24 conversation with Dean Brown?

25          A.  Not that my notes reflect.

1 Q. Did you have such a conversation with  
2 Professor Zeitz?

3 A. No. They were scared.

4 Q. Did you have such a conversation with  
5 Professor Needham?

6 A. Not that I remember.

7 Q. Did you have such a conversation with Professor  
8 Yeung?

9 A. Not that I remember.

10 Q. Did you have such a conversation with anyone in  
11 the math department?

12 A. Not that I recall.

13 Q. Did you have such a conversation with Dean  
14 Turpin?

15 A. To file a complaint under the PSOUH, not that I  
16 recall.

17 Q. Now, if someone files a complaint under the  
18 University's policies against harassment, that would  
19 involve an investigation?

20 A. Yes.

21 Q. That would involve -- and under the handbook,  
22 there's no -- under the handbook, you would reach a  
23 decision? Under the pamphlet, you would reach a  
24 decision?

25 A. Under our policy, we would reach a decision.



1 Q. Okay. That decision could be, for example,  
2 that this isn't covered by the anti-harassment policies;  
3 right?

4 A. That could be, yes.

5 Q. Much like the decision you gave Dr. Kao when  
6 you looked at his complaint under those policies?

7 A. Yes.

8 Q. Now, thank you.

9 At some point, did you have a -- at some point,  
10 did you have a meeting with a Dr. Good concerning  
11 Professor Kao?

12 A. Yes. Whether we used -- I'm sorry if I was too  
13 loud.

14 I don't know that I used his name, but  
15 concerning his behaviors, yes.

16 Q. That was -- do you recall that being in  
17 mid-February of 2008?

18 A. Yes.

19 Q. Did you recall at that meeting Dr. Good gave  
20 you an option, advised you of the option of speaking  
21 directly to Dr. Kao?

22 A. My recollection of the meeting was more a  
23 general kind of educational meeting to educate us and me  
24 on kind of different psychological issues and how and  
25 what options were, how to talk to people that might be

1 exhibiting certain kinds of behavior as well as other  
2 options like a fitness-for-duty exam.

3 Q. Do you remember Dr. Good proposing that it was  
4 an option that people from the University could talk to  
5 Dr. Kao about any concerns?

6 A. Again, I don't think we were specifically  
7 talking about Dr. Kao. But yes, I remember him saying  
8 that it was an option that people could -- that someone  
9 could talk to the person that we were referring to.

10 Q. All right. Now, at any time between that  
11 meeting with Dr. Good and June 18th, 2008, did anyone  
12 speak to Dr. Kao about any concerns that they had with  
13 him?

14 MR. VARTAIN: The question is vague.  
15 Objection. You mean including June 18th or not?

16 MR. KATZENBACH: Q. Prior to June 18th.

17 A. I think people tried to talk to him all along  
18 the way. That was part of the problem is that he would  
19 talk over them and not listen to them and even make it  
20 sound, make it look like he was purposely not listening  
21 to him.

22 People tried to talk to him during the  
23 behaviors. And as a matter of fact, the department  
24 chair would talk about who could actually sit down and  
25 talk to him. And people were afraid. But the

1 department chair said that he was willing to, at one  
2 point, kind of tentatively. And then as things went on  
3 a little bit, he decided he was -- he wouldn't do it,  
4 and he was too afraid.

5 Q. Did you ask Public Safety to speak to Dr. Kao?

6 A. No, we did not.

7 Q. Did you know that Dr. Kao had friends in the  
8 department?

9 A. I would assume so.

10 Q. Did you ask any of them to speak to Dr. Kao?

11 A. I did not.

12 Q. Did anyone?

13 A. The Associate Dean felt that no one was  
14 comfortable doing it.

15 Q. Did you know that Dr. Kao had family in the  
16 area?

17 MR. VARTAIN: Objection. Irrelevant.

18 THE COURT: Overruled. The Witness may answer.

19 THE WITNESS: I knew he had family. I don't  
20 know now if at the time I knew his sister was in the  
21 area or not. I don't remember.

22 MR. KATZENBACH: Q. Did you ask anyone in his  
23 family to speak to Dr. Kao about any of the concerns the  
24 University had?

25 A. No.

1 Q. Did you know that Dr. Kao had seen -- was  
2 seeing or had seen a psychiatrist?

3 A. I assume so because there had been a prior case  
4 where he had been on a prescription for depression. So  
5 I would have assumed he had at one point been under a  
6 psychiatrist's care.

7 Q. Did you ask his doctor if his doctor would  
8 speak to Dr. Kao?

9 A. Could you say that again, please?

10 Q. Did you inquire -- I'll rephrase it just so  
11 that we can be clear.

12 Did you ask any doctor that Dr. Kao was seeing  
13 if they would speak to him about the University's  
14 concerns?

15 A. I did not ask that I knew of a doctor he was  
16 seeing. I did ask though a psychiatrist that I had used  
17 before that was an expert in this area what to do. And  
18 his assessment was that the only real way for him or for  
19 anyone to really judge whether Dr. Kao could be -- could  
20 function in his job safely was for an independent  
21 medical doctor to do an exam.

22 Q. Let me just repeat my question.

23 Did you contact or attempt to contact Dr. Kao's  
24 psychiatrist and ask that psychiatrist to speak to  
25 Dr. Kao about any concerns that the University had?

1 A. No, I did not.

2 Q. Take a look at Exhibit 52, if you will. Can  
3 you identify Exhibit 52?

4 A. It looks like a meeting with myself and  
5 Associate Dean Brandon Brown in March.

6 Q. Are these notes in your handwriting?

7 A. Yes, they are.

8 Q. And do they concern Dr. Kao?

9 A. Yes, they do.

10 MR. KATZENBACH: I would like to move  
11 Exhibit 52 into evidence, not for its truth but for  
12 evidence of what the University knew.

13 THE COURT: Any objection?

14 MR. VARTAIN: No objection.

15 THE COURT: It's received with that limitation.  
16 (Plaintiff's Exhibit No. 52 was  
17 marked for identification and  
18 received in evidence.)

19 MR. KATZENBACH: Q. Taking a look at  
20 Exhibit 52, again, the date of that document?

21 A. March 10th, 2008.

22 Q. And taking a look at the -- it lists a number  
23 of witnesses, and it says -- do you see that, number of  
24 persons?

25 A. Persons, yes.

1 Q. Sorry. It says, does it not, it refers to the  
2 second -- beginning of the second handwritten line  
3 refers to Pacheco?

4 A. Yes.

5 Q. And what does it say after that?

6 A. "Pacheco good terms with John. Informal  
7 stage."

8 Q. What's the next line?

9 A. "John polite but not hostile."

10 Q. Thank you.

11 Does it also discuss -- well, this is a  
12 conversation or information you were receiving from  
13 Dean Brown?

14 A. Yes.

15 Q. Now, does it also discuss this memo, these  
16 notes of March 10th, does this also discuss what Brandon  
17 would do to ask -- did this also indicate -- sorry.

18 Was there a discussion here of having Brandon  
19 ask Dr. Pacheco to speak to Dr. Kao?

20 A. Can I go back a minute? Because even though I  
21 wrote, "John," hyphen, "polite but not hostile," and  
22 that comes under "Pacheco," I think maybe I meant to  
23 write, "but now hostile," because the next sentence  
24 says, "Peter says borderline hostile." Peter is Peter  
25 Pacheco. That maybe should have read, "John polite but

1 now hostile."

2 Q. All right. The phrase "good terms with John,"  
3 what did that mean?

4 A. I think that's what it was early on. And then  
5 it says, "Informal stage," and that refers back to the  
6 complaint from the sentence above that that was in  
7 around 2000 that was resolved in an informal stage.

8 Q. Was Dr. Pacheco involved in that 2000 incident?

9 A. I don't remember the specifics of it.

10 Q. Okay. Wasn't -- as a result of this meeting or  
11 this telephone call or this meeting with Dean Brown, you  
12 determined that you would ask Dr. Pacheco to speak with  
13 him, with Dr. Kao; isn't that right?

14 A. Yes. It says, "Brandon will ask Peter to meet  
15 with him."

16 Q. And nothing happened -- as a result of that  
17 decision, did Dr. Pacheco ever speak to John about the  
18 University's concerns?

19 A. No. He was too afraid to.

20 Q. Is that what he told you?

21 A. That's what I was told by someone.

22 Q. Who told you?

23 A. I believe it was Dean Brown.

24 Q. So you never spoke directly to Dr. Pacheco  
25 whether he was afraid of John at this time?

1 A. On or around March 10th, I don't believe I did,  
2 no.

3 Q. On or around April 10th?

4 A. I know I spoke with him at the end of April.

5 Q. Between the time of this meeting on March 10th  
6 and the end of April, you didn't speak directly to  
7 Mr. -- sorry -- to Dr. Pacheco whether he was in fact  
8 willing or unwilling to speak to Dr. Kao?

9 A. No. One of the things we try to do and I  
10 always try to do is resolve things with kind of the  
11 least possible rumblings to everyone else. I don't want  
12 to get everyone else upset.

13 I trusted Brandon when he said -- and that's  
14 Dean Brown -- that Peter Pacheco wasn't comfortable with  
15 it. I didn't want for me to go and make him  
16 uncomfortable by having the head of HR make him feel  
17 like he had to do something that he was afraid to do.

18 Q. Right. And were you afraid of Dr. Kao at that  
19 point?

20 A. In March?

21 Q. Yeah.

22 A. I had not personally experienced the behaviors,  
23 so no, I was not.

24 Q. You had Maye-Lynn Gon-Soneta working for you in  
25 HR at that point?



1 A. Yes.

2 Q. In fact, she was meeting with Dr. Kao right  
3 around that same time; wasn't she?

4 A. With his attorneys, and I believe she may have  
5 also had other folks nearby.

6 Q. Is Ms. Gon-Soneta still employed by the  
7 University?

8 A. No, she's not.

9 Q. You referred to Dr. Kao's attorneys.  
10 Did you call Dr. Kao's attorneys and ask them  
11 to talk to Dr. Kao about the University's concerns in  
12 March of 2008?

13 MR. VARTAIN: The question is vague. Did she  
14 call them in March of 2008?

15 THE COURT: I think I understand the question.  
16 Let's see if the Witness does. Overruled.

17 THE WITNESS: Could you repeat it, please?

18 MR. KATZENBACH: Q. Did you -- in March 2008,  
19 did you contact Dr. Kao's attorneys and ask them to  
20 speak to Dr. Kao about any of the University's concerns  
21 about him?

22 A. No, I did not.

23 Q. Now, taking a look back on Exhibit 32, there's  
24 a phrase at the bottom.

25 A. 32?

1 Q. Huh?

2 A. 32?

3 Q. Sorry. The one we're looking at, 52.

4 A. Okay.

5 Q. You see it right below the sentence it talks  
6 about, "Brandon will ask Peter P.. to meet with him."

7 You see that?

8 A. M-hm.

9 Q. There's another phrase right below that?

10 A. Yes.

11 Q. What does that say?

12 A. "External facil," which to me would have meant  
13 external facilitator.

14 Q. At that point when you're talking about an  
15 external facilitator, do you mean someone outside of the  
16 University?

17 A. That's what that would have meant. I don't  
18 know if we were talking about it or if I just thought of  
19 that as a note to myself.

20 Q. As another possibility?

21 A. Yes.

22 Q. That would be another possibility of a way for  
23 someone to speak to Dr. Kao?

24 A. That would have possibly been a possibility,  
25 yeah.

1 Q. An external facilitator would be whom? What  
2 would an external facilitator do?

3 A. I'm not sure what you mean.

4 Q. All right. You wrote down the phrase appears  
5 to be external facilitator; correct?

6 A. Yes.

7 Q. You were thinking of using an external  
8 facilitator in connection with talking to Dr. Kao; is  
9 that right?

10 A. Yes.

11 Q. That external facilitator would have had no  
12 prior connections with Dr. Kao; correct?

13 A. I don't know.

14 Q. You certainly could have selected an external  
15 facilitator that had no prior connections with Dr. Kao;  
16 couldn't you?

17 A. Yes. One could do that.

18 Q. And so you could have selected an external  
19 facilitator who had no reason to be afraid of Dr. Kao;  
20 correct?

21 A. Which is eventually what we did, but even more  
22 so in finding an external person who actually had the  
23 knowledge and expertise to make an informed judgment.

24 Q. So you're thinking that Dr. Reynolds, the  
25 psychiatrist hired by the University to do a

1 fitness-for-duty exam, is the same as the external  
2 facilitator referred to on Exhibit 52? Is that what  
3 you're saying?

4 A. No. I don't follow you.

5 Q. Let's go back to Exhibit 52. All right.

6 Did you ever -- in and around March, did you  
7 ever hire an external facilitator to try to have a  
8 meeting with Dr. Kao?

9 A. No.

10 Q. In April, did you hire an external facilitator  
11 to have a meeting with Dr. Kao?

12 A. No.

13 Q. Thank you.

14 Now, prior to talking to Dr. Good and meeting  
15 with Dr. Good, did the University also contact another  
16 psychologist concerning Dr. Kao?

17 A. We consulted another professional. Whether it  
18 was a psychologist or psychiatrist, I don't remember  
19 their particular title.

20 Q. Was that a Dr. Chang?

21 A. I believe so.

22 Q. Now, do you recall what Dr. Chang told you?

23 A. That was not very specific. It was in general.  
24 It actually made it -- the crux of it, it sounded like  
25 he implied that we kind of ought not consult him

1 further. And I couldn't take that to mean whether he  
2 felt like he didn't feel like he had the expertise or he  
3 had a conflict whether he knew Dr. Kao.

4 Q. All right. Take a look, if you would, at  
5 Exhibit 53.

6 A. (Complying.)  
7 (Plaintiff's Exhibit No. 53 was  
8 marked for identification.)

9 MR. KATZENBACH: Q. Can you identify  
10 Exhibit 53?

11 A. It's my notes of a meeting.

12 Q. All right. Is that your handwriting on  
13 Exhibit 53?

14 A. Most of it is, yes. I'm not sure. There are  
15 four or five letters that I'm not sure are mine.

16 Q. Okay. Four or five letters. What are you  
17 referring to?

18 A. At the top where it says, "ED," hyphen, "RAM,"  
19 I think.

20 Q. Okay. Any other parts of this, these notes  
21 that don't have your handwriting on them?

22 A. No. That's it.

23 Q. Exhibit 53 begins with the top page looks like  
24 the number 2.

25 A. Yes.

1 Q. And the next page of Exhibit 53 has the page  
2 number at the top 4?

3 A. Yes.

4 Q. And do you know what happened to page 1 and 3  
5 of your meeting notes for this meeting?

6 MR. VARTAIN: Objection. Counsel, you  
7 subpoenaed the original of her file, and she brought the  
8 original in response to your subpoena. It's in the  
9 binder on her desk.

10 THE COURT: Mr. Vartain, what's the grounds for  
11 the objection?

12 MR. VARTAIN: Argumentative.

13 THE COURT: I beg your pardon?

14 MR. VARTAIN: Argumentative.

15 THE COURT: Seems to assume some facts not in  
16 evidence as well. Sustained.

17 MR. KATZENBACH: All right. I would like, your  
18 Honor, to move Exhibit 53 into evidence with the same  
19 stipulation, not for the truth of the matter but only to  
20 show what the University was considering.

21 THE COURT: Any objection?

22 MR. VARTAIN: I think it is a business record,  
23 and I would like the opportunity to voir dire the  
24 Witness to show that she was keeping her notes in the  
25 ordinary course of business; therefore, it is admissible

1 for the truth of the notes, unless Counsel --

2 THE COURT: Mr. Vartain, if you want to  
3 introduce this for the truth of the matter asserted,  
4 that's fine. But I propose to enter it for the limited  
5 purpose stated by Plaintiff's Counsel without prejudice  
6 to your acceding to have it admitted for the truth of  
7 the matter.

8 MR. VARTAIN: That's fine, your Honor. Thank  
9 you. I'll defer then. I appreciate that.

10 (Plaintiff's Exhibit No. 53 was  
11 received in evidence.)

12 MR. KATZENBACH: Very well.

13 Q. Taking a look at what's now admitted as  
14 Exhibit 53, you'll notice that the first page has the  
15 number 2.

16 A. Yes.

17 Q. And the second page has the number 4?

18 A. Yes.

19 Q. Do you have pages 1 and 3?

20 A. I would have given them to whoever subpoenaed  
21 them, so --

22 Q. All right. Have you looked for the pages 1 and  
23 3 of these notes before today?

24 A. When the documents were subpoenaed, I looked  
25 for everything and put together everything and put it in

1 a box to our attorney to give to you.

2 Q. Did you bring those documents with you pursuant  
3 to bringing them with you today?

4 MR. VARTAIN: Two things, Mr. Katzenbach: Did  
5 you want us to bring -- her whole box of stuff is right  
6 there, plus the particular numbered documents that you  
7 wanted the originals of, Ms. Adler pulled the originals  
8 out of the box, and they're in a binder with  
9 Ms. Peugh-Wade.

10 MR. KATZENBACH: Q. Now in the binder that you  
11 have in front of you --

12 MR. VARTAIN: She has not looked at it, by the  
13 way. Ms. Adler took care of it.

14 MR. KATZENBACH: That's fine.

15 Q. In the binder that's in front of you is page 1  
16 and 3 of your notes of 4/23/08 that's Exhibit 53.

17 Do you have those in that binder?

18 A. Let me look.

19 Q. That's fine.

20 MR. VARTAIN: Mr. Katzenbach, it may save time  
21 if you would allow Ms. Adler to assist the Witness  
22 because Ms. Adler put the binder together last night for  
23 you.

24 MR. KATZENBACH: That's fine.

25 MR. VARTAIN: May she approach?



1 MR. KATZENBACH: It's not up to me.

2 May Ms. Adler approach the Witness, your Honor?

3 THE COURT: Yes.

4 THE WITNESS: There are some pages without  
5 numbers, so I'm wondering --

6 (Sotto voce discussion between Ms. Adler and  
7 the Witness.)

8 THE WITNESS: No, not there.

9 MR. KATZENBACH: Q. Not in that binder?

10 A. No.

11 Q. Taking a look at what we do have for your notes  
12 looking at the first page of the exhibit which is marked  
13 page 2, you see that?

14 A. Yes.

15 Q. If you look halfway down, you see the phrase,  
16 "Both consultants say the same thing." You see that?

17 A. Yes.

18 Q. Now, the two consultants as of April 23rd, that  
19 would be Dr. Good and Dr. Chang; correct?

20 A. That would be my recollection, yes.

21 Q. And is your recollection they both said the  
22 same thing?

23 A. That's what it says, yes.

24 Q. Was that same thing the University should talk  
25 to Dr. Kao?

1           A. I don't know that because if you go two lines  
2 down, it says, "Consultant two idea didn't work," which  
3 meant to me the idea to have someone talk to him and the  
4 "didn't work" meaning because I say below that, Paul Z.  
5 no and Peter P. no. So neither of them were willing to  
6 come face-to-face and talk to him about it.

7           Q. Okay. So you understand consultant two at  
8 least recommended talking to Dr. Kao?

9           A. Again, I don't know about recommended talking  
10 to Dr. Kao, but suggested it as an option in this kind  
11 of situation.

12          Q. And it didn't work because Paul Zeitz and Peter  
13 Pacheco refused to do it; is that right?

14          A. I don't know about refused to do it. They were  
15 scared.

16          Q. They said no?

17          A. Actually, I think it's more like they said they  
18 were not comfortable. I would not have the Dean and --  
19 neither the Dean nor I would have asked someone to do  
20 something like this where they felt as frightened as  
21 these folks did.

22          Q. Did you ask Dean Brown to talk to Dr. Kao?

23          A. Yes, we did.

24          Q. He refused?

25          A. Again, I wouldn't take it to say refused when

1 someone is not doing something because they're afraid  
2 for themselves and their safety. But yeah, he was not  
3 comfortable doing it.

4 Q. Okay. Now, Dean Brown isn't in the math  
5 department; is he?

6 A. No.

7 Q. He had only one interaction with Dr. Kao that  
8 was the one on January -- on January 3rd; correct?

9 A. I would have to go back to my notes. I don't  
10 remember specifically.

11 Q. Can you recall any interaction Dean Brown had  
12 with Dr. Kao other than the one time Dr. Kao was in his  
13 office?

14 MR. VARTAIN: Objection. The Attorney is not  
15 letting the Witness finish her answer before he starts  
16 the next question.

17 THE COURT: The question stands. Strike the  
18 answer. I'll invite Plaintiff's Counsel to bear in mind  
19 that you should let the Witness finish.

20 MR. KATZENBACH: I will.

21 THE WITNESS: In one of the January meetings,  
22 actually, Dr. Brown and the Dean Jennifer Turpin said  
23 that -- this was in January that they were telling us  
24 about it, that at the last convocation, which is the  
25 event that we have at the beginning of the school year

1 and all the faculty get together for that particular  
2 college, that they were afraid of Dr. Kao's behavior at  
3 that time and that they -- that Brandon Brown actually  
4 sat in front of John Kao between John and Jenny to  
5 protect, generally, which I can't believe people would  
6 do that.

7           Anyway, so yes, he already talked to me about  
8 his concern. He voiced it at this point as well.

9           MR. KATZENBACH: Q. That's based on something  
10 that Dean Turpin told him?

11           A. No. Based on their interactions.

12           Q. Whose interactions?

13           A. Brandon's interactions with Dr. Kao.

14           Q. And the only interaction that -- the only  
15 interaction -- strike that.

16           Did Dean Brown have any interaction directly  
17 with Dr. Kao other than the meeting in January 2008?

18           MR. VARTAIN: Objection. The question is  
19 argumentative. Lacks foundation. How would she know  
20 what he had?

21           THE COURT: Again, it's argumentative in tone  
22 at least.

23           MR. KATZENBACH: I will rephrase that, your  
24 Honor.

25           Q. Are you aware of any meetings Dean Brown had

1 with Dr. Kao other than the meeting in early  
2 January 2008?

3 MR. VARTAIN: Objection. Lacks foundation.  
4 During what period of time? There's a whole bunch of  
5 years.

6 THE COURT: Overruled. The Witness may answer.

7 THE WITNESS: What do you mean by "meeting"?

8 MR. KATZENBACH: Q. A time when Dr. Kao and  
9 Dean Brown were sitting and talking to each other.

10 A. I'm not aware of any meetings, but I took it  
11 there were encounters and that Brandon was basing his  
12 thoughts and his concerns about what he saw at other  
13 times.

14 Q. Okay. What do you recall Dean Brown informing  
15 you that he saw at other times?

16 A. At the convocation in August.

17 Q. That would be August 2007?

18 A. Yes.

19 Q. And what did Dean Brown tell you he saw Dr. Kao  
20 do in August of 2007?

21 A. It's in my notes. I would have to go back and  
22 look. I don't remember the specifics.

23 Q. What notes would that be?

24 A. Notes that are somewhere exhibits for -- that I  
25 sent to you folks.

1 Q. M-hm.

2 A. Because I reviewed those. I remember I saw  
3 that somewhere, but I don't remember where specifically.

4 Q. Did you interview Dean Brown around the time of  
5 this convocation concerning this alleged encounter with  
6 Dr. Kao?

7 MR. VARTAIN: Objection. Ambiguous.

8 THE COURT: Overruled.

9 THE WITNESS: No, I did not. The first I heard  
10 of it was in January.

11 MR. KATZENBACH: Q. So the first you heard of  
12 it is when he came to you on January 8th?

13 A. Again, I don't know if he came to me or I came  
14 to him or it was about that time though, yes.

15 Q. Okay. Taking a look at your interview notes,  
16 which are Exhibit 51, do you have those in front of you?

17 A. I do.

18 Q. There's no mention of a convocation in those  
19 notes; is there?

20 A. No. If you like, I can look through the rest  
21 of the exhibits though and find the date of the  
22 conversation that I had with Brandon.

23 Q. I just want to clarify.

24 In the notes that you took on January 8th,  
25 2008, in your conversation with Dean Brown, he didn't

1 mention anything about any events at this convocation  
2 that you refer to?

3 A. I have to say, I can't remember specifically  
4 everything that was said in a meeting four years ago.  
5 But I didn't -- and since it appears that -- so this  
6 exhibit is page 1 and 3. There may be a page missing.  
7 I don't know if he said anything about it at that time  
8 or not. I know that he and/or Dean Turpin mentioned it  
9 at another time because it was in my notes, and you  
10 folks had them. I'm happy to look for it if you like.

11 THE COURT: Ladies and gentlemen, remember the  
12 admonition. Do not form or express any opinion on this  
13 case until it's finally submitted to you for your  
14 decision. Do not discuss among yourselves or with  
15 others until that time.

16 Please be back in your places at 2:40 according  
17 to the courtroom clock.

18 (Recess taken: 2:29 p.m. - 2:40 p.m.)

19 THE COURT: Jurors and Alternates are all  
20 present. Counsel for all sides are present. Plaintiff  
21 is personally present. Ms. Peugh-Wade is on the stand.

22 Mr. Katzenbach, you may resume your inquiry.

23 MR. KATZENBACH: Thank you.

24 Q. Ms. Peugh-Wade, at some point did you interview  
25 some faculty members concerning Dr. Kao?

1 A. Yes, concerning his behaviors.

2 Q. Well, okay. I'll ask you to look, if you  
3 would, at Exhibit 56.

4 (Plaintiff's Exhibit No. 56 was  
5 marked for identification.)

6 MR. KATZENBACH: Q. Can you identify  
7 Exhibit 56?

8 A. It's my notes of meeting with Tristan Needham.

9 Q. When did that meeting occur?

10 A. April 28th, 2008.

11 MR. KATZENBACH: At this point, your Honor --

12 Q. These notes concern Dr. Kao?

13 A. Yes.

14 MR. KATZENBACH: At this point, I would offer  
15 56 into evidence for the same limited purpose.

16 THE COURT: Any objection?

17 MR. VARTAIN: How many pages do you have there,  
18 Chris, just to make sure?

19 MR. KATZENBACH: I have numbers USF 132 to 138.

20 MR. VARTAIN: No objection.

21 THE COURT: It's received.

22 (Plaintiff's Exhibit No. 56 was  
23 received in evidence.)

24 MR. KATZENBACH: Q. Now, I would like to go  
25 through this exhibit, if you would.



1           Now, the first page of Exhibit 56 contains --  
2 it looks like a script to begin the interview; is that  
3 right?

4           A. Kind of like that, yeah. It says for me to  
5 introduce the topic to Tristan.

6           Q. And who developed this -- who developed what  
7 looks like a script on Exhibit 56?

8           A. I did -- I'm sorry. I didn't mean to  
9 interrupt.

10          Q. It's okay. I paused, so you have the right.

11          A. You're talking about USF 0132?

12          Q. Yes.

13          A. I did whenever -- not always, but when I have  
14 important meetings, I sometimes script out what I want  
15 to say. Particularly, like in this case, I wanted to  
16 make sure I got everything across to the person that I  
17 was interviewing and sometimes I forget. So...

18          Q. Okay. So first page doesn't -- the first page  
19 of Exhibit 56 doesn't contain any information you  
20 received from Tristan Needham; correct?

21          A. Let me just read through it all.

22          Q. Sure.

23          A. (Reviewing document.)

24                 The notes at the top of the page where I have  
25 their date of hires could have come from Tristan. I

1 don't remember.

2 Q. Okay. Other than that, it doesn't contain any  
3 information you received from Tristan Needham on page 1?

4 A. No.

5 Q. On the side of the first page of Exhibit 56,  
6 there seems to be some handwritten notes. Do you see  
7 those?

8 A. Yes.

9 Q. What do those handwritten notes say?

10 A. Part of it is blacked out I think by the  
11 copier. But it appears to say "no speculation, no  
12 opinions."

13 Q. Was it part of this interview that you wanted  
14 the facts and not opinions?

15 A. I wanted the facts, but I also wanted their  
16 perceptions or how it made them feel.

17 Q. Okay. Taking a look at the second page of  
18 Exhibit 56, now looking at the second page here, is  
19 there any specific incident that's discussed on page 2?

20 A. Yes, there is.

21 Q. Which one?

22 A. In the middle of page 2 in the question where I  
23 ask, "What is Dr. Kao like in groups," it says that in  
24 department meetings, he yells.

25 Q. Okay.

1           A. And further on down, he was talking about a  
2 particular meeting where he threw the pieces of paper  
3 that was the model.

4           Q. Pieces of paper and the model, you mean -- are  
5 you referring of course -- are you referring to the  
6 meeting on February 6th, 2008?

7           A. I don't remember the exact meeting, but the  
8 meeting where they were discussing the search and the  
9 mathematical model that Dr. Kao had talked about.

10          Q. Other than the apparent reference to that that  
11 you understood, were there any other meetings that  
12 Dr. Needham identified in which Dr. Kao yelled?

13                 MR. VARTAIN: Objection. The question is  
14 vague.

15                 MR. KATZENBACH: I'll rephrase that question.  
16 That's fine.

17          Q. Other than the reference that you're reading  
18 that you interpret to mean -- you indicate a reference  
19 to that meeting which I just identified, does  
20 Dr. Needham identify any other meetings where Dr. Kao  
21 may have yelled?

22           A. Yes. From my notes, it says department  
23 meetings, so...

24          Q. So you think -- does he indicate a specific  
25 department meeting?

1 A. No.

2 Q. Does he indicate a specific department meeting?

3 A. No.

4 Q. Does he indicate how frequently in department  
5 meetings?

6 A. My notes indicate that he yells in department  
7 meetings.

8 Q. All right. And your notes don't indicate that  
9 you asked him how many meetings?

10 A. No.

11 Q. And this page doesn't indicate that you asked  
12 him how frequently?

13 A. No.

14 Q. Doesn't indicate anything about the subject  
15 matter of the meetings involved -- excuse me.

16 MR. VARTAIN: I apologize. I interrupted.

17 MR. KATZENBACH: Q. Your notes don't indicate  
18 the subject matter of the meetings where Dr. Kao was  
19 supposedly yelling other than the one meeting that  
20 you've identified?

21 MR. VARTAIN: Objection. The question is  
22 vague. There's a seven-page document. Do you want her  
23 to refer just to the page?

24 MR. KATZENBACH: I'll start with this page.  
25 We're going to go through it page by page.

1 MR. VARTAIN: Then the question is vague. You  
2 said in the notes.

3 THE COURT: I'll also sustain the objection,  
4 and we'll get a fresh start.

5 MR. KATZENBACH: Q. On this page of the notes,  
6 it doesn't indicate Dr. Kao was yelling in other than  
7 the one involving the search?

8 MR. VARTAIN: This page -- objection. Vague.  
9 You mean 133?

10 MR. KATZENBACH: Second page of Exhibit 56.

11 MR. VARTAIN: 133, Counsel?

12 MR. KATZENBACH: Bearing No. 133.

13 MR. VARTAIN: No objection.

14 THE WITNESS: My notes would indicate the  
15 department meeting as well as meetings -- that one  
16 particular meeting about the search where the model was  
17 discussed.

18 MR. KATZENBACH: Q. All right. But it doesn't  
19 indicate any department meeting, specific department  
20 meeting beyond that one search meeting on that page of  
21 the notes?

22 MR. VARTAIN: Okay. Now you cleared it up. On  
23 that page of the notes.

24 MR. KATZENBACH: All right.

25 THE WITNESS: No. I don't mean to disagree,

1 but my notes to me were at department meetings and this  
2 one in particular because generally they have department  
3 meetings that are ongoing and you have whatever ones  
4 once a month. But this is a particular meeting about a  
5 search which would not have been the same as department  
6 meetings.

7 MR. KATZENBACH: Q. All right. But the notes  
8 don't indicate how many department meetings; do they?

9 A. No, they don't. Not on this page.

10 Q. On this page of notes, they don't indicate when  
11 those meetings took place?

12 A. No.

13 Q. And they don't indicate any particular subject  
14 matter of those meetings on this page of the notes?

15 A. The fact that it says "throwing the pieces of  
16 paper with the model" to me that was -- that meeting was  
17 the one that they were talking about that particular  
18 search.

19 Q. All right. Thank you.

20 Take a look at the next page of Exhibit 56.

21 Does the next page of Exhibit 56 identify any particular  
22 incident involving Dr. Kao?

23 A. Yes.

24 Q. What incident does Dr. Needham identify?

25 A. It involves a letter that I believe was written

1 in about 2000 about the course that was taught in  
2 conjunction with the joint program that we had at the  
3 time with CCAC, the California College of Arts and  
4 Crafts.

5 Q. So just directing your attention to the  
6 contents of this page of Exhibit 56, you asked  
7 Dr. Needham, "Can you give me an example," slash,  
8 "incident that occurred?"

9 A. Yes.

10 Q. And the first thing that Dr. Needham told you  
11 about was this letter involving CCAC; is that right?

12 A. This was -- would appear to be the first thing  
13 that he said in response to that question, yes.

14 Q. All right. And he identifies that incident as  
15 happening something like ten years earlier?

16 A. That letter did, and I think that the reason he  
17 said that my notes on the left say that that letter in  
18 this professor's perspective is what turned him,  
19 Dr. Kao, against Tristan.

20 Q. All right. And that's the -- now, if you take  
21 a look at the next page of Exhibit 56, you move on -- at  
22 that point, you move on to question 8, sorry, question  
23 8. Is that correct?

24 A. Yes.

25 Q. And in response to this question, that question

1 is, "Have you had any problems," slash, "conflicts with  
2 John?"

3 A. Yes.

4 Q. Have I read --

5 A. Yes. You're getting good.

6 Q. I'm practicing.

7 And taking a look at what you write down below  
8 that, you, again, identify CCAC. Is that right?

9 A. Yes.

10 Q. And then you also in the side you indicate a  
11 second incident now; correct?

12 A. Well, I actually -- if you're looking at -- are  
13 you looking at the side of 135?

14 Q. Yes, I am.

15 A. I actually labeled it first incident, which was  
16 Cidas, who was the department secretary, accidentally  
17 opened a letter that was meant for Dr. Kao. And so  
18 again, this is Tristan's recount saying that that was  
19 his first incident of seeing Dr. Kao rage at her.

20 Q. That incident happened how long ago?

21 A. Sometime before the CCAC.

22 Q. Well, did you -- that incident happened before  
23 Dr. Kao got tenure; didn't it?

24 A. I don't recollect.

25 Q. Well, did you investigate that incident?



1           A. No, I did not.

2           Q. All right. In this case, now Dr. Needham is  
3 identifying two incidents: One, the CCAC incident, and  
4 this incident involving the departmental secretary who  
5 was even older -- we have one incident that's ten years  
6 old and one incident that's even older than that; is  
7 that correct?

8           A. Right. But I wasn't in a role of doing  
9 investigations about these kinds of things in 2000 or  
10 before that. I was at this point trying to get  
11 information from -- I already talked to two Deans and  
12 was talking to three faculty members to see if, if their  
13 description of what they were seeing in this gentleman  
14 that they were worried about was something that I should  
15 worry more about. I take these kinds of things very  
16 seriously.

17          Q. I'm glad you do. I really just am focusing on  
18 what your notes reflect Tristan Needham telling you in  
19 response to your questions.

20          A. Okay.

21          Q. You asked him first, "Can you give me an  
22 example of an accident that occurred," and then second,  
23 "Have you had any problems," slash, "conflicts with  
24 John?"

25                   And in response to those two questions, Tristan

1 Needham identified only the CCAC incident, which is  
2 about ten years earlier, and advised you of this  
3 conflict with the department secretary that was even  
4 older than that; is that right?

5 A. Those were the two incidents. But he went on  
6 to say that ever since then, I think I said this in the  
7 previous page, you make one mistake with John and that's  
8 it. And the relationship after the CCAC, even though I,  
9 Tristan, apologized actually in the letter, after that  
10 conflict, the relationship was horrible.

11 Q. That's fine. I understand that's what the  
12 notes say.

13 A. Okay.

14 Q. What I'm asking you though are the specific  
15 incidents or examples that Tristan was giving you in  
16 response to your specific questions. And there's only  
17 the CCAC issue and the earlier incident regarding the  
18 department secretary. Isn't that right on that page?

19 A. On those two pages, yes.

20 Q. On those two pages, thank you.

21 Take a look at the next page of Exhibit 56,  
22 which is the number USF 0136.

23 Do you have that page in front of you?

24 A. I do.

25 Q. Now, that again describes incidents.

1 MR. VARTAIN: Objection. Vague.

2 MR. KATZENBACH: Strike that. I'll look at  
3 that.

4 Q. Looking that up, does that again seek to record  
5 other incidents involving -- that Tristan Needham  
6 identified to you?

7 A. I'm sorry. Could you say that again?

8 Q. Does that page again seek to identify incidents  
9 of conflict with John Kao that you asked Tristan Needham  
10 to identify?

11 A. He went into more discussion on this page or my  
12 notes did about the CCAC letter.

13 Q. Right. So again, first top of this letter  
14 again refers to the CCAC matter; correct?

15 A. Yes.

16 Q. All right. Again, on this page of Exhibit 56,  
17 again, there's no other event described?

18 A. No. But I think part of what is important  
19 about that is that kind of a common thread with all of  
20 these folks was that they felt that this individual  
21 obsessed about certain things in the past, so much so  
22 that it was kind of not based in reality. And it made  
23 them feel like that in addition to everything else, the  
24 shaking and quivering and things, made them feel like he  
25 wasn't a stable person.

1 Q. I see.

2 Getting back to your interview notes on this  
3 page labeled USF 0136, again, the only thing that  
4 Dr. Needham tells you about is the CCAC incident;  
5 correct?

6 MR. VARTAIN: Objection. The question is vague  
7 and ambiguous.

8 MR. KATZENBACH: Strike that. You're  
9 absolutely correct.

10 Q. The only specific event that Dr. Needham tells  
11 you about is the CCAC incident?

12 MR. VARTAIN: Objection. The question is  
13 ambiguous. There's a phrase "now" on the document.

14 MR. KATZENBACH: Q. I just want to get -- even  
15 to the phrase "now," does he describe anything that  
16 John Kao actually did?

17 MR. VARTAIN: Objection. Ambiguous.

18 MR. KATZENBACH: Q. Look at the phrase "now."  
19 Okay.

20 THE WITNESS: Yes.

21 MR. KATZENBACH: Q. He says that he perceives  
22 hatred in Dr. Kao; is that right?

23 A. It says that he sees hatred in his face out of  
24 proportion with reality. It also goes on to say that --  
25 this is at the bottom, but it does actually talk of

1 another instance that Dr. Kao always dressed very nicely  
2 and came to campus in a suit. And that there was one  
3 instance he didn't come in a suit.

4 And actually, I believe Tristan was so  
5 concerned he wasn't in a suit that something was wrong,  
6 that, you know, he warned people. So to me, that was  
7 another incident.

8 Q. Another incident of Dr. Kao's fearful  
9 activities was one day in 2008 he didn't wear a suit?

10 MR. VARTAIN: Objection. Argumentative.

11 THE WITNESS: I like how you put that.

12 MR. VARTAIN: Objection. Argumentative.

13 THE COURT: Objection. Sustained. Next  
14 question.

15 MR. KATZENBACH: Q. So the other incident that  
16 Professor Needham identifies is an incident where  
17 Dr. Kao didn't come to campus wearing a suit?

18 A. Not that he identified that as an incident, but  
19 identified it as to the things -- it was a discussion of  
20 telling me about all of the things that made up the  
21 entire picture of why they were afraid for and of  
22 Dr. Kao.

23 Q. All right. Let's just go over that.

24 Specifically, Tristan Needham said as one of  
25 these reasons he was afraid of Dr. Kao was what you

1 wrote down here, that he was not in suit, couldn't  
2 teach; is that correct?

3 MR. VARTAIN: Objection. Argumentative. Asked  
4 and answered three times.

5 THE COURT: Overruled. The Witness may answer.

6 THE WITNESS: Can you say it again, please?

7 MR. KATZENBACH: Q. Sure.

8 In response to your questioning of what things  
9 Dr. Kao did that caused Tristan Needham to be afraid,  
10 Tristan Needham voluntarily told you that one of those  
11 things was one day when Dr. Kao was not in a suit and  
12 couldn't teach?

13 A. Yes. That was one of the things that made him  
14 afraid. Dr. Kao you could always expect to be in a  
15 suit. And when he was smoking, pacing at a particular  
16 pace, when he did something this different, it made him  
17 worried.

18 I mean, this showed the state of mind that  
19 Tristan was in about this individual. I mean, that's  
20 how scared he was, that he was looking at this kind of  
21 thing.

22 Q. And did Dr. Kao, as far as you understand, come  
23 in a suit on another day following this suitless day?

24 A. I don't know. Normally when I saw him, he was  
25 in a suit.

1 Q. Thank you.

2 I would like to, directing your attention to  
3 the language directly above the comment about the suit,  
4 there are two phrases there I would like to direct your  
5 attention to.

6 The first, did Tristan Needham say to you he  
7 has never threatened verbally or physically?

8 A. That would be my recollection of these notes.

9 Q. Those are the words Tristan Needham used?

10 A. I don't know if those were the exact words.  
11 But I think the intent was he never directly physically  
12 or verbally came out and said, "I'm going to kill you,"  
13 or, "I'm going to hurt you."

14 Q. Well, the words you wrote down were never  
15 threatened verbally or physically. Are those as close  
16 you can recall to the words Tristan Needham actually  
17 used in your interview?

18 A. I don't recall.

19 Q. All right. Then you used the phrase, "Tristan  
20 feels threatened like VA Tech." Is that something  
21 Tristan Needham told you?

22 A. Yes. I believe that would have been  
23 Tristan's --

24 Q. The phrase "like VA Tech," is that something  
25 Tristan used, or is that something you added?

1           A. That would have been something I believe that  
2 Tristan used. And he wouldn't have used the letters VA.  
3 He would have said Virginia. That was me writing.

4           Q. That's fine.

5                     Did you discuss what it was about Dr. Kao's  
6 activities that led Tristan Needham to compare him to  
7 the Virginia Tech killer?

8           A. Yes. I think my notes on USF 133 reflect it.  
9 "He reaches breaking points quickly. His lips quiver.  
10 Raises his voice."

11                     And at that point, I would have asked, "What  
12 does that mean? Like if someone were to close a door,"  
13 and he would have said, "Heard over a shut door. Stands  
14 up at the table. He's so quickly to anger over small  
15 things. He's inflexible over small things." "How is he  
16 triggered?" "Anything that violates a rule. John's  
17 behavior is sometimes perceived as threatening or  
18 combative."

19                     Yeah. These were all things when he described  
20 the incident with Cidas Deguzman, even though it was a  
21 long time ago, there were things in his past that he had  
22 done at times. And now more recently, since January,  
23 they were increasing.

24           Q. Really? Okay.

25                     MR. VARTAIN: Objection. Objection. Move to



1 strike.

2 THE COURT: Motion to strike is granted. The  
3 word really"" is stricken.

4 MR. VARTAIN: I would like an instruction to  
5 the Counsel to not disparage the Witness any further.

6 THE COURT: I think he knows better than that.

7 MR. KATZENBACH: Thank you, your Honor.

8 Q. Have you ever seen the video the Virginia Tech  
9 killer produced?

10 A. I'm sorry.

11 Q. Have you ever looked at the video the Virginia  
12 Tech killer released?

13 A. I don't know that I saw the whole thing. I  
14 have seen parts of some video.

15 Q. When did you see that?

16 A. I don't know.

17 Q. The Virginia Tech killer was Asian; correct?

18 A. Probably.

19 Q. He was Korean. Do you recall that? Korean  
20 ancestry anyway.

21 A. Okay. No, I don't.

22 Q. Do you recall the language the Virginia Tech  
23 killer used in describing his actions?

24 A. No.

25 Q. Do you recall the tone of voice the Virginia

1 Tech killer used in describing why he engaged in that  
2 outrageous rampage?

3 A. No.

4 Q. Do you recall the explanation the Virginia Tech  
5 killer gave in recalling that -- when he described his  
6 justifications for the horror he inflicted on the poor  
7 people in that University?

8 A. No. I tried not to deal with this too much  
9 because it's the whole thing was kind of frightening at  
10 the time. No, I don't.

11 Q. Did Tristan Needham describe to you  
12 specifically why he thought that Dr. Kao was like the  
13 Virginia Tech killer?

14 A. He described the things that are in my notes  
15 and that we've already talked about.

16 Q. In your discussions with him when he raised  
17 this statement "like the Virginia Tech killer," did you  
18 ask Dr. Kao -- Dr. Needham, "Why is Dr. Kao like the  
19 Virginia Tech killer?"

20 A. I don't think he was suggesting that the two of  
21 them were similar. I think what he was suggesting is he  
22 was afraid something as horrible as what happened at  
23 Virginia Tech could happen in this situation.

24 Q. Did you ask him specifically why he thought  
25 something that horrible would happen, that Dr. Kao could

1 commit such a horrible, horrible act on the campus at  
2 the University of San Francisco?

3 A. All of the questions I had asked up until then  
4 I think were things, were questions that were similar to  
5 that, what seems to trigger him, et cetera.

6 Q. Take a look at the next page.

7 A. I'm sorry. What page are we on now?

8 Q. Take a look at the -- I'm sorry -- the one  
9 after the Virginia Tech killer, that would be page  
10 labeled 0127.

11 A. Excuse me. Could I ask for a Kleenex?

12 Q. Excuse me?

13 A. Could I ask for a Kleenex?

14 Q. Certainly.

15 May I approach the Witness, your Honor?

16 THE COURT: You may.

17 THE WITNESS: Thank you.

18 MR. KATZENBACH: Q. Taking a look at the next  
19 page of Exhibit 56 which is page 1037, right, that  
20 addresses the issue of the retirement party for  
21 Professor Finch; is that right?

22 A. Yes.

23 Q. And that was a party that had actually was  
24 going to be held at Professor Needham's home; isn't that  
25 right?

1 A. Yes.

2 Q. Is it accurate to say that -- did  
3 Professor Needham say to you the words recorded, "I  
4 honestly don't believe the setting is problematic,  
5 structured environment"?

6 A. That would be my recollection, yes.

7 Q. Thank you.

8 Looking at the next line following that, it  
9 states, does it not, "If he could behave decently, I  
10 would be his friend again"?

11 A. Yes.

12 Q. What exactly was Dr. Kao supposed to do to  
13 behave decently so that Tristan Needham would be his  
14 friend again?

15 A. Not look at him angrily; not yell at meetings.

16 Q. Anything else?

17 A. Not glare at him; not have quivering lips and  
18 act intimidating and scary to him.

19 Q. Did anyone ask Dr. Kao to stop yelling at  
20 meetings?

21 A. Yes. I don't know the specific dates, but  
22 people on occasions when I talked to him about this,  
23 they said they would try to talk to him and try to get  
24 him to stop yelling, but he would talk over them or yell  
25 over them.

1 Q. At the meetings?

2 A. Yes.

3 Q. We'll go over the meetings and see if that's  
4 what you report.

5 Now, take a look at the last page of  
6 Exhibit 56, if you would.

7 Top of that refers to an incident with Elliot  
8 where Tristan Needham said he was yelling but maybe just  
9 trying to figure out how to file a grievance.

10 A. M-hm.

11 Q. Does that refer to a conversation with Elliot  
12 Nieman, the president of the faculty union?

13 A. It wouldn't have been my conversation. It  
14 would have been Tristan talking about John yelling at  
15 Elliot.

16 Q. All right. And did the language "maybe just  
17 trying to figure out how to file a grievance," is that  
18 something Tristan Needham said, or is that something  
19 that you added?

20 MR. VARTAIN: That question is vague.

21 MR. KATZENBACH: Q. Just looking at the  
22 phrase, "but maybe just trying to figure out how to file  
23 grievance," do you see that language?

24 A. Yes.

25 Q. All right. Is that something that

1 Professor Needham said, or is that something that you  
2 added?

3 A. It's been four years, but generally, I would  
4 have written down what he said. It would have been what  
5 he said, not my recollection.

6 Q. All right. That's fine.

7 Now, going down the pages, I would like to  
8 direct your attention to the phrase where you write,  
9 "Anybody sees friendly."

10 Do you see that?

11 A. Yes.

12 Q. In that context, you write Bob Wolf. Is that  
13 what Tristan Needham told you?

14 A. That would be my recollection.

15 Q. All right. Any time did you contact -- after  
16 this interview with Tristan Needham, did you contact Bob  
17 Wolf to discuss his relationship with Dr. Kao?

18 A. No. As I said, I went through the Associate  
19 Dean, and the Associate Dean had told me that Bob Wolf  
20 would not have been comfortable talking to him.

21 Q. Well, the Associate Dean you're talking about  
22 is Brandon Brown?

23 A. Yes.

24 Q. You specifically asked Brandon Brown if he  
25 would speak about using Dr. Wolf to speak to

1 Professor Kao?

2 A. I don't know that I specifically brought it up,  
3 but it was in the conversation was there anyone to talk  
4 to him, and it was no.

5 Q. Did Bob Wolf's name specifically mentioned?

6 A. I don't -- I don't recollect.

7 Q. All right. So would it be accurate to say --  
8 but it is accurate to say no one from human resources  
9 interviewed Bob Wolf?

10 A. That's correct. Yes.

11 Q. And there are no notes of any interview with  
12 Bob Wolf?

13 A. That's correct.

14 Q. And there's no notes of any interview actually  
15 with anyone other than Professor Needham,  
16 Professor Zeitz and Professor Pacheco?

17 MR. VARTAIN: Objection. The question is  
18 vague. Do you mean in the math department?

19 MR. KATZENBACH: Q. In the math department.  
20 Let's limit it to that.

21 A. Yes. In the math department, plus the two  
22 Deans. So five people. Then actually, even though I  
23 didn't interview Professor Yeung, Professor Yeung did  
24 contact me later on, and you have those notes.

25 Q. That was in -- I'm sorry. That was in 2009

1 that you spoke to Professor Yeung; isn't it?

2 A. I don't believe so, but I would go back and be  
3 happy to look.

4 Q. Did that concern an issue where Dr. Kao was  
5 asking Professor Yeung about the number of applicants in  
6 the search?

7 A. That was one of the times, yes.

8 Q. When was the other time?

9 A. Do you want me to take time and look through it  
10 now?

11 Q. No. I just want your recollection now. I  
12 don't want you to look at the notes or potential  
13 exhibits. It may mean we don't have those notes.

14 MR. VARTAIN: Objection. Move to strike.

15 MR. KATZENBACH: Q. I just want you to answer  
16 the question.

17 THE COURT: Motion to strike is granted. All  
18 the words following "because" are stricken.

19 MR. KATZENBACH: Okay.

20 MR. VARTAIN: I would like to ask the Court to  
21 instruct the attorney not to disparage the Witness.

22 THE COURT: All right. Mr. Katzenbach, don't  
23 disparage the Witness.

24 MR. KATZENBACH: I will not disparage the  
25 Witness, your Honor.



1 Q. But to return to my question: Do you recall  
2 from your memory a meeting with Dr. Yeung other than a  
3 discussion of a time when Dr. Kao was asking Dr. Yeung  
4 for the number of applicants in the search?

5 A. It wasn't a meeting. My recollection is of a  
6 conversation that happened in May or June, I believe,  
7 separate from when Dr. Yeung was concerned in January of  
8 the following year, sometime in the following year.

9 Q. All right. Just to finish up the last page of  
10 our Exhibit 56, other than the reference to Elliot, is  
11 there any other reference to any other incident,  
12 specific incident involving Professor Needham?

13 MR. VARTAIN: Objection. Vague. You mean on  
14 that page?

15 MR. KATZENBACH: On that page.

16 THE WITNESS: He talked about and he used this  
17 word "maniacal chuckle."

18 MR. KATZENBACH: Q. Did he say when that  
19 maniacal chuckle occurred?

20 A. I don't remember specifically from this meeting  
21 because that was something that was similar to what  
22 other people said. So I don't remember.

23 Q. Nothing about the circumstances under which  
24 this maniacal chuckle took place?

25 A. Just that it would have been odd.

1 Q. No dates, times, places?

2 A. No.

3 Q. Nothing about the circumstances?

4 A. Just that it would have been not something one  
5 would normally expect in the circumstances.

6 Q. But what circumstances are described in your  
7 notes concerning this maniacal chuckle?

8 A. That goes along with I say -- I wrote down what  
9 he said which is, "It's getting worse. Things are  
10 getting more frequent. Smaller things are setting him  
11 off. His anger at me feels constant. Maniacal  
12 chuckle."

13 Q. What smaller -- is there anything under the  
14 smaller things that are setting him off, is there  
15 anything Dr. Needham said to you specifically as to what  
16 things he felt Dr. Kao was being set off by on that  
17 page?

18 A. Perhaps the note above it that says with Elliot  
19 when he was yelling. So that could be considered a  
20 smaller thing or if indeed he was trying to figure out  
21 how to file a grievance, that would certainly be  
22 something one normally wouldn't yell about.

23 Q. All right. Other than that perhaps reference  
24 to the conversation with Dr. Neiman, anything else that  
25 you recall, anything on this page that indicates what

1 smaller things Dr. Needham was referring to?

2 A. Yes, there is. The bottom half of that page,  
3 it says, "John felt denied access to teaching a course.  
4 Seemed odd. Tristan brought it to him and Bob there.  
5 He was yelling at both of them."

6 Q. And Bob refers to Bob Wolf?

7 A. That would be my recollection. It says, "It  
8 would be great to have him back to normal." One of the  
9 earlier things it said, "We need your help. Please help  
10 us." I put an exclamation point, which I don't use a  
11 whole lot of, which meant to me to show me from my notes  
12 really how disturbed by all this that this faculty  
13 member was.

14 Q. Now, let's go back to this. I want to be more  
15 specific. When you said get "back to normal," let's  
16 just go back. All right.

17 Is it your understanding that Tristan Needham  
18 was willing to have Dr. Kao continue in the department?

19 MR. VARTAIN: Objection. Arguing and vague.

20 MR. KATZENBACH: Let me rephrase that, your  
21 Honor. I'll be happy to do that.

22 Q. When you write down the phrase "great to have  
23 back to normal," do you see that on page, the last page  
24 of Exhibit 56?

25 A. Yes.

1 Q. Did you understand that Tristan Needham -- did  
2 you have any understanding of what Tristan Needham meant  
3 by that?

4 A. My understanding would have been what we all  
5 wanted, which was Dr. Kao to be able to function well.

6 Q. There wasn't any problem with his teaching; was  
7 there?

8 A. I wouldn't necessarily say that. He was  
9 scaring everyone, such that just him being on campus  
10 meant that the rest of the campus, some of the rest of  
11 the campus couldn't go on.

12 Q. Really? In what way did the campus not  
13 function when he was on campus?

14 A. I had faculty members from his department call  
15 me and say they wanted to work from home because they  
16 were so afraid to be near him.

17 Q. Really?

18 A. Yes.

19 Q. Really?

20 A. Yes.

21 MR. VARTAIN: Objection.

22 MR. KATZENBACH: I'm sorry. You're right.

23 MR. VARTAIN: I would like another instruction  
24 to Counsel to stop disparaging the Witness.

25 THE COURT: "Really" is stricken. The Jury is

1 admonished to disregard it. Mr. Katzenbach is reminded.

2 MR. KATZENBACH: Thank you.

3 Q. You had telephone calls from the faculty. Was  
4 that Tristan Needham? Did he call you and say that?

5 A. I don't know which one called me on that.

6 Q. Today you can't tell -- can you tell the Jury  
7 here today which faculty members called you and told you  
8 that they had to go work from home because they were so  
9 frightened of Dr. Kao?

10 A. I can't say for sure. All three of the faculty  
11 had pretty much the same message that they were talking  
12 to me about. And Dr. Yeung, when I eventually did hear  
13 from him, he was saying the same consistent kinds of  
14 things. I can't remember which one of those four said  
15 that -- or ones. I would be happy to go through notes  
16 during a break if you would like.

17 Q. Sure. That would be fine. Thank you very much  
18 for the offer. That would be appreciated.

19 But the question I'm having right as you sit  
20 here right now you can't recall the names of the person  
21 of the faculty member that told you that?

22 MR. VARTAIN: Objection. You've asked that  
23 three times. Asked and answered.

24 THE COURT: Sustained.

25 MR. KATZENBACH: Q. Now, I would like to go

1 back now, if you would, and take a look at Exhibit 61.

2 (Plaintiff's Exhibit No. 61 was  
3 marked for identification.)

4 MR. KATZENBACH: Q. Can you identify what  
5 Exhibit 61 is?

6 A. Sure. These are notes from the meeting I had  
7 with Professor Paul Zeitz.

8 Q. And was that meeting on May 1st of 2008?

9 A. Yes.

10 Q. And was this the first meeting that you had  
11 with Professor Paul Zeitz concerning John Kao?

12 A. That would be my recollection, yes.

13 MR. KATZENBACH: All right, your Honor. I  
14 would like to move Exhibit 61 into evidence with the  
15 same limitations.

16 THE COURT: Any objection?

17 MR. VARTAIN: 155 through?

18 MR. KATZENBACH: I have 155 through 167.

19 MR. VARTAIN: No objection.

20 THE COURT: Received for the limited purpose.

21 (Plaintiff's Exhibit No. 61 was  
22 marked for identification and  
23 received in evidence.)

24 MR. KATZENBACH: All right.

25 Q. Now, taking a look at the first page of

1 Exhibit 61, if you would --

2 A. Yes.

3 Q. -- you have a section described, "Events"; is  
4 that right?

5 A. I'm sorry. Could you say it again?

6 Q. You have a section that's described, "Events"?

7 A. Yes. It says "Events."

8 Q. And in these -- in this meeting, you began --  
9 you looked at the event you were seeking to find the  
10 events that Dr. Zeitz would identify that concerned him  
11 about Dr. Kao; is that correct?

12 MR. VARTAIN: Objection. Ambiguous question.

13 THE COURT: Sustained.

14 MR. KATZENBACH: Q. What were the events you  
15 were trying to record in your interview with  
16 Professor Zeitz?

17 A. I would have been following the same format  
18 that I followed with the first interview. So likely, I  
19 had gotten a little bit less labor intensive by the  
20 second time and had the questions in a separate set so I  
21 didn't have to rewrite them every time. So...

22 Q. Okay. So the first event labeled No. 1 --

23 A. Yes.

24 Q. -- do you see that?

25 A. Yes.

1 Q. So the first event that you wrote down in your  
2 conversation with Professor Zeitz involved the --  
3 involved the job search; is that correct?

4 A. It looks like it involved an August of '07 job  
5 search, yes.

6 Q. And that says, "DZ appointed chair in October  
7 of '07"?

8 A. Yes.

9 Q. All right. And does this concern the search in  
10 -- that was going on in 2007 and 2008?

11 A. That would be my recollection.

12 Q. All right. And it refers to -- the first item  
13 under the "Two different things" column is, "No print  
14 ad."

15 A. Yes. It says, "No print ad," slash, "math  
16 journal, consensus by the committee." So actually, on  
17 the line above when you said Paul Zeitz appointed chair,  
18 that may have been chair of the search committee, not  
19 necessarily the chair of the department.

20 Q. I'm sorry. I think people probably understand  
21 that now, but it's a good clarification. I appreciate  
22 that.

23 THE COURT: Ladies and gentlemen, remember the  
24 admonition. Do not form or express any opinion on this  
25 case until it's finally submitted to you for your



1 decision. Do not discuss among yourselves or with  
2 others until that time.

3 Please be back in your places at 3:40 according  
4 to the courtroom clock.

5 (Recess taken: 3:30 p.m. - 3:43 p.m.)

6 THE COURT: Jurors and Alternates are all  
7 present. Counsel for all sides are present. Plaintiff  
8 is personally present. Ms. Peugh-Wade is on the stand.  
9 Sorry to keep you waiting.

10 Mr. Katzenbach, you may continue your inquiry.

11 MR. KATZENBACH: Thank you, your Honor.

12 Q. Just now, going back to Exhibit 61, the first  
13 page; right?

14 A. Yes.

15 Q. The first entry on this exhibit concerns the  
16 2008 faculty search that was going on in the mathematics  
17 department; is that right?

18 A. Are you talking about the second half of the  
19 page?

20 Q. Yes, under the "Event." The first listing  
21 listed under "Events" is the faculty job search?

22 A. Yes.

23 Q. All right. And that job search -- thank you.

24 Now, take a look at the next page, taking a  
25 look at the next page of Exhibit 61, referring to the

1 first reference there concerns when Stephen Yeung was  
2 hired; right?

3 A. Yes.

4 Q. Now, see if I can get this up on the machine.  
5 Probably not. Life is tough.

6 Does anything in that first part refer to  
7 anything that John Kao did?

8 A. Yes. Professor Zeitz was recounting to me  
9 two years ago when they hired Stephen Yeung, who was  
10 Asian, that they had three finalists for the position:  
11 Two Chinese males, one white female.

12 Q. And your notes reflect Dr. Zeitz telling you  
13 that John Kao felt the woman was best; he used objective  
14 number scheme, needed diversity, women?

15 A. Yes. That would be what my notes say, yes.

16 Q. There's nothing in connection with this hiring  
17 of Steve Yeung which indicates Dr. Kao shouted during  
18 any meetings involving the hiring of Dr. Yeung?

19 A. No. Not that my notes would show, no.

20 Q. There's nothing in your notes that reflect  
21 Professor Zeitz indicated that Dr. Kao did anything  
22 improper in connection with the hiring of Dr. Yeung?

23 A. No. But I think the relevance is that it  
24 continues from page 1 wherein Dr. Zeitz was talking  
25 about the current '07/'08 search where Dr. Kao was

1 concerned about that there was no print ad, et cetera,  
2 and that he was also saying two years ago, he was  
3 concerned. And then right below that, it talks about  
4 Dr. Kao's concern of the 2001 hire of Dr. Stillwell.

5 Q. All right. So then we also have on page 2, in  
6 addition to Dr. Kao's concern about he preferred the  
7 woman candidate over Dr. Yeung in that search, Dr. Zeitz  
8 also identified in 2001 John felt that the hiring -- the  
9 hiring of Stillwell was improper; is that right?

10 A. Yes. But whether he felt -- whether he was  
11 saying that in 2001 or that he was saying he continued  
12 to obsess about something that happened in 2001.

13 Q. Well, what he says in your notes reflect that,  
14 "John felt improper not national search, and he was  
15 against the hiring." Isn't that right?

16 A. I don't know that it says it was against the  
17 hiring. That it went against rule and protocol, which  
18 was the example I think that we talked about earlier of  
19 things that were told to me that Dr. Kao didn't like is  
20 when things went against normal rule and protocol.

21 Q. Okay. That's fair enough.

22 But it doesn't indicate that Dr. Kao's  
23 opposition to hiring Professor Stillwell involved  
24 yelling like that; did it?

25 A. Not on this page.

1 Q. Not on this page.

2 Now, take a look at the next entry. It refers  
3 to 1/2/08.

4 A. Yes.

5 Q. Do you see that?

6 A. Yes.

7 Q. It talks about, "The committee recommends to  
8 Dean, committee elects chair." Do you see that?

9 A. Yes.

10 Q. It goes on, "John expressed interest in serving  
11 but withdrew interest; therefore, not on committee."

12 A. Yes.

13 Q. Is there anything on the remainder of this page  
14 that says that John Kao yelled or did anything else  
15 improper in connection with those events described on  
16 this page of Exhibit 61?

17 A. Not on this page.

18 Q. All right. Now, on the next page, it describes  
19 a meeting, an interaction with Professor Zeitz on about  
20 -- Dr. Zeitz says about the 2nd of January; is that  
21 right? '08?

22 A. Yes.

23 Q. And this interaction also involved the 2008  
24 search; is that right?

25 A. Yes.

1 Q. In other words, this was where Dr. Kao came to  
2 Dr. Zeitz and asked Dr. Zeitz about the search, and  
3 Dr. Zeitz said that John Kao suddenly got angry?

4 A. Yes.

5 Q. This, again -- I would like to look down last  
6 entry on this one. It says, "Paul felt terrible and  
7 lose sleep"; is that right? Is that what you wrote  
8 down?

9 A. Yes.

10 Q. Now, it doesn't say here anything as  
11 Professor Zeitz is relating to you about this incident,  
12 it doesn't say anything about Professor Zeitz feeling  
13 frightened about John in connection with this  
14 conversation that you write that he's describing?

15 MR. VARTAIN: Objection. Ambiguous. Sorry.

16 THE WITNESS: Sorry.

17 MR. KATZENBACH: Q. Taking a look at this page  
18 and the notes you made about this conversation, right,  
19 does it say in this section that Paul Zeitz was fearful  
20 of John in this conversation?

21 A. Yes.

22 Q. Where does it say that?

23 A. "Made Paul feel terrible and lose sleep."

24 Q. "Made Paul feel terrible." You interpret --  
25 nevermind.

1 A. Well --

2 Q. Did he use the word fear in this section?

3 MR. VARTAIN: I'm going to object and ask  
4 Counsel to let the Witness, once again, finish her  
5 answer.

6 THE COURT: Overruled.

7 THE WITNESS: All of the information in between  
8 when he said that he "asked about search" and  
9 "suddenly," I underlined it because that would have  
10 meant that was an important part of this "got angry in  
11 the office." "He yelled," in parenthesis, "overheard  
12 next door," so heard next door, I guess that's  
13 Christina is next door. "His face was quivering, was  
14 extra stiff. He wouldn't listen to Paul. He repeated,  
15 'Didn't run the print ad. Didn't run the print ad,'"  
16 this is consistent with the other people that I talked  
17 to, all of these things.

18 And then Paul said he seemed to feel personally  
19 wounded and betrayed by the search. That, to me,  
20 expresses some fear and the fact that he loses sleep  
21 over it.

22 MR. KATZENBACH: Q. All right. The actual  
23 words that you recorded were "made Paul feel terrible";  
24 right?

25 A. Yes.

1 Q. Now, the next incident, you had not  
2 interviewed -- sorry.

3 Now, you hadn't interviewed Professor Zeitz  
4 about this incident prior to the interview on May 1st?

5 A. That would be right.

6 Q. That would be correct?

7 A. That would be correct.

8 Q. And following this interview with  
9 Professor Zeitz, did you interview Christine Liu, the  
10 department administrative assistant?

11 A. No, I did not.

12 Q. Did anyone interview Ms. Liu to follow up on  
13 this incident with Professor Zeitz?

14 A. No. As I said, when we do these kinds of  
15 things, I try to talk to enough people to find out if  
16 indeed what I think is going on is going on. I try not  
17 to interview anymore people than I feel like I have to  
18 because I don't want -- I don't want other people to be  
19 involved if they don't need to be.

20 I don't need to ask everybody about Dr. Kao.  
21 That makes his things less private. All through this I  
22 tried to keep things as confidential and private for  
23 Dr. Kao as I could. So I'm sorry. That was a long  
24 answer to a short question, but -- and also, I generally  
25 didn't interview lower ranked people like Christina, who

1 had been a program assistant or Professor Yeung because  
2 he wasn't tenured because often people that are in a  
3 lower kind of organizational structure feel powered --  
4 feel pressured to say something one way or the other.  
5 So I tried not to do that.

6 Q. And you also didn't interview Dr. Kao?

7 MR. VARTAIN: Objection.

8 THE WITNESS: I talked to Dr. Kao on June  
9 the 18th.

10 MR. KATZENBACH: Q. Thank you. We'll get to  
11 that.

12 THE COURT: There was an objection which should  
13 turn into a motion to strike.

14 MR. VARTAIN: It's not going to turn into  
15 anything because everybody is ahead of me today. So I'm  
16 going to withdraw the objection.

17 THE COURT: Okay.

18 MR. VARTAIN: I'm going to soon withdraw as  
19 counsel if I am becoming a potted plant.

20 MR. KATZENBACH: Is that a promise?

21 MR. VARTAIN: It's a threat. It's a  
22 nonverbal --

23 MR. KATZENBACH: Both of those.

24 MR. VARTAIN: I'm only joking. If you were  
25 going to wear me down, Chris, you would have worn me



1 down years ago.

2 THE COURT: Okay. Enough colloquy.

3 MR. VARTAIN: Sorry.

4 MR. KATZENBACH: Q. The next incident that's  
5 recorded in Exhibit 61 goes back to the, "Mid-'90's,  
6 outburst with Cidas"; is that right?

7 A. You're still on page 157; right?

8 Q. Same.

9 A. Yes.

10 Q. Just one line there, "Mid-'90's, outburst with  
11 Cidas."

12 A. Yes.

13 Q. And then after that, we now go back to the  
14 search issues concerning the search.

15 A. Yes.

16 Q. All right. And this appears -- the next note  
17 appears to be a reference to the search committee  
18 meeting in February of 2008.

19 A. Yes.

20 Q. Okay. The notes reflect that Dr. Kao said  
21 search was illegal?

22 A. Yes. He was upset in a department meeting.  
23 "He raised his voice, said that the lack of a print ad  
24 made it discriminatory against ethnic" --

25 Q. Is that "minorities"?

1           A. Yeah, "ethnic minorities could prove  
2 statistically with P values."

3           Q. All right. The language that Dr. Zeitz used as  
4 to Dr. Kao's tone of voice during that was he said  
5 "voice raised"; is that right?

6           A. Yes.

7           Q. Thank you.

8           A. He also said that Dr. Kao said he had been up  
9 all night calculating P values.

10          Q. And he actually presented a paper on that;  
11 didn't he?

12          A. I don't know if presented, but yes, he had a  
13 paper on it.

14          Q. He distributed it? It's your understanding he  
15 distributed this paper at the meeting?

16          A. Okay.

17          Q. Don't accept anything I say as true.

18          A. Okay.

19          Q. Make sure you know you're agreeing with what I  
20 say. Was it your understanding he distributed a paper  
21 containing P values?

22          A. I don't think I knew if he distributed it or if  
23 he just talked about it and had, had copies. So...

24          Q. Okay. That's fine. But he had some piece of  
25 paper he conducted some calculations on?

1 A. Yes.

2 Q. Okay. Thank you.

3 Going on to the next page, we now have -- the  
4 next page of exhibit -- do you have that in front of  
5 you?

6 A. Yes.

7 Q. That refers to the next incident, the next  
8 incident that Dr. Zeitz described to you. That was an  
9 incident around 2001; wasn't it?

10 A. That was the date that Paul Zeitz put on it,  
11 yes.

12 Q. Okay. So taking a look at that incident, this  
13 involves CCAC; does it not?

14 A. Yes.

15 Q. All right. And the remainder of this page down  
16 through almost to the -- just above the last line, that  
17 all concerns the CCAC issue; is that right?

18 A. Well, it goes on to say, "Since 2001," which  
19 would be the CCAC issue, "JK appears" -- "felt that his  
20 job was at risk, that there was a blemish on his record  
21 and that Paul didn't protect him."

22 This was about a letter that actually wasn't  
23 written to or even about Professor Kao doing anything  
24 wrong. It was about Professor Zeitz doing something  
25 wrong. And it just happened to involve Professor Kao.

1 Q. The letter, as you understood it from  
2 Professor Zeitz's discussion, really didn't accuse  
3 Dr. Kao of doing anything wrong?

4 A. Correct.

5 Q. In fact, was Dr. Kao mentioned in that letter  
6 as you understood it?

7 A. As I understood it, he was.

8 Q. In what connection?

9 A. He was mentioned in connection to -- John was  
10 not going to teach a class, again, with the CCAC, and  
11 Paul supported that. And the Associate Dean was telling  
12 Paul you can't make that kind of decision.

13 Q. Right. So there was no criticism of John Kao  
14 in this letter as you understood it?

15 A. Definitely not. But the point here with this  
16 person and the other people that brought it up is there  
17 was no criticism of Dr. Kao, but Dr. Kao was obsessed  
18 with it and thought that there was and kept bringing it  
19 up over and over again in complaints, you know. Brought  
20 up the 2000 grievance over it, had to get a formal  
21 letter of apology and brought it over and over in all  
22 the complaints I saw.

23 Q. Have you ever seen the letter that's being  
24 referred to?

25 A. Not that I remember.

1 Q. Take a look at Exhibit 3. It's a big binder.  
2 It's one of the big exhibits.

3 MR. VARTAIN: Chris, do we really need to go  
4 back over this?

5 MR. KATZENBACH: I want to see if she has seen  
6 that letter.

7 MR. VARTAIN: Asked and answered objection.  
8 She said she hadn't. My objection, your Honor, is  
9 cumulative. 352 Evidence Code.

10 THE COURT: What are you objecting to?

11 MR. VARTAIN: The question has she seen the  
12 letter, which she already answered no, she hadn't.

13 THE COURT: So objection, asked and answered?

14 MR. VARTAIN: Yes. And 352, which means  
15 cumulative over and over again.

16 THE COURT: Overruled.

17 MR. KATZENBACH: Q. Taking a look at a  
18 document marked as SD-9 of Exhibit 3.

19 Your Honor, if I might approach the Witness and  
20 locate that for her?

21 THE COURT: Sure.

22 MR. KATZENBACH: Thank you.

23 Q. Taking a look now at a document which is part  
24 of Exhibit 3 and contains the page number, the  
25 identification number SD-9, have you seen that letter

1 before?

2 A. Not to my recollection.

3 Q. Is this the letter -- strike that.

4 If you've never seen it before, you can't  
5 answer any questions.

6 Do you recall reading Dr. Kao's formal  
7 complaint that he filed in 2006?

8 A. Yes. That's why it's somewhat familiar, yeah.

9 Q. Do you recall seeing this letter when you read  
10 his formal complaint?

11 A. I believe I may have seen it there.

12 Q. And that formal complaint also involved the  
13 same issue concerning what happened at CCAC?

14 A. The two thousand --

15 Q. Six?

16 A. Six. Yes, it did.

17 Q. All right. And that was -- the issue that  
18 Dr. Kao was raising in his 2006 complaint included,  
19 among other things, his feeling that this letter  
20 unfairly criticized him?

21 A. Yes.

22 Q. And isn't it a fact this letter does, in fact,  
23 criticize Dr. Kao's performance?

24 A. Can I have a few minutes to read it?

25 Q. Of course you can.

1 MR. VARTAIN: I'm going to object. Undue  
2 consumption of time, 352.

3 THE COURT: Overruled.

4 THE WITNESS: (Reviewing document.)  
5 Could you ask it again, please?

6 MR. KATZENBACH: Q. Does this letter criticize  
7 John Kao's actions?

8 A. Actually, no. I would say it starts off by  
9 saying -- thanking John for all the work he put in it,  
10 and the class was great and had been especially tailored  
11 to the students at CCAC. The criticism I think went  
12 more to the chair of the department because the chair is  
13 the one that makes those kinds of decisions.

14 Q. First, it refers to private discussions between  
15 John Kao and John Loomis at CCAC.

16 A. Yes.

17 Q. Right. And it directs John Kao, "Neither  
18 John Kao nor you are empowered to negotiate with CCAC on  
19 behalf of USF."

20 A. That's correct. But no one would think that a  
21 faculty member would negotiate contracts with CCAC. So  
22 it would be the chair of the department that might have  
23 that. So...

24 Q. But it refers to John Kao; doesn't it?

25 A. Yes, it does.

1 Q. Now, the last line on this page of Exhibit 61  
2 numbered 158, it says, "Raised voice 2x."

3 A. Yes.

4 Q. What did that refer to?

5 A. That Paul would have been recounting that  
6 Dr. Kao raised his voice two times.

7 Q. Okay. Thank you.

8 Let's go to the next page of Exhibit 61.

9 Now, does this page describe anything that  
10 Dr. Kao did that was in any sense concerning to you.  
11 I'm sorry. Let me rephrase that.

12 The first part refers to a school of education  
13 dual degree program; is that correct?

14 A. Yes.

15 Q. Is there anything in there that refers to any  
16 action -- anything in that paragraph that refers to  
17 anything that John Kao did in regards to that?

18 A. I don't recall everything from these meetings,  
19 but the notes say this was an extreme measure to ensure  
20 protocol met. And then it says, "Mask show his teeth."

21 Q. Maybe he had some sort of facial expression.  
22 Is that what you're trying to do? That refers to an  
23 incident in about 2001?

24 A. That's what it appears to be.

25 Q. All right. So now the next incident refers to



1 2003.

2 A. It has squiggles by it. That would have meant  
3 approximately. Same thing with 2001, when I put  
4 squiggles, that means around.

5 Q. Thank you.

6 This is about 2003. This refers to a time when  
7 Dr. Kao took Prozac leading him to experience an  
8 incident of hallucinations; is that correct?

9 A. Yes, and that he wouldn't be able to be on  
10 campus to teach.

11 Q. All right. And what did Dr. Kao do that was of  
12 concern to you concerning this incident, this event?

13 I'm sorry. What did he do that concerned --  
14 that Dr. Zeitz told you about that was concerning?

15 MR. VARTAIN: Objection. Lack of foundation  
16 that Dr. Zeitz was saying this as a manner of concern,  
17 no testimony.

18 MR. KATZENBACH: All right. I will withdraw  
19 the question. Let me ask directly.

20 Q. Was this an incident that Dr. Zeitz was  
21 concerned about, or was this just history?

22 A. I don't think he was concerned about the fact  
23 that Dr. Kao had been ill with depression. But more the  
24 unusualness -- and I would have to see if it was him or  
25 someone else because they all talk pretty much about the

1 same thing that in this when he had to stay out because  
2 of his adverse reaction to Prozac, Dr. Kao actually  
3 distributed copies of the doctor's note that said that  
4 to, I believe, the entire math department, which is a  
5 little unusual.

6 Q. All right. So your understanding is that  
7 Dr. Kao distributed a doctor's note to the entire  
8 department to explain why he wasn't at work that  
9 semester?

10 A. Or part of the -- for a period of time, yes.

11 Q. Okay. Thank you.

12 Now, take a look at the next page of  
13 Exhibit 61. Now, this page, does this refer to any  
14 specific incident?

15 A. It talks about a lot of things. Not specific  
16 incidences, but things that had changed over time.

17 Q. All right. So let's take a look at that.

18 Are you referring to when he returned from  
19 Princeton, that he started wearing suits?

20 A. That was one of the things, yes.

21 Q. And again, another reference to CCAC?

22 A. I haven't gotten that far yet. Oh, yes.

23 Q. I'm sorry. And says, "His e-mails became more  
24 formal."

25 A. Yes. And then also I go down to say, "In

1 department meetings, he is sometimes emotional."

2 Q. So it says "issues at temper," is that what it  
3 says?

4 A. "Of."

5 Q. "Issues of temper"?

6 A. Yes.

7 Q. Says, "Sometimes emotional at department  
8 meetings"?

9 A. M-hm. "John upset, yelled". And then it says,  
10 "Paul was concil," which would have been conciliatory,  
11 "and asked for respect."

12 Q. Is that, again, is it your understanding that  
13 that meeting referred to, again, the department meeting  
14 involving the search?

15 A. No, because it says, "Sometimes emotional in  
16 department meetings." So I would take that to mean  
17 department meetings, not just any meeting.

18 Q. All right. But the comment about "asked for  
19 respect and the reply I'll treat with" -- "I'll treat,"  
20 something, "respect they treat me"?

21 A. Yes.

22 Q. That refers to a particular meeting; right?

23 A. Or a particular, yes.

24 Q. You understand that meeting was, again, the  
25 meeting with the search committee where Dr. Kao

1 expressed his concerns about discrimination?

2 A. Yes.

3 Q. I would like to direct your attention to the  
4 language that now appears immediately following that.

5 Do you see the language it says, "He feels  
6 everyone hates him. We do, because we are afraid he's  
7 collecting data for lawsuit."

8 Is that something that Dr. Zeitz told you?

9 A. And then also it goes on with three dots which  
10 to me means therefore socially isolated.

11 Q. Okay.

12 A. I think what he was saying there was not --

13 Q. I'm sorry. There was no question.

14 A. Okay.

15 MR. VARTAIN: You don't want her to answer,  
16 Counsel? You don't want her to answer that?

17 MR. KATZENBACH: No. I want her to answer -- I  
18 first want her to establish what was said.

19 MR. VARTAIN: You cut her off again.

20 I would like to ask the Court to direct Counsel  
21 to let the Witness finish her answer.

22 THE COURT: Ms. Peugh-Wade, I lost my thought.  
23 Oh, yes. Did you finish your answer?

24 THE WITNESS: No.

25 THE COURT: Do so.

1 THE WITNESS: Okay. You asked me to read  
2 something. You only asked me to read part of it. My  
3 point was just part of it was somewhat out of context in  
4 that I don't believe it was just that folks were afraid  
5 of a lawsuit, but that they were afraid of how obsessing  
6 he was over this kind of lawsuit and all the other  
7 problems that had happened in the past that were all a  
8 large part of what brought them to be so afraid now that  
9 he might not be emotionally stable.

10 MR. KATZENBACH: Q. All right. Thank you.

11 Let me just go back so that I understand.

12 Did Paul Zeitz use the language "he feels  
13 everyone hates us"?

14 A. No.

15 Q. Did he use those words?

16 A. No.

17 Q. Did he use the word "hates"? Did he say --  
18 sorry. Did he say, "He feels everyone hates him"?

19 A. Something to that effect, yes.

20 Q. When you wrote this down, were you trying to  
21 write down what Dr. Zeitz was actually saying?

22 A. Yes.

23 Q. So did Dr. Zeitz use the phrase, "He feels  
24 everyone hates him."

25 A. Or something very close to it, yes.

1 Q. And did Dr. Zeitz then say, "We do"?

2 A. Yes, "because we were afraid."

3 Q. And then did Dr. Zeitz use the phrase, "because  
4 we are afraid he is collecting data for a lawsuit"?

5 A. That would be my recollection, yes.

6 Q. And did Dr. Zeitz use the phrase, "because of  
7 that, he's socially isolated"?

8 A. Yes.

9 Q. Do you understand who Dr. Zeitz was referring  
10 to when he used the phrase "everyone hates him" and "we  
11 do"?

12 A. Yes. I believe so.

13 Q. Who was he referring to?

14 A. He was referring to Dr. Kao. This was page 5  
15 of a conversation where I was asking him to recount all  
16 the reasons why he was so afraid of someone. He, at  
17 that point, he used the word and said, "We hate him." I  
18 don't think it was necessarily real hate, but it was  
19 fear.

20 Q. Thank you.

21 When he used the phrase "We do," who was the  
22 "we" Dr. Zeitz was referring to?

23 A. Since I didn't ask him specifically, I took it  
24 to me he and other people in the math department.

25 Q. Okay. Which other people did you take him to

1 be referring to?

2 A. I didn't particularly think about specifics.

3 Q. Thank you.

4 Now, directing your attention to the last  
5 notation you have on this exhibit, did Dr. Zeitz tell  
6 you, "Every day I eat with Steve Y, Stephen Yeung, I am  
7 a mentor and friend"?

8 A. That would be my recollection, yes.

9 Q. Thank you.

10 Now, would you turn to the next page of your  
11 notes. This is a page that's marked 3A at the top.

12 A. Yes.

13 Q. Thank you. Can you explain to me -- sorry.

14 These notes also involve the 2008 search?

15 A. After I have long meetings, I try to go back  
16 and make sure all my notes make sense. And sometimes I  
17 run out of room or I end up mislabeling. So 3A would  
18 have been after 3.

19 I'm trying to remember since it's not in the  
20 right order, trying to remember what it was about. It  
21 says, "Six semifinalists, four women."

22 Could you repeat your question, please?

23 Q. These notes refer to the 2008 search?

24 A. I don't remember.

25 Q. Okay. That's fine.

1           Take a look at the next page of your notes,  
2 that's a page labeled 5A?

3           A. Yes.

4           Q. That's correct?

5           A. Yes. I'm sorry.

6           Q. Taking a look at the bottom, just so it's  
7 clear, the USF numbers are all consecutive for this  
8 exhibit; is that correct?

9           A. Yes. US -- I'm sorry. The numbers at the  
10 bottom are consecutive. It's not necessarily in the  
11 order that I put them in.

12          Q. Okay. But the USF numbers are indeed  
13 consecutive?

14          A. Yes.

15          Q. Okay. Just to keep a focus on this page so we  
16 can keep a focus on this page.

17                 This refers to Math Teas?

18          A. Yes.

19          Q. Okay. Looking at the second paragraph there,  
20 you see the language, "John converses" --

21          A. M-hm.

22          Q. -- "freely." Can you read the rest of that?

23          A. Sure. It describes what a Math Tea was. I  
24 didn't know what a Math Tea was. "Social structure  
25 Wednesday afternoons for professors and math majors to



1 get together and hang out and tell math jokes and have  
2 tea and cake." It says, "John converses freely then  
3 with students and small talk. Talks, jokes with Tristan  
4 and Paul."

5 Q. And "Tristan" refers to Tristan Needham?

6 A. Yes.

7 Q. And "Paul" refers to Paul Zeitz?

8 A. Yes.

9 Q. This is something that Paul Zeitz told you?

10 A. Yes. Again, this was an example of when they  
11 felt that he could be professional and nonthreatening  
12 was in these structured events. And particularly, the  
13 impression I got also was that students were there.  
14 That was a more comfortable setting, it seemed.

15 Q. I'm just trying to focus on the words that  
16 Dr. Zeitz used. So if we could just --

17 A. Okay.

18 Q. -- I just want to clarify that.

19 Dr. Zeitz said that John engaged in small talk  
20 and jokes with Tristan and Paul at Math Teas?

21 A. Yes.

22 Q. Thank you.

23 Now, the next thing you have on here is, "Worry  
24 about John going postal." Do you see that?

25 A. Yes, I do.

1 Q. "And brushing up against me." I guess that  
2 means Paul Zeitz in the hall and bathroom?

3 A. Yes.

4 Q. "Playing games with space, hall and bathroom."  
5 Do you see that?

6 A. Yes.

7 Q. "Water cooler dominance," question. Do you see  
8 that?

9 A. Yes, I do.

10 Q. Okay. What dates did Dr. Zeitz give you for  
11 any of these acts?

12 A. He didn't give me specific dates. But I do  
13 have in parenthesis "not in the beginning." So this was  
14 one of the themes that came up with several of the other  
15 folks was that -- this was more around the April area  
16 that he was, as John described -- I'm sorry -- Paul  
17 described playing games with his space and that he would  
18 sometimes bump into or almost bump into them or almost  
19 walk down a hallway like he was going to bump into them  
20 and veer at the last minute.

21 Q. I'm sorry. I missed it. You indicated that  
22 this also involved some sort of bumping, you reference  
23 here in this section?

24 A. Here in this section, it says, "Brushes up  
25 against me." What I said was this is consistent with

1 what the other people that I interviewed said about this  
2 kind of space interference.

3 Q. If I might, ma'am.

4 A. Yeah.

5 Q. I just want to know what Paul Zeitz told you in  
6 these notes.

7 A. Okay.

8 Q. We'll get to other people eventually. I would  
9 like to know exactly what Paul Zeitz told you.

10 MR. VARTAIN: Objection. Arguing with the  
11 Witness.

12 THE COURT: Motion to strike implicit in the  
13 objection is denied.

14 MR. KATZENBACH: Q. In this section of your  
15 conversation with Professor Zeitz, did Professor Zeitz  
16 say that Dr. Kao had bumped into him?

17 A. According to my notes, the language he used was  
18 "he brushed up against me in hall and bathroom."

19 Q. He didn't say anything about bumping?

20 A. I think brushed up and bumping is similar, so I  
21 used the word interchangeably.

22 Q. Okay. Did he say anything about veering  
23 towards him?

24 MR. VARTAIN: Ambiguous. Did he say it, or do  
25 the notes say it?

1 MR. KATZENBACH: Q. Do the notes say that  
2 Dr. Zeitz said that Dr. Kao had ever veered towards him?

3 A. My notes say, "Playing games with my space."  
4 Whether he used the word "veer" or not in that meeting,  
5 I don't remember.

6 Q. He also said, "He moved" -- "He'll move his  
7 hands to move people"; right?

8 A. Yes.

9 Q. Does that refer to -- do you know what that  
10 refers to?

11 A. (Indicating).

12 Q. Something like that? You're waving your hands?

13 A. That could be one of them.

14 Q. Could it also be saying please go through the  
15 door ahead of me?

16 A. That wasn't the recollection I have for this,  
17 no.

18 Q. Then the last thing on this page again refers  
19 to "a bad faith search"?

20 A. Yes.

21 Q. Again, is this a reference to the 2008 search?

22 A. Yes.

23 THE COURT: Ladies and gentlemen, remember the  
24 admonition. Do not form or express any opinion on this  
25 case until it's finally submitted to you for your

1 decision. Do not discuss among yourselves or with  
2 others until that time. Please be back in your places  
3 at 9:00 tomorrow morning. Please remember to leave your  
4 notebooks and instructions behind.

5 JUROR 1: Can I stay here and work real  
6 quickly, or do I need to leave?

7 THE COURT: I'll ask you to leave. And yeah,  
8 I'll ask you to leave.

9 JUROR 1: Okay. All right.

10 (Whereupon, the Jury exited the courtroom at  
11 4:31 p.m.)

12 THE COURT: The Jurors and Alternates have  
13 departed the courtroom. Counsel and both sides as well  
14 as the Plaintiff remain.

15 Anything you need on the record,  
16 Mr. Katzenbach?

17 MR. KATZENBACH: I received your note on the  
18 Jury instruction, and I've looked at my proposed jury  
19 instructions. And I simply don't know why I cited that  
20 section at the moment.

21 THE COURT: Okay.

22 MR. KATZENBACH: But I will look into it. I  
23 think it's a general damage section of some kind. I  
24 must have taken some language from it. That's the only  
25 thing I can think of.

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THE COURT: Okay. Anything else?

MR. VARTAIN: I'll wait until Mr. Katzenbach revises his jury instruction before commenting, if I may.

THE COURT: Anything you want to put on the record, Mr. Vartain?

MR. VARTAIN: No. Thank you.

THE COURT: All right. We're adjourned then until tomorrow. Out of session. Off the record.

MR. KATZENBACH: Yes. I believe so.

(Whereupon, the proceedings were adjourned at 4:32 p.m.)

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STATE OF CALIFORNIA                    )  
  )                    ss.  
COUNTY OF SAN FRANCISCO            )

I, KIMBERLEE SCHROEDER, CSR No. 11414, do hereby certify that I am a Freelance Certified Shorthand Reporter in and for the State of California, and that as such, I reported the proceedings had in the above-entitled matter at the time and place set forth herein;

I further certify that my stenotype notes were thereafter transcribed by me, and that the foregoing pages numbered 1104 to 1323, inclusive, constitute a full, true and correct transcription of my said notes.

DATED: This 20th day of September, 2012.



KIMBERLEE SCHROEDER, CSR, RPR, CCRR  
License No. 11414

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

--o0o--

JOHN S. KAO,

Plaintiff/Appellant,

Appellate No. A135750

vs.

UNIVERSITY OF SAN FRANCISCO,  
et al.,

SF Superior Court Case  
No. CGC-09-489576

Defendant/Respondent.

/

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

Thursday, February 16, 2012

Volume 7

Pages 1324 through 1526

Reported by:

KIMBERLEE SCHROEDER, CSR, RPR, CCRR

License No. 11414

Holly Moose & Associates  
Certified Shorthand Reporters  
236 Spencer Avenue  
Sausalito, CA 94965  
(Phone) 415-332-4959  
(Fax) 415-332-4943



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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN FRANCISCO  
HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE  
DEPARTMENT 318

---oOo---

JOHN S. KAO,  
Plaintiff,  
vs. No. CGC-09-489576  
UNIVERSITY OF SAN FRANCISCO,  
et al.,  
Defendant.

/

JURY TRIAL  
REPORTER'S TRANSCRIPT OF PROCEEDINGS  
Thursday, February 16, 2012  
Volume 7  
Pages 1324 through 1526

Reported by:  
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APPEARANCES

For the Plaintiff:

KATZENBACH & KHTIKIAN  
By: CHRISTOPHER W. KATZENBACH  
CONOR D. MACK  
Attorneys at Law  
1714 Stockton Street  
San Francisco, California 94133  
Ph: 415-834-1778  
E-mail: ckatzenbach@kkcounsel.com  
cmack@kkcounsel.com

For the Defendants:

VARTAIN LAW GROUP  
By: MICHAEL J. VARTAIN  
LINDA K. ADLER  
Attorneys at Law  
601 Montgomery Street  
San Francisco, California 94111  
Ph: 415-391-1155  
E-mail: charissa@vartainlaw.com

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I N D E X

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EXHIBITS

PLAINTIFF'S

| No. | Description   | ID   | EVD  |
|-----|---|------|------|
| 27  | Martha Peugh-Wade, notes of conversation with Dr. Reynolds, 05/30/2008, USF 178-179                                 | 1455 | 1456 |
| 38  | Letter dated 06/30/08 from Martha Peugh-Wade to Dr. Reynolds re: Mental examination and consent form, USF 0248-0249 | 1461 | 1462 |
| 47  | Invoice from Dr. Missett for services   | 1468 | 1469 |
| 49  | Meeting notes of Dr. Missett, 05/20/08, USF 0226-0229   | 1471 | 1472 |
| 55  | Notes of Martha Peugh-Wade, USF 81-89   | 1473 | 1474 |
| 57  | Martha Peugh-Wade notes, interview with Tristan Needham, 05/12/08, USF 170  | 1378 | 1379 |
| 58  | Martha Peugh-Wade notes, Tristan Needham, 05/12/08, USF 171   | 1380 | 1381 |
| 59  | Martha Peugh-Wade interview notes with Tristan Needham, 05/12/08, USF 172-173                                       | 1383 | 1383 |
| 60  | Martha Peugh-Wade interview notes with Tristan Needham, USF 175-176   | 1387 | 1386 |
| 62  | Martha Peugh-Wade interview notes with Paul Zeitz, USF 168-169  | 1391 | 1392 |
| 63  | Martha Peugh-Wade interview notes with Peter Pacheco, 05/01/08, USF 147-154   | 1353 | 1354 |

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EXHIBITS

PLAINTIFF'S

| No. | Description  | ID   | EVD  |
|-----|--|------|------|
| 64  | Martha Peugh-Wade summary of interviews, USF 124-1128                        | 1396 | 1397 |
| 99A | Economic Solutions, John S. Kao, Economic Loss Case 1 and Case 2, five pages | 1480 | 1524 |

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P R O C E E D I N G S

Thursday, February 16, 2012 9:05 o'clock a.m.

---oOo---

THE COURT: Jurors and Alternates are all present. Counsel for all sides are present. Plaintiff is personally present. Mr. Katzenbach is on the seat. The Witness is on the witness stand.

Mr. Katzenbach, you may continue.

MARTHA PEUGH-WADE,  
called as a witness by the Plaintiff, having been previously duly sworn, was examined and testified further as follows:

MR. KATZENBACH: Yes, your Honor. Thank you.

DIRECT EXAMINATION (Resumed)

BY MR. KATZENBACH:

Q. Now, Ms. Peugh-Wade, I was asking you about Exhibit 61 when we left yesterday.

Do you have that in front of you?

A. No, I don't.

Q. Would you please pull it up for yourself?

A. Sure. Just a second. Okay.

Q. We were on the eighth page of that exhibit I believe marked USF 0162 when we stopped yesterday.

Why don't you turn to -- if you could turn to there.

1 A. Okay.

2 Q. Do you have that in front of you?

3 A. Yes.

4 Q. Thank you.

5 I think we just talked about the Math Teas.

6 That's the first -- the first two paragraphs.

7 Do you see that?

8 A. Yes.

9 Q. All right. I would like to turn now our  
10 attention to the next section there where people are  
11 talking about people worrying about John going postal.

12 Do you see that?

13 A. Yes.

14 Q. Now, the first question I have for you is: Did  
15 you ask what they meant by "going postal"?

16 A. I don't remember.

17 Q. All right. Did you ask what Dr. Zeitz meant  
18 when he said, "John is a martial arts expert"?

19 A. I don't remember if I asked then. I know that  
20 I had knowledge that he was a martial arts expert. I  
21 don't remember what kind.

22 Q. Which martial arts was that?

23 A. As I said, I don't remember which kind.

24 Q. Okay. Was it judo?

25 A. I'm sorry. I really don't remember.

1 Q. All right. Did you learn anything about the  
2 martial art that Dr. Kao was supposedly an expert in?

3 A. No, I didn't.

4 Q. Did you know whether it had anything to do --  
5 -- strike that.

6 Then this continues, "Playing games with my  
7 space, dominance, those things." Those are notes that  
8 you made?

9 A. Yes.

10 Q. Did you ask Dr. Zeitz where these things  
11 occurred?

12 A. I don't remember if I asked him or if he  
13 volunteered, but my notes reflect the hall, the  
14 bathroom, the water cooler.

15 Q. Right. Then the last reference on this page I  
16 think we talked about was, again, a reference to the  
17 search and the incident in January; isn't that right?

18 A. Yes.

19 Q. Okay. Now, if you could turn to the next page,  
20 again, this again is a page labeled 5B, does that mean  
21 you sort of put that at the top? Do you see?

22 A. Yes.

23 Q. And does that mean you sort of wrote this a  
24 little later and then put it in order, or how did that  
25 happen?



1 A. It would be that the page number came later.

2 Q. Page number came later. What was the purpose  
3 of calling it 5B?

4 A. That it comes after 5A and before 5C.

5 Q. Thank you.

6 Was this something you wrote at that time --  
7 are these notes that you took at the time of your  
8 conversation with Dr. Zeitz?

9 A. Oh, yes.

10 Q. Were all these notes taken in sequence?

11 A. I'm not sure I know what you mean by that.

12 Q. Taking notes you're writing down?

13 A. Yeah.

14 Q. You come to the end of the page; turn the page  
15 over; maybe you put 2 at the top; you continue taking  
16 notes, writing down; turn the page over; write 3;  
17 continue. Is that how you did it?

18 A. Sometimes I go to a different question in a  
19 different order so not necessarily. If the person being  
20 interviewed, in this case Paul, had started into  
21 something that was say two questions ahead, instead of  
22 me going to the question that then would seem kind of  
23 odd, I might skip over a page or two and go to the next  
24 question that was kind of his same line of talking of  
25 what he was already saying.

1 Q. Is the reference 5 to a question number?

2 A. You know, I don't remember at this point.

3 Q. Okay. Very well. Let's go back to the  
4 document.

5 First line in there says, "Paul would like to  
6 come back to department and be happy and get along with  
7 rest."

8 Who would he like to come back to department?

9 A. Professor Kao.

10 Q. I'm a little -- what did he mean by "come back  
11 to the department"? Did you ask?

12 A. I don't remember if I asked. I think my  
13 recollection is I understood it to mean I want him to  
14 come back to the department as a happy person and get  
15 along with everyone. I don't believe it necessarily  
16 meant he was going to go away but to come back to a  
17 place where he could be happy and get along with  
18 everyone.

19 Q. Were you talking with Professor Zeitz about  
20 putting Dr. Kao on a leave of absence?

21 A. No. I don't believe so. As I said, it was  
22 more to come back to a place of being happy and getting  
23 along with everyone.

24 Q. I see. Were you talking to Professor Zeitz  
25 about sending Dr. Kao to a fitness-for-duty examination?

1 A. No, I was not.

2 Q. So those were not what the notes meant when it  
3 said "come back to department"?

4 A. No.

5 Q. I see. Okay.

6 Now, taking a look at the next entry, you have,  
7 says, "He dresses well." Then it says, "Great with  
8 students, Friday afternoon math games and cake."

9 A. Yes.

10 Q. Now, really, in all of your interviews with  
11 these professors every one of them said Dr. Kao was  
12 great with students; didn't they?

13 A. I don't remember if they used the word "great,"  
14 but that he worked well with students, yes.

15 Q. Every one of them complimented him on his  
16 teaching; right?

17 A. I don't remember specifically that, but I do  
18 remember that there weren't any criticisms.

19 Q. Well, don't you remember all of them said that  
20 Dr. Kao was an exceptionally good teacher?

21 A. No. I would have to go back and see if that  
22 was in every single note.

23 Q. Wasn't that your understanding?

24 A. My understanding was from Associate Dean  
25 Brandon at one point that he was good or very good. I

1 don't remember exceptionally good. To me, there's a  
2 real difference.

3 Q. All professors get graded by students; don't  
4 they?

5 A. Yes.

6 Q. All right. You had access to all the ratings  
7 that Dr. Kao had?

8 A. I could have gotten that access, yes.

9 Q. Did you actually access those ratings?

10 A. No, I did not.

11 Q. Why not?

12 A. There was no reason to. That wasn't the  
13 question at the time. My understanding was that he was  
14 good with his students.

15 Q. Uh-huh. And the next note you have, it says,  
16 "If we do something, alert Tristan and Paul vaguely in  
17 advance." Looking at the page --

18 A. Yes.

19 Q. Yes. What sort of something else are you  
20 talking about with Dr. Zeitz?

21 A. Well, I wasn't talking about it. But my  
22 recollection is that Professor Zeitz was saying if  
23 you're going to alert him in any way, tell us so we can  
24 be gone.

25 Q. Thank you. But what I want to know is about

1 the phrase, "if we do something." Who's the "we" in  
2 that?

3 A. He meant the University.

4 Q. What was the "something" that you were  
5 discussing?

6 A. As I said, I don't recollect that we were  
7 discussing anything. He had said, "If you're going to  
8 do something with him, please tell us in advance."

9 Q. So, okay. I would like to also now direct you  
10 to the next remark that Dr. Zeitz makes. Dr. Zeitz --  
11 highlighting here, I hope I am.

12 "Not ever physical." Are those words he used?

13 A. I think it says "not ever phys viol," v-i-o-l,  
14 which to me means physically violent, not just physical.

15 Q. Let's look at the words he used. You think  
16 that says not ever physically violent?

17 A. Yes.

18 Q. And it's your -- okay.

19 Did he ever identify -- and then the next one  
20 he talks about my -- is that vibes?

21 A. Yes. I think so. You're getting good at  
22 reading my writing.

23 Q. Uh-huh. He said he was unhappy -- then I can't  
24 even read that next word.

25 A. Me neither.

1 Q. "We have to move on, holding in anger"; right?

2 A. Yes.

3 Q. Taking a look at the -- now we have references  
4 to foaming; is that right? Glaring?

5 A. I believe that one is frowning.

6 Q. Frowning. Okay. I'll accept your reading of  
7 your handwriting. So it's frowning, glaring and  
8 chuckling. And this indicates that it's been going on  
9 -- some of this frowning has been going on, what, two  
10 years? One to two years?

11 A. That's what it says.

12 Q. The other two, glaring and chuckling since  
13 January?

14 A. It says "worse since January," yes.

15 Q. And January is, again, when the issues on the  
16 search arose; isn't that right?

17 A. On that search, yes.

18 Q. The next one, next line then makes another  
19 reference to this search. "Since search, divorce from  
20 department."

21 A. Yes.

22 Q. Does that mean the department -- that the  
23 department didn't like John?

24 A. No. That's not at all what I took from  
25 Professor Zeitz's comments. What I took it was that he

1 was divorced from the department.

2 Q. Does that mean the department was hostile  
3 toward John?

4 A. No, not at all. I think it meant more that he  
5 was separate.

6 Q. I see. Okay. Okay. Is that the word  
7 Dr. Zeitz used, "divorced from the department"?

8 A. That would be my recollection.

9 Q. Okay. Now, the next statement says, "I can't  
10 tell. I will tell if can" -- then I can't read that  
11 word at all.

12 A. I think it was "learn and."

13 Q. "Learn if I can, vague"?

14 A. Yes, I believe that's what it says.

15 Q. Is that what he said?

16 A. No. I don't believe so. I think those were  
17 what I said. You'll notice I have two stars by the  
18 outside, which is to remind me of things. So that would  
19 have been back to what he was saying earlier, which is  
20 can you alert us or let us know. And I said something  
21 to the effect of, "I don't know that I can, but if I  
22 can, it would be I were to give you something vague."

23 Q. On this page of your notes, would it be  
24 accurate to say, the only specific event described  
25 concerns the search?

1 MR. VARTAIN: Objection. Ambiguous.

2 THE COURT: Overruled. The Witness may answer,  
3 if you understand the question.

4 THE WITNESS: I would say there aren't really  
5 events described on this page.

6 MR. KATZENBACH: Q. Okay. I would like you to  
7 take, if you would, a look on to the next page. That's  
8 a page labeled with a C and numbered 164.

9 Do you have that in front of you?

10 A. Yes, I do.

11 Q. All right. Now, once again, the first item  
12 here, that's a reference to again John not wearing a  
13 suit?

14 A. Yes. I believe so.

15 Q. One day when he was sick; is that right?

16 A. That would be my recollection, yes.

17 Q. Is that something that concerned Dr. Zeitz?

18 A. Yes.

19 Q. Now, again, next entry refers to back to  
20 January.

21 A. Yes.

22 Q. It's where he felt bad and lost sleep?

23 A. Yes. And it says "worried about physical  
24 harm."

25 Q. I see. And the -- that refers to, again, back



1 to the incident discussion that Dr. Kao and Dr. Zeitz  
2 had about the search; is that correct?

3 A. I think it refers to his feelings after the  
4 discussion and everything else kind of about Dr. Kao's  
5 behaviors.

6 Q. Doesn't it refer specifically to January?

7 A. Yes.

8 Q. Doesn't it refer to the time Dr. Kao and  
9 Professor Zeitz discussed the search?

10 A. Yes. But it wasn't just the discussion of the  
11 search in that particular incident. It was all of his  
12 behaviors over time and particularly how they had  
13 changed I think made him worried about the physical harm  
14 and losing sleep.

15 Q. Perhaps. Are you saying it was a cumulative  
16 issue for him of -- that that's why he was losing sleep?

17 A. I can't say for certain that it was a  
18 cumulative issue.

19 Q. But that's your understanding?

20 A. My understanding is that it would be the  
21 combination of things, not just the one episode where  
22 Dr. Kao was upset about the search but the combination  
23 of all of his different behaviors.

24 Q. All right. Then after that paragraph, it now  
25 says this is what Dr. Zeitz told you, "Now no sleep

1 lost?

2 A. That would be my recollection, yes.

3 Q. So whatever happened between those January  
4 dates and now, apparently he's feeling better. Would  
5 that be your understanding of what he told you?

6 A. I don't know about feeling better, but not  
7 losing sleep over it, yes.

8 Q. Now, it talks about the Finch party; correct?

9 A. Yes.

10 Q. And again, Dr. Zeitz is expressing -- do you  
11 understand that to say, "The Finch party okay,  
12 structured situation, so okay, talk and laugh."

13 A. Yes. That's what my notes --

14 Q. In other words, Dr. Zeitz didn't seem to have  
15 any problems with Dr. Kao attending the Finch party?

16 A. That's true, but, you know, at this point, I'm  
17 not sure how much Dr. Zeitz, if he would have known that  
18 there was going to be someone there or not. If he knew,  
19 then that may have been why he was less uncomfortable.

20 Q. I see. Was there anything reflected other than  
21 the fact that you told him there might be somebody  
22 there?

23 A. No.

24 Q. So as far as you know, what he told you at that  
25 time was "Finch party okay"?

1 A. Yes.

2 Q. Is there anything else on this page that refers  
3 to a specific incident or event?

4 A. No. I think the rest of the notes are  
5 generalities.

6 Q. Thank you.

7 Take a look at the next page, again, on this  
8 page which is labeled 5D. Taking a look at the middle  
9 -- that looks to me like there are identifying --  
10 Dr. Zeitz identifies only two incidents.

11 A. Well, the two questions on this page aren't  
12 really incidents. They're more generalities, "What  
13 triggers him and what does he do that makes you fearful  
14 of violence?"

15 Q. I see. Once again, isn't that correct that the  
16 only incidents -- the only events that Dr. Zeitz  
17 identifies in response to your question are the Cidas  
18 incident regarding Dr. Kao's mail and the search?

19 A. If we're talking about just this page, there's  
20 nothing else on this page about specific incidences;  
21 that is correct.

22 Q. Once again, he only identifies in response to  
23 your questions Cidas and the search; is that correct?  
24 On that page?

25 A. On that page, that's correct.

1 Q. That's fine. The rest, as you indicated, were  
2 just generalities?

3 A. They were responses to the questions of what  
4 triggers him and what makes you think -- what does he do  
5 that makes you fearful of violence.

6 Q. And in response to that question, does  
7 Dr. Zeitz identify any specific incident other than the  
8 two we've just identified?

9 A. He specifies specific things that he does.  
10 "Can't control his body, long glaring" --

11 Q. I understand that. Does he put a date, time?

12 MR. VARTAIN: Objection. The Witness had not  
13 finished her answer.

14 THE COURT: Is that right, Ms. Peugh-Wade?

15 THE WITNESS: "That he yells and accuses, he  
16 yells inappropriately."

17 MR. KATZENBACH: Q. Are you finished with your  
18 answer?

19 A. I am.

20 Q. Thank you.

21 None of those statements are tied to any  
22 particular date, time or place?

23 A. No. They are not tied to a specific date, time  
24 or place.

25 Q. Not tied to a particular year?

1           A.  No.  You know, one of the things, I wasn't  
2 questioning people to get information to discipline  
3 Dr. Kao.  I was trying to get information to see if  
4 indeed there was consistent concern from a number of  
5 people such that I needed to look into it further or  
6 someone, an expert needed to look into it further.

7           Q.  So you were gathering information to see if you  
8 could send Dr. Kao for a fitness-for-duty exam at this  
9 time?

10          A.  No.  I was gathering information to see if  
11 people who had knowledge in this area would say, "Oh,  
12 yeah.  Not a problem.  There's nothing to be worried  
13 about."  Or, "Yeah, there may be a problem of risk," in  
14 which case they would recommend or not recommend a  
15 fitness for duty or something else.

16          Q.  Were you trying to get a complete picture of  
17 that to assist this expert that you were going to hire?

18          A.  I certainly was.

19          Q.  So how many people in the department other than  
20 Peter Pacheco, Dr. Zeitz and Tristan Needham did you  
21 actually interview at the end of April and beginning of  
22 May?

23          A.  Only those three in the department and the two  
24 Deans that I talked to as well.

25                 As I said yesterday.

1 Q. There's no question pending.

2 Take a look at the next page, if you would --

3 A. Yes.

4 Q. Top of that page, this is, again, your  
5 conversation with Dr. Zeitz.

6 Is this what Dr. Zeitz said?

7 A. Yes.

8 Q. "If no outbursts, would be harmless" -- I'm not  
9 sure what that next word is.

10 A. Yeah. I didn't know how to spell "kook." That  
11 would not be my words though.

12 Q. So Dr. Zeitz is referring to Professor Kao as a  
13 harmless kook if he had no outbursts?

14 A. That's correct.

15 Q. What outbursts did Dr. Zeitz identify for you  
16 in your interviews?

17 MR. VARTAIN: Would you restate that last part  
18 of that question, Mr. Katzenbach? I did not hear it.

19 MR. KATZENBACH: I'm sorry.

20 Q. What outbursts had -- let me rephrase it.

21 In your interview with Dr. Zeitz, did you ask  
22 him what outbursts he was concerned about?

23 A. I don't know that I asked him at that point  
24 because he had already talked about two outbursts that I  
25 had reported earlier in the notes.

1 Q. All right. Next thing on your notes, Dr. Zeitz  
2 says that, "Now civil, purely formal, no" -- I don't  
3 know what that word is. What's that word?

4 A. I think it's "content."

5 Q. "No content." What did he mean by the word  
6 "civil"?

7 A. Purely perfunctorily.

8 Q. Taking a look, again, down there it uses the  
9 word "civil now," it says, "No longer colleagues, now  
10 civil"?

11 A. Yes.

12 Q. All right. Those are the words that Dr. Zeitz  
13 used?

14 A. That would be my recollection.

15 Q. And once again, we have a reference to the CCAC  
16 incident?

17 A. Yes. So this would be a third.

18 Q. Excuse me?

19 A. This would be a third incident.

20 Q. No, I said once again, we have a reference to  
21 the CCAC?

22 A. Yes.

23 Q. And we also have a reference to accelerated in  
24 January. You see that?

25 A. Yes.

1 Q. All right. January is when the search started,  
2 issues with the search started arising; correct?

3 A. With this search, that's correct.

4 Q. And then your reference to Christine Liu?

5 A. Yes.

6 Q. And then we have, once again, a reference to  
7 going postal. He says, "Tristan, Peter and I have all  
8 talked about this," quote, "'going postal,'" unquote.

9 You see that?

10 A. I do.

11 Q. Were they just -- did you understand they were  
12 just joking around when they were using that phrase?

13 A. No, I did not.

14 Q. You thought there was a serious risk of Dr. Kao  
15 going postal?

16 A. I never said that. I thought it was a serious  
17 risk. That was their concern at the time. I didn't  
18 know. I don't have those credentials to judge that.

19 Q. When Dr. Zeitz told you that there was a fear  
20 of Dr. Kao going postal, did you take him off campus at  
21 that point?

22 A. No.

23 Q. And we have the next thing that on this  
24 document it says that "Tristan and Steven close the door  
25 because JK badgers them about the search."



1 Do you see that?

2 A. Yes.

3 Q. Now, Steven is who?

4 A. My recollection is it's Steven Yeung.

5 Q. All right. There's nothing in there, is there,  
6 about them closing their doors because they were afraid  
7 of John?

8 A. Not on this page.

9 Q. Not on this page.

10 Finally, the last question here, it says, "Ask  
11 Peter if Christine" -- then again, "needed"?

12 A. That's what it looks like to me.

13 Q. Do you know what he said there?

14 A. No.

15 Q. And Christine was the -- you understand that  
16 was Christine Liu?

17 A. That would be my recollection, yes.

18 Q. And that's someone, again, you didn't talk to?

19 A. That's correct. I did not talk to her.

20 Q. And no one else from your office talked to her?

21 A. Not about this, no.

22 Q. Not about this, all right.

23 Turn to the next page. Top of the next page,  
24 it refers to -- this is the last page of the document.

25 Pardon me. Top of the last page, it begins, "Most

1 recent behaviors." Is that what it says?

2 A. I think it says "more."

3 Q. "More recent behaviors."

4 And in April or in May, once again, he refers  
5 to "January outburst to Paul."

6 A. Yes. It says "big outburst."

7 Q. "Big outburst," of course. That was, again, a  
8 conversation that he and Professor Zeitz about the  
9 search?

10 A. That would be my recollection.

11 Q. And then "obsessive about the search"?

12 A. Yes.

13 Q. That's all under -- is there anything else  
14 other than those two references that involve recent  
15 behaviors by John Kao?

16 MR. VARTAIN: On this page?

17 MR. KATZENBACH: On this page.

18 THE WITNESS: Let me just finish reading.

19 MR. KATZENBACH: Q. Of course.

20 A. (Reviewing document.) I don't believe so.

21 Q. In fact, the only other events he indicates  
22 were sometime around 1996 on that page?

23 A. But I don't believe the question was about  
24 events. I believe he was trying to give information  
25 about why he was fearful of violence, and he was talking

1 to me about the different things and ways he obsessed  
2 over things over his tenure there.

3 Q. I see. So he was trying to give you examples  
4 of why he was afraid of John. Is that what you're  
5 trying to say?

6 A. Yes.

7 Q. So he identified the search?

8 A. He identified the things that he was obsessing  
9 -- that he would call he was obsessing over including  
10 the search, the tenure process, et cetera.

11 Q. Let's go back to the top. The top says under  
12 category where you say, "More recent behaviors." Isn't  
13 that right?

14 MR. VARTAIN: I'm going to object.

15 MR. KATZENBACH: Let me rephrase that.

16 MR. VARTAIN: I'm not going to object to the  
17 phraseology. I'm going to object to now the third time  
18 on the same issue.

19 THE COURT: Object to what?

20 MR. VARTAIN: Asked and answered.

21 THE COURT: Oh, overruled.

22 MR. KATZENBACH: Q. On this page, with the  
23 heading "Most recent behavior" -- "More recent  
24 behaviors," right, Dr. Zeitz informs you of one incident  
25 in January -- rather, incidents in January concerning

1 the search: An incident in 1996 when Dr. Kao was  
2 getting tenure, and an incident in 1992 concerning  
3 Dr. Kao's girlfriend.

4 A. I don't believe I meant the three words "more  
5 recent behaviors" to be a heading because obviously  
6 those things aren't necessarily recent. And the third  
7 thing that you talked about, the girlfriend, isn't --  
8 wasn't described as an incident at all. I was taking  
9 notes of what Tristan had said to me in response to my  
10 questions. One of the things he remarked about was  
11 John's girlfriend in '92.

12 Q. Just to be clear, these are notes of Dr. Zeitz?

13 A. No. These are my notes. I'm sorry.

14 Q. Of your conversation with Dr. Zeitz?

15 A. Yes, yes.

16 Q. You just indicated Tristan.

17 A. I'm sorry. No, no. Dr. Zeitz, yeah.

18 Q. Okay. So again, these are what -- things that  
19 he told you in response to your questions about Dr. Kao;  
20 correct?

21 A. Yes.

22 Q. Thank you.

23 Now, please take a look, if you would, at  
24 Exhibit 63.

25 /////

1 (Plaintiff's Exhibit No. 63 was  
2 marked for identification.)

3 MR. KATZENBACH: Q. Can you identify  
4 Exhibit 63 for us.

5 A. These are my notes with my conversation with  
6 Peter Pacheco on May 1st.

7 Q. And are these notes that you took?

8 A. Yes.

9 Q. Is this your handwriting?

10 A. Yes.

11 Q. Now, when you wrote it, was anyone else present  
12 other than you and Dr. Pacheco during these events, when  
13 you took these notes?

14 A. No. I don't believe so.

15 MR. KATZENBACH: Your Honor, at this point --  
16 this concerns Dr. Kao?

17 THE WITNESS: Yes.

18 MR. KATZENBACH: At this point, I would like to  
19 move Exhibit 63 into evidence with the same limitation  
20 previously noted.

21 THE COURT: All right. Any objection?

22 MR. VARTAIN: I object to the limitation. It's  
23 a business record. It should be offered --

24 THE COURT: We discussed that yesterday.

25 MR. VARTAIN: Other than that, your Honor, I

1 have no objection.

2 THE COURT: Okay. You're free to lay a  
3 foundation for admission under 1271 for all purposes,  
4 but for the limited purposes, it's received now.

5 MR. VARTAIN: Thank you, your Honor.

6 MR. KATZENBACH: Thank you.

7 (Plaintiff's Exhibit No. 63 was  
8 received in evidence.)

9 MR. KATZENBACH: Q. Now, again, taking a look  
10 at what Dr. Pacheco tells you, let's start at the top.  
11 The first thing he informs you is that he has no  
12 firsthand experiences comparable with Paul or Tristan.

13 Is that what it says?

14 A. Yes.

15 Q. Now, once again, taking a look at the specific  
16 -- any specific events described by Dr. Pacheco in your  
17 interview with him, on the first page here, does he  
18 identify any particular events on?

19 A. On the beginning of that page, he identifies  
20 the event with Cidas Deguzman.

21 Q. He identifies, once again, we have the blowup  
22 with Cidas?

23 A. Yes.

24 Q. That was over ten years?

25 A. That would be what my notes reflect, yes.

1 Q. Right. Now, other than on this page, other  
2 than the incident with Cidas, does he identify any  
3 particular event -- any particular event that he  
4 experienced with Dr. Kao or he was identifying with  
5 Dr. Kao?

6 A. If I can just read the whole thing?

7 Q. Right.

8 A. (Reviewing document.)

9 Could you repeat your question, please?

10 Q. Does he identify any specific date other than  
11 the Cidas incident -- any specific event other than the  
12 Cidas incident?

13 A. Yes. He identifies the change in the  
14 department rules. And again, this was Dr. Pacheco's  
15 talk to me, but he feels, "he" Dr. Kao, feels people are  
16 against him now, conspiracy against him, that he feels  
17 there's a -- he, Dr. Pacheco, is saying that Dr. Kao  
18 feels that there is a conspiracy against Dr. Kao.

19 Part of this was the anger about the change in  
20 the department rules. And that had to do with teaching  
21 a class, certain classes, if I recollect.

22 Q. That was actually a proposal -- nevermind.

23 I would like to focus on the "conspiracy"  
24 language. Are those words that Dr. Pacheco used?

25 A. That would be correct.

1 Q. Now, in the period of January through the end  
2 of April, had the University administration been meeting  
3 about Dr. Kao?

4 A. Yes.

5 Q. They actually hired Dr. Good as a consultant?

6 A. Give me a time period again.

7 Q. Do you remember when Dr. Good was hired?

8 A. I believe it was February.

9 Q. Right. You had another consultant before that?

10 A. Yes.

11 Q. And then you had meetings with -- you had  
12 conversations with Dean Brown about Dr. Kao?

13 A. Yes.

14 Q. And you were -- so would it be accurate to say  
15 you were looking at John Kao -- the administration was  
16 looking at John Kao from around January through the date  
17 of this interview, May?

18 A. I don't know that I would say "looking at him."  
19 It was in January where concerns were first brought to  
20 our attention about his behavior.

21 Q. All right. So for some period of time, people  
22 had been meeting to discuss him; correct?

23 A. Some period of time meaning in January we  
24 started hearing concerns about his behavior, and yes, we  
25 then sought different information between that time and



1 May.

2 Q. And during that entire period of time, no one  
3 was asking John Kao about anything?

4 A. That's not true. During confrontations,  
5 departmental meetings, et cetera, people were trying to  
6 talk to him. And my recollection of all of the  
7 interviews is that he would not rationally talk to them.

8 Q. I see. No one told him that the administration  
9 was engaged -- had any questions about his behaviors; is  
10 that right?

11 A. Can you say that again, please?

12 Q. No one told him that the administration had any  
13 questions about his behavior?

14 A. Not to my knowledge.

15 Q. No one told him that the -- no one told him  
16 that the administration was looking into his conduct at  
17 meetings; is that correct?

18 A. As I said, this wasn't a disciplinary matter.  
19 This was something that was brought to our attention  
20 because people were fearful, both for him and for others  
21 in the community. They -- at different times I said  
22 earlier on, they tried to talk to him, even to reassure  
23 him he would be able to teach the classes, but the fact  
24 they couldn't talk to him in these meetings meant that  
25 they really couldn't have conversations with him.

1 Q. Okay. Just repeat my question.

2 No one from administration told Dr. Kao that  
3 they were looking into his conduct during this period of  
4 time?

5 MR. VARTAIN: Objection. Vague. What period  
6 of time, Counsel?

7 MR. KATZENBACH: All right. We'll rephrase it,  
8 your Honor.

9 Q. During the period January through May 2008,  
10 it's true no one from the administration told Dr. Kao  
11 that people were looking into his conduct?

12 A. During that period of time, that's correct.

13 Q. During that period of time, no one told Dr. Kao  
14 that anyone was concerned about his behavior; isn't that  
15 right?

16 A. I would disagree with that because I think when  
17 people tried to talk to him when he was talking over  
18 them and yelling at him and people would ask him to  
19 stop, I think that's showing concern about someone's  
20 behavior.

21 Q. Okay. You're referring I think to department  
22 meetings?

23 A. Whether it was a department meeting or meeting  
24 of the search committee, I don't know.

25 Q. And did you interview everyone who attended

1 that meeting?

2 MR. VARTAIN: Asked and answered objection.

3 MR. KATZENBACH: I'll withdraw that question,  
4 your Honor.

5 Q. Take a look at the second page of Exhibit 63.  
6 That refers to the meeting on the department rule.

7 A. Yes.

8 Q. That was before January '06 -- or '08?

9 A. When I wrote "think," I think that means that  
10 that was Dr. Pacheco's recollection that's when he  
11 thought it was, yes.

12 Q. Now, this was a rule change that was proposed  
13 by Bob Wolf; right? That's what you were told?

14 A. That's what the notes say, yes.

15 Q. Did you interview Bob Wolf about Dr. Kao's  
16 conduct at this meeting?

17 A. No.

18 Q. Well, taking a look at Dr. Pacheco's  
19 description of this meeting, it says, does it not, says,  
20 "John became very upset and speaks in a loud voice."

21 Do you see that?

22 A. Could you say that again?

23 Q. This is information that Dr. Pacheco is giving  
24 you; correct?

25 A. Yes.

1 Q. When he describes this meeting, he uses the  
2 phrase "speaks in a loud voice"; doesn't he?

3 A. Yes.

4 Q. But he adds also the phrase "not shouting"?

5 A. I don't know that he added that. I probably  
6 asked him, "What do you mean by a loud voice? Do you  
7 mean shouting," and probably he responded back "not  
8 shouting."

9 Q. So he confirmed this was not shouting?

10 A. That would be what my notes indicate, yes.

11 Q. All right.

12 A. But he went on to say, "Won't listen to  
13 others," and when I asked him what he meant by that, he  
14 said it was common in his outbursts.

15 Q. So when you say he won't listen to others, I  
16 assume what you mean is -- when he says he won't listen  
17 to others, you mean he doesn't agree with others'  
18 positions?

19 A. No. I don't believe that's what this faculty  
20 men was alluding to. I believe what he was alluding to  
21 is he doesn't listen to other people's point of view or  
22 what they are trying to say.

23 Q. I see.

24 A. That would be consistent with him talking over  
25 other people.

1 Q. Well, your understanding was that he just  
2 wouldn't listen. When it says he wouldn't listen, it  
3 means he didn't accept other people's opinions?

4 MR. VARTAIN: Objection. Vague. Compound.

5 MR. KATZENBACH: Probably, your Honor. I'll  
6 withdraw it.

7 Q. Let's just go on. The issue here -- strike  
8 that.

9 In fact, what it says here is that Dr. Kao was  
10 concerned that this would affect his ability to teach  
11 probability and statistics; isn't that right?

12 A. That's what it says, yes.

13 Q. And it also says he refused to believe, I  
14 believe Peter, when he said that you can teach it; is  
15 that right?

16 A. Can you say that again, please?

17 Q. What Peter told you was that Dr. Kao's  
18 response -- that Peter said you can still teach it and  
19 that Dr. Kao refused to believe it; is that right?

20 A. That's what my notes say, yes.

21 Q. Thank you.

22 Taking a look at the next page, if you would,  
23 that again refers to the horrible search committee  
24 meeting. You see that?

25 A. Yes.

1 Q. Once again, this is a reference back to the  
2 meeting where Dr. Kao presented his statistics?

3 A. That would be my recollection, yes.

4 Q. And this was a meeting where Dr. Kao was  
5 concerned about the fact that the ad had not been  
6 published in a journal?

7 A. In a print, that's correct.

8 Q. Had you looked at the online ads that the  
9 University actually used?

10 A. I have looked at online ads that the University  
11 uses, yes.

12 Q. Did you look at what they actually used for  
13 this search?

14 A. No, I did not.

15 Q. Did you understand that the database that the  
16 University math department had used for this search was  
17 the exact same, was simply an online version of the  
18 journal, or was it something different?

19 MR. VARTAIN: Compound. Vague.

20 MR. KATZENBACH: Let me rephrase it, your  
21 Honor. Maybe it's compound.

22 Q. Did you ask someone what the online database  
23 that was used in that search in the search in 2008  
24 looked like?

25 MR. VARTAIN: Objection. Compound question.

1 Ambiguous.

2 THE COURT: Sustained.

3 MR. KATZENBACH: Q. Did you ask anyone to show  
4 you what the online database the University used in the  
5 2008 searched looked like?

6 A. I don't recollect.

7 Q. Now, he uses the phrase here, looking down on  
8 this once again, it says directing to this meeting,  
9 "Dr. Pacheco says that Dr. Kao spoke in a raised voice,  
10 not yell."

11 MR. VARTAIN: Objection. Ambiguous.

12 MR. KATZENBACH: Q. Are the words that --  
13 sorry.

14 A. I'm sorry. Where are you now?

15 Q. I'm looking at the eleventh line down.

16 THE COURT: Overruled.

17 THE WITNESS: Yes.

18 MR. KATZENBACH: Q. Those are the words that  
19 Dr. Pacheco used?

20 A. That would be my recollection. Again, probably  
21 he said raised voice, and I would have asked further  
22 what that meant. And that's why we put it in  
23 parenthesis.

24 Q. All right. Now, this time it also says Dr. Kao  
25 would be asked several times to let others finish;

1 correct?

2 A. Yes. That's what it says.

3 Q. And then Dr. Pacheco says he did?

4 A. But if you also look right above those three  
5 lines, it says, "Peter left one half meeting to go to  
6 teach." So Dr. Pacheco wasn't there for the full  
7 meeting.

8 THE COURT: Ladies and gentlemen, remember the  
9 admonition. Do not form or express any opinion on this  
10 case until it's finally submitted to you for your  
11 decision. Do not discuss among yourselves or with  
12 others until that time. Please be back in your places  
13 at 10:10 according to the courtroom clock.

14 Can I confer with Counsel a minute in the  
15 hallway?

16 (Recess taken: 10:00 a.m. - 10:12 a.m.)

17 THE COURT: Jurors and Alternates are all  
18 present. Counsel for all sides are present. Plaintiff  
19 is personally present. Ms. Peugh-Wade is on the stand.

20 Mr. Katzenbach, you may continue your inquiry.

21 MR. KATZENBACH: Yes. Thank you.

22 Q. Just directing your attention back to where we  
23 left off where Dr. Pacheco is describing the meeting on  
24 the search committee, right, and you pointed out that at  
25 some point Dr. Pacheco left the meeting?



1 A. Yes. He indicated it was halfway through.

2 Q. But during the time that he was there, he  
3 reported to you that Dr. Kao discussed the statistics  
4 that Dr. Kao was presenting?

5 A. Yes. And that also he, Pacheco, said it's  
6 clearly absurd.

7 Q. Well, thank you. I'm glad we got that in.

8 He also referred that he expressly stated that  
9 Dr. Kao was saying in this meeting that the search gave  
10 preference to nonminorities?

11 A. My notes indicate that that's what Professor  
12 Pacheco said that Dr. Kao said.

13 Q. All right. And Professor Pacheco thought that  
14 was clearly absurd?

15 A. Yes.

16 Q. Did he explain why he thought it was clearly  
17 absurd?

18 A. No, he did not. As I said, I was interviewing  
19 three mathematicians, and I don't know enough about  
20 statistics and P values. So when I talked to them, I  
21 did ask in your experience, is this something that made  
22 sense to do? His answer was no, that it was clearly  
23 absurd.

24 Q. There were no minorities in the final applicant  
25 pool for that search; were there?

1 A. I don't recall.

2 Q. On this page of your notes, is there any other  
3 specific incident that Dr. Pacheco identifies?

4 A. Here, I wasn't asking for specific incidences.  
5 The first question was what's he like to work with as a  
6 colleague. Then halfway through page 3 was one-on-one,  
7 what's he like one-on-one. So at this point, I wasn't  
8 asking for specific incidences.

9 Q. That's fine. What I'm trying to do is clarify  
10 going through all your notes to see what specific  
11 incidence these individuals identified.

12 I just want to clarify on this page, whatever  
13 you were asking, there is no specific incident  
14 identified?

15 A. (Reviewing document.) Could you ask your  
16 question again, please?

17 Q. Other than the search meeting, which we've  
18 discussed, is there any other specific incident  
19 identified on this page of your notes?

20 A. No.

21 Q. Can you go to the next page of your notes?

22 Now, this page begins with a discussion of a  
23 meeting in April; is that correct?

24 A. Yes.

25 Q. And it says, "April meeting, no Tristan or

1 Paul." It said John was good in that meeting; correct?

2 A. That's what my notes reflect, yes.

3 Q. In fact, it goes on to say he was helpful.

4 A. Yes. That's at the end of -- there were  
5 controversial issues about changes to the curriculum  
6 that they thought he would block, but that he was  
7 helpful. And it goes on to say because he had an  
8 agenda, and this was really doing things by book and by  
9 protocol. So this was an example of things being  
10 comfortable for Dr. Kao.

11 Q. So would it be accurate to say that -- strike  
12 that.

13 This is all information that Dr. Pacheco told  
14 you; right?

15 A. Yes.

16 Q. All right. Is there -- other than this April  
17 meeting on this page of your notes, is there any other  
18 specific incident described involving Dr. Kao?

19 A. I don't know of an incident, but there was  
20 another topic discussed.

21 Q. Was that the WASC learning outcomes?

22 A. Yes.

23 Q. Anything negative said about Dr. Kao in terms  
24 of that?

25 A. No.

1 Q. Thank you. Take a look at the next page.

2 A. Again, that was an example of where things met  
3 protocol and that was Dr. Pacheco's thought as to why  
4 Dr. Kao didn't get upset.

5 Q. Okay. So you understood that Dr. Kao's upset  
6 was largely around -- Dr. Pacheco was saying to you  
7 Dr. Kao got upset when the rules were violated?

8 A. That's one of the times, yes.

9 Q. Thank you.

10 Now, take a look at the next page. And taking  
11 a look at what Dr. Pacheco says here. He says this  
12 calendar year he was better.

13 Is Dr. Pacheco referring to department  
14 meetings?

15 A. I don't recollect specifically what he's  
16 referring to.

17 Q. Okay. Was that language that Dr. Pacheco used?

18 A. It would have been language or very close to  
19 it.

20 Q. And do you know whether he was referring to  
21 department meetings?

22 A. I don't recollect at this time.

23 Q. Take a look at the next sentence. Says, "Two  
24 years ago, John dominated meetings." Then you look at  
25 that bullet point below the comment, "This calendar

1 year, he was better."

2 Does this refresh your recollection that  
3 Dr. Pacheco was referring to department meetings?

4 A. I don't know that it refreshes my recollection,  
5 but it would seem that it's probably assumed.

6 Q. You agree with the phrase "this calendar year  
7 he was better" was referring to Dr. Kao's conduct in  
8 department meetings?

9 A. Yes.

10 Q. In fact, Dr. Pacheco yet makes another comment  
11 that you record on this. "This year he's doing well in  
12 meetings"; is that right?

13 A. That's what my notes reflect, yes.

14 Q. And right above that, Dr. Pacheco says, "Paul  
15 at most meetings; Tristan frequently not there."

16 Do you see that comment?

17 A. Yes.

18 Q. All right. Now, so did you understand that  
19 comment to mean that it was primarily when -- sorry --  
20 that John Kao's conflicts at meetings was primarily  
21 involving Tristan Needham?

22 MR. VARTAIN: Ambiguous. Complex.

23 MR. KATZENBACH: I'll rephrase that. I'll ask  
24 it slightly differently.

25 Q. Is this language that Dr. Pacheco told you,

1 "Paul at most meetings; Tristan frequently not there"?

2 A. Or something very close to that, yes.

3 Q. Thank you.

4 Now, taking a look again, you ask him if his  
5 behavior scares you. You see Q3?

6 A. I do.

7 Q. That's a question that you asked?

8 A. Yes.

9 Q. That was one of the questions that we labeled  
10 as Q.3 that was one of the questions you were asking  
11 everybody, "Does his behavior scare you?"

12 A. Yes.

13 Q. And again, Dr. Pacheco refers, says "If he's  
14 upset in meetings"; right?

15 A. Yes.

16 Q. And then he says something, "Tristan and Paul  
17 go head to head." You see that?

18 A. Yes.

19 Q. Head to head with whom?

20 A. That would have meant with Dr. Kao.

21 Q. So when you say head to head, what did you  
22 understand that to mean?

23 A. I understood that to mean that Tristan and Paul  
24 would take on Dr. Kao's concerns or debate his -- I  
25 think I said irrational, later on he was calling it

1 rational, but what Peter Pacheco says is he just let's  
2 him vent. There's no point in taking him on when he's  
3 irrational.

4 Q. So did you understand that -- strike that.

5 He also refers here to the phrase "speaks loud"  
6 and again, we're ignoring adverbs.

7 A. You are.

8 Q. Your notes.

9 Is that the phrase that Dr. Pacheco used?

10 A. That or something close to it. I don't  
11 recollect all the words from these meetings.

12 Q. But you agree he didn't -- you don't record on  
13 your notes anything about Dr. Kao yelling on this page  
14 in response to this question?

15 A. That's correct. But the question is was  
16 something to the effect of why does his behavior scare  
17 you, and then he went on to list all the parts of his  
18 behavior he felt was scary.

19 Q. He didn't include yelling in response to that  
20 list?

21 A. Right. He said repeatedly interrupts,  
22 et cetera.

23 Q. Thank you. Now, would you please take a look  
24 at the next page.

25 Again, this is back to your question 3. Refers

1 to group situations and says he does quite well.

2 A. That would be my notes of what Professor  
3 Pacheco said, yes.

4 Q. Now, again, this is -- again, does anything on  
5 this page identify a specific incident involving  
6 Dr. Kao?

7 A. For this page, I didn't ask for incidents.

8 Q. I understand.

9 A. So as a matter of fact, one of the questions  
10 would have been, "What's he like one-on-one?" He says,  
11 "His temperament is such I avoid any interaction with  
12 him."

13 Q. All right. Again, just to get through this  
14 page, there's no specific event that he describes with a  
15 date, time or other year?

16 MR. VARTAIN: Objection. The question  
17 misstates the document.

18 THE COURT: Overruled.

19 THE WITNESS: There actually are specifics in  
20 that he's referring to department meeting agendas. So  
21 that's specific meetings. And he says that they prepare  
22 the agenda thinking in mind how is it going to affect  
23 John.

24 MR. KATZENBACH: Q. Have you ever seen any  
25 meeting agendas?



1 A. Not -- not to my recollection.

2 Q. And he's not indicating what agendas he's  
3 referring to?

4 A. He is in that he's saying the department  
5 meeting agendas.

6 Q. Okay. Taking a look at the next page, if you  
7 would, all right. On this page, once again, we have yet  
8 another reference to CCAC.

9 A. Let me just look it over, please.

10 Q. Sure.

11 A. (Reviewing document.) Yes. It's referring to  
12 CCAC.

13 Q. And to this, he describes how Dr. Kao felt he  
14 had to proceed with a grievance?

15 A. Yes. He's saying that even though he was  
16 talked to, that once he makes up his mind about  
17 something like in this grievance, he has to proceed with  
18 it.

19 Q. Fair enough.

20 Other than the CCAC, is there anything on this  
21 page that talks about a specific incident involving  
22 Dr. Kao?

23 A. Yes.

24 Q. What is that?

25 A. I believe it's at the bottom. I believe it

1 refers to the '07/'08 search where it says other faculty  
2 are annoyed by the absurd charge.

3 Q. That was the absurd charge of Dr. Kao's that  
4 the search was discriminatory?

5 A. That would be my recollection.

6 Q. That's the absurd charge by Dr. Kao that the  
7 way the search had been advertised adversely affected  
8 the number of minority candidates?

9 MR. VARTAIN: Argumentative and vague  
10 objection.

11 THE COURT: Overruled. The Witness may answer.

12 THE WITNESS: Can you say that again, please?

13 MR. KATZENBACH: Q. That was the -- the absurd  
14 charge by Dr. Kao that the way the 2008 search was  
15 conducted discriminated against minorities?

16 A. Yeah. My thinking at the time was the reason  
17 they were saying that -- one of the reasons they were  
18 saying that it was absurd is at the time you would  
19 generally think that everyone who is doctorially  
20 prepared would be using the internet, and ads placed on  
21 the internet would probably be seen even more than those  
22 in a print journal.

23 That might not be the same, for example, for  
24 gardeners or laborers. But for faculty who have their  
25 doctorate, it generally would not be -- that would be

1 the place to place an ad.

2 Q. So that was -- so it wasn't statistics --  
3 strike that question.

4 In your interviews with these three faculty  
5 members, did they tell you that the number of applicants  
6 in the 2008 search was over a hundred fewer than in the  
7 prior two searches where advertisements had been placed  
8 in professional journals?

9 A. My recollection is that this search had  
10 approximately 200 applicants; that other searches had  
11 approximately 300 and there -- when I asked them further  
12 about that, they said yes, actually in the ad, they  
13 stressed that this was for nonmath majors or  
14 introductory math. And that generally you're going to  
15 get less -- fewer number applying for that kind of  
16 position.

17 And actually, they were thrilled with the  
18 quality of applicants they had in this 200 pool.  
19 Actually, they told me that the pool they thought was  
20 even more well qualified in general than the pool when  
21 it was over 300.

22 Q. M-hm. Do you recall what happened in the next  
23 year, 2009?

24 A. The next year?

25 Q. There was another search the following year;

1 wasn't there?

2 A. I don't recollect.

3 Q. Do you know the number of applicants in the  
4 following year?

5 A. Actually, I do recollect a little bit. No. I  
6 don't know the number of applicants.

7 Q. Do you know the applicants -- do you know what  
8 the terms of the ad in the next year were?

9 A. No.

10 Q. Finally, we go to the last page of your  
11 interview notes with Dr. Pacheco. And on this page, he  
12 doesn't identify any particular incident involving  
13 Dr. Kao; is that correct?

14 A. That's correct.

15 Q. Thank you.

16 I would like to go back, if you would, to  
17 Exhibit 56. Those are your notes with Tristan Needham.

18 I will like to ask you about one particular  
19 part of that. I would like to direct your attention on  
20 the first page, the very last line.

21 Do you have your attention on that?

22 A. Yes.

23 Q. This is a -- I think you indicated the first  
24 page was a script that you had prepared.

25 A. I don't believe I indicated that it was a

1 script. I said it was notes to myself on points I  
2 wanted to make to the candidates.

3 Q. Are there things you wanted to tell the  
4 candidates?

5 A. Yes.

6 Q. Or rather tell the people you were  
7 interviewing?

8 A. I'm sorry. The people I was interviewing.

9 Q. As I read it, it says, "I need all perspectives  
10 on this matter." Is that what you said?

11 A. That's what it says here, yes.

12 Q. Is that what you told these people when you  
13 interviewed them?

14 A. I don't know the exact words that I would have  
15 used, but my point would have been to tell them that I  
16 wanted their perspective, and I was asking other people  
17 as well as.

18 Q. What does the phrase "I need all perspectives  
19 on this matter" mean to you?

20 A. It means what it says there, I think.

21 Q. Let me ask you this: Does it mean more than  
22 the three individuals that you interviewed?

23 A. It was part of my explaining to them that I  
24 wanted to get the best information I could. And that  
25 means getting a variety of perspectives.

1 Q. And in getting a variety of perspectives, did  
2 you interview any of the other faculty members in the  
3 department who might be in a position to observe  
4 Dr. Kao?

5 A. As I mentioned yesterday, you have the names of  
6 the three faculty members in the department that I  
7 interviewed. I choose not to interview every single  
8 person on a topic if I think I have enough information  
9 so as to keep things from mushrooming. The more people  
10 you talk to, the more rumors that are out there.

11 And also, again, this was -- this was someone's  
12 livelihood and persona. And I didn't want to have to  
13 keep asking things that could make things possibly worse  
14 for Dr. Kao. I was really trying to balance both  
15 things.

16 Q. Did you get Dr. Kao's perspective on these  
17 issues?

18 A. I did in June, yes.

19 Q. Okay. We'll get to that.

20 I would like you to take a look at Exhibit 57.  
21 (Plaintiff's Exhibit No. 57 was  
22 marked for identification.)

23 MR. KATZENBACH: Q. Do you have that in front  
24 of you?

25 A. I do.

1 Q. Is that a note of a meeting -- is that a note  
2 of information that Tristan Needham provided you?

3 A. That would be my recollection, yes.

4 Q. All right. This concerned Dr. Kao?

5 A. Yes.

6 MR. KATZENBACH: I would like to move  
7 Exhibit 57 into evidence with the same limitation  
8 previously noted.

9 THE COURT: Any objection?

10 MR. VARTAIN: No objection.

11 THE COURT: Received.

12 (Plaintiff's Exhibit No. 57 was  
13 received in evidence.)

14 MR. KATZENBACH: Q. Taking a look at  
15 Exhibit 57, this is described by you as an addendum  
16 dated 05/12/08; is that right?

17 A. Yes.

18 Q. In this addendum, Professor Needham tells you  
19 that there was bumping; is that right?

20 A. Since there's only two words on the page other  
21 than the date on the addendum. My recollection this  
22 might be just from a phone message because there's  
23 another page with the same date about Tristan that has  
24 more information on it. I think just looking at this  
25 page might be taking it a little bit out of context.

1 Q. That's fine. We can get to other pages.

2 On this page, it says, "Addendum." What's it  
3 an addendum to?

4 A. My recollection it's an addendum to the  
5 information that Tristan gave me about Dr. Kao.

6 Q. The only word on this page is bumping  
7 describing any actions; correct?

8 A. That's correct, yes.

9 Q. Take a look at the next exhibit, that's  
10 Exhibit 58.

11 (Plaintiff's Exhibit No. 58 was  
12 marked for identification.)

13 MR. KATZENBACH: Q. Can you identify  
14 Exhibit 58?

15 A. It's my notes. Probably about a conversation  
16 over the phone.

17 Q. Again, this is a conversation with whom?

18 A. Tristan, it appears.

19 Q. All right. This is concerning Dr. Kao?

20 A. Yes.

21 MR. KATZENBACH: I would like to move  
22 Exhibit 58 into evidence, your Honor, with the  
23 limitations previously noted.

24 THE COURT: Any objection?

25 MR. VARTAIN: No objection, your Honor.



1 THE COURT: Was that a yes?

2 MR. VARTAIN: I said no objection, your Honor.

3 THE COURT: Received.

4 (Plaintiff's Exhibit No. 58 was  
5 received in evidence.)

6 MR. KATZENBACH: Q. All right. Taking a look  
7 at Exhibit 58, this is again dated 5/12/08, the same  
8 date as the bumping note.

9 A. Yes.

10 Q. Does this refer to bumping in any way?

11 A. Yes, because it says, "I got your message and  
12 very interested," that would mean in talking to you  
13 further. Then I wrote, "Tristan, new concerns. Blew up  
14 three times. I'm afraid of him."

15 Q. The question I think I was asking does it -- is  
16 it your understanding that refers to bumping?

17 A. It refers to the conversation that I had in  
18 follow-up on his message about bumping.

19 Q. Was there any bumping identified in these notes  
20 that are Exhibit 58?

21 A. Are you asking about this page specifically?

22 Q. Yes. I'm asking about this page specifically.

23 A. No, not on this page.

24 Q. Okay. There's nothing in there about bumping.

25 I would like to direct your attention, if you would, to

1 some marginal notes that you have.

2 A. Yes.

3 Q. Can you please read the first marginal note  
4 that you wrote?

5 A. The one on the top, though it's written  
6 sideways, "Protect you from" -- "in lawsuit," I think is  
7 what it says.

8 Q. Is that something that you told Tristan?

9 A. I don't recollect.

10 Q. Is that something he asked for?

11 A. That would probably be more like it.

12 Q. So would it be accurate to say he raised the  
13 issue of protection in a lawsuit?

14 A. I wouldn't have raised the issue.

15 Q. Thank you.

16 Now, if you please take a look at Exhibit 56.  
17 Tell me what Exhibit 56 is?

18 A. These are the notes I make -- that I made to  
19 myself as to the key points I wanted to get across to  
20 the faculty that I interviewed.

21 Q. All right. These are notes of a conversation  
22 with Tristan Needham?

23 A. As I said, these are notes of the points that I  
24 would want to have gotten across with all of the people  
25 that I interviewed, including Tristan.

1 Q. I'm sorry. Are you looking at Exhibit 59? I  
2 apologize.

3 A. Okay.

4 Q. I apologize. I'm reading the numbers upside  
5 down.

6 A. All right.

7 Q. Taking a look at Exhibit 59, is this a note,  
8 another note of a 5 -- May 12th conversation with  
9 Tristan Needham?

10 A. It appears so, yes.

11 MR. KATZENBACH: Again, I would like to move  
12 Exhibit 59 into evidence with the same limitation.

13 THE COURT: Any objection?

14 MR. VARTAIN: None, your Honor.

15 THE COURT: Received.

16 (Plaintiff's Exhibit No. 59 was  
17 marked for identification and  
18 received in evidence.)

19 MR. KATZENBACH: Q. Taking a look at the two  
20 pages that are comprised of Exhibit 59, do either of  
21 those pages refer to any incident of bumping involving  
22 Tristan Needham?

23 A. This refers to different incidents.

24 Q. Are either of those incidents of bumping  
25 involving Tristan Needham?

1 A. Not according to my note.

2 Q. If you briefly turn back to Exhibit 59, I'm  
3 sorry, 58 and 57, you see those?

4 A. Yes.

5 Q. Is it true that each one of these exhibits has  
6 a number on the bottom, USF number?

7 A. Yes.

8 Q. And 57 is USF 0170, and 58 is USF 0171 and 59  
9 is USF 0172 and 0173?

10 MR. VARTAIN: Objection. Irrelevant.

11 THE COURT: Compound. Sustained.

12 MR. KATZENBACH: Q. Are these three exhibits  
13 all contain the USF numbers in sequence?

14 MR. VARTAIN: Irrelevant. Those are litigation  
15 numbers, Counsel.

16 THE COURT: I don't see the relevance. You  
17 want to make an offer of proof, Mr. Katzenbach?

18 MR. KATZENBACH: No, your Honor. It's fine.

19 THE COURT: Sustained.

20 MR. KATZENBACH: Q. Taking a look at  
21 Exhibit 59, if you would, I would like to direct your  
22 attention to the subject of these notes.

23 Is it accurate Professor Needham was describing  
24 a department meeting that occurred on May 6th, 2008?

25 A. Can you state that again, please?

1 Q. Was Dr. Needham describing a department meeting  
2 that occurred on May 6th, 2008?

3 A. Yes.

4 Q. All right. And is this a meeting where Dr. Kao  
5 volunteered to be chair?

6 A. That's what the notes reflect, yes.

7 Q. All right. In this meeting, your notes reflect  
8 Tristan Needham telling you specifically -- I apologize  
9 -- specifically, "John piped up and said 'I'll do it.'  
10 Paul and I said we'll have to have an election."

11 A. And it says, "and run through COSEC," which  
12 was --

13 Q. That's the faculty union?

14 A. No, but I believe it refers to some kind of  
15 procedures within either that department or the School  
16 of Arts and Sciences.

17 Q. Okay. Taking a look at the next page of  
18 Exhibit 59, that apparently refers to Dr. Kao  
19 impersonating --

20 A. I'm sorry. You're looking at 173?

21 Q. Yes, I am. That apparently refers to Dr. Kao  
22 impersonating Peter Pacheco from the meeting that was in  
23 the May?

24 A. That would be my recollection, yes.

25 Q. Thank you.

1           Now, take a look at Exhibit 60, if you would.  
2           (Plaintiff's Exhibit No. 60 was  
3           marked for identification.)

4           MR. KATZENBACH: Q. Are these notes of a  
5 conversation you had with Tristan Needham?

6           A. Yes.

7           Q. These notes don't seem to be dated.

8           Do you know when these notes were taken?

9           A. No, I don't. But since it includes things  
10 about bumping with Tristan, I would assume it was  
11 somewhere near or if not on the 12th.

12          Q. You think this was on the 12th?

13          A. Well, you asked me why it wasn't talking about  
14 bumping in the other notes from the 12th. So it could  
15 be that these pages got out of order from others.

16          Q. That's fine. Okay.

17          Your Honor, with the same limitations, I would  
18 like to move Exhibit 60 into evidence?

19          THE COURT: Any objection?

20          MR. VARTAIN: No, your Honor.

21          THE COURT: Received.

22          (Plaintiff's Exhibit No. 60 was  
23 received in evidence.)

24          MR. KATZENBACH: Q. Okay. Now, taking a look  
25 at Exhibit 60, I hope, taking a look at the very first

1 line of Exhibit 60, it says, "Went to campus Tuesday,  
2 6/4"; is that correct?

3 A. It does.

4 Q. What's the first line there, after the name  
5 Steve Devlin, what's the first line on Exhibit 60?

6 A. Well, the first line on Exhibit 60 says Stephen  
7 Yeung.

8 Q. What's the second line?

9 A. "Steve Devlin," hyphen, "home."

10 Q. What's the third line say?

11 A. "Went to campus, Tuesday 6/4."

12 Q. So would it be fair to say that these notes  
13 were taken sometime on or after June 4th?

14 A. Yes.

15 Q. So these wouldn't have been taken at or around  
16 the time of the information that you got on May 12th  
17 about an alleged bumping incident involving Tristan  
18 Needham?

19 A. I think you're right. Yeah.

20 Q. Now, this refers -- in fact, this refers to a  
21 theatrical bow by Dr. Kao; correct?

22 A. Yes.

23 Q. All right. And it refers to a -- Dr. Kao  
24 laughing after -- that Dr. Kao went in his office and  
25 cackled something?

1 A. "Cackled wildly."

2 Q. Cackled loudly?

3 A. No. "Cackled wildly."

4 Q. I see. Then the next incident described on  
5 this refers to Dr. Kao lying down in an armchair  
6 something under his feet with a heavy blanket over him?

7 A. Yes. With the door open is what the notes  
8 indicate.

9 Q. All right.

10 A. And also that Tristan didn't look further. To  
11 me, the recollection there from that was he really was  
12 afraid to look any further.

13 Q. I see. M-hm.

14 On the next page of this exhibit, if you would  
15 turn to that, the top line says, "He is warning  
16 against," quote, "fit-for-duty test. He will be fit as  
17 smart."

18 Are those the notes you took of what Tristan  
19 told you?

20 A. Yes. Those are notes I took.

21 Q. How did Professor Needham know that the  
22 University was considering sending Dr. Kao for a  
23 fitness-for-duty test?

24 A. I don't know.

25 Q. Did you tell him?



1           A. I would not have told him, no. I'm not even  
2 sure where that was in time in our options and our  
3 thinking.

4           Q. This is a conversation you had with him you  
5 identified sometime on or after June 4th.

6           A. M-hm.

7           Q. Would there be any reason you can conceive of  
8 why someone in the University would be telling  
9 Dr. Needham that the University was considering sending  
10 Dr. Kao for a fitness-for-duty test?

11          A. This isn't what that says here. People watch  
12 TV shows all the time. I'm not sure. Unfortunately, I  
13 have two kids. I don't have as much time to watch some  
14 of them.

15                    People know all kinds of things from TV shows  
16 these days. So people are often asking me when they  
17 have something unusual in their office, different  
18 behaviors, whatever, "Can't you send him or her for a  
19 fitness-for-duty test?"

20                    So people bring it up as a solution to things  
21 as to how to handle problems.

22          Q. I see. So you think Dr. Needham was warning  
23 against this fitness-for-duty test because perhaps he  
24 had seen this on television?

25          A. Or somewhere else.

1 Q. I see. Not from the University?

2 A. I didn't say that. I said I did not say that  
3 in this meeting.

4 Q. Finally, we have sometime on or after the  
5 June 4th, we finally have something you write, "Other  
6 thing, Tristan bumping in hallway. Paul bumping."

7 I assume that means just bumping?

8 A. I don't know about just bumping. But I  
9 actually have two quotes. To me, that would mean  
10 bumping in hallway as well.

11 Q. Okay. That's fine.

12 Again, this doesn't contain any date?

13 A. Not on this page, no.

14 Q. Doesn't contain any description of the event?

15 A. I think the description is that Dr. Kao bumped  
16 into Tristan and bumped into Paul as had been seen in  
17 other notes.

18 Q. Let's just look at these notes. We can find --  
19 if there are other notes, we can look at those.

20 These notes say simply "bumping in hallway," no  
21 date.

22 A. Right. But this is page 2. The paper looks  
23 the same as the page before it. So I think it might  
24 well be part of those notes that appear to be taken  
25 after -- on or after 6/4.

1 Q. All right. Once again, there's nothing on  
2 either page of the notes that indicate when this bumping  
3 occurred?

4 MR. VARTAIN: Objection. Argumentative.

5 MR. KATZENBACH: Is there -- I'll rephrase it.

6 Q. Is there anything on these notes that say when  
7 this bumping occurred?

8 A. No.

9 Q. Is there anything on these notes that say  
10 Professor Needham described anything about the  
11 circumstances concerning this bumping?

12 A. My notes do not reflect anything else about  
13 bumping on this page.

14 Q. Thank you.

15 Please take a look at Exhibit 62.

16 (Plaintiff's Exhibit No. 62 was  
17 marked for identification.)

18 MR. KATZENBACH: Q. Again, are these notes  
19 that you took?

20 A. Yes, they are.

21 Q. Did you take these notes on or about the 12th  
22 of May?

23 A. Yes.

24 Q. Do these notes concern Dr. Kao?

25 A. Yes.

1 MR. KATZENBACH: At this point, I would like to  
2 move Exhibit 62 into evidence with the same limitation  
3 as previously noted.

4 THE COURT: Any objection?

5 MR. VARTAIN: No, your Honor.

6 THE COURT: Received.

7 (Plaintiff's Exhibit No. 62 was  
8 received in evidence.)

9 MR. KATZENBACH: Q. This refers to a  
10 conversation on May 12th; is that right?

11 Q. Was this a face-to-face conversation, or was  
12 this over the phone?

13 A. I don't remember.

14 Q. All right. Did you call Dr. Zeitz, or did he  
15 call you?

16 A. I don't know for sure.

17 Q. First page of this refers, again, to the  
18 meeting involving the chair.

19 A. But there's a line above it that says,  
20 "Behavior a little weirder. It's changed." I believe  
21 that's referring to the meeting that I had with Paul  
22 Zeitz on May 1st. So that would indicate that Dr. Zeitz  
23 was saying things have gotten, as I said weirder, less  
24 able to control and act normal.

25 THE COURT: Ladies and gentlemen, remember the

1 admonition. Do not form or express any opinion on this  
2 case until it's finally submitted to you for your  
3 decision. Do not discuss among yourselves or with  
4 others until that time.

5 Please be back in your places at 11:10  
6 according to the courtroom clock.

7 (Recess taken: 11:03 a.m. - 11:13 a.m.)

8 THE COURT: Jurors and Alternates are all  
9 present. Counsel for all sides are present. Plaintiff  
10 is personally present. The Plaintiff is personally  
11 present. Ms. Peugh-Wade is on the stand.

12 Mr. Katzenbach, you may continue your inquiry.

13 MR. KATZENBACH: Thank you, your Honor.

14 Q. Taking a look back, we were talking about  
15 Exhibit 62. And once between, this talks about the  
16 meeting in -- the meeting involving the chair.

17 A. Yes.

18 Q. Okay. I would like in particular, however,  
19 turn to the second page of Exhibit 62. You see that?

20 A. (Reviewing document.) Yes.

21 Q. And now, at the bottom of -- the bottom of  
22 these notes, it refers to "bumping into me." You see  
23 that?

24 A. Yes.

25 Q. And in this time, it looks to me that -- am I

1 accurate that this is, that your notes on the 12th of  
2 May are the first time that Dr. Zeitz referred to any  
3 bumping?

4 A. I don't remember. I would have to go back and  
5 look at my notes.

6 Q. They're all in evidence so we can all look.

7 Let me go here and look at these notes.

8 A. Okay.

9 Q. Initially, it looks like there's some crossing  
10 out on both of these incidents?

11 A. Yes.

12 Q. What's the first -- can you read the first part  
13 that's crossed out, department office?

14 A. I can read the first part. "Within two," but I  
15 don't know what the other part was.

16 Q. Was it "within two months"?

17 A. I don't know.

18 Q. And that's crossed out?

19 A. Yes.

20 Q. Ultimately, it says "this semester"?

21 A. Yes.

22 Q. And "in bathroom"?

23 A. Yes.

24 Q. There's some lines crossed out?

25 A. Yes.

1 Q. Can you read what's crossed out there?

2 A. With the same thing, "within two" something.

3 Q. Months? Weeks?

4 A. I can't read it.

5 Q. Again, the closest that -- the only language  
6 that Dr. Zeitz settles on is after January '08?

7 A. That's what my notes reflect, yes.

8 Q. Thank you.

9 Now, I would like if you would please briefly  
10 go back to Exhibit 61 and to the page marked 5C, which  
11 has the identification number USF 0164.

12 You have that in front of you now?

13 A. I do.

14 Q. Taking a look at the top part of that document  
15 where it's referring to January loss sleep --

16 A. Yes.

17 Q. Do you see -- I apologize for not getting it up  
18 on the screen as fast as I would like. I'll buy a  
19 better processor.

20 Taking a look at the language, I would like to  
21 direct you to the language, if I could, to the phrase  
22 that you write right next to the phrase "January lost  
23 sleep about."

24 Do you see that?

25 A. I'm sorry. "Lost sleep about"?

1 Q. You used the word "about." Do you see that?

2 Sorry. "Lost sleep, worried about." Do you see?

3 A. Yes. Yes, I do.

4 Q. And then you have -- you have some words that  
5 you've written down here. The word "bad."

6 A. Opposite the word "bad"?

7 Q. Opposite the word "about," do you see those  
8 words?

9 A. Yes.

10 Q. Does that say "him suing department"?

11 A. It says "him" something "department."

12 Q. Isn't that word "suing"?

13 A. It looks like "survey" to me, but I'm not sure  
14 what it was about. It could be. But also three lines  
15 down, it says, "Worried him, physical harm," so...

16 Q. Thank you.

17 I would like you to now take a look at  
18 Exhibit 64.

19 (Plaintiff's Exhibit No. 64 was  
20 marked for identification.)

21 MR. KATZENBACH: Q. Can you identify what  
22 Exhibit 64 is?

23 A. It is a summary of the interviews that I did  
24 with the three math faculty.

25 Q. Is that a summary you prepared?



1           A. Yes, it is.

2           MR. KATZENBACH: All right. I would like to  
3 move Exhibit 64 into evidence with the same limitation  
4 previously noted.

5           THE COURT: Any objection?

6           MR. VARTAIN: None, your Honor.

7           THE COURT: Received.

8           (Plaintiff's Exhibit No. 64 was  
9 received in evidence.)

10          MR. KATZENBACH: Thank you.

11          Q. Taking a look at Exhibit 64, which is entitled,  
12 "Summary of three faculty interviews," is this a  
13 document that you sent to Dr. Missett prior to  
14 consulting with Dr. Missett?

15          A. There were two versions of this document.  
16 There was a draft that I did first, and then there was  
17 the final one. I don't remember at this point -- I  
18 think it was the draft that went to Dr. Missett because  
19 I think at the time that he wanted it, that's where it  
20 was in the process of being finalized. It was still a  
21 draft at that point.

22          Q. All right. The draft and this final are  
23 essentially the same thing?

24          A. They're very similar.

25          Q. All right. The summary of three faculty

1 members, is that a document you also sent to  
2 Dr. Reynolds?

3 A. It would have, again, I would have to look back  
4 to see if it was the draft or the final. But...

5 Q. Do you recall sending one of those to  
6 Dr. Reynolds?

7 A. Yes.

8 Q. Okay. I have a few questions about this.

9 First is on the first page, you state that two  
10 of the faculty members whose offices are close to  
11 Dr. Kao try to avoid contact him by keeping their doors  
12 closed.

13 You see that?

14 A. No. What paragraph is that in?

15 Q. I'm sorry. That's one, two, three, four, fifth  
16 paragraph on the page. The first paragraph following  
17 the phrase, "What is JK like one-on-one?"

18 A. Yes.

19 Q. Do you recall reading the -- from the notes  
20 that you had concerning that Dr. Needham and Dr. Yeung  
21 kept their doors closed to keep John Kao from badgering  
22 them about the search, do you recall that language?

23 A. I do recall that language.

24 Q. That was from your notes?

25 A. Yes, it was.

1 Q. Can you tell me why you omitted the fact that  
2 they were keeping their doors closed because he was  
3 badgering them about the search from your report?

4 A. Because there may have been other talks, that  
5 that wasn't the only reason they were keeping the door  
6 closed. It wasn't just about the search, but they were  
7 trying to avoid him.

8 Q. If that was the case, those would be in your  
9 notes; wouldn't they?

10 A. I would believe so.

11 Q. All right. This document, Exhibit 64, is a  
12 summary of your notes?

13 A. Yes.

14 Q. So if the -- so would it be accurate to say the  
15 only information in your notes about keeping doors  
16 closed was about badgering them about the search, then  
17 you would have omitted that language from this document;  
18 right?

19 MR. VARTAIN: That question --

20 MR. KATZENBACH: Strike that. It's vague and  
21 ambiguous. Terrible question.

22 Q. If there was any other reason why they were  
23 keeping their doors closed, that would be reflected in  
24 your notes; wouldn't it?

25 A. I certainly purposely would not have misled

1 anyone with this summary. So....

2 Q. You don't mention here that one of the reasons  
3 they were keeping their doors closed was because Dr. Kao  
4 was badgering about the search even if there were other  
5 reasons?

6 MR. VARTAIN: Objection. Asked and answered.

7 THE COURT: Overruled.

8 THE WITNESS: As you stated regarding further  
9 reasons, further on down the page, it says one of the  
10 faculty members said that everyone had to be extremely  
11 cautious about anything they say or do because JK is  
12 looking for evidence of conspiracy.

13 So to me, that would be reasons to keep your  
14 door closed. If you have to be cautious about  
15 everything you say and do all the time, you certainly  
16 might want to keep your door closed.

17 MR. KATZENBACH: Q. When you wrote the  
18 language about keeping the door closed, you didn't say  
19 it was because John Kao was looking for evidence of a  
20 conspiracy, and they kept their door closed to prevent  
21 him from finding that.

22 MR. VARTAIN: Ambiguous objection.  
23 Argumentative.

24 THE COURT: It's not even a question.  
25 Sustained.

1 MR. KATZENBACH: Good point, your Honor.

2 Q. You didn't mention anything about looking for  
3 evidence as reason for keeping the door closed when you  
4 refer to that in this document; is that correct?

5 MR. VARTAIN: Objection. Ambiguous,  
6 argumentative.

7 THE COURT: Overruled. The Witness may answer.

8 THE WITNESS: Could you state it again, please?

9 MR. KATZENBACH: Q. You don't mention anything  
10 about Dr. Kao looking for evidence of a conspiracy when  
11 you write the sentence about keeping the office doors  
12 closed.

13 A. This subheading is, "What is John Kao like  
14 one-on-one?" And in the third paragraph, it's  
15 responsive to what he's like one-on-one is that we have  
16 to be careful about what we say and do because of that  
17 reason.

18 Q. Take a look at the second page of this exhibit.

19 Top of that second page, we again have a  
20 reference to the incident involving CCAC; is that right?

21 A. Yes.

22 Q. You describe -- then, once again, you use the  
23 phrase Virginia Tech.

24 A. I used that phrase in quotes because I was  
25 quoting from what the person I was interviewing said,

1 that's correct.

2 Q. And then again --

3 MR. VARTAIN: I'm going to object. Counsel is  
4 misleading the Jury by constantly changing the  
5 paragraph. Just when the Jury can read the full  
6 paragraph, he changes it. I would like an instruction  
7 from the Court to not do that. Just about get the  
8 paragraph halfway read, and Counsel changes it.

9 THE COURT: So is your objection pertaining to  
10 the questioning or what's on the screen?

11 MR. VARTAIN: What's on the screen. I would  
12 like an instruction to the Counsel to put back on the  
13 screen the paragraph that he was just questioning the  
14 Witness on so that all of us can read it before he  
15 changes it, and then the Jury, the Counsel and the  
16 Witness can read the rest of it.

17 THE COURT: Does that present any problems to  
18 you, Mr. Katzenbach?

19 MR. KATZENBACH: No. I'll try to keep anything  
20 up there I'm asking about for a sufficient length of  
21 time. And Mr. Vartain, if you haven't been able to  
22 finish it, you can certainly advise me. I can't ask the  
23 Jury.

24 THE COURT: Okay.

25 MR. KATZENBACH: Are you finished, Mr. Vartain?

1 MR. VARTAIN: More important that the Jury has  
2 been finished. You've been doing this constantly  
3 throughout the trial. I think it's about time you  
4 stopped. Nobody can follow what you're doing. It's  
5 really -- I think it's hard on the --

6 THE COURT: Mr. Vartain, that's enough.

7 MR. VARTAIN: I know it's enough.

8 THE COURT: You made the problem known.  
9 Mr. Katzenbach is aware of it.

10 MR. VARTAIN: I have been patient with him,  
11 your Honor, for now --

12 THE COURT: I said that's enough, Mr. Vartain.

13 MR. VARTAIN: Okay, your Honor.

14 THE COURT: Juror No. 1?

15 JUROR NO. 1: Your Honor and attorneys, the  
16 lawyer had it magnified where I could see it, and  
17 everybody could see it. It was really magnified well.  
18 What I can't understand is all this time it's never been  
19 like that. He's always had trouble trying to magnify it  
20 so we can see it.

21 So since the other attorney has brought this  
22 up, I would like to see it magnified the way it was  
23 today for the first time today, we saw it really  
24 magnified.

25 MR. KATZENBACH: I'll try and do that.

1 JUROR NO. 1: If you can.

2 MR. KATZENBACH: I apologize to the Court.  
3 I've been trying to increase the magnification as much  
4 as I can. For example --

5 JUROR NO. 4: I cannot read that at all, if it  
6 matters.

7 JUROR NO. 9: Can we have print-outs?

8 MR. KATZENBACH: Oh, at the end of the case,  
9 yes, of course, when you get to the jury room. That's  
10 slightly larger. Is it easier? Well, it's larger.  
11 It's going to be a little easier. Is it sufficiently  
12 easy?

13 JUROR NO. 10: Better, yeah.

14 MR. KATZENBACH: That's a better magnification.  
15 It tends to cut off. Let's see if I can do that.

16 JUROR NO. 4: There's no way to magnify the  
17 entire document? Earlier today, the notes were very  
18 large, and we could read everything on the notes. But  
19 this, you have the little thing and a big thing. I  
20 can't read any of it.

21 MR. KATZENBACH: It's -- because the document  
22 is wider that it creates -- the magnification cuts off  
23 things.

24 JUROR NO. 3: The content relative to the size  
25 of the page is what he has to work with. There's no way



1 to either magnify it that large without cropping out  
2 content. You can't read it when it's a fragment. When  
3 there are handwritten notes, you can zoom in on a chunk.  
4 It's just a limitation.

5 I mean, other than moving the projector back so  
6 the projected image is larger -- the scale is larger on  
7 the screen. It depends on what the original is.

8 MR. KATZENBACH: So I will try to be as  
9 sensitive as I can for the Jury.

10 JUROR NO. 1: Or read the entire paragraph.  
11 Have someone read it.

12 JUROR NO. 3: That would be best.

13 MR. VARTAIN: Maybe could you ask the Witness  
14 to read this entire paragraph? Let's start there.

15 MR. KATZENBACH: Okay.

16 Q. You can certainly read the entire paragraph.  
17 Maybe that would be helpful.

18 A. Sure. This was --

19 Q. The top paragraph on page 2?

20 A. I'm giving it context. This is the subsection,  
21 "What is Dr. Kao like one-on-one?"

22 It's under the subsection, "What is Dr. Kao  
23 like one-on-one?"

24 It starts, "This faculty member also recounted  
25 an incident with JK about ten years ago when the faculty

1 member was an Associate Dean. He had written a  
2 disciplinary letter to the chair of the math department  
3 about allowing JK not to teach a math course at the  
4 CCAC. Dr. Kao was copied on this letter.

5 "Dr. Kao took this letter very hard. He asked  
6 for and received a copy of apology from the Dean. The  
7 faculty member said that their relationship has not been  
8 the same since then. The faculty member says he is now  
9 concerned about his own safety, and that when he looks  
10 at Dr. Kao, he sees hatred in Dr. Kao's face. It is way  
11 out of proportion with reality.

12 "The faculty member went on to say that Dr. Kao  
13 had never verbally or physically threatened him, but  
14 nevertheless he feels threatened" -- and then in quotes  
15 I have, "'like at Virginia Tech.'"

16 Q. Okay.

17 A. End quotes.

18 Q. And the quote was intended to be language that  
19 Dr. Needham stated?

20 A. You know, I would be happy to go back to my  
21 notes. But I purposely when I did this summary because  
22 of the concern of the three faculty about not being  
23 identified unless I had to, I purposely called them  
24 "FM." When I do that in my notes, I really don't have  
25 it in my mind as to exactly who said what. I would to

1 go back and look at it.

2 Q. Next paragraph on Exhibit 64 addresses the  
3 issue of wearing a suit; correct?

4 A. Yes.

5 Q. Would you read that to the Jury?

6 A. Certainly.

7 "Another example of impact of Dr. Kao's  
8 behavior is as follows: The faculty member saw Dr. Kao  
9 at the office recently, and Dr. Kao was not wearing a  
10 suit, which is uncharacteristic. As it turned out,  
11 Dr. Kao was ill and had just come in to post a notice on  
12 his door. The faculty member was so frightened by this  
13 atypical behavior, that he warned others."

14 Q. Thank you.

15 Now, the next paragraph refers to the Finch  
16 retirement party.

17 A. Yes.

18 Q. Why don't you read that to the Jury?

19 A. "This same faculty member said he's having a  
20 retirement party at his home for another math faculty  
21 member, and Dr. Kao will be attending. I asked the  
22 faculty member if he was concerned about having Dr. Kao  
23 in his home near his wife and kids, and he said" -- and  
24 this was in quotes -- "'No, Dr. Kao is a stickler for  
25 manners,'" end quotes. "The faculty member believed

1 that the setting would be a structured environment in  
2 which Dr. Kao would be able to behave."

3 Q. Thank you.

4 I don't want to in particular go through every  
5 line of this. We also have gone all through the notes  
6 that underlie this.

7 A. M-hm.

8 Q. So I would like, if I could, just to refer  
9 to --

10 A. You know, I'm not sure we went through all the  
11 notes that underlie it.

12 Q. I'm sure if there are additional notes, your  
13 counsel will be able to bring them up.

14 A. Okay. Thank you.

15 Q. That's fine. If there's something in here,  
16 some other note that we didn't read, you can certainly  
17 tell us that.

18 A. Okay.

19 Q. I would like to, however, go down to the last  
20 paragraph on this page. Can you read that paragraph for  
21 the Jury?

22 A. Sure. This is the one that starts, "Alert FM"?

23 Q. Yes.

24 A. This is under the subtitle, "What is Dr. Kao  
25 like in groups?"

1           "Another faculty member said that" -- I wrote  
2 KL, but I think it means JK, so you can tell I typed  
3 this. "Another faculty member said that Dr. Kao can  
4 sometimes be emotional in department meetings. The  
5 faculty member said he once asked Dr. Kao to treat a new  
6 faculty member with respect, and Dr. Kao said," in  
7 quotes, "'I'll treat them with respect that they treat  
8 me.'" This faculty member feels Dr. Kao behaves as  
9 though everyone hates him, and the faculty member said,"  
10 in quotes, "'We do because we are afraid he's collecting  
11 data for a lawsuit against us.'"

12           And then in parenthesis, I wrote "Dr. Kao has  
13 copied faculty members on e-mails to his attorney about  
14 the search matter."

15           That was an important part of why people felt  
16 like they were being or trying to be involved in a  
17 lawsuit or conspiracy.

18           Q. Thank you.

19           Now, did you ever give a copy of Exhibit 64 to  
20 Dr. Kao?

21           A. No, I did not.

22           Q. Did you have a copy of Exhibit 64 at the time  
23 you met with Dr. Kao concerning a fitness-for-duty  
24 evaluation?

25           A. Did I have it with me?

1 Q. No. Had you prepared it by then?

2 A. I don't know if it would have been the final or  
3 the draft at that point.

4 Q. Okay. But you have one or the other?

5 A. Yes.

6 MR. VARTAIN: Counsel, can I propose a  
7 stipulation to shortcut this that the Witness did not  
8 give this document to Dr. Kao at this June 18th meeting,  
9 if that's where you're going. And you can argue with  
10 it, ask any follow-up questions. It might save about 10  
11 or 15 minutes.

12 MR. KATZENBACH: Certainly, I'll be happy to  
13 stipulate to that.

14 MR. VARTAIN: Okay. Go for it.

15 MR. KATZENBACH: Q. After the June 18th  
16 meeting, did you give a copy of Exhibit 64 --

17 MR. VARTAIN: We'll stipulate to that too,  
18 Mr. Katzenbach, that it wasn't ever given to  
19 Professor Kao, this document. Or you, his attorney.

20 MR. KATZENBACH: All right.

21 MR. VARTAIN: We'll also stipulate other things  
22 if you wish to meet separately over lunch.

23 MR. KATZENBACH: We can talk separately over  
24 lunch then.

25 Q. Would you please take a look at Exhibit 30?

1 Exhibit 30 a copy of a letter you gave to Dr. Kao?

2 A. Yes, it is.

3 Q. I would like to direct your attention to the  
4 second paragraph. Let's see how much I can get this  
5 enlarged.

6 Can you please read the second paragraph to the  
7 Jury?

8 A. Sure. To keep it in context, this is following  
9 where I begin by saying, "The letter is to inform  
10 Dr. Kao of the subject of the meeting is about a concern  
11 for his health and his behavior in the recent past."

12 "Specifically," so reading from the second  
13 paragraph, "Specifically, there have been multiple  
14 reports from a variety of well-intentioned individuals  
15 who are quite frankly frightened by your conduct. There  
16 are reports of your yelling, exhibiting highly contorted  
17 facial expressions that suggest unfeigned anger,  
18 staring, glaring, et cetera, impeding or attempting to  
19 impede others' physical movements, e.g., sudden  
20 movements in the hallways that cause people to believe  
21 you will suddenly run into them or impede their pathway,  
22 similarly bumping and/or nearly bumping into people in a  
23 manner that suggests intent to do so, rapidly repeating  
24 the same words during meetings and conversations,  
25 displaying an expression or gesture that indicates you

1 cannot or do not want to listen to what others have to  
2 say, and bizarre chuckling in an intimidating tone that  
3 conveys the message that you are doing so to frighten  
4 whomever may hear it."

5 Q. Thank you.

6 Taking a look at the language that just  
7 precedes that, I would like to direct your attention to  
8 the phrase, "Based on your behavior and actions during  
9 the past few weeks." You see that?

10 A. Yes.

11 Q. That wasn't correct; was it?

12 A. The point I was trying to make with that is as  
13 we've talked through some of my notes, that the major  
14 changes in behavior had started in January, but really,  
15 April to May. So this was written in the middle of  
16 June. It had gotten more severe. So the past few weeks  
17 were the severe ones.

18 Q. I see. And the severe ones, what events  
19 happened that were the severe ones during the past few  
20 weeks?

21 A. I don't believe we've gone through all my notes  
22 yet, but the taking up the space, the veering and then  
23 suddenly shifting out, et cetera.

24 Q. I see. So --

25 A. And the incident with Dr. Turpin, the Dean at



1 the time, in the parking lot.

2 Q. I see. We'll get to that in a minute.

3 A. Okay.

4 Q. So it was your intention to state that the most  
5 severe actions had happened within the past few weeks?

6 A. That would be my recollection.

7 Q. And that would have been a time when there were  
8 no students on campus?

9 A. If I meant the past six to eight weeks,  
10 students were still on campus. And in April when  
11 Dr. Turpin said it happened, students were still on  
12 campus.

13 Q. So you meant something longer than the past few  
14 weeks?

15 A. It depends what you mean by "few."

16 Q. Fair enough.

17 I would like you to take a look, if you would,  
18 at the bottom of the letter. At this point, you were  
19 proposing some options; correct?

20 A. What it says is, "I'm considering making a  
21 recommendation that will result in one or more of the  
22 following."

23 Q. I would like to talk to you about those.

24 The first potential recommendation is -- can  
25 you read No. 1 to the Jury?

1           A.   Yes.   "No. 1, placing you on a leave of absence  
2 without duties or physical presence at the University."

3           Q.   What sort of leave of absence were you  
4 considering?

5           A.   A paid leave of absence.

6           Q.   Okay.   And how long was that leave of absence  
7 going to last?

8           A.   That would depend on what was needed.

9           Q.   Well, what do you mean by "what was needed"?

10          A.   I think it's interesting because the reason for  
11 this letter, if you notice, it says, "Draft."   And it  
12 says these are the things we're considering, is we  
13 really weren't sure of what to do.   I wanted to have the  
14 meeting with Dr. Kao and his attorney or attorneys to  
15 find out if they had information for me or for the  
16 University that would make us think either that he  
17 didn't need a leave of absence or perhaps, you know, as  
18 you go down to No. 2, did he need a fitness-for-duty  
19 exam because that was one of the things that was  
20 definitely being considered at that time.

21          Q.   Well, would it be correct to say that the  
22 options you were considering at this meeting were based  
23 upon the reported behaviors that you just read to the  
24 Jury?

25          A.   No, because you haven't let me read everything,

1 all of the notes I've taken nor all of the summary. I  
2 had several, I don't know if it was four or five, it was  
3 much too long, but a very long summary of those  
4 interviews. So no, it wasn't just based on what you  
5 heard.

6 Q. So it was based on some additional information  
7 that's not contained in Exhibit 30?

8 A. You asked me if I had just -- well, Exhibit 30  
9 is not the summary of the interviews.

10 Q. No. Exhibit 30 is the letter.

11 A. Yes.

12 Q. Right. In Exhibit 30, you just read to the  
13 Jury all the behaviors that you are identifying Dr. Kao  
14 engaged in that prompted this meeting; is that right?

15 A. No.

16 Q. What you read to the Jury was all the behaviors  
17 contained in Exhibit 30; correct?

18 MR. VARTAIN: So stipulated. Objection. Asked  
19 and answered and argumentative.

20 THE COURT: Plaintiff join the stipulation?

21 MR. KATZENBACH: No. I'm confused about her  
22 answer. I want to clarify this.

23 THE COURT: Okay. You're not required to  
24 accept the stipulation. Overruled.

25 THE WITNESS: I think what you're getting at is

1 when I did the final draft of the letter, so one of the  
2 things that I've learned is when you have difficult news  
3 to tell someone, that it's often better to give them a  
4 little bit of a preview before you do the final news.

5 So one of the things I did and also in talking  
6 to the expert, the forensic psychiatrist that we used,  
7 his suggestion was to have this preliminary meeting and  
8 say some of these things might happen. So this letter  
9 does that.

10 The final letter says we didn't hear anything  
11 from you that gave us information that has changed our  
12 mind. Therefore, something to the effect of we're going  
13 to put you on leave, and we're going to require a  
14 fitness-for-duty exam.

15 In that letter, it's slightly different than  
16 this first letter. And it includes, I think what the  
17 attorney is getting to. It includes a description of  
18 clenched fists, which when I went back to write the  
19 final letter, I reviewed all of my notes again, and  
20 there was that one descriptor that I had left off this  
21 draft letter, but I thought it was important, so I  
22 included it in the final letter.

23 Is that helpful?

24 MR. KATZENBACH: Q. No. That's not my  
25 question.

1 A. Okay.

2 Q. But thank you for the information anyway.

3 A. Sure.

4 Q. You indicated you were looking for a response  
5 from Dr. Kao; correct?

6 A. Are you referring to on this one page or on the  
7 second page as well?

8 Q. No. I'm actually referring to the testimony  
9 that you just gave where you said you were looking for a  
10 response from Dr. Kao. That's what I'm referring to.

11 You just testified you were looking for a  
12 response from Dr. Kao to this letter; correct?

13 MR. VARTAIN: Objection. Compound.  
14 Argumentative.

15 THE COURT: Overruled. The Witness may answer.

16 THE WITNESS: Yes. Both in my testimony and in  
17 this letter I did.

18 MR. KATZENBACH: Q. Okay. The response you  
19 were asking from Dr. Kao concerned the behaviors that  
20 you listed in Exhibit 30; is that correct?

21 A. It actually says, "I would welcome explanation,  
22 information or anything that you or your attorney wish  
23 to provide us that may assist us in fulfilling our  
24 duties." So it's broader than that.

25 Q. You did ask for an explanation, though;

1 correct?

2 A. Yes.

3 Q. All right. That would be an explanation of  
4 these events that you say occurred during the past few  
5 weeks?

6 A. Not events. The behaviors.

7 Q. All right. The ones you listed in your letter?

8 A. The types that were listed in my letter.

9 Q. Well, the types that were listed in the letter  
10 or the specific ones?

11 MR. VARTAIN: Argumentative.

12 MR. KATZENBACH: Sorry. I'll strike that.

13 We'll just keep it simple.

14 Q. You asked for an explanation?

15 MR. VARTAIN: Asked and answered.

16 THE WITNESS: An explanation of conduct that is  
17 frightening.

18 MR. VARTAIN: Objection. Asked and answered.

19 THE COURT: Overruled. The answer will stand.

20 When there is an objection, please hold your  
21 answer until I rule.

22 THE WITNESS: Sorry.

23 MR. KATZENBACH: Thank you.

24 Q. Let's go back to "placing you on the leave of  
25 absence" option, if you would.

1 A. Yes.

2 Q. You actually met with Dr. Kao on the 18th of  
3 June?

4 A. Yes, I did.

5 Q. Did you give any explanation of what you meant  
6 by "placing you on a leave of absence without duties or  
7 physical presence at the University"?

8 A. If he had asked about it, I would have given  
9 information. I don't remember if he asked more or not.

10 Q. All right. And you indicated that you were  
11 considering this to be might be a paid leave of absence?

12 A. Yes. That's how I would normally do it, yes.

13 Q. All right. How long was such a paid leave of  
14 absence have lasted?

15 A. It all depends on the case. We really try to  
16 work with folks. In similar situations where we've had  
17 someone that needs to be out for a physical or mental  
18 disability, we have a generous sick leave policy with  
19 disability such that they can remain paid. We have  
20 short- and long-term disability and a quite extensive  
21 sick leave they can remain paid for quite a long period  
22 of time.

23 Q. The paid for leave of absence as you were  
24 understanding it at that time, would it come from the  
25 sick leave policy; is that correct?

1 A. At this point, it was one of the options, yes.

2 Q. So to get sick leave, Dr. Kao would have to say  
3 he's sick; correct?

4 A. No. You can get sick leave if you are out on  
5 medical leave.

6 Q. You have to say there's a medical reason for  
7 him being out; right?

8 A. If Dr. Kao had come forward or his attorney had  
9 come forward and spoken and said, "We want to work on  
10 this. We don't think Dr. Kao is sick, but we're willing  
11 to have him out for a fitness-for-duty exam," we would  
12 have used sick leave and made his pay the same.

13 Q. In order --

14 A. I'm sorry. Made his pay whole.

15 Q. Prior to becoming vice president in charge of  
16 human resources for the University of San Francisco,  
17 were you in the benefits office for San Francisco,  
18 University of San Francisco?

19 A. Yes, I was.

20 Q. And you handled sick leave applications?

21 A. They're not applications, but yes.

22 Q. Sick leave program?

23 A. M-hm.

24 Q. When people file for sick leave at the  
25 University of San Francisco, that's paid through an



1 insurance company; isn't it?

2 A. No, it is not.

3 Q. When people file for sick leave with the  
4 University of San Francisco, isn't it necessary to say  
5 you're sick?

6 A. Generally one uses sick leave when they are  
7 sick.

8 Q. Thank you.

9 A. But -- may I finish answering, please?

10 Q. Sure, sure.

11 A. But in this case, if Dr. Kao and/or his  
12 attorney had said, "We're not agreeing that Dr. Kao is  
13 sick; however, if you want him to be off campus while he  
14 goes through this fitness-for-duty exam," I would have  
15 done that.

16 Q. So in order to get -- to have a paid leave, was  
17 it your intention that at the time you wrote Exhibit 30,  
18 that in order to get paid, Dr. Kao would have to apply  
19 for sick leave and say he would go to the  
20 fitness-for-duty examination?

21 MR. VARTAIN: Ambiguous. Objection.

22 THE COURT: I think I understand. Do you  
23 understand it, Ms. Peugh-Wade?

24 THE WITNESS: Could you repeat it again?

25 MR. KATZENBACH: I'll be happy to.

1 Q. Exhibit 30, letter of June 18th, at the time  
2 you were considering placing Dr. Kao on a leave of  
3 absence, if he were to have a leave of absence under  
4 sick leave, was it your intention that the only way he  
5 could get sick leave was if he agreed to go to a  
6 fitness-for-duty evaluation?

7 A. No. Nothing was in stone at this point. We  
8 were putting out information and asking for help from  
9 him and information from him before we made our decision  
10 as to what finally needed to be done.

11 Q. All right. The next paragraph refers to a  
12 fitness-for-duty evaluation.

13 A. Yes, it does.

14 Q. And in this one --

15 MR. VARTAIN: You promised you would let her  
16 read it. Objection.

17 THE COURT: What was your suggestion,  
18 Mr. Vartain?

19 MR. VARTAIN: My objection was that Counsel  
20 promised when he put it up on the screen to let the  
21 Witness read it aloud so the Jury could hear it.

22 MR. KATZENBACH: I think that's a request.

23 THE COURT: I don't think that's a promise that  
24 every document would be read from beginning to end, only  
25 the portions he was questioning on.

1 MR. VARTAIN: No. Just this paragraph. I  
2 didn't ask him to read the whole document. It's  
3 probably the most important paragraph in the whole case.

4 THE COURT: Well, then, I'll save it till after  
5 lunch. Take our lunch break. I'll ask Juror No. 4 to  
6 remain after the Jurors have departed.

7 Ladies and gentlemen, remember the admonition.  
8 Do not form or express any opinion on this case until  
9 it's finally submitted to you for your decision. Do not  
10 discuss among yourselves or with others until that time.

11 Please be back in your places at 1:30 this  
12 afternoon. Please remember to leave your instructions  
13 and notebooks behind.

14 (Whereupon, the Jurors exited the courtroom at  
15 12:02 p.m.)

16 THE COURT: The Jurors and Alternates, save for  
17 Juror No. 4 have departed. Counsel for both sides,  
18 Plaintiff remains.

19 I have a request that you be excused from  
20 further service on account of hardship as you won't get  
21 paid for the full-time of your service. I consulted  
22 with Counsel, and your request to be excused is denied.  
23 It is something that should have come up a long time  
24 ago.

25 JUROR NO. 4: I wasn't requesting that. I

1 spoke with the Clerk asking how long the trial was going  
2 to take so I could, you know, look at my funds coming in  
3 and try to figure out a situation because at first, I  
4 thought I was going to get paid for the duration. Then  
5 they informed me it was only ten days. So I'm  
6 personally just trying to figure out my, you know, my  
7 balance on my checkbook and whatnot. I was just trying  
8 to get a better idea how long it was going to last so I  
9 know how long I was going to be out of work.

10 THE COURT: You're not asking to be excused?  
11 You're just asking for information?

12 JUROR NO. 4: M-hm.

13 THE COURT: Counsel, you want to talk to each  
14 other and form an estimate?

15 MR. KATZENBACH: Yes. I think we can do that  
16 maybe. I don't know if we can --

17 MR. VARTAIN: I know how much time I need. I  
18 don't know how much time he needs.

19 THE COURT: That's why I suggest you talk to  
20 each other before we start giving out numbers.

21 MR. KATZENBACH: Your Honor, we'll do that and  
22 see if we can get an estimate.

23 THE COURT: Sure. Why don't we do that over  
24 the lunch hour, and I expect to have an answer to your  
25 question. I'm sorry. I misinterpreted your request.

1 JUROR NO. 4: Yeah. I wasn't looking to get  
2 excused. I was needing to know a guideline of where we  
3 were at.

4 THE COURT: Okay. See you at 1:30.

5 JUROR NO. 4: Great. Thank you.

6 (Whereupon, Juror No. 4 exited the courtroom at  
7 12:05 p.m.)

8 THE COURT: (Juror No. 4) has departed the  
9 courtroom. Counsel for both sides and plaintiff remain.

10 Anything you want to put on the record,  
11 Mr. Katzenbach?

12 MR. KATZENBACH: Yes, your Honor. There are  
13 two witness issues that I'm not sure quite at the moment  
14 how we need to resolve. The first one is Dean Turpin  
15 who we were going to call and ask for some questions.

16 Counsel reports to me Dean Turpin is still --  
17 rather Provost Turpin is still ill and unavailable. So  
18 I'm not sure what her availability is. I don't know if  
19 Counsel would care to advise.

20 MR. VARTAIN: You've got four other witnesses  
21 who you control before we get to Dean Turpin. I told  
22 you she's hacking. She told me if she were to be here,  
23 she would be hacking after every question.

24 So we're going to check in with her later today  
25 and see what she predicts for tomorrow. She's not even

1 in the office. She's at home. So you know, we didn't  
2 need to raise that with the Judge, Mr. Katzenbach.  
3 We've talked about it.

4 MR. KATZENBACH: Thank you.

5 The second issue I have is we have an economic  
6 expert on call. She's going to be here at approximately  
7 2:00 p.m. She is unavailable tomorrow. And I would  
8 like -- at some point, I would like to put her on today  
9 to give calculations of lost wages.

10 THE COURT: So you have an economist who you  
11 would like to put on this afternoon, interrupting the  
12 testimony of other witnesses?

13 MR. KATZENBACH: Yes, if necessary.

14 THE COURT: If necessary.

15 Is this something you and Mr. Vartain haven't  
16 been able to figure out between you?

17 MR. KATZENBACH: No. I haven't discussed it  
18 with Mr. Vartain. I'm trying to alert the Court to this  
19 issue, and hopefully we can resolve it. I had hoped  
20 this morning would go faster, and this wouldn't be  
21 something --

22 THE COURT: What I prefer is what Mr. Vartain  
23 has suggested; that is that you talk to each other about  
24 solving any problems out of court having any witnesses  
25 in to testify. And only if you come to an impasse

1 should you be involving the Court.

2 MR. KATZENBACH: That's fine with me, your  
3 Honor.

4 THE COURT: Okay. Anything else,  
5 Mr. Katzenbach?

6 MR. KATZENBACH: That's all I have at the  
7 moment.

8 THE COURT: Mr. Vartain?

9 MR. VARTAIN: I have nothing, your Honor.

10 THE COURT: Okay. See you at 1:30.

11 MR. MACK: Thank you, your Honor.

12 (Whereupon, the lunch recess was taken at  
13 12:08 p.m.)

14 ---oOo---

15 AFTERNOON SESSION

16 (Time noted: 1:33 p.m.)

17 THE COURT: Jurors and Alternates are all  
18 present. Counsel for all sides are present. Plaintiff  
19 is personally present. The Witness is on the stand.

20 Mr. Katzenbach, I think you were -- you folks  
21 were going to consult and see if you could give us an  
22 estimate of where we were in terms of finishing the  
23 trial.

24 MR. KATZENBACH: We discussed it. I think we  
25 are still a little away -- we may be still a tad away

1 from getting a firm or getting a good estimate.

2 MR. VARTAIN: I have an estimate of how much  
3 time the University is going to take to do its part of  
4 the case once the plaintiff finishes his part of the  
5 case, when I know when he's going to finish his case.

6 I can tell you right now how long it's going to  
7 take.

8 THE COURT: Okay.

9 MR. VARTAIN: You want me to tell you?

10 THE COURT: We're all interested.

11 MR. VARTAIN: It's going to take less than  
12 three days, less than 18 court hours of time for the  
13 University to put on all of its witnesses, all of its  
14 case. In fact, that doesn't matter when he finishes. I  
15 just don't know when he finishes.

16 MR. KATZENBACH: We anticipate finishing by  
17 tomorrow.

18 JUROR NO. 4: Can I ask a question?

19 Then after that, we do, we deliberate?

20 THE COURT: Correct.

21 JUROR NO. 4: I know each case is different.  
22 Typically how long does that take?

23 THE COURT: I'm sorry. I'm having trouble  
24 hearing you.

25 MR. VARTAIN: The question was, your Honor,



1 from Juror No. 4, after the case is over, typically how  
2 long does it take for the Jurors to do their  
3 deliberations?

4 THE COURT: That can vary tremendously.  
5 Occasionally deliberations last far longer than the  
6 trial itself. Occasionally, Jurors find it much easier.  
7 Half an hour is the quickest verdict I ever had.

8 JUROR NO. 4: Thank you. That's --

9 THE COURT: Juror No. 1?

10 JUROR NO. 1: When we're doing our  
11 deliberations, we're not sequestered? We can go home at  
12 night?

13 THE COURT: Correct.

14 JUROR NO. 1: That's all I need to know.

15 MR. VARTAIN: You can't go home at night.  
16 Everyone else can.

17 THE COURT: The Court hasn't the money nor the  
18 inclination to put you up.

19 JUROR NO. 11: That would ensure a vote for the  
20 plaintiff.

21 MR. KATZENBACH: Well, then.

22 THE COURT: All right. Mr. Katzenbach, you may  
23 continue.

24 MR. KATZENBACH: Thank you, your Honor.

25 Q. We were asking about Exhibit 30 when we left.

1 Do you have that exhibit back in front you?

2 A. Yes.

3 Q. All right. Now, taking a look at now the  
4 paragraph numbered 2 on the options that you identified  
5 in this letter, why don't you read that for the Jury?

6 A. So I see paragraph 2 is starting with  
7 "Specifically." Is that where you mean?

8 Q. Gosh. No. I'm sorry. Paragraph numbered 2.

9 A. Okay.

10 THE COURT: Paragraph No. 2?

11 MR. KATZENBACH: Yes.

12 THE WITNESS: This is within the -- I'm making  
13 a recommendation that will result in one or more of the  
14 following: "No. 2, requiring a health," in quotes,  
15 "fitness-for-duty evaluation of you by an independent  
16 physician selected by the University at the University's  
17 expense with the independent physician issuing a report  
18 to the University regarding your fitness for your  
19 faculty functions here at the University. You will be  
20 required to cooperate with this process, provide your  
21 medical records for the past years to the independent  
22 physician and meet with independent physician  
23 cooperatively. The independent physician, however,  
24 would not disclose your medical records or medical  
25 diagnoses of your health professionals to the

1 University."

2 MR. KATZENBACH: Q. All right. Now, at the  
3 time you wrote Exhibit 30 and -- what sort of medical  
4 records were you contemplating that Dr. Kao would have  
5 to disclose?

6 A. I wasn't contemplating anything specific.

7 Q. Well, did you understand that that would  
8 include any records of treatment by psychiatrists?

9 A. I'm sorry. Can you say that again?

10 Q. Sure. Did you understand that demand that  
11 Dr. Kao disclose any medical records by psychiatrists?

12 A. You used the word "demand." I don't think I  
13 did. But I would assume that it would include any  
14 medical records including those of a psychiatrist, yes.

15 Q. Okay. Did you know that Dr. Kao had seen  
16 psychiatrists in the past?

17 A. I think, as I mentioned yesterday, because of a  
18 letter that he passed around the office, I was aware  
19 that he had been under the care of a psychiatrist or  
20 psychologist, something of that matter, yes.

21 Q. At the time that you wrote this, did you intend  
22 that those would be the types of records that Dr. Kao  
23 would be discussing to this IP?

24 A. I intended to let Dr. Kao know that he would  
25 need to disclose anything that would be helpful to the

1 IP in making an informed judgment, and that would  
2 include whatever medical records the IP needed.

3 Q. Do you have any idea what those medical records  
4 would be at the time you made this statement of a  
5 requirement?

6 A. No.

7 Q. Okay. Now, take a look at -- sorry. Take a  
8 look at the last numbered paragraph 3. You indicate  
9 other actions yet to be considered.

10 A. Yes.

11 Q. Do you recall any discussion at the meeting  
12 with Dr. Kao as to any other actions that might be  
13 considered on this issue?

14 A. No, I don't.

15 Q. Okay. Now, taking a look at the next page of  
16 Exhibit 30, you have a reference, taking a look at the  
17 last paragraph there, why don't you read that to the  
18 Jury?

19 A. "Once again, before making a final decision,  
20 the University, through me, would welcome explanation,  
21 information or anything else you and/or your attorney  
22 wish to provide that may assist us in fulfilling our  
23 duties as an institution of higher learning. We want to  
24 proceed thoughtfully and with respect for you as well as  
25 for all others on the campus."

1 Q. All right. Now, did you actually meet with  
2 Dr. Kao on the 18th of June?

3 A. Yes.

4 Q. All right. And during the course of that  
5 meeting, do you recall Dr. Kao addressing the issue of  
6 the laughing or chuckling you referred to in your  
7 letter?

8 A. I don't remember if he addressed it there or in  
9 an e-mail later.

10 Q. Okay. Do you recall Dr. Kao saying that it's  
11 possible that -- do you recall Dr. Kao saying it was  
12 characteristic of Asian culture and him in particular  
13 that he would chuckle when he was nervous?

14 A. As I said, I don't remember if I hear him  
15 saying it or if it was in an e-mail later.

16 Q. You do recall that issue coming up?

17 A. Yes.

18 Q. In the course of the meeting that you had with  
19 Dr. Kao, do you recall Dr. Kao asking for more  
20 information about the allegations that were made in your  
21 letter?

22 A. Yes. He wanted to know the names of the people  
23 that were involved, I wouldn't call them allegations,  
24 but in the behavior that I was discussing.

25 Q. Well, isn't it a fact that he just asked for

1 whatever information you would be able to provide?

2 A. My recollection is that he asked for the  
3 specifics of the names of people. He may have also  
4 asked for other specifics, but that's what sticks in my  
5 mind.

6 Q. All right. Do you also recall that Dr. Kao  
7 proposed a clear-the-air meeting at your meeting with  
8 him on the 18th?

9 A. Yes, I do.

10 Q. And do you understand what the purpose of that  
11 meeting was, a clear-the-air meeting?

12 MR. VARTAIN: Objection.

13 MR. KATZENBACH: Sorry.

14 Q. Did Dr. Kao explain to you the purpose of a  
15 clear-the-air meeting?

16 A. I don't remember if he explained it.

17 Q. All right. Do you remember any explanation  
18 being given to you?

19 A. I think it's pretty clear what a clear-the-air  
20 meeting means.

21 Q. Did you understand that that was an opportunity  
22 for Dr. Kao to address the concerns that you had raised  
23 with the people making them and assure them that he  
24 meant them no harm?

25 A. I understood that that was a suggestion he was

1 making. I did not think that that was a reasonable  
2 option since those people were too afraid to be in the  
3 same room with him, which is why I was doing the meeting  
4 instead of anyone else up the normal chain of command.

5 Q. All right. Now, at the conclusion of this  
6 meeting on the 18th, was Dr. Kao banned from campus?

7 A. At the conclusion of this meeting, we said that  
8 was one of the possibilities.

9 Q. But he wasn't banned from campus on the 18th;  
10 was he?

11 A. Not to my recollection.

12 Q. And there's no reference in here of when --  
13 strike that.

14 The first -- at the conclusion of that meeting,  
15 Dr. Kao was free to go back to his office?

16 A. I don't believe that it was said otherwise.

17 Q. All right. Did you arrange for Dr. Kao to be  
18 videotaped coming in and out of the meeting with you?

19 A. Did I specifically arrange it, no, I did not.

20 Q. Did you know it was happening?

21 A. I knew that he was being surveilled. I didn't  
22 know if they were using videotape or just watching.

23 Q. Was the purpose of that surveillance to see if  
24 Dr. Kao would have some form of physical reaction to the  
25 information you were putting him on an indefinite leave

1 of absence?

2 A. The purpose of watching him was because people  
3 were afraid. And I had a dual duty at the time. I was  
4 also risk manager, so I was trying to make sure that the  
5 institution was safe. So that was the purpose of  
6 watching him.

7 Q. Uh-huh. And the purpose of watching him, did  
8 that surveillance then continue for the remaining days  
9 or the week that Dr. Kao was on campus?

10 A. I'm not sure.

11 Q. Did it continue until you banned him from  
12 campus?

13 A. I'm not sure.

14 Q. So during -- isn't it a fact that that  
15 surveillance lasted only for a brief period as he was  
16 coming to the meeting and when he left the meeting?

17 A. From the information I have, it lasted -- that  
18 would have been Public Safety's decision as to how long  
19 to have it last. My understanding they had it last  
20 until he left the campus.

21 Q. That day?

22 A. Yes.

23 Q. But not any of the following days; is that  
24 right?

25 A. I might not know about everything else. Again,



1 I wasn't the person -- that's our director of Public  
2 Safety's expertise.

3 Q. You asked Public Safety to provide you  
4 something; didn't you?

5 MR. VARTAIN: You're arguing with the Witness.

6 MR. KATZENBACH: I'm sorry. I'll retract that.

7 Q. Did you ask Public Safety to hire private  
8 investigators for purposes of this meeting with Dr. Kao?

9 A. I don't remember if I asked or if the  
10 Provost -- I'm sorry, at the time the Dean or the  
11 Provost asked it or if it was just a joint decision.

12 Q. When you're talking about the Dean, you're  
13 referring to Dean Turpin?

14 A. Yes.

15 Q. Thank you.

16 Take a look at Exhibit 31. Is Exhibit 31 your  
17 response to issues Dr. Kao raised at the meeting on  
18 June 18th?

19 A. Yes.

20 Q. All right. Please read the -- strike that.

21 Let's go down a little bit. When was this  
22 e-mail sent?

23 A. June 20th.

24 Q. That was Friday?

25 A. Yes.

1 Q. Thank you.

2 Now, take a look at the first paragraph  
3 following the, "Thank you for meeting with me on  
4 Wednesday." Can you read that to the Jury?

5 A. Certainly. "I want to reiterate that if you  
6 have any information you believe the University should  
7 consider in making its decision on this matter, please  
8 either provide the information to me or let me know the  
9 nature of the information by Monday June 23rd.  
10 Additionally, if you want to voluntarily agree to the  
11 independent medical evaluation and/or the leave of  
12 absence, please provide written notice of such by Monday  
13 as well."

14 Q. Please read the next paragraph.

15 A. "With regard to your request for detailed  
16 information about the reports that form the basis for  
17 concern, I do not believe providing that information  
18 would be productive. As I mentioned, this matter does  
19 not stem from a complaint against Professor Kao or a  
20 complaint under the University's sexual and other  
21 unlawful harassment policy, and it is not a disciplinary  
22 matter."

23 Q. Thank you.

24 Now, what was the significance to you of  
25 stating in this e-mail that this did not arise from a

1 complaint against Professor Kao?

2 A. That what we were concerned about was him.

3 Q. Well, you're raising, as I see you are stating  
4 in response to a request for more information that "this  
5 matter does not stem from a complaint against Professor  
6 Kao or a complaint under the University's sexual or  
7 other unlawful harassment policies and is not a  
8 disciplinary matter."

9 Why did you include that information in the  
10 paragraph responding to requests for additional  
11 information?

12 MR. VARTAIN: Objection. Compound. You're  
13 arguing with the Witness. Argumentative.

14 THE COURT: Overruled. The Witness may answer.

15 THE WITNESS: Can you say it again, please?

16 MR. KATZENBACH: Q. What is the significance  
17 in saying this does not arise or does not stem from a  
18 complaint against Professor Kao in response to requests  
19 for information?

20 A. That under official complaint procedures, there  
21 are oftentimes when the person being complained about  
22 needs to be told the specifics of who complained,  
23 et cetera, I'm saying this is not one of those times.

24 Q. Now, did this letter also address the issue of  
25 the University's policies on fitness-for-duty

1 evaluations?

2 A. Yes, in the next paragraph.

3 Q. Why don't you read that to the Jury?

4 A. "As to a written policy for fitness-for-duty  
5 evaluations, I refer you to state and federal law, FEHA,  
6 EEOC, both of which authorize these evaluations as  
7 nondisciplinary actions. See also various sections of  
8 the collective bargaining agreement located on the USF  
9 website including sections 23.34 and 15."

10 Q. What was the purpose of referring Dr. Kao to  
11 state and federal law?

12 A. If I recollect, either he or his attorney were  
13 questioning the University's right to require a  
14 fitness-for-duty exam.

15 Q. Isn't it the case Dr. Kao or his attorney --  
16 that was me; right?

17 A. Yes.

18 Q. Requested what policies you were relying on,  
19 the University was relying on in this making demand?

20 MR. VARTAIN: I'm going to object to the tone  
21 of that last question.

22 MR. KATZENBACH: I'm sorry.

23 MR. VARTAIN: I want to renew my request for an  
24 instruction that I made yesterday of the Court that the  
25 Attorney be instructed to use a professional tone in

1 talking to my Witness, the assistant vice president of  
2 human resources.

3 THE COURT: The question can be argumentative  
4 simply by the tone of voice which it is made.

5 Mr. Katzenbach, try and avoid using that tone  
6 of voice.

7 MR. KATZENBACH: I will, your Honor.

8 Q. In the meeting on the 18th, I or Dr. Kao asked  
9 for you to provide Dr. Kao or me with the policies that  
10 the University had on fitness-for-duty evaluations; is  
11 that right?

12 MR. VARTAIN: Counsel, I could propose a  
13 stipulation again that could deal with this issue, if  
14 you would like me to.

15 MR. KATZENBACH: I think the Witness can answer  
16 the question.

17 MR. VARTAIN: I'm sure she can. I think you're  
18 going to take ten minutes on the subject that I could  
19 stipulate.

20 THE COURT: There's an invitation to stipulate.

21 MR. KATZENBACH: Your proposed stipulation is?

22 MR. VARTAIN: The proposed stipulation is that  
23 the policies of the University as contained in the  
24 collective bargaining agreement states that the  
25 University will exercise the rights that the law gives

1 it. And Ms. Peugh-Wade is telling you, referring you to  
2 the collective bargaining agreement provisions and to  
3 the laws that those policies relate to. So stipulated?

4 MR. KATZENBACH: Sure. That would be fine.

5 THE COURT: All right. When the attorneys  
6 stipulate to a fact, that means you must accept the  
7 fact, ladies and gentlemen of the Jury, as being true  
8 without further inquiry.

9 MR. KATZENBACH: Q. So would it be accurate to  
10 say, Ms. Peugh-Wade, there is no separate policy the  
11 University has governing fitness-for-duty evaluations?

12 MR. VARTAIN: I'm going to object. That's  
13 irrelevant now that we made the stipulation.

14 THE COURT: No. I don't think so. Overruled.

15 MR. KATZENBACH: Q. There is no separate  
16 policy the University has regarding fitness-for-duty  
17 evaluations; isn't that correct?

18 A. The collective bargaining agreement would cover  
19 this.

20 Q. Is there anything in the collective bargaining  
21 agreement that refers to fitness-for-duty evaluations?

22 A. The collective bargaining agreement refers to  
23 management rights which includes a wide variety of  
24 things.

25 Q. You're referring to paragraph 15 or sections 15

1 of the collective bargaining agreement?

2 A. I don't remember if it was 15 or 23.

3 Q. Well, let's take a look.

4 Would you please take a look at Exhibit 8.

5 Taking a look at Exhibit 8, that's a copy of the  
6 collective bargaining agreement.

7 Is that a copy of the collective bargaining  
8 agreement?

9 A. Yes.

10 Q. I would like to direct you first to article 15,  
11 "Management rights."

12 A. Yes.

13 Q. Do you have that in front of you?

14 A. I do.

15 Q. Is there anything in this section on management  
16 rights that says anything specific about  
17 fitness-for-duty examinations?

18 A. Not specifically. It is much more general than  
19 that.

20 Q. It says basically unless it's covered by the  
21 contract, management retains the rights to do anything  
22 the law allows?

23 A. It's a little bit more specific. It says we  
24 have the right to plan, direct and control the  
25 University operations.

1 Q. Fair enough.

2 A. And then it goes on.

3 Q. But anything in -- nothing in section 15 or  
4 article 15 uses the term "fitness for duty"?

5 JUROR NO. 9: Are we going to have an  
6 opportunity to read it?

7 MR. KATZENBACH: Yes. It will be in evidence.  
8 Let me see if I can make it larger.

9 JUROR NO. 3: Can we have the opportunity now?  
10 It keeps scrolling.

11 MR. KATZENBACH: Q. Why don't we do this: Why  
12 don't you read article 15 to the Jury. I'll see if I  
13 can --

14 A. Do you want me to read it as well.

15 Q. Yes, if you could.

16 A. "15.1, the management of the University and the  
17 direction and the control of the staff including the  
18 right to plan, direct and control University operations  
19 to determine the number and location of operation, to  
20 determine the means, methods, schedules of operation, to  
21 author, rearrange, change, extend, curtail or  
22 discontinue its operations partially or completely, to  
23 determine the methods of educational delivery to be used  
24 and services to be rendered, to determine the size,  
25 scheduling and assignment of the staff to establish



1 standards and maintain quality of performance, to  
2 establish and require employees to observe University  
3 rules and regulations and reasonable standards of  
4 conduct, to maintain order and discipline or discharge  
5 employees shall be the right solely and exclusively of  
6 the University. The foregoing enumeration of  
7 management's rights is not intended to be all inclusive  
8 but indicate the type of matters or rights which belong  
9 to and are inherent to management and shall not be  
10 deemed to exclude other rights of management not  
11 specifically set forth. The University, therefore,  
12 reserves all rights unless they're limited by the clear  
13 and explicit language of the provision of this  
14 agreement."

15           Then there are section 15.2.

16           "Any of the rights, powers" -- I don't know if  
17 you want to.

18           Q. Yeah. Why don't you finish reading the whole  
19 paragraph. If it's okay, I'll scroll up so the Jury can  
20 follow along.

21           A. "Any of the rights, powers, authority and  
22 function the University had prior to the negotiation of  
23 this agreement are retained by the University except as  
24 expressly abridged by a specific provision of this  
25 agreement. The University is not exercising rights,

1 powers, authorities and functions referred to it or is  
2 exercising them in a particular way, shall not be deemed  
3 a waiver of said rights, powers, authorities, functions  
4 or its right to exercise them in some other way not in  
5 conflict with specific provisions of this agreement."

6 Q. Okay. Thank you.

7 Now, the other section you referred to in  
8 Exhibit 31 was section 26.3.4 of the collective  
9 bargaining agreement. I believe that's on page 70 of  
10 the collective bargaining agreement.

11 Again, let me see if I can get to that stage.

12 MR. VARTAIN: 23.3.4, Counsel.

13 MR. KATZENBACH: I know. Okay.

14 Q. What was the section that you identified in  
15 your letter?

16 MR. VARTAIN: 23.3.4.

17 MR. KATZENBACH: 23.3.4.

18 Q. You want to look at 23.3.4 of the collective  
19 bargaining agreement?

20 A. I think you're pointing out my typo.

21 Q. So you meant 26.3.4?

22 A. Let me finish reading it and make sure.

23 Q. Article 23 deals with intellectual property.

24 A. Yes, 26.3.4.

25 Q. Thank you. That's the one I have displayed,

1 the start of which I have displayed up here; is that  
2 correct?

3 A. Yes.

4 Q. Why don't you read 26.3.4 to the Jury?

5 A. "If the University believes that a health  
6 condition is interfering with the scope or quality of  
7 the association member's professional responsibilities,  
8 the association member shall be consulted in an attempt  
9 to resolve the problem. If no agreement is reached, the  
10 Dean may require the association member to request an  
11 appropriate leave of absence pursuant to this article  
12 which shall normally be sick leave."

13 Q. Is there anything in that section that you just  
14 read -- I'm sorry -- that specifically addresses the  
15 issue of fitness-for-duty examinations?

16 A. I think it does. That was my attempt.

17 Q. Excuse me?

18 A. That was my attempt by something that we've  
19 done elsewhere, yes.

20 Q. All right. But you agree with me -- I  
21 apologize for flashing back and forth.

22 But you agree with me that section doesn't  
23 actually say anything about a member's obligation to go  
24 to a fitness-for-duty obligation -- fitness-for-duty  
25 examination?

1           A. That's correct. This section deals more with  
2 the sick leave idea that the person would be paid.

3           Q. Is there anything else in the contract that you  
4 believe -- strike that.

5                     Would you please take a look at Exhibit 32?

6                     Do you have Exhibit 32 in front of you?

7           A. I do.

8           Q. Is that an e-mail that was sent to you by my  
9 office on Friday in response to your e-mail which is  
10 Exhibit 31?

11           A. You asked me if you sent this in response to my  
12 e-mail; right?

13           Q. Did you receive Exhibit 31?

14           A. Yes, I did.

15           Q. Thank you.

16                     Could you please read Exhibit 31 to the Jury?

17           A. Yes.

18                     "Ms. Peugh-Wade, your e-mail today did not  
19 provide any additional information as to the allegations  
20 against Professor Kao. I simply cannot understand your  
21 statement," in quotes, "'I do not believe providing that  
22 information would be productive,'" end quotes.

23                     "You are using Professor Kao to agree to a  
24 detailed medical," slash, "psychological examination" --  
25 I'm sorry -- "You are asking Professor Kao to agree to a

1 detailed medical/psychological examination and produce  
2 all his medical records for that purpose. It is not  
3 unreasonable," in parenthesis, "or unproductive, to ask  
4 the University to give more detail as to the events  
5 apparently underlying that request so that Professor Kao  
6 can evaluate the University's demand in light of the  
7 evidence asserted to justify it.

8 "The University cannot seriously expect me to  
9 be able to advise Professor Kao on this matter when the  
10 University withholds the information necessary to  
11 provide such advice. To date, all we have is a series  
12 of undated events presented largely in terms of a  
13 person's subjective reactions or concerns rather than  
14 any detail as to what actually transpired.

15 "All we know for certain is that none of the  
16 events involve students or concern Professor Kao's  
17 teaching duties; that nothing Professor Kao is accused  
18 of interfered with any of the University's or the  
19 department's operations, and that all of these events  
20 have occurred since about January 2008.

21 "With regard to your June 23 deadline, telling  
22 us Friday of a Monday deadline is totally unreasonable.  
23 The University has already waited months before advising  
24 Professor Kao of any of these allegations, and at our  
25 meeting Wednesday gave no indication that June 23rd

1 would be a potential deadline.

2 "To the extent we can respond, I hope to do so.  
3 But I can make no commitment that any response will be  
4 submitted by your newly created Monday deadline.  
5 Christopher W. Katzenbach."

6 Q. Thank you.

7 Would you please take a look now at Exhibit 33.  
8 Can you identify what Exhibit 33 is?

9 A. It is my out-of-office e-mail.

10 Q. What's the time -- what's the date and time of  
11 that out-of-office e-mail?

12 A. June 20th, 2008, 4:53 p.m.

13 Q. And could you read your out-of-office e-mail to  
14 the Jury?

15 A. Yes. It says, "Subject, out of office." "This  
16 is an automatic reply. I am out of the office during  
17 the week of June 23rd and will be accessing e-mail  
18 infrequently. If you need immediate assistance, please  
19 contact Miguel Ayrea at mayrea@usfca.edu or Maye-Lynn  
20 Gon-Soneta at gonsonetam@usfca.edu. Thank you."

21 Q. Now, just to go back, what's the date and time  
22 stamp on Exhibit 31 -- I'm sorry -- Exhibit 33, the  
23 out-of-office e-mail?

24 A. June 20th, 4:53 p.m.

25 Q. Would you please read to the Jury the date and

1 time stamp on the e-mail from me, Exhibit 32?

2 A. June 20th, 4:53.

3 Q. Thank you.

4 Now, would you please now take a look at  
5 Exhibit 34. Do you have that in front of you?

6 A. Yes. But I just want to put in that even  
7 though I was intending to be out of the office, that  
8 doesn't mean that I am not unfortunately having to do  
9 some work during that time that I'm out of the office.  
10 So...

11 Q. Please take a look at Exhibit 34. Is that a  
12 letter that you wrote to Dr. Kao?

13 A. Yes.

14 Q. When did you sign that letter?

15 A. I had someone sign it on my behalf.

16 Q. In other words, the signature on the second  
17 page of that letter is not yours?

18 A. That is correct.

19 Q. Who signed it on your behalf?

20 A. My assistant.

21 Q. Is that because you weren't in the office?

22 A. On that day, that's correct. I was preparing  
23 to go out of town. I, unfortunately, had some things,  
24 important things that I had to keep continue doing.

25 Q. Thank you.

1           Would you please take a look at the paragraph  
2 beginning, "In particular."

3           Do you see that paragraph?

4           A. I do.

5           Q. All right. Now, this is slightly different  
6 than the letter that you gave Dr. Kao on 6/18; correct?

7           A. Probably, yes.

8           Q. Well, do you recall adding the phrase "with  
9 fists clenched"?

10          A. I think, as I noted earlier, I went back to my  
11 original notes when I was compiling this, rewriting this  
12 letter, and that was -- I believe the only material  
13 thing that I missed the first time.

14          Q. Do you see the phrase "inappropriate closeness"  
15 in this paragraph?

16          A. Yes, I do.

17          Q. Did you add that to this letter?

18          A. Can you remind me please what --

19          Q. Exhibit 30 is the --

20          A. Thank you.

21          Q. -- letter of the 18th.

22          A. Yes.

23          Q. All right. Now, isn't it a fact that both of  
24 those two additions were taken from a report of the  
25 incident, an incident between Dr. Kao and Jennifer



1 Turpin --

2 A. I don't remember.

3 Q. Very well.

4 Now, I would like to -- now, I would like to  
5 direct your attention to the paragraph that begins, "For  
6 those reasons, following is the University's  
7 nondisciplinary course of action."

8 The first, No. 1, can you read that to the  
9 Jury?

10 A. "Effective today, you are on a leave of absence  
11 without duties. You are deemed to have requested this  
12 leave per section 26.34 of the collective bargaining  
13 agreement, and you may draw sick pay. All of your  
14 health and welfare benefits remain in effect."

15 Q. And draw sick pay, did that require filing an  
16 application for that?

17 A. No.

18 Q. Okay. Do you have to be sick?

19 A. Usually one is sick when they receive sick pay,  
20 but as you remember from the section that I read that if  
21 the Dean deems performance issues, I can't remember the  
22 exact wording, but get in the way, then the Dean may --  
23 the Dean may deem that sick leave should be awarded.

24 Q. All right. Taking a look at paragraph 4,  
25 numbered 4, you see that paragraph with the No. 4?

1 A. Yes.

2 Q. Okay. Can you read that to the Jury?

3 A. "Your attending the appointment as well as any  
4 follow-up meetings and fully cooperating with  
5 Dr. Reynolds in a timely manner is a condition of your  
6 continued employment."

7 Q. Now, I would like to ask you about the phrase  
8 "as well as any follow-up meetings."

9 Did you understand at the time you wrote this  
10 letter how many days Dr. Kao was going to be expected to  
11 go down to Dr. Reynolds in San Jose?

12 A. My recollection is that there were two separate  
13 meetings.

14 Q. That there be two meetings over two days?

15 A. Two meetings on two separate days, yes.

16 Q. All right. Could you please -- how long was  
17 the first meeting going to take?

18 A. My recollection is it was close to a full day.

19 Q. In other words, Exhibit 34 directs Dr. Kao to  
20 go down to visit Dr. Reynolds for an appointment  
21 starting at 8:30 a.m. in the morning and continuing  
22 until 5:30 in the afternoon?

23 MR. VARTAIN: Objection. Argumentative.  
24 Misstates the document. You're asking her to state what  
25 the document says.

1 THE COURT: Overruled. The Witness may answer.

2 THE WITNESS: Could you say it again, please?

3 MR. KATZENBACH: Q. Did you understand that  
4 Dr. Kao's initial appointment with Dr. Reynolds would be  
5 from 8:30 in the morning until 5:30 in the afternoon in  
6 San Jose?

7 A. That's what I said in my letter.

8 Q. Now, there's nothing in this letter about a  
9 second day; is there?

10 A. It says "any follow-up appointments."

11 Q. At the time you wrote this letter, you knew  
12 there was going to be a follow-up appointment; didn't  
13 you?

14 A. I know that when I spoke with Dr. Reynolds on  
15 the phone that generally he said there would be two.  
16 But I know from experience that things change. So that  
17 was why I wrote it broadly to say that appointment on  
18 the first and any required follow-up.

19 Q. Please take a look at Exhibit 27.

20 (Plaintiff's Exhibit No. 27 was  
21 marked for identification.)

22 MR. KATZENBACH: Q. Are these notes that you  
23 wrote?

24 A. Yes.

25 Q. Is that your handwriting?

1 A. Yes.

2 Q. This is a conversation with Dr. Reynolds?

3 A. Yes.

4 Q. This conversation occurred on May 30th, 2008?

5 A. Yes.

6 MR. KATZENBACH: I would like to move  
7 Exhibit 27 into evidence.

8 THE COURT: Any objection?

9 MR. VARTAIN: No objection.

10 THE COURT: Received.

11 (Plaintiff's Exhibit No. 27 was  
12 received in evidence.)

13 MR. KATZENBACH: Q. Now, taking a look at  
14 Exhibit 27, does it refer to -- thank you.

15 Does it discuss how long -- well, what the  
16 interviews with Dr. Reynolds are going to consist of?

17 MR. VARTAIN: Objection. Ambiguous, compound.

18 MR. KATZENBACH: I'll rephrase, your Honor.

19 Q. I would like to direct your attention to  
20 section of the middle of the first page of Exhibit 27.

21 Does that discuss the length of the  
22 examinations that Dr. Reynolds is contemplating?

23 MR. VARTAIN: Counsel, you just -- withdraw.

24 You now have it displayed for the Jury, I think the part  
25 you want.

1 MR. KATZENBACH: I'm trying to anyway.

2 Q. Let's ask you. Does this reflect notes of what  
3 Dr. Reynolds told you?

4 A. Yes.

5 Q. So the first indication is that there's five to  
6 six hours. It says, "Two interviews in San Jose"; is  
7 that right?

8 A. Yes.

9 Q. And it says, "Plus psych tests"?

10 A. Yes.

11 Q. "Plus lab tests"?

12 A. Well, it doesn't say "plus," but yes.

13 Q. "Drug and alcohol"?

14 A. Yes.

15 Q. And "self-assessment questions"?

16 A. Yes.

17 Q. Then you go down a little bit. It says, "Day  
18 one, long"?

19 A. Yes.

20 Q. And it says, "8:30 to 5:30"?

21 A. Yes.

22 Q. And it says, "In-depth comprehensive review"?

23 A. Yes.

24 Q. This is what Dr. Reynolds told you on May 30th?

25 A. Yes.

1 Q. And day two says something other, what is that  
2 first word?

3 A. I think it would mean "pick up others," but I'm  
4 not sure what I meant by that.

5 Q. Then it says, "Three hours"?

6 A. Yes.

7 Q. And it says, "Give him an opportunity to  
8 correct." What was that about?

9 A. My recollection is that Dr. Reynolds would have  
10 said something to the effect that he would have gotten  
11 information from the first day interviews, tests,  
12 et cetera, would be presenting that back to Dr. Kao and  
13 give him an opportunity to correct anything.

14 Q. Did you understand that Dr. Reynolds was going  
15 to give anything to Dr. Kao in writing about the  
16 allegations against him?

17 A. Could you say that again, please?

18 Q. Prior to -- you've sent Dr. Reynolds a copy of  
19 your notes of interviews with three faculty members; is  
20 that right?

21 A. I believe so.

22 Q. Did you expect Dr. Reynolds to go over those  
23 notes with Dr. Kao?

24 A. I expected Dr. Reynolds to use his expertise.  
25 He told me to send him everything connected with this.

1 So that's what I did.

2 Q. Okay. Now, I would like to ask you a question  
3 about drug and alcohol testing that's referred to in  
4 your notes here.

5 A. Okay.

6 Q. What was the purpose of conducting drug and  
7 alcohol testing?

8 MR. VARTAIN: Objection. Irrelevant. You're  
9 asking the wrong witness, Counsel.

10 MR. KATZENBACH: You're right, counsel. Let me  
11 rephrase it.

12 Q. Did you discuss the fact that this  
13 comprehensive examination was going to include drug and  
14 alcohol testing?

15 A. I don't know that I would say discuss. My  
16 notes would indicate that Dr. Reynolds told me that it  
17 would.

18 Q. All right. Did you tell Dr. Reynolds that that  
19 was not necessary?

20 A. No, I did not. I don't tell him how to do his  
21 job.

22 Q. Did you tell him the University had no concerns  
23 about drug and alcohol use by Dr. Kao?

24 A. No, I did not.

25 Q. All right. Now, I would like to direct your

1 attention, if you would to Exhibit 38.

2 THE COURT: Ladies and gentlemen, remember the  
3 admonition. Do not form or express any opinion on this  
4 case until it's finally submitted to you for your  
5 decision. Do not discuss among yourselves or with  
6 others until that time.

7 Please be back in your places at 2:40 according  
8 to the courtroom clock.

9 (Recess taken: 2:28 p.m. - 2:41 p.m.)

10 THE COURT: Jurors and Alternates are all  
11 present. Counsel for both sides are present. Plaintiff  
12 is personally present. Ms. Peugh-Wade is on the stand.

13 Mr. Katzenbach, you may continue your inquiry.

14 MR. KATZENBACH: Thank you, your Honor.

15 Q. I would like to please direct you back, if you  
16 would, to Exhibit 34. I would like to direct your  
17 attention to paragraph No. 5 on the first page.

18 Do you see that?

19 A. Yes.

20 Q. Could you please read paragraph 5 to the Jury?

21 A. "The IP," which is independent physician, "will  
22 provide the University a report setting forth his  
23 opinion as to condition and fitness to perform your  
24 faculty functions in a manner that is safe and healthy  
25 for you, your faculty colleagues and others in the



1 University community."

2 Q. Now, did you then, after sending Exhibit 34 to  
3 Dr. Kao, did you then -- did you communicate with  
4 Dr. Reynolds about this examination?

5 A. Could you say that again, please?

6 Q. Sure. Did you communicate with Dr. Reynolds as  
7 to this fitness-for-duty evaluation?

8 A. Yes.

9 Q. Would you please take a look at Exhibit 38?  
10 (Plaintiff's Exhibit No. 38 was  
11 marked for identification.)

12 MR. KATZENBACH: Q. Can you identify what  
13 Exhibit 38 is?

14 A. 38 is a letter from me to Dr. Reynolds.

15 Q. Second page of Exhibit 38, what does that  
16 contain?

17 A. It contains a consent form for Dr. Reynolds and  
18 is labeled "Consent form No. 1."

19 Q. Is that a consent form you instructed  
20 Dr. Reynolds to use for Dr. Kao's examination?

21 A. In the earlier conversation with Dr. Reynolds  
22 about how this fitness-for-duty exam would go, he said  
23 he had three consent forms as options. I wanted to use  
24 the one that was most confidential, which he called  
25 consent form No. 1.

1 Q. So is the consent form on the second page of  
2 Exhibit 38 is that the consent form you told  
3 Dr. Reynolds you wanted to use?

4 A. Of the three he gave me, yes, this is the one  
5 that I preferred.

6 MR. KATZENBACH: All right. I move Exhibit 38  
7 into evidence.

8 MR. VARTAIN: No objection.

9 THE COURT: Received.

10 (Plaintiff's Exhibit No. 38 was  
11 received in evidence.)

12 MR. KATZENBACH: Q. Taking a look at the first  
13 page of Exhibit 38, direct your attention to paragraph  
14 that begins, "In conjunction with your evaluation." You  
15 see that paragraph?

16 A. Yes.

17 Q. Would you read that paragraph to the Jury?

18 A. "In conjunction with the evaluation, please use  
19 consent form No. 1 as attached. Please prepare a report  
20 to me of your conclusions. Do not provide me with  
21 medical diagnoses or other clinical information. The  
22 issues to be evaluated are those stated in my letters to  
23 Dr. Kao enclosed."

24 Q. Thank you.

25 I would like to direct your attention to second

1 page of Exhibit 38. That's the consent form.

2 A. Yes.

3 Q. Okay. I would like to direct your attention,  
4 if you would, to the paragraph that begins at the  
5 bottom, that begins, "The comprehensive psychiatric  
6 evaluation will consist of."

7 A. "The comprehensive psychiatric evaluation will  
8 consist of review and analysis of complete history and  
9 background, e.g., current difficulties, medical history,  
10 legal and financial history, educational and work  
11 history, family and social history, mental status  
12 examination, psychological test results, laboratory  
13 results, diagnostic assessment, analysis of findings,  
14 conclusions and recommendations."

15 Q. Would you also take a look at two bullet points  
16 immediately above that paragraph. I'll try and scroll  
17 up to those if I can.

18 Can you please read the first bullet point that  
19 begins, "Dr. Reynolds will not"?

20 A. Sure. So this is within the context of, it  
21 says, "To indicate that Dr. Reynolds has explained each  
22 of the following items, and I understand and agree to  
23 each of them, I've placed my initials after each of  
24 them."

25 The bullet is, "Dr. Reynolds will not provide

1 me or my designee with a copy of the psychiatric report  
2 or a copy of Dr. Reynolds' records."

3 Q. Now, you indicated that this is part of a  
4 section of the evaluation which instructs Dr. Kao --  
5 which begins with the paragraph I'm highlighting, if you  
6 could read that to the Jury?

7 A. I'm sorry. I'm not clear where you are.

8 Q. Sure. That's fine.

9 Could you -- the part that you just read is  
10 part of a paragraph that's opening sentence begins, "To  
11 indicate that," what does that say?

12 A. "To indicate that Dr. Reynolds has explained  
13 each of the following items, and I understand and agree  
14 to each of them, I have placed my initials after each of  
15 them."

16 Q. Now, was this a consent form that you  
17 anticipated that Dr. Kao would have to sign as part of  
18 the fitness-for-duty examination?

19 A. I don't know as part of, but prior to.

20 Q. Could this fitness-for-duty examination go  
21 ahead if Dr. Kao did not sign this form?

22 MR. VARTAIN: Objection. Calls for her to  
23 speculate.

24 THE COURT: Sustained.

25 MR. KATZENBACH: Q. Did you understand from

1 Dr. Reynolds signing a consent form was necessary for  
2 him to conduct this psychiatric evaluation?

3 MR. VARTAIN: Calls for speculation. She's not  
4 the doctor. Objection.

5 THE COURT: She can testify to what the doctor  
6 told her in response to the question.

7 MR. VARTAIN: I have no objection to her  
8 testifying what the doctor told her. I have an  
9 objection to her speculating what the doctor was  
10 thinking.

11 THE COURT: Okay. Speculation. And the other  
12 one is hearsay?

13 MR. VARTAIN: No. I didn't object to what the  
14 doctor told her as being hearsay. I'm sorry, your  
15 Honor, if I misled you. I have no objection to her  
16 being asked what Dr. Reynolds told her his plans were  
17 for the way to do the evaluation of Dr. Kao.

18 THE COURT: Go ahead, Ms. Peugh-Wade. Answer  
19 the question in its final form.

20 MR. KATZENBACH: Q. Do you recall the  
21 question?

22 A. Can you repeat it, please.

23 Q. I will try to.

24 Did Dr. Reynolds tell you that signing a  
25 consent form by John Kao was necessary in order to go

1 ahead with the fitness-for-duty evaluation?

2 A. He said that a consent form would be necessary,  
3 yes.

4 Q. Okay. When was Dr. Kao going to get this  
5 consent form to sign?

6 MR. VARTAIN: Objection. Calls for  
7 speculation. I have no objection if the Witness says  
8 what the doctor told her, but to speculate by her, I  
9 have an objection.

10 THE COURT: Fine. Sustained.

11 MR. KATZENBACH: Q. All right. Did  
12 Dr. Reynolds tell you when Dr. Kao would receive the  
13 consent form to sign?

14 A. Not that I recollect.

15 Q. Did you give a copy to Dr. Kao in advance of  
16 the July 1st date when the examination was to begin?

17 A. I did not, no.

18 Q. Did you give a copy to any of Dr. Kao's  
19 attorneys in advance of the date when the examination  
20 was to begin?

21 A. I don't believe so.

22 Q. At any time, did you give a copy of the consent  
23 form to Dr. Kao?

24 A. That wouldn't have been my place.

25 Q. Excuse me?

1 A. No.

2 Q. All right. Did you ever give a copy to  
3 Dr. Kao's attorneys?

4 MR. VARTAIN: Asked and answered. Objection.

5 THE WITNESS: Overruled. The Witness may  
6 answer.

7 MR. KATZENBACH: Q. Did you give a copy to  
8 Dr. Kao's attorneys?

9 A. Of.

10 Q. Consent form No. 1?

11 A. No.

12 Q. Thank you. Is this consent form the only  
13 consent form that -- was there any other part to this  
14 consent form that are not part of Exhibit 38?

15 MR. VARTAIN: Objection. Ambiguous and  
16 compound.

17 MR. KATZENBACH: Q. Let me just ask you.  
18 You've identified Exhibit 38 as including this consent  
19 form No. 1; correct?

20 A. I'm sorry. Can you say that again?

21 Q. I'll try to make it even simpler.

22 Were there any additional consent forms you  
23 were going to be asking Dr. Kao to have signed?

24 MR. VARTAIN: Objection. Vague and ambiguous.  
25 She's testified that the doctor was going to handle the

1 consent.

2 MR. KATZENBACH: I'll just rephrase it.

3 Q. This is -- Exhibit 38 contains the entirety of  
4 consent form No. 1 that Dr. Reynolds provided to you;  
5 isn't that right?

6 A. To my knowledge, yes.

7 Q. Thank you.

8 Now, prior to directing this examination, do  
9 you recall having a meeting with a Dr. Missett?

10 MR. VARTAIN: Objection. Ambiguous. Compound.

11 THE COURT: Overruled. The Witness may answer.

12 THE WITNESS: Can you say it again, please?

13 MR. KATZENBACH: Q. Prior to directing that  
14 Dr. Kao attend a fitness-for-duty examination, did you  
15 have a meeting with Dr. Missett?

16 A. Yes.

17 Q. All right. Now, could you please take a look  
18 at Exhibit 47, I believe the first exhibit in volume 3.

19 A. Thank you.

20 Q. No problem.

21 (Plaintiff's Exhibit No. 47 was  
22 marked for identification.)

23 MR. KATZENBACH: Q. Do you recognize  
24 Exhibit 47.

25 A. Yes.



1 Q. Can you tell -- what is it?

2 A. It is an invoice or bill, bill from  
3 Dr. Missett.

4 Q. Is it addressed to you?

5 A. Yes.

6 Q. Is it a bill that the University paid?

7 A. I hope so, yes.

8 Q. Very good. Thank you.

9 I would like to move Exhibit 47 into evidence?

10 MR. VARTAIN: No objection, as long as it was  
11 paid.

12 THE COURT: It is received.

13 (Plaintiff's Exhibit No. 47 was  
14 received in evidence.)

15 MR. KATZENBACH: Q. Did Dr. Missett ever  
16 prepare a report to the University summarizing his  
17 conclusions?

18 A. No, because Dr. Missett was engaged to provide  
19 advice about what to do in this situation. We did not  
20 ask him for a conclusion.

21 Q. All right. Now, taking a look at the invoice  
22 Dr. Missett sent you, would it be accurate to say that  
23 this bill contains evidence of only two communications  
24 with the University by Dr. Missett, a meeting on 5/20/08  
25 and a telephone consultation on 6/18/08?

1 A. Yes.

2 Q. Do you recall any other conversations with  
3 Dr. Missett about Dr. Kao after 6/18/08?

4 A. I don't recollect.

5 Q. Okay. Now, taking a look at the remainder of  
6 the bill, do you know what the black binder Dr. Missett  
7 looked at was?

8 A. I'm not even sure if it's more than one black  
9 binder, or it's the same black binder, but it would have  
10 faculty documents.

11 Q. And this looks like from the period of -- after  
12 his last time Dr. Missett spoke to you, he spent -- he  
13 worked from July 1st through July 22nd reviewing the  
14 black binder.

15 A. That's what it appears, yes.

16 Q. And there's no indication that he prepared any  
17 report to the University after this review?

18 A. There's no indication here.

19 Q. You don't recall such a report?

20 A. No, I don't.

21 Q. And do you recall -- so it looks to me that he  
22 spent --

23 MR. VARTAIN: Objection. Arguing.

24 MR. KATZENBACH: Q. Am I correct in saying  
25 that Dr. Missett spent approximately 28 hours reviewing

1 this black binder?

2 MR. VARTAIN: Objection. He's asking her to  
3 speculate what someone else was doing.

4 MR. KATZENBACH: That's fine. I'll withdraw  
5 the question. Let me ask it differently.

6 Q. Dr. Missett billed the University approximately  
7 \$2,200 for his meeting with you in the telephone  
8 conversation; is that correct?

9 A. Approximately, yes.

10 Q. So he billed another approximately \$11,800 for  
11 reading the black binder?

12 A. Well, there was a little bit as well for his  
13 review of the summary of the faculty interviews.

14 Q. Thank you. I would like to direct your  
15 attention, if you would, to Exhibit 49.

16 (Plaintiff's Exhibit No. 49 was  
17 marked for identification.)

18 MR. KATZENBACH: Q. Would you take a look at  
19 Exhibit 49, please?

20 A. Yes.

21 Q. Can you tell us what Exhibit 49 is?

22 A. It's notes of the meeting, my notes with the  
23 meeting of Dr. Missett.

24 Q. And that meeting was on what date?

25 A. May 20th.

1 Q. Is this your handwriting on Exhibit 49?

2 A. Yes.

3 Q. Does this concern Dr. Kao?

4 A. Yes.

5 MR. KATZENBACH: I would like to move  
6 Exhibit 49 into evidence, but with the limitations I've  
7 previously noted.

8 THE COURT: Any objection?

9 MR. VARTAIN: No objection, your Honor.

10 THE COURT: It's received.

11 MR. KATZENBACH: Thank you.

12 (Plaintiff's Exhibit No. 49 was  
13 received in evidence.)

14 MR. KATZENBACH: Q. Now, if you would,  
15 Ms. Peugh-Wade, I would like you to turn to the third  
16 page of Exhibit 49.

17 Do you have that in front of you now?

18 A. Yes.

19 Q. Would you please read what your notes state  
20 following the phrase "fitness for duty" on the top of  
21 the third page of Exhibit 49?

22 A. Sure. "Tape recorded, not part of HR file."

23 Q. Continue on, please.

24 A. "If fit with no qualifications, we can regard  
25 bumping as assault. If people are terrified, we regard

1 as purposeful and responsible," I guess, "resp," "and if  
2 risk of physical harm, you can be fired."

3 Q. Thank you.

4 Now, would you please take a look at  
5 Exhibit 55.

6 (Plaintiff's Exhibit No. 55 was  
7 marked for identification.)

8 MR. KATZENBACH: Q. Can you tell -- can you  
9 identify Exhibit 55?

10 A. It's my notes of a meeting.

11 Q. It appears undated. Do you know when that  
12 meeting would have been?

13 A. Not off the top of my head, no.

14 Q. Okay. But these are your notes?

15 A. Yes.

16 MR. KATZENBACH: I would like to move  
17 Exhibit 55 into evidence with the limitation previously  
18 noted.

19 THE COURT: Any objection?

20 MR. VARTAIN: I want to look at it real quick,  
21 your Honor.

22 How many pages do you have, Counsel?

23 MR. KATZENBACH: Nine.

24 MR. VARTAIN: I'm sorry. 81 through --

25 MR. KATZENBACH: 89.

1 MR. VARTAIN: No objection.

2 THE COURT: Received.

3 (Plaintiff's Exhibit No. 55 was  
4 received in evidence.)

5 MR. KATZENBACH: I would like you to look at  
6 the ninth page --

7 A. Yes.

8 Q. -- of Exhibit 55, if you would. That's the  
9 last page of the exhibit. Do you have that in front of  
10 you?

11 A. I do.

12 Q. I would like you to read to the Jury the  
13 paragraph beginning "Options."

14 A. "Options. May need" -- this is my abbreviation  
15 for emergency, "emergency plan to cover courses."

16 Q. What's the next paragraph say?

17 A. "Get him out medically and keep him out  
18 medically."

19 Q. Thank you.

20 Your Honor, I would like to move the statement  
21 "get him out medically and keep him out medically" for  
22 the truth of the matter stated.

23 MR. VARTAIN: You already offered -- I'm going  
24 to object.

25 MR. KATZENBACH: I believe that's an admission

1 by the defendants and admissible on the merits.

2 MR. VARTAIN: I have no objection, if you'll  
3 let the Witness -- if you ask the Witness the question  
4 what was the conversation. You've just entered a note.

5 THE COURT: I'm not sure if this is a  
6 conversation by Ms. Peugh-Wade or something that she put  
7 down and she heard from someone else.

8 MR. VARTAIN: Exactly, your Honor.

9 THE COURT: I'll sustain the objection.

10 MR. KATZENBACH: Q. Were the individuals at  
11 this meeting members -- can you tell me, were any  
12 persons at this meeting that's recording this anyone  
13 other than University officials?

14 MR. VARTAIN: Ambiguous. Compound. Objection.

15 THE COURT: Sustained on the former ground.

16 MR. KATZENBACH: Very well.

17 Q. Who gave the -- who stated as an option "get  
18 him out medically and keep him out medically"?

19 MR. VARTAIN: Objection. Lacks foundation of  
20 what the background is.

21 THE COURT: Overruled.

22 THE WITNESS: I don't know that anyone stated  
23 that specifically. From my notes, I can tell this was  
24 relatively early on in the conversations because it  
25 tells me to contact Barbara Thomas who I would have

1 contacted in January, I believe.

2 But these were the types of options we were  
3 considering. And my notes would -- to me, it means when  
4 we say get him out medically, it means that's how you  
5 keep his pay going on, through sick leave and  
6 disability.

7 As you, Counsel, brought up before, my  
8 background is in benefits. And I -- I am sorry. I  
9 worked with, with John earlier and many other folks when  
10 they had to be out on disability leave. And part of one  
11 of the things I'm proud of is our sick leave policies  
12 and getting people on disability and making sure that  
13 their salary and benefits were continued.

14 MR. KATZENBACH: Q. Is the phrase "get him out  
15 medically" in your handwriting?

16 A. Yes, it is.

17 Q. Is the phrase "and keep him out medically" in  
18 your handwriting?

19 A. Yes, it is.

20 Q. At the time you wrote that, what was your  
21 position at the University of San Francisco?

22 A. My position was assistant vice president of  
23 human resources.

24 MR. KATZENBACH: That's all I have.

25 THE COURT: Mr. Vartain, would you like to



1 inquire?

2 MR. KATZENBACH: Your Honor, we had a  
3 discussion about taking a witness out of order.

4 THE COURT: Oh, yes.

5 MR. KATZENBACH: I believe this was the time  
6 that Mr. Vartain had agreed that we could do so.

7 MR. VARTAIN: I said that if you are done with  
8 Ms. Peugh-Wade's questioning, that I would be happy to  
9 indulge your witness outside as long as we can get your  
10 witness outside done today, and then I'll question  
11 Ms. Peugh-Wade another time when you're done today with  
12 your witness.

13 MR. KATZENBACH: That's fine, your Honor.

14 MR. VARTAIN: Are you done with Ms. Peugh-Wade?

15 MR. KATZENBACH: I am finished with her.

16 MR. VARTAIN: That's agreeable, your Honor.

17 THE COURT: Okay. Ms. Peugh-Wade, you can step  
18 down.

19 THE WITNESS: Thank you.

20 JUROR NO. 9: If the Jury has questions for  
21 her, do we wait until she comes up again?

22 THE COURT: Yes. The rule that the lawyers ask  
23 questions first applies even when we break up the  
24 testimony.

25 MR. KATZENBACH: Your Honor, the Plaintiff will

1 call Margo Rich Ogus.

2 MARGO RICH OGUS,  
3 called as a witness by the Plaintiff, after being first  
4 duly sworn, was examined and testified as follows:

5 THE CLERK: Please be seated. State your name  
6 and spell it for the record.

7 THE WITNESS: Okay. Margo Rich Ogus,  
8 M-a-r-g-o, R-i-c-h, O-g-u-s.

9 DIRECT EXAMINATION

10 BY MR. KATZENBACH:

11 Q. Ms. Ogus, what is your profession?

12 A. I'm an economist.

13 Q. Can you describe to the Jury what that means?

14 A. Well, it means that I've studied economics at  
15 the undergraduate and graduate level. And I work as an  
16 economic consultant.

17 Q. Do you have a degree in economics?

18 A. I do.

19 Q. What type of degree do you have?

20 A. I have a bachelor of science degree in  
21 agricultural economics, which was obtained at Cornell  
22 University in 1973. I have a master of arts and PhD  
23 both in applied economics both from Stanford University.  
24 The master's in 1975 and the doctorate in 1980.

25 Q. Are you currently employed?

1 A. I am.

2 Q. What are you currently employed doing?

3 A. I am employed as an economic consultant in a  
4 firm called Economic Solutions. And my work is to  
5 calculate economic loss in cases such as this where  
6 there's a claimed loss by an individual in a lawsuit. I  
7 am retained by attorneys representing plaintiffs and  
8 attorneys representing defendants. And I've been doing  
9 this for about 27 years.

10 Q. What proportion of your work is done on behalf  
11 of plaintiffs or defendants?

12 A. I'm retained about equally by attorneys  
13 representing plaintiffs and attorneys representing  
14 defendants.

15 Q. Thank you. Now, were you retained by our firm?

16 A. Yes, I was.

17 Q. And what did we ask you to do?

18 A. Calculate Dr. Kao's economic loss as a result  
19 of the termination of his employment at USF.

20 Q. And did you do so?

21 A. I did.

22 Q. I would like to show you what I would like to  
23 substitute for the document we have in our file as  
24 Exhibit 99.

25 THE CLERK: There is an Exhibit 99.

1 MR. KATZENBACH: I would like to substitute  
2 this.

3 THE CLERK: I would like to call it 99A.

4 MR. KATZENBACH: We'll call it 99A.

5 (Plaintiff's Exhibit No. 99A was  
6 marked for identification.)

7 MR. KATZENBACH: Showing the Witness, your  
8 Honor, an exhibit that has now been marked as 99A, I  
9 have a copy for the Court.

10 THE COURT: Thank you.

11 MR. KATZENBACH: May I approach?

12 THE COURT: Yes.

13 MR. KATZENBACH: Q. Can you identify what  
14 Exhibit 99A is?

15 A. Yes. This is the two reports that I've  
16 recently completed.

17 Q. And what does this show?

18 A. This shows my various calculations of Dr. Kao's  
19 possible economic loss.

20 Q. Thank you.

21 Now, as part of Exhibit 99A, there are -- the  
22 document show Case 1 and Case 2?

23 A. Yes.

24 Q. Can you tell the Jury what Case 1 is?

25 A. Case 1 is the first of two reports that I've

1 done. Basically the difference between 1 and 2 is only  
2 in the duration of his loss that I've calculated. So in  
3 Case 1, I've made a calculation of Dr. Kao's loss based  
4 on an assumption provided to me by counsel which was to  
5 assume that he has had a loss in the past from a start  
6 date of September 1st, 2008, when he was not being paid,  
7 and that the loss would continue until a possible  
8 reinstatement of his employment in the academic year  
9 2012/2013.

10 So essentially, the loss runs through the past,  
11 which I've taken up to mid-February 2012, about now, and  
12 into the future only about another six months to the  
13 beginning of the academic year 2012/2013.

14 Q. So would it be accurate to say Case 1 assumes  
15 that Dr. Kao would be reinstated to his former  
16 employment?

17 A. Yes.

18 Q. What's the total of past economic loss under  
19 Case 1?

20 A. The past economic loss is \$375,232.

21 Q. And the future economic loss?

22 A. \$62,462.

23 Q. And the total economic loss?

24 A. \$437,694, the sum of the two.

25 Q. Now, what is Case 2?

1           A. Case 2 is the same analysis. It's a  
2 calculation of Dr. Kao's possible loss, past and future.  
3 The difference is that it runs out to two different  
4 possible dates of retirement, but it also provides a way  
5 to determine the loss through any given year that one  
6 might choose to cut off in the future on the assumption  
7 that Dr. Kao might find comparable employment.

8           Q. So is Case 2 -- is it accurate to say Case 2  
9 gives you a total cumulative loss for each year going  
10 forward?

11          A. It does. And in fact, in the past as well.

12           MR. KATZENBACH: I would like to move  
13 Exhibit 99A into evidence, your Honor?

14           THE COURT: Any objection.

15           MR. VARTAIN: May I reserve my objections for  
16 cross-examination?

17           THE COURT: Yes.

18           MR. KATZENBACH: Q. Now, in terms of Case 2,  
19 have you assumed any future employment for Dr. Kao?

20          A. I don't personally have an opinion. I have  
21 been asked to assume no future employment for Dr. Kao  
22 until perhaps some date of cutoff when the losses would  
23 end.

24          Q. Okay. In calculating the losses year by year,  
25 is it possible then to cut off his losses in the event

1 he obtains future employment?

2 A. Yes.

3 Q. How would the Jury do that?

4 A. If the Jury were to look at my Case 2 report,  
5 you would see there's calculations of the expected  
6 earnings that Mr. Kao would have called earnings without  
7 termination, wages and fringe benefits and the total of  
8 those in each year or partial year.

9 There's an offset in 2009 for what he did  
10 receive from USF at the time of his termination. And so  
11 then there's a difference column for each year, the  
12 difference between what he might have expected to earn  
13 and the payments he did get, and essentially zero  
14 payments that he's had due to his inability to find  
15 employment.

16 There's a present value column, and then  
17 there's a cumulative column. So the cumulative column  
18 goes out for each year. It's a spreadsheet. If you  
19 were to look at the figures in the cumulative column for  
20 any given year in the past or future, you could  
21 determine what the total loss is up to that point.

22 Q. Have you -- there's a present value column?

23 A. There is.

24 Q. Does that mean -- what does that mean?

25 A. When economists like myself are asked to make

1 calculations of losses that haven't been incurred yet  
2 that might be incurred in the future, like a loss to  
3 Dr. Kao for the loss of his earnings at USF on offset by  
4 other income, we're asked to make a calculation in this  
5 legal setting which results in the amount of money that  
6 would be needed today in order for Dr. Kao to compensate  
7 himself for each year in the future through a  
8 combination of that award and interest that he could  
9 earn on the money in a safe, risk-free kind of  
10 investment.

11           So when economists refer to present value, it's  
12 not the total value of the loss taking into account  
13 possible wage rate increases that might occur over time  
14 and the passage of time and all of those years, it's the  
15 amount that would be needed today that would take into  
16 account that wages might go up and his loss might be  
17 bigger in years in the future, but it also takes into  
18 account the ability to invest any award given today and  
19 through a combination of that principal and the interest  
20 that could be earned on it, Mr. Kao could compensate  
21 himself for a loss in future years.

22           At the end of whatever that loss period is,  
23 there would be nothing left. That amount of money is  
24 called the present value.

25           Q. Now, you have included -- what sort of economic



1 losses have you included in your reports?

2 A. I've included a loss of wages which come from  
3 the salary schedules for Mr. Kao's position. I've  
4 assumed a loss of fringe benefits, which is -- which  
5 includes the contributions that USF would be making into  
6 retirement plans on his account and to pay the  
7 employer's share of medical and dental insurance.

8 That's the extent of the earnings that I have  
9 taken into account.

10 Q. Based on Case 2 where there's no reinstatement,  
11 have you determined Professor Kao's past economic loss?

12 A. I have.

13 Q. What is that?

14 A. It's the same as we talked about in Case 1,  
15 \$375,232.

16 Q. Now, have you also made a calculation as to his  
17 future economic losses?

18 A. I have. I made many calculations.

19 Q. Right. But do you have a total of what that  
20 would be through age 65?

21 A. I do.

22 Q. What would that be?

23 A. The future economic loss if Dr. Kao were not to  
24 find employment through age 65 would be \$2,437,668.

25 Q. And if he did not find employment through age

1 70, what would his total loss be for future economic  
2 loss?

3 A. The future loss would be \$2,815,778 in present  
4 value.

5 Q. And what would be -- in each of those scenarios  
6 at -- if he required at age 65, what would be his total  
7 economic loss?

8 A. The sum of the past and future numbers would be  
9 \$2,722,900 to retirement at age 65.

10 Q. And to retirement at age 70, what would his  
11 total economic loss present value be?

12 A. \$3,191,010.

13 Q. And the two reports, the report of Case 1,  
14 Case 2, do those also contain a section on comments and  
15 assumptions?

16 A. They do.

17 Q. And that describes the comments and assumptions  
18 you've made in calculating these wages?

19 A. It does. It intends to show the sources of  
20 information and any assumptions that I made in doing my  
21 calculations.

22 Q. Thank you.

23 Your Honor, I would ask that before I stop that  
24 Dr. Ogus be declared -- determined to be an expert in  
25 economic analysis of this kind?

1 THE COURT: Any objection?

2 MR. VARTAIN: May I reserve until I question  
3 the Witness on cross?

4 THE COURT: Yes.

5 MR. KATZENBACH: That's fine. That's all I  
6 have for the Witness.

7 MR. VARTAIN: You want to take your break now,  
8 your Honor, or you want me to begin, or how would you  
9 like to proceed?

10 THE COURT: Might as well get started with  
11 cross-examination. Go ahead, Mr. Vartain.

12 MR. VARTAIN: Thank you.

13 CROSS-EXAMINATION

14 BY MR. VARTAIN:

15 Q. Did you say \$3 million?

16 A. To age 70, yes.

17 Q. That's how much you calculated the University  
18 should pay Professor Kao in this case, \$3 million?

19 A. It's what I've calculated his loss would be if  
20 he had continued to be employed by the University and if  
21 he does not find other employment.

22 Q. If we give him \$3 million now, he gets it;  
23 right? We can't know whether he'll get employment later  
24 on. So then he would get a double dipper; right? In  
25 other words, if we give him \$3 million now to cover him

1 until age 65, then he goes over and gets a job, he'll  
2 get \$3 million from us and whatever he gets from the new  
3 employer; right?

4 A. That's true.

5 Q. That's what you want us to do?

6 A. I haven't offered a preference about what to  
7 do. I've offered a set of opinions about certain  
8 losses.

9 Q. I know you have, Doctor, but you forgot to tell  
10 the Jury one big thing; didn't you? You assumed because  
11 Mr. Katzenbach told you that he -- that had he not  
12 stopped working three years ago, he would definitely  
13 keep working till age 70; right? You assumed that?

14 A. Under that scenario, I did assume that, yes.

15 Q. The scenario is the one Mr. Katzenbach told you  
16 to assume; right?

17 A. It is one of the assumptions he asked me to  
18 make, that's correct.

19 Q. Right. But he didn't, did he, ask you to think  
20 about all those other things that happen to people along  
21 the way from when they're 43 till 70, like they get  
22 sick, can't work; they get tired of their job, they take  
23 another one; they hurt their back and go on disability;  
24 they decide they have accumulated enough money, which my  
25 wife wishes would happen, and then they can retire

1 early.

2 All of those things which are a normal part of  
3 life aren't covered in this \$3 million that you're  
4 reporting on; right? Is that true? Is that true?

5 A. If one were to decide --

6 Q. No. Is it true that you haven't covered for  
7 any of those things?

8 A. I have determined Mr. -- Dr. Kao's statistical  
9 work life which does cover many of those things and  
10 which suggests employment until about age 68. I have  
11 made a number of calculations to a number of different  
12 ages of retirement. The one you've referred to is one  
13 of them.

14 Q. Did you talk to Dr. Kao at all?

15 A. I did not.

16 Q. You didn't ask Dr. Kao if he even planned to  
17 stay at the University of San Francisco had he not had  
18 this employment problem; did you?

19 A. I did not.

20 Q. You didn't ask him what his health was like as  
21 in what health problems have you had thus maybe  
22 factoring in what health problems he might have in the  
23 future such that he may or may not be able to work to  
24 68; isn't that true?

25 A. Well, I wouldn't be qualified to evaluate

1 health problems, but I did not do that. That's correct.

2 Q. No. But you're qualified to ask him the  
3 question, "How long do you think you would work given  
4 your health situation?" You are qualified to ask him  
5 that?

6 A. I can, yes.

7 Q. And you didn't?

8 A. That's correct.

9 Q. Because Mr. Katzenbach didn't invite you to  
10 talk to Dr. Kao; did he? I'm not blaming you.

11 MR. KATZENBACH: No, you're not.

12 MR. VARTAIN: Q. Did Mr. Katzenbach allow you  
13 to talk to Dr. Kao to ask all of these relevant  
14 questions before you come in and tell the nonprofit  
15 University to pay him \$3 million?

16 MR. KATZENBACH: That's argumentative, your  
17 Honor.

18 THE COURT: Yes. Sustained.

19 MR. VARTAIN: It's argumentative.

20 Q. Did Mr. Katzenbach invite you to speak with his  
21 client?

22 A. The subject never came up. I did not ask.

23 Q. That wasn't my question.

24 A. Well, he couldn't -- he couldn't limit me from  
25 it if I hadn't asked him.

1 Q. No, no, no, no. The question was really  
2 direct. It was.

3 Did Mr. Katzenbach invite you to talk to his  
4 client and get some information like, "Dr. Kao, what was  
5 your plans for how long you were thinking you would work  
6 at the University? What's your health like? Do you  
7 think you would be able to work to a certain age?"

8 Did he invite you to do that?

9 A. He invited me to make two calculations based on  
10 what he told me would be testimony provided by Dr. Kao.

11 Q. Doctor, I asked you a very direct question.

12 THE COURT: Ladies and gentlemen, remember the  
13 admonition. Do not form or express any opinion on this  
14 case until it's finally submitted to you for your  
15 decision. Do not discuss among yourselves or with  
16 others until that time.

17 Please be back in your places at 3:40 according  
18 to the courtroom clock.

19 (Recess taken: 3:30 p.m. - 3:42 p.m.)

20 THE COURT: Jurors and Alternates are all  
21 present. Counsel for all sides are present. Plaintiff  
22 is personally present. The Witness is on the stand.

23 Mr. Vartain, you may continue your inquiry.

24 MR. VARTAIN: Could I have the Reporter read  
25 the last question back. That's when you stopped us.

1 THE COURT: Sure.

2 Ms. Schroeder, would you oblige, please?

3 MR. KATZENBACH: May I ask the Reporter for  
4 context so the Witness has the background and the Jury  
5 does, that the Reporter read the last full question and  
6 answer, and then read the question that wasn't answered  
7 by the Witness because you asked us to stop.

8 THE COURT: Okay. Go ahead, Ms. Schroeder.

9 (Record read: "Did Mr. Katzenbach invite you  
10 to talk to his client and get some information  
11 like, "Dr. Kao, what was your plans for how long  
12 you were thinking you would work at the University?  
13 What's your health like? Do you think you would be  
14 able to work to a certain age? Did he invite you  
15 to do that?

16 "He invited me to make two calculations based  
17 on what he told me would be testimony provided by  
18 Dr. Kao.

19 "Doctor, I asked you a very direct question.")

20 MR. VARTAIN: Q. Then that direct question  
21 would have been had we not taken a coffee break: Did  
22 Mr. Katzenbach invite you to speak with Dr. Kao about  
23 those matters?

24 A. I was not given a direct invitation, no.

25 Q. Were you given an indirect invitation?



1           A. I believe had I wanted to have that discussion,  
2 I could have asked Mr. Katzenbach, but I was not offered  
3 an invitation.

4           Q. Did Mr. Katzenbach say something that caused  
5 you to believe that if you asked him for permission to  
6 talk to his client, he would have allowed you to?

7           A. We didn't have that conversation.

8           Q. Okay. So Mr. Katzenbach never said anything to  
9 you to suggest that if you felt the need to, you could  
10 speak to his client to get information about his  
11 intentions for the future as far as working at USF or  
12 being medically able to work at USF; is that correct?

13          A. Yes.

14          Q. Isn't it true that Mr. Katzenbach actually flat  
15 out told you that you had to assume that Dr. Kao was  
16 going to work at USF until age 70 even though you asked  
17 him the question, quote, How long would Dr. Kao have  
18 remained employed at USF, question mark, close quote?

19                 He answered, quote, There would be no  
20 impediment to working to age 70, close quote.

21                 Didn't he tell you that?

22          A. He did.

23          Q. And you didn't ask him, "Well, might there be  
24 the normal customary impediments like health, move for a  
25 spouse, get tired of your job, hit the jackpot, stop

1 working, you don't need to work?" You didn't ask him  
2 any of those questions; did you?

3 A. Since I was asked to put in a cumulative  
4 present value column which would offer the opportunity  
5 to determine loss through many different years including  
6 age 65 and age 70 and reinstatement this year, there was  
7 no need for me and I'm not qualified to have an opinion  
8 other than statistical work life data about other dates  
9 besides that whole range of them that I'm offering in my  
10 report.

11 Q. I just asked you the question. Did you ask  
12 Mr. Katzenbach to give you that information?

13 A. That's my answer.

14 Q. Is your answer, "No, I didn't ask him for that  
15 information"?

16 A. I didn't need to because of the reasons I just  
17 described.

18 Q. You didn't need to because he told you flat out  
19 that you had to assume, you had to assume that Dr. Kao  
20 was going to work at USF until 70; correct? Didn't he  
21 tell you that?

22 A. As one of many different alternative durations  
23 of loss, yes.

24 Q. But the \$3 million -- the big jackpot, the  
25 \$3 million jackpot was based on Mr. Katzenbach assuming,

1 telling you that Dr. Kao was going to work at the  
2 University until age 70 come hell or high water;  
3 correct?

4 MR. KATZENBACH: Objection. That's  
5 argumentative.

6 THE COURT: Sustained.

7 MR. VARTAIN: Q. Isn't the \$3 million figure  
8 based on the information that Mr. Katzenbach gave you  
9 that Dr. Kao was going to work at USF until 70?

10 A. He never said he would work until 70. He said  
11 he could work until 70, and it was one of many durations  
12 that I considered.

13 Q. I thought you said he told you, quote, There  
14 would be no impediment to working to age 70, close  
15 quote, and that he told you that, Mr. Katzenbach, in  
16 response to your question, "How long would Dr. Kao have  
17 remained employed at USF?" Wasn't that his answer to  
18 your question?

19 A. That was his answer, yes.

20 Q. Did Mr. Katzenbach tell you anything whatsoever  
21 about how happy Dr. Kao was working at the University?  
22 I'm sorry?

23 A. We didn't have that conversation.

24 Q. So the answer is no, he didn't tell you that;  
25 correct?

1           A. He did not.

2           Q. Did he tell you anything whatsoever about  
3 whether Dr. Kao had actually, from the time he left the  
4 University till today had been employed elsewhere?

5           A. My understanding is he has not been.

6           Q. Did Mr. Katzenbach tell you that?

7           A. Not in direct words, but in answer to my  
8 questions about any earnings that Dr. Kao has had.

9           Q. Doctor, that wasn't my question. The  
10 question --

11           MR. KATZENBACH: Your Honor, that's  
12 argumentative. Arguing with the Witness.

13           MR. VARTAIN: I'll withdraw that.

14           Q. My question was: Did Mr. Katzenbach tell you  
15 whether or not Dr. Kao has worked anyplace since he left  
16 the University till today?

17           A. Mr. Katzenbach, at my request, provided me with  
18 information about any earnings that Dr. Kao has had.  
19 That's the way I addressed the question.

20           Q. Okay. So he told you in that way, I grant you  
21 that he has no interim earnings. Therefore, implicit in  
22 that is he hasn't worked anywhere else.

23           A. That's correct.

24           Q. Fair enough. I get that.

25           But did he tell you whether it's by his choice

1 or not that Dr. Kao has no other earnings?

2 Sorry, Jurors.

3 A. He told me that Mr. Kao has not found  
4 alternative employment.

5 Q. Is that how he put it?

6 A. I can't remember exactly how he put it. That's  
7 my interpretation.

8 Q. Okay. It sounds like when someone says that  
9 the person hasn't found interim employment, it suggests  
10 that they have been looking to find interim employment.  
11 Is that what Mr. Katzenbach told you?

12 MR. KATZENBACH: I'm going to object. It's not  
13 clear to me -- the question is ambiguous.

14 MR. VARTAIN: Q. The question is: Did  
15 Mr. Katzenbach -- well, I'll back up.

16 You said that Mr. Katzenbach told you that  
17 Dr. Kao has not found any employment so far; correct?

18 THE COURT: Give me an opportunity to rule.

19 Sustained.

20 MR. VARTAIN: Excuse me, your Honor.

21 Q. Did Mr. Katzenbach tell you that Dr. Kao has  
22 not found interim employment thus far?

23 A. Yes.

24 Q. Did Mr. Katzenbach tell you whether Dr. Kao has  
25 been looking to find interim employment, that is,

1 employment from when he left USF to today?

2 A. I don't know if he has.

3 Q. Did you bring your file?

4 A. I did.

5 Q. Would you look in your file and see if  
6 Mr. Katzenbach has ever told you that Dr. Kao hasn't  
7 applied for even one job since he left the University?

8 A. I do not believe he has told me that.

9 Q. Did Mr. Katzenbach tell you that Dr. Kao has  
10 made no efforts whatsoever to find employment?

11 A. He has not told me that.

12 Q. Notwithstanding -- therefore, you don't have  
13 any information either way as to whether he actually has  
14 any economic loss caused by USF? Would it be fair to  
15 say? In other words, asking it maybe the flip side of  
16 the coin, I see the document that you want the Jury to  
17 look at is called "John Kao Economic Loss." That's the  
18 title of it; right?

19 A. Yes.

20 Q. And you've got a \$437,000 plus change figure  
21 that represents total economic loss from February '09  
22 till now; right?

23 A. No. That's the total through reinstatement in  
24 August of 2012.

25 Q. Okay. You're even counting losses that haven't

1 happened yet; right?

2 A. That's correct.

3 Q. Did Mr. Katzenbach tell you to do that?

4 A. He asked me to assume a loss until a  
5 reinstatement in the new academic year 2012.

6 Q. February 2009 to August 2012, you've got --  
7 we'll just call it 437K. That's your figure; right?

8 A. That's correct.

9 Q. You've got a title, "Economic loss." But my  
10 question is: It might be an economic loss that was  
11 caused by Dr. Kao in that he's not looked for other  
12 work. Would you agree with that?

13 A. I don't know.

14 Q. What is it that you don't know? In other  
15 words, the loss could have been caused by him. It's  
16 just that he's out \$437,000, but it might be caused by  
17 him if he wasn't looking for work; right?

18 A. I believe that gets into a legal opinion about  
19 what caused his loss. My understanding is that he's had  
20 no earnings. Had he had earnings in that period, then  
21 they could be an offset to these figures.

22 Q. Or I thought -- how do you know that could be  
23 an offset? Isn't that a question of law whether other  
24 earnings could be an offset?

25 A. Had he had earnings, I would have taken them

1 into account other than the ones I was provided with.  
2 My understanding there's been no other earnings.

3 Q. So you wouldn't take into account if he made a  
4 decision that he wasn't going to work anyplace else, you  
5 wouldn't take that as a deduction from the 437,000;  
6 would you?

7 A. It's not a question that I've asked. I did not  
8 assume -- I assume there will be testimony that he has  
9 not actively made a decision not to be employed during  
10 this time.

11 Q. Where did you get that assumption from? Is  
12 that from Mr. Katzenbach too?

13 A. It's an interpretation, yes.

14 Q. Is it an interpretation of what Mr. Katzenbach  
15 told you?

16 A. Mr. Katzenbach told me that Dr. Kao had not  
17 found employment during that time period.

18 Q. I got that, that he had not found. But that's  
19 why I'm pursuing this question because it -- doesn't it  
20 imply that he's been looking for it. It's like when I  
21 drop my keys, I haven't found them because I haven't  
22 been looking for them. That could be a problem.

23 Is that true, that he -- you took the  
24 implication that Dr. Kao's been looking for employment?

25 A. I took the implication that were he able to



1 look for employment and had he found it, that he would  
2 have had income, and he did not have income.

3 Q. Were he to be able to -- would you read that  
4 back for me?

5 May I have that last answer read back, your  
6 Honor?

7 THE COURT: Yes.

8 (Record read: "I took the implication that  
9 were he able to look for employment and had he  
10 found it, that he would have had income, and he did  
11 not have income.")

12 MR. VARTAIN: Q. So what do you mean by "able  
13 to look for employment"? Do you mean physically or  
14 mentally able to look for employment?

15 A. I do, in general terms. It gets out of my  
16 expertise, but I'm aware that there's an issue of the  
17 termination of his employment. I don't know to what  
18 extent that had an impact on his ability to either  
19 choose to look for employment or find employment.

20 All I know is he has not had any and that  
21 underlies my assumptions that I was asked to make.

22 Q. There's certain times when attorneys are  
23 allowed to ask you a hypothetical question. So I'm  
24 going to take that opportunity because you're an expert  
25 Witness. And I'm agreeing that she's an expert witness.

1 THE COURT: Okay. Now you stipulate she's an  
2 expert?

3 MR. VARTAIN: She's an expert economist.

4 Q. For purposes of your calculations, did you  
5 assume that Dr. Kao was physically and mentally able to  
6 look for a job?

7 A. I didn't make any assumptions about that.

8 Q. Okay. That's what I thought.

9 Did Mr. Katzenbach tell you that Dr. Kao was  
10 able to -- able physically and mentally on both counts  
11 to look for a job?

12 A. We didn't have that discussion.

13 Q. Did he, Mr. Katzenbach, tell you that Dr. Kao  
14 was unable physically or mentally to look for a job?

15 A. We didn't have that discussion.

16 Q. Okay. Did Mr. Katzenbach tell you what the  
17 expected -- what the salaries would be for a professor  
18 at Dr. Kao's level?

19 A. I was provided with the salary schedules  
20 supplied by USF.

21 Q. So you took -- for the sake of argument, do you  
22 remember what his salary is now?

23 A. He's not employed there now.

24 Q. What's that?

25 A. He's not employed at the University now.

1 Q. I apologize. What his salary was when he last  
2 worked there?

3 A. Yes. It was \$98,809 a year in September of  
4 2008.

5 Q. And then how did you -- did you put in a number  
6 for what his health benefits and retirement benefits are  
7 equal to?

8 A. I did.

9 Q. What number did you plug in for that?

10 A. I relied on the collective bargaining agreement  
11 from USF which suggested that there was 20 percent of  
12 pay that went into retirement plans. Actually a little  
13 higher than that.

14 Q. Yeah. You're right.

15 A. There was a specific figure for how much the  
16 University pays for medical and dental benefits. I took  
17 them as a percent of Dr. Kao's salary which was 8.8  
18 percent. I used a total of 28.8 although the University  
19 in its responses said 36 percent.

20 Q. What responses?

21 A. Interrogatory responses, it says 36 percent.

22 Q. So you rounded off -- you basically said, well,  
23 the value of his benefit package is about 30 percent or  
24 so of salary give or take?

25 A. That's right. I did it precisely at 28.8

1 because I'm the economist.

2 Q. That's why you do your thing, and I do my  
3 thing?

4 A. That's correct.

5 Q. That's right. Then you multiplied the number  
6 of years that Dr. Kao would have to age 70, and that's  
7 where you came up with the \$3 million figure, give or  
8 take?

9 A. Well, I did an interim which was take into  
10 account what the University said about how salaries had  
11 changed since the time of his termination.

12 Q. So you predicted maybe he would have, if he  
13 stayed there, he would get increases along the way?

14 A. I didn't predict it. But I did look at what  
15 the rates were for his position without any change in  
16 the position. And yes, I did take it out for years all  
17 the way up to and including age 70.

18 Q. Before I close, I appreciate you did your job.  
19 My quibble isn't with you. But I want to close with one  
20 question.

21 This \$3 million figure assumes that Dr. Kao  
22 would not for the future -- I don't know, I think he's  
23 43 or 44 -- until he got to be 70, he wouldn't work  
24 anywhere else even if he's able-bodied?

25 A. That's true.

1 MR. VARTAIN: Okay. No further questions.

2 THE COURT: All right. Do you want to take up  
3 the exhibit?

4 MR. VARTAIN: I'm going to object to the  
5 exhibit. I think it's totally misleading.

6 THE COURT: Totally what?

7 MR. VARTAIN: Misleading.

8 THE COURT: Okay. We'll discuss it further  
9 outside the presence of the Jury.

10 Mr. Katzenbach, would you care to redirect?

11 MR. KATZENBACH: Yes.

12 REDIRECT EXAMINATION

13 BY MR. KATZENBACH:

14 Q. Calculations that you put on Exhibit 99A, are  
15 those just mathematical calculations?

16 A. Well, they come down to being mathematical  
17 calculations. They start with real information that's  
18 then put into the mathematical calculations.

19 Q. All right. Now take a look at this Case No. 1,  
20 that's the reinstatement case.

21 A. Okay.

22 Q. Take a look at that. Who do you understand has  
23 the power to reinstate Dr. Kao?

24 A. I assume that would be USF.

25 Q. So under Case No. 1, you've made the assumption

1 that USF gives him his job back; isn't that right?

2 A. That's correct.

3 Q. So that in that assumption, you're assuming he  
4 would be reemployed in the job he had?

5 A. That's right.

6 Q. Now, Case No. 2, that makes the assumption USF  
7 doesn't reinstate him; correct?

8 A. Correct.

9 Q. If USF chooses not to reinstate and he remains  
10 unemployed, then each year he has a loss; is that right?

11 A. That's correct.

12 MR. VARTAIN: Leading. That's okay. I'm not  
13 going to object.

14 MR. KATZENBACH: Is there an objection?

15 MR. VARTAIN: I waived my objection off, like a  
16 hockey player gets waived off.

17 MR. KATZENBACH: They usually whistle, I think.

18 Q. In any event, waived off or not, so Exhibit 2  
19 assumes again no reinstatement; right?

20 A. Yes.

21 Q. Assumes each year it shows he has a cumulative  
22 loss; correct?

23 A. It does show the accumulation of his loss in  
24 each year all the way out, that's correct.

25 Q. If there's evidence that USF wished to present

1 that Dr. Kao was going to kick over dead in a year or  
2 two, they could present that evidence here; couldn't  
3 they?

4 MR. VARTAIN: Objection. Argumentative.

5 MR. KATZENBACH: Strike that.

6 MR. VARTAIN: We would never do that, Chris.

7 THE COURT: Question withdrawn. New question.

8 MR. KATZENBACH: Thank you.

9 Q. If there was evidence offered to the Jury that  
10 said Dr. Kao would work one, two, three years and not  
11 decide to work anymore, if there was evidence in this  
12 case that you have provided in the chart by which they  
13 could determine what his cumulative loss would be to  
14 that point?

15 A. Yes.

16 Q. And if they decided that he would find another  
17 job if there were some evidence in this case that showed  
18 Dr. Kao could find another job as a university professor  
19 in a tenured position at any time in the future and  
20 there was a date when that job could start, this chart,  
21 scenario No. 2, Case 2, would allow the Jury to  
22 determine what his loss was to that point; isn't it?

23 A. Yes.

24 Q. And if there was any evidence in this case that  
25 Dr. Kao wanted to teach, stop teaching for any reason,

1 you've given them in Case No. 2 an opportunity to say,  
2 okay, at what point, what year did that happen and then  
3 draw a line across, and that would show what his  
4 cumulative loss was to that point; is that right?

5 A. Yes.

6 Q. Would it be fair to say that Case No. 2 allows  
7 the University to put on whatever evidence it wants to  
8 show the amount -- the date the loss should stop; isn't  
9 that correct?

10 MR. VARTAIN: Objection. That's a question for  
11 the Judge, not the Witness. It's argumentative.

12 THE COURT: Sustained.

13 MR. KATZENBACH: Q. Well, let me just ask one  
14 question then along these lines.

15 Now, you understood that Dr. Kao was a  
16 University professor; is that correct?

17 A. Yes.

18 Q. I suppose -- did you include in his loss his  
19 potential ability to get a job flipping burgers at  
20 McDonald's?

21 MR. VARTAIN: Argumentative. Ambiguous.

22 THE COURT: Sustained.

23 MR. KATZENBACH: Q. In performing your job as  
24 an economist, is it your role to determine when somebody  
25 might get another job?



1 MR. VARTAIN: Objection. Argumentative.

2 THE COURT: Overruled. The Witness may answer.

3 THE WITNESS: Generally not because I'm not  
4 qualified to provide an opinion of how long it might  
5 take a particular individual with their set of skills  
6 and experience to get a -- to find employment. That's  
7 really the expertise of a vocational expert.

8 MR. KATZENBACH: Q. When you do calculations  
9 such as in Exhibit 99, Case 1 and Case 2, is it typical  
10 that you -- do you ever make a decision as to how --  
11 what somebody should have done to get employment if they  
12 hadn't become employed?

13 A. No.

14 Q. And is it generally up to the -- in your  
15 experience, is it generally up to the evidence at trial  
16 to determine -- for the Jury to determine when it should  
17 be, based on the evidence, somebody should or should not  
18 get another job?

19 MR. VARTAIN: Objection. That's an  
20 argumentative question. It's for the Judge to decide.

21 THE COURT: Sustained.

22 MR. KATZENBACH: Q. All right. In the event  
23 that -- as you present the case, Exhibit 99, in the  
24 event that the University of San Francisco offers any  
25 evidence as to the amount of damages -- as to the time

1 when Dr. Kao could find another position, would it be  
2 possible to use the Case 2 scenario to determine at what  
3 point Dr. Kao's loss would cut off?

4 MR. VARTAIN: Objection. That calls for  
5 speculation and is argumentative.

6 THE COURT: Overruled. The Witness may answer.

7 THE WITNESS: The way I interpret your  
8 question, you asked me if the University were to offer  
9 evidence about when he could become employed. The  
10 implication of what you have asked me is that there  
11 would need to be a decision made by the Jury as to how  
12 long that might suggest it would take for him to find a  
13 job.

14 What I offered and as we discussed is a report  
15 which shows losses through the end of each calendar  
16 year. So whether there is a particular assumption about  
17 a date that losses would end or Dr. Kao would have  
18 chosen to stop working or if there's the opportunity to  
19 interpret testimony that might be provided, all of it  
20 would lead to being able to use the chart and say as of  
21 whatever date one assumes the loss would end, the  
22 calculation of loss to that date can be determined.

23 MR. KATZENBACH: Q. Did I ask you to prepare a  
24 chart in this format?

25 A. Yes, you did.

1 Q. Was I specific about asking you to do it year  
2 by year?

3 A. Yes.

4 Q. Did I explain to you why I wanted it done year  
5 by year?

6 A. Yes.

7 Q. What did I tell you?

8 A. That you wanted me to make a calculation to  
9 present a tool which could offer a trier of fact the  
10 opportunity to determine Dr. Kao's loss through  
11 alternative dates of retirement had he continued to be  
12 employed at USF for his career and for any hypothetical  
13 date in which a trier of fact might choose to cut off  
14 damages because of the assumption that Dr. Kao might be  
15 able to find a like job with similar compensation.

16 Q. Thank you.

17 Did I also ask you to do the calculations  
18 assuming reinstatement?

19 A. Yes, you did.

20 MR. KATZENBACH: Thank you. Again, I would  
21 renew our offer of Exhibit 99A.

22 THE COURT: There's an outstanding objection  
23 which we'll deal with outside the presence of the Jury.

24 MR. KATZENBACH: Thank you, your Honor. That's  
25 all I have for this Witness.

1 THE COURT: Okay. Mr. Vartain?

2 RECROSS-EXAMINATION

3 BY MR. VARTAIN:

4 Q. The \$3 million you calculated would be  
5 Dr. Kao's loss that he would get, and he wouldn't have  
6 to work even if he's able-bodied, did anything  
7 Mr. Katzenbach ask you change that?

8 A. That's the outcome of the age 70 scenario, one  
9 of the figures I presented.

10 Q. Okay. Fair enough.

11 That's all I have. Thank you, your Honor.

12 THE COURT: Mr. Katzenbach, do you have any  
13 further questions?

14 MR. KATZENBACH: No.

15 THE COURT: Jurors have you questions? Yes.

16 (Whereupon, the Court received three written  
17 questions from Jurors, and a discussion at sidebar  
18 was held: 4:13 p.m. - 4:15 p.m.)

19 THE COURT: Some questions from the jurors,  
20 Dr. Ogus.

21 THE WITNESS: Okay.

22 THE COURT: What is the true risk-free rate you  
23 used?

24 THE WITNESS: The interest rate component of  
25 the Treasury, of the present value calculation was based

1 on U.S. Treasury Bonds. In order to make the net  
2 discount rate calculation that I use, I look at the  
3 difference between interest rates historically on  
4 three-year U.S. Treasury Bonds, and I subtract from that  
5 the average historic increase in the compensation, the  
6 earnings of U.S. workers.

7 So the interest rate, the risk-free interest  
8 rate component is Treasury Bonds.

9 THE COURT: Does the risk-free rate change over  
10 time, or is it just one number for the whole length of  
11 time?

12 THE WITNESS: The methodology that I use -- and  
13 if you see my report, you'll see all of the figures in  
14 the future are all the same. They're all shown in  
15 current dollars, 2012.

16 What I do and what many economists do in order  
17 to come up with those rates is that we look historically  
18 at the difference between that interest rate guideline,  
19 the three-year U.S. Treasury Bond rate, and the increase  
20 in the U.S. compensation of U.S. workers and determine  
21 historically an average.

22 I look back over about 20 years. So what I'm  
23 saying is that historically interest rates have been  
24 about one and a half percent higher than wage growth  
25 over that historical period. And I use that figure

1 going out into the future for the entire duration of the  
2 future, and that way, I don't need to make explicit  
3 assumptions about what might be this year and what might  
4 be another year.

5 My crystal ball isn't that clear, but I do  
6 think history provides a guideline, and it suggests  
7 periods when that differential has been greater, has  
8 been smaller, but on average, has been about a one and a  
9 half percent difference.

10 THE COURT: Does either case analysis  
11 incorporate or calculate the University offer of putting  
12 Dr. Kao on indefinite sick leave or reinstated  
13 employment at another university or position?

14 If you would like to have a look at it, you're  
15 welcome to Dr. Ogus.

16 THE WITNESS: Yeah. Maybe I will. Thank you.

17 The answer to the first question whether my  
18 report incorporates or calculates the University offer  
19 of placing Dr. Kao on indefinite sick leave prior to  
20 reinstatement, there's no account in this report, and  
21 I'm not aware of either the offer or what that would  
22 mean in terms of the level of sick leave that would be  
23 paid under that scenario.

24 So to the extent that that would be appropriate  
25 to consider, it's not in these numbers, and it would

1 need to be taken into account separately.

2           With respect to reemployment at another  
3 university or position, well, Case 1 assumes  
4 reemployment at USF in identically the same position,  
5 and the damages cutting off in August of 2012 as a  
6 result of a possible reinstatement. There's no other  
7 reinstatement taken into account or alternative job at a  
8 university taken into account.

9           But were the Jury to decide that this was a  
10 reasonable expectation, that's where the cumulative loss  
11 could be taken into account and the damages cut off at  
12 whatever point there might be testimony to suggest that  
13 such a job would be possible or might occur in the  
14 future.

15           THE COURT: Mr. Katzenbach, have you follow-up  
16 questions?

17           MR. KATZENBACH: No.

18           THE COURT: Mr. Vartain?

19           MR. VARTAIN: No.

20           THE COURT: May the Witness be excused?

21           MR. VARTAIN: Yes, your Honor.

22           MR. KATZENBACH: Yes, your Honor.

23           MR. VARTAIN: And thanks.

24           THE COURT: Dr. Ogus, thank you very much.

25 You're free to go.

1 THE WITNESS: You're welcome.

2 (Witness excused.)

3 THE COURT: Back to Ms. Peugh-Wade?

4 MR. VARTAIN: I know Mr. -- I know

5 Mr. Katzenbach had another, what I think might be a  
6 short witness.

7 Is that true, Mr. Katzenbach? I know Dr. Kao's  
8 sister is here.

9 MR. KATZENBACH: I think she's gone out.

10 MR. VARTAIN: She's left?

11 MR. KATZENBACH: We do actually have her.  
12 The Plaintiff will call Stephanie Kao.

13 THE COURT: Okay.

14 THE CLERK: Please raise your right hand.

15 STEPHANIE KAO,

16 called as a witness by the Plaintiff, after being first  
17 duly sworn, was examined and testified as follows:

18 THE CLERK: Please be seated. State your full  
19 name and spell it for the record, please.

20 THE WITNESS: My name is Stephanie spelled  
21 S-t-e-p-h-a-n-i-e, last name is Kao, spelled K-a-o.

22 THE COURT: Mr. Katzenbach, you may inquire.

23 MR. KATZENBACH: Yes, thank you.

24 /////

25 /////



1 DIRECT EXAMINATION

2 BY MR. KATZENBACH:

3 Q. Ms. Kao, what's your relationship to John Kao?

4 A. I'm his sister.

5 Q. Younger or older?

6 A. I'm younger.

7 Q. Thank you.

8 Now, I would like to ask you a few short  
9 questions. First of all, are you currently estranged  
10 from your brother?

11 A. No, I'm not.

12 Q. Have you ever been estranged from your brother?

13 A. No. We're very close.

14 Q. Thank you.

15 I would like to direct your attention to a time  
16 where your brother, Dr. John Kao, had an adverse  
17 reaction from Prozac. Do you recall that?

18 A. Yes, I do.

19 Q. Can you just describe to the Jury briefly what  
20 happened?

21 A. It was in December of 2001. My mother got --  
22 was acting strangely, and we thought she was quite  
23 depressed. As a result, my brother got depressed. And  
24 so I recommended that he see a therapist to get some  
25 medication.

1 Q. Okay.

2 A. And then he took the medication in January of  
3 2002. That was Prozac.

4 Q. Did he have some sort of adverse reaction to  
5 that?

6 A. Yes, he did. He told me things weren't looking  
7 right; things weren't sounding right. He didn't feel  
8 good on it.

9 Q. Okay. Did he go see a doctor about that?

10 A. Yes. He went to see a doctor specifically to  
11 help him with his depression, and the doctor prescribed  
12 the Prozac.

13 Q. Now, did Dr. Kao ask you to do anything  
14 concerning his employment?

15 A. Concerning his employment, when he went to see  
16 the doctor, the doctor gave instructions on how to deal  
17 with his bad reaction. And then because my brother  
18 wasn't feeling well, I called the department of  
19 mathematics to give them the information about his  
20 illness.

21 Q. And who did you speak to?

22 A. I spoke to Nancy Campagne.

23 Q. And how did Ms. Campagne identify herself to  
24 you?

25 A. I recall her telling me her name was Nancy

1 later on. I don't know her, but she later told me her  
2 last name.

3 Q. Okay. What did you say to her during this  
4 conversation; what did she say to you?

5 A. Well, originally my intention was to leave a  
6 message because it was really late at night when I tried  
7 to call USF. It was like 9:00 o'clock at night. And I  
8 told her that my brother had taken some medication, he  
9 had a bad reaction and that he was told to stop it and  
10 that he couldn't come to work the next day, but that  
11 it -- most likely, he would be able to return in two  
12 weeks. That's how long it takes the medication to get  
13 out of his system.

14 Q. And what did Ms. Campagne say to you?

15 A. She said that that was fine. I told her that I  
16 couldn't definitively say when he could come back. I  
17 apologized he would be gone, and my brother would call  
18 back the next day to confirm.

19 Q. Did Ms. Campagne say anything else to you in  
20 this conversation?

21 A. No.

22 Q. All right. During the rest of the month of  
23 January, did you have any other conversations about your  
24 brother with anyone from the University of  
25 San Francisco?

1 A. Not in January, no.

2 Q. When was the next conversation you had with  
3 anyone concerning your brother's absence from work?

4 A. I was called at my workplace on February 6th by  
5 one of the department members.

6 Q. Which department member was that?

7 A. It was Paul Zeitz.

8 Q. And how did you learn of this phone call?

9 A. Well, I returned to my cubicle, and there was a  
10 voicemail from Paul. And basically, I wrote down a  
11 Post-it saying his message which was call him back at  
12 between this time frame that day, and he left his work  
13 number.

14 Q. Okay. And did you call him back?

15 A. Yes, I did.

16 Q. And can you tell what did you say to him?

17 A. I called him back asking why he called me. He  
18 asked me why or when my brother would be returning to  
19 work.

20 Q. And what did you say to Dr. Zeitz?

21 A. I told him I didn't know when he would be  
22 returning to work, and he should talk to my brother  
23 directly. I'm assuming he called me because I'm the  
24 emergency number.

25 MR. KATZENBACH: Okay. Thank you. That's all

1 I have for this Witness.

2 THE COURT: Mr. Vartain?

3 CROSS-EXAMINATION

4 BY MR. VARTAIN:

5 Q. Ms. Kao, you spoke with Nancy. She's at the  
6 Dean's office, not the mathematics department?

7 A. Yes. That's correct.

8 Q. Okay. And she's the administrative assistant  
9 to the Dean; correct?

10 A. I did not know that at the time.

11 Q. Did you find that out later?

12 A. Yes.

13 MR. VARTAIN: I have no further questions of  
14 Ms. Kao.

15 THE COURT: Mr. Katzenbach, any further  
16 questions?

17 MR. KATZENBACH: Yes.

18 REDIRECT EXAMINATION

19 BY MR. KATZENBACH:

20 Q. Did you speak to Nancy because she answered  
21 your phone call?

22 A. Yes, she did.

23 MR. VARTAIN: Thank you. That's all I have.

24 THE COURT: Juror questions for Ms. Kao? See  
25 no hands.

1 May Stephanie Kao be excused?

2 MR. KATZENBACH: Thank you, your Honor, yes.

3 THE COURT: Thank you very much, Ms. Kao.

4 You're free to go.

5 THE WITNESS: Thank you.

6 (Witness excused.)

7 THE COURT: We're virtually at quitting time.

8 Ladies and gentlemen, remember the admonition.

9 Do not form or express any opinion on this case until  
10 it's finally submitted to you for your decision. Do not  
11 discuss among yourselves or with others until that time.

12 Please be back in your places at 9:00 tomorrow  
13 morning. Please remember to leave your notebooks and  
14 instructions behind.

15 (Whereupon, the Jurors exited the courtroom  
16 4:29 p.m.)

17 THE COURT: Jurors and Alternates have departed  
18 the courtroom. Counsel for both sides and the Plaintiff  
19 remain. We need to take up the admissibility of  
20 Exhibit 99A.

21 Mr. Vartain, go ahead and discourse on your  
22 objection.

23 MR. VARTAIN: Thank you, your Honor.

24 The Witness testified that the exhibit was  
25 dependent on whether -- upon the existence of evidence

1 that the Plaintiff intended to work at the University  
2 until a given date and time. And she had different  
3 dates and time on up to age 70.

4 But she specifically said it is dependent on  
5 and it assumes that there's evidence to show that the  
6 Witness -- that the Plaintiff rather, I'm sorry, was  
7 intending to and would likely be employed at the  
8 University that long. And there is no such evidence in  
9 the record by anybody in this case. There's just a  
10 complete absence of any evidence on that issue;  
11 therefore, the foundation for the admissibility of the  
12 document is absent.

13 THE COURT: Well, of course one of the things  
14 that Dr. Kao seeks is reinstatement.

15 MR. VARTAIN: That's -- that is -- that is a  
16 legal request, but there is no evidence that he was  
17 intending to work at the University. There is that  
18 demand in this case for sure. But there is no evidence  
19 that if he accepted the reinstatement, if there was one,  
20 that if it was offered to him he would accept it, and if  
21 he accepted it, he would intend to work at the  
22 University for any period of time.

23 THE COURT: Mr. Katzenbach?

24 MR. KATZENBACH: I think Dr. Kao testified that  
25 he wanted his job back because he loves teaching. And

1 that under the union contract, he's entitled to continue  
2 working there until age 65 or age 70. We have witnesses  
3 here indicating that that is a -- long careers are  
4 entirely appropriate.

5 The exhibits are simply mathematical  
6 calculations what his loss would be at any particular  
7 period of time. It's up to the Jury to decide how long  
8 he worked. That's the purpose of giving a cumulative  
9 figure.

10 THE COURT: Okay. Last word, Mr. Vartain?

11 MR. VARTAIN: Yeah. The last, the last word is  
12 that nothing new.

13 THE COURT: Submitted?

14 MR. VARTAIN: It is submitted, your Honor.

15 MR. KATZENBACH: Yes, your Honor. I'm sorry.

16 THE COURT: Okay. The exhibit is admitted over  
17 objection.

18 (Plaintiff's Exhibit No. 99A was  
19 received in evidence.)

20 THE COURT: Anything else that needs to go on  
21 the record?

22 MR. KATZENBACH: No. That's all at this point,  
23 your Honor.

24 THE COURT: Mr. Vartain?

25 MR. VARTAIN: Thank you, your Honor. Have a



1 good evening.

2 THE COURT: Thank you. You have a good evening  
3 too.

4 MR. KATZENBACH: Thank you, your Honor.

5 MR. MACK: Thank you, your Honor.

6 (Whereupon, the proceedings were adjourned at  
7 4:33 p.m.)

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STATE OF CALIFORNIA                     )  
   )                     ss.  
COUNTY OF SAN FRANCISCO             )

I, KIMBERLEE SCHROEDER, CSR No. 11414, do hereby certify that I am a Freelance Certified Shorthand Reporter in and for the State of California, and that as such, I reported the proceedings had in the above-entitled matter at the time and place set forth herein;

I further certify that my stenotype notes were thereafter transcribed by me, and that the foregoing pages numbered 1324 to 1526, inclusive, constitute a full, true and correct transcription of my said notes.

DATED: This 20th day of September, 2012.



KIMBERLEE SCHROEDER, CSR, RPR, CCRR  
License No. 11414

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

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JOHN S. KAO,

Plaintiff/Appellant,

Appellate No. A135750

vs.

UNIVERSITY OF SAN FRANCISCO,  
et al.,

SF Superior Court Case  
No. CGC-09-489576

Defendant/Respondent.

/

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

Friday, February 17, 2012

Volume 8

Pages 1527 through 1849

Reported by:

KIMBERLEE SCHROEDER, CSR, RPR, CCRR

License No. 11414

Holly Moose & Associates  
Certified Shorthand Reporters  
236 Spencer Avenue  
Sausalito, CA 94965  
(Phone) 415-332-4959  
(Fax) 415-332-4943

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN FRANCISCO  
HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE  
DEPARTMENT 318

---oOo---

JOHN S. KAO,  
Plaintiff,  
vs. No. CGC-09-489576  
UNIVERSITY OF SAN FRANCISCO,  
et al.,  
Defendant.

/

JURY TRIAL  
REPORTER'S TRANSCRIPT OF PROCEEDINGS  
Friday, February 17, 2012  
Volume 8  
Pages 1527 through 1849

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APPEARANCES

For the Plaintiff:

KATZENBACH & KHTIKIAN  
By: CHRISTOPHER W. KATZENBACH  
CONOR D. MACK  
Attorneys at Law  
1714 Stockton Street  
San Francisco, California 94133  
Ph: 415-834-1778  
E-mail: ckatzenbach@kkcounsel.com  
cmack@kkcounsel.com

For the Defendants:

VARTAIN LAW GROUP  
By: MICHAEL J. VARTAIN  
LINDA K. ADLER  
Attorneys at Law  
601 Montgomery Street  
San Francisco, California 94111  
Ph: 415-391-1155  
E-mail: charissa@vartainlaw.com

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P R O C E E D I N G S

Friday, February 17, 2012 9:02 o'clock a.m.

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THE COURT: Juror No. 12, Mr. Taylor, Ms. Mack said you aren't feeling well. You do look pale. Are you okay?

JUROR NO. 12: I'll see how long I can hang here. I've invested all this time. I'm going to see if I can stay with this.

THE COURT: Jurors and Alternates are all present. Counsel for all sides are present. The Plaintiff is personally present. Ms. Peugh-Wade is on the stand.

And you have one more question, Mr. Katzenbach?

MR. KATZENBACH: I do, your Honor. Thank you.

MARTHA PEUGH-WADE,  
called as a witness by the Plaintiff, after having been previously duly sworn, was examined and testified further as follows:

THE COURT: Mr. Peugh-Wade, you took the oath yesterday. It's still in effect today. You're still testifying under oath.

THE WITNESS: Okay.

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1 DIRECT EXAMINATION

2 BY MR. KATZENBACH:

3 Q. Now, Ms. Peugh-Wade, would you please take a  
4 look at Exhibit 34, which is a June 24th, 2008, letter.

5 A. Okay.

6 Q. Was that letter sent to Dr. Reynolds?

7 A. A copy of it was, yes.

8 MR. KATZENBACH: Thank you. That's all I have.

9 THE COURT: All right. Mr. Vartain, your turn.

10 MR. VARTAIN: Yes. Ms. Adler will be in later  
11 today. She has another matter, but she'll come in  
12 around 11:00. I want to let the Jury and you know that.

13 I'm going to introduce my paralegal who's going  
14 to do some things. She'll be coming in and out, letting  
15 the Jury know she's my paralegal.

16 We're going to give the Jury, during  
17 Ms. Peugh-Wade's examination, with his Honor's  
18 permission, we're going to give you copies of some of  
19 those exhibits, the key ones, not everything. And  
20 Ms. Eng is going to help me do that. That's why she's  
21 here.

22 You're done, Mr. Katzenbach?

23 MR. KATZENBACH: I am.

24 /////

25 /////

1 CROSS-EXAMINATION

2 BY MR. VARTAIN:

3 Q. Ms. Peugh-Wade, can you tell the Jury a  
4 little bit about you, and just basically starting with  
5 when you came to work at the University of  
6 San Francisco, what you did for a job when you got --  
7 when you first came. And then just a real thumbnail  
8 sketch of how you got from where you were then to where  
9 you are today.

10 A. Okay. I went to the University of  
11 San Francisco for graduate school and then afterwards  
12 got a job there as financial analyst. That was actually  
13 25 years ago. Worked in that department for three years  
14 and then moved over to human resources. Started out in  
15 the benefits area as the manager of compensation,  
16 benefits and risk.

17 At that time, we also oversaw risk and risk  
18 management. And then after a number of years, became  
19 the associate director of human resources. And then  
20 about five years ago, became the assistant vice  
21 president.

22 Q. So tell the Jury what the person, namely you,  
23 that's in charge of benefits, what are benefits? What  
24 does that mean, and what did you do in that job?

25 A. I oversaw all of our benefits, and that also

1 meant working with individuals sometimes when there were  
2 problems. So we had benefits going from health care  
3 like Blue Cross and Kaiser, dental, employee assistance  
4 program, retirements, short-term, long-term disability,  
5 sick leave, actual tuition mission. We now have other  
6 things like commuter checks. We oversaw all of those.

7 Q. So in the 25 years you've been at the  
8 University, have you been involved with making decisions  
9 about what the University employees get in the way of  
10 health benefits, sick leave and disability benefits?

11 A. Yes.

12 Q. Would it be fair to say in the last ten years,  
13 you're probably the primary person that, that designs  
14 and decides what those benefits are going to be?

15 A. Yes. And because we're a collective bargaining  
16 agreement environment, we have seven different unions.  
17 It's not all my decision or recommendation, but  
18 certainly a big part of it.

19 Q. You sit on the negotiating team with the union  
20 and hash out what the health benefits are going to be,  
21 what the employee assistance program is going to be, all  
22 that stuff; don't you?

23 A. I do. I have to say I'm a little bit, a little  
24 bit proud of our benefits.

25 Q. Tell the Jury why that is in comparison to what

1 corporate America is doing?

2 A. At a time when, when the last ten years when  
3 most other employers have been shrinking what they  
4 provide for their employees, our benefits, universities  
5 generally have better benefits than other industries  
6 because we don't pay as much, even among other  
7 universities our benefits are probably in the top ten  
8 percent.

9 We have a very rich medical plan with low  
10 copays. It's a great network, et cetera. We actually  
11 have -- our premiums for health care are based on  
12 salary. So the more money an employee makes, the more  
13 they pay. Someone makes less than 50,000 pays about a  
14 third of what someone who makes 150,000 for example.

15 Q. And tell the Jury why you do that and what  
16 you've done personally to support doing that?

17 A. One of the great things about working at USF is  
18 as part of the Jesuit mission, we really believe in care  
19 for the whole person. And everyone is different. And  
20 really -- and social justice is also a big part of our  
21 mission. And those folks that are making \$50,000 a year  
22 can't afford \$300 a month for their health care premium.

23 Q. Did you say cannot?

24 A. Cannot. So it's part of who we are.

25 Q. So then is it the case that the University

1 charges the lesser-paid people less for their health  
2 care premiums than the higher salaried people?

3 A. Yes. I'm sorry if I didn't make that clear.

4 So the less you make, the less you have to pay  
5 in health care premium.

6 Q. Tell us about mental health benefits and what  
7 part you play in drug and alcohol programs at the  
8 University, the employee assistance program and in  
9 general, what the Kaiser and Blue Cross plans have in  
10 the way of mental health benefits for faculty, staff and  
11 other employees.

12 A. First, we have an EAP, that's employee  
13 assistance program. It provides -- it has a network of  
14 psychiatrists, psychologists and social workers that  
15 will work with people on an individual basis.

16 You get eight free visits for any one thing  
17 that you're working on. Other visits after that are  
18 negotiated. If you happen to be a Blue Cross member and  
19 that provider is part of the Blue Cross network and  
20 that's something that you can often work out, then  
21 actually each session -- so for example, if I saw a  
22 therapist once a week, after my eight sessions, each  
23 session is \$20, the same as a doctor's co-pay.

24 Q. You mean the employee only has to pay \$20?

25 A. Yes. The employee has to only pay \$20. That's

1 a huge benefit.

2 As far as Kaiser, obviously those are going to  
3 be different therapists, but they also have quite the  
4 network as well as internal network. And as far as drug  
5 and alcohol programs, both Blue Cross and Kaiser have  
6 inpatient and outpatient programs for those.

7 Q. But is it true you actually negotiate with  
8 Kaiser and with Blue Cross for what they're going to  
9 give to USF employees? You personally have a lot to say  
10 about that; don't you?

11 A. Yes. What kind of plan we have, how high the  
12 copays are, number of visits, et cetera.

13 Q. Isn't it true that you actually decide how much  
14 money the University is going to pay out of its budget  
15 to Blue Cross and Kaiser for the mental health benefits  
16 -- I don't mean you alone, but as part of a  
17 decision-making?

18 A. Yeah. I'm kind of the final recommender. I  
19 don't generally recommend to my boss or the president  
20 something that I think is going to get turned down, but  
21 yeah.

22 Q. So you have a lot to say about how much money  
23 the University is going to spend of its own, not of the  
24 employees, on paying Kaiser, Blue Cross and the other  
25 networks for what kind of medical benefits and how much

1 the employee is going to have to pay out of their own  
2 pocket?

3 A. Yes.

4 Q. Okay. Would it be fair to say that during the  
5 time Dr. Kao was a faculty member of the University, he  
6 had the same mental health benefits as what you're  
7 describing?

8 A. Yes.

9 Q. In the same venue as all other full-time  
10 faculty members?

11 A. Yes.

12 Q. Are the other mental health benefits for  
13 Dr. Kao and the other members, are they listed in the  
14 collective bargaining agreement that's in the binder?

15 A. The employee assistance program I believe is  
16 listed. I don't know how much detail that it goes into  
17 under Blue Cross and Kaiser.

18 Q. But the subject of mental health benefits was  
19 negotiated by you with the faculty union?

20 A. Yes.

21 Q. And it's in the collective bargaining  
22 agreement?

23 A. Yes.

24 Q. Is that true?

25 A. Yes.

1 Q. What is your philosophy as the head of HR as  
2 pertaining to physical problems of employees versus  
3 mental problems in terms of what the University will do  
4 in the way of help, accommodations and so forth?

5 A. I feel both physical and mental problems are  
6 both things we all need help with at times. And that's  
7 -- that's part of why I'm here is really to help.

8 And it's funny that you mention that because I  
9 was thinking that I was interviewing for another  
10 position elsewhere and I was talking to the vice  
11 president there, and he said something about not having  
12 an employee assistance program and not believing in it.

13 And it was right then and there that I knew I  
14 couldn't work there. That it just, you wouldn't, you  
15 know, that's not fair to the employee. Anyway, my point  
16 is they're both really important -- so important such  
17 that obviously we try to get the right programs but also  
18 not so much me anymore but my staff. It's very  
19 important they work individually with people when they  
20 need to kind of navigate through the system.

21 Q. What do you mean individually work with people?  
22 What people?

23 A. Our faculty staff and employees that might be  
24 having medical or psychological problems.

25 Q. So are you saying that you, actually, the



1 University employees, its own HR people that actually  
2 help its employees deal with the complexities of the  
3 insurance companies?

4 A. Yes. I had, for example, I had a person, you  
5 know, we don't do many fitness-for-duty exams. I think  
6 probably when as long as I've been here, I've only been  
7 involved in two, but the other one was a psychological  
8 one. And the individual was actually found not fit for  
9 duty, but the doctor we used in that case contacted me  
10 and said the patient was really having a hard time  
11 getting a treating physician and could we help with  
12 that.

13 And my office did. We got the insurance  
14 carrier involved to find someone in the network so that  
15 this person could go ahead and get the help that he  
16 needed.

17 Q. I know I sometimes have problems and I just  
18 sort of won't do it, calling Blue Cross and working  
19 through their hotlines and this and that.

20 Do you have people on your staff that actually  
21 help the faculty and staff do that kind of getting  
22 through the hassles of the insurance companies that  
23 provide mental health benefits?

24 A. Yes.

25 Q. Dr. Kao testified here that way back when in

1 2002 -- I believe other people testified here, he  
2 distributed a letter to his colleagues saying he had  
3 depression and that he had this medication problem, and  
4 that's why he was out of work back in 2002.

5           Was there ever any kind of help for his mental  
6 health issues, that is Dr. Kao, that he ever asked for  
7 that HR didn't give him? Was there any denials of any  
8 accommodations or benefits to Professor Kao?

9           A. Not that I'm aware of, no.

10          Q. Did he ever ask you for anything that you said  
11 no to in the way of benefits, mental health benefits or  
12 mental health accommodations?

13          A. No.

14          Q. What is the University's policy on  
15 accommodations for people with mental health? By  
16 "policy," I mean in the day-to-day world, how does your  
17 office, you, and how do you instruct employees to deal  
18 with people who are having, you know, mental health  
19 problems and come forward and ask for some assistance?

20          A. It all depends on the problem. But sometimes  
21 it's just something that we can help by working with the  
22 supervisor. I have a person actually who specializes in  
23 ADA accommodation, Americans with Disability Act,  
24 accommodations for people with disabilities.

25               So often she works with the supervisor and the

1 employee and the medical provider to find out what  
2 indeed they need so that they can still accomplish their  
3 job.

4 Q. What about leaves of absence for mental health  
5 versus a physical problem? Does the University  
6 distinguish or give different medical leaves for people  
7 if it's a mental health versus a physical health?

8 A. No. It's the same thing.

9 Q. And so how do you deal with requests for mental  
10 health leave?

11 A. The same way. Actually, so a person would just  
12 -- that's why I said medical provider instead of doctor.  
13 Just really the medical provider needs to say you need  
14 to be out. And I think as we mentioned a little bit  
15 yesterday, we have both sick leave and disability  
16 policies. So the disability forms have to be signed by  
17 the medical provider. But...

18 Q. In the last ten years, Ms. Peugh-Wade, could  
19 you give me an estimate of how many people that your  
20 office, the human resources office, how many employees  
21 have obtained some type of accommodation for a mental  
22 issue that they came forward to HR to ask something of?

23 A. I would say, I mean, I'm just -- maybe four or  
24 five a year. So 40 or 50.

25 Q. Can you think of any time where your office

1 didn't facilitate the granting of a mental health  
2 accommodation where an employee said they needed  
3 something for that purpose?

4 A. No.

5 Q. Do you know of any situation where any  
6 University manager or officer has denied a mental health  
7 accommodation that was legitimate, that where the person  
8 really had a mental health issue and had a documented  
9 problem?

10 A. No.

11 Q. Did you in any way base your decision to send  
12 Dr. Kao for a fitness-for-duty evaluation on the feeling  
13 that, well, because he has depression, he can't do his  
14 job?

15 A. Certainly not. I deal with and used to really  
16 know more than I do now. I don't get involved as much  
17 with specific people, unfortunately, in some ways. No,  
18 there are probably at least a hundred people that, you  
19 know, are currently are at work that have depression.

20 Q. Tell the Jury how you went about deciding that  
21 it would be Dr. Reynolds who you would assign the job of  
22 evaluating Dr. Kao. And, you know, take it just maybe  
23 what we'll do is this is a chronology.

24 Who cannot see that? Okay. Everybody cannot.  
25 Okay. I'm not going through that drill.

1           You met with Dr. Kao in June of 2008. The  
2 Jurors heard of that by now. When was it that you began  
3 thinking about if we send Dr. Kao for a fitness for  
4 duty, who it was -- who it will be the doctor who will  
5 do it. When did you start that thinking?

6           A. On May 20th when several of my colleagues and I  
7 met with Dr. Missett, the expert.

8           Q. Tell the Jury again who Dr. Missett was and in  
9 what capacity he's ever done anything for USF in the  
10 prior incident.

11          A. Okay. Dr. Missett is a medical doctor and  
12 psychiatrist, a forensic psychiatrist. And he is well  
13 known in the Bay Area and actually the country for this.  
14 He has lots of experience in fitness-for-duty exams and  
15 in schools and college campuses. So that was a big deal  
16 for us to understand kind of our industry. And he also  
17 has done a lot of speaking on workplace violence.

18                 So when we met with Dr. Missett on May 20th, he  
19 had asked for all the background information, which is  
20 why he got a summary of the faculty interviews and asked  
21 lots of other questions.

22                 After lots of discussion and also he heard from  
23 Brandon Brown who was one of the people that had really  
24 been frightened by Dr. Kao, he said the only way to  
25 assess whether having Dr. Kao -- whether Dr. Kao can do

1 his job on campus in a safe way was to have an  
2 independent medical exam by an independent physician.

3 And he stressed to me that it should be a  
4 physician that understands both -- that has experience  
5 both in psychiatric as well as -- so mental health as  
6 well as medical diagnoses.

7 So I followed up with him, I believe after the  
8 meeting because this involved a lot of people as to how  
9 to choose that person. He actually recommended three  
10 doctors that included Dr. Reynolds. And I spent some  
11 time reviewing information about them and spoke to them.

12 Q. "Them" being?

13 A. The three doctors on the phone to ascertain  
14 which, which would be the best one. And I was most  
15 impressed with Dr. Reynolds.

16 I think one of the things that stuck out is  
17 that Dr. Reynolds started by saying, "You might not want  
18 me because I'm not just going to go through this and say  
19 he's not fit and he can't come back." And kind of threw  
20 me and actually made me think of course not. We want to  
21 make sure that whoever we get is fair and unbiased and  
22 is looking at both sides.

23 The other thing that I really liked about  
24 Dr. Reynolds is he said, "I have" -- if I'm going into  
25 too much detail --

1 Q. No, that's fine.

2 A. He said, "I have three consent forms that I  
3 use, giving different levels of information to the  
4 employer." I said, "Okay, I'll look at all three, but I  
5 think I want the one that only gives us, probably going  
6 to be your narrowest which just says whether he's fit or  
7 not or if he's fit but needs some accommodation, what  
8 that accommodation would be."

9 Q. Did Dr. Reynolds -- so explain to the Jury  
10 about you mean by information to the employer. Are you  
11 talking about after the doctor is finished evaluating  
12 the employee, how much he's going to say to the employer  
13 about what's wrong with the employee or not wrong?

14 A. Yes.

15 Q. And so what is it you told Dr. Reynolds you  
16 wanted in the way of information that he would give to  
17 you after he was all done evaluating Dr. Kao?

18 A. That I wanted something that said he was either  
19 fit or wasn't fit. If he wasn't fit, that's all he  
20 needed to say. If he was fit, then is he fit with any  
21 kind of limitations or accommodations. Like he's fit  
22 but he needs, you know, approximately six weeks off  
23 while we work on medications or whatever.

24 I mean, often people on disability leave for  
25 psychiatric issues need time off to get the medications

1 right. That pretty often happens. That's the kind of  
2 thing.

3 Q. So tell the Jury what the options that  
4 Dr. Reynolds gave you in terms of three things in terms  
5 of how many different levels of information he would  
6 give you and how you went about deciding that?

7 A. So as I said, there were three consent forms  
8 going from the one I chose, which is the least  
9 information, all the way to telling what the diagnosis  
10 was and medical history.

11 So I don't make these kinds of decisions in a  
12 vacuum. So I kind of knew what I thought I wanted. I  
13 also talked to my legal counsel and said, "Does this  
14 make sense to you?" She said, "Yeah."

15 Q. So you told Dr. Reynolds to suggest to Dr. Kao  
16 to use the consent form that would restrict the most  
17 what Dr. Reynolds could tell the University at the end  
18 of the game?

19 A. Yes.

20 Q. Why did you want to restrict what Dr. Reynolds  
21 could tell the University about Dr. Kao's health  
22 problems?

23 A. Because as the employer, we don't need to know  
24 that. Whatever we get in medical statements from any  
25 medical provider, I don't like it when they put more



1 than, "This person needs to be out for medical treatment  
2 of X time to Y time." We just don't need that  
3 information, and it's confidential and private. And  
4 that's important to the individual.

5 Q. So let's continue with -- so you talked to  
6 Dr. Reynolds. But what we sort of skipped over was I  
7 didn't ask you too much but how you picked Dr. Reynolds  
8 versus the other two names that Dr. Missett offered you.

9 You said you thought he would be the best.  
10 Tell us a little why you thought that.

11 A. By, as I said, by him coming out and saying,  
12 "I'm not going to just give you what you want," but also  
13 because he said, "I'm going to need a job description so  
14 I understand what the job is." He asked a lot more  
15 questions and said he wouldn't need a lot more from us  
16 such that I think he really was going to be the most  
17 thorough in his evaluation.

18 Q. Did Mr. Katzenbach or Dr. Kao ever come to you  
19 and ask you to change the doctor, the fitness-for-duty  
20 doctor?

21 A. No.

22 Q. Did Mr. Katzenbach or Dr. Kao ever even tell  
23 you that they objected to Dr. Reynolds as the  
24 fitness-for-duty doctor?

25 A. No.

1 Q. Throughout all those six or seven months when  
2 Dr. Kao was on leave and then was going through the  
3 discipline process because he wouldn't go to the doctor,  
4 did it ever -- did anybody ever tell you he, Dr. Kao,  
5 had any objection to Dr. Reynolds?

6 A. No.

7 Q. Other than people inside the University that  
8 you consulted with and Dr. Missett, did you consult with  
9 anybody else about the selection of Dr. Reynolds?

10 A. No.

11 Q. Had the University ever had any -- had they  
12 ever used Dr. Reynolds before on a fitness-for-duty  
13 evaluation?

14 A. No.

15 Q. Did you contact other universities to see how  
16 he usually ends up when he evaluates employees, or did  
17 you care about that?

18 A. What do you mean "how he ends up"?

19 Q. Well, like he said to you, "Martha, just so you  
20 know, I call it as I see it." Isn't that about what he  
21 said?

22 A. Yeah.

23 Q. Did you tell him, "Yeah, that's what I want"?

24 A. Yes.

25 Q. Did you do any research into how he calls it --

1 how he calls -- how he decides these things for other  
2 organizations?

3 A. No, I did not.

4 Q. You were only concerned with him doing a fair  
5 job for Dr. Kao?

6 A. Yes.

7 Q. If Dr. Kao's attorney had said to you, "You  
8 know, we're willing to go for the fitness-for-duty  
9 evaluation, but can we talk about which doctor," I know  
10 you said he never did that, but if he had done that,  
11 what would your mindset have been on that?

12 MR. KATZENBACH: Objection, your Honor. Pure  
13 speculation.

14 THE COURT: Sustained.

15 MR. VARTAIN: I think, your Honor, it does go  
16 to the Witness's motive -- let me see if I can get at it  
17 -- see if I can ask the question so I don't generate the  
18 objection again.

19 Q. Is it typical when you are dealing with medical  
20 issues with employees that you adopt the flexible  
21 approach?

22 A. Yes.

23 Q. In the case for a fitness-for-duty evaluation,  
24 was it the case that you had decided the doctor because  
25 you wanted to make sure the doctor was going to be

1 independent, and you assured yourself of that?

2 MR. KATZENBACH: Compound, your Honor.

3 THE COURT: Sustained.

4 MR. VARTAIN: I'll break it apart.

5 Q. Did you assure yourself that Dr. Reynolds would  
6 be independent, that is, before you selected him?

7 A. To the best of my ability, I did.

8 Q. Okay. Did Dr. Kao or Mr. Katzenbach ever tell  
9 you that they wanted you or authorized you to talk to  
10 Dr. Kao's doctor, that is Lenore Terr?

11 A. No.

12 Q. You sent letters to them inviting them to  
13 provide information before you would make the final  
14 decision on the fitness for duty; correct?

15 MR. KATZENBACH: Objection, your Honor. He's  
16 characterizing the documents.

17 THE COURT: Overruled.

18 THE WITNESS: Yes, I did.

19 MR. VARTAIN: Q. Over all those many months,  
20 did Dr. Kao or his attorney Mr. Katzenbach ever say they  
21 would like you to look at information from Dr. Terr that  
22 they were going to give you a letter or a report from  
23 her?

24 A. No.

25 Q. In fact, way back when a couple years earlier,

1 Dr. Terr had given a letter to the University on some  
2 other issue. Do you remember that?

3 A. Vaguely, yes.

4 Q. Okay. But in this particular case, neither  
5 Dr. Kao nor his attorney had Dr. Terr send a letter to  
6 you or ask -- tell you that they would send a letter;  
7 correct?

8 A. That's correct.

9 MR. VARTAIN: This is the place, your Honor,  
10 where I would like permission to hand to the Jury --  
11 first one of the letters that we're talking about, and  
12 that is Exhibit 30. May I?

13 THE COURT: You may.

14 MR. VARTAIN: First, I would like to give a  
15 copy to you and Mr. Katzenbach to show it's the same as  
16 Exhibit 30.

17 MR. KATZENBACH: Is this going to be Exhibit 30  
18 or is it remarked?

19 MR. VARTAIN: It is Exhibit 30. It's just  
20 another copy.

21 MR. KATZENBACH: Okay. I just wanted to know  
22 your number or my number.

23 MR. VARTAIN: It's my number.

24 MR. KATZENBACH: Okay.

25 MR. VARTAIN: I brought a highlighter so that

1 anybody can use a highlighter if they would like for the  
2 documents.

3 Q. You're up to Exhibit 30, Ms. Peugh-Wade?

4 A. Yes.

5 MR. VARTAIN: Do we have enough for everybody?

6 Q. At the end of the letter, you said you told  
7 Dr. Kao and his lawyer that before making a final  
8 decision, you see that?

9 A. Yes.

10 Q. What final decision were you referring to  
11 there?

12 A. As to which of the -- I think it was three  
13 options that we would need to do.

14 Q. That is the three options up above, one, two,  
15 and three, a leave of absence, a fitness-for-duty  
16 evaluation and other actions?

17 A. Yes.

18 Q. You said that you would welcome any explanation  
19 or information or anything else that he may wish -- he  
20 or his attorney may wish to provide.

21 At the meeting itself, the June 18th meeting,  
22 other than the comment where Dr. Kao made where maybe  
23 his jokes are something of a cultural way, did he give  
24 you any information whatsoever to help you decide  
25 whether these behaviors were truly ones that he had

1 engaged in or anything else of the medical nature?

2 MR. KATZENBACH: Objection. That's compound.

3 MR. VARTAIN: Let me break it apart.

4 Q. Did he give you any information of a medical  
5 nature in that meeting?

6 A. No.

7 Q. Thereafter, that is after that meeting, did he  
8 ever give you any information to suggest that this might  
9 be something that he could take care of with his own  
10 doctor and medical?

11 A. No.

12 Q. In the first line of this letter, you told him  
13 that you thought it might be a concern about his health.

14 You see that?

15 A. Yes.

16 Q. Did he ever come back to you and say, "Yes,  
17 you're right. It is a health issue. It's not a  
18 misconduct issue. Let me deal with it with my doctor as  
19 a health issue"?

20 A. No.

21 Q. Why did you tell him in the last line of the  
22 letter that you wanted to proceed thoughtfully and with  
23 respect to him personally? Was that just a bunch of  
24 words?

25 A. No, because I think this kind of thing is huge.

1 And I tried to put myself in his shoes. And if my boss  
2 were telling me that my behavior was such that they were  
3 concerned about me and concerned about having me in the  
4 workplace, I would feel bad. I would feel horrible.  
5 And so that's why.

6 Q. Are you saying that you truly were concerned  
7 for Dr. Kao?

8 A. I was concerned for him, and I was also  
9 concerned for his feelings. I mean, as I said, I've  
10 been at USF for 25 years. I worked my way up. So I  
11 have worked with Dr. Kao on other things, and I knew him  
12 and, you know, felt a certain partnership.

13 Q. Tell the Jury a little bit where you had gotten  
14 some feeling of partnership with Dr. Kao in working with  
15 him on some other things, if you would. Just a little.

16 A. "Partnership" might not be the right word, but  
17 there was an earlier time he had been out having to do  
18 with the prescription he was taking. I believe that was  
19 the time or maybe there was another time he was out.

20 Anyway, I contacted him about how to deal with  
21 the disability, et cetera. Also, we talked at times, I  
22 don't remember exactly when, but at some point we had  
23 talked such that I had information about him that  
24 included his birthday. We happened to share the same  
25 day of birth. Not year; I'm older. But we both -- my



1 father died when I was a child, and his father wasn't  
2 around.

3 I don't know if I ever said any of this to him.  
4 I feel a particular responsibility to care for my  
5 mother. And I got the sense from Dr. Kao that he felt  
6 the same way.

7 Q. I would like you to open up to Exhibit 38 which  
8 is your letter to Dr. Reynolds telling him to go forward  
9 using this particular consent form. I would like to  
10 distribute a copy of that letter to the Jury as well.

11 And here's a copy for you, your Honor.

12 THE COURT: Thank you, Mr. Vartain.

13 MR. VARTAIN: It's Exhibit 38.

14 Q. In this letter, is it true, Ms. Peugh-Wade, you  
15 had already spoken by phone with Dr. Reynolds on several  
16 occasions before you sent him this letter; correct?

17 A. Yes.

18 Q. This was sort of a finalization of the  
19 agreement with him that he would be the doctor for this  
20 case; is that true?

21 A. Yes.

22 Q. What does the letter mean where it says, "You  
23 are acting as an independent evaluator. The University  
24 of San Francisco understands that you have agreed not to  
25 establish a treatment relationship with Professor Kao"?

1 I'm focusing on that, what did that mean, and why did  
2 you put that there?

3 MR. KATZENBACH: I'm sorry. That's compound,  
4 your Honor.

5 MR. VARTAIN: Q. Why did you put that there,  
6 and then after you're done with that, you can answer the  
7 other part.

8 MR. KATZENBACH: Your Honor, I think maybe two  
9 questions. So objection.

10 MR. VARTAIN: Withdraw.

11 Q. Why did you put that there? Mr. Katzenbach is  
12 right.

13 A. Are you withdrawing why did I put that there,  
14 or is it why did you put that there?

15 Q. Why did you put that sentence there about "you  
16 are not to have a treatment relationship with Dr. Kao"?

17 A. My understanding from Dr. Missett and it makes  
18 total sense is you need to have this evaluator be  
19 totally independent. And if they ended up being the  
20 treating physician, then there could be a conflict. A  
21 conflict of interest.

22 So this person has to be totally independent.  
23 So they have to agree ahead of time that they are not  
24 going to become a treating physician.

25 Q. Look at the attachment which is the consent

1 form No. 1 that you told the Jury about. This is the  
2 one that you directed Dr. Reynolds that you preferred he  
3 use and submit to Dr. Kao; correct?

4 A. Yes.

5 Q. This is the one you said of the three choices,  
6 vanilla, chocolate and strawberry, and Dr. Reynolds gave  
7 you, this was vanilla because it meant Dr. Reynolds  
8 would have to limit to the greatest degree how much he  
9 told the University; correct?

10 A. Yes.

11 Q. Go down to the middle of the page, count down  
12 bullet point number -- ten bullet points down with the  
13 words "purpose and need."

14 Would you read that to the Jury, please?

15 A. Sure.

16 "Purpose and need for the comprehensive" --  
17 this is to indicate that Dr. Reynolds has explained each  
18 of the following items, "and I understand and agree to  
19 each of them. I placed my initials after each of them.  
20 Purpose and need for the comprehensive psychiatric  
21 fitness-for-duty evaluation is to determine whether I am  
22 fit for duty or not fit for duty and my functional  
23 limitations that render me not fit for duty if there is  
24 a finding of not fit for duty."

25 Q. So was it your understanding that Dr. Reynolds

1 was not to tell you anything about the underlying  
2 medical diagnoses or conditions of Professor Kao but  
3 just what his fitness was to do his job functions?

4 A. Yes. If he could do his job functions, do his  
5 job responsibilities and do it in a manner that was safe  
6 for him and safe for the University.

7 Q. What does the word "functional limitations"  
8 mean?

9 A. Sometimes someone may have a functional  
10 limitation. For example, somebody that has to lift,  
11 their functional limitation could be that this person  
12 can't lift say more than 40 pounds. That's definitely a  
13 functional limitation.

14 Q. Not necessarily saying what's wrong with them  
15 medically as to why they can't lift the 40 pounds;  
16 correct?

17 A. Exactly.

18 Q. So where -- withdraw that.

19 So this was the document that Dr. Reynolds said  
20 he would give to Dr. Kao and ask Dr. Kao to read this  
21 and sign this?

22 A. Yes.

23 Q. In this document, consent form 1, read the  
24 third paragraph beginning with "Nevertheless." When you  
25 do that, you're telling us that Dr. Kao was going to

1 have to read this paragraph in Dr. Reynolds' office; is  
2 that true?

3 A. Yes. "Nevertheless, Dr. Reynolds has discussed  
4 with me the fact that pursuant to California Code of  
5 Civil Procedure section 56, Confidentiality of Medical  
6 Information Act, he is permitted to release certain  
7 information to my employer without my permission.  
8 Specifically, he's permitted to release to my employer a  
9 statement that I am fit for duty or that I am not fit  
10 for duty and special functional limitations."

11 Q. And what?

12 A. "And specify," thank you, "specify functional  
13 limitations. Dr. Reynolds is not permitted to release  
14 information regarding causation or any other matters."

15 Q. Was it your understanding that you were  
16 agreeing with Dr. Reynolds that he was not to tell you  
17 anything about the medical causes of why Dr. Kao would  
18 be rendered by him a finding of fit or why it might be  
19 that he might be unfit?

20 A. My understanding was I was not to find out any  
21 medical information.

22 Q. Did Dr. Kao or Mr. Katzenbach ever ask you to  
23 sit down and talk to them about what medical information  
24 Dr. Reynolds would or would not give the University?

25 A. No.

1 Q. Did anybody ever tell you that Dr. Kao talked  
2 to Dr. Reynolds to ask him how this process works, what  
3 information might end up in the employer's hands or not?

4 A. No, to the best of my knowledge.

5 Q. What about Mr. Katzenbach, did he ever do that?

6 A. Not to my knowledge, no.

7 Q. Did Dr. Reynolds ask you to provide some job  
8 descriptions and copies of the faculty contract by way  
9 of background to Dr. Kao's employment?

10 A. Yes. He needed to know what he was supposed --  
11 what the job entailed so that he could indeed determine  
12 whether he could do the job or not.

13 Q. Was it your understanding that Dr. Reynolds was  
14 going to sit down with Professor Kao and ask him for his  
15 side of the story, that is, the story of the asserted  
16 behaviors?

17 A. You know, Dr. Reynolds never told me exactly  
18 everything that he did. But I know they would have had  
19 some conversations. I don't know if that would have  
20 exactly been part of it or not.

21 Q. Was it your intention Dr. Kao would have an  
22 interview with Dr. Reynolds?

23 A. Yes.

24 Q. And that was set forth in other letters that  
25 you sent to Dr. Kao; is that right?

1 A. Yes.

2 Q. Where it said you're going to have meetings  
3 with Dr. Reynolds?

4 A. And it even specified like a length of time,  
5 yes.

6 Q. And where did you get the information about the  
7 go to Dr. Reynolds' office from 8:30 a.m. to 5:30 p.m.?

8 A. From Dr. Reynolds.

9 Q. Okay. He told you what he wanted you to say in  
10 that letter so as to give a heads up to Dr. Kao?

11 A. Yes. Oh, yes. It was important that the  
12 patient be told, I guess in this case it wasn't a  
13 patient, but the person that's being evaluated be told  
14 what to expect.

15 Q. Okay. Did Dr. Reynolds tell you exactly how  
16 much time he was going to spend face-to-face with  
17 Dr. Kao in that 8:30 to 5:30 period of time?

18 A. He said, I think it was three to four hours on  
19 what I thought was face-to-face. And then there were  
20 other things of tests, lab tests and such. I don't know  
21 if there was going to be more time face-to-face or not.

22 Q. Okay. Did Dr. Kao or Mr. Katzenbach ever ask  
23 you how much of that 8:30 to 5:30 period of time would  
24 be face-to-face between the doctor and Professor Kao?

25 A. No.

1 Q. As far as you know, Dr. Kao and Mr. Katzenbach  
2 never asked Dr. Reynolds any of those questions?

3 A. Right. The last I followed up with  
4 Dr. Reynolds, which was in the summer, he hadn't heard  
5 anything from Dr. Kao.

6 Q. Tell us about what you mean the last you  
7 followed up with Dr. Reynolds was in the summer.

8 A. Well, I followed up to say he still hasn't  
9 come, but please keep, keep this case open. I can't  
10 remember if I said through August or through September  
11 because I was still hopeful we could get him in. And I  
12 wanted him to be aware that we were still trying and  
13 that I hopefully would be in touch with him to try and  
14 get his availability again.

15 THE COURT: Ladies and gentlemen, remember the  
16 admonition. Do not form or express any opinion on this  
17 case until it's finally submitted to you for your  
18 decision. Do not discuss among yourselves or with  
19 others until that time.

20 Please be back in your places at 10:10  
21 according to the courtroom clock.

22 (Recess taken: 9:59 a.m. - 10:09 a.m.)

23 THE COURT: Jurors and Alternates are all  
24 present. Counsel for all sides are present. Plaintiff  
25 is personally present. The Witness is on the stand.



1 Mr. Vartain, you may continue your inquiry.

2 MR. VARTAIN: Thank you, your Honor.

3 Q. In the end of April, did you get an urgent  
4 phone call from Dean Jennifer Turpin?

5 A. Yes. Actually, I got at least two on the  
6 evening of I think it was the 22nd.

7 Q. Of April?

8 A. Yes.

9 Q. Tell the Jury the circumstances of those urgent  
10 phone calls.

11 A. Dean Turpin had left a message I think for me  
12 on my office phone and called me on my cell phone and  
13 spoke to me on my cell phone that evening.

14 Q. That evening?

15 A. Yeah.

16 Q. What time?

17 A. Sometime probably after 5:00 and before 6:30  
18 because I hadn't -- I hadn't left yet.

19 Q. You were still on campus?

20 A. I was.

21 Q. Tell the Jury what she said.

22 MR. KATZENBACH: Objection, your Honor.  
23 Hearsay.

24 THE COURT: Sustained.

25 MR. VARTAIN: With that objection -- withdraw

1 that question.

2 MR. KATZENBACH: If only.

3 MR. VARTAIN: Q. Whatever she said, did it  
4 play a factor in why you decided to send Dr. Kao to the  
5 medical evaluation?

6 A. Yes. Very much so. She said she had an  
7 encounter with --

8 MR. KATZENBACH: Objection, your Honor.  
9 Nonresponsive.

10 THE COURT: Motion to strike the answer is  
11 granted.

12 MR. VARTAIN: Q. Did you tell us what  
13 Dr. Turpin said to you?

14 MR. KATZENBACH: Objection. Hearsay.

15 MR. VARTAIN: It's not offered for the truth.  
16 The Dean will come in and tell the Jury what happened.  
17 But it's offered to explain the decisions of the Witness  
18 regarding the fitness-for-duty evaluation.

19 MR. KATZENBACH: I don't believe it's  
20 admissible for that purpose since the Witness can simply  
21 testify what she did. I don't believe it's admissible  
22 for that purpose.

23 MR. VARTAIN: She's being accused of  
24 disability-related motivation. This Witness is being  
25 accused of it, your Honor. And now Counsel doesn't want

1 the Witness to explain the facts of why she made the  
2 decision.

3 THE COURT: All right. The objection is  
4 overruled with the understanding this is admitted for  
5 the purpose of determining this Witness's state of mind.

6 MR. VARTAIN: Thank you, your Honor.

7 Q. So --

8 A. Can you repeat the question, please?

9 Q. The question is, take it from the top. What  
10 did the Dean say to you once you -- did you return her  
11 call?

12 A. No, because she actually got me on my cell  
13 phone. I don't remember the explicit exact words she  
14 used. I actually don't even remember if she used the  
15 words that she was afraid. But I could tell that she  
16 was really scared and frightened.

17 She had -- I said had an encounter, not  
18 literally run into but gone past Dr. Kao in the Harney  
19 parking lot, which is outside the building where her  
20 office was, both of their offices were at the time. And  
21 her daughter had been in the hospital. And John -- I'm  
22 sorry. Dr. Kao's mother had been ill, and he was out  
23 there I believe smoking.

24 And so --

25 MR. KATZENBACH: Your Honor, I object. It's a

1 narrative response. It's not -- it's not what the  
2 Witness heard from Dr. Turpin. She is expanding on  
3 that. I don't believe this is what is being told by --

4 MR. VARTAIN: That was nice of you to interrupt  
5 her in the most important piece of testimony in the case  
6 on some technicality.

7 THE COURT: Mr. Vartain, please don't carp at  
8 opposing Counsel. All right.

9 There's an objection to a narrative answer.  
10 The objection is sustained. I'll cut off the answer and  
11 invite a new question.

12 MR. VARTAIN: Q. Tell us what she said from  
13 the top. And if you need to say something that she  
14 didn't say, stop. Mr. Katzenbach doesn't want that.

15 A. Okay.

16 MR. KATZENBACH: Objection, your Honor. That's  
17 not a question. It's argument.

18 THE COURT: All right.

19 THE WITNESS: She told me she was very scared;  
20 that she had run into Dr. Kao outside of their building  
21 near the parking lot where she parked, and she tried to  
22 ask him about his mother.

23 And then he asked her about her daughter who  
24 had been in the hospital recently, and then he kept  
25 going back and saying the same words, "How is my

1 mother," "How is my mother," or maybe it was "How is  
2 your daughter," whichever. Anyway, he kept repeating  
3 the same words nonsensically.

4 And she said that she was very scared because  
5 she got -- because he got this very rigid look, you  
6 know, the glaring look and very rigid body, and she kept  
7 walking to her car. And when she turned around, he was  
8 very close to her, very much in her space and had his  
9 fists clenched very close to her head, I believe.

10 And she was very, very, very scared. And was  
11 demanding that we get protection for her right away, and  
12 she was very, very scared.

13 Q. So what did you say to her?

14 A. I said that we would do everything that we  
15 could, that we would get in touch with Public Safety.  
16 Actually, I said, "If you haven't already called Public  
17 Safety, you need to do that right now." I think by the  
18 time she got me on my cell phone, she had called and  
19 left a message and that she should put it in a report.  
20 That we would meet that night and talk or we would meet  
21 the next morning with Public Safety and then Provost at  
22 the time to put together a plan.

23 Q. And was there a meeting within the next  
24 24 hours?

25 A. Yes.

1 Q. With the then Provost, the number two of the  
2 University?

3 A. Yes, urgent meeting.

4 Q. Say that again.

5 A. Yes. It was an urgent meeting.

6 Q. It's pretty hard to get the top second in  
7 command at the University to a meeting on 24 hours'  
8 notice?

9 A. On less than, yeah.

10 Q. Who was at that meeting, that is the meeting  
11 the next day after the Harney parking lot incident?

12 A. It was Dean Turpin, myself, Provost, Public  
13 Safety and I can't remember if legal counsel was there  
14 or not.

15 Q. Was that meeting one in which it was discussed  
16 to revisit the question of interviewing faculty members  
17 and getting more information about Dr. Kao?

18 A. Yes.

19 MR. KATZENBACH: Objection, your Honor.  
20 Assumes facts not in evidence. And it's leading.

21 THE COURT: It's what?

22 MR. KATZENBACH: Leading.

23 THE COURT: This is cross-examination.

24 MR. KATZENBACH: The Witness is an adverse  
25 witness.

1           THE COURT: Not adverse to Mr. Vartain. The  
2 objection is sustained.

3           MR. VARTAIN: Q. Tell us what was -- what the  
4 upshot of this meeting at the top level of the  
5 University was?

6           A. The upshot was that Public Safety was going to  
7 be doing much more as far as being in Harney even  
8 escorting Dean Turpin to and from the building. And  
9 that I was going to get more detailed information and  
10 set up the interviews with the faculty members that I  
11 hadn't talked to in detail before.

12           And the point was that at that point then was  
13 that I would have five people that I would have talked  
14 to in depth to get kind of an aggregate of information  
15 to see if things were relatively consistent from these  
16 five folks and so that we could then talk to an expert,  
17 Dr. Missett, and plan out next steps.

18           Q. Were your interviews with the three faculty  
19 members that you told the Jury about yesterday, all  
20 afternoon, did those take place before you sat down with  
21 the expert Dr. Missett to talk about what was proper to  
22 do?

23           A. Yes.

24           Q. This incident with Dr. Turpin and Dr. Kao, that  
25 had already happened when you sat down with Dr. Missett,

1 and he recommended the fitness for duty?

2 A. Yes. The interviews and the incident with Dean  
3 Turpin were at the end of April. I met with Dr. Missett  
4 on May 20th.

5 Q. Then did some more incidents happen vis-a-vis  
6 Dr. Kao in the early part of June insofar as you were  
7 informed?

8 A. Yes.

9 Q. Would you look at Exhibit 66, which is I  
10 believe is that an e-mail that you received from the  
11 Associate Dean of the College of Arts and Sciences,  
12 Brandon Brown?

13 A. Yes, it is.

14 (Defense Exhibit No. 66 was marked  
15 for identification.)

16 MR. VARTAIN: Q. Did the information in that  
17 e-mail, which I will soon give to the Jury, was that  
18 part of your thinking when you made the final decision  
19 to send Dr. Kao for the fitness-for-duty evaluation?

20 A. Yes, it was.

21 Q. Did you read this e-mail at the time it  
22 purports to have been sent to you, June 5th, 2008?

23 A. Sometime around that time, yes.

24 MR. VARTAIN: I offer this exhibit into  
25 evidence, 66.



1 THE COURT: Any objection?

2 MR. KATZENBACH: Yes, your Honor. We're  
3 willing to have it introduced for a limited purpose but  
4 not for its truth.

5 MR. VARTAIN: I'm offering it to at this point  
6 to explain, with the other exhibit, your Honor --

7 THE COURT: It's admitted for the limited  
8 purpose.

9 (Defendant's Exhibit No. 66 was  
10 received in evidence.)

11 MR. VARTAIN: With your permission, your Honor,  
12 I'm going to distribute a copy to the Jury.

13 THE COURT: You may.

14 MR. VARTAIN: Here is a copy for his Honor.

15 THE COURT: Thank you.

16 MR. VARTAIN: And Counsel.

17 MR. KATZENBACH: Thank you.

18 MR. VARTAIN: Q. Would you read this exhibit,  
19 please? That is an e-mail that you received from the  
20 Associate Dean on June 5th, 2008. Was it also addressed  
21 to the University counsel?

22 A. Yes. That's Donna.

23 Q. Was the University counsel monitoring this  
24 situation as far as you knew?

25 A. Oh, yes.

1 Q. Why -- to your knowledge, why was the  
2 University counsel monitoring this situation? Let me  
3 withdraw that question.

4 Is it true that the University counsel doesn't  
5 monitor every single employee situation on the campus?

6 A. That's true.

7 Q. Why was the University counsel monitoring this  
8 situation as far as you knew?

9 A. Because this was a very important matter and a  
10 potential safety issue for the whole institution.

11 Q. So read the e-mail to the Jury, please?

12 A. "Hi Martha and Donna, I spoke with Jenny."

13 Q. Who's Jenny?

14 A. Jenny is Dean Turpin.

15 "I spoke with Jenny about an intake I had  
16 yesterday, and we think I should share it with you so  
17 that you have all data. Tristan Needham came to see me  
18 in a very worried way about John Kao.

19 "No. 1, assistant professor Stephen Yeung is  
20 increasingly uncomfortable in the department due to  
21 John's erratic behavior, and Tristan has urged Yeung to  
22 just work at home. Most of the department, other than  
23 Bob Wolf, is doing this now. Tristan is doing all his  
24 work at home now.

25 "No. 2, Yeung reports that this week John

1 exited the math copier room, made a theatrical bow in  
2 front of Yeung, went into his office, quickly closed the  
3 door and started a long bout of maniacal laughter.

4 "No. 3, Yeung reports that he once passed John  
5 in the hallway last week. John said nothing but veered  
6 across the hallway as if to run into Yeung. At the last  
7 moment, Kao avoided contact. When Needham heard this  
8 and Zeitz heard this, they both confirmed independently  
9 they received significant shoulder bumps in hallways  
10 from John this last semester. Both had assumed these  
11 were purely accidental, and that may be the case. Odd  
12 coincidence.

13 "No. 3, Needham reports that Kao has been  
14 leaving his door open reclining in his office chair and  
15 covering himself with a comforter. Whether or not these  
16 items are minor, I thought it best that I pass them  
17 along. Needham is very worried, especially with a new  
18 hire coming into the department in the fall. He said it  
19 is very much as if John has," quote, "'quit taking the  
20 medication.'

21 "Thanks and best wishes, Brandon."

22 Q. Do you know whose handwriting that is that is  
23 not particularly legible at the bottom of the e-mail?

24 A. Yeah. I think it's mine.

25 Q. Can you read it?

1 A. I can't on this copy.

2 Q. Do you know what it says?

3 A. No, I don't.

4 Q. Okay. Is it of any particular relevance to  
5 this that you know?

6 A. Um, it probably was, but I really can't read  
7 it.

8 Q. Okay. This e-mail came to you after you had  
9 completed those interviews with Professors Needham,  
10 Zeitz and Pacheco that you talked about yesterday at the  
11 -- in your testimony yesterday; is that correct?

12 A. That's correct.

13 MR. VARTAIN: I would like to have the Court's  
14 permission to distribute to the Jury a copy of your  
15 summary of those interviews with the faculty members  
16 that was entered into evidence yesterday by  
17 Mr. Katzenbach. May I do so?

18 THE CLERK: Exhibit number?

19 MR. VARTAIN: May I do so, your Honor?

20 THE COURT: You may.

21 MR. VARTAIN: I'll start distributing while I  
22 get the exhibit number.

23 It's Exhibit 64, Madam Clerk.

24 Everybody got theirs?

25 Q. Ms. Peugh-Wade, before we get to this, I want

1 to ask you a very direct question.

2 Did you ever factor into your decision to send  
3 Dr. Kao for the evaluation with Dr. Reynolds, did you  
4 ever factor into it the fact that he was unhappy with  
5 the way the department was handling searches for faculty  
6 members?

7 A. I don't know what you mean by "factor into."  
8 But it was certainly one of the things that he obsessed  
9 on over time. So in that sense, it was kind of an  
10 example of unusual behavior.

11 Q. Is that why Dr. Missett said he would like to  
12 read all those binders of complaints because he wanted  
13 to see to what extent there might be some issues of  
14 obsessiveness that could factor into his psychology?

15 MR. KATZENBACH: Objection, your Honor.  
16 Hearsay. Assumes facts not in evidence.

17 THE COURT: Overruled.

18 THE WITNESS: I don't know why Dr. Missett said  
19 he wanted all the information about Dr. Kao. I  
20 explained that there was lots of information and talked  
21 a little bit about the complaints. He said no, he  
22 wanted that as well.

23 MR. VARTAIN: Q. Did you have any resentment  
24 towards Dr. Kao because he had different suggestions for  
25 how the department should advertise or he had complaints

1 about the advertising of professors?

2 A. No. I was actually pretty far from removed  
3 from academic advertising in general.

4 Q. Did you have any resentment to Dr. Kao because  
5 he had filed a grievance and complaints in the past?

6 A. No. We're a university and so people are  
7 supposed to complain and make their thoughts known. We  
8 have lots of, I hate to say it, but we have lots of  
9 complaints.

10 Q. You have lots of complaints. You mean you have  
11 lots of complainers?

12 A. I didn't say that. Don't tell the faculty I  
13 said that.

14 Q. In other words, the faculty members like to  
15 exercise their freedom of speech; isn't that true?

16 A. Yes.

17 Q. And Dr. Kao was exercising his freedom of  
18 speech for quite some number of years; correct?

19 A. Yes.

20 Q. And up until 2008, the University did not send  
21 him for a fitness-for-duty evaluation though he was  
22 exercising his freedom of speech; correct?

23 A. Correct. We had several complaints about many  
24 years before.

25 Q. What, if anything, changed in 2008 back as

1 compared with the previous eight or ten years when he  
2 had made complaints that now caused you to look at this  
3 as a potential safety issue?

4 A. The fact that five people came forward  
5 describing all of the same similar things, that his  
6 behavior -- most of them said his behavior had really  
7 changed in the last several months, and his behavior was  
8 scaring him -- was scaring them.

9 I mean to have people, a lot of us would like  
10 to work from home, but I knew that that wasn't the game.  
11 It was people were scared to be on campus, and they were  
12 really scared. And it was his behavior that was causing  
13 that.

14 Q. In those letters that you sent to Dr. Kao, you  
15 said this was a nondisciplinary matter, quote,  
16 nondisciplinary, close quote.

17 What does that term mean, and why did you put  
18 it there?

19 A. Nondisciplinary means we're not thinking this  
20 is purposeful at this point. We're not looking to  
21 punish Dr. Kao for his behavior. We think that there is  
22 something going on, and we want to give him the  
23 opportunity to make things right so that he doesn't  
24 behave like this.

25 Obviously people do get disciplined for bad

1 behavior in the workplace, including threats or  
2 nonverbal indirect threats. And that's not what this  
3 was. We're saying, "We don't think you are purposefully  
4 doing this. We want to give you the chance to get  
5 things worked out."

6 Q. Did Dr. Kao or his attorney ever tell you they  
7 failed to comprehend what you meant by the words  
8 "nondisciplinary"?

9 A. No.

10 Q. What did Dr. Missett say to you in that May 20  
11 meeting, if anything, about -- this is what  
12 Mr. Katzenbach asked you about yesterday. I don't think  
13 he finished asking the questions though; that's why I  
14 want to finish it.

15 The question is: What, if anything, did  
16 Dr. Missett say to you in the May 2008 meeting about  
17 bumping as an assault and in the context of the topic  
18 being if Dr. Kao goes for the doctor's evaluation and  
19 then is found to be fine or fit to come back to work?

20 A. What he was saying was that if he was found to  
21 be fit to come back to work, then bumping or running  
22 into people purposefully would then be purposeful  
23 conduct that then would be open for discipline.

24 Q. Did he suggest to you that, oh, you can go back  
25 and retroactively fire Dr. Kao for the bumping in the



1 past?

2 A. No. And that's something I think that would be  
3 totally unheard of. If indeed Dr. Kao were found fit,  
4 then we would start at that point as I do with other  
5 folks that are coming back to work after a leave of  
6 absence and establish what the expectations are and go  
7 forward.

8 Q. Such that if he was found healthy and fit, then  
9 you would have concluded that what he's doing is  
10 purposeful and then you would tell him, "Next time it  
11 happens, you might lose your job"?

12 A. Yes. Or something to that effect, whatever the  
13 collective bargaining agreement allows.

14 Q. So did the fact that Professor Kao was  
15 exercising his freedom of speech to file complaints  
16 under University policies cause you to make the decision  
17 to send him for a fitness-for-duty evaluation in any  
18 way, shape or form?

19 A. No. That would be against the law as well as  
20 totally wrong.

21 Q. Had the University, to your knowledge, ever  
22 sent an employee for a fitness-for-duty evaluation  
23 because they had exercised their free speech rights to  
24 file a complaint?

25 A. No.

1 Q. Let's go back to 64, which I distributed to the  
2 Jury, ladies and gentlemen of the Jury and his Honor.

3 I just want to go through certain parts of it.  
4 Jurors can read it as they see fit.

5 Look at the fifth paragraph down on the fifth  
6 page, it's number 124. Would you read that out loud  
7 please? "One FM," one faculty member.

8 A. "One faculty member said he was alone in his  
9 office in January when JK entered and started a  
10 conversation about the search process. He characterized  
11 Dr. Kao as becoming angry quite suddenly and yelling at  
12 him. Dr. Kao's voice could have been heard even if the  
13 door had been closed with his face quivering his body  
14 extremely stiff. The faculty member said Dr. Kao kept  
15 repeating himself and would not listen to the faculty  
16 member."

17 Q. So the Jurors are going to hear testimony from  
18 the faculty members hopefully starting this afternoon.

19 Do you remember which one this is -- we don't  
20 have to hide the names now because we're in a court of  
21 law. Was this Zeitz?

22 A. Yeah.

23 Q. Paul Zeitz?

24 A. I believe that would be Paul Zeitz, yes.

25 Q. Okay. Did you ask this faculty member to give

1 you the history, his view of the history with Dr. Kao?

2 A. Yes.

3 Q. And did he do so, and is that why from your  
4 perspective he went back to the 2000 and 2002 period of  
5 time because you asked him for history?

6 MR. KATZENBACH: Your Honor, speculation as to  
7 somebody else's state of mind.

8 THE COURT: Sustained.

9 MR. VARTAIN: Q. After you asked the faculty  
10 member for the history, did he respond by giving you  
11 history vis-à-vis back to CCAC 2000 and the like?

12 A. Yes.

13 Q. Go to the next page, 125 where it says, "What  
14 is JK like in groups," and read the first paragraph  
15 under that?

16 A. "One faculty member said Dr. Kao yells in  
17 department meetings, and he reaches his breaking point  
18 quickly. The faculty member said Dr. Kao's lips quiver,  
19 and when he's angry, he raises his voice so loud it can  
20 be heard behind closed doors. Dr. Kao has stood up and  
21 thrown papers at people, e.g., the mathematics model of  
22 the search. He quickly becomes angry. He's inflexible  
23 on ideas. And if he is angered, he will shout anyone  
24 down and not listen to them."

25 Q. So like the other rest of this memo, was this

1 your recap or your summary of the highlights of the  
2 interviews with the three faculty members?

3 A. Yes, it was.

4 Q. Did Professor Zeitz give you the information  
5 reported on this paragraph?

6 A. I don't remember if that one was Zeitz. I  
7 would have to go back to the individual --

8 Q. Okay. Fair enough. If it wasn't, it was  
9 either Needham or Professor Pacheco?

10 A. Yes.

11 Q. Go to the next page, the first paragraph under  
12 the heading, "How would you describe his temperament."  
13 As you read this paragraph, tell us if you remember  
14 which of the three faculty members provided you this  
15 information.

16 A. "One faculty member described Dr. Kao as  
17 incredibly brittle and angry. Another faculty member  
18 said if Dr. Kao believes you made a single mistake,  
19 that's it; he will never forgive you. Another faculty  
20 member said Dr. Kao's outbursts have gotten worse during  
21 the last six months to a year. Insignificant things are  
22 now setting him off. The faculty member feels constant  
23 anger from Dr. Kao, and Dr. Kao's maniacal chuckle is  
24 more frequent now."

25 That was different, that was a combination of

1 faculty members. I don't remember which said which.

2 Q. Okay. Go two paragraphs down from there, "One  
3 faculty member stated that comfortable socially."

4 A. "One faculty member stated that Dr. Kao was  
5 comfortable socially prior to 1999. In 1999, Dr. Kao  
6 had a one-year sabbatical at Princeton. This faculty  
7 member felt that Dr. Kao came back a changed person. He  
8 was quieter, more formal, and he started to wear suits  
9 all the time.

10 "CCAC," which is the California College of Arts  
11 and Crafts, "happened shortly thereafter, and his  
12 e-mails became more formal. This faculty member  
13 characterized Dr. Kao as very rigid. No real give and  
14 take with him. The faculty member said all Dr. Kao's  
15 banter is absolute platitudes, like if you can't do the  
16 time, don't do the crime."

17 Q. Which faculty member, if you recall, provided  
18 this background?

19 A. Probably Paul Zeitz.

20 Q. You're not certain which of the three?

21 A. No. More than two of them, at least two  
22 brought up the CCAC. But Paul was, since it was -- he  
23 was the one really intimately involved in the CCAC, I  
24 think this was him.

25 Q. All right. I noticed there are some things

1 that are positive about Dr. Kao in this memo such as  
2 when he acted properly in meetings, when he acted  
3 professionally. You made an attempt to put that in  
4 there; is that true?

5 A. Yes.

6 Q. Why is that?

7 A. Because I was trying to show a fair picture of  
8 what I learned about Dr. Kao.

9 Q. I notice you told Mr. Katzenbach there was a  
10 line in one of your notes where you were asking the  
11 faculty members, you said, "Give me all perspectives."

12 A. Yes.

13 Q. Did you ask the faculty members to tell you not  
14 just what was going wrong with Dr. Kao but was going  
15 right with Dr. Kao?

16 A. Yes.

17 Q. And did they do so? Did they tell you when it  
18 seemed he was -- had been happy or when it wasn't going  
19 well?

20 A. Right. That was why the Math Teas are  
21 mentioned as far as when he, you know, he seemed to do  
22 well. And also why I had notes about Dr. Kao having a  
23 girlfriend at an earlier state in time.

24 Q. There were a couple of times in those notes  
25 that you told the Jury and you answered the questions

1 yesterday that the faculty members said words to the  
2 effect of, "We really would like it if he could be --  
3 could act properly. We would rather have him come back  
4 to the department and be proper."

5 A. Yes, definitely.

6 Q. Was there a -- were there any faculty members  
7 who said they wanted him gone forever no matter what his  
8 behavior was like in the future?

9 A. No.

10 Q. There was that comment about one of the faculty  
11 members said, you know, "We hate him." Could you tell  
12 the Jury how that came out? Was this part of you wanted  
13 to put the whole picture in there?

14 A. M-hm.

15 THE COURT: Was that an affirmative "m-hm"?

16 THE WITNESS: I'm sorry. Yes.

17 I think as I said it yesterday, I took that to  
18 mean that they hated the effect he was having on him,  
19 the scaring them. The fact that they would go home and  
20 tell their wives how scared they were, and their wives  
21 didn't want them to come to work.

22 MR. KATZENBACH: Objection, your Honor. I  
23 think this is narrative.

24 THE COURT: I'll cut off the answer and invite  
25 a new question.

1 MR. VARTAIN: Q. One of the faculty members  
2 said to you that -- did one of the faculty members say  
3 to you that they hated that he was sending his attorneys  
4 name around the department, and it was scaring them also  
5 about lawsuits?

6 A. Yes. At least one did. I can't remember if it  
7 was just one.

8 Q. What did they say -- what did that one say  
9 about being scared of lawsuits?

10 A. That, to them, it was more evidence, kind of  
11 him obsessing on things and obsessing on things even  
12 more so than he had in the past.

13 Q. Did any of the faculty members tell you that  
14 the obsessing was part of the thing they were scared as  
15 to whether he might go postal?

16 A. Yes. They felt that the obsessing and his  
17 other behavior made it seem that he was unstable and  
18 that he might break, as they put it.

19 Q. Is it true Dr. Missett had done a previous case  
20 for the University wherein he actually did a  
21 fitness-for-duty evaluation?

22 A. Yes, he did.

23 Q. Was that several years before you retained him  
24 to help advise you on how to handle this issue with  
25 Dr. Kao?



1           A. It was at least two or three. I'm not sure of  
2 exactly how long.

3           Q. What had been the result of the  
4 fitness-for-duty evaluation that Dr. Missett had  
5 performed on that particular employee?

6           A. She had been returned to work.

7           Q. And what kind of position was that employee in?

8           A. She was a Public Safety officer.

9           Q. And had the University sent that employee to  
10 Dr. Missett for him to perform a comprehensive  
11 psychiatric fitness-for-duty evaluation?

12          A. Yes.

13          Q. Did the University return that employee to work  
14 as recommended by Dr. Missett?

15          A. Yes.

16          Q. But were there some adjustments or  
17 accommodations along the way?

18          A. Yes. She needed some accommodation.

19          Q. We heard the name David Philpott. He will come  
20 in and testify. Can you tell the Jury who he is and why  
21 it is that at some point along this case, you stopped  
22 being a party to the communications with Dr. Kao, and  
23 Mr. Philpott took over that process?

24          A. Yes. I'm in charge of human resources, and  
25 David Philpott is in charge of labor relations. So

1 human resources deals with the benefits and pretty much  
2 the employment for all the employees, but only deals  
3 with discipline issues and terminations for those that  
4 aren't unionized. So for an employee that are unionized  
5 like the faculty are, then termination or discipline  
6 issues, that is David Philpott's area.

7 Q. Did any of the faculty members who you  
8 interviewed tell you that in the spring of 2008, Dr. Kao  
9 started behaving in a way that they could see some level  
10 of hatred in his face?

11 A. Yes. I don't remember if it was all three or  
12 two of the three. That was one of the consistent themes  
13 was his look of anger. And one of the things I remember  
14 is the wording of anger just totally out of proportion  
15 with reality.

16 Q. Did Dr. Kao ever tell you in that meeting on  
17 June 18th or thereafter that he had never been yelling  
18 in the department of mathematics?

19 A. I don't believe so.

20 Q. Did he ever tell you that he had never been  
21 displaying his fists on campus when he could be seen by  
22 other people?

23 A. No.

24 Q. Did he ever tell you that which he told the  
25 Jury here, namely, that he had been taking some

1 medication that was affecting him or he felt was  
2 affecting him in that spring of 2008?

3 A. No.

4 Q. Did he ever tell you that he knew he had bumped  
5 into people or had nearly bumped into people?

6 A. No.

7 Q. Did he ever tell you that he was angry to the  
8 point of rage at different times?

9 A. No.

10 Q. Did his attorney ever tell you that in the  
11 meeting of June 18th or thereafter?

12 A. No.

13 MR. VARTAIN: I don't have any further  
14 questions.

15 THE COURT: Mr. Katzenbach, have you further  
16 questions?

17 MR. KATZENBACH: I do, your Honor.

18 REDIRECT EXAMINATION

19 BY MR. KATZENBACH:

20 Q. Did you bring documents with you for your  
21 testimony here today?

22 A. Documents for my testimony, no.

23 Q. You're under subpoena; correct?

24 A. Yes.

25 Q. Did you bring documents in response to that

1 subpoena?

2 A. Not today, but I brought them the first day I  
3 was here, yes.

4 MR. VARTAIN: Counsel looked through them and  
5 inspected them on the witness stand.

6 MR. KATZENBACH: Q. Did you keep them here?

7 A. No. I left them with my Counsel.

8 Q. I see. Exhibit 66 --

9 A. Which maybe they were kept here. I'm not sure  
10 if they left them here or not.

11 Q. Exhibit 66 you see that it's the ones that  
12 bears the number USF 1039?

13 A. Yes.

14 Q. It's got the handwriting on the bottom you  
15 can't read?

16 A. Yes.

17 Q. The handwriting up here says, "Dr. Missett"?

18 A. Okay. That might be.

19 Q. That was one of the documents we asked you to  
20 bring.

21 A. Okay. Yes.

22 Q. Thank you.

23 Now, a couple questions. You stated in  
24 response to Counsel's questions that at the June 18  
25 meeting, Dr. Kao did not deny displaying his fists; is

1 that correct?

2 A. Yes.

3 Q. Is there some significance of that to you?

4 A. Yes.

5 Q. What significance would that be?

6 A. That he didn't have other information for me to  
7 let me know that perhaps there is a different point of  
8 view or a different side.

9 Q. So you would have expected him at that meeting  
10 to say, "I didn't display my fists"; is that right?

11 MR. VARTAIN: Objection. Argumentative and  
12 calls for speculation.

13 THE COURT: Overruled. The Witness may answer.

14 THE WITNESS: In that meeting or in response to  
15 that meeting?

16 MR. KATZENBACH: Q. Would you take a look at  
17 Exhibit 30? That's the letter you handed Dr. Kao on  
18 June 18th.

19 A. M-hm. Yes.

20 Q. Can you tell me point to the section in there  
21 that talks about his clenched fists.

22 A. You're right. This one doesn't.

23 Q. So it would be a little surprising wouldn't you  
24 think -- strike that.

25 So there really wasn't an occasion on June 18th

1 for Dr. Kao to say anything about displaying fists  
2 because the University didn't raise it to him on  
3 June 18th?

4 THE COURT: You want to make that a question?

5 MR. KATZENBACH: I'm sorry.

6 Q. The University didn't raise any issue of  
7 clenching fists on June 18;th isn't that right?

8 A. That's correct, but there were other issues  
9 like bumping and veering.

10 Q. There's the hallway in the math office; isn't  
11 there?

12 A. Is there a hallway in the math office? Yes,  
13 there is.

14 Q. And people, students use that hallway too?

15 A. Yes.

16 Q. And in fact, that's -- there are classrooms  
17 there; aren't there? Or nearby?

18 A. Yes.

19 Q. And there are bathrooms there?

20 A. Yes.

21 Q. And the people come in and out of classes at  
22 the end of classes?

23 A. Yes.

24 Q. And students will all leave classes sort of in  
25 a rush?

1 A. I would assume so, sometimes, yes.

2 Q. It's really hard to know if you're talking in  
3 your letter of June 18th what sort of bumping you're  
4 talking about; isn't it?

5 A. I don't think so. I think where I say that  
6 movements in the hallway that cause people to believe  
7 you are suddenly -- that you will suddenly run into them  
8 or impede their pathway, to me, makes it look like -- I  
9 mean, it's pretty obvious that it's saying that you're  
10 making it look like you're purposeful about it.

11 Q. Well, wouldn't you agree with me the language  
12 you're using here sounds like he's intentionally  
13 attempting to intimidate or harass people?

14 A. I would say that intent to intimidate.

15 THE COURT: Ladies and gentlemen, remember the  
16 admonition. Do not form or express any opinion on this  
17 case until it's finally submitted to you for your  
18 decision. Do not discuss among yourselves or with  
19 others until that time.

20 Please be back in your places at 11:10  
21 according to the courtroom clock.

22 (Recess taken: 10:59 a.m. - 11:12 a.m.)

23 THE COURT: Jurors and Alternates are all  
24 present. Counsel for all sides are present. Plaintiff  
25 is personally present. Ms. Peugh-Wade is on the stand.

1 Mr. Katzenbach, you may continue your inquiry.

2 MR. KATZENBACH: Thank you.

3 Q. We were asking about Exhibit 30, which is the  
4 letter that you gave to Dr. Kao on June 18th, 2008. And  
5 would you agree with me that the description that you  
6 put in there sounds look a whole bunch of pretty  
7 intentional acts?

8 A. Yes.

9 Q. All right. Would you agree with me that if  
10 these acts were intentional, that these were acts that  
11 you could get disciplined for?

12 A. Yes. If we were certain that they were  
13 intentional. But that's why I start off the letter  
14 saying that, "We have a concern about your health."

15 Q. Well, let's take a look at the very last  
16 description of an event. It says, "Bizarre chuckling in  
17 an intimidating tone that conveys the message you are  
18 doing so to frighten whomever may hear it."

19 That uses both the phrase "intimidating tone"  
20 and "conveying the message you are doing so to frighten  
21 whomever you may hear it."

22 Again, if Dr. Kao was doing that, wouldn't the  
23 University's normal policies call for some form of  
24 disciplinary action?

25 MR. VARTAIN: Compound. Argumentative.



1 Ambiguous.

2 THE COURT: Overruled. The Witness may answer  
3 the question, if she understands it.

4 THE WITNESS: Would you please repeat it?

5 MR. KATZENBACH: Q. If somebody did what you  
6 describe in that sentence or that part of the sentence,  
7 under the University's normal policies, wouldn't that  
8 cause disciplinary action to ensue?

9 MR. VARTAIN: Vague. "Normal policies"?

10 MR. KATZENBACH: Okay. I'll rephrase that  
11 then. Let me see.

12 Q. You're experienced -- your department handles  
13 disciplinary matters?

14 A. Yes, we do.

15 Q. If people are going around attempting to  
16 frighten people -- I'm sorry.

17 If employees are attempting to frighten people,  
18 doesn't that usually trigger some form of disciplinary  
19 action?

20 A. Usually it would, yes.

21 Q. People going around intimidating people,  
22 doesn't that usually result in some form of disciplinary  
23 action?

24 A. Yes. But as I said before, I really -- we  
25 really try to deal with the whole person. This faculty

1 member had been with us for over 15 years, and yes, he  
2 had some odd behaviors in those 15 years. But at this  
3 point, there was a major change in behavior, and we were  
4 giving him the opportunity to, if it wasn't purposeful,  
5 to fix whatever was causing it.

6 Q. Let's just go back to this. You say,  
7 "Similarly bumping and/or nearly bumping into people in  
8 a manner that suggests an intent to do so."

9 Would you agree with me if you were  
10 intentionally -- a staff member was intentionally  
11 bumping into people, that would be a cause for  
12 disciplinary action?

13 MR. VARTAIN: Asked and answered. Objection.

14 THE COURT: Overruled. The Witness may answer.

15 THE WITNESS: Normally, yes.

16 MR. KATZENBACH: Q. All right. Now, you just  
17 said that Dr. Kao had engaged in strange behavior in the  
18 past. What sort of strange behavior are you referring  
19 to?

20 MR. VARTAIN: Objection. Misstates testimony.  
21 She didn't say that.

22 MR. KATZENBACH: That's fine. We can read  
23 back.

24 Q. In answer to a question, Ms. Peugh-Wade, you  
25 said that yes, he had some odd behaviors in those

1 15 years. What sort of odd behaviors were you referring  
2 to?

3 A. One of them -- and it was in my notes, I don't  
4 know that we've talked about it here yet, but it was  
5 before he was tenured, one of the faculty described that  
6 he was obsessed, kind of obsessive about whether he was  
7 going to get tenure or not to the extent of actually  
8 bringing it up to the then Dean at that time who wasn't  
9 Jennifer Turpin, but the prior Dean, in front of other  
10 people at a large meeting to the extent of this faculty  
11 member felt was really embarrassing that someone would  
12 do that.

13 Q. All right. Now, let's ask about that.

14 It's your understanding -- what about Dr. Kao's  
15 concern about getting tenure was odd?

16 A. Not his concern about getting tenure, but the  
17 way that he went about it in public, showing his concern  
18 about it in public.

19 Q. So it was odd -- let me see if I understand.  
20 Tenure is pretty important; isn't it?

21 A. Very.

22 Q. And a professor like Dr. Kao comes to the  
23 University of San Francisco. They work for six years,  
24 and then they're up for tenure; right?

25 A. Approximately, yes.

1 Q. There's no guarantee you are going to get it;  
2 is there?

3 A. No.

4 Q. In fact, it's a big commitment on everyone's  
5 part to get tenure; isn't it?

6 A. Yes.

7 Q. It's a lot of work for the University?

8 A. I don't know if tenure itself is a lot of work.  
9 There's a lot of work in the relationship up to that  
10 point, yes.

11 Q. The tenure process involves a lot of faculty  
12 members reviewing another faculty member's work?

13 A. Yes.

14 Q. Research?

15 A. Yes.

16 Q. Service?

17 A. Yes.

18 Q. And goes over through several levels of review?

19 A. Yes.

20 Q. And if the faculty member gets tenure at the  
21 University, then he has got a job that pretty much for  
22 life; isn't it?

23 A. He -- tenure is that he would have a job for as  
24 long as he's able to do -- he or she is able to do that  
25 job and as long as that job is there.

1 Q. In fact, you know Professor Wolf; don't you?

2 A. A little bit, yes.

3 Q. He's been there a very long time; hasn't he?

4 MR. VARTAIN: Objection. Not relevant.

5 THE COURT: Overruled. The Witness may answer.

6 THE WITNESS: I don't know how long he's been  
7 there.

8 MR. KATZENBACH: Q. Okay. Long enough to get  
9 a white beard?

10 A. Some would say I've probably been there as long  
11 as he has.

12 Q. But you don't have the white beard?

13 A. Not today.

14 Q. So anyway, back to the odd behavior, so does it  
15 strike you -- does it strike you as odd that someone  
16 would be concerned about the tenure process in his  
17 ability to get tenure?

18 A. No.

19 Q. Does it strike you as odd that someone might  
20 ask publicly to confirm what the rules are regarding  
21 tenure?

22 A. Not if they did it once or twice, no.

23 Q. Well, does it strike you as odd that someone  
24 might want to know the precise procedures that are  
25 involved in tenure?

1 A. No.

2 Q. And when you heard this information that you  
3 received about this odd behavior of this obsessing of  
4 tenure, what did you do to investigate that beyond just  
5 taking the opinion of one of these faculty members that  
6 that was oddly obsessive?

7 A. Nothing.

8 Q. Now, what other odd behavior had Dr. Kao  
9 engaged in that you were referring to in your prior  
10 answer?

11 A. The fact that Dr. Kao had distributed the note  
12 from his doctor saying he had an adverse reaction to  
13 Prozac to all of his colleagues.

14 Q. All right. That was the semester where Dr. Kao  
15 was off work; right?

16 A. I don't remember when it was.

17 Q. Okay. You know Dr. Kao after -- after this  
18 adverse reaction to Prozac was not allowed to teach for  
19 the remainder of the semester; correct?

20 MR. VARTAIN: Object. Argumentative.

21 THE COURT: Overruled.

22 THE WITNESS: I know he was told to be out -- I  
23 was going to say out of work, not teaching for a period  
24 of time. I don't know that it was the whole semester.

25 MR. KATZENBACH: Q. You investigated Dr. Kao's

1 complaints, his formal complaint and the addendum to  
2 that?

3 A. I investigated the addendum.

4 Q. Okay. Now, did you ever ask Dr. Kao why he  
5 distributed the letter to his colleagues?

6 A. No, I did not.

7 Q. What other odd behavior had Dr. Kao engaged in?

8 A. Odd or unusual wearing suits.

9 Q. Anything else?

10 A. His -- I don't know if this is odd but more  
11 unusual, his -- he kept bringing up kind of the old  
12 complaints over and over again in the different formats.

13 Q. You mean when he filed his formal complaint?

14 A. Formal and informal.

15 Q. Okay. That's something that went to the human  
16 resources department; correct?

17 A. Yes.

18 Q. He didn't distribute that to the faculty of the  
19 math department; did he?

20 A. No.

21 Q. All right. So it would be pretty hard -- so no  
22 one in the math department complained about him bringing  
23 a formal complaint or informal complaint; right?

24 A. Could you ask that again, please?

25 Q. Yeah. It's a bad question. Let me try this.

1           He didn't distribute his complaints to anyone  
2 in the math department as far as you know?

3           A. As far as I know, no.

4           Q. Right. In fact, when you interviewed these  
5 individuals, did they say they were concerned about the  
6 fact that Dr. Kao had bought either his formal complaint  
7 or addendum?

8           A. I'm sorry. Bought?

9           Q. That he filed a formal complaint or the  
10 addendum to the formal complaint?

11          A. No, but one of the things you had asked that  
12 was unusual and they did bring up was that he copied his  
13 attorney on many of the correspondence with his  
14 colleagues.

15          Q. I see. What correspondence was that?

16          A. I don't know specifically.

17          Q. Do you have copies of them?

18          A. Some of them are copied in these exhibits.

19          Q. All right. Take a look at Exhibit 11.

20                 That's an e-mail concerning -- taking a look at  
21 Exhibit 11, that's an e-mail that Dr. Kao sent to advise  
22 persons that he would be filing for an intake meeting  
23 under the USF's policies; is that right?

24          A. Yes.

25          Q. That's an e-mail that he copied to his



1 attorneys; correct?

2 A. Yes.

3 Q. Well, what I'm concerned about here is --

4 MR. VARTAIN: Objection. You're arguing with  
5 the Witness.

6 MR. KATZENBACH: You're right.

7 MR. VARTAIN: This is cumulative. This was not  
8 the subject of my examination. The Attorney examined  
9 this Witness on these things for quite a long time. To  
10 go back now is outside the scope.

11 THE COURT: That objection is overruled.

12 MR. KATZENBACH: Q. Now, going across on this,  
13 individuals that are identified here, Gon-Soneta, who is  
14 that?

15 A. One of my colleagues.

16 Q. Someone in human resources?

17 A. Yes.

18 Q. That's the person who he's going to meet with;  
19 isn't it?

20 A. Yes.

21 Q. Maye-Lynn Gon-Soneta?

22 A. That was, yes.

23 Q. All right. Brown, B., who would that be?

24 A. That is Brandon Brown.

25 Q. That is the Associate Dean; right?

1 A. Yes.

2 Q. Turpin, J., who would that be? Who is that?

3 A. That is the then Dean, Jennifer Turpin.

4 Q. All right. Peter@usfca.edu, who is that?

5 A. I'm not sure.

6 Q. Would that be Peter Pacheco, the chair of the  
7 department?

8 A. That would be my guess.

9 Q. Okay. Peugh@usfca, yourself?

10 A. Yes.

11 Q. Thank you. Davisdj@usfca, and who might that  
12 be?

13 A. That's University legal counsel.

14 Q. All right. Now, can you point out here one of  
15 the people is Tristan Needham listed there?

16 A. No.

17 Q. Is Paul Zeitz listed there?

18 A. No.

19 Q. Bob Wolf?

20 A. No.

21 Q. Renee Brunelle?

22 A. No.

23 Q. Dayna Soares?

24 A. No.

25 Q. Stephen Yeung?

1 A. No.

2 Q. Steve Devlin?

3 A. No.

4 Q. The only person in the math faculty listed on  
5 that is really only the chairman of the math department;  
6 isn't it?

7 A. Yes.

8 Q. All right. Was it your understanding that --  
9 strike that.

10 Take a look, please, at, Exhibit 12, if you  
11 would. Do you have that in front of you?

12 A. I do.

13 Q. Some day I'll be fast enough to do this.

14 That's another e-mail; correct?

15 A. It is.

16 Q. That's also about Dr. Kao's impending complaint  
17 over the job search in early 2008; correct?

18 A. Yes. This one is entitled, "Ad placement."

19 Q. All right. And this is an e-mail that he sent  
20 to Brandon Brown. And Brandon Brown you identified.  
21 That's the Associate Dean?

22 A. Yes.

23 Q. Turpin, again, Dean Turpin; correct?

24 A. Yes.

25 Q. Plaintiff's counsel; right?

1 A. Yes.

2 Q. Anyone from the math department copied on that  
3 e-mail?

4 A. Not other than Dr. Kao.

5 Q. So was this concern about copying his counsel  
6 that these faculty members raised to you as strange  
7 behavior, did that involve something that happened  
8 before 2008?

9 MR. VARTAIN: Objection. Compound.

10 MR. KATZENBACH: I'm sorry. You're correct.

11 MR. VARTAIN: Lacks foundation.

12 MR. KATZENBACH: May I rephrase, your Honor?

13 THE COURT: Sure.

14 MR. KATZENBACH: Thank you.

15 Q. Was it your understanding in talking to these  
16 faculty members that they were concerned about being  
17 copied with e-mails sometime prior to January of 2008?

18 MR. VARTAIN: Vague. Objection.

19 THE COURT: Do you understand the question,  
20 Ms. Peugh-Wade?

21 THE WITNESS: I understand the question.

22 THE COURT: Then you may answer it. Overruled.

23 THE WITNESS: I took it to mean that it was  
24 over time.

25 MR. KATZENBACH: Q. Okay. Now, what other odd

1 behaviors before 2008 were you referencing in the answer  
2 we've been discussing?

3 A. Pacing back and forth while smoking.

4 Q. Well, which of those behaviors is the odd one  
5 now?

6 A. The two together.

7 Q. All right. So he paced back and forth while  
8 smoking. Anything -- and how long had that been going  
9 on?

10 A. A long time.

11 Q. All right. What other odd behaviors?

12 A. The way that he was so obsessed with the matter  
13 involving the CCAC letter.

14 Q. You mean he filed a grievance over that?

15 A. That's not what I mean.

16 Q. All right. How did he obsess over it?

17 A. That he went and talked about it first, and  
18 both parties assured him that he was not the one at  
19 fault, but that wasn't enough. And then yes, eventually  
20 he did file a grievance.

21 Q. And Stanley Nelson signed off on that grievance  
22 to settle it?

23 A. That would be my understanding, yes.

24 Q. It was settled at the earliest possible stage  
25 of the grievance procedure; wasn't it?

1 A. Yes, it was.

2 Q. And that was settled by about December 2000;  
3 correct?

4 A. Somewhere back around there. I don't know the  
5 exact date.

6 Q. Okay. And so what did Dr. Kao do after that  
7 settlement of that grievance involving CCAC that was  
8 obsessive?

9 MR. VARTAIN: Objection. Lacks foundation.

10 MR. KATZENBACH: I'll reframe that.

11 Q. What did Dr. Kao do after the settlement of  
12 that grievance in 2000 that was odd in reference to the  
13 CCAC matter?

14 A. He kept bringing it up in his other complaints.

15 Q. When you say, "He kept bringing it up in his  
16 other complaints," you mean the one complaint that he  
17 filed in 2006 referred to that; correct?

18 A. There was a filing in 2006. There was a  
19 formal, an informal, and then there was a later one as  
20 well.

21 Q. And this, the CCAC was raised in the informal,  
22 at the informal stage; correct?

23 A. It was raised in the 2000 or so zero level  
24 grievance, as you pointed out, and then it was also  
25 raised in 2006, I believe.

1 Q. All right. So in that complaint process, he  
2 raised that again; is that right?

3 A. Yes.

4 Q. And he raised that with human resources?

5 A. Yes.

6 Q. As part of a formal complaint procedure?

7 A. Yes.

8 Q. And in part, he was concerned about the fact  
9 that that information wasn't in his -- seemed to have  
10 disappeared from his personnel file?

11 MR. VARTAIN: Objection. Lacks foundation.

12 MR. KATZENBACH: Q. You read the complaint?

13 THE COURT: The question is withdrawn. A new  
14 question is pending.

15 MR. KATZENBACH: You're correct, your Honor.

16 Q. Have you read the complaint?

17 A. Yes, I have.

18 Q. Did you understand his complaint to be that he  
19 was concerned that this information about the settlement  
20 of this grievance didn't appear in his personnel file?

21 A. It has been a long time since I read the  
22 complaint, so I don't remember exactly.

23 Q. Okay. But that's the -- is there any other  
24 occasion where he raised the CCAC issue other than  
25 putting it in that formal complaint that he filed?

1 MR. VARTAIN: Objection. Asked and answered.  
2 And it is ambiguous.

3 THE COURT: Overruled. The Witness may answer.

4 THE WITNESS: Yes.

5 MR. KATZENBACH: Q. When?

6 A. At least later in the addendum.

7 Q. So the addendum to the formal complaint  
8 referred to the CCAC matter; correct?

9 A. Yes.

10 Q. Wasn't that all part of just one long big  
11 complaint process?

12 MR. VARTAIN: Arguing.

13 MR. KATZENBACH: Strike that. I'll rephrase  
14 it.

15 Q. The addendum was part of the original  
16 complaint; wasn't it?

17 A. No. It was a more than a year later. He  
18 called it the addendum.

19 Q. It was all considered at the same time as you  
20 considered the issues on this formal complaint; right?

21 MR. VARTAIN: Objection. Ambiguous.  
22 Argumentative.

23 THE COURT: Ms. Peugh-Wade, do you understand  
24 the question?

25 THE WITNESS: No. Say it again, please.



1 MR. KATZENBACH: All right. Let me rephrase  
2 it.

3 Q. You recall responding to Dr. Kao's addendum,  
4 you recall that I asked you questions about that?

5 A. Yes.

6 Q. That's a two-page memo that you wrote?

7 A. Yes.

8 Q. That was September 2007 that you wrote that  
9 memo; correct?

10 A. Yes.

11 Q. All right. Other than the two-page memorandum  
12 that you wrote, was there any other response to any of  
13 the issues raised in Dr. Kao's formal complaint or his  
14 addendum?

15 MR. VARTAIN: Objection. Objection. Now we're  
16 outside the scope and irrelevant.

17 THE COURT: Could you say the question again,  
18 please, Mr. Katzenbach?

19 MR. KATZENBACH: Yes. Well, I'm a liar; aren't  
20 I?

21 Q. Other than the two-page memorandum that you  
22 wrote, was there any other response to any of the issues  
23 raised in Dr. Kao's formal complaint or his addendum?

24 THE COURT: Overruled.

25 THE WITNESS: Yes.

1 MR. KATZENBACH: Q. What was that response?

2 A. There was -- they were trying -- both parties  
3 tried to reach agreement on the formal complaint.

4 Q. And that didn't work out?

5 A. That's correct.

6 Q. That didn't work out because Dr. Kao was  
7 unwilling to agree to certain terms that the University  
8 proposed?

9 A. Both parties could not come to agreement.

10 Q. Okay. That's a fair answer. That's when  
11 agreements don't happen is when both parties can't  
12 agree. It's a fair answer.

13 MR. VARTAIN: Objection. Move to strike  
14 Counsel's testimony.

15 THE COURT: Motion to strike is granted.  
16 Mr. Katzenbach's remarks are stricken.

17 MR. KATZENBACH: Thank you.

18 Q. We talked a little bit about the internal  
19 complaints Dr. Kao has filed. I'm a little -- what I  
20 would like to ask you now about are you aware of any  
21 time when Dr. Kao ever threatened a lawsuit?

22 A. Not that I'm aware of. Not that I remember, I  
23 should say.

24 Q. When these individuals referred to contacting  
25 his attorneys, are you aware of any time Dr. Kao ever

1 said he was actually going to sue somebody?

2 A. Not that I'm aware of.

3 Q. All right. In fact, everything that Dr. Kao  
4 did he raised through internal complaints within USF;  
5 right?

6 MR. VARTAIN: Objection.

7 MR. KATZENBACH: Strike that.

8 MR. VARTAIN: I'm sorry.

9 MR. KATZENBACH: Let's see what we have here.

10 Q. Dr. Kao raised an internal dispute through the  
11 union grievance procedure?

12 MR. VARTAIN: I'm going to object. This line  
13 of questioning is now unduly cumulative under section  
14 352 of the Evidence Code.

15 THE COURT: There's a request for exclusion  
16 under 352 of the Evidence Code is denied, but it is  
17 subject to renewal.

18 MR. KATZENBACH: Q. I want to just go through  
19 briefly, if I could --

20 MR. VARTAIN: Your Honor, I'm going to object to  
21 the rehash of the -- we've now been here how many days  
22 over complaint, complaint, complaint, complaint. I  
23 don't think there's a need to rehash it. Renew the  
24 objection, given the new question.

25 THE COURT: That's an objection. It's

1 overruled.

2 MR. KATZENBACH: Q. Would it be accurate to  
3 describe Dr. Kao's procedures, Dr. Kao's complaint  
4 procedures as he filed internal complaints within USF?

5 A. I'm sorry. What would -- would what be  
6 accurate to describe?

7 Q. Would it be accurate to describe how Dr. Kao  
8 raised his complaints by saying that he filed internal  
9 complaints under USF's internal procedures?

10 MR. VARTAIN: Objection. The question is  
11 contrary to the stipulation of the parties that was  
12 entered into evidence that Dr. Kao also filed EEOC,  
13 DFEH; therefore, the question is irrelevant.

14 THE COURT: The question is self-answering by  
15 virtue of the stipulation. All right. I accept that  
16 proposition. Sustain the objection.

17 MR. KATZENBACH: All right.

18 Q. Prior to filing charges with the EEOC and DFEH  
19 involved in this case, Dr. Kao had only filed internal  
20 complaints within USF; isn't that correct?

21 A. I can only speak to what I am aware of.

22 Q. Okay. As far as you know?

23 A. As far as I know, he filed the complaints  
24 internally to USF that we've discussed.

25 Q. Okay. Now, I think I stopped following up on,

1 and I want to go back to the odd behavior of Dr. Kao  
2 that you were referring to.

3 Are there any additional evidence after the  
4 obsession on the CCAC matter that you referred to, were  
5 there any other odd behaviors that he had before 2008?

6 MR. VARTAIN: Objection. Compound and  
7 ambiguous.

8 THE COURT: Overruled. The Witness may answer.

9 THE WITNESS: I can't speak to any behaviors.  
10 I can speak to those that I can remember at this time,  
11 and I believe we've talked about them.

12 MR. KATZENBACH: Q. So we have -- so we have  
13 obsession over the tenure issue; isn't that right?

14 MR. VARTAIN: Objection. Cumulative.

15 THE COURT: Sustained.

16 MR. KATZENBACH: Okay, your Honor.

17 Q. Now, taking -- going back to Exhibit 30, if you  
18 would --

19 MR. VARTAIN: Objection. Cumulative. We've  
20 covered Exhibit 30 every which way.

21 THE COURT: Let's hear what the question is.

22 MR. KATZENBACH: Q. Going back to Exhibit 30,  
23 the next communication on the subject was your e-mail to  
24 Dr. Kao responding to issues he raised at the June 18  
25 meeting; isn't that right?

1 MR. VARTAIN: Objection. Asked and answered at  
2 least three times in this examination.

3 THE COURT: Overruled. I'll let the Witness  
4 answer.

5 We're getting close to the invocation of 352,  
6 Mr. Katzenbach.

7 MR. KATZENBACH: Okay.

8 THE COURT: The Witness may answer this  
9 question.

10 MR. KATZENBACH: That's Exhibit 31.

11 THE WITNESS: Could you say it again, please?

12 MR. KATZENBACH: Q. The next communication  
13 between the University and Dr. Kao after Exhibit 30 was  
14 Exhibit 31. That's an e-mail you sent to Dr. Kao;  
15 correct?

16 MR. VARTAIN: So stipulated.

17 THE WITNESS: This was the next communication  
18 from me.

19 MR. KATZENBACH: Q. This is where you said  
20 that you wanted any information by June 23rd; correct?

21 MR. VARTAIN: Objection. Asked and answered.  
22 Evidence Code 352.

23 THE COURT: Sustained. Mr. Katzenbach, unless  
24 you're going over something new, I think we're replowing  
25 old ground here.

1 MR. KATZENBACH: That's fine. I'll maybe move  
2 it on a little quicker then.

3 Q. At any time, did the University ask to speak to  
4 any doctor Dr. Kao had?

5 MR. VARTAIN: Objection. Asked and answered  
6 and so stipulated.

7 THE COURT: Overruled. The Witness may answer.

8 THE WITNESS: No.

9 MR. KATZENBACH: Q. At any time did the  
10 University suggest to -- state to Dr. Kao that they were  
11 willing to negotiate who would do a fitness-for-duty  
12 examination?

13 MR. VARTAIN: Same objection. That was covered  
14 in the initial direct.

15 THE COURT: I think so. We're getting to an  
16 area where things -- we're going over the same things.  
17 We're not proving anything new under Evidence Code  
18 section 352, de minimis probative value, undue  
19 consumption of time.

20 MR. KATZENBACH: Okay, your Honor.

21 MR. VARTAIN: Motion to terminate the  
22 examination? Counsel is obviously trying to kill time  
23 till we get to the noon hour. There's Evidence Code  
24 section 352.

25 THE COURT: Motion is denied.

1 MR. KATZENBACH: I'm just trying to --

2 Q. At any time, isn't it the case that from --  
3 sorry -- from June 24th forward, June 24th was a letter  
4 directing Dr. Kao to go to the examination, that the  
5 University insisted without change that Dr. Kao go to  
6 the IP, the independent physician, selected by the  
7 University?

8 MR. KATZENBACH: Objection. Compound.  
9 Ambiguous. Section 352.

10 THE COURT: Overruled. The Witness may answer.

11 THE WITNESS: I'm sorry. Could you say it  
12 again, please?

13 MR. KATZENBACH: Q. At any time did the  
14 University -- sorry.

15 At no time from June 24th through Dr. Kao's  
16 discharge did the University ever change its position  
17 that Dr. Kao had to go to the independent physician  
18 selected by the University?

19 MR. VARTAIN: Objection. Ambiguous. Compound.

20 THE COURT: Ms. Peugh-Wade, do you understand  
21 the question?

22 THE WITNESS: I think so.

23 THE COURT: You may answer it. Overruled.

24 THE WITNESS: I would disagree with that  
25 particularly in David Philpott's conversations and



1 letters, he was offering on the University's behalf to  
2 compromise.

3 MR. KATZENBACH: Q. Would you take a look at  
4 Exhibit 43?

5 Do you have Exhibit 43 in front of you? That's  
6 a letter from David Philpott to Dr. Kao.

7 A. It is.

8 Q. Taking a look at the letter, it's dated  
9 January 23rd, 2009.

10 MR. VARTAIN: It's in evidence, Counsel.  
11 Objection. Question is irrelevant.

12 THE COURT: I don't think I heard a question.

13 THE CLERK: It's not in evidence.

14 MR. VARTAIN: The objection is to the question  
15 which asks the Witness to identify a document that is  
16 already in evidence.

17 THE CLERK: It is not in evidence.

18 MR. VARTAIN: I have it in evidence.

19 MR. KATZENBACH: I have it in evidence too.

20 THE CLERK: All right.

21 MR. VARTAIN: It's not in evidence unless the  
22 Clerk says it's in evidence.

23 THE COURT: Both Counsel say it's in evidence;  
24 it's in evidence.

25 MR. KATZENBACH: Thank you.

1 THE CLERK: In evidence.

2 THE COURT: The objection to the question --  
3 the objection to the question asking the Witness to  
4 identify the document is overruled.

5 MR. KATZENBACH: Q. All right. In this  
6 letter, Mr. Philpott states at the end of the third  
7 paragraph, "The assurance the University requires must  
8 come from someone with necessary experience, i.e., an  
9 independent physician."

10 Was that the University's position?

11 MR. VARTAIN: That question is ambiguous.

12 THE COURT: Ms. Peugh-Wade, do you understand  
13 the question?

14 THE WITNESS: No.

15 THE COURT: The objection is sustained.

16 MR. KATZENBACH: Q. Did the University require  
17 assurances concerning Dr. Kao to come from an  
18 independent physician?

19 A. Yes.

20 Q. And at any time, that was the position stated  
21 by -- was that the University ever indicated from the  
22 start of this dispute until that point any  
23 qualifications on that requirement?

24 MR. VARTAIN: Objection. Ambiguous.

25 THE COURT: Sustained. I don't understand the

1 question.

2 MR. KATZENBACH: Q. From June 24, 2008 through  
3 January 23rd, 2009, was it the University's consistent  
4 position that any assurances that the -- that the  
5 assurances that the University required had to come from  
6 an independent physician?

7 MR. VARTAIN: So stipulated. This is Evidence  
8 Code 352. We stipulate that we do not accept the  
9 clear-the-air meeting from Mr. Katzenbach. There needed  
10 to be an independent physician.

11 THE COURT: Mr. Katzenbach, do you care to join  
12 in the stipulation?

13 MR. KATZENBACH: Is it my understanding the  
14 stipulation means that the assurances had to come from  
15 an independent physician?

16 MR. VARTAIN: The stipulation is as proposed,  
17 Counsel. I don't need to interpret it. It's on the  
18 record. I would like to ask the Court to terminate the  
19 examination. I'm under the belief that Counsel is  
20 intentionally trying to protract it and make the Witness  
21 uncomfortable and get him to the lunch hour so he can  
22 come back and start all over after lunch.

23 MR. KATZENBACH: That's not the case, your  
24 Honor.

25 THE COURT: I don't entertain any suspicions

1 yet.

2 MR. KATZENBACH: The stipulation, as I  
3 understand it, includes both the clear-the-air meeting  
4 and the independent physician. Under that  
5 understanding, that's acceptable to me.

6 MR. VARTAIN: The stipulation is as stated on  
7 the record. I'm not going to join in Counsel's  
8 interpretation.

9 THE COURT: Well, without a stipulation, we  
10 have to have people agreeing to something they  
11 understand what they're agreeing to. If you're unable  
12 to respond to Mr. Katzenbach's question about what the  
13 stipulation is, then we don't have a stipulation.

14 MR. KATZENBACH: Do you want to try it again?

15 MR. VARTAIN: You're probably going to get to  
16 the point quicker from the Witness than us arguing about  
17 it.

18 THE COURT: Okay. Next question.

19 MR. KATZENBACH: Q. Is it correct that the  
20 assurance that the University required during the period  
21 June 23rd through -- June 23rd, 2008, through  
22 January 23rd, 2009, was it had to come from an  
23 independent physician?

24 A. The assurance that he could perform his  
25 position in a safe manner, yes.

1 Q. Would you have accepted Dr. Terr --

2 MR. VARTAIN: Calls for speculation.

3 Objection.

4 THE COURT: All right. It's better to let the  
5 questioner finish his question.

6 MR. VARTAIN: I apologize, your Honor. I have  
7 to say.

8 THE COURT: I can see where we're going. It's  
9 sustained.

10 MR. KATZENBACH: Q. All right. Now, I would  
11 like to ask you a little bit about some of the incidents  
12 you discussed.

13 You recall talking about a meeting with  
14 Dr. Missett on around May 20th?

15 A. Yes.

16 Q. And you provided him some information in  
17 connection with that meeting?

18 A. Yes.

19 Q. All right. And do you recall at that meeting  
20 -- prior to that meeting, did you provide Dr. Missett  
21 with any description of the incident involving  
22 Dr. Turpin?

23 A. I don't remember.

24 Q. Now, did you keep a record of what documents  
25 you provided to Dr. Missett?

1 MR. VARTAIN: Objection. Irrelevant. We  
2 produced the entire file, Counsel, for you.

3 MR. KATZENBACH: Excuse me?

4 THE COURT: Overruled.

5 MR. KATZENBACH: Q. Do you keep a record of  
6 documents you gave Dr. Missett?

7 A. Yes.

8 Q. Where is that record?

9 A. Somewhere in all of these.

10 Q. Does that record, to your knowledge, does that  
11 record include any copies of any e-mails that Dean  
12 Turpin wrote describing this incident?

13 A. I don't remember.

14 Q. Okay. Now, all right.

15 THE COURT: Ladies and gentlemen, remember the  
16 admonition. Do not form or express any opinion on this  
17 case until it's finally submitted to you for your  
18 decision. Do not discuss among yourselves or with  
19 others until that time.

20 Please be back in your places at 1:30 according  
21 to the courtroom clock. Leave your notebooks and  
22 instructions behind.

23 (Whereupon, the Jury exited the courtroom at  
24 11:59 a.m.)

25 THE COURT: Jurors and Alternates have departed

1 the courtroom. Counsel for both sides and the Plaintiff  
2 remain.

3 Mr. Katzenbach, I do sense you are reploting  
4 old ground. How about an offer of proof, thumbnail  
5 sketch you hope to prove with the balance of your  
6 redirect?

7 MR. KATZENBACH: I would like to discuss  
8 certain inconsistencies between her testimony and  
9 certain documents that I would like to discuss, and  
10 those are the primary areas that I intend to ask about  
11 that has not -- I do not believe have been discussed  
12 yet.

13 THE COURT: You're going to point out some  
14 inconsistencies and what else?

15 MR. KATZENBACH: I'm going to ask her about --  
16 I'm going to ask her about those inconsistencies. And  
17 I'm also going to ask her about what the reaction, what  
18 the University did in response to the Turpin incident in  
19 connection with its own policy.

20 THE COURT: Is that it?

21 MR. KATZENBACH: I believe that will be -- I  
22 believe that that is going to be it.

23 THE COURT: How much time do you anticipate  
24 that will take you?

25 MR. KATZENBACH: 15, 20 minutes depending on

1 answers. Maybe less.

2 THE COURT: Okay. Anything you would like to  
3 put on the record?

4 MR. KATZENBACH: Yeah. In terms of the  
5 exhibits distributed to the Jurors, certainly it's okay  
6 they can keep those during this examination but should  
7 they be collected afterwards?

8 THE COURT: It's okay with me.

9 MR. KATZENBACH: I just think that would be  
10 rather than just giving them a couple of exhibits, I  
11 would prefer --

12 MR. VARTAIN: My thought would be since those  
13 are sort of the two or three key exhibits in the case,  
14 they're going to be referenced in further testimony,  
15 then I'll just have to hand them out again. Why don't  
16 they just keep them at their desk, and we don't have to  
17 go through that repetition. It's only two or three  
18 pieces of paper.

19 THE COURT: I don't know the answer to your  
20 question, which is somewhat rhetorical. Maybe  
21 Mr. Katzenbach has an answer.

22 MR. KATZENBACH: I don't particularly mind the  
23 idea of him having -- if he's actually asking questions  
24 about it. But I don't really want, if there's not going  
25 to be asking questions about those exhibits, then I'm



1 concerned that Jurors will be reading the exhibits  
2 rather than listening to the Witness's testimony. Some  
3 of these exhibits, the faculty member one is fairly  
4 long.

5 MR. VARTAIN: I think the Court's instruction  
6 that already given to pay attention to testimony takes  
7 care of that. Otherwise, we'll bring it to the  
8 attention of the Court.

9 THE COURT: What we'll do is leave them with  
10 the Jury. If Mr. Katzenbach or anyone on the  
11 Plaintiff's team notices any Juror appear to read the  
12 exhibits instead of paying attention to the testimony,  
13 you can bring it up.

14 MR. VARTAIN: I have one little item on the  
15 agenda, your Honor.

16 THE COURT: Go ahead.

17 MR. VARTAIN: I'm preparing special verdict  
18 forms for the -- to serve on opposing Counsel and give  
19 to the Court. I intend to bring them to court on  
20 Tuesday, just --

21 THE COURT: I would love to see them before the  
22 weekend, if you can manage it.

23 MR. VARTAIN: I haven't finished proofreading  
24 them. That's the problem.

25 THE COURT: Oh, okay. I can give you an e-mail

1 address.

2 MR. VARTAIN: I will e-mail them over the  
3 weekend.

4 THE COURT: Okay.

5 MR. VARTAIN: And I'll e-mail them to Counsel  
6 too.

7 THE COURT: The record may reflect that  
8 Mr. Katzenbach and I giggled.

9 MR. VARTAIN: I guess I'm the odd man out.

10 MR. KATZENBACH: No, no, no. If you're telling  
11 a joke, it's not appropriate to laugh at your own jokes.

12 MR. VARTAIN: All right. See you at 1:30.  
13 Thank you, your Honor.

14 THE COURT: Does that take care of everything  
15 you need on the record?

16 MR. VARTAIN: Yes.

17 MR. KATZENBACH: I think so.

18 THE COURT: Okay. See you after lunch.

19 MR. MACK: Thank you, your Honor.

20 (Whereupon, the lunch recess was taken at  
21 12:06 p.m.)

22 ---oOo---

23 AFTERNOON SESSION

24 (Time noted: 1:32 p.m.)

25 THE COURT: Jurors and Alternates are all

1 present. Counsel for all sides are present. Plaintiff  
2 is personally present. Ms. Peugh-Wade is on the stand.  
3 Plaintiff's counsel may continue his inquiry.

4 MR. KATZENBACH: Thank you, your Honor.

5 Q. Now, I would like to direct your attention to  
6 Exhibit 66, which is an e-mail from Brandon Brown. Do  
7 you have that in front of you?

8 The Jurors have copies of that. I would like  
9 to direct your attention, if you would, to the paragraph  
10 the first paragraph No. 3.

11 Do you have that in front of you?

12 A. Yes.

13 Q. I would like to direct your attention to what  
14 Dean Brown writes. He writes, "When Needham heard about  
15 this and Zeitz heard about this, they both confirmed  
16 that independently they had received significant  
17 shoulder bumps in hallways from John this semester.  
18 Both had assumed these were purely accidental and that  
19 may be the case. Odd coincidence."

20 Do you see that?

21 A. I do.

22 Q. All right. Was this the first time that you  
23 understood that Needham or Zeitz -- sorry.

24 Prior to this e-mail, was it your understanding  
25 that Needham and Zeitz had assumed any shoulder bumps

1 were purely accidental?

2 A. I'm sorry. Can you say that again?

3 Q. Prior to the date of e-mail and the  
4 conversation reflected in it, was it your understanding  
5 that Professor Needham and Professor Zeitz had assumed  
6 any shoulder bumping was purely accidental?

7 A. I'm not sure what you mean. Can you --

8 Q. Sure. This appears to be Dean Brown reporting  
9 on a conversation. Is that your understanding?

10 A. Yes.

11 Q. And that in that conversation that following --  
12 following an event in the prior week involving  
13 Professor Yeung, that Dean Brown says, "When Needham  
14 heard this and Zeitz heard this, they both confirmed  
15 that independently they had received significant  
16 shoulder bumps in hallways from John this last semester.  
17 Both had assumed these were purely accidental and that  
18 may be the case. Odd coincidence."

19 The reference to "her," this refers to I  
20 believe to the incident involving Professor Yeung in the  
21 first sentence.

22 MR. VARTAIN: Objection. Ambiguous.

23 MR. KATZENBACH: Strike that.

24 Q. Did you understand that when Needham heard  
25 this, that is referring to the event concerning

1 Dr. Yeung?

2 A. Yes.

3 Q. And that this event occurred as happening in  
4 the hallway last week?

5 A. Yes.

6 Q. And that would be the last week before the date  
7 of the e-mail, which is June 5th?

8 A. Yes.

9 Q. All right. So is it your understanding that  
10 prior to hearing about this incident with  
11 Professor Yeung, that both Dr. Needham and Dr. Zeitz had  
12 assumed that any shoulder bumping by Dr. Kao was purely  
13 accidental?

14 A. I don't remember the timing.

15 Q. Before you received this e-mail recounting the  
16 conversation that Dean Brown had with Needham and Zeitz  
17 in which they apparently said they had assumed that  
18 prior shoulder bumpings were purely accidental, had  
19 either of them told you that they believed that Dr. Kao  
20 had bumped them, and it wasn't accidental?

21 MR. VARTAIN: Objection. Ambiguous. Compound.

22 THE COURT: Overruled.

23 THE WITNESS: Yesterday, I went over the notes  
24 of conversations. And as we read the notes of the three  
25 faculty conversations, there were notes of bumping and

1 veering. I don't remember the timing.

2 MR. KATZENBACH: Q. Well, do you recall we  
3 went over notes dated May 12th?

4 A. Yes.

5 Q. And that in those notes dated May 12th, there  
6 was a reference by both Dr. Zeitz and by Dr. Needham to  
7 bumping?

8 A. I would be happy to go back to those notes,  
9 but --

10 Q. Would you like to look at those notes? Would  
11 that make it easier for you? If you could take a  
12 look --

13 A. Sure. I'll try and do it quickly.

14 Q. Sure. Exhibit 57.

15 A. I believe there was another one as well.

16 Q. That's fine.

17 A. Okay.

18 Q. 57 involves Tristan?

19 A. Yes.

20 Q. That's dated 5/12/08?

21 A. Yes.

22 Q. And that says -- the one word on that is  
23 bumping?

24 A. Yes.

25 Q. That's Exhibit 57. If you take a look at

1 Exhibit 60, on the second page, Exhibit 60 is another  
2 conversation with Tristan Needham.

3 A. Yes.

4 Q. And that's a conversation that occurred  
5 sometime after June 4th?

6 A. That's what it appears, yes.

7 Q. That one refers to bumping?

8 A. Yes.

9 Q. And doesn't say whether -- neither of these two  
10 documents indicate whether the bumping was intentional  
11 or unintentional?

12 A. That's correct.

13 Q. And if you take a look at Exhibit 62, there's  
14 another set of notes, but this time a conversation with  
15 Professor Zeitz?

16 A. Yes.

17 Q. That's also dated May 12th?

18 A. Yes.

19 Q. On the second page of that, it uses the phrase  
20 "bumping into me."

21 A. Yes.

22 Q. And in your notes of this conversation on  
23 May 12, does it state whether or not that bumping --  
24 state anything about Dr. Zeitz saying that the bumping  
25 was intentional or unintentional?

1           A. No. It was my recollection at the time that it  
2 was not stated that it was accidental.

3           Q. Are you saying he didn't say either way?

4           A. The implication was that it was not accidental.

5           Q. Okay. So do you recall him actually using  
6 words that -- that he used words that said it wasn't  
7 accidental?

8           A. I don't recollect the exact words.

9           Q. There are no words on any of the three exhibits  
10 I've shown you which contain any description of this  
11 beyond the term "bumping into me"; is that correct?

12          A. That's correct.

13          Q. There's no words that say, "I thought this was  
14 intentional"?

15          A. That's correct.

16          Q. And there are no words that say, "I thought  
17 this was unintentional"?

18          A. That's correct.

19          Q. And there are no words that describe these  
20 events in any language at all; is that correct?

21          A. From what you brought up, that's correct.

22          Q. All right. Back to my question. Back to  
23 Exhibit 66 when Dean Brown reports the phrase, both --  
24 on June 5th, that "both had assumed these bumps were  
25 purely accidental and that may be the case."



1           Was June 5th the first time that neither --  
2 Professor Needham or Professor Zeitz had said anything  
3 about whether this bumping was accidental or  
4 intentional?

5           MR. VARTAIN: Objection. Calls for the Witness  
6 to speculate.

7           MR. KATZENBACH: Q. Prior to the e-mail dated  
8 Exhibit 66 and dated June 5th, was it your understanding  
9 that up until that point and up until the time -- up  
10 until that point, both Dr. Zeitz and Dr. Needham had  
11 assumed that any bumping by Dr. Kao was purely  
12 accidental?

13          MR. VARTAIN: Objection. Ambiguous. And calls  
14 for speculation.

15          THE COURT: Sustained.

16          THE WITNESS: Can you repeat it, please?

17          MR. VARTAIN: The objection was sustained.

18          THE WITNESS: Sorry.

19          MR. KATZENBACH: Q. Based on your  
20 conversations with -- I'm sorry.

21                 Based on your conversations with  
22 Professor Needham prior to June 4 -- June 5th of 2008,  
23 had he indicated to you that he had assumed that  
24 shoulder bumping by Dr. Kao was purely accidental?

25           A. No. I don't believe so.

1 Q. And prior to the e-mail dated June 5, 2008, in  
2 your conversations with Professor Zeitz, had he stated  
3 up until that point he had assumed any shoulder bumping  
4 by Dr. Kao was purely accidental?

5 MR. VARTAIN: Once again, objection. Ambiguous  
6 and compound.

7 THE COURT: Overruled. The Witness may answer.

8 THE WITNESS: Can you repeat it, please?

9 MR. KATZENBACH: Q. Before the e-mail that's  
10 Exhibit 66, which is dated June 5, 2008, in your  
11 conversations with Professor Zeitz, had he informed you  
12 that he assumed that any shoulder-bumping by Dr. Kao was  
13 purely accidental?

14 A. No.

15 Q. Now, after you received -- strike that.

16 Take a look at the first part of the -- of  
17 Exhibit 66. The first part of that sentence, which  
18 refers to Yeung reports that, "He had once passed John  
19 in the hallway last week and John veered across the  
20 hallway as if to run into Yeung."

21 Do you see that?

22 A. Yes.

23 Q. All right. Didn't Yeung actually say that this  
24 event occurred as Dr. Yeung was standing in the bathroom  
25 door?

1 MR. VARTAIN: Objection. Lacks foundation.

2 THE COURT: Overruled.

3 THE WITNESS: I don't know.

4 MR. KATZENBACH: Q. When you interviewed --  
5 after you received Exhibit 66, when was the first time  
6 you interviewed Dr. Yeung about this incident?

7 A. I don't remember.

8 Q. Did you take notes of that interview?

9 A. I believe I took notes of a conversation.

10 Q. You still have them?

11 A. If I have them, you have them.

12 Q. And your attorney has them as well?

13 A. Yes. They would have been the ones given to  
14 you, yes.

15 Q. Thank you.

16 Now, after you received Exhibit 66, did you  
17 convey that information to Dr. Missett?

18 A. Probably.

19 Q. Okay. Would you please take a look at  
20 Exhibit 50?

21 (Plaintiff's Exhibit No. 50 was  
22 marked for identification.)

23 MR. KATZENBACH: Q. Ask if you can identify  
24 Exhibit 50.

25 A. My notes of the conversation with Dr. Missett.

1 Q. On what date?

2 A. June 6th.

3 MR. KATZENBACH: I would like to move  
4 Exhibit 50 into evidence, your Honor.

5 THE COURT: Any objection?

6 MR. VARTAIN: No objection, your Honor.

7 THE COURT: It's received.

8 (Plaintiff's Exhibit No. 50 was  
9 received in evidence.)

10 MR. KATZENBACH: Q. Taking a look -- sorry.

11 Taking a look at the first two lines, did  
12 Dr. Missett tell you he thinks it's over the top now?  
13 Are those his words?

14 A. I don't know if those are his exact words.

15 Q. Now, before this meeting, before this telephone  
16 conversation with Dr. Missett on, it appears June 6th --

17 A. Yes.

18 Q. -- you had been discussing having Dr. Kao go to  
19 a fitness-for-duty examination; correct?

20 A. That is one of the options that we were  
21 considering.

22 Q. All right. Would it be accurate to say to say  
23 that once after this phone call with Dr. Missett on  
24 June 6th, at that point, you decided to go send Dr. Kao  
25 to a fitness-for-duty examination?

1           A. No. As I stated earlier, when I met with  
2 Dr. Kao and his attorney on June the 18th, that was one  
3 of the options that was provided.

4           Q. Okay. Taking a look as we move down -- I hope  
5 this is not too hard.

6                     Does this discuss a plan -- does this  
7 meeting -- this telephone call with Dr. Missett first  
8 discusses a meeting with Dr. Kao and his attorney;  
9 correct?

10          A. Yes.

11          Q. And then it also talks about No. 2. It talks  
12 about sending a letter to Norman Reynolds.

13          A. Yes.

14          Q. And what's the phrase "mental emotional  
15 condition that" -- and I can't read the next word.

16          A. I can't either. Something "to safety issue."

17          Q. Would it be "links to safety issue"?

18          A. Maybe.

19          Q. Then it talks about instructing Dr. Reynolds to  
20 do something; right?

21          A. It talks about what to put in the letter to  
22 Dr. Reynolds.

23          Q. The language you wrote down is, "Instruct him  
24 re what we need back."

25          A. Yes.

1 Q. Is that, "Instruct Dr. Reynolds regarding what  
2 we," the University of San Francisco, "need back from  
3 Dr. Reynolds"?

4 A. Yes.

5 Q. All right. Then it continues, "without  
6 identifying the mental or emotional condition he is  
7 suffering from." Have I read that correctly?

8 A. Yes.

9 Q. "That makes performance of his  
10 responsibilities," what's that word?

11 A. "Responsibilities."

12 Q. "Responsibilities, USF more difficult or  
13 problematic"?

14 A. "At USF," yes.

15 Q. What mental and emotional condition did you  
16 think Dr. Kao had that he was suffering from?

17 A. As I've said before, I didn't form those  
18 judgments. I am not in anywhere capable or trained to  
19 even decide if there was anything at stake, any kind of  
20 condition. That's why we were engaging him.

21 Q. M-hm. And going on to the next page, if you  
22 would, the top of that next page refers to "any  
23 indication that could, that result of emotional  
24 condition."

25 Am I reading that correctly?

1 A. I believe so.

2 Q. "Could lead condition that he constitute a  
3 danger to himself"?

4 A. Yes.

5 Q. "Or that constitutes a danger to others"?

6 A. Yes.

7 Q. Again, what emotional condition are we  
8 referring to there?

9 MR. VARTAIN: Objection. Asked and answered.

10 THE COURT: Sustained.

11 MR. KATZENBACH: Q. All right. Again, this is  
12 what you're going to talk to Dr. Reynolds to do. It  
13 includes -- what's that? "Any indication"?

14 A. Yes.

15 Q. "Of evaluation of Kao that he is suffering  
16 from" -- is that "psychiatric condition"?

17 A. Or "physical."

18 Q. It's "psh"?

19 A. I don't know.

20 Q. Okay. "Psychiatric" or "physical" "without  
21 identifying any three things -- without identifying the  
22 physical or psychological condition." Right?

23 A. Yes.

24 Q. And then we go down to his estimate, the next  
25 one is, "If there are problems in these areas, what is

1 estimate of the length of time." Is that "condition"?

2 A. Yes.

3 Q. "Is likely to continue"?

4 A. Yes.

5 Q. Now, now at the time you're having this  
6 conversation with Dr. Missett, did you think that  
7 Dr. Kao had a mental condition that was making him  
8 engage in violent behavior towards other people?

9 MR. VARTAIN: Objection. Asked and answered.  
10 The Witness just answered that.

11 THE COURT: Overruled. The Witness may answer.

12 THE WITNESS: I did not make that judgment at  
13 that time. I did not know. That's why I was engaging  
14 the doctor.

15 MR. KATZENBACH: Q. Okay. Could you please  
16 look at the last page of Exhibit 50.

17 In the middle of the page, your notes -- sorry  
18 -- your notes state, "Verbal to Reynolds. Intentional  
19 bumping into others," quote.

20 A. I'm sorry. What page are you on?

21 Q. Last page 4, the last page. And the one that  
22 begins, "Verbal to Reynolds, intentional bumping into  
23 others," quote, "'battery,'" unquote?

24 A. M-hm.

25 Q. Do you see that?



1 A. Yes.

2 Q. Why was that a verbal?

3 A. My recollection is that Dr. Missett said that  
4 you need to give Dr. Reynolds everything and that may  
5 include verbal things as well as what you've already  
6 sent him.

7 Q. All right. Why does this -- why would it be a  
8 verbal to Reynolds for intentional bumping into people?

9 MR. VARTAIN: Objection. Ambiguous.

10 THE COURT: Sustained.

11 MR. KATZENBACH: Q. Was your -- did  
12 Dr. Missett in your conversation tell you that you  
13 should verbally convey to Reynolds that Dr. Kao was  
14 intentionally bumping into others?

15 A. Not to my recollection.

16 Q. Did Dr. Missett tell you that you were not to  
17 put that in writing to Dr. Reynolds?

18 A. Not to my recollection.

19 Q. I would like to go back to a meeting that you  
20 described after this incident with then Dean Turpin.

21 Do you recall that subject?

22 A. Yes.

23 Q. All right. That was at the end of April?

24 A. Yes.

25 Q. And that meeting involved Public Safety?

1 A. Yes.

2 Q. And the consequence of that meeting at the end  
3 of April, was Dr. Kao taken off the campus any time  
4 before the end of June?

5 A. Not to my knowledge, no.

6 Q. Was Dr. Kao spoken to about any of the events  
7 that Dean Turpin related at any time before the end of  
8 June?

9 A. Yes.

10 Q. At the meeting on June 18th?

11 A. At least then, yes.

12 Q. Any time prior to that?

13 A. Not to my knowledge.

14 Q. Was Dan Lawson, the head of USF Public Safety,  
15 was he present at this meeting?

16 A. Yes, he was.

17 MR. KATZENBACH: I'm sorry.

18 MR. VARTAIN: I was going to ask you which  
19 meeting but the Witness knew. I don't, but okay.

20 MR. KATZENBACH: Q. The meeting after the  
21 incident Dean Turpin reported.

22 A. Was at the meeting the next day?

23 Q. Yes. Was Dan Lawson present?

24 A. Yes.

25 Q. That's fine. And he heard everything that

1 Dean Turpin said to describe the event?

2 MR. VARTAIN: Objection. Calls for  
3 speculation.

4 MR. KATZENBACH: You're right. Let me rephrase  
5 it.

6 Q. Was he present during the time Dean Turpin  
7 described the event?

8 A. Yes.

9 Q. Was his purpose there to determine what actions  
10 Public Safety should take in light of what Dean Turpin  
11 informed him?

12 MR. VARTAIN: Objection. Calls for  
13 speculation, and it's cumulative.

14 THE COURT: Sustained.

15 MR. KATZENBACH: Q. What was Dan Lawson's role  
16 in this meeting?

17 MR. VARTAIN: Same objection. Same question.

18 THE COURT: Different ruling. Overruled.

19 THE WITNESS: His role was to discuss with us  
20 and make plans for next steps regarding Dr. Kao. And in  
21 particular, how to ensure Dean Turpin's safety.

22 MR. KATZENBACH: Q. Was he there to implement  
23 the provisions of the University of San Francisco's  
24 policy against violence?

25 A. In part.

1 Q. Fair enough.

2 That's all I have for the Witness, your Honor.

3 THE COURT: Further cross, Mr. Vartain?

4 MR. VARTAIN: I'm happy to say no further  
5 questions of the Witness.

6 THE COURT: Jurors, have you questions for  
7 Ms. -- yes.

8 (Whereupon, the Court received eight written  
9 questions from Jurors, and a discussion at sidebar  
10 was held: 2:02 p.m. - 2:09 p.m.)

11 THE COURT: Ms. Peugh-Wade, some questions from  
12 Jurors.

13 THE WITNESS: Okay.

14 THE COURT: What processes exist at USF to  
15 address or resolve University noncompliance or failure  
16 to adhere to the policy on sexual or other unlawful  
17 harassment?

18 THE WITNESS: So I think the question is if  
19 someone doesn't adhere to the policy?

20 THE COURT: I think so.

21 THE WITNESS: Okay. Then someone can voice a  
22 complaint or if the supervisor sees that and the  
23 complaint isn't voiced, there's still a procedure.

24 If indeed there is a complaint voiced, then it  
25 would be investigated. And then depending upon the

1 investigation, if indeed it turned out that the policy  
2 had been violated, depending on the specifics, the  
3 person would receive discipline. And possibly, if it  
4 were bad enough, it could be termination.

5 THE COURT: What processes exist at USF to  
6 address or resolve a department's noncompliance or  
7 failure to adhere to the adopted hiring, slash, search  
8 policies?

9 THE WITNESS: Can you repeat it, please?

10 THE COURT: Sure.

11 What processes exist at USF to address or  
12 resolve a department's noncompliance or failure to  
13 adhere to the adopted hiring, slash, search policies?

14 THE WITNESS: That would be brought to the  
15 department and/or the Dean. And if that wasn't listened  
16 to, then human resources and/or the collective  
17 bargaining would be involved.

18 THE COURT: For this case, had you undergone  
19 specific or formal training in investigation or  
20 documentation in regards to employee safety concerns,  
21 slash, complaints, slash, allegations?

22 THE WITNESS: Not specifically for this case.  
23 But I've had a number of different trainings both about  
24 investigations and workplace safety.

25 MR. VARTAIN: Your Honor, may I be heard on

1 that? I think the Witness --

2 THE COURT: You'll get a turn to do follow-up  
3 questions.

4 MR. VARTAIN: It's not a follow-up question. I  
5 don't think she heard the question. I think Counsel  
6 would agree.

7 THE COURT: Let me read it again.

8 Before this case, had you undergone specific or  
9 formal training in investigation or documentation in  
10 regards to employees safety concerns, slash, complaints,  
11 slash, allegations.

12 THE WITNESS: Thank you. I heard it wrong.

13 Before the case, yes, I had a number of  
14 different formal training sessions on both  
15 investigations, workplace safety, complaint processing,  
16 et cetera.

17 THE COURT: The letter to Dr. Reynolds states,  
18 quote, "We have agreed if you would begin the evaluation  
19 on July 1 at 8:30 at your office," close quote. Who is  
20 "we"?

21 THE WITNESS: The University.

22 THE COURT: What other types of leave of  
23 absence other than sick leave did Dr. Kao qualify for  
24 that allowed for, open quote, fitness for duty, close  
25 quote?

1 THE WITNESS: What other types of leave of  
2 absence? There could be a personal leave of absence,  
3 leave of absence under FMLA.

4 THE COURT: Did Dr. Needham or anyone else  
5 describe what Dr. Kao was wearing and his behavior the  
6 day Dr. Kao did not wear a suit?

7 THE WITNESS: Not to my recollection.

8 THE COURT: Was Dr. Kao offered EAP referral at  
9 any time before June 18th, 2008?

10 THE WITNESS: It was a standard part of our  
11 benefits, and I don't remember if specifically any time  
12 along the way if he had been given it or not.

13 THE COURT: Next question. I'll read it, but I  
14 will not ask for an answer from Ms. Peugh-Wade. The  
15 answer is a question of law, and we're going to  
16 anticipate it might very well be answered in the  
17 instructions the Jury receives.

18 Is there any type of medical information that  
19 is exempt or protected from disclosure to an independent  
20 physician, open parenthesis, IP, close parenthesis.

21 Moving on to the next question. Were you  
22 serving as risk manager for USF in addition to your  
23 duties as assistant vice president for human resources  
24 in June 2008?

25 THE WITNESS: In June 2008, I was the assistant

1 vice president of human resources which meant I oversaw  
2 human resources as well as risk management.

3 THE COURT: So would yes or no be a more  
4 accurate answer?

5 THE WITNESS: I oversaw risk management. There  
6 was someone under me with the title of risk manager, if  
7 that helps.

8 THE COURT: Okay. The question says if yes,  
9 I'll read you what it says after that.

10 What are the jobs and responsibilities of the  
11 risk manager?

12 THE WITNESS: The risk manager is responsible  
13 for helping departments ensure that they have the  
14 appropriate policies in place such that they can carry  
15 out the business of their department within the  
16 University without undue risk so that they're minimizing  
17 any risk that they can, you know, like with rules and  
18 policies, et cetera.

19 And then also risk management involves  
20 purchasing insurance for those kinds of risk that you  
21 can't totally get rid of.

22 THE COURT: Is there any inherent conflict of  
23 interest between the two positions?

24 THE WITNESS: I don't think so, no.

25 THE COURT: When you hire, open parenthesis,



1 paid for services of, closed parenthesis, IP, can you be  
2 sure of his impartiality?

3 THE WITNESS: I think you can be as sure of  
4 that as you can with anything else that you do sound  
5 research for and try to use your best judgment.

6 THE COURT: What information was made available  
7 to Dr. Missett in the quote, black binder, close quote?

8 THE WITNESS: Complaints and maybe other  
9 faculty documents from the Dean's office.

10 THE COURT: Acting purely in an advisory  
11 capacity, why did Dr. Missett continue and be paid for  
12 -- paid to review the black binder after the May 20  
13 discussion and the ensuing discussion to move forward  
14 with Dr. Reynolds for the fitness-for-duty exam?

15 THE WITNESS: I don't remember at this time.

16 THE COURT: Quote, work performance  
17 evaluations, close quote, open parenthesis, provided to  
18 Dr. Reynolds, closed parenthesis, can you clarify if all  
19 favorable student evaluations were supplied?

20 THE WITNESS: Probably not all evaluations but  
21 summaries.

22 THE COURT: Mr. Katzenbach, have you follow-up  
23 questions?

24 MR. KATZENBACH: Yes.

25 /////

1 REDIRECT-EXAMINATION (RESUMED)

2 BY MR. KATZENBACH:

3 Q. Directing your attention to the student  
4 summaries, isn't it the case that it takes about three  
5 months or so for the summaries to be processed after the  
6 end of the semester?

7 A. I'm not sure how long it takes.

8 Q. All right. Are you aware whether or not you  
9 ever gave Dr. Reynolds copies of the June -- sorry --  
10 the spring 2008 semester student evaluation summaries  
11 for Dr. Kao?

12 A. I don't know.

13 MR. KATZENBACH: That's all I have. Thank you.

14 MR. VARTAIN: May I ask a few from here, your  
15 Honor?

16 THE COURT: Certainly.

17 RECROSS-EXAMINATION

18 BY MR. VARTAIN:

19 Q. EAP, that stands for?

20 A. Employee assistance program.

21 Q. One of the Jurors asked you the question to the  
22 effect of had the EAP ever been offered to Dr. Kao  
23 before June 18th, 2008. I want to follow-up on that.

24 What -- what, prior to June 18th, 2008, were  
25 the ways, if any, that the University publishes the EAP

1 to its employees such as Dr. Kao? In other words, in  
2 what ways would Dr. Kao have known how to access the  
3 employee assistance program?

4 A. At his benefits orientation when he was hired.  
5 Then also in a benefits statement that is done annually.

6 Q. What is that? What is the benefits statement  
7 that is done annually?

8 A. It's now -- it's actually online now. It's  
9 more than annual. It's now electronic. It's been paper  
10 at times. It lists all the benefits and dollar value  
11 with it and also explains what it is.

12 Q. So what in that statement that was sent to  
13 Dr. Kao annually gave him information about how to  
14 access the EAP?

15 A. There, it didn't say. It would be on the  
16 website. It said how to access it.

17 Q. On the University website?

18 A. On the University website, yes.

19 Q. So prior to June 18th, was the EAP information  
20 on the University website?

21 A. Yes.

22 Q. And if an employee wants -- in what page of the  
23 University website was the EAP access information?

24 A. Through the benefits page.

25 Q. And where is the benefits page located?

1           A. Under human resources.

2           Q. Are employees able to access EAP themselves, or  
3 do they have to contact a live body at the University's  
4 human resources office?

5           A. They can do it themselves. There's a phone  
6 number on the web page, or they can call our office and  
7 ask for the phone number for the EAP.

8           Q. Does a University employee have to disclose any  
9 private information to their supervisor or to the  
10 University human resources office in order for them to  
11 get mental health assistance from the University's  
12 employee assistance program?

13          A. No.

14          Q. Thank you.

15           THE COURT: Mr. Katzenbach, anything more?

16           MR. VARTAIN: I said thank you, but I have one  
17 more question.

18           THE COURT: I apologize.

19           MR. VARTAIN: That's okay. I said thank you.

20          Q. Did you give Dr. Missett that black binder of  
21 the faculty personnel file on Dr. Kao, et cetera, at or  
22 around the time of the May 20th meeting?

23          A. I believe so.

24          Q. When you gave it to him, was it with the  
25 understanding that he was to review that if he thought

1 it important to review it?

2 A. Yes.

3 Q. Did you ever instruct or in any way require him  
4 to review it?

5 A. Only if he felt it was important.

6 Q. Okay. The Juror had a question as to look back  
7 at his invoice when he billed when he reviewed it, it  
8 was already after you sent the letter to Dr. Reynolds to  
9 do the fitness for duty on Dr. Kao.

10 The question I have is: Was there any time  
11 where you told Dr. Missett that, A, you didn't want him  
12 or need him to review the binder any longer?

13 A. No. I think maybe those dates were wrong as  
14 far as the billing.

15 Q. By Dr. Missett's office?

16 A. Yes.

17 Q. But did you ever tell him, "Oh, I'm already  
18 done with you. I don't need you to review that stuff"?

19 A. No.

20 Q. While you were trying to get Dr. Kao to go for  
21 the fitness-for-duty evaluation there in that summer,  
22 were you having any ongoing discussions with  
23 Dr. Missett?

24 A. I don't believe so.

25 Q. So he didn't know what was going on between

1 Dr. Kao, Dr. Reynolds and the University? He sort of  
2 had been put in suspended animation; would that be fair?

3 A. Yes.

4 Q. But you had never told him, "Don't read it"?

5 A. No.

6 Q. And you don't know when he actually read the  
7 binder; is that correct?

8 A. That's correct.

9 MR. VARTAIN: No further questions, your Honor.

10 THE COURT: All right. Further questions,  
11 Mr. Katzenbach?

12 MR. KATZENBACH: If I might, your Honor, may I  
13 stand here.

14 THE COURT: Sure.

15 MR. KATZENBACH: Okay.

16 FURTHER REDIRECT EXAMINATION

17 BY MR. KATZENBACH:

18 Q. Isn't it the case that the information in the  
19 black binder given to Dr. Missett was a copy of  
20 Dr. Kao's formal complaint and addendum to formal  
21 complaint?

22 A. I believe that was part of it.

23 Q. Can you think of any other documents that were  
24 part of the black binder that were not those two  
25 documents?

1           A. I don't recollect what was exactly in the black  
2 binder.

3           Q. Okay. Did Dr. Missett prepare a report  
4 summarizing his analysis of the black binder?

5           MR. VARTAIN: Objection. Asked and answered.

6           MR. KATZENBACH: You're correct. You're  
7 correct. It has been asked and answered.

8           THE COURT: The question is withdrawn.

9           MR. KATZENBACH: Q. Yes. Do you recall  
10 discussing at any time with Dr. Missett anything  
11 concerning what Dr. Missett found in the black binder  
12 that was of interest to him?

13          A. No.

14          MR. KATZENBACH: Thank you. That's all I have,  
15 your Honor.

16          THE COURT: Mr. Vartain, anything further?

17          MR. VARTAIN: Not in the Plaintiff's case, your  
18 Honor. I reserve the right to recall the Witness if  
19 need be in the defense case.

20          THE COURT: When you put on your case, sure.

21          All right, may Ms. Peugh-Wade be excused?

22          MR. VARTAIN: Yes, your Honor.

23          MR. KATZENBACH: Yes, your Honor.

24          THE COURT: Ms. Peugh-Wade.

25          THE WITNESS: Thank you.

1 THE COURT: Thank you very much. You're free  
2 to go.

3 (Witness excused.)

4 THE COURT: Ladies and gentlemen, remember the  
5 admonition. Do not form or express any opinion on this  
6 case until it's finally submitted to you for your  
7 decision. Do not discuss among yourselves or with  
8 others until that time.

9 Please be back in your places at 2:35 according  
10 to the courtroom clock.

11 (Recess taken: 2:27 p.m. - 2:44 p.m.)

12 THE COURT: Jurors and Alternates are all  
13 present. Counsel for all sides are present. Plaintiff  
14 is personally present. I apologize, ladies and  
15 gentlemen, for keeping you waiting. I hated that when I  
16 was on jury duty.

17 The problem is that Dean Turpin who is the next  
18 witness is seriously ill in bed. So what we worked out  
19 is the following: We will put off Plaintiff resting and  
20 allow the defendant to go ahead with beginning of its  
21 case. And then hopefully Dean Turpin is well enough to  
22 come and testify, finish up the plaintiffs case on  
23 Tuesday.

24 Do I have that right, Counsel?

25 MR. VARTAIN: I think what we agreed was



1 Plaintiff does rest with the exception of that one  
2 witness, Provost Turpin's testimony.

3 THE COURT: One witness, one item of evidence.

4 MR. VARTAIN: And the filing of one exhibit  
5 that Mr. Katzenbach is going to do after the Jury goes  
6 home. We'll do it then, but Plaintiff does rest subject  
7 to the testimony.

8 THE COURT: Save for those two --

9 MR. VARTAIN: And that one exhibit.

10 THE COURT: Is that right, Mr. Katzenbach?

11 MR. VARTAIN: The one witness being  
12 Provost Turpin.

13 MR. KATZENBACH: That is correct.

14 THE COURT: The Plaintiff rests subject to  
15 concluding the case with the two matters we discussed,  
16 and it's time for the defense case.

17 MR. VARTAIN: Yes, it is. And you want to  
18 start that right now right, your Honor?

19 THE COURT: That's what I thought we were going  
20 to do.

21 MS. ADLER: The University calls Tristan  
22 Needham.

23 THE CLERK: Please raise your right hand.

24 TRISTAN NEEDHAM,  
25 called as a witness by the Defense, after being first

1 duly sworn, was examined and testified as follows:

2 THE WITNESS: I do.

3 THE CLERK: Please be seated. State your name  
4 and spell it for the record.

5 THE WITNESS: Tristan Needham, T-r-i-s-t-a-n.  
6 Needham is N-e-e-d-h-a-m.

7 THE COURT: Mr. Vartain, excuse me. Linda  
8 Adler, Ms. Adler, you may inquire.

9 MS. ADLER: Thank you, your Honor.

10 DIRECT EXAMINATION

11 BY MS. ADLER:

12 Q. Are you currently employed by the University?

13 A. I am.

14 Q. How long have you worked there?

15 A. Since 1989.

16 Q. All right. And can you tell me a little bit  
17 about what you teach at the University? What do you do?

18 A. I teach mathematics, but I teach all kinds of  
19 different courses in mathematics.

20 Q. Okay. Could you tell me a little bit about  
21 your background?

22 A. Yes. I studied as undergraduate at Oxford. I  
23 also did my doctorate at Oxford working with Sir Roger  
24 Penrose on the geometry of collapsing stars to make  
25 black holes.

1 Q. Have you ever held an administrative position  
2 at the University?

3 A. I have. I was Associate Dean of Sciences  
4 starting in 1999, I think it was. And I think I stepped  
5 down in 2004.

6 Q. And what happened when you stepped down in  
7 2004?

8 A. I returned to the mathematical team.

9 Q. Do you currently hold any administrative  
10 position at the University?

11 A. No.

12 Q. Okay. Can you please tell me a little about  
13 the math department, what the atmosphere is like, the  
14 size of the department?

15 A. Sure. Any particular era though?

16 Q. Currently.

17 A. Currently. Okay.

18 I guess there's about ten of us. All of our  
19 offices are right together in two alcoves basically on  
20 opposite sides of the hall. So we're all right on top  
21 of each other. And then there's a math office close by.

22 And it's an extremely -- I mean, remarkably  
23 friendly department. We're all really get along well  
24 together. I mean, some of us are greater friends than  
25 others. It's a very harmonious department, unusually

1 so. I mean, even at USF I think we stand out as being  
2 an unusually friendly department. Like we all watch the  
3 Super Bowl together.

4 Q. Now, do professors have to be able to work  
5 together outside the courtroom?

6 A. Oh, yeah. Absolutely. We're constantly  
7 collaborating with each other on revising curricula and  
8 designing new courses with other departments and just  
9 normal departmental affairs like department meetings and  
10 so on.

11 Q. Within the math department, are there regular  
12 meetings --

13 A. Yeah.

14 Q. -- that the professors attend?

15 A. Yes, there are.

16 Q. How often do those take place?

17 A. I think typically once a month.

18 Q. Okay. And are there committees that you serve  
19 on as professors in the math department?

20 A. Yes. Not necessarily tied to mathematics, but  
21 everybody is expected to serve on different committees  
22 at different times to help the workings of the  
23 University as a whole.

24 Q. Okay. And during your department meetings or  
25 your committee meetings, are you called upon to make

1 decisions affecting the math department and so on?

2 A. Yeah. Usually we don't even need a vote. I  
3 mean, sometimes if something is a little bit  
4 contentious, we would actually call a vote. Usually  
5 it's so informal that it's, it doesn't need to be voted  
6 on. It's a clear consensus of what the department wants  
7 to do next about whatever the issue is.

8 Q. Does that describe the process that you usually  
9 arrive at to reach decisions, consensus you mentioned?

10 A. Yes. It's usually a consensus.

11 Q. Okay. Can you give me an overview of what it  
12 has been like working with John Kao in the math  
13 department? I understand you first came to the  
14 University in 1991.

15 A. Yeah.

16 Q. Up to the start of the 2008 spring semester,  
17 which starts in January 2008.

18 A. So would you like me to start at the beginning?

19 Q. Yes.

20 A. Okay. Because it was very different at the  
21 beginning.

22 So when John first joined the department, he,  
23 he fit into this pre-existing harmony very well. It  
24 sort of happened at the time that we all lived in a  
25 similar part of town, and we were all friends with each

1 other. I was friends with John. He came to my house.  
2 I went to his. We had drinks pretty regularly on  
3 Fridays after work at one of our houses. We sort of  
4 rotate.

5 One thing that John and I did together pretty  
6 early on, he went to Princeton, and I went to Oxford.  
7 Both of them have a tradition of afternoon tea, of  
8 Math Tea. At Oxford, they have tables where you can  
9 actually write on the tables. They're like boards. You  
10 clean after tea.

11 So John and I thought it would be a splendid  
12 idea to do the same thing at USF. The two of us went  
13 off to see Dean Nell and got money to buy furniture,  
14 sofas, comfortable sofas for students to sit on. We  
15 went shopping together for sofas.

16 Then we launched Math Tea. It's been going on  
17 nonstop for almost 20 years now.

18 Q. Okay.

19 A. So it was a completely happy environment, and  
20 John was part of all of that. I don't know what  
21 happened. It was very gradually at first, and then very  
22 rapidly towards the end. He started behaving in strange  
23 ways and being less friendly and showing anger towards  
24 us and to me in particular.

25 And then the last semester he was there, it

1 was -- I hated going to work. I had never felt that way  
2 before. And several of us felt that way, like we  
3 started shutting our doors at work we. Always used to  
4 keep our doors open so students could wander in to ask  
5 questions. But we felt nervous.

6 So we were shutting our doors and working at  
7 home as much as possible instead of being on campus all  
8 the time. It was all just because John was creating  
9 such an incredibly kind of tense atmosphere at work.

10 Q. Is there a particular event you can think of in  
11 looking back where you noticed your relationship with  
12 John Kao started to change?

13 A. I think from, this is speculation, but it seems  
14 like --

15 MR. KATZENBACH: Your Honor, I'm going to  
16 object if it's just speculation.

17 THE WITNESS: Well, okay.

18 THE COURT: The objection is sustained.

19 You may continue your answer. Just leave out  
20 speculation.

21 THE WITNESS: I know of one concrete incident  
22 that I know made him angry at me, but I couldn't believe  
23 how long he managed to stay angry at me over something  
24 so trivial. That was -- I've forgotten the year. I  
25 think it was 2000.

1           There was an incident where we were supposed to  
2 be delivering a math course for another program, not at  
3 USF but downtown, CCAC. And this was when I was  
4 Associate Dean of Sciences.

5           And unbeknownst to me, the math department,  
6 Paul Zeitz at the time was the chair, had agreed to let  
7 them teach the course for themselves instead of us  
8 delivering it. And my bosses were pretty mad about it.

9           Father Lucas who set up this program was  
10 particularly livid. And he's an important figure at the  
11 University. The Jesuits still run the place. And he  
12 had set up this program. And he, in particular, sort of  
13 demanded that I write a fairly stern letter to the chair  
14 of the math department, to Paul Zeitz, which I did.

15           Although I called Paul before I sent the  
16 letter, and I said, "Sorry buddy. My bosses tell me I  
17 have to write this letter, you know, saying we can't  
18 screw up like this again. We have to deliver the math  
19 course for CCAC."

20           I copied Dr. Kao on it. The letter was not  
21 addressed to him. And in fact, the letter said some  
22 pretty nice things about the work he had been doing.  
23 Somehow he got totally the wrong end of the stick and  
24 thought that he was being criticized by me and  
25 immediately filed some kind of grievance with the union.



1 And I was totally stunned and taken aback.

2 I'm sure it's in the file somewhere. There are  
3 e-mails I wrote to John within days, you know, abject  
4 apology. "I had no intention of offending you. This  
5 letter wasn't addressed to you at all." And I spelled  
6 out that I didn't think that the University's position,  
7 speaking for the University, John had done absolutely  
8 nothing wrong.

9 I also just apologized on a human level. And I  
10 thought that that was going to be the end of it. In  
11 fact, it was the end of it in terms of sort of formal  
12 thing. He wrote some kind of formal letter saying that  
13 he was satisfied now, and that the matter was over.

14 But clearly, it wasn't over for him because  
15 when I came back to the faculty several years later --  
16 there was nothing in between that incident and me coming  
17 back that I can recall that involved John. When I came  
18 back to the faculty, I found him being, you know, from  
19 the get-go, really frosty.

20 And every morning -- our offices were right  
21 next door to each other with an adjoining wall. Every  
22 morning I said, "Good morning, John." I tried to sort  
23 of break the ice and get back to normality. And he  
24 would just glare at me; never would exchange a single  
25 pleasantry. I never gave up trying, literally till the

1 last semester, I never gave up trying to be civil and  
2 polite. I got nowhere.

3 The speculation part was that I can't imagine  
4 what else he was holding a grudge against me for except  
5 for that one incident.

6 MS. ADLER: Q. Does that describe how you  
7 felt; he was harboring a grudge against you?

8 A. Yeah.

9 Q. Okay. Back in 2000 when you were aware that  
10 Dr. Kao was unhappy with the letter and filed a  
11 complaint, did you report to the administration or  
12 anyone at the University that you were afraid of him?

13 A. No, not at that time.

14 Q. Were you afraid for your safety of Dr. Kao in  
15 2000?

16 A. No, not at all then.

17 Q. Okay. Now, I want to talk about the 2008  
18 spring semester, which began January of 2008.

19 If you could describe for me generally based on  
20 your observations, how would you describe his behavior  
21 during that semester?

22 A. We're talking about the last semester spring?

23 Q. The 2008 spring semester.

24 A. I mean, even before that semester, there had  
25 been a deterioration in that he was more aggressive

1 looking. He looked angry more often. Particularly in  
2 that last semester, it developed much more rapidly. I  
3 became really quite nervous.

4           Every day passing him in the hallway, his face  
5 would become contorted with anger in quite a sort of  
6 scary way and very clearly directed at me. And I just  
7 became nervous being anywhere near him being on campus  
8 at all.

9           Q. What was the level of anger that you sensed  
10 that he had against you?

11          A. It just seemed like white hot rage out of  
12 nowhere. I mean, every day.

13          Q. So this wasn't just a few times in the  
14 semester?

15          A. No, no. It was every day passing him in the  
16 hallway. And even then, I was saying, "Good morning,  
17 John," and but I was greeted with, you know, just fury  
18 in his face.

19          Q. Okay. In 2008, the same semester now I'm going  
20 to be focusing on, were you serving on any committees in  
21 the department?

22          A. I was on the search committee.

23          Q. Okay.

24          A. For a new faculty member. I've been on pretty  
25 much every search committee.

1 Q. Okay. And who was the faculty member that was  
2 ultimately hired in that search?

3 A. At that point, it would have been Cornelia  
4 Van Cott.

5 Q. Okay. And did you attend all the meetings?

6 A. Yes, I did.

7 Q. Do any of them stand out in your mind in  
8 particular?

9 A. Certainly as far as John is concerned, of  
10 course we had all the meetings just of the search  
11 committee. It's a pretty lengthy process. You  
12 basically give up your whole Christmas vacation to work  
13 on reading these hundreds of files and going to  
14 interview candidates.

15 After all of that was over and we narrowed  
16 things down and invited the finalists to campus to give  
17 lectures, we had picked who we wanted to hire I think at  
18 that meeting I'm thinking of. And so we presented --  
19 it's more or less a formality. You present who you want  
20 to hire to the rest of the department. And so that was  
21 the purpose of the meeting.

22 And then John suddenly -- I mean, just suddenly  
23 got really angry and started shouting about how we  
24 hadn't advertised the search, hadn't conducted the  
25 search properly. And he, he started -- he stood up, and

1 he was shaking with anger. I mean, all just like that.  
2 He started throwing these pieces of paper across at us.

3           And he said, "I've done all these calculations  
4 that prove that what you've done is wrong and that  
5 you're discriminating," and so on and so forth. And  
6 people did try and get him to calm down and say, "You  
7 know, stop shouting and sit down." And he just seemed  
8 deaf. When he goes in a rage like that, it's not the  
9 first time I've seen it, it's as though he can't hear  
10 anything.

11           And I remember Professor Finch who was on the  
12 search committee just he was clearly angry but totally  
13 professional and quiet in what does. He said to John,  
14 he said, "This is not the purpose of this meeting to  
15 discuss how we advertise the search or whatever. The  
16 purpose of the meeting was to present the person we  
17 wanted to hire."

18           And I also remember Professor Zeitz being sort  
19 of very cool under fire. I was very impressed by him  
20 that day that he said to John, "You know, however you  
21 feel about the search, you know, who we want to hire, I  
22 hope when they get here, you're going to treat them with  
23 courtesy and respect and be professional."

24           He said -- everybody was speaking quietly and  
25 normally except for John yelling. And that seemed to be

1 the one thing that John actually heard and responded to.  
2 He responded in some kind of an aggressive, sarcastic  
3 way. I don't remember the exact words, but something  
4 like, "I'll treat the new person with the same respect  
5 you have shown me."

6 It was something like that.

7 Q. Okay.

8 THE COURT: Go ahead.

9 THE WITNESS: Then I can't remember how it  
10 ended, whether he stormed out of the meeting. That  
11 maybe was another meeting I'm thinking of. I think he  
12 stormed out of that meeting.

13 THE COURT: When the Witness motioned throwing  
14 papers, he illustrated with a Frisbee-flinging type  
15 motion.

16 THE WITNESS: Yes.

17 MS. ADLER: Q. I want to go over a few of the  
18 points you just mentioned.

19 You snapped your fingers. What did you mean by  
20 that?

21 A. I just mean when John would lose his temper,  
22 there would be almost no precursor. It would be one  
23 minute he was normal and the next he was in a blind  
24 rage, I mean, to the point there were a couple of times  
25 where he was literally foaming at the mouth like a rabid

1 animal or something. Quite frightening to look at.

2 Q. You said he was very angry. Could you describe  
3 for me a little bit more why you thought that, what his  
4 face looked like?

5 A. He was standing up, his whole body sort of  
6 rigid and shaking and yelling and leaning over the table  
7 towards us as he threw these papers across the table at  
8 us. Yeah, it was pretty intimidating.

9 Q. Okay. You mentioned people tried to talk to  
10 him about how he was behaving?

11 A. Yes. They asked him to stop yelling and sit  
12 down. As I mentioned, Professor Finch specifically said  
13 that was not the purpose of the meeting.

14 Q. Okay. How did he respond to people talking to  
15 him about his behavior?

16 A. He kept yelling.

17 Q. Okay. Did it help at all?

18 A. No.

19 Q. Okay. Did you look around and see the faces of  
20 the other professors who were at the meeting?

21 A. Yes. I mean, we were all shocked at the sudden  
22 outburst. And also I think as a member of the search  
23 committee, I can certainly speak for how I felt and I  
24 think it's how the other members felt, we felt sort of  
25 insulted. We worked so hard and found somebody so good

1 at the end of the search, and suddenly at the very end  
2 of the search to have the whole process questioned. I  
3 think we felt sort of offended that our good faith,  
4 nondiscriminatory search had found a woman at the end  
5 was being questioned like that.

6 Q. And what about the substance of what he was  
7 saying? Was there anything about what he was saying  
8 that stood out to you or --

9 A. I honestly don't remember him making any kind  
10 of rational point.

11 Q. Can you think of an example of an irrational  
12 point he made?

13 A. He was talking about these statistical  
14 calculations he had done with P tests. He kept saying,  
15 "I've been up all night calculating P values."

16 Q. And what about that struck you as --

17 A. I just didn't think any kind of a statistical  
18 analysis was relevant when you're dealing with all these  
19 individual gifted human beings that you're searching  
20 through. I mean, it's a difficult and unscientific  
21 process, the process of finding the best mathematician  
22 that you can.

23 We worked very hard to try and find the  
24 smartest, best teacher, regardless of color, gender,  
25 anything. We don't care about any of that. We want the



1 best mathematician. And we found a really good one.

2 Q. As a fellow mathematician, how did you view  
3 his --

4 A. I didn't think they were remotely relevant. I  
5 don't think P values had anything to do with the  
6 discussion.

7 Q. Okay. How did you evaluate the rationale or  
8 the logic of what he was saying?

9 A. I thought it was completely irrational.

10 Q. How did that make you feel that he was being  
11 completely irrational?

12 A. I mean, I found it disturbing.

13 Q. Why did you find it disturbing?

14 A. Because mathematicians are supposed to be  
15 supremely rational beings. That's our trade. And his  
16 outburst of anger and his reasons for criticizing the  
17 search, none of it seemed to make any sense whatsoever.

18 Q. Based on your observations, how did you -- what  
19 did you think of his ability to control his emotions at  
20 this meeting?

21 A. Nonexistent. I mean, we asked him to stop  
22 yelling and sit down and be calm and talk in a  
23 professional manner, but he wouldn't hear us. Couldn't  
24 hear us.

25 Q. Okay. Prior to this meeting that we're talking

1 about here in this spring 2008 semester, do you recall  
2 the month of that meeting actually?

3 A. Probably -- it's usually around the same time  
4 each year. So this year it was February. It was  
5 probably February at that time.

6 Q. Had you ever seen Dr. Kao behave in this way at  
7 another meeting prior to that?

8 A. I had seen him lose his temper that quickly and  
9 almost to that degree before.

10 Q. Had you ever seen him shaking and in the white  
11 hot rage that you described --

12 A. Yes.

13 Q. -- at this meeting before?

14 A. Yes. I had seen it. One -- sorry. One  
15 occasion I'm thinking of right now was actually that  
16 semester, but it might have been later. I can't  
17 remember what the sequence was. There was one where we  
18 were discussing who should be chair of the -- the next  
19 chair of the department.

20 Q. Okay. I'm asking about prior semesters in  
21 prior years, had you ever seen Dr. Kao behaving in the  
22 way he did at this meeting?

23 A. I had seen him losing his temper at meetings,  
24 and there was at least one other meeting where he walked  
25 out in a huff.

1 Q. Had you ever seen him with the physical  
2 symptoms that you had described, shaking, prior to this?

3 A. Yes. I had seen another occasion where he  
4 was literally there was spit in his mouth. You could  
5 see him like foaming at the mouth.

6 THE COURT: The Witness pointed to the corners  
7 of his mouth.

8 MS. ADLER: Q. Have you ever seen another  
9 faculty member behave as Dr. Kao had a department  
10 meeting?

11 A. Never.

12 Q. Were you -- how did you feel when you saw  
13 Dr. Kao behaving like this at this meeting?

14 A. Disturbed, frightened, worried about the  
15 future.

16 Q. Had you ever been frightened by Dr. Kao's  
17 behavior before this meeting personally frightened?

18 A. Yeah. I'm trying to remember, but the incident  
19 with him bumping me and other faculty members in the  
20 hallway, I can't remember if that came before or after  
21 this particular meeting we're talking about. It was  
22 definitely that semester that it happened.

23 Q. Okay.

24 A. And can I talk about that incident?

25 Q. I'll ask you about that.

1 A. Okay. Great.

2 Q. Definitely. And what was it that caused you to  
3 be personally afraid of Dr. Kao after this meeting?

4 A. I just felt that he was completely unable to  
5 control his emotions, and he already made it very clear  
6 day to day quite aside from this special occasion that a  
7 lot of his anger was directed at me personally. And so  
8 I was fearful, I mean, physically fearful of him.

9 Q. And did anyone who was at that meeting with you  
10 talk to you right after the meeting about what had  
11 happened at the meeting?

12 A. I don't remember who specifically, but we  
13 all certainly, I mean, we all talked about how upsetting  
14 it was.

15 Q. Do you recall specifically speaking to -- who  
16 was at the meeting with you?

17 A. The whole department.

18 Q. Okay. Would that include Paul Zeitz and Steve  
19 Yeung and Peter Pacheco?

20 A. Yes. All of them.

21 Q. Okay. Do you recall anyone approaching you  
22 after that meeting?

23 A. I don't -- I don't remember. I think we just  
24 stayed in a group after the meeting was officially over  
25 and just talked about the explosion and how disturbing

1 it was.

2 Q. Okay. And you mentioned another meeting that  
3 -- where who the new chair was going to be discussed was  
4 raised. What happened then?

5 A. Yeah.

6 Q. What happened then? This is the same semester  
7 the spring of 2008?

8 A. That's right. It was the same semester. I  
9 think that must have been after the faculty search  
10 meeting.

11 Q. Would that kind of meeting take place at the  
12 end of the semester?

13 A. That would make sense.

14 Q. Okay.

15 A. And so being department chair is really not  
16 that much fun. And so usually we have to sort of cajole  
17 somebody into doing it. You don't get more money, but  
18 you get let off of teaching one course. That's the only  
19 incentive. But most people don't want to do it.

20 And Peter Pacheco was the chair at the time and  
21 was stepping down, going on sabbatical. We hadn't quite  
22 got our ducks in a row yet as to who was going to  
23 volunteer to be the next chair. And we had this meeting  
24 to discuss it, and to everybody's surprise, without any  
25 previous discussion of this possibility, John

1 interjected and said, "Well, I volunteer to be chair."

2           And we were all sort of stunned that he would  
3 do that. And secondly, we were desperately trying to  
4 think how could we get out of this because he's already  
5 degenerated so badly, there's no way on earth any of us  
6 would vote him as chair.

7           As I mentioned, normally, we do all these  
8 things by consensus. Here, we resorted to bureaucracy  
9 as the way out of appointing him chair and said, "Oh, we  
10 have to have a ballot," blah, blah, blah. And so that's  
11 how we sort of stalled during the meeting so as not to  
12 appoint him a chair.

13           And I think -- I mean, he's a very smart guy.  
14 He, of course, realized what we were doing was because  
15 we didn't want him to be chair. And he got angry, and  
16 I'm pretty sure that was one of the meetings that he  
17 stormed out after it became clear that we didn't want  
18 him to be chair.

19           Q. All right. What was it about his behavior that  
20 made you say he was angry?

21           A. I think that was another -- this might have  
22 been another one of the occasions you could actually see  
23 him rigid with anger, like white knuckles then the  
24 foaming at the mouth.

25           Q. Okay. And did anyone say anything rude to

1 Dr. Kao?

2 A. No.

3 Q. Okay. Did anyone insult him?

4 A. No.

5 Q. Okay. Did anyone say anything unkind to

6 Dr. Kao?

7 A. No.

8 Q. And what was the reason that nobody wanted him  
9 to be chair?

10 A. Because already by that --

11 MR. KATZENBACH: Objection. Speculating as to  
12 why other people didn't want something.

13 THE COURT: Sustained. Next question.

14 THE WITNESS: Well, I -- I can.

15 THE COURT: Wait for the next question.

16 MS. ADLER: Q. What was the reason you did not  
17 want Dr. Kao to be chair?

18 A. The reason I did not and the stated reason of  
19 other people, so this is not speculation.

20 MR. KATZENBACH: Objection, hearsay.

21 THE COURT: Sustained.

22 THE WITNESS: Okay. My reason for wishing him  
23 not to be chair was the behavior I've already described  
24 to you, that the whole semester he had been acting in  
25 this incredibly angry, frightening way.

1 MS. ADLER: Q. All right. At this point in  
2 time at this meeting, this is toward the end of semester  
3 you said?

4 A. Correct.

5 Q. And what do you mean when you said "a number of  
6 events had happened already"?

7 A. So principally what I was talking about the  
8 daily interactions with him seeing him so angry at me  
9 for no apparent reason all the time.

10 Q. And the meeting that you just talked about in  
11 February regarding Cornelia Van Cott that had already  
12 taken place?

13 A. Yes.

14 Q. As of the time of this chair meeting as well;  
15 is that correct?

16 A. That's correct.

17 Q. Okay. So we've talked about some of the  
18 meetings that you were present at during this spring  
19 2008 semester.

20 Were there any interactions, one-on-one  
21 interactions that you personally had with Dr. Kao that  
22 stood out in your mind that semester?

23 A. There was the incident I was alluding to before  
24 where he bumped me. We were walking down the corridor  
25 in opposite directions outside of the math offices. And



1 sometimes the corridor does get busy in-between classes.  
2 There can be loss of students jostling about and so on.

3 But if classes are going on, everything is  
4 quiet, and the hallway is pretty much empty. I was on  
5 one side of the hallway, and John was on the other side  
6 of the hallway walking down. And there's absolutely no  
7 reason we should ever come close to each other.

8 And suddenly, I was reading a piece of paper so  
9 I was looking down at this piece of paper. I saw that  
10 John was walking towards me. I just kept looking at the  
11 piece of paper. The next thing I knew, I was hit quite  
12 forcefully on the shoulder by him. Not hard enough to  
13 really hurt or knock me over or anything. But pretty  
14 strong bump. And I was sort of stunned, I mean.

15 And I looked around. He just kept going and  
16 disappeared around the corner and didn't say sorry or  
17 anything. It was more bizarre than immediately  
18 frightening. It became frightening to me later.

19 Q. You said he didn't say anything to you. Did he  
20 do anything to acknowledge what had happened?

21 A. No. There was no acknowledgment at all. No  
22 apology, no nothing. He just kept going.

23 Q. Would you expect if it was an accident, the  
24 person would apologize or at least say something?

25 A. I certainly would.

1 Q. And how many -- in all the years you've been at  
2 USF, has that happened to you before? Have you bumped  
3 into someone like that?

4 A. No. It's never happened.

5 Q. Has Dr. Kao ever bumped into you like that  
6 previously?

7 A. No.

8 Q. Okay. Had you ever known Dr. Kao to be clumsy  
9 previously?

10 A. No. I mean, on the contrary. He's an expert  
11 in martial arts and, you know, has very good motor  
12 controls.

13 MR. KATZENBACH: Objection, your Honor. He's  
14 speculating. He has no foundation.

15 THE COURT: Motion to strike inherent, and the  
16 objection is granted.

17 MS. ADLER: Q. You mentioned that later you  
18 found it frightening. What do you mean by that?

19 A. I mean that at the time that it happened, I  
20 thought it was really strange and rude not to apologize  
21 for it. Even if it had been an accident, he should have  
22 apologized.

23 But the thing that really worried me was  
24 that -- I can't remember what it was, but that same  
25 semester I found out that he had done the same thing to

1 Professor Zeitz twice I think and also he had attempted  
2 to do the same thing to Professor Yeung, although  
3 Professor Yeung saw him coming and jumped out of the  
4 way, I think --

5 MR. KATZENBACH: Objection.

6 THE WITNESS: -- before he got bumped.

7 MR. KATZENBACH: Your Honor, objection. Move  
8 to strike. No foundation. Appears hearsay.

9 THE COURT: Motion to strike is granted.

10 MS. ADLER: Q. So at some point in time, you  
11 said you compared notes with your colleagues?

12 A. Right. When I compared notes with my  
13 colleagues, then I became more than puzzled. I became  
14 genuinely frightened this was a pattern. And I went to  
15 the Dean to report it right away.

16 Q. What do you mean that it was a pattern?

17 A. That he was doing it to several people that he  
18 had shown animosity toward in the past.

19 Q. And what was this a pattern of?

20 A. A pattern of what frightened me. I knew how  
21 angry he was. It was clear. But to me, there was a big  
22 difference in crossing the line between the mental world  
23 and the physical world. I thought to myself if he can  
24 bump me, what's to stop him from shooting me.

25 Q. You're saying he seemed to be crossing some

1 kind of line?

2 A. I mean, it's a clear-cut line between how you  
3 feel and what you actually physically do in the world.

4 Q. Okay. What did your colleagues tell you, Paul  
5 Zeitz and Stephen Yeung, when you compared notes? What  
6 did they say when you realized that?

7 MR. KATZENBACH: Objection. Hearsay.

8 MS. ADLER: Statement of mental state.

9 THE COURT: Ask the question again.

10 MS. ADLER: Q. What did Stephen Yeung tell you  
11 when you -- the three of you compared notes about your  
12 bumping or near-bumping incidents?

13 MR. KATZENBACH: Objection. Hearsay.

14 THE COURT: Sustained.

15 MS. ADLER: Same thing.

16 Q. How did Stephen Yeung appear to you when he was  
17 telling you about his near-bumping incident?

18 MR. KATZENBACH: Objection. Irrelevant.

19 THE COURT: Overruled.

20 THE WITNESS: He came to my office in  
21 connection with that incident and some other incident in  
22 the same semester and closed the door and told me how --

23 MR. KATZENBACH: Objection. About to relay  
24 hearsay.

25 THE COURT: Cut off the answer. Invite a new

1 question.

2 MS. ADLER: Statement of mental state.

3 THE WITNESS: Can I state he burst into tears?

4 THE COURT: Can you say what?

5 THE WITNESS: That he burst into tears in my  
6 office.

7 THE COURT: Yes.

8 MS. ADLER: Your Honor, if I may, it's a  
9 spontaneous statement that happened at the time, and  
10 it's also an exception to explain why it is that  
11 Dr. Needham reported what he reported.

12 THE COURT: All right, if you want to lay the  
13 foundation for admission under 1240 of the Evidence  
14 Code, you're welcome to try and do so.

15 MS. ADLER: Okay.

16 Q. So during the course of semester, did you  
17 report to anyone at the University the events that  
18 were --

19 A. Yes. I went to Associate Dean Brown, Brandon  
20 Brown, to tell him about the bumping incident and tell  
21 him why I was so very concerned about it.

22 Q. And if your reports to Associate Dean Brandon  
23 Brown, did you describe any incidents that had been told  
24 to you by other faculty of the department?

25 A. Yeah. I just described that the two other

1 faculty members, Paul Zeitz and --

2 MR. KATZENBACH: Hearsay.

3 THE WITNESS: -- Stephen Yeung had experienced  
4 the same bumping.

5 MS. ADLER: It's the exception to explain why  
6 it is that Dr. Needham took the action that he did and  
7 also a spontaneous statement.

8 THE COURT: Dr. Needham is not the declarant.  
9 So that exception doesn't fit.

10 MR. KATZENBACH: Move to strike the answer,  
11 your Honor.

12 THE COURT: Motion is granted. Next question.

13 MS. ADLER: Q. What did you report to Brandon  
14 Brown?

15 A. I reported --

16 MR. KATZENBACH: Objection. Hearsay.

17 THE COURT: I think so. Sustained.

18 MS. ADLER: Q. Did you have any conversations  
19 with Dr. Yeung where you discussed any of your concerns  
20 about Dr. Kao's behavior?

21 A. Yes, I did.

22 Q. And what was discussed in that conversation?

23 MR. KATZENBACH: Objection. Hearsay.

24 THE COURT: Overruled. The Witness may answer.

25 THE WITNESS: I can certainly report what I

1 said which was as a result of the bumping incident, I  
2 was extremely worried that John could result to real  
3 violence against all of us.

4 MS. ADLER: Q. Okay. Was there a retirement  
5 party that was held for the math professors in the  
6 spring 2008 semester?

7 A. Yes. It was specifically for Professor Finch  
8 who was retiring.

9 Q. Okay. And who organized that party or hosted  
10 it?

11 A. I volunteered to host the party because my  
12 house was the biggest one to fit people for the party.  
13 But it was actually in the name of the math department.  
14 It was paid for by the math department. And so all  
15 members of the math department were invited to it.

16 Q. Was this a University-sponsored event?

17 A. Yes, it was.

18 Q. Okay. And who was invited to the party?

19 A. So all of the math department, including  
20 Professor Kao.

21 Q. Why -- what time in the semester was this  
22 party? Was this towards the end of the semester?

23 A. It must have been towards the end of the  
24 semester. I don't remember the date.

25 Q. Okay. Why was Dr. Kao invited?

1           A.  Simply because he was a member of the math  
2 department.  If I had been throwing my own party, I  
3 would not have invited him.  But I had no choice.  I  
4 also invited Professor Wolf who hasn't attended a single  
5 social function in 20 years.

6           Q.  Did you have any observations of what  
7 Professor Kao's behavior was like at social settings,  
8 group settings like this previously?

9           A.  Previously?

10          Q.  Yes.

11          A.  Yes.  As I described in the early days, we, we  
12 had social events all the time at each other's houses,  
13 and that was all, that was during the good old days when  
14 John wasn't behaving that way.

15          Q.  What happened at this party?

16          A.  The one remarkable thing involving John, which  
17 I witnessed, was that he was talking with my wife.  And  
18 my wife had been asking how John's mother was because  
19 she heard through me that she wasn't well.  And instead  
20 of -- it was an innocent, solicitous question on the  
21 part of my wife.

22                 But John's reaction was instantaneous rage.  
23 From the moment she asked how John's mother was, he got  
24 in her face and very close to her and again rigid with  
25 anger and raised his voice and said, "How's your mother?"



1 How's your mother? How's your mother?" I think three  
2 times, but in a sort of startling frightening way.

3 My wife, I mean, she's only a few feet away.  
4 He left right after that. John Kao moved away from her  
5 right after that. And then my wife and I talked about  
6 what on earth had just happened.

7 Q. How would you rate Dr. Kao's level of control  
8 over his emotions at that party?

9 A. Again, he seemed out of control.

10 Q. How did that make you feel after that,  
11 witnessing that?

12 A. I wished he wasn't in my house.

13 Q. Where was your office located? I think you  
14 mentioned you were right next door during that semester.

15 A. That's correct.

16 Q. Okay. Did you share a common wall?

17 A. That's correct.

18 Q. Okay. During the semester that we've been  
19 talking about, the 2008 spring semester, did you observe  
20 any other behavior by Dr. Kao that you thought was  
21 unusual?

22 A. Yes. I had, as I mentioned, been trying to  
23 work at home as much as possible to avoid any contact  
24 with Dr. Kao. So sometimes if I needed a book or  
25 something for my research, I would come in in the

1 evening to try and retrieve it without meeting him. But  
2 then sometimes I would see that his door was open, you  
3 know, even long after work hours, and I -- I could see  
4 that his legs were up on something, and he was covered  
5 with a comforter like he was sleeping or he was sick or  
6 something.

7           But I, once I saw that, I deliberately didn't  
8 look further to look into the office to see what was  
9 going on. I didn't want to make eye contact with him.  
10 I saw that on more than one occasion and on the weekends  
11 as well he was there.

12           Q. Was this new behavior that you were seeing this  
13 semester?

14           A. Yes. I had not seen that before.

15           Q. Any other unusual behavior?

16           A. Beyond what I've already described, nothing is  
17 popping into my mind.

18           Q. Could you hear him ever from inside your  
19 office?

20           A. Oh, yes. That was a new thing that semester is  
21 he started this wild cackling laugh, both inside his  
22 office and when he was walking up and down the hall, for  
23 no apparent reason. Like just a really slightly  
24 deranged sounding laugh.

25           Q. Could you see some kind of explanation, like

1 was he walking and talking with someone?

2 A. No. He was walking on his own.

3 Q. So he's by himself, and you're hearing him you  
4 described this wild cackling?

5 A. Yes.

6 Q. Okay. And I think you said this is something  
7 that you had not seen in previous semesters?

8 A. No. That was new.

9 Q. Okay. Just to circle back and talk a little  
10 bit more about that February meeting that you talked  
11 about earlier where Cornelia Van Cott was discussed, if  
12 I recall correctly, you said there had been quite a bit  
13 of work put into that search at that point in time.

14 When did the search begin?

15 A. I'm not sure when the first advertisements are  
16 posted. All of the heavy-lifting of the search of  
17 reading the hundreds of files has to be done before the  
18 January meeting of the math societies. Every year,  
19 there's a joint meeting of the two major mathematical  
20 societies, and that is the principal place one  
21 interviews mathematicians for the job.

22 You have to have your preliminary short list  
23 ready before that. So we would have been working hard  
24 through December for sure.

25 Q. Is the search a process that takes many months?

1 A. Yes.

2 Q. And at the stage that the meeting took place  
3 that you testified about, was this an end stage of the  
4 search?

5 A. Sorry. The meeting?

6 Q. Exactly, in February.

7 A. The meeting was the very, very last step before  
8 the Deans who hold the power actually to get to approve  
9 the choice and make an offer.

10 THE COURT: Ladies and gentlemen, remember the  
11 admonition. Do not form or express any opinion on this  
12 case until it's finally submitted to you for your  
13 decision. Do not discuss among yourselves or with  
14 others until that time.

15 Please be back in your places at 3:40 according  
16 to the courtroom clock.

17 You need not sit perched there.

18 (Recess taken: 3:30 p.m. - 3:42 p.m.)

19 THE COURT: Jurors and Alternates are all  
20 present. Counsel for all sides are present. Plaintiff  
21 is personally present.

22 Ms. Adler, you may continue your inquiry.

23 MS. ADLER: Thank you, your Honor.

24 Q. We were just talking about how this was the  
25 final stage of the search at the time of this February

1 search committee meeting.

2           If the committee threw out the search as  
3 Dr. Kao suggested, what would that have meant for the  
4 department?

5           A. It would have meant that we would not have a  
6 professor that next year, and we would have to do  
7 another search the following year. It only happens once  
8 a year, the cycle.

9           Q. Would there have been enough time to go through  
10 the whole process of the search and find another  
11 replacement faculty member to start by the next fall?

12           A. Absolutely not.

13           Q. Okay. Was it an appropriate time to be  
14 bringing up how ads were placed back at the beginning of  
15 the search at this point in time?

16           A. No, not at all.

17           Q. Okay. Now, during the semester that we've been  
18 talking about, given the incidents that you described,  
19 the meetings, the bumping and the daily anger that you  
20 you could see from Dr. Kao directed at you, how did that  
21 affect you?

22           A. I felt extremely uneasy being on campus. I  
23 love my job, and I love it again now. But, but during  
24 that semester, I just didn't want to be there. I had to  
25 teach my classes, of course. But I tried to go home as

1 much as I could. And even with office hours and so on,  
2 I tended to keep my door shut unless I had to have it  
3 open.

4 Q. Had you previously kept your door open?

5 A. Yes, I had. And my colleagues had. And they,  
6 they were shutting their doors too.

7 Q. Okay. How did you feel about coming to work  
8 every day?

9 A. As I said, I sort of dreaded it, and for this  
10 one reason alone. Everything else in the math  
11 department was as good as it had ever been. I was still  
12 as good friends with the rest of them as I had ever  
13 been.

14 Q. You mentioned keeping your door shut.

15 Was there anything you did differently going  
16 about your business at the University as a result?

17 A. I mentioned already about going home to do work  
18 rather than being on campus. Do you mean something  
19 beyond that?

20 Q. So you would previously whereas you would have  
21 stayed on campus or be in your office, you chose to work  
22 from home; is that correct?

23 A. That's correct.

24 Q. Okay. And -- okay. And what about your  
25 family? Was there an impact on your family?

1           A. Yes. My, my wife was quite scared on my  
2 behalf. She talked about it quite often.

3           Q. And what kinds of things did she talk -- did  
4 you discuss?

5           A. The threat of me being --

6           MR. KATZENBACH: Objection, your Honor.  
7 Hearsay.

8           THE COURT: Sustained.

9           MS. ADLER: Q. What kinds of things did you  
10 tell your wife?

11          A. I told her that I was physically afraid of him  
12 now during that semester.

13          Q. Did you ever think about during that semester  
14 confronting Dr. Kao about how you felt about his  
15 behaviors?

16          A. I never, I never entertained the idea seriously  
17 because he demonstrated time and time again an inability  
18 to listen to rational discussion.

19          Q. Okay. And was there any other reason that you  
20 chose not to speak to him about that?

21          A. I was afraid. I was afraid of him and afraid  
22 of provoking further anger by attempting to talk to him.  
23 I really thought it would do no good.

24          Q. Did you feel you could predict the kind of  
25 things that would cause an outburst by Dr. Kao?

1           A. No. I really, I really didn't. It seemed like  
2 the smallest thing could set him off like the incident I  
3 described with my wife with him yelling at her. Just  
4 like that.

5           Q. Okay. Now, you mentioned that you went to  
6 Associate Dean Brandon Brown with some of your concerns  
7 the spring semester; is that correct?

8           A. That is correct.

9           Q. Did you speak to him more than once?

10          A. I believe I talked to him more than once.  
11 Certainly I talked to him about the bumping, and there  
12 may have been another time I expressed the same kinds of  
13 concerns for physical safety of myself and my  
14 colleagues.

15          Q. Did you tell him that you were afraid of  
16 Dr. Kao?

17          A. I did.

18          Q. Did you tell him you felt personally  
19 threatened?

20          A. I did.

21          Q. At some point in the semester, did you speak to  
22 anyone else in the University administration?

23          A. I was called by Martha Peugh-Wade, and she  
24 asked me and some of my colleagues to go and meet with  
25 her in her office to be interviewed at length about



1 Dr. Kao.

2 Q. Okay. And what kinds of things did you --  
3 first of all, did you have any concerns about talking to  
4 Martha Peugh-Wade about Dr. Kao?

5 A. No, not really concerns. I didn't know what  
6 was going on. But I was glad that the University was at  
7 least investigating what I reported to Dean Brown. No,  
8 I wasn't concerned. I wasn't concerned.

9 Q. Did you have any concern about it becoming  
10 known that you had reported some complaints about  
11 Dr. Kao?

12 A. I was concerned about confidentiality, yes. I  
13 was concerned that if Dr. Kao found out that we were  
14 telling the administration about his behavior, that he  
15 might then be pushed into some kind of physical  
16 violence. Yes, I was worried about that.

17 Q. Did Martha provide you with any kind of  
18 assurance?

19 A. I believe she did.

20 Q. Okay. And what did you tell Martha Peugh-Wade?

21 A. Honestly, I really don't remember very many  
22 details. She asked me a lot of questions, and I tried  
23 to answer truthfully about what was going on with  
24 Dr. Kao. But I don't remember what kinds of questions  
25 she was asking.

1 Q. Do you recall telling her about the constant  
2 level of anger that you felt towards Dr. Kao?

3 A. That Dr. Kao felt towards me?

4 Q. Towards you, yes.

5 A. Yes. I did tell her about that.

6 Q. Did you tell her you were afraid of Dr. Kao?

7 A. I'm sure I did.

8 Q. Did you tell her you felt personally threatened  
9 by Dr. Kao?

10 A. I'm sure I did.

11 Q. Okay. Did you tell her about the bumping  
12 incident?

13 A. I don't recall.

14 Q. Okay. Did you ask Martha Peugh-Wade to help  
15 you and your colleagues?

16 A. Yes, I did. And I also, I mean, it was clear  
17 from the fact that we were being interviewed that  
18 something was afoot, but I didn't know what the  
19 University was planning. But I did specific -- this is  
20 the only part of the conversation I actually remember is  
21 asking her if the University was about to take some kind  
22 of action against Dr. Kao, that, if possible, could they  
23 please give us some advance warning so the rest of us  
24 could stay away from campus in case he went ballistic  
25 and actually went on some kind of rampage and attacked

1 people.

2 Q. Did you ask the University to instruct  
3 Professor Kao to have a fitness-for-duty evaluation?

4 A. No.

5 Q. Did you instruct the University to fire  
6 Dr. Kao?

7 A. No.

8 Q. Okay. Did you hold it against Professor Kao  
9 that he had complained about you in 2000?

10 A. No.

11 Q. Okay. Did you hold it against him that he was  
12 making complaints about the hiring process for the 2008  
13 search?

14 A. No.

15 Q. Okay. Did you hold it against Professor Kao  
16 that he suffered from depression?

17 A. No.

18 Q. Okay. How did you feel when Dr. Kao was  
19 removed from the math department?

20 A. Immensely relieved.

21 Q. How did you feel about coming to work then?

22 A. Happy again.

23 Q. Okay. How do you feel today knowing that  
24 Dr. Kao is suing to be able to come back to the math  
25 department?

1           A. I feel extremely nervous at the possibility  
2 that if he came back, it would return to the same kind  
3 of fear-filled tension and hating my job that existed in  
4 that last semester before he left.

5           Q. Okay. You mentioned earlier that you had seen  
6 Dr. Kao crying in your office. I want to go back and  
7 ask you a few questions about that.

8                   Do you recall how many times you had seen him  
9 crying in your office that semester?

10          A. Twice in my office and one time in my car when  
11 I drove him home one time.

12          Q. Okay. The time in your office, do you recall  
13 when that happened?

14          A. I'm afraid I don't.

15          Q. Okay. Was this during the day?

16          A. Yes.

17          Q. Okay. Do you recall any details of how that --  
18 did you have a conversation with him at that time?

19          A. Yes. It was the conversation that led to the  
20 tears.

21          Q. What led to his tears?

22          A. His fear --

23                   MR. KATZENBACH: Objection. Asking for  
24 hearsay.

25                   MS. ADLER: It's contemporaneous. I would like

1 to lay a foundation for a contemporaneous statement to  
2 explain his conduct of crying, Dr. Kao.

3 THE COURT: Say it again, please.

4 MS. ADLER: I'm offering it as a  
5 contemporaneous statement to inquire about what  
6 statements Dr. Yeung made to explain his conduct of  
7 crying under Evidence Code 1241.

8 THE COURT: All right. I'll allow it. The  
9 Witness may answer.

10 MS. ADLER: Q. What were you talking about  
11 that led to his crying?

12 A. He was expressing the fear that his young son  
13 would grow up without a father if Professor Kao murdered  
14 him.

15 Q. How old was his son?

16 A. I'm not sure how hold he is now. Four years  
17 old. Or something.

18 Q. Did he tell you why he felt that?

19 MR. KATZENBACH: Objection. Hearsay.

20 THE COURT: Overruled. The Witness may answer  
21 yes or no.

22 THE WITNESS: Yes. He told me --

23 MR. KATZENBACH: Objection. Hearsay.

24 THE COURT: Sustained.

25 MS. ADLER: I have no further questions. Thank

1 you.

2 THE COURT: Mr. Katzenbach, any?

3 MR. KATZENBACH: Yes, if I may.

4 THE COURT: Yes, you may.

5 MR. KATZENBACH: Thank you, your Honor. I'm  
6 sorry. That was probably a rhetorical question.

7 MS. ADLER: Actually, your Honor, I have a  
8 couple more questions as it turns out.

9 THE COURT: All right.

10 MR. KATZENBACH: Please.

11 MS. ADLER: I apologize.

12 Q. Returning to the subject of Dr. Yeung crying in  
13 your office, why was it -- did he tell you why it was  
14 that he was afraid that he wasn't going to be around for  
15 his young son?

16 MR. KATZENBACH: Objection. Hearsay.

17 THE COURT: Overruled. The Witness may answer  
18 yes or no.

19 THE WITNESS: He told me he was afraid Dr. Kao  
20 would murder him.

21 MR. KATZENBACH: Objection. Hearsay. Not  
22 answering.

23 MS. ADLER: Contemporaneous statement to  
24 explain his conduct of crying in Dr. Needham's office.

25 THE COURT: I'll allow it. Overruled.

1 THE WITNESS: He told me that Dr. Kao was  
2 extremely angry with him as he was with me. And that  
3 he, therefore, feared that Dr. Kao would kill him and  
4 that his young son would grow up without a father. And  
5 that was the reason for the crying on all three  
6 occasions.

7 MS. ADLER: All right. Thank you.

8 THE COURT: Ms. Adler has stepped away from the  
9 lectern.

10 CROSS-EXAMINATION

11 BY MR. KATZENBACH:

12 Q. So I understand, Doctor, you don't want Dr. Kao  
13 to return to work at USF?

14 A. That's correct.

15 Q. You would be distressed if he did?

16 A. Yes.

17 Q. I will like to go back to the CCAC issues that  
18 you talked about. Do you mind if I do that?

19 A. Be my guest.

20 Q. All right. You indicated that you thought that  
21 Dr. Kao's reaction to your letter was inappropriate?

22 A. I did.

23 Q. And you thought -- now, do you recall that  
24 sorry -- strike that.

25 Do you recall that there was an issue -- you

1 indicated there was an e-mail where you sort of  
2 apologized or withdrew any bad implications from the  
3 letter; is that right?

4 A. That's right. I would love to read it out to  
5 the Jury if I might.

6 Q. We might get to that in a minute. But what I  
7 really wanted to ask you is this: Do you recall being  
8 asked to sign -- to sign a copy -- I'm sorry.

9 Do you recall being asked to give a hard copy  
10 letter rather than an e-mail?

11 A. Not really.

12 Q. Do you recall being asked for an official  
13 record to protect John from any future conceivable harm  
14 that any future conceivable administration could  
15 conceive of regarding this issue by contrast an e-mail  
16 inhabits a limbo world from a legal point of view?

17 MR. VARTAIN: Objection. Ambiguous.

18 THE COURT: Sustained.

19 MR. KATZENBACH: Q. Do you recall being asked  
20 to give a hard copy of your apology?

21 A. You jogged my memory. I don't recall that, but  
22 I do remember the conclusion of this mess was that the  
23 Dean, Stanley Nell, did actually print out a copy of the  
24 e-mail, and he signed it. Not me. I do remember that.

25 Q. Do you recall that was something Dr. Kao wanted



1 to have happened, a signed copy of something?

2 A. Yes.

3 Q. Did you think that was reasonable?

4 A. No.

5 Q. Could you please take a look at Exhibit 3 in  
6 your binder. Exhibit 3 is a big long document. It's  
7 the binder with the fewest number of tabs.

8 Your Honor, if I might approach the Witness.

9 A. Okay.

10 THE COURT: No need.

11 MR. KATZENBACH: Q. You have Exhibit 3?

12 A. I think so. Is this the report of race-based  
13 discrimination?

14 Q. It is. Thank you.

15 If you take a look at that document, you'll see  
16 if you turn about a hundred pages into it or a little  
17 more, maybe 120, you'll see page numbers that have "SD"  
18 at the bottom in the middle of the page. You may have  
19 to go farther back than that I think.

20 A. Page hundred.

21 Q. Go farther back, 120?

22 A. Forward, okay.

23 Q. Well, I suppose you're correct.

24 MR. VARTAIN: May I approach the Witness and  
25 help the Witness, your Honor?

1 THE COURT: You may.

2 MR. KATZENBACH: I'm looking for page SD-49.

3 MR. VARTAIN: Why don't you give him the page  
4 that you want?

5 MR. KATZENBACH: May I approach the Witness,  
6 your Honor?

7 THE COURT: You may.

8 MR. KATZENBACH: Thank you.

9 Q. Showing the Witness page numbered SD-49 in  
10 Exhibit 3 and ask the Witness if he can identify the  
11 e-mail that appears on that document.

12 A. Yes. It's an e-mail to me from Paul Zeitz.

13 Q. Can you read what the e-mail says?

14 A. The whole thing?

15 Q. Yes. From the "Hi Tristan" on.

16 A. Okay. "Hi Tristan. Thanks for your recent  
17 e-mails to me and John Kao. I appreciate what you said.  
18 I appreciate what you have said. Agree with it. And  
19 have only one request which I think will truly put all  
20 this behind us. Could you also put your e-mail  
21 statements in hard copy letter form and place them in  
22 our official files. I request this not because I think  
23 you mean me or John harm, but institutional memories are  
24 effectively infinite even when administrators change,  
25 thus an official record," in quotes, "would protect John

1 and I from any future conceivable harm that any future  
2 conceivable administration could conceive of regarding  
3 this issue. By contrast, e-mail inhabits a limbo world  
4 from a legal point of view."

5 Q. Who sent that e-mail to you?

6 A. Paul Zeitz.

7 Q. And did you think that Professor Zeitz's  
8 request for you to "put your e-mail statements in a  
9 hardcopy letterhead form and place them into our  
10 official files" was unreasonable?

11 A. I did.

12 Q. And you didn't do it?

13 A. I don't recall if I did it or not. I do recall  
14 that Dean Nell signed the one that John wanted signed.

15 Q. But you wouldn't?

16 A. I don't think on principal.

17 Q. Did you tell John Kao that the e-mail was an  
18 official record and just as good as a signed statement?

19 A. I believe Dean Nell told him that.

20 Q. But Dean Nell went and signed the e-mail;  
21 right?

22 A. Yes, after John continued to object it wasn't  
23 official enough.

24 Q. All right. And when that happened, when Dean  
25 Nell signed the e-mail, the grievance was over; right?

1           A. Correct. I believe John wrote an official  
2 statement that it was over.

3           Q. Thank you.

4           You were asked some questions about -- strike  
5 that. Rephrase it.

6           Did you know that the University was  
7 considering requiring Dr. Kao to go to a  
8 fitness-for-duty examination?

9           A. No.

10          Q. Did you recommend against requiring a  
11 fitness-for-duty examination?

12          A. No.

13          Q. Did Martha Peugh-Wade ever -- did you ever have  
14 a conversation with Martha Peugh-Wade where a  
15 fitness-for-duty examination for John Kao was discussed?

16          A. As I said, I believe I only had the one  
17 conversation with Martha Peugh-Wade when she invited me  
18 to her office. I don't recall the details of that  
19 except for the bit I already told you. So I don't  
20 recall.

21          Q. All right. That was a face-to-face  
22 conversation with her; correct?

23          A. Correct.

24          Q. Did you speak with her on the phone after that?

25          A. I don't recall.

1 Q. Do you recall telling her on May 12th that you  
2 had had an incident -- there had been an incident of  
3 bumping regarding Dr. Kao?

4 A. I don't recall.

5 Q. Do you recall telling her on May 12th -- sorry.  
6 Strike that.

7 Do you recall speaking to her in early June  
8 where you described a bowing incident involving Dr. Kao?

9 A. I remember hearing about the bowing incident  
10 from colleagues, but I don't remember telling her about  
11 it.

12 Q. All right. And do you remember do you recall  
13 any conversation with her where you discussed Dr. Kao  
14 mocking Peter Pacheco following the May meeting  
15 involving the chair issue?

16 A. Again, I heard from colleagues about the  
17 incident where Dr. Kao was mocking Peter Pacheco. But I  
18 don't recall who I told it to.

19 Q. All right.

20 A. If anyone.

21 Q. You knew that you weren't the only faculty  
22 member that Ms. Peugh-Wade was interviewing?

23 A. Yes. I knew colleagues of mine were being  
24 interviewed as well.

25 Q. How did you find that out?

1 A. We're all friends. We all talk to each other.

2 Q. So you knew -- who did you know she was  
3 interviewing?

4 A. As far as I recall, Peter Pacheco, Stephen  
5 Yeung and Paul Zeitz. Only three that I can think of.

6 Q. Have you ever heard Dr. Zeitz complain that he  
7 felt that Dr. Kao was collecting information to use in a  
8 lawsuit?

9 A. I don't recall.

10 Q. Did you ever hear Dr. Zeitz express a concern  
11 that -- strike that.

12 At any time, did you ever ask Martha Peugh-Wade  
13 to protect you in the event of a lawsuit?

14 A. I don't recall.

15 Q. Now, at the time you described this bumping  
16 incident, you indicated that you were reading a journal  
17 or something?

18 A. I don't recall what it was, but a piece of  
19 paper I think.

20 Q. Was it like -- I'm sorry; I don't mean to be  
21 difficult -- like a paper? Like a newspaper or like a  
22 paper like a --

23 A. Like a mathematics paper.

24 Q. So that would be something like --

25 A. Small.

1 Q. -- small?

2 A. (Nods head.)

3 Q. What, like a booklet size?

4 A. Like the size of a piece of regular paper,  
5 8 x 11.

6 Q. As I understand this event, you were looking  
7 down reading the paper, and then you were bumped; is  
8 that right?

9 A. Correct.

10 Q. Okay. Now, do you recall when that took place?

11 A. I don't recall. I just remember that it was in  
12 that semester, the spring 2008 semester.

13 Q. Do you recall whether it was early, late, mid?

14 A. I really don't.

15 Q. Do you recall it was before or after this  
16 meeting about the search?

17 A. I don't even recall that.

18 Q. Okay. Let's go back to the search meeting then  
19 -- strike that.

20 You also talked about at some point you made a  
21 report about this bumping incident to Dean Brandon  
22 Brown?

23 A. Correct.

24 Q. Did you make more than one -- did you report  
25 this bumping incident more than one time to him?

1 MR. VARTAIN: Objection. Vague.

2 THE COURT: Overruled. The Witness may answer  
3 if he understands the question.

4 THE WITNESS: I believe that I talked to  
5 Brandon Brown twice during that semester. I know that  
6 one of the occasions was specifically prompted by the  
7 bumping. That's why I went to see him. And the other  
8 one, I don't remember if it came up again or not.

9 MR. KATZENBACH: Q. Do you recall when during  
10 the semester these two conversations occurred?

11 A. I don't recall.

12 Q. Do you recall whether they were in the first  
13 half or the second half?

14 A. I don't recall.

15 Q. Can you locate them in relationship to this  
16 meeting concerning the search?

17 A. I don't recall.

18 Q. Now, at this search meeting, this meeting  
19 concerning the search, you weren't -- there were many  
20 people present; correct?

21 A. Correct.

22 Q. Where were you sitting?

23 A. I was sitting on the other side of the table  
24 from Dr. Kao.

25 Q. Okay. And where were the other search



1 committee members sitting?

2 A. We were scattered all around the conference  
3 table.

4 Q. Okay. So just so I understand it -- the search  
5 committee wasn't sitting at one end and the rest of the  
6 faculty at the other?

7 A. Not as far as I recall.

8 Q. Was Christine Liu there?

9 A. I don't recall.

10 Q. Do you recall she normally attends meetings and  
11 takes minutes?

12 A. Usually. Not always.

13 Q. Did you take any notes of that meeting?

14 A. No.

15 Q. Did anyone on the search committee take notes  
16 of that meeting?

17 A. I have no idea.

18 Q. Have you ever seen any notes maintained by  
19 anyone on the search committee?

20 A. No.

21 Q. The purpose of that meeting was, as I  
22 understand it, there's been testimony in this case of --  
23 correct me if I'm wrong -- that for the members of the  
24 department who are not on the committee to rank the four  
25 finalists?

1 A. No. That's not the purpose.

2 Q. What was the purpose then?

3 A. The purpose is simply to inform them of the  
4 conclusion of the search, who the search committee  
5 believes should be presented to the Dean to be hired.

6 Q. Okay. Was there any request at that meeting  
7 for the members of the department to rank the four  
8 remaining candidates in level of preference?

9 A. I don't believe so. That wouldn't be the  
10 normal way that that meeting would go.

11 Q. Well, okay. So was this -- was there -- as I  
12 understand it, this meeting -- what was the role of the  
13 nonsearch committee faculty members at this meeting?

14 A. It's really to advise them of the decision that  
15 the search committee has arrived at because the search  
16 committee is the one who's done the hard work of reading  
17 all the files and interviewing the candidates multiple  
18 times and attending teaching talks, research talks and  
19 so on.

20 Q. Was this to get input from any of the other  
21 faculty members?

22 A. It's really more of a formality that's dictated  
23 by the Dean's office. They dictate there be this one  
24 last meeting before the search committee meet with the  
25 Deans to present their list of people.

1 Q. When you say "formality," what do you mean?

2 A. I mean there are written guidelines from the  
3 Dean's office that have to be adhered to regardless of  
4 whether they seem to make sense or not. What happens  
5 when -- one of the things dictated in the guidelines  
6 there is a final meeting where the search committee  
7 advises the whole department on what their  
8 recommendation is and what they'll be sending to the  
9 Dean's office.

10 Q. Is your understanding for this particular  
11 meeting that there was no role for the faculty to play  
12 in ranking candidates?

13 A. Correct.

14 Q. And there's no role for the faculty members to  
15 play in terms of saying, "I don't agree with this  
16 choice"?

17 A. Correct.

18 Q. All right. And now, let's go back to the prior  
19 meeting. There's actually two meetings as I understand  
20 it when you do a search; is that correct?

21 A. There are a host of meetings.

22 Q. There are two meetings of the search committee  
23 and the faculty?

24 A. Yes, okay.

25 Q. I mean, there are faculty meetings every month

1 as I understand it or more or less every month?

2 A. I just meant that the search committee itself  
3 meets many, many times in the process of writing up the  
4 conclusion. You're right. I believe, I would have to  
5 check, but I believe that the Dean's office guidelines  
6 mandate two meetings: One to decide who to bring to  
7 campus as finalists, and then this final meeting where  
8 you present the conclusion of who you want to hire.

9 Q. Let's talk about the first meeting.

10 Does the faculty have any input as to who to  
11 bring to campus, or is that something they're informed  
12 about from the search committee?

13 A. That's, again, a formality.

14 Q. All right. When these candidates come to  
15 campus, I think they give a research talk and a teaching  
16 talk; is that right?

17 A. That's correct.

18 Q. And the faculty members all go to these -- the  
19 faculty members are allowed to go to these two talks?

20 A. Correct. They're encouraged to go, but of  
21 course many of them are teaching at the times these  
22 talks are happening. So in general, only a fraction can  
23 actually witness all the talks.

24 Q. Did you observe Dr. Kao attending either of the  
25 teaching talks or research talks of any of the

1 candidates of the 2008 search?

2 A. I don't recall.

3 Q. All right. Now, do you recall Dr. Kao speaking  
4 at the first meeting of the search committee?

5 A. I don't recall.

6 Q. Do you recall Dr. Kao asking about one  
7 particular candidate, Professor Duchin (phonetic)? Or  
8 Dr. Duchin, I believe would be appropriate.

9 A. No, I don't recall that.

10 Q. Do you recall Dr. Kao asking if Dr. Duchin had  
11 self-identified herself as a minority?

12 A. No. I don't remember that.

13 Q. Now, after the meeting -- let me see.

14 Did Dr. Kao hand out, or as you said throw,  
15 copies of his statistical analysis at the meeting in  
16 February of 2008?

17 MR. VARTAIN: Objection. Ambiguous. Compound.

18 THE COURT: Sustained.

19 MR. KATZENBACH: Q. All right. Let's go back  
20 to the second meeting, the second meeting with the  
21 faculty where Dr. Kao was discussing his statistics.

22 Do you recall that meeting?

23 A. I do.

24 Q. Did Dr. Kao distribute something?

25 A. Yes. As I previously testified, he threw these

1 pieces of paper at us that had mathematical calculations  
2 on them.

3 Q. Did you keep a copy?

4 A. I did not.

5 Q. Did you look at it?

6 A. Hardly.

7 Q. Excuse me?

8 A. I hardly looked at it.

9 Q. Did you try and figure out what his  
10 calculations meant?

11 A. No, I did not. I felt it was completely  
12 irrelevant.

13 Q. Did you, did you -- am I correct in saying you  
14 felt it was completely irrelevant because the search  
15 committee had already decided who the candidates were  
16 going to be?

17 MR. VARTAIN: Objection. Ambiguous. Compound.

18 THE COURT: Overruled. The Witness may answer.

19 THE WITNESS: I believed it was irrelevant on  
20 multiple levels.

21 MR. KATZENBACH: Q. All right. Was it  
22 irrelevant because there was -- because the issue of  
23 discrimination was inappropriate to raise at this point?

24 MR. VARTAIN: Objection. Lacks foundation.

25 THE COURT: Overruled. The Witness may answer.

1 THE WITNESS: I believed at the time  
2 discrimination was irrelevant because I was a member of  
3 the search committee and firsthand had witnessed that  
4 there never was any discrimination in any search I was  
5 ever involved in. We were always looking for the best  
6 mathematician.

7 MR. KATZENBACH: Q. Did you understand  
8 Dr. Kao's concerns were not with your personal  
9 motivations but rather with the effect and the manner of  
10 which the search was advertised?

11 A. I know that that's the concern that he  
12 expressed.

13 Q. And didn't he express the concern that the  
14 manner in which the search was advertised did not reach  
15 enough minorities?

16 A. Yes. That's what he said.

17 Q. Right. And didn't you understand that he was  
18 offering statistics to try to show that there should  
19 have been, there would have been likely more minority  
20 candidates had the search been advertised differently?

21 MR. VARTAIN: Objection. Ambiguous.

22 THE COURT: Overruled. The Witness may answer.

23 THE WITNESS: I understand what he was trying  
24 to show me. If you take a fair coin and you toss it ten  
25 times, you would expect to get five heads, five tails.

1 Very often you won't get five heads, five tails. You'll  
2 get different answers. And in fact, you could even get,  
3 with a fair coin that isn't unbalanced, you could even  
4 get ten heads in a row. It could happen.

5 So to take one search and try and do a  
6 statistical analysis of it and say that it proved we  
7 were discriminating certainly didn't make mathematical  
8 sense.

9 MR. KATZENBACH: Q. Flipping a coin, you can  
10 calculate the likelihood it will come out heads or  
11 tails; right?

12 A. Right.

13 Q. If you take seven flips and it comes up three  
14 heads, four tails, you can determine the likelihood?  
15 That's chance; is that correct?

16 A. That's correct. That's exactly the calculation  
17 that John had been doing.

18 Q. So the P value is a measure of chance; isn't  
19 it?

20 A. It is.

21 Q. When you have a P value that is under five  
22 percent, what you're saying there's only a five percent  
23 possibility that this outcome was as a result of chance;  
24 isn't that correct?

25 A. That's one way of interpreting it, yes.



1 Q. Now, that's a common way of determining the  
2 validity of any sampling; isn't it?

3 A. Yes. It's a common -- it's a common technique.

4 Q. All right. So would it be accurate to say that  
5 John's position was simply that if you did a statistical  
6 analysis of the search, compared it to the available  
7 candidate pool based on standard information, it  
8 appeared to him that this search had only a five percent  
9 chance of not having resulted in more minority  
10 candidates?

11 A. The implication was that we had exercised  
12 discrimination, and the reality was that we had, we had  
13 advertised in the standard way that people advertise at  
14 all universities. Everybody is moving away from print  
15 advertising, which is what Professor Kao wanted us to  
16 do, to electronic advertising. That is the way  
17 everybody applies for jobs these days.

18 There's a standard place where mathematicians  
19 advertise for jobs, every university. Every person  
20 looking for a job knows to look there. There's nothing  
21 discriminatory about it whatsoever.

22 Q. Again, actually, let's go back to that meeting  
23 a second.

24 Did Professor Finch ask John a question whether  
25 he was -- his statistics assumed that if there were

1 people who were actively looking and might look at a  
2 journal and see an ad, they might have been encouraged  
3 to apply? Do you recall that conversation?

4 A. I don't recall that.

5 Q. All right. Now, who made the decision how to  
6 advertise the search?

7 A. I'm sorry?

8 Q. Who made the decision how to advertise the  
9 search?

10 A. I don't know.

11 Q. Did the search committee vote that they use  
12 only online resources?

13 A. I don't recall.

14 Q. Did the Dean's office tell you they were only  
15 going to put the ad online?

16 A. I don't recall.

17 Q. Did you feel personally insulted when John  
18 suggested that the manner in which the search had been  
19 advertised created a discriminatory outcome?

20 A. Yes.

21 Q. Now, you referred other meetings -- let's go to  
22 the meeting on the chair.

23 You were there, the meeting concerning the  
24 position of the chair?

25 A. Okay.

1 Q. You testified, I believe I have your words  
2 pretty close, "We had not gotten our ducks in a row  
3 yet"?

4 A. Correct.

5 Q. Who's the "we"?

6 A. The whole department.

7 Q. Including John?

8 A. John at this point was not really in  
9 communication with any of us in a normal civilized way.  
10 So as a matter of fact, no.

11 Q. Who else then in the department? Let me just  
12 give you -- had you talked to Bob Wolf who should be  
13 chair if Peter Pacheco had to go on sabbatical?

14 A. I can't recall.

15 Q. Had you talked to Steve Devlin about that  
16 issue?

17 A. I really don't recall which individuals. The  
18 problem was we had not talked amongst ourselves enough.

19 Q. Who would you have talked to outside of the  
20 meeting?

21 MR. VARTAIN: Okay. Speculation. Objection.

22 THE COURT: Sustained.

23 MR. KATZENBACH: Q. All right. You agree,  
24 however, that when you raised the issue of procedure  
25 there had to be a vote, that was a way of preventing

1 Dr. Kao from volunteering for chair?

2 A. Correct.

3 Q. After that meeting, did you go up to Peter  
4 Pacheco and say, "What were you thinking?"

5 A. I don't recall.

6 Q. Okay. Did you intend -- you testified the  
7 intention of raising this issue wasn't to insult  
8 Dr. Kao; is that right?

9 A. Correct.

10 Q. Do you think he could have taken it as an  
11 insult?

12 A. I don't know.

13 Q. You testified he's a smart man, obviously that  
14 he understood what was going on?

15 MR. VARTAIN: Objection. Arguing.

16 THE COURT: Sustained.

17 MR. KATZENBACH: Q. All right. You testified  
18 I believe that you felt that Dr. Kao knew what was going  
19 on with this procedural mechanism that you did?

20 A. Yes. And I believe that's why he got angry and  
21 stormed out.

22 Q. Do you think he felt insulted?

23 A. Probably.

24 Q. Did it surprise you under those circumstances  
25 that he would get angry?

1           A. Not that one would become angry, but the extent  
2 of the anger and the instantaneous nature of it and  
3 storming out I was taken aback by.

4           Q. Don't you think that leaving the meeting was an  
5 appropriate way of dealing with a very humiliating  
6 circumstance?

7           MR. VARTAIN: Objection. Lacks foundation.  
8 Calls for speculation.

9           THE COURT: Overruled. The Witness may answer.

10          THE WITNESS: Could you repeat the question?

11          MR. KATZENBACH: Q. Do you think that leaving  
12 the meeting was an appropriate way of dealing with a  
13 humiliating experience?

14          A. No, I don't. I think it's childish and  
15 unprofessional.

16          Q. But of course, you're raising the procedural  
17 issue in response to John's volunteering was  
18 professional and appropriate?

19          MR. VARTAIN: Objection. Argumentative.

20          MR. KATZENBACH: You're right. It is. I  
21 withdraw it.

22          Q. Now, you indicate that -- you, I think,  
23 testified, correct me if I'm wrong if I didn't hear you  
24 correctly, that throughout the semester through at least  
25 the first part of it, you still wanted to resolve things

1 with John? You kept trying to be nice to him?

2 A. I had. Ever since I came back to the faculty,  
3 I think in 2005, I had every morning when I had seen him  
4 I tried to say, "Good morning, John." I would greet him  
5 in the hallway. I believe I was still trying in vein,  
6 even in that final semester, at least in the beginning  
7 of the semester. But then it got so much worse, it was  
8 really pointless.

9 Q. You stopped sometime during the semester?

10 A. I think so.

11 Q. After the Finch retirement party and the  
12 incident you described with your wife, who did you  
13 report that to?

14 A. I don't recall.

15 Q. Did you report that to Martha Peugh-Wade?

16 A. I don't recall.

17 Q. Did you report it to Brandon Brown?

18 A. He may have witnessed it himself. I think he  
19 was at the party. I'm not sure.

20 Q. All right. You don't recall ever making a  
21 report of this incident to anyone; is that accurate?

22 A. I don't recall.

23 Q. Okay. Now, do you recall Dr. Kao objecting to  
24 the hiring of Professor Stillwell?

25 A. I don't remember.

1 Q. Do you recall Dr. Kao ever saying that he  
2 opposed the hiring of Dr. Stillwell without performing a  
3 normal search?

4 A. I really don't -- I don't remember because I've  
5 seen papers since that show that he had these  
6 objections, but I don't remember if I saw that more  
7 recently during this litigation or if I knew at the time  
8 that he objected. At some point, I later found out he  
9 objected.

10 Q. You were -- this was during a period of time  
11 when you were Associate Dean for Sciences the issue of  
12 hiring Dr. Stillwell came up?

13 A. Correct.

14 Q. As Associate Dean for Sciences, you would have  
15 been involved in the hiring of Dr. Stillwell?

16 A. Correct. I was specifically trying to hire  
17 him.

18 Q. And you were the person trying to hire him?

19 A. Correct, with the assistance of the Dean.

20 Q. The Dean of the College of Arts and Sciences?

21 A. Yes, correct. Dean Stanley Nell.

22 Q. Do you have any recollection whatsoever of  
23 Dr. Kao saying that there should be a search for the  
24 position rather than hiring Dr. Stillwell?

25 MR. VARTAIN: Asked and answered. Objection.

1 THE COURT: Overruled. The Witness may answer.

2 THE WITNESS: I have to explain this was not an  
3 ordinary search. This was creating a position  
4 specifically for a famous mathematician that we were  
5 very lucky that we were able to headhunt. It's a  
6 routine activity of universities to go after talent like  
7 that. This was not a normal faculty search where we  
8 have hundreds of applications we sift through like the  
9 one that led to the hiring of Professor Van Cott.

10 MR. KATZENBACH: Q. I understand. This was a  
11 special arrangement; correct?

12 A. It was a specially created position to have  
13 headhunt a famous mathematician for the University.

14 Q. But you still have no recollection whether  
15 Dr. Kao said, "If we're going to have a position, we  
16 should have a search"?

17 A. I don't recall.

18 Q. Do you recall at the time -- Dr. Stillwell was  
19 hired in about 2000, 2001?

20 A. I don't recall what year it was.

21 Q. About that period of time?

22 A. It's a matter of public record. I just don't  
23 remember.

24 Q. I understand. Dr. Kao was hired in -- started  
25 at the University in 1991 approximately?



1 MR. VARTAIN: Objection. Not relevant. And  
2 it's cumulative. Evidence Code 352. We're going down  
3 the same path.

4 THE COURT: Let's see where it leads us. Take  
5 a few more paces. Overruled.

6 MR. KATZENBACH: Q. From the time Dr. Kao was  
7 hired until the hiring --

8 THE COURT: There was an objection which I  
9 overruled pointing at an answer.

10 MR. KATZENBACH: I'm sorry. You're correct.

11 THE WITNESS: Can you repeat the question,  
12 please?

13 MR. KATZENBACH: Q. I'll be happy to. Let me  
14 rephrase the question, and pray it's not compound.

15 From the time Dr. Kao was hired until the  
16 hiring of Stephen Yeung, were there any other -- were  
17 there any other minorities hired in the math department?

18 A. I honestly can't remember who got hired in  
19 that, in that period.

20 Q. Okay. Now Millie, there's a Millie Lehman at  
21 one point was a member of the math department?

22 A. Correct.

23 Q. She retired when?

24 A. I don't remember the year.

25 Q. From the time Ms. Lehman or Dr. Lehman retired

1 until the hiring of Cornelia Van Cott, were there any  
2 women hired in the math department?

3 A. I really don't recall the sequence of events.  
4 What I can tell you we've had four searches and only one  
5 white male has been hired out of those four searches,  
6 the last four searches. The rest are women or  
7 minorities.

8 MR. KATZENBACH: One second, your Honor.

9 Q. Do you recall having any dispute with Dr. Kao  
10 -- you talked about the CCAC one. Do you recall having  
11 a dispute with Dr. Kao when he had a reaction to Prozac  
12 in about 2002?

13 A. Did I have what with him? I'm sorry.

14 Q. Do you recall that Dr. Kao had a reaction to  
15 Prozac in about 2002?

16 A. Yes.

17 Q. Do you recall that -- you were Dean at that  
18 time?

19 A. I was Associate Dean.

20 Q. Associate Dean. Do you recall at that time  
21 that you told him that he could not come back to work  
22 without your approval?

23 A. No. I don't recall that.

24 Q. Do you recall telling him that he had to have  
25 another professor in his class for the remainder of the

1 term if he were to come back to teach?

2 A. No. Can I just explain that as Associate Dean  
3 I would not have authority even to say something like  
4 that. Only the Dean and human resources could decide  
5 something of that magnitude.

6 Q. Only somebody above you?

7 A. Right.

8 Q. Not somebody below you?

9 A. Correct.

10 Q. In other words, just so that I understand the  
11 hierarchy at that time, the chair of the department  
12 wouldn't even be in the administration at all?

13 A. Correct. We're an unusual institution. The  
14 chair has no administrative power. It's all in the  
15 Dean's office and above.

16 Q. We probably ask everybody that just because  
17 it's so unusual. You understand.

18 THE COURT: Ladies and gentlemen, remember the  
19 admonition. Do not form or express any opinion on this  
20 case until it's finally submitted to you for your  
21 decision. Do not discuss among yourselves or with  
22 others until that time.

23 Please be back in your places on Tuesday,  
24 February 21, 2012. Remember to leave your notebooks and  
25 instructions behind. It's 9:00 o'clock as usual.

1           (Whereupon, the Jury exited the courtroom at  
2 4:33 p.m.)

3           THE COURT: Jurors and Alternates have departed  
4 the courtroom. Counsel for both sides and the Plaintiff  
5 remain. We may add to the record what we met out in the  
6 hallway about, the order in which the respective sides  
7 put on the balance of their cases?

8           MR. VARTAIN: I think we have, your Honor. We  
9 made that before the Witness was called.

10          THE COURT: The Defendant's motion for a  
11 nonsuit, I'll give you a tentative ruling on that.

12          Do you want to take care of that now or put it  
13 off?

14          MR. VARTAIN: No. I would like to -- I would  
15 like -- the Court has indicated -- the Defense, Martha  
16 Peugh-Wade and the University, have moved for nonsuit on  
17 the cause of action of defamation. The Court has  
18 indicated that its tentative ruling is to grant that  
19 motion. And I don't know if Mr. Katzenbach has any  
20 comments.

21          MR. KATZENBACH: Yes, I do.

22          THE COURT: I invite them.

23          MR. KATZENBACH: The Court indicated it was  
24 going to apply the litigation privilege to the  
25 communications with Dr. Reynolds. As I understand the

1 Court's tentative, since the Court was brief, the Court  
2 can correct me if I'm wrong, was that that was in  
3 anticipation of litigation and in a preparatory mode of  
4 some sort of litigation or agency or other type of  
5 action.

6           If that's the correct understanding of the  
7 Court's position, I would argue that while litigation  
8 privilege does indeed apply to preliminary activities  
9 involving litigation, the standard is that litigation  
10 must be actively contemplated at the time of the  
11 communication.

12           The testimony in this case is that there was --  
13 that the purpose of the examination was only for the  
14 purposes of fitness-for-duty examination. There is no  
15 evidence of any kind that litigation was seriously  
16 contemplated and to the extent that the litigation  
17 privilege might begin. In fact, the opposite.

18           While it seems to me that what -- while it is  
19 of course always possible that litigation would be  
20 contemplated in our society, that it hadn't reached the  
21 point where the litigation privilege was triggered under  
22 normal standards which means there has to be a lawsuit  
23 that has to be visible or at least seriously considered.

24           At this point, it was simply an examination and  
25 an argument over what would be appropriate for that

1 examination. I don't think that the litigation  
2 privilege extends that far down the pipeline.

3 THE COURT: Okay. Either have anything you  
4 want to add?

5 MR. VARTAIN: No, I don't because the cases  
6 cited are dispositive, and there are no contrary  
7 authority offered by the Plaintiff.

8 THE COURT: All right. Submitted?

9 MR. KATZENBACH: Your Honor, candidly, since  
10 this has come up this afternoon, if the Court feels my  
11 statement of the privilege about seriously contemplated  
12 litigation is inaccurate, I would like the opportunity  
13 to brief it and submit a brief to you before we begin,  
14 before Tuesday.

15 THE COURT: Are you going to e-mail it to me?

16 MR. KATZENBACH: I will e-mail it to you. I  
17 will deliver it in any manner that the Court will accept  
18 it.

19 THE COURT: Let me give you -- let me give you  
20 citation of the published opinion I was relying on.

21 It's Lerette, L-e-r-e-t-t-e, vs. Dean Witter  
22 Organization, Inc., 1976 60 Cal.App.3d 573.

23 MR. KATZENBACH: Yes, your Honor. I would  
24 think the case I would probably be looking at -- it's  
25 hard to do this completely from memory -- is

1 Silverberg vs. Anderson in the Supreme Court, which I  
2 believe discusses that. I think I am right on the case  
3 cite. My memory isn't what it once was.

4 THE COURT: The discussion in that begins on  
5 page 576 to page 578.

6 We'll let the tentative granting of the motion  
7 stand as a tentative ruling. I welcome whatever  
8 authority Mr. Katzenbach wants to submit that would  
9 indicate the contrary.

10 MR. KATZENBACH: Okay. How and when should I  
11 submit that by?

12 THE COURT: How what?

13 MR. KATZENBACH: How should I submit that to  
14 you and by when?

15 THE COURT: I'll give you the e-mail address,  
16 and you can have it so that I can work on it on Monday.  
17 That's --

18 MR. KATZENBACH: Okay.

19 THE COURT: That would be good.

20 MR. KATZENBACH: I will get it to you by  
21 Monday.

22 THE COURT: All right. Anything else that  
23 needs to go on the record?

24 MR. VARTAIN: Not from the Defense, your Honor.

25 THE COURT: I beg your pardon?

1 MR. VARTAIN: Not from the Defense.

2 THE COURT: Okay. Plaintiff?

3 MR. KATZENBACH: No. I think we discussed the  
4 issue of calling Dean Turpin on Tuesday.

5 THE COURT: Right.

6 MR. KATZENBACH: And then we will also have to  
7 move -- we wanted to move the cross-complaint, I think  
8 it's the first amended cross-complaint, into evidence  
9 and ask the Court to take judicial notice of it and  
10 accept it in this case.

11 I have copies for the Courtroom Clerk.

12 THE COURT: All right. Out of session, off the  
13 record.

14 (Whereupon, the proceedings were adjourned at  
15 4:39 p.m.)

16 (Page numbers estimated for consecutive  
17 numbering purposes. No pages missing from 1741 through  
18 1848. Volume 9 to begin on page 1850.)

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1 STATE OF CALIFORNIA )  
2 COUNTY OF SAN FRANCISCO ) SS.

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I, KIMBERLEE SCHROEDER, CSR No. 11414, do hereby certify that I am a Freelance Certified Shorthand Reporter in and for the State of California, and that as such, I reported the proceedings had in the above-entitled matter at the time and place set forth herein;

I further certify that my stenotype notes were thereafter transcribed by me, and that the foregoing pages numbered 1527 to 1849, inclusive, constitute a full, true and correct transcription of my said notes.

DATED: This 20th day of September, 2012.



KIMBERLEE SCHROEDER, CSR, RPR, CCRR  
License No. 11414

1 IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

2 FIRST APPELLATE DISTRICT

3 ---o00---

4 JOHN S. KAO,

5 Plaintiff/Appellant,

Appellate No. A135750

6 versus

SUPERIOR COURT CASE

No. CGC-09-489576

7 UNIVERSITY OF SAN FRANCISCO,  
8 et al.

9 Defendants/Respondents.

10 \_\_\_\_\_/

11  
12 APPEAL FROM THE JUDGMENT OF THE  
13 SUPERIOR COURT OF CALIFORNIA  
14 COUNTY OF SAN FRANCISCO

15 THE HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE

16 REPORTER'S TRANSCRIPT ON APPEAL

17 VOLUME 9, Page 1850 through Page 2091

18 Tuesday, February 21, 2012

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20  
21 REPORTED BY: SANDRA L. CARRANZA, CSR No. 7062

22  
23 SANDRA L. CARRANZA  
24 Certified Shorthand Reporter  
25 13 Joan Avenue  
Novato, California 94947  
(415)893-1861  
sandycarranza@comcast.net

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SAN FRANCISCO

3 ---oOo---

4 HON. WALLACE P. DOUGLASS, JUDGE DEPARTMENT 318

5 JOHN S. KAO,

6 Plaintiff,

7 vs.

Case No. CGC-09-489576

8 UNIVERSITY OF SAN FRANCISCO,  
9 et al.

10 Defendants.

\_\_\_\_\_ /

11 REPORTER'S TRANSCRIPT OF PROCEEDINGS

12 Tuesday, February 21, 2012

13 - - -

14  
15 A P P E A R A N C E S:

16 For the Plaintiff:

17 KATZENBACH & KHTIKIAN  
18 By: CHRISTOPHER W. KATZENBACH and  
19 CONOR MACK, ATTORNEYS AT LAW  
1714 Stockton Street, Suite 300  
San Francisco, California 94133

20 For the Defendants:

21 VARTAIN LAW GROUP  
22 By: MICHAEL J. VARTAIN and LINDA K. ADLER,  
23 ATTORNEYS AT LAW  
601 Montgomery Street, Suite 540  
San Francisco, California 94111

24  
25 REPORTED BY: SANDRA L. CARRANZA, CSR No. 7062, RPR

I N D E X

february 21, 2012

DEFENDANTS' WITNESSESPAGE VOL.TRISTAN NEEDHAM

|                                   |      |   |
|-----------------------------------|------|---|
| Cross by Mr. Katzenbach (resumed) | 1853 | 9 |
| Rediredt by Mr. Vartain           | 1868 | 9 |
| Recross by Mr. Katzenbach         | 1872 | 9 |
| Further redirect by Vartain       | 1877 | 9 |
| Further Cross by Mr. Katzenbach   | 1878 | 9 |

PAUL ZEITZ

|                            |      |   |
|----------------------------|------|---|
| Direct by Ms. Adler        | 1880 | 9 |
| Cross by Mr. Katzenbach    | 1918 | 9 |
| Recross by Mr. Vartain     | 1977 | 9 |
| Redirect by Mr. Katzenbach | 1978 | 9 |

STEPHEN YEUNG

|                         |      |   |
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| Direct by Ms. Adler     | 1981 | 9 |
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BRANDON BROWN

|                             |            |   |
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| Direct by Ms. Adler         | 2040, 2062 | 9 |
| Voir Dire by Mr. Katzenbach | 2061       | 9 |
| Cross by Mr. Katzenbach     | 2069       | 9 |

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E X H I B I T SPLAINTIFF'SIDEVIDVOL.

|    |   |      |  |   |
|----|---|------|--|---|
| 93 | Minutes, Math Dept.<br>Meeting, 2/12/08 | 1945 |  | 9 |
|----|---|------|--|---|

E X H I B I T SDEFENDANTS'IDEVIDVOL.

|     |   |      |  |   |
|-----|---|------|--|---|
| 210 | June 5, 2008 e-mail from<br>Brandon Brown re Report<br>from Tristan Needham<br>(USF 0139) | 2060 |  | 9 |
|-----|---|------|--|---|

|     |   |      |      |   |
|-----|---|------|------|---|
| 275 | January 3, 2008 e-mail<br>from Brandon Brown to<br>Jennifer Turpin, re:<br>"two bits" | 2067 | 2069 | 9 |
|-----|---|------|------|---|

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1 SAN FRANCISCO, CALIFORNIA

9:02 A.M.

2 - - -

3 THE COURT: Jurors and alternates are present.  
4 Counsel from both sides are present. Our plaintiff is  
5 back with us.

6 Dr. Needham, the oath from last week is still  
7 in effect this week. You're still testifying under  
8 oath.

9 Who was questioning Dr. Needham?

10 MR. KATZENBACH: I was, Your Honor.

11 THE COURT: You may continue.

12  
13 CROSS-EXAMINATION BY MR. KATZENBACH (resumed)

14 MR. KATZENBACH: Q. Dr. Needham, I'd like to  
15 ask you about CCAC for a minute.

16 Now, you recall writing a letter to Dr. Zeitz  
17 about the incidents involving CCAC, correct?

18 A. Correct.

19 Q. All right. You attached to that letter some  
20 e-mails?

21 A. I believe so.

22 Q. Okay. Could you please take a look at  
23 Exhibit 3, and I'd like to direct your attention to  
24 document No. SD -- SD11 as part of Exhibit 3.

25 And it's about 127 pages into it.

1 A. I'm sorry. What's the name again, the number?

2 Q. It's got -- the bottom number is SD11.

3 A. SD11. Okay. Okay.

4 Q. Do you have it in front of you?

5 A. I do.

6 Q. Is that a copy of two e-mail -- a two e-mail  
7 message that you attached to your letter to Dr. Zeitz?

8 A. I believe so.

9 MR. KATZENBACH: Your Honor, I have additional  
10 copies I'd like to distribute to the jury, of this  
11 document?

12 THE COURT: Go ahead.

13 MR. VARTAIN: With the understanding this came  
14 out of plaintiff's documents, not defense documents.

15 MR. KATZENBACH: Of course.

16 MR. VARTAIN: So it's a plaintiff's exhibit,  
17 not the defense.

18 THE COURT: Mr. Vartain didn't shake his head  
19 side to side when I inquired whether there was any  
20 objection.

21 MR. VARTAIN: Meaning there was none, Your  
22 Honor.

23 MR. KATZENBACH: Q. When did you first receive  
24 copies of the two e-mails that -- that you attached to  
25 your letter that are part of Exhibit 4 [sic] and marked

1 SD11?

2 A. I have absolutely no idea. This is over a  
3 decade ago.

4 Q. I'd -- if you would please take a look, if you  
5 would, at a page No. SD41.

6 A. Okay. I have it.

7 Q. Okay. And taking a look at that, is that an  
8 e-mail that you received from Professor Zeitz?

9 A. Yes.

10 MR. KATZENBACH: I'd like to distribute this  
11 document again to the jury, Your Honor.

12 THE COURT: Any objection?

13 MR. VARTAIN: May I look at it, Your Honor?

14 THE COURT: Sure.

15 MR. KATZENBACH: I can't get at the right  
16 number.

17 MR. VARTAIN: I don't have any objection to  
18 that, Your Honor.

19 THE COURT: Thank you.

20 MR. KATZENBACH: I'm sorry, Your Honor, I  
21 should have given you a copy as well. I apologize.

22 THE COURT: Thanks.

23 MR. KATZENBACH: Q. Now, SD41, take a look at  
24 SD41. That's the forwarded copy of -- a forwarded copy  
25 of an e-mail that you received from Professor Zeitz?



1 A. Can you repeat the question?

2 Q. Starting at SD41, it appears to be an -- a  
3 forwarded copy of an e-mail that you received from  
4 Professor Zeitz?

5 A. You mean the e-mail at the bottom after Paul's  
6 message?

7 Q. Yes. The e-mails that begin at the bottom of  
8 the first page of SD41, continues on to SD42, and on to  
9 SD43; is that correct?

10 A. Correct.

11 Q. Well, did you -- when you prepared the two  
12 e-mails that are SD11, did you simply copy the forwarded  
13 text from the e-mails that you received from Professor  
14 Zeitz into a new document that you then attached to your  
15 letter?

16 MR. VARTAIN: Objection. No foundation that  
17 this witness prepared SD11. That's plaintiff's exhibit.

18 THE COURT: Objection overruled.

19 Witness may answer.

20 THE WITNESS: I don't -- I don't know how I  
21 prepared the page, the SD11. Again, I have no memory of  
22 these details of -- of a small event 11 years ago.

23 MR. KATZENBACH: Q. SD11 was a document you  
24 prepared and attached to your letter to Dr. Zeitz?

25 A. It certainly appears so, but I have no memory

1 of the details of any of this.

2 Q. And you don't recall, for example, copying the  
3 text of the two e-mails that you received from Professor  
4 Zeitz in August 2000, eliminating the forwarding marks  
5 and then putting them into a new document, do you?

6 A. I was in charge of all of the science  
7 departments and this is 11 years ago. One minor event  
8 in my day, I -- I have no memory.

9 Q. How many times has a grievance been filed  
10 against you in those years?

11 A. I don't recall any, apart from John.

12 Q. Now -- all right.

13 And this was apparently an important issue to  
14 Dr. Kao?

15 A. To him and him alone.

16 Q. But not to you?

17 A. No, it was a minor incident.

18 Q. Weren't you asked to send this letter by your  
19 boss?

20 A. Yes, as I explained before.

21 Q. So your boss was telling you to take care of  
22 this apparent problem at CCAC?

23 A. Yes.

24 Q. And in taking -- in the context of taking care  
25 of that, you wrote a letter to Dr. Zeitz with a copy to

1 Dr. Kao, starting with Dr. Kao had engaged in  
2 negotiations behind your back; isn't that right?

3 A. I don't believe the original letter said that,  
4 no. It was addressed to Professor Zeitz as chair of the  
5 math department and it was copied to Professor Kao and  
6 praised Dr. Kao for the fine job he had done at CCAC.

7 Q. Please take a look at Exhibit 4, page SD9.

8 A. I have that.

9 Q. Is that a copy of the letter you wrote to  
10 Dr. Zeitz?

11 A. Correct.

12 Q. Taking a look at paragraph beginning "Less  
13 happily," do you see that paragraph, the third paragraph  
14 on the first page?

15 A. I do.

16 Q. Okay. Taking a look at that paragraph, could  
17 you read that paragraph to the jury?

18 A. "Less happily by real reason for writing is to  
19 spell out great concerns about which you and I have  
20 already spoken in person regarding the breakdown of both  
21 the lines of communication and the chain of command in  
22 connection with the delivery of the course by USF for  
23 CCAC.

24 "Specifically, I was, as you know, very  
25 disturbed to discover that as a result of private

1 communications between John Kao and John Loomis at CCAC,  
2 it was decided," in quotes, "that USF would not deliver  
3 this course to CCAC in spring 2001 and that John Loomis  
4 received a -- by a CCAC instructor for their department  
5 of humanities and sciences."

6 Q. Now, your letter labeled SD9, it's dated  
7 November 1, 2000?

8 A. Correct.

9 Q. Well, did you -- did you or did you not receive  
10 the e-mails that are part of labeled -- beginning label  
11 SD41, 42 and 43, that I have just shown you? Didn't you  
12 receive those in about August?

13 A. I have no memory.

14 Q. Do you recall Dr. Zeitz telling you that he  
15 sent you those e-mails in August?

16 A. I have no memory of such details.

17 Q. Wasn't the real purpose of blaming Dr. --  
18 writing this letter concerning Dr. Kao and Dr. Zeitz was  
19 to deflect criticism away from you?

20 A. No.

21 Q. Now, I'd like to direct your attention to the  
22 meeting where the -- the meeting involving the faculty  
23 search in February 2008.

24 Were there minutes taken in that meeting?

25 A. I don't know.

1 Q. Do you recall anyone asking that minutes not be  
2 taken?

3 A. No, I don't remember.

4 Q. Do you recall Dr. Zeitz asking Ms. Liu not to  
5 take minutes at that meeting?

6 A. No, I don't.

7 Q. Do you recall Dr. Kao asking that minutes not  
8 be taken?

9 A. No, I don't.

10 Q. Now, at that meeting, did you get angry?

11 A. Certainly not visibly.

12 Q. So do you -- did you argue with Dr. Kao?

13 A. I don't recall if I was one of the people  
14 that -- that asked him to calm down and stop shouting.  
15 I don't remember.

16 Q. But you would recall -- did Dr. Finch get  
17 angry?

18 A. Dr. -- again, not visibly. He did speak very  
19 calmly, not shouting to Dr. Kao and told him that --  
20 that -- what Dr. Kao was trying to bring up was not  
21 relevant to the purpose of the meeting. That I  
22 remember.

23 Q. I see. Did Dr. Finch ask Dr. Kao anything  
24 about his statistical analysis?

25 A. I don't remember that.

1 Q. Did he make a point to Dr. -- strike that.

2 Did he ask Dr. Kao if Dr. Kao's position was  
3 that by failing to advertise, that there were people who  
4 might not have been actively looking might still have  
5 stumbled across the ad and applied?

6 A. I don't remember anything like that. I only  
7 remember Dr. Finch saying, "This is not why we're here,"  
8 something to that effect.

9 Q. And during -- at the time of the February  
10 meeting, do you recall that Dr. Kao was actually  
11 teaching a course in statistics?

12 A. I don't recall. Many of us have taught the  
13 statistics course.

14 Q. Dr. Kao included?

15 A. Yes.

16 Q. And did you have any question about his ability  
17 to teach statistics?

18 A. No.

19 Q. Now, during -- as a result of this meeting or  
20 any other events, did -- at any time during the spring  
21 semester of 2008, did you have any concerns about Dr.  
22 Kao's behavior regarding the students?

23 A. No.

24 Q. Did you have any concerns that Dr. Kao might  
25 have a problem dealing with parents of students?

1           A.    Normally we wouldn't interact with parents at  
2 all.  But, no, if it would have come up, I wouldn't have  
3 been concerned.

4           Q.    Well, parents came and visited their child, you  
5 didn't have any concern that Dr. Kao might meet with  
6 those parents?

7           A.    No.

8           Q.    You didn't have any concern that Dr. Kao would  
9 go postal and hurt any students?

10          A.    No.

11          Q.    You didn't have any concern -- did you have any  
12 concern that Dr. Kao -- strike that.

13                   Who did you think Dr. Kao was going to hurt?

14          A.    Several of us in the faculty.

15          Q.    You?

16          A.    Myself, Stephen Yeung, Paul Zeitz.  Those would  
17 probably be the top three.  But maybe also Steve Pacheco.  
18 He was very angry at -- at -- after the incident where  
19 John volunteered to become chair and was denied that.

20          Q.    Right.  That was in May, correct?

21          A.    I don't remember which month that was.

22          Q.    End of the semester, correct?

23          A.    I believe so.

24          Q.    All right.  And the semester ends in about  
25 mid-May, correct?

1 A. Correct.

2 Q. All right. And the people you've identified --  
3 well, you identified Dr. Pacheco. Prior to the incident  
4 regarding the chair, what concerns did you have of Dr.  
5 Kao -- what did you know about Dr. Kao's relationship  
6 with Professor Pacheco?

7 MR. VARTAIN: Objection. Compound. Ambiguous.

8 THE COURT: Sustained.

9 MR. KATZENBACH: Q. Prior to the incident with  
10 the chair, had you observed any interactions with  
11 Dr. Kao and Professor Pacheco?

12 A. Their interactions were very limited because  
13 Professor Pacheco, unlike the rest of us, has a joint  
14 appointment in computer science and his office is  
15 actually on the fifth floor away from the rest of us, so  
16 he would very rarely even bump into Dr. Kao.

17 Q. So the answer is you didn't observe any  
18 interactions between Dr. Kao and Peter Pacheco?

19 A. Very limited interactions.

20 Q. Well, other than the incident involving the  
21 chair, what interactions did you observe that gave you  
22 any cause for concern?

23 A. I -- I didn't see anything specifically with  
24 Peter Pacheco.

25 Q. Do you recall an incident where Dr. Kao came



1 to -- to school not wearing a suit?

2 A. I don't remember.

3 Q. At any time did you go around to other people  
4 in the department saying -- expressing fear that Dr. Kao  
5 had come to school without wearing a suit?

6 A. I don't recall.

7 Q. Did you call -- did you ever speak to Martha  
8 Peugh-Wade about your fear that Dr. Kao would do  
9 something because he had come to school not wearing a  
10 suit?

11 A. I remember speaking to Dr. Peugh-Wade about my  
12 fear of him, but I don't remember it being linked to not  
13 wearing a suit.

14 Q. And you indicated, I think the other day, that  
15 you only recall one meeting with Dr. -- with Martha  
16 Peugh-Wade?

17 A. That's all I recall, yes.

18 Q. And you don't -- do you recall any telephone  
19 conversations that followed up on that?

20 A. I don't recall.

21 Q. You testified, I believe the other day, that  
22 you felt that the second -- the two faculty meetings  
23 concerning the search were mere formalities; do you  
24 recall that?

25 A. Yes.

1 Q. Did you also feel that the requirement to  
2 advertise in professional journals was a mere formality  
3 as well?

4 MR. VARTAIN: Objection. Lacks foundation.

5 THE COURT: Sustained.

6 MR. KATZENBACH: Q. Are you familiar with the  
7 rules governing the -- are you familiar with the rules  
8 governing searches?

9 A. It's been many years. I haven't really looked  
10 at the guidelines for many years.

11 Q. Are you familiar that those rules require  
12 advertising?

13 A. Yes.

14 Q. Do you recall that those rules require  
15 advertising in a professional journal?

16 A. I don't recall the details.

17 Q. When you were conducting the search, did you --  
18 were you provided copies of the rules?

19 A. Yes.

20 Q. Those were the same rules that contained the  
21 requirements for the two meetings of the faculty?

22 A. Correct.

23 Q. Again, do you recall whether any of the -- you  
24 felt that any of the advertising requirements in these  
25 rules were mere formalities?

1           A.    No.  But in any case, the Dean's office is the  
2           one that decides ultimately and pays for the advertising  
3           of positions.

4           Q.    So would it be accurate to say it was the  
5           Dean's office, rather than the search committee, that  
6           made the decisions concerning how to advertise this job?

7           A.    Probably ultimately they would be the ones to  
8           decide and pay for the ads, yeah.

9           Q.    And that would be Dean Brown in 2008?

10          A.    In 2008, yes.

11          Q.    And Dean Turpin?

12          A.    Correct.

13          Q.    And when you were -- and when you were meeting  
14          to discuss this advertisement, or to discuss the search,  
15          right, did you ever meet with any affirmative action  
16          officer for the University?

17          A.    I don't believe so.

18          Q.    Did you have any discussions with any  
19          affirmative action officer for the University about how  
20          this search should proceed?

21          A.    I don't believe so.

22          Q.    Did you have any discussions with the  
23          affirmative action officer about what sort of  
24          advertisements you should place?

25          A.    I don't believe so.

1 Q. Did you have any discussion with the  
2 affirmative action officer about what sort of candidates  
3 you should be looking for?

4 A. Can I -- can I just remind you, though, that I  
5 was a member of the search committee, but I was not  
6 chair of the search committee. So the bureaucratic  
7 business of -- of ads and meetings and so on of deans  
8 would not have involved me.

9 Q. That's fine. That's fine. I mean, I'm just  
10 clarifying. We can ask Dr. Zeitz.

11 Dr. Zeitz was the chair, correct?

12 A. Correct.

13 Q. All right. So we can ask him.

14 But I'm just saying, you didn't attend any  
15 meetings where any -- there was any discussion of  
16 affirmative action in regards to the search?

17 A. No.

18 Q. There was no discussion -- you didn't attend  
19 any meeting where there was any discussion of -- of  
20 conducting the search to attract the largest number of  
21 minority and women candidates?

22 A. No.

23 Q. In fact, you don't -- so it would be accurate  
24 to say that as far as you're aware of, you attended no  
25 meetings where issues of diversity were discussed in

1 connection with the search?

2 A. No.

3 Q. Other than the meeting on February 6th where  
4 Dr. Kao raised this issue?

5 A. Right.

6 MR. KATZENBACH: Thank you. Thank you. That's  
7 all I have.

8 THE COURT: Mr. Vartain, do you have anymore  
9 questions for the defendant?

10 MR. VARTAIN: Just a few, Your Honor.

11

12 REDIRECT EXAMINATION BY MR. VARTAIN

13 MR. VARTAIN: Q. Mr. Katzenbach showed you  
14 that document that had SD9 on the bottom?

15 A. Uhm-hum.

16 Q. Did you ever prepare any document that had the  
17 term "SD9" on the bottom of it?

18 A. No.

19 Q. Tell the jury what you did in the spring of  
20 2008 to change your work habits on your day, place of  
21 work and so on, after witnessing the behaviors that  
22 Dr. Kao had directed at you.

23 A. Well, previously it's been my habit to -- I  
24 teach -- most of us teach three days a week -- Monday,  
25 Wednesday and Friday -- but, of course, there are many

1 other things to do on the days we're not lecturing:  
2 meeting with students and grading exams, preparing  
3 lectures and so on. And it was my habit previously  
4 to -- to spend the whole week in the office. So on the  
5 Tuesday and Thursday, I would be there as well.

6 But when I became so uncomfortable with the  
7 atmosphere at work, I started to stay home on Tuesdays  
8 and Thursdays and doing all of my work there.

9 Q. After the incident in the spring of 2008 where  
10 Dr. Kao was in your home and had that interaction with  
11 your wife that you witnessed, what did you do different  
12 about your work -- about your work style as compared to  
13 what you were doing in previous years?

14 A. At that point, I don't think there would have  
15 been a difference because the semester was -- was over  
16 or ending and -- and so normally in -- in the summer I  
17 would be -- I would be tending to do my research at  
18 home.

19 Q. So the incident with your wife happened after  
20 or around the time school was ending for you?

21 A. I believe so.

22 Q. Okay. Mr. Katzenbach asked you this question  
23 on Friday, and I'm going to -- and I am going to read  
24 his question and your answer, and then I am going to ask  
25 you a question about it.

1           "What was it about his misbehavior that made  
2 you say he was angry?"

3           That was Mr. Katzenbach's question.

4           Your answer was, "I think that was another --  
5 this might have been another of the occasions you could  
6 actually see him rigid with anger, like white knuckles,  
7 then foaming at the mouth."

8           Was that a situation with Dr. Kao that you  
9 observed in the spring of 2008, rigid with anger, white  
10 knuckles and foaming at the mouth?

11          A.    Yes.

12          Q.    When you -- when you had the bumping incident  
13 in the hall with Dr. Kao in the spring of 2008 -- I want  
14 to take you to that incident. I want to ask you just a  
15 few questions about that.

16          Did the incident come about at a time when you  
17 and he were on opposite sides of the hallway, of the  
18 school hallway?

19          A.    Correct.

20          Q.    You were walking north and he was walking  
21 south, so to speak?

22          A.    Correct.

23          Q.    But you were on opposite ends of the hallway?

24          A.    Opposite sides of the hallway.

25          Q.    Opposite sides of the hallway. East and west,

1 in other words?

2 A. Correct.

3 Q. Somehow he ended up on your side of the hallway  
4 and bumped into you?

5 A. Yes, quite hard.

6 Q. Did you yourself -- before Dr. Kao bumped into  
7 you, did you yourself move in any direction?

8 A. No. I was walking right along the -- the wall.  
9 And he was originally walking right along the other  
10 side.

11 Q. So if he had not moved -- if Dr. Kao had not  
12 moved, then there would have been no bumping; is that  
13 true?

14 A. Absolutely. Correct.

15 Q. Was it Dr. Kao's custom to wear a suit to  
16 school, as far as you could tell?

17 A. Yes, pretty much every day.

18 Q. Did the cackling laughs take place in the  
19 spring of 2008?

20 A. They did.

21 Q. Had they taken place to anywhere to that degree  
22 or frequency or tone prior to then?

23 A. No.

24 Q. Did you tell your wife that you were physically  
25 afraid?



1 A. I did.

2 Q. And why did you do that?

3 A. Just normal spousal sharing of feelings and  
4 concerns.

5 MR. VARTAIN: No further questions.

6 THE COURT: Mr. Katzenbach?

7 MR. KATZENBACH: A few, Your Honor.

8

9 RE-CROSS-EXAMINATION BY MR. KATZENBACH

10 MR. KATZENBACH: Q. When -- just to be clear  
11 on this, on the bumping incident, when did that happen  
12 during the spring semester?

13 A. I don't recall when it was.

14 Q. So it could have been anywhere from January  
15 through when?

16 A. Any time throughout the semester, through --  
17 through -- the semester ends in May.

18 Q. All right. And do you recall whether it was  
19 early or later?

20 A. I don't.

21 Q. Before or after the February 6th meeting?

22 A. I don't.

23 Q. Was it at a time before or after you were  
24 concerned about Dr. Kao?

25 A. I was already concerned about him at that

1 point.

2 Q. Did you report this incident to anybody?

3 A. I did, to Dean Brown.

4 Q. And right after -- soon after it occurred?

5 A. I don't remember the -- how much time elapsed.

6 As I explained before, it was -- it was discovering that  
7 the same thing had happened to my colleagues that made  
8 me particularly alarmed.

9 Q. Was that in June of 2008?

10 A. I don't recall.

11 Q. All right. How many conversations with Dean  
12 Brown about this did you have?

13 A. At least one.

14 Q. All right. Was your -- when -- was your  
15 conversation with Dean Brown about this incident at any  
16 time close to when this incident occurred?

17 A. As I just said, I don't recall how much time  
18 elapsed.

19 Q. All right. So it could have been as many as  
20 five months?

21 MR. VARTAIN: Calls for speculation.

22 THE COURT: Sustained.

23 MR. KATZENBACH: Q. All right. Now, did this  
24 incident -- at the time of this incident, you were  
25 reading -- you described you were reading a paper,

1 correct?

2 A. Just a piece of paper.

3 Q. And you were walking down the hall?

4 A. Correct.

5 Q. That's near the men's bathroom?

6 A. Correct.

7 Q. And you were on the side of the men's bathroom?

8 A. Correct.

9 Q. And Dr. Kao was on the side of the women's  
10 bathroom?

11 A. Correct.

12 Q. And...

13 A. I was well passed the entrance to the men's  
14 bathroom.

15 Q. Isn't the corridor for the -- doesn't the  
16 corridor for the math offices T right before the men's  
17 bathroom?

18 A. No, right before.

19 Q. Right before the women's bathroom?

20 A. The women's bathroom is closer, I believe.

21 Q. Okay. Now -- now, your office -- so let me  
22 see. You'd be walking down the hall, correct?

23 A. Correct.

24 Q. There is a T junction where if you were going  
25 to -- if you were going to the math office, the -- your

1 office, you would then take a left turn?

2 A. Yes, I would take a left turn in the direction  
3 I was walking.

4 Q. And that would be right after the bathrooms,  
5 right?

6 A. Not -- I mean, as I say, it's a hallway and  
7 then comes the alcove with my office, and Dr. Kao's  
8 office.

9 Q. Right. And you have to take a left to get  
10 there?

11 A. Correct.

12 Q. Now, the -- the -- when did you start staying  
13 home?

14 A. I don't remember exactly. I believe pretty  
15 much the whole of the spring semester. I might have  
16 even started previously.

17 Q. Okay. So it's your recollection that you might  
18 have started staying home as early as the fall of 2007?

19 A. It's -- it's possible.

20 Q. All right. And when do you recall -- when  
21 would be the earliest point in the fall of 2007 you  
22 started staying home?

23 A. I don't know.

24 Q. So you recall starting to stay home before the  
25 February 2008 meeting?

1           A.    Correct, because Dr. Kao's behavior, although  
2           it became much worse in the spring semester, it wasn't  
3           suddenly out of the blue.  He'd have some expressions of  
4           anger well before that.

5           Q.    Now, the -- at the time you started staying  
6           home, did you report that, that you were doing that to  
7           anybody?

8           A.    No.

9           Q.    Did you ask Paul -- did you report it to Paul  
10          Zeitz?

11          A.    Can I -- can I go back to that?  I think I did,  
12          in fact, tell Dean Brown at some point that I was doing  
13          that.

14          Q.    When?

15          A.    I don't recall.

16          Q.    Was that before or after the February meeting?

17          A.    I don't recall.

18          Q.    All right.  Now, the -- the party for  
19          Dr. Finch's retirement, that was about May 6th, May 8th?

20          A.    If you say so.  I don't recall.

21          Q.    Was it in May?

22          A.    I believe it was May.

23          Q.    Okay.  Was it after you had spoken to Martha  
24          Peugh-Wade?

25          A.    I don't recall.

1 Q. Do you recall ever telling Martha Peugh-Wade  
2 about this incident regarding your -- respecting your  
3 wife?

4 A. I don't recall.

5 Q. Did you ask for security at the party?

6 A. I don't believe so.

7 Q. Okay. Did you ever ask Dr. Kao why he was  
8 laughing?

9 A. No.

10 MR. KATZENBACH: That's all. Thank you.

11 THE COURT: Mr. Vartain?

12 MR. VARTAIN: Yes. Thank you, Your Honor.

13  
14 FURTHER REDIRECT EXAMINATION BY MR. VARTAIN

15 MR. VARTAIN: Q. Why was it that you didn't --  
16 when you heard Dr. Kao's scary cackling, why was it you  
17 didn't ask him what was going on with him?

18 A. Precisely because it was scary cackling and not  
19 normal laughter and it was occurring as he walked down  
20 the hallway. It was certainly nothing I was going to  
21 voluntarily go up and ask him about.

22 Q. You are a little upset today?

23 A. Yes.

24 Q. Are you still anxious about being in the  
25 presence of Dr. Kao?

1           A.    I am.  It's the only part of this proceeding  
2   that -- that is really getting to me.

3           Q.    What do you mean by it's getting to you to be  
4   near Dr. Kao?

5           A.    I just -- rationally, I know I'm perfectly safe  
6   here, but I still feel quite uneasy.

7           MR. VARTAIN:  Thank you.

8           THE COURT:  Mr. Vartain has sat down.

9           Mr. Katzenbach, any further questions?

10          MR. KATZENBACH:  Just one.

11

12                   FURTHER RECROSS-EXAMINATION BY MR. KATZENBACH

13          MR. KATZENBACH:  Q.  During the 17 years you  
14   worked with Dr. Kao, how many times did he make a  
15   personal threat to you?

16          A.    Never.

17          MR. KATZENBACH:  Thank you.

18          THE COURT:  Both counsel are sitting down.

19          Any more questions from Counsel?

20          MR. KATZENBACH:  No, Your Honor.

21          THE COURT:  Jurors, any questions for  
22   Dr. Needham?

23          I see no hands.  Can Dr. Needham be excused?

24          MR. VARTAIN:  Yes, for the defense, Your Honor.

25          MR. KATZENBACH:  Yes, from the plaintiff, Your

1 Honor.

2 THE COURT: Dr. Needham, thank you very much.  
3 You can go, sir.

4 Mr. Katzenbach, you have a witness?

5 MR. KATZENBACH: Your Honor, it's my  
6 understanding that the witness we would call is not  
7 available.

8 MR. VARTAIN: No. The next witness is  
9 Mr. Zeitz.

10 MR. KATZENBACH: He's being called by the  
11 defense.

12 THE COURT: Oh, so you still lack here --

13 MR. KATZENBACH: We still lack --

14 MR. VARTAIN: Dr. Turbine has bronchitis. She  
15 is going to come tomorrow morning, as I told  
16 Mr. Katzenbach over the weekend. We -- we unfortunately  
17 neglected to include you in our plans, and I apologize.

18 THE COURT: But you're including me now and I  
19 thank you.

20 MR. VARTAIN: Better late than never, but  
21 better never late.

22 THE COURT: Okay. So we're continuing with the  
23 defense case?

24 MR. KATZENBACH: Yes, Your Honor.

25 THE COURT: Okay. Defense may call the next



1 witness.

2 MS. ADLER: The University calls Professor Paul  
3 Zeitz.

4 THE CLERK: Please stand. Raise your right  
5 hand.

6 PAUL ZEITZ,  
7 having been duly sworn, testified as follows:

8

9 THE WITNESS: I do.

10 THE CLERK: Please be seated.

11 Spell your name and spell it for the record.

12 THE WITNESS: My name is Paul Zeitz. First  
13 name Paul, P-A-U-L, last name Z-E-I-T-Z again.

14

15 DIRECT EXAMINATION BY MS. ADLER

16 MS. ADLER: Q. Good morning, Professor.

17 Are you currently employed by the University?

18 A. Yes, I am.

19 Q. Okay. And what is your position?

20 A. I'm a professor of mathematics.

21 Q. Okay. Could you give us a little bit about  
22 your background, your education and...

23 A. Yeah, I was -- I went to the -- I have been at  
24 the University -- this is my 20th year at the  
25 University. I was hired in 1992.

1           Prior to that, I was a grad student at UC  
2 Berkeley, and before that I was a high school teacher in  
3 Colorado and San Francisco. And I went to college at  
4 Harvard before that.

5           Q.    Okay. And have you ever served in any  
6 administrative position at the University?

7           A.    I've been the department chair. I was --  
8 served as chair for six years, although it's technically  
9 not an administrative position, because we have a  
10 unionized faculty so I guess I have not been an  
11 administrator, but that's -- that's been the, sort of  
12 the highest level I've served.

13          Q.    Okay. Thank you.

14               Starting in the 2008 spring semester which  
15 begins in January, do you recall any behaviors that you  
16 had never seen before in Professor Kao, in particular in  
17 any one-on-one interactions that you had with him?

18          A.    Yes, I do. This was right before the spring  
19 semester began, very early January, probably the 2nd of  
20 January, maybe the 3rd of January.

21               I was the chair of a search committee, and the  
22 search committee had a deadline for applications which  
23 was in December, and I was in my office getting ready to  
24 go to San Diego to prepare for -- to interview the top  
25 candidates, and Dr. Kao came to my office and just

1 started chatting about the search. He was not on the  
2 search committee, but he was just asking a few, you  
3 know, simple questions and I was answering them.

4 And then he suddenly became enraged, and  
5 started just yelling and screaming and accusing me of  
6 something, sort of like traitor's behavior, that he  
7 sudden -- he -- he -- he was very, very upset that  
8 our -- that our employment ads did not include what he  
9 felt were the appropriate ads in print, if I understand  
10 correctly. And he was extremely upset, and was just out  
11 of control.

12 And it was a sudden -- it was very frightening  
13 to me because it was a very sudden change in behavior.  
14 He was speaking very politely and then suddenly just  
15 was -- was unable to control his emotions. It felt as  
16 though I had -- it seemed that -- he was anguished and  
17 furious and upset and -- and it was very personal. It  
18 was as though I had personally done something horrible  
19 to him.

20 Q. Did you feel personally threatened by him?

21 A. Yeah. I was very scared because it seemed to  
22 me that Dr. Kao had lost control of himself and was  
23 completely enraged. And he is a martial artist, and he  
24 was just a few feet away from me. So I was -- I was --  
25 I was terrified. It was the most upsetting thing that's

1 ever happened to me at my job.

2 Q. I'd like to go over a few things that you  
3 mentioned.

4 Well, first of all, what did he look like?  
5 You've described that he was screaming at you. Can you  
6 describe what his face looked like, his -- his demeanor,  
7 his body language?

8 A. Well, he -- when he first started speaking, he  
9 had a fairly normal posture, but then he became very  
10 stiff and sort of was shaking and his -- his face looked  
11 stiff. It's hard to describe, but he -- you know,  
12 like -- I don't know, I don't remember what he did with  
13 his body, but it's the sort of demeanor one gets if  
14 you're -- if you're -- you know, clenching your fists  
15 and trying to, you know, and -- and fighting to control  
16 what your body is doing. It was like a quivering  
17 stiffness, is the best I can describe.

18 Q. And what was he saying to you? Does anything  
19 stand out in your mind? What was he saying as he was  
20 screaming at you?

21 A. Well, he -- he repeated -- he repeated his  
22 point which was you should have had print ads. This is  
23 wrong. It's against the rules. It's wrong. It's evil.

24 You know, he might not have used the word  
25 "evil," but it's as though I had done something

1 profoundly evil or profoundly traitorous and that also  
2 was profoundly personal to him. And -- but the main  
3 point was, you didn't have print ads. This is bad.  
4 This is why I'm losing control.

5 Q. And you said that he was standing about  
6 three feet away from you. Can you describe where he was  
7 and where you were in your office?

8 A. Yeah. So I'm sitting at a desk that's, you  
9 know, like this size, and my door is here, and so I'm  
10 sitting like this, and he's standing at the doorway like  
11 that. So he's, you know, slightly more than an arm's  
12 length away.

13 Q. Okay. And you said he was standing three feet  
14 away from you and that made you scared. What were you  
15 scared of?

16 A. Well, as I said before, Dr. Kao is an expert in  
17 martial arts. He -- I remember years ago he told me he  
18 was the ivy league judo champion. And some years prior  
19 to this incident, he told me that he had bought a used,  
20 I think a used wooden mannequin for punching practice.  
21 And so he is somebody who punches a wooden mannequin and  
22 is an expert in judo, and he is not in control of his  
23 emotions and he's three feet away from me. I mean, I  
24 was extremely, extremely scared.

25 Q. Were you afraid that he could strike you?

1           A.    Of course.

2           Q.    What was the office like that day?  You said it  
3 was early January before classes began.

4           A.    Yeah.  My office is -- I'm in one office and  
5 adjacent to me is another office.  And then there's a  
6 larger room; that's the department program assistant's  
7 office, and then there is a door to that.  So there's a  
8 door that comes into the sort of common area, and then  
9 there's my office and another office right next to it.  
10 And to my recollection, no one else was there, because  
11 it was right after the new year, and the semester hadn't  
12 begun.

13                   A lot of the professors were -- were not  
14 around.  And I don't recall that the program assistant  
15 was there.  The office next to mine, the professor was  
16 on sabbatical and the program assistant had moved into  
17 that office temporarily.

18           Q.    Was that something that you made a note of,  
19 that -- that stood out to you at the time, that the  
20 offices were empty?

21           A.    I didn't make a note of it, I just -- I went to  
22 my office knowing that it was going to be quiet so I  
23 could get -- get work done, because it was right after  
24 the new year.  I was heading to San Diego in just a day  
25 or two, and I didn't expect there would be people there,

1 frankly.

2 Q. Did it cause you any concern that there was no  
3 one else around during the meeting?

4 A. Yeah, I felt scared. And, you know, to be  
5 honest, I was unaware of anything at all during that  
6 interaction, except for Dr. Kao standing at my door. It  
7 was -- I was not thinking about anything else.

8 Q. In all your years at the university up to the  
9 point of that meeting, had you ever previously been  
10 afraid of Dr. Kao?

11 A. No.

12 Q. In all your years at the University up to the  
13 point of this meeting that we've been talking about, had  
14 you ever previously seen Dr. Kao behave in that manner?

15 A. Not -- not -- not personally, no.

16 Q. Had he ever come to your office previously and  
17 screamed at you while shaking in anger?

18 A. No.

19 Q. Were you a member of the search committee  
20 during that same 2008 spring semester?

21 A. Yes. I was the chair for the search committee.

22 Q. Okay. Were there meetings that the search  
23 committee had with the math department during that  
24 semester?

25 A. Yes. We are required -- if I remember

1 correctly, the Dean's office asks us to have two  
2 meetings with the department. And also the department  
3 is small and the search committee is small, too, and the  
4 composition of the search committee is voluntary, so  
5 anyone can volunteer to serve on this committee.

6 But once the committee is formed, it has access  
7 to confidential material, such as letters of  
8 recommendation from candidates, so -- so we can't -- so  
9 some of our deliberations are confidential, so -- but we  
10 have two official meetings, one with the rest of the  
11 department, after we've come back from the national  
12 meetings to discuss our top candidates. Then we go to  
13 the Dean and meet with the deans to discuss who will be  
14 invited as finalists to the campus. And it's usually  
15 just three to four people. Then the finalists visit the  
16 campus.

17 And then the next official meeting with the  
18 department is the search committee meets with the  
19 department to discuss its rankings of the candidates and  
20 to see if there's consensus with the rest of the  
21 department about the search committee's rankings because  
22 the next step is to make a recommendation to the Dean,  
23 who was the person ultimately in charge of -- of hiring  
24 the new person.

25 Q. Did any of those meetings that the search



1 committee held with the math department stand out in  
2 your mind that semester?

3 A. Yes. The -- the second of those meetings after  
4 all the finalists had been on campus and the search  
5 committee wanted to discuss with the department. It was  
6 a very unusual, very unusual meeting. That was -- that  
7 was February 6th. I remember -- remember the date from  
8 my calendar.

9 Q. Could you please tell us what happened at that  
10 meeting?

11 A. Well, the -- the way it works is the -- it's  
12 not a math department meeting, it's a search committee  
13 meeting. And the -- so normally in a math department  
14 meeting the program assistant takes minutes. And at the  
15 beginning of this meeting, I remember we had some  
16 discussion about who was running the meeting. It was a  
17 search committee meeting, and I believed Dr. Kao  
18 requested that, because of that, no minutes should be  
19 taken, but I'm not sure if I remember that completely  
20 correctly. So the members of the search committee  
21 discussed the candidates, discussed their -- their  
22 ranking.

23 And then we went around the room talking to  
24 other members of the -- of the search committee to -- of  
25 the department to see where they stood with these

1 candidates. And everyone, except for Dr. Kao, said  
2 something along the lines of I think candidate X is No.  
3 1 and candidate No. 2 is No. 2, and, you know, something  
4 along those lines. And when -- and Dr. Kao was last and  
5 he said, I think the search is illegal and should be  
6 cancelled.

7 And after that, the meeting became pretty  
8 unruly, because a lot of people said things like this is  
9 crazy. What's going on? What are you doing? This --  
10 this -- that makes no sense. And it became pretty  
11 heated.

12 And Dr. Kao was very insistent and started  
13 repeating his point that the lack of print ads was a  
14 positive evil and he claimed to have statistical  
15 evidence that could prove beyond a reasonable doubt. If  
16 I remember correctly, that he claimed he could prove  
17 with probability less than one over 10,000, or something  
18 along those lines, that -- that the fact that there were  
19 no print ads meant that the search was discriminating  
20 against certain groups. That's the gist of the  
21 argument. The argument was not presented in a civil,  
22 rational discourse form. It was just, you know, a very  
23 heated argument.

24 And the technical -- one of the technical tools  
25 you use in this sort of statistical analysis is

1 something called a P-value, which is sort of a --  
2 essentially a probability that something couldn't occur  
3 due to chance. And at one point Dr. Kao shouted "I have  
4 been up all night calculating P-values," and that -- you  
5 know, the meeting pretty much ended on that note. It  
6 was clear that there was no way for there to be a  
7 rational discourse about this.

8 And I was technically the chair of this meeting  
9 and I really didn't want it to be chaotic, so I tried to  
10 calm things down, and I said look, we are going to have  
11 to agree to disagree, or something along those lines.

12 And Dr. Kao said "I want you to make sure you  
13 bring my concerns to Brandon Brown," who was the  
14 associate dean of sciences at the time. And I assured  
15 him that I would.

16 And -- so that's -- that, in a nutshell, is  
17 what happened in this meeting.

18 Q. I just want to go over a few things.

19 You -- you said that Dr. Kao was not civil,  
20 that you tried to calm things down, that -- could you  
21 describe his demeanor, his tone of voice, his body  
22 language of Dr. Kao at this meeting?

23 A. Well, he was -- he was not as -- he was not  
24 as -- did not have as hostile a demeanor as he had in my  
25 office the month before, but he -- he seemed like he was

1 fighting to control his emotions and he kept repeating  
2 himself. His posture was stiff. His - he was unable to  
3 make contact with his colleagues. It was -- it was --  
4 you know, he had this argument that he felt passionately  
5 about that he just kept repeating. And there was no  
6 communication, it was just this sort of rigid, angry  
7 argument on his side. And other members of the  
8 department also started, too.

9 Q. What was the volume of his voice like?

10 A. It was loud. I don't remember exactly, but it  
11 was -- it was -- you know, I think you would say it was  
12 a heated argument.

13 Q. What about the expression on his face, his  
14 eyes, his mouth?

15 A. He -- he looked upset. And to be honest, I  
16 really didn't -- wasn't interested in making eye  
17 contact, and I don't think anyone else was. He was  
18 clearly upset and he was -- I think -- I can speak for  
19 the rest of the people in the room, that he was talking  
20 about things that really didn't make sense to the rest  
21 the people in the room. And not only that, but the fact  
22 that he was speaking about it so impassionate was what  
23 was upsetting people in the room.

24 It was not what he was saying, but the fact  
25 that it clearly mattered so much to him and he was

1 taking it so personally and it was such a, you know,  
2 passionate thing for him that he was, you know, he was  
3 not in control of his feelings about this, and -- and I  
4 think it disturbed everyone else who was there because  
5 they could not understand why somebody would be so upset  
6 about these things.

7 Q. Okay. And you mentioned that he was unable to  
8 connect. Did people try to talk to him at the meeting  
9 to calm him down?

10 A. A little bit. I think I tried the hardest,  
11 since I was supposedly in charge of this meeting which  
12 was basically spinning out of control. And I, you know,  
13 said, look, let's not argue about this. We have a  
14 meeting to do, we have a decision to make, we've heard  
15 your complaints. You know, there's no point in going  
16 over this again and again, and that's what was  
17 happening. It was repeating again and again.

18 Q. And how did he seem to respond when people  
19 tried to talk to him? Did he seem to be able to hear  
20 them? Did he...

21 A. Not very well, but in the end he -- we did  
22 quiet things down, but it was -- again, it was not --  
23 there was no rational discourse, it was not like, "Oh, I  
24 see what you're saying." "Oh, yeah, I understand." You  
25 know, let's agree to disagree. It was not that kind of

1 a disagreement.

2 It was a -- it was a -- it was closer to  
3 dealing with someone with a temper tantrum, although I  
4 would not go so far as to say -- it wasn't quite like  
5 that, but it was more on the spectrum of arguments  
6 between dealing with somebody who is having a temper  
7 tantrum versus somebody who is just disagreeing with  
8 you.

9 Q. And you said a number of times now that he was  
10 not rational. Was there anything that was troubling  
11 about that to you?

12 A. Well, the -- again, I'm speaking for myself,  
13 but I believe I'm speaking for the rest of the people in  
14 the room. His insistence that there was something  
15 fundamentally wrong with this job search that was  
16 causing a -- you know, a pos -- a true harm, a social  
17 harm of some sort, and that he seemed to be passionately  
18 invested in this. It honestly didn't make any sense to  
19 me and I think it didn't make any sense to anyone else.

20 It seemed to me that he was worrying about very  
21 minor details that -- that -- that were unimportant and  
22 had no effect on -- on the ultimate search itself,  
23 because I think he was very worried, as far as I  
24 understand it, about discrimination. And as far as I  
25 can tell, the search was conducted well and it had a

1 good outcome.

2 So that was -- it was very strange, very  
3 upsetting and very strange.

4 Q. Okay. And after the meeting, did anyone who  
5 was at the meeting share their thoughts with you or talk  
6 to you about what had happened?

7 A. Oh, well, there were a number of people at the  
8 meeting who were upset about it, but in particular, my  
9 colleague, Stephen Yeung, was sitting next to Dr. Kao  
10 and he was shaken and, you know, he was pale and very  
11 upset. And he -- he just -- I think he was stunned and  
12 frightened, and just didn't know what to think. He was  
13 beside himself.

14 Q. Did he tell you that at the meeting?

15 A. He did. He was very upset. It was -- you  
16 know, he -- we -- he couldn't believe what happened and  
17 it profoundly bothered him.

18 THE COURT: Ladies and gentlemen, remember the  
19 admonitions. Do not form or express any opinion on this  
20 case until it's finally submitted to you for your  
21 decision. Do not discuss it among yourselves or with  
22 others until that time.

23 Please be back in your places at 10:10  
24 according to the courtroom clock.

25 (Recess taken.)

1 THE COURT: Jurors and alternates are all  
2 present. Counsel from both sides are present.  
3 Plaintiff is personally present. Dr. Zeitz is on the  
4 witness stand.

5 Ms. Adler, you may continue your inquiry.

6 MS. ADLER: Thank you, Your Honor.

7 Q. Dr. Zeitz, when we last spoke you had said that  
8 after the February 6th meeting that your colleague,  
9 Professor Yeung, told you how afraid he was after the  
10 meeting.

11 Could you tell us what he said to you?

12 MR. KATZENBACH: Objection. Hearsay.

13 MS. ADLER: Offered under Evidence Code 1250 to  
14 show the mental state of Professor Yeung at that time.

15 THE COURT: It may be received for that  
16 purpose.

17 MS. ADLER: Q. Go ahead.

18 A. Well, I don't remember his exact words. This  
19 is four years ago and -- but he was very shaken and  
20 upset. And he said something along the lines of, "I'm  
21 really scared of him." I think what -- what bothered  
22 him is what was bothering --

23 MR. KATZENBACH: Objection. Speculation.

24 THE COURT: Overruled. The witness may  
25 continue his answer.



1           THE WITNESS: What was upsetting, I think was  
2 what's upsetting for me, was that here Dr. Kao was going  
3 on and on ranting, literally, about things that  
4 seemingly made no sense to the rest of the department,  
5 and it indicated a lack of -- a lack of rational  
6 control. And certainly for myself, that coupled with  
7 what happened in my office the month before, I was just  
8 very worried, because it is not normal behavior and it's  
9 changing behavior, and it's irrational behavior and it's  
10 uncontrolled behavior. And Dr. Yeung was just as  
11 impressed by this.

12           I'm using "impressed" in a negative sense, and  
13 he was very, very upset.

14           MS. ADLER: Q. And what do you mean when you  
15 say this was "changing behavior"?

16           A. Well, I have been at the University for 20  
17 years and I have known Dr. Kao since I came to the  
18 University. He had been hired the year before me, and I  
19 have seen him for many years. And he was a collegial  
20 colleague for the first number of -- quite a few of  
21 these years, and over time his demeanor changed.

22           But in 2008, it was this sudden change to  
23 complete irrational, uncontrollable rage and then  
24 followed a month later by this, what, to my mind, was a  
25 nearly un-contained rant, uncontrolled rant about things

1 that made no sense in -- during an official meeting,  
2 coupled with, you know, changes in body language,  
3 changes in posture and changes in demeanor. It was very  
4 upsetting and very scary for me.

5 Q. Now, did Professor -- during this semester that  
6 we've been talking about, the 2008 spring semester, did  
7 Professor Yeung on other occasions come to you and tell  
8 you that -- about any experiences he had with Dr. Kao?

9 A. Yes. He -- he --

10 MR. KATZENBACH: Objection, Your Honor.  
11 Hearsay.

12 MS. ADLER: Evidence Code 1250 to show  
13 Professor Yeung's mental state.

14 THE COURT: All right. Received under Evidence  
15 Code 1250.

16 THE WITNESS: He -- he described -- I don't  
17 remember the timing of this, but it was most likely  
18 after February -- after the February meeting, so  
19 sometime during the remainder of the spring.

20 But he several times told me about -- I think  
21 one time he was walking down the hallway and he felt  
22 that he had -- had -- that Dr. Kao was deliberately  
23 trying to kind of intercept him, and he described -- you  
24 know, I did not witness this, but he -- he was upset and  
25 told me about this.

1           And he had described another -- another event  
2 where Dr. Kao, you know, bent down like in sort of a  
3 caricature of bowing, and then, you know, stood up and  
4 laughed at him. And something -- you know, some very  
5 strange sort of inappropriate theatrical behavior.

6           The incident in the hallway really bothered me,  
7 because I had had incidents of the same kind that I had  
8 just prior to then thought, well, maybe it's a weird  
9 coincidence, but then it occurred to me that this was  
10 some sort of strange pattern that, again, from my mind,  
11 a disturbing change in behavior.

12           MS. ADLER: Q. And what incident are you  
13 referring to in the hallway that happened to you?

14           A. Well, for me these were two -- two things that  
15 happened. I don't remember when they happened.  
16 Sometime during the spring. And they were maybe in  
17 isolation, seemingly almost unimportant, but -- but --  
18 but coupled with all the rest, it was strange and  
19 upsetting.

20           Once -- one time I was in the bathroom washing  
21 my hands, and Dr. Kao was in the bathroom, and -- and in  
22 trying to get out of the bathroom, Dr. Kao bumped into  
23 me. Not hard, but it was a bump. And in the 20 years  
24 I've used that bathroom, I've never bumped into anyone.  
25 You know, it's just not that kind of a bathroom. And it

1 was just strange, and I thought that's weird.

2 And then there was a similar incident when the  
3 two of us were alone in the -- I think I've described my  
4 office is one of two offices and then there's a common  
5 room. And I was leaving my office to go through the  
6 common room out the door to leave, and again Dr. Kao was  
7 there, and again there was this bumping. No pain, but  
8 it was -- it was -- it was -- it was body contact that  
9 was -- that I certainly was not intending -- intending  
10 to have. And it was just strange because this had never  
11 ever happened before.

12 And the fact that the same thing happened to  
13 Stephen Yeung, and I believe also to Tristan Needham,  
14 made it seem like a very strange thing where something  
15 new was happening that -- that our -- our colleague who  
16 had started to seemingly have trouble controlling  
17 himself verbally and in terms of appropriate behavior in  
18 a meeting, and it was also now having -- was -- there  
19 was some issues about, you know, boundary, physical  
20 boundary. So it was very upsetting.

21 Q. Okay. And going back to the bumping that took  
22 place in the men's restroom, had Dr. Kao ever bumped  
23 into you before in the men's restroom?

24 A. No. No one had ever.

25 Q. Okay.

1           A.    Yeah, in 20 -- well, back then it was like 16  
2 years or something. Yeah, no -- yeah. No. Never ever.

3           Q.    Was it crowded in the men's restroom?

4           A.    No, just the two of us --

5           Q.    Okay.

6           A.    -- to my memory. There could have been  
7 someone. I didn't check, but it seemed like there were  
8 just two of us in there. It's not a big bathroom.

9           Q.    Okay. And regarding the second bumping in the  
10 hall, you said that you were on -- were you on two  
11 different paths of travel or --

12          A.    I can't -- this is -- trying to describe body  
13 language four years ago, I can't be accurate. All I  
14 know is I was trying to -- I was trying to leave my  
15 office to go out and then I -- and again, when I do this  
16 in the 20 years I've worked at USF, I've never had to  
17 negotiate body boundaries with other people.

18                    I mean, you know, when I was walking through  
19 the -- I took the ferry in here this morning. And when  
20 I left the ferry, I was in a crowd of people. And  
21 there's crowds of people going in all directions. No  
22 one bumps anybody. You know, it's just -- you don't  
23 know what you're doing but you are not bumping. So  
24 somehow bumping occurred.

25          Q.    Okay. Now, in the men's restroom after Dr. Kao

1 bumped into you, did he say anything to you?

2 A. Not to my recollection.

3 Q. Did he apologize?

4 A. No.

5 Q. Okay. And regarding the second bumping in the  
6 hall, did Dr. Kao apologize afterward?

7 A. I have no memory of any conversation.

8 Q. Okay. Did it strike you as odd?

9 A. Both incidents in isolation strike me as a  
10 little bit odd. The first time I thought, well, that's  
11 odd; the second time I thought that's odder, because it  
12 was the second time.

13 But I -- to be honest, I would have been  
14 embarrassed to talk about it with anyone else had I had  
15 not heard that this had happened to other people. And  
16 once I heard that, then I became -- became very upset,  
17 because it was no longer just a one coincident -- a one  
18 odd thing, a coincidence, it was -- it was something,  
19 you know, something strange.

20 Q. And why was -- why was that worrisome for you,  
21 that you found that -- you used the word "pattern." Why  
22 was that worrisome?

23 A. I'm not a doctor and -- but I'm an observant  
24 person and what I'm observing in Dr. Kao here is  
25 disturbing changes in behavior that are -- involve both

1 aggression and lack of control.

2 The speech in January was very, very angry,  
3 uncontrolled rage, and the ranting in February was  
4 barely controlled and, in my opinion, irrational  
5 ranting. And then the -- these other incidents were  
6 aggressive -- aggressive behaviors involving, you know,  
7 physical proximity.

8 And, again, I'm not a doctor, but, you know, I  
9 can't help but to try to connect dots in something like  
10 this. And the whole thing -- the whole thing made me  
11 terrified, made me not sleep at night. And I know  
12 several of my colleagues felt the same way.

13 It was -- it was the dominating -- the  
14 dominating thing of that spring for me. It was pretty  
15 much all I could think about was worrying about what's  
16 going on here.

17 Q. Okay. And -- so you've discussed that you had  
18 a conversation with Professor Yeung and learned that he  
19 had a similar incident happen to him regarding John Kao.

20 You mentioned that intercepting, was that --

21 A. Yeah. Again, I'm not good at describing  
22 physical things that well, but -- but to my  
23 recollection, and this was, you know, four years ago, my  
24 memory was that it was something like he was walking  
25 down the hallway and Dr. Kao was walking in the --

1 towards him, and, you know, sometimes when people are  
2 walking, you know, towards each other, they'll sometimes  
3 accidentally move towards each other and then veer away.  
4 This happens to everyone a hundred times a day walking  
5 down the street. But it was -- it wasn't quite like  
6 that in that there was -- I think Dr. Yeung felt as  
7 though -- thought Dr. Kao was actually trying to  
8 intercept him, rather than trying to avoid him. That's  
9 the sense I got.

10 Q. Trying to bump into him?

11 A. Correct.

12 Q. Okay.

13 A. I don't know if he succeeded or if it occurred  
14 or not. And this is, to the best of my recollection,  
15 what -- what Dr. Yeung was describing to me.

16 Q. Did any of your other colleagues during that  
17 semester tell you about any bumping incidents that they  
18 had?

19 A. Yes. Tristan Needham did.

20 MR. KATZENBACH: Objection. Hearsay.

21 MS. ADLER: Evidence Code 1250 to explain the  
22 mental state of Mr. Needham, and also to explain his  
23 conduct of later reporting his bumping incident to  
24 Associate Dean Brandon Brown.

25 THE COURT: It may be received for that



1 purpose.

2 THE WITNESS: Well, I don't remember any  
3 details of -- of what happened with Tristan, except  
4 something along the lines of, "Oh, man, the same thing  
5 happened to me."

6 And, you know, and I was not interested in  
7 details. I didn't want to know who walked where. But  
8 just the fact that this was happening to several of us  
9 was, to my mind, very -- you know, kind of raised the  
10 hair on the back of my neck kind of thing. It's --  
11 because it's not something normal. I didn't go to  
12 graduate school for this. This was not -- this is  
13 not -- this is not the kind of working environment that  
14 I had signed on to have.

15 MS. ADLER: Q. How did Professor Needham  
16 appear to you when you learned that he had a similar  
17 incident?

18 A. I can't remember, again, his exact demeanor,  
19 but we're talking about -- we're not talking about happy  
20 people this spring. Everyone is looking kind of pale  
21 and shaken and, you know, the dominant emotion is -- is  
22 fear and confusion, because we don't -- it's not  
23 expected. It's not something that any of us had ever  
24 dealt with before. We don't know what's happening. We  
25 don't know what's going to happen. That's how my

1 colleagues were.

2 Q. All right. I want to go back to the early  
3 January incident in your office where Professor Kao was  
4 speaking to you in your office.

5 Did you tell me what else about that incident?

6 A. Pardon?

7 Q. The incident where Professor Kao was in your  
8 office and yelling at you, did you report that to  
9 anyone?

10 A. Oh, yes. I spoke about it with Brandon Brown,  
11 who was the associate dean at the time. I don't  
12 remember exactly when, but I probably tried to find him  
13 that very day. I don't have any records. I didn't keep  
14 records about this, but I know he was almost certainly  
15 the first person that I spoke to.

16 Q. And what was your purpose in telling him?

17 A. Well, I was -- again, this was the worst thing  
18 that had ever happened to me since I started working at  
19 the University. I was -- you know, I was terrified and  
20 also upset, and a little bit mad, too. And -- but  
21 mostly terrified and upset and confused.

22 And I had thought -- I thought of several  
23 things. I thought should I go to public safety, should  
24 I file a grievance against this individual? Should I go  
25 to my supervisor? And I decided to go to my supervisor

1 and let him handle it because I felt that whatever was  
2 happening was way above my pay grade, and I trusted Dean  
3 Brown to deal with whoever he thought was necessary at  
4 that point.

5 I did not file a formal complaint. I just  
6 wanted to say, man, this -- something really, really  
7 upsetting happened in my office, and I think you should  
8 know about it. That was our discussion.

9 Q. Do you recall if you met with Brandon Brown in  
10 person over this incident?

11 A. You know, I don't -- I don't remember. I  
12 expect that I did. Certainly if he was in his office on  
13 that day, then I did because I'm sure the first thing I  
14 did was walk down the hall to look -- walked a couple of  
15 hallways down to try to find him, but I honestly don't  
16 remember. I -- I'm -- I'm pretty sure I did not e-mail  
17 him directly about this -- this incident. I might have  
18 spoken to him on the phone. But I just -- I don't  
19 remember.

20 Q. And I just want to talk a little bit about how  
21 this episode in your office in early January impacted  
22 you.

23 Were you still upset when you got home that  
24 evening, for example?

25 A. Oh, yes, yeah. I mean, yeah, it -- again, it

1 was the worst thing that ever happened to me. It  
2 didn't -- and it didn't stay -- it stayed bad, and I --  
3 I had trouble sleeping for -- I had trouble sleeping  
4 last night. I mean, I had trouble -- I mean, I -- but I  
5 had -- literally I had trouble sleeping for weeks.  
6 And -- and I was in a state of, you know, stress for  
7 much of that semester, you know. Like the adrenaline  
8 gland pumping kind of stress. Like when I would walk to  
9 my office, I would worry what's going to happen, that  
10 sort of stress. So no, it was bad.

11 Q. When you spoke to Brandon Brown, did you tell  
12 him that you were losing sleep over this incident?

13 A. If it was the very same day, I didn't because I  
14 hadn't yet lost any sleep, but certainly in subsequent  
15 conversations, I definitely told him about that.

16 Q. All right. And I want to take you back briefly  
17 to the faculty search that we were talking about  
18 earlier, and in particular, you testified a little bit  
19 about the ad issue that Professor Kao was --

20 A. Yeah.

21 Q. -- raising.

22 Are there guidelines regarding placement of ads  
23 for faculty searches?

24 A. Yes. The Dean's office has a little, you know,  
25 several page document that says something like -- I

1 think it's even titled "Guidelines for a Job Search,"  
2 and it has some -- it has some rudimentary guidelines  
3 about how search ads should be placed.

4 Q. Okay. And who places the actual ad?

5 A. The -- it's done in consultation with the  
6 search committee, but the Dean's office approves the ads  
7 that actually get placed and the program assistant  
8 probably physically does the work for that.

9 Q. And does the guidelines specify that the ads  
10 have to be in print?

11 A. Not to my recollection. I think it says they  
12 should be in appropriate journals, something along those  
13 lines.

14 Q. Okay. And what decision was reached about  
15 where to place the ads?

16 A. The decision we made was to place our main ad  
17 in electronically in the EIMS; I think that's electronic  
18 information -- Employment Information in the  
19 Mathematical Sciences, which is a popular website. And  
20 it also had a print version, which I believe we placed  
21 ads, and also we placed, I believe both online and print  
22 ads with the AWMD, the Associate for Women in  
23 Mathematics. I believe that's what we did.

24 Q. How common are online ads these days?

25 MR. KATZENBACH: No foundation.

1           THE COURT:  Yeah, technically you're right.  
2 Sustained.

3           MS. ADLER:  Okay.

4           MS. ADLER:  Q.  At that time that the online  
5 ads were placed, did you have any knowledge as to  
6 whether that was a common practice among other  
7 universities and colleges?

8           A.  Well, I attempted to find out, since I was the  
9 chair of the search committee, and I had conversations  
10 with other people and other universities.  And I  
11 remember a colleague who was the chair of the math  
12 department at Gettysburg College saying all serious  
13 applicants --

14           MR. KATZENBACH:  Objection.  Hearsay.

15           THE COURT:  Sustained.

16           MS. ADLER:  Q.  Why was -- did the committee --  
17 did the committee decide to place the ads online during  
18 that search -- the search for Cornelia Van Cott?

19           A.  Yes.  We had consensus and we felt, from the  
20 conversations that we had with others, that it was the  
21 best practices, that it was a completely standard thing.  
22 And Dean Brown himself said that at that time the -- all  
23 the job searches occurring at the University that year,  
24 I believe, there were only two departments that were not  
25 fully online in their ads.  So it seemed like a

1 completely reasonable, completely -- you know, like a  
2 no-brainer decision in my opinion.

3 And to be honest, I did not think about it that  
4 much, and I felt completely confident that what I was  
5 doing was -- was completely in line with what other  
6 institutions were doing.

7 Q. And you mentioned the online site for the  
8 American Mathematical Society, so it's a website that  
9 you go to, it's for the organization; is that correct?

10 A. Correct.

11 Q. And is there an option to select the classified  
12 ads, the job ads?

13 A. Yeah. The -- I forget whether it's affiliated  
14 with the AMS, the American Math Society, or the  
15 Mathematical Association of American. Those are pretty  
16 much the two main professional organizations. But it's  
17 not like this website is in isolation, it's part of a  
18 larger web presence of these mathematical organizations.  
19 You can click on employment ads, you can look at  
20 journals online, you can look at all the things a  
21 website has. It's all the same world. It's not --  
22 there's no isolation between the employment ads and the  
23 rest of the -- the way the mathematical associations are  
24 trying to communicate with their audience is online.

25 Q. So if you wanted to, for example, see what jobs

1 are out there and you also wanted to read some scholarly  
2 journal articles, you'd go to the same website?

3 A. You could, certainly. Yeah, you could.

4 Although a job seeker would probably just, you know,  
5 would -- would do a job -- would go "EIMS" and get  
6 there, boom. But somebody who wanted to read a journal  
7 article and then said, hey, maybe I can apply for a job,  
8 they could easily, you know, click away from where  
9 they're reading and move into employment zone.

10 Q. All right. And in hindsight, do you believe  
11 the decision to place the ads online for the search of  
12 Cornelia Van Cott was the best practice?

13 A. Absolutely.

14 Q. And why is that?

15 A. Well, the search was very successful. I -- we  
16 did not have as many applications as the year -- the  
17 search that occurred, I believe, two years before that.

18 However, the number -- in my opinion, the  
19 quality of applicants was higher. And also the lower  
20 number of applications, in my opinion, was due to the  
21 fact that we had changed the wording of our ad and we  
22 had changed the deadline for our ad.

23 But I felt that the -- what's important is not  
24 the number of applications but the quality of  
25 applications, and I felt that we had a very excellent



1 diverse pool. We brought four finalists to the campus,  
2 and three were female. And in my opinion, we hired the  
3 best person. And we have a good colleague.

4 Q. Okay. And you mentioned you changed the  
5 wording of the ad and that may account for fewer  
6 applicants.

7 What was the change?

8 A. I don't remember the exact words, but the gist  
9 of it was that the -- that we included in our  
10 application that the -- the ad that we wanted applicants  
11 to be interested in teaching freshmen level courses. We  
12 also made the deadline earlier. And part of that was to  
13 keep the number of applications down. We saw no need to  
14 be bombarded with lots of applications, especially if  
15 they were people that weren't serious about the job, so  
16 that's what we decided to do.

17 I don't remember who decided that. It was, you  
18 know, a communal decision with the committee and the  
19 Dean, the Associate Dean.

20 Q. And you said something about there being an  
21 earlier deadline for --

22 A. Yeah.

23 Q. Is that for people to be able to send an  
24 application?

25 A. Right. So the ad said something along the

1 lines of "We will fully consider all applications  
2 received before December," you know, "5th." And -- and  
3 we moved that earlier. I forget how much earlier, but  
4 from the -- from one application -- from one search to  
5 the other, we made it a little bit earlier. Again,  
6 partly to get fewer applications.

7 Q. Okay. Now, you've testified that you spoke to  
8 Brandon Brown about your fears of Professor Kao.

9 During the semester, the spring 2008 semester,  
10 did you speak to anyone else in the University's  
11 administration?

12 A. In the administration -- yes, I was called in  
13 to the -- to speak to Martha Peugh-Wade, who is -- I  
14 don't know her formal title. She's head of HR or she's  
15 the HR person. And she ---she asked me to speak to her  
16 sometime in the spring. I don't remember when exactly.  
17 Like April or May.

18 Q. And what did you tell her?

19 A. Well, she -- she -- she wanted to hear about  
20 all these incidents -- incidents that had occurred and  
21 the worries that I was having. And she asked me, you  
22 know, to provide details of the incident in January 2008  
23 and the February meeting. And that was the basic  
24 conversation.

25 Q. Okay. Did you tell Ms. Peugh-Wade that you

1 were afraid of John Kao?

2 A. During that conversation, I'm sure I did. I  
3 don't know my exact words, but I -- I -- it was not a  
4 deposition, but it was a -- but it was a fairly informal  
5 conversation, although I know she was taking -- taking  
6 notes, but she was definitely asking about my feelings.

7 And certainly one point I was -- I was not  
8 asking her to do anything specifically, but one point I  
9 was trying to make was that what was going on during  
10 this spring was something that was creating for me a  
11 very unpleasant work experience.

12 Q. Did she ask you if you felt threatened by  
13 Professor Kao?

14 A. I don't remember the exact words, but I'm sure  
15 that -- that she -- she asked some questions to that  
16 effect. And certainly I said something to that effect  
17 that I was scared and upset and confused, but I don't  
18 remember the exact words.

19 Q. Okay. Did you have any anger against Professor  
20 Kao because he said that the search that results in the  
21 hire -- you had in the hiring of Cornelia Van Cott  
22 should be thrown out?

23 A. Well, I won't say that there was no anger. I  
24 was -- you know, I was very invested in the search  
25 process. These are very serious endeavors and they take

1 a lot of work, and -- and if -- if I hadn't already  
2 questioned Dr. Kao's state of mind, I would have been  
3 insulted by what -- what I would have felt was  
4 belittling of something that I had spent months working  
5 very, very, very hard at. That it was -- it should be  
6 cancelled -- it's, you know, wrong.

7 So I wasn't that mad because of that, because I  
8 was more -- but I was upset with him but my -- my  
9 dominant feelings were not anger towards him but just  
10 fear and confusion and -- and a -- and also a little bit  
11 of sadness, too, because Dr. Kao and I had -- once had  
12 very cordial relations and I felt that I no longer --  
13 this person was unrecognizable to me now, and I -- and  
14 there was absolutely no -- there was only enmity coming  
15 from him, and -- and no respect, no collegiality, no  
16 friendship.

17 Q. Did you ask the University to fire Professor  
18 Kao?

19 A. No.

20 Q. Did you ask the University to instruct him to  
21 have a Fitness for Duty Evaluation?

22 A. No.

23 Q. Did you hold against Professor Kao that he  
24 suffered from depression?

25 A. No. No. In fact, this was about ten years

1 ago, Dr. Kao had to miss a semester because of a  
2 depression-related incident, and I tried my hardest to  
3 keep this matter confidential and make sure the rest of  
4 the department did not know what was going on. And I  
5 felt it was -- it was a health emergency that was  
6 confidential, and I -- I didn't have any problem with  
7 that at all.

8 Q. Okay. During the semester that we've been  
9 talking about, the spring 2008 semester, given the new  
10 behaviors that you described, the screaming in your  
11 office in January, the outburst at the  
12 February 6th meeting, the bumping, what was going on in  
13 your mind? What was it like for you to come to work  
14 every day?

15 A. Well, as I said earlier, it was very  
16 unpleasant, it was scary. I would -- when I walked  
17 towards my office, I would think about exit routes. I  
18 would worry about -- make sure I had a phone with me. I  
19 tried to be aware of the location of Dr. Kao. I would  
20 try to avoid him, try to -- you know, I would do  
21 everything I could not to have any interactions with him  
22 of any kind. And I was upset.

23 I talked about this with my wife quite a bit,  
24 and she -- she was very upset and feared for my safety.  
25 And it was -- the thing that was hardest for me was the

1 fact that I felt that I could not -- I could not trust  
2 Dr. Kao to behave in a predictable way. And his  
3 behavior was -- at times was uncontrolled and  
4 unpredictable, and that's what was -- that was the scary  
5 thing. It was not anything else, but it was enough to  
6 really be an awful experience for me.

7 Q. What has the math department been like since  
8 Professor Kao left in the summer of 2008?

9 A. We've had our ups and downs, but the -- there  
10 is -- I'm speaking more for myself here, but it's a  
11 very -- it's more of a relaxed place. People leave  
12 their doors open and mingle in the hallways. And that  
13 had stopped happening in the alcove where Dr. Kao  
14 worked.

15 And, you know, the purpose of a -- of a  
16 department in a university is not for people to be  
17 best -- best friends, but it's very important for the  
18 functioning of the department that people respect each  
19 other and admire each other and be able to talk to one  
20 another, both formally and informally, and that had  
21 stopped occurring in the spring semester of 2008, and it  
22 has commenced -- it's occurring now in our department,  
23 it's -- which is very healthy.

24 Q. And how do you feel now today knowing that  
25 Professor Kao is trying to return to the math

1 department?

2 A. Well, this is very upsetting. It's very  
3 upsetting for me to be here in this courtroom. I have  
4 not gotten any sleep. It's -- it's, you know, this  
5 isn't a fun thing for me, and I -- I -- it's not like I  
6 have malice towards Dr. Kao. What I'm concerned about  
7 is my safety and my ability to -- to have a job where I  
8 can work with my colleagues and not feel -- and --  
9 and -- and not worry about behavior.

10 And so I'm just worried about what -- again, I  
11 hope I'm not repeating myself, but what worries me and  
12 worries me still is uncontrolled and unpredictable  
13 behavior.

14 MS. ADLER: Thank you.

15 THE COURT: Mr. Katzenbach is standing up.

16 MR. KATZENBACH: Yes, I'm anticipating that  
17 it's my turn.

18 THE COURT: Okay. You may inquire.

19 MR. KATZENBACH: Thank you, Your Honor.

20

21 CROSS-EXAMINATION BY MR. KATZENBACH

22 MR. KATZENBACH: Q. Dr. Zeitz, could you look  
23 at what's been marked as Exhibit 19?

24 A. The EIMS Employment Listing Search Form?

25 Q. Yes.

1 A. Yes.

2 Q. Is that the database that the job announcement  
3 was put in?

4 A. I think so, yeah.

5 Q. Do you find the University of San Francisco's  
6 announcement on it in that printout?

7 A. I don't think I saw it.

8 Q. Okay. Take a look at No. 169.

9 A. 169. Oh, yes.

10 Q. It's 169 on that list; isn't that right?

11 A. Correct.

12 Q. And how long is the ad placement?

13 A. You mean the number of words?

14 Q. How many lines is the ad placement for the  
15 University of San Francisco?

16 A. Where is the ad? Is this part of Exhibit 19?

17 Q. Well, do you see anything more than a one-line  
18 link?

19 MR. VARTAIN: We are going to stipulate, Your  
20 Honor. I propose a stipulation that the ad had a link  
21 to the University website with the ad on it. We've been  
22 over that.

23 THE WITNESS: Right. So what I'm looking at is  
24 a list of -- of zillions of -- of names of -- of  
25 institutions and each of them is a web link, and the



1 University of San Francisco is like it's neighbors.

2 MR. KATZENBACH: Q. All right.

3 A. Yeah.

4 Q. Thank you. Take a look at Exhibit 20, if you  
5 would.

6 A. Uhm-hum.

7 Q. You also advertised in the Women in  
8 Mathematics --

9 A. Association for Women in Mathematics, yes.

10 Q. Right. And looking at Exhibit 20 you see there  
11 is an opening list of large numbers of certain  
12 classified ads. This is, again, online.

13 Do you see that?

14 A. Wait. At the very top of this page? I mean,  
15 there's just lists -- there's -- it's text here.

16 Q. Right.

17 A. Yeah. Yeah.

18 Q. Job descriptions?

19 A. Uh-huh.

20 Q. Advertisements?

21 A. Right.

22 Q. Right. In other words, it tell tells you what  
23 the job is about?

24 A. Uhm-hum.

25 Q. All these other -- and you see -- there's how

1 many pages of those ads are there?

2 A. I don't know. A bunch.

3 Q. Okay. Would you find a University of San  
4 Francisco's ad among those pages?

5 A. I see a link for University of San Francisco.

6 Q. And again, that's one line?

7 A. Uh-huh.

8 Q. Would it be accurate to say that the University  
9 of San Francisco decided not to -- in the Women's  
10 Mathematical Society Journal or advertisements, decided  
11 not to put in a description but just to put in, again,  
12 just a link?

13 A. You know, I don't remember decisions about  
14 this. All I know is what I'm looking at here. But  
15 there's a link in the EIMS and there's a link in AWM for  
16 sure.

17 Q. Okay. Did they -- was there actually an ad  
18 put -- you talked about that the -- some of these  
19 journals are available online. You recall that, talking  
20 about that?

21 A. Right.

22 Q. Right. Did the University of San Francisco in  
23 2008 put any ad in the classified section of the  
24 journals that were available online?

25 A. In the physical journals, the physical print

1 journals?

2 Q. Well, the physical print journals are  
3 duplicated as an online PDF document?

4 A. Right. Correct. Uhm-hum.

5 Q. But that's just the same thing as a physical  
6 journal, right?

7 A. I -- I think that -- I think the issue of  
8 online versus physical is very important here, so I  
9 don't want to venture an opinion. I'm sorry.

10 Q. Okay. Fine.

11 Do you recall whether or not the University of  
12 San Francisco put a copy of any sort of print ad or any  
13 sort of job description ad in any -- in the American --  
14 I'm sorry, in the Notices of the American Mathematical  
15 Society?

16 A. I do not think so.

17 Q. All right. The next year, do you recall in  
18 spring of 2008 Dr. Kao made a motion at a meeting to  
19 advertise in the Notices of the American Mathematical  
20 Society?

21 A. I don't recall.

22 Q. Do you recall a vote to -- by the department to  
23 have such an advertisement in the next search?

24 A. I don't recall.

25 Q. All right. Now, would you please take a look

1 at Exhibits 21 and 22.

2 A. Got them.

3 Q. Those are the copies of the Faculty Recruitment  
4 Procedures?

5 A. Yes. The second one I don't think I've ever  
6 seen.

7 Q. And the one -- that one is?

8 A. The one that's dated May 15th, 1991, I don't  
9 believe I've seen that -- that document.

10 Q. You have seen Exhibit 21, which is the --

11 A. Yes.

12 Q. -- College of Arts and Sciences Chronologic  
13 Procedures?

14 A. Correct.

15 Q. Okay. Taking a look, hopefully, at the Arts  
16 and Sciences Chronological Procedures, I'd like to  
17 direct your attention to the section on "Job  
18 Advertisement."

19 A. Yes.

20 Q. Do you see that?

21 A. Uhm-hum.

22 Q. All right.

23 THE COURT: Is that an affirmative "uhm-hum"?

24 THE WITNESS: Yes.

25 MR. KATZENBACH: Q. Now, taking a look at that

1 section, did you have any discussion with the Dean's  
2 office as to what the phrase "Journal specific to the  
3 field" meant?

4 A. I don't recall having discussions of that sort.

5 Q. All right. Now, do you recall having  
6 discussion with other departments as to how they  
7 advertised for jobs?

8 A. Other mathematics department, yes.

9 Q. Other departments at USF?

10 A. I -- I don't think so, but I'm not sure.

11 Q. Did you call around in any other departments in  
12 the College of Arts and Sciences to see how they  
13 advertised their jobs?

14 A. No. The reason I did not is because I was in  
15 consultation with colleagues in -- at mathematical  
16 institutions that I respected and that had had lots of  
17 experience hiring good people. And I felt that talking  
18 to people in -- in field specific venues was -- made  
19 more sense.

20 It's not out of disrespect to my colleagues in  
21 sociology, but I just thought -- it was a better use of  
22 my time to talk to my friends at places like Gettysburg  
23 College or Harvey Mudd College than other people at USF.

24 Q. All right. Please, taking a look -- taking a  
25 look at Exhibit 22.

1           Again, you said -- this is in evidence, but I  
2 would like to address one point on this.

3           A.    Right.  This is the 20-year-old document  
4 that was approved by John Clark.

5           Q.    Well, documents can exist for many years?

6           A.    Yes, yes, yes.  Of course.

7           Q.    Right.  Just so we have --

8           A.    Right.  That's why I haven't seen it, because  
9 it probably -- it's -- it's --

10          Q.    Would you like to look at the next -- why don't  
11 you turn to the next page?

12          A.    Absolutely.

13          Q.    Right.  It looks like an online version of the  
14 same thing.

15                What's the printout date of the online version?

16          A.    8/17/2005.

17          Q.    Okay.  So that -- as far as you can tell, these  
18 two documents look identical?

19                MR. VARTAIN:  Objection.

20                THE WITNESS:  I'm not sure.  I'm not sure what  
21 your question is.

22                MR. KATZENBACH:  Q.  Okay.  That's fine.

23                Take a look at Paragraph No. -- Paragraph No. 3  
24 under the "Recruitment Process."

25          A.    This is on the first page of the document?

1 Q. Yes, it is.

2 A. Yeah. Okay.

3 Q. All right. And you can refer to it.

4 Take a look at that, compare the two, the  
5 online version and the print version. Are they the same  
6 thing?

7 A. I don't know what you mean by "online version"  
8 and "print version."

9 Q. Look at -- compare 22 and 23.

10 A. Oh, 23? I see, you said next page, you  
11 didn't -- I didn't understand. Okay.

12 Okay. I got you.

13 Q. They are the same, aren't they?

14 A. I don't know, but they --

15 Q. Paragraph 3 under "Recruitment Process" is the  
16 same?

17 A. Are you waiting for a response?

18 Q. Yeah, are they the same?

19 A. The wording of Paragraph 3?

20 Q. Yes.

21 A. As far as I can tell.

22 Q. Okay.

23 A. Yeah.

24 Q. All right.

25 A. Actually, no, they're not exactly the same.

1 Q. Okay.

2 A. But they are -- I think they're substantially  
3 the same.

4 Q. All right. At any time did the search  
5 committee and the search that you were chair of, meet  
6 with an Affirmative -- University Affirmative Action  
7 Officer to discuss how to place the ad?

8 A. We met with Sister Theresa Moser, who I think  
9 was, if I understand correctly, was acting in that  
10 capacity.

11 Q. Okay. When did you meet with her?

12 A. Early in the search process. I don't remember  
13 precisely.

14 Q. Did you discuss the placement of the  
15 advertisement with her?

16 A. I do not recall.

17 Q. All right. Did you discuss other affirmative  
18 action issues with her?

19 A. Yes.

20 Q. What other issues did you talk with her?

21 A. I don't remember the details. It was fairly  
22 standard things, such as admonitions about you cannot  
23 ask people their -- questions that -- sort of loaded  
24 questions that -- that could determine memberships in  
25 groups, like trying to determine someone's marital



1 status or ethnic background, things of that sort.

2 Q. All right. Now, when you -- did you discuss  
3 how the job would be advertised with her?

4 A. I don't recall.

5 Q. Did you discuss ways of maximizing the outreach  
6 for this job with her?

7 A. I don't recall.

8 Q. Did the search committee discuss with the  
9 Dean's office at any time ways of maximizing outreach  
10 for this job?

11 A. We decided that we would place ads with the  
12 Association for Women in Mathematics.

13 Q. Okay. Thank you.

14 Did you discuss placing -- did you discuss  
15 whether there existed any similar organization for  
16 minorities?

17 A. I don't recall if we discussed placing ads in  
18 specific journals of that sort.

19 THE COURT: Ladies and gentlemen, remember the  
20 admonitions. Do not form or express any opinion on this  
21 case until it's finally submitted to you for your  
22 decision. Do not discuss among yourselves or with  
23 others until that time.

24 Please be back in your places at 11:10  
25 according to the courtroom clock.

1 (Recess taken.)

2 THE COURT: Jurors and alternates are all  
3 present. Counsel from both sides are present.  
4 Plaintiff is personally present. Professor Zeitz is on  
5 the stand.

6 Mr. Katzenbach, you may continue your inquiry.

7 MR. KATZENBACH: Q. I'd like to just go back  
8 to the search in 2008. And it's my understanding that  
9 there were two meetings with the faculty; is that  
10 correct?

11 A. With the mathematics department.

12 Q. The faculty?

13 A. Yes.

14 Q. The first one you gave us was before the  
15 finalists come to the campus, and then the next one is  
16 sort of after the finalists have come to campus and made  
17 some presentations?

18 A. Correct.

19 Q. And now going to the first meeting, about how  
20 much time was there in between those two meetings?

21 A. The first meeting was probably around  
22 January 10th, and the second one was definitely on  
23 February 6th.

24 Q. Okay. And so at the first meeting, do you  
25 recall Dr. Kao asking you about whether or not one of

1 the panelists -- one of the candidates had identified  
2 herself as a member of any diverse background?

3 A. I recall that we gave a list of, I think our  
4 top six candidates at that point, five of whom were  
5 women, and Dr. Kao asked if any of them were ethnic  
6 minorities. I believe that was -- that was the  
7 interchange.

8 Q. Anything further about that conversation?

9 A. Well, the -- the answer that I gave was that I  
10 honestly wasn't sure, because I could not ask. It's not  
11 legal to ask, and the candidates -- I believe when you  
12 apply for a job, the way it works is the -- the  
13 University sends separately from -- the search committee  
14 sends a -- a postcard or something along those lines  
15 asking for a person to state answers to various  
16 questions about ethnic affiliation. And that gets sent  
17 back to the University but not to the math department.  
18 So it's separate from -- it's part of the Affirmative  
19 Action Procedures. It's separate from the search.

20 Q. Do you recall Dr. Kao asking you if Dr. Duchin  
21 had self-identified herself as an ethnic minority?

22 A. I think he might have asked that, yeah.

23 Q. Do you recall anything else Dr. Kao said during  
24 that meeting?

25 A. I remember him -- him seeming -- seeming a

1 little bit argumentative about, "Why don't you know  
2 about ethnic minorities?" And I remember other people  
3 in the room saying "Well, you can't" -- "We can't ask  
4 this question. It's illegal to determine this  
5 information."

6 Q. Other than that?

7 A. That's about it.

8 Q. Was there shouting and yelling at that meeting?

9 A. It was a little tense. And in fact I -- when I  
10 came to that meeting, I remember being a little nervous  
11 about the meeting, and I even thought about where I  
12 would -- where I would go if things got dangerous, and  
13 went into the meeting room a little earlier to see if I  
14 could lift the table and move it to protect myself.  
15 Nothing -- nothing of the sort happened, but I was  
16 nervous.

17 Q. Okay. So it must have been gratifying for you  
18 that nothing of the sort happened?

19 A. Absolutely.

20 Q. And this was after your initial -- this first  
21 meeting was after your initial encounter with Dr. Kao?

22 A. Correct.

23 Q. In your initial encounter with Dr. Kao, was  
24 Christine Liu in the office?

25 A. Not to my recollection.

1 Q. And I don't mean in your office, I mean --

2 A. Right. Right.

3 Q. -- in the math department.

4 A. Yeah. I don't think she was in the area.

5 Q. Do you recall Dr. Kao telling you that he  
6 thought the number of applicants were too low?

7 A. Yes.

8 Q. Now, going to the meeting on February 6th,  
9 right, did you observe Dr. Kao foaming at the mouth in  
10 any way?

11 A. Literally foaming at the mouth? No.

12 Q. All right. Did you observe him having spittle  
13 in his mouth?

14 A. I didn't look at his mouth.

15 Q. All right. Do you recall -- did he throw any  
16 papers at that meeting?

17 A. Which meeting? February 6th meeting?

18 Q. February 6th meeting.

19 A. I don't think he did.

20 Q. Now, would it be correct to say that Dr. Finch  
21 got angry at Dr. Kao during that meeting?

22 A. I think he was at the very least exasperated,  
23 yes.

24 Q. All right. Do you recall Tristan Needham  
25 getting angry at that meeting?

1           A.    Again, I would say exasperated, irritated,  
2    impatient.

3           Q.    All right.  Do you recall Tristan Needham and  
4    Jim Finch talking loudly at that meeting?

5           A.    I'm sure their voices were louder than -- than  
6    normal conversational tone.

7           Q.    All right.  Would you describe Tristan Needham,  
8    Professor Finch and John Kao all started to get mad at  
9    some point?

10          A.    No, I wouldn't -- they weren't -- this was not  
11    a communal activity.  The -- what -- Dr. Kao was -- was  
12    making his assertions about the need to cancel the  
13    search, and Dr. Needham and Dr. Finch said things along  
14    the lines of "This is crazy."  "This is insane."  "This  
15    makes no sense."  And they were not at all happy when  
16    they were saying this.

17                    And, of course, Dr. Kao wasn't happy either.  
18    And he kept repeating his point of view, and they said  
19    "This doesn't make sense.  Let's move on.  This is  
20    crazy."

21                    I don't remember the exact words but that's the  
22    gist of it.

23          Q.    All right.  Would you describe Jim Finch and  
24    Tristan Needham getting mad?

25                    MR. VARTAIN:  Objection.  Asked and answered.

1 THE COURT: Overruled. The witness may answer.

2 THE WITNESS: I think the -- if I want to be  
3 really precise about the language, it would be that they  
4 were exasperated and -- and impatient. They --  
5 especially Dr. Finch, you know, he wanted to get through  
6 the meeting and get it done and he felt, you know,  
7 what's -- this is wasting my time. It was that kind of  
8 an attitude.

9 These were not -- these people were not happy,  
10 put it that way.

11 MR. KATZENBACH: Q. Will you show the  
12 witness -- I'd like to show the witness page 50,  
13 starting at Line 4 --

14 A. Exhibit 50?

15 Q. No, no. Your deposition at page 50. And I  
16 will hand that to you.

17 A. Okay.

18 Q. If we can hand the deposition to the clerk. I  
19 am going to hand this to you.

20 MR. KATZENBACH: May I approach, Your Honor?

21 THE COURT: You may.

22 MR. KATZENBACH: Thank you. I am just going to  
23 hand it to you to follow along. I'll get it back from  
24 you in just a moment.

25 THE WITNESS: Page 150?

1 MR. KATZENBACH: Q. Yes, starting at Line 4.  
2 You state in your deposition concerning this  
3 meeting, "And the discussion got more and more heated.  
4 And my recollection is that Jim Finch and Dr. Kao and, I  
5 think, Tristan Needham were all starting to get mad.  
6 And Dr. Kao then at some point just shouted out of, I  
7 think, frustration that his point wasn't really  
8 understood, but he shouted 'I have been up all night  
9 calculating P-values.'"

10 A. Yes.

11 Q. All right. "And at the meeting -- and the  
12 meeting started to calm down after that. I tried very  
13 hard to calm down the meeting, since I was technically  
14 running the meeting, and I really wanted to end --  
15 didn't want it to end in pandemonium"; is that right?

16 A. Yes.

17 Q. So do you recall now that Jim Finch, Dr. Kao  
18 and, you think, Tristan Needham were all starting to get  
19 mad?

20 A. Those are the words I said there.

21 Q. Is that your best recollection now?

22 A. It's -- we're quibbling over -- over words  
23 here, and I'm trying to be as -- as precise as I can.  
24 And, again, to give it more precision, I'll say that  
25 Drs. Finch and Needham were irritated, exasperated,



1 impatient, confused, and certainly a little bit angry as  
2 well.

3 Q. Okay. And it's your recollection that the only  
4 time that -- is it your recollection that Dr. Kao  
5 shouted but it was out of frustration.

6 Was that your impression?

7 MR. VARTAIN: Objection. Calls for  
8 speculation.

9 THE COURT: Overruled. Witness may answer.

10 THE WITNESS: Well, there was a lot of shouting  
11 going on and -- and I -- again, it's speculative to put  
12 myself into another person's -- another person's head,  
13 but I do think Dr. Kao was -- felt a burning need to  
14 talk about P-values, and that that was what was most  
15 important to him was getting out the P-value theory.  
16 And that he needed to talk to -- he needed to explain to  
17 us his statistical theory. And I think his attitude was  
18 we weren't understanding where he was coming from.

19 He has this theory about P-values, and -- and  
20 again, putting myself in the point of view of  
21 Dr. Needham and Dr. Finch, they just want to get through  
22 the damn meeting and -- and -- and -- and stop the weird  
23 talk.

24 That's my feeling about what was going on here.

25 MR. KATZENBACH: Q. Well, did you understand

1 that what you're characterizing as P-values was Dr.  
2 Kao's effort to explain that he felt that the search had  
3 a discriminatory impact?

4 A. The way I understand it is that Dr. Kao felt  
5 that this -- there was an aspect of the search, this --  
6 the lack of a printout that, for some reason that I  
7 still do not understand, caused him to obsess about  
8 something. And he developed what, in my mind, is a  
9 irrational fixation on this issue and attempted to come  
10 up with a rational mathematical explanation for why this  
11 issue concerned him so much. And I believe that was the  
12 genesis of him shouting, "I have been up all night  
13 calculating P-values."

14 Q. Did you understand the calculations were  
15 designed to show discriminatory impact as to the choice  
16 not to advertise the search in a journal?

17 A. I understood his intent.

18 Q. Well, did he distribute calculations at the  
19 meeting?

20 A. I don't recall if he distributed his  
21 calculations at the meeting. I do recall him imploring  
22 me to share his ideas with Dean Brown.

23 Q. Did you ask Dr. Kao to put those -- his ideas  
24 in writing so they could be shared with Dean Brown?

25 A. I don't recall, but I did say I would talk to

1 Dr. Brown and I did.

2 Q. All right. And did you ask -- at the time you  
3 talked to Dr. Brown, did you have any written  
4 documentation from Dr. Kao concerning his calculations?

5 A. I don't recall. I don't think so, but I'm not  
6 100 percent sure.

7 Q. Well, did -- when you talked -- did you ask Dr.  
8 Kao to provide you his calculations, his P-value  
9 calculations?

10 A. I don't remember.

11 Q. All right. Did you ever look at his P-value  
12 calculations?

13 A. I don't think so. I'm not sure if I ever saw  
14 them.

15 Q. Do you know if anyone did?

16 A. I don't know.

17 Q. Did anyone, to your knowledge, look at his  
18 P-value calculations to determine that he had calculated  
19 anything incorrectly?

20 A. I don't know.

21 Q. Do you know that he was calculating this --  
22 now, at the time this search was being conducted in  
23 2008, there was an open question whether there was going  
24 to be one or two job offers?

25 A. Yes.

1 Q. All right. And do you recall Dr. Kao saying  
2 that if the search was discriminatory as to one job  
3 offer, it was even worse as to two?

4 A. I remember he had two different P-values in  
5 his -- when he -- when he spoke about this.

6 Q. In other words, one was if you offered one  
7 job --

8 A. Yeah, I don't remember which was which, but,  
9 no, he definitely -- you know, he said, you know, it's  
10 tenths to the fourth for this and tenths to the  
11 eighth -- negative eighth for this. But I don't  
12 remember -- I don't remember if I have my orders of  
13 magnitude correct, which is which, but I do remember  
14 that he was shouting about two different P-values.

15 Q. Well, do you recall that the reason there were  
16 two different P-values was that Dr. Kao expressed a  
17 concern that if the search was biased as to one job  
18 offer then it was even more biased as to two?

19 A. I'm not sure I understood what he was getting  
20 at, but I know he was talking about one versus two.

21 But to be honest, the -- we were -- this talk  
22 of P-values was not something that we were entertaining,  
23 because it seemed to be a fixation on a -- on a  
24 minuscule aspect of the search. It was -- everyone else  
25 in that room, with the exception of Dr. Kao, found this

1 frighteningly perplexing, to put it mildly, that he --  
2 that not only was he insisting on this but that he felt  
3 he had a mathematical calculations to back it up.

4 I -- respectfully I agreed to pass on his  
5 concerns to Dr. Brown and I did. And I don't know what  
6 Dr. Brown -- how he acted on that afterwards.

7 Q. All right. Now, going back now, at some point  
8 was there a decision to make two job offers in the  
9 search?

10 A. Yes.

11 Q. Okay. Now, as I understand the candidate pool,  
12 the final four finalists -- well, strike that. Let me  
13 go back.

14 As I understand, there were four finalists in  
15 this -- in --

16 A. Right. There were four people that we invited  
17 to campus, yes.

18 Q. Okay. And the purpose of the search meeting  
19 was to rank -- have each of the faculty members rank the  
20 finalists?

21 A. If possible, yes.

22 Q. Okay.

23 A. And determine -- and if possible, determine if  
24 there was a consensus. For example, if there was a  
25 consensus if there was a finalist that we would not want

1 to extend a job offer to, if there was a consensus  
2 favorite. You know, whatever we could accomplish.

3 Q. All right. Was it your understanding that each  
4 of the faculty members was going to give an individual  
5 ranking of his or her preferences?

6 A. The guidelines, I think, stipulate merely that  
7 we have a meeting with the department. There's no  
8 guidelines about what we do. And, you know, these are  
9 the guidelines, I think, of this Exhibit 20 -- 21 which,  
10 if I understand correctly, are the -- the current  
11 guidelines, Exhibit 22 that you showed me, the 1999 --  
12 1991 document, I had never seen before. I don't think  
13 it's at all current.

14 Q. Well, I'm just trying to determine --

15 A. Yeah.

16 Q. -- what the purpose --

17 A. But anyway, yeah, the purpose is to have a  
18 meeting. The idea is we are allegedly a collegial  
19 department and we are doing something very important and  
20 the department wants to have a meeting that the search  
21 committee and the department are meeting together to  
22 discuss the finalists. That's the object of the  
23 meeting.

24 Q. Would you describe this meeting as a mere  
25 formality?

1 A. No.

2 Q. Now, getting back to the meeting, was it your  
3 understanding -- and we have had some testimony -- over  
4 the years the nature of this meeting sometimes changes.

5 Would that be accurate to say?

6 A. I'm not sure I understand the question.

7 Q. Well, in some searches, would the faculty then  
8 have a vote on each of the candidates and it's a  
9 majority rule?

10 MR. VARTAIN: Your Honor, I am going to object.  
11 I think we are on to Evidence Code 352 which says "Undue  
12 waste of time." We're going back over the same things  
13 without any apparent actual cross-examination here. So  
14 I would like --

15 THE COURT: Okay. If this is background on  
16 this --

17 MR. KATZENBACH: If you'd like me to stop, I  
18 understand.

19 MR. VARTAIN: I'd like to object.

20 THE COURT: There is an objection on Evidence  
21 Code Section 352. Objection is overruled. The request  
22 is denied.

23 Mr. Katzenbach, move on or he may have some  
24 more objections.

25 MR. KATZENBACH: Q. Let me see if I can make

1 it simpler.

2 In this meeting, was each of the faculty  
3 members to state their individual opinion as to the rank  
4 of each of the four candidates?

5 A. I don't think it was to state, but we were  
6 just -- go around the room and tell us what you think.  
7 It was not a -- the meeting was not a formality, but it  
8 was an important meeting. It was -- you know, it was a  
9 discussion.

10 Q. All right.

11 A. And certainly of having a ranking, if possible,  
12 was useful. I don't think everyone was able to do an  
13 exact one, two, three, four ranking anyway.

14 Q. Okay. That's fine.

15 A. Certainly Dr. Kao was not.

16 Q. Well, he indicated he wanted the search  
17 cancelled?

18 A. Right. Exactly. So he had -- he had different  
19 concerns.

20 Q. And were there any minutes kept of this meeting  
21 there?

22 A. There were not.

23 Q. Did you -- was Christine Liu there?

24 A. She was.

25 Q. Did you tell her to not take minutes?



1           A.    As I said earlier, I believe that Dr. Kao  
2 brought up the fact that this was not a math  
3 department -- official math department departmental  
4 meeting and, therefore, Ms. Liu did not need to take  
5 minutes. And since it was a search committee meeting, I  
6 agreed. I thought that was fine.

7           Q.    All right. Now, did you take any handwritten  
8 notes?

9           A.    I don't recall.

10          Q.    Did anyone in the search committee take any  
11 handwritten notes?

12          A.    I have no idea.

13          Q.    Did anyone in the search committee record what  
14 the various faculty members said about the various  
15 candidates?

16          A.    Most likely, because we reported them to the --  
17 to the Dean. So I was -- I probably took notes, I'm  
18 just deducing that. I have no memory of what I was  
19 doing --

20          Q.    You have not seen any notes that you had for  
21 that meeting?

22          A.    No.

23          Q.    You have not reviewed them in connection with  
24 any testimony in this case?

25          A.    Correct.

1 Q. All right. Now take a look at Exhibit 17.

2 A. Seventeen?

3 Q. Yes.

4 A. The "Job Announcement"?

5 Q. No.

6 A. "Position Announcement." Oh, that's 18?

7 Q. I believe that's --

8 A. Okay. "Calculation of P-value."

9 Q. Right. Have you ever seen Exhibit 17 before?

10 A. No.

11 Q. Okay. You don't recall Dr. Kao distributing  
12 Exhibit 17 at the meeting?

13 A. I don't remember.

14 Q. Okay. Now, going back to this meeting, this  
15 was -- this was a meeting on February 6th, correct?

16 A. February 6th, 2008.

17 Q. 2008?

18 A. Yes.

19 Q. Was there a departmental meeting on  
20 February 12th?

21 A. I don't remember.

22 (Whereupon, Plaintiff's Exhibit 93 was  
23 marked for identification.)

24 MR. KATZENBACH: Q. Take a look, if you would,  
25 at Exhibit 93. Probably in that binder.

1 A. Yeah. I've got it.

2 Q. All right. So there was a -- do you recall if  
3 there was a departmental meeting a week later on the  
4 12th of February?

5 A. As I said, I don't recall. But I'm looking at  
6 minutes for a February 12th meeting, so I am sure it  
7 took place.

8 Q. Do you recall anything happening during that  
9 meeting?

10 A. I do not.

11 Q. Okay. Was there a departmental meeting on  
12 March 11?

13 A. On March 11th?

14 Q. Take a look at --

15 A. Yeah, I see -- I see minutes. Yes, here we go.

16 Q. Right. Do you recall anything happening at  
17 that meeting?

18 A. Let me read the minutes, and I'll see if I can  
19 see what happened during this meeting.

20 Q. Well, as you sit here today, you don't have  
21 any -- you are just looking at the minutes to refresh  
22 your recollection?

23 A. Correct.

24 Nothing comes to mind.

25 Q. All right. Would it be accurate to say that

1 the only two incidents you can date with Dr. Kao were  
2 the incident in January in your office and the  
3 February 2008 search committee meeting?

4 A. As precise dates? Again, I'm confused by the  
5 question, by your question.

6 Q. That's fine.

7 You can date the -- you recall the event in  
8 early January in your office.

9 A. Right. And most likely January 2nd.

10 Q. You recall -- wasn't it January 3rd?

11 A. I think when I gave a deposition I said it was  
12 January 2nd or January 3rd. And since then, I looked at  
13 my calendar and I'm pretty sure it was January 2nd.

14 Q. Grades were due January 2nd, weren't they?

15 A. I have no idea.

16 Q. All right. Did you go to Dean Brown's office  
17 that same day as this meeting, as the incident with Dr.  
18 Kao?

19 A. Again, as I said earlier, I don't remember  
20 exactly what I did, but if Dean Brown was in his office,  
21 I most definitely would have gone to his office.

22 Q. How far away is Dean Brown's office from you?

23 A. It's about as here from her as, say, the  
24 elevators are from -- from this -- from where I'm  
25 sitting.

1 Q. Okay.

2 A. Approximately. Maybe a little further.

3 Q. All right. Do you recall going down to Dean  
4 Brown's office that same day this incident with Dr. Kao  
5 occurred?

6 MR. VARTAIN: Objection. The question has been  
7 asked and answered three times.

8 THE COURT: Overruled. The witness may answer.

9 THE WITNESS: Again, I -- I don't remember when  
10 I saw Dean Brown. I do know that after this very  
11 unpleasant incident in my office, the first thing I --  
12 I -- I would have tried to do would be to speak to  
13 somebody. And if he was in his office, I probably went  
14 right to his office. But I don't remember -- you know,  
15 I just don't remember.

16 MR. KATZENBACH: Q. Okay. Now, do you recall  
17 a meeting in -- do you recall a meeting in May where the  
18 issue of a chair came up, who would be chair for the  
19 next year?

20 A. A department meeting?

21 Q. Yes.

22 A. I remember a meeting in the spring; I don't  
23 remember what month.

24 Q. All right. Between the February 2nd, meeting  
25 and this meeting involving a chair, what interactions

1 did you have with Dr. Kao?

2 MR. VARTAIN: Objection. Asked and answered.  
3 We've heard about the bumping, we've heard about the  
4 veering, we've heard about Dr. Yeung. Evidence Code  
5 352.

6 MR. KATZENBACH: I haven't asked him any  
7 questions on those issues, Your Honor.

8 THE COURT: Overruled.

9 THE WITNESS: The -- I tried to have as few  
10 interactions with Dr. Kao as possible, and had succeeded  
11 mostly in that way.

12 When there would be communal activities in our  
13 departmental alcove, the area adjacent to my office and  
14 Dr. Stillwell's office over here, there would sometimes  
15 be a few unpleasant incidences with -- again, things  
16 that -- that were an alteration in -- in what I thought  
17 of was standard collegial behavior.

18 For example, if I was standing in front of the  
19 water fountain and Dr. Kao was -- wanted to get some  
20 water, he would make kind of a dismissive-like waving  
21 motion to -- nonverbal to have me move out of his way.  
22 Something that had never happened before, and something  
23 that has never happened between me and any other  
24 colleague. There were a fair number of incidences of  
25 that kind.

1 MR. KATZENBACH: Q. Do you recall whether they  
2 were between the meeting of the search committee and the  
3 meeting of the chair?

4 A. I can't say for sure.

5 Q. The bumping, did that occur after the meeting  
6 on the search committee or before?

7 A. I am pretty sure before. But I'm not  
8 100 percent certain, but I -- I'm pretty sure.

9 Q. Okay.

10 A. At least one of them.

11 Q. Now, when you -- you referred, if you would, to  
12 conversations involving -- or a conversation involving  
13 Professor Yeung involving Dr. Kao?

14 A. Pardon me, what's your question?

15 Q. My question is: When you had a conversation  
16 with Dr. Yeung about this incident where he expressed  
17 concern about Dr. Kao somehow veering towards him, do  
18 you recall that being in June?

19 A. I don't recall the time.

20 Q. Was that close in time to this alleged bowing  
21 incident?

22 A. I'm not sure. Probably not too far in time  
23 from it.

24 Q. Okay. Do you recall the -- you indicated this  
25 was -- you were talking to Tristan Needham around the

1 same time, is that right, about bumping?

2 A. Among other things.

3 Q. Were the three of you in a meeting together  
4 when you talked about this?

5 A. Possibly.

6 Q. You also referred to "everyone was looking  
7 shaken in the department."

8 Do you recall that testimony?

9 A. Yes.

10 Q. Who do you mean by "everyone"?

11 A. "Everyone" is probably not literal, but the --  
12 certainly myself, certainly Stephen Yeung, certainly  
13 Tristan Needham. And possibly Peter Pacheco as well.

14 Q. And it would be accurate to say that all three  
15 of -- that -- that you, Professor Yeung, and Tristan  
16 Needham, were all in the search committee?

17 A. Yes. Not Pacheco.

18 Q. Pacheco was the department chair?

19 A. He was the department chair at that time, yes.

20 Q. He appointed the search committee?

21 A. No. The search committee is formed by people  
22 who are asked to serve, and then the Dean's office makes  
23 the final approval of the committee.

24 Q. Who asked you to serve?

25 A. I think it was just announced in a department



1 meeting, we're going to have a search, anyone want to  
2 serve on the search committee. So it's possible that  
3 Professor Pacheco was announcing it, but it was not he  
4 formally asking -- asking anyone to serve.

5 Again, the University of San Francisco, we're a  
6 unionized faculty and the department chair has no  
7 administrative powers. He is not our supervisor in any  
8 way.

9 Q. When you talked to Professor Yeung about this  
10 incident of veering, did Dr. Yeung say he was walking  
11 down the hallway?

12 A. I don't recall the exact words.

13 Q. Well, did he say he was coming out of the  
14 bathroom?

15 A. I don't recall the exact words.

16 Q. Did Dr. Yeung tell you that he's not sure that  
17 Dr. Kao even saw him?

18 A. I don't recall the exact words. But I do --  
19 but, again, Steve Yeung was upset and shaken and felt  
20 that this was a bizarre and hostile encounter.

21 Q. You don't recall him saying he was coming out  
22 of the bathroom and he's not sure that Dr. Kao even saw  
23 him?

24 A. No.

25 Q. All right. Have you looked at Dr. Yeung's

1 deposition in this case?

2 A. No.

3 Q. Okay. Now, are you in the policy board of the  
4 union?

5 In 2008, were you in the policy board of the  
6 union?

7 A. Yes.

8 Q. What's the role of the policy board?

9 A. It's -- it's an advisory board to the faculty  
10 association. We're a unionized faculty and we have  
11 representatives -- it's -- we elect representatives  
12 from, like, the science departments, humanities  
13 department, the school of education, and -- so in a  
14 very, very vague sense, it's like I'm a shop steward,  
15 but much more informal than that.

16 Q. Do you meet weekly?

17 A. It meets every other week.

18 Q. When you went to the meetings, did you --  
19 coming back from the meetings, did you get a ride with  
20 Professor Neaman?

21 A. Sometimes.

22 Q. All right. Professor Neaman was the president  
23 of the union in 2008?

24 A. Correct.

25 Q. Did you ever tell him that you were frightened

1 of Dr. Kao, during the course of riding back and  
2 forth -- in 2008, riding back and forth in those  
3 meetings?

4 A. Oh, I'm sure I did.

5 Q. And now I'd like to direct your attention, if  
6 you would.

7 Did you ever tell -- you talked about this  
8 meeting with Martha Peugh-Wade, did you call her in --  
9 roughly end of April, early May? Is that about right?

10 A. She called me.

11 Q. She called you?

12 A. Yeah. This was not a meeting that I instigated  
13 or asked for or had any -- or knew was going to take  
14 place.

15 Q. All right. Did she say why she was calling  
16 you?

17 A. When she invited me, I don't remember. But I'm  
18 pretty sure I understood when she explained it, but I  
19 don't remember the conversation.

20 Q. During the course of this meeting, did you tell  
21 her that Dr. Kao acts as if everyone hates him?

22 A. I don't remember my exact words.

23 Q. Did you tell her words to the effect that Dr.  
24 Kao acts as if everyone hates him and we do because he's  
25 gathering -- we feel he's gathering evidence for a

1 lawsuit?

2 A. Again, I don't remember my exact words. If --  
3 if she's taken notes to that effect, then it's possible  
4 I did say that. But, again, I don't remember.

5 Q. Well, did -- do you recall expressing any  
6 concerns to her about Dr. Kao gathering evidence for a  
7 lawsuit?

8 A. A little bit. But the -- the context is -- is  
9 within the fact that by this point in time, I was very  
10 afraid of Dr. Kao. Not just physically, but in many  
11 other ways.

12 I felt that for whatever reason, because I did  
13 something that -- with regards to print ads, that he  
14 disapproved of, I -- I became an object -- worse than an  
15 object of scorn, and I became his enemy. And that --  
16 and that he was now my enemy in pretty much any -- any  
17 form.

18 And -- which made me fear physically from him.  
19 It made me fear having conversations with him, and it  
20 also made me fear basically saying anything because I  
21 did get the sense that he was taking notes everywhere,  
22 and that he had this obsession to prove something.

23 And so that's the context of the conversation  
24 that Martha Peugh-Wade and I were having when I --

25 Q. Did you use the phrase to her that you had

1 any -- you had -- that Dr. Kao was gathering evidence  
2 for a lawsuit?

3 A. Again, I don't remember my exact words.

4 Q. What had Dr. Kao done since the February 2  
5 meeting that, in your mind, showed that he was obsessed  
6 with the search?

7 A. The January 2 is -- I think you meant to say --

8 Q. February 6th meeting.

9 A. No. But this goes back to before, to January.

10 So Dr. Kao was not on the search committee,  
11 and -- and in early January he started asking Christine  
12 Liu questions about the search procedures and he wanted  
13 records from her about when she placed this ad, when she  
14 called for that ad, when she did this, when she did  
15 that.

16 And I remember saying to Ms. Liu that I didn't  
17 think that this was appropriate, because the search is  
18 a -- the search committee is a confidential group. It's  
19 not like we're trying to keep secrets, but the -- if you  
20 are on the search committee, you are on the search  
21 committee; if you are not on the search committee,  
22 you're interfering. And I felt that -- I saw him walk  
23 around with a notebook and talk to Ms. Liu.

24 So starting in very early January, I could see  
25 that he was very concerned with the nature of the ads,

1 the job ads in our search and it disturbed me.

2 Q. All right. Do you recall him talking --  
3 discussing these things with Ms. Liu as early as  
4 December?

5 A. I don't know.

6 Q. All right. After January -- after the  
7 February 6th meeting, what did he do? What did Dr. Kao  
8 do, to your understanding, to pursue his concerns about  
9 the search?

10 MR. VARTAIN: Objection. Argumentative.  
11 Evidence Code 352.

12 THE COURT: Overruled.

13 THE WITNESS: I don't recall exactly what he  
14 did, but he was -- he -- he still was contentious about  
15 the notion of print ads, and he -- we talked about it,  
16 and he still seemed extremely upset about this matter.

17 MR. KATZENBACH: Q. Where would Dr. Kao talk  
18 about his continuing concerns with print ads?

19 A. He would -- he would sometimes blurt this out  
20 in the -- in the office area, "We should have had print  
21 ads."

22 Q. When you say "blurt it out," does that mean he  
23 had a discussion with somebody, as you recall?

24 A. I don't remember.

25 Q. It was just -- okay. That's fine.

1           A.    Again, he could have been standing, you know,  
2    in the room and talking to Christine and saying "We  
3    should have had print ads."

4           Q.    Okay.

5           A.    So...

6                    You have to be aware that I -- I -- I was not  
7    in the habit of following Dr. Kao around to see what  
8    behavior he was doing.  I was trying to avoid Dr. Kao  
9    during this period.

10          Q.    Did you go to math TEAS?

11          A.    Occasionally.

12          Q.    They are right outside your office?

13          A.    Correct.

14          Q.    So if you were in your office, you'd go to the  
15    math TEAS, wouldn't you?

16          A.    If I was not busy.  And half the time I was in  
17    policy board meetings during that time.

18          Q.    And math club was also held in the office?

19          A.    The math club was a games club.  It was held on  
20    Fridays in that office, Friday afternoons.

21          Q.    Were you at work on Friday afternoons?

22          A.    I usually was gone by then.

23          Q.    Did you have any concerns about Dr. Kao's  
24    relationship with students?

25          A.    It -- I was a little bit worried but I was not

1 very concerned. And the reason for this was because Dr.  
2 Kao's behaviors were very focused on certain types of --  
3 certain people and certain issues. Namely the issues  
4 were job search related, P-value-related issues. And  
5 the people were generally the people involved with this  
6 search committee and the administration above that.

7 And what worried me was that it seemed evident  
8 to me that Dr. Kao was losing and -- and in a  
9 progressive way, losing -- showing that he was losing  
10 control, to some degree, over his emotion. But I did  
11 not -- I did not see any such behaviors with students.

12 Q. All right. And you keep referring to P-values,  
13 and again that was his concern about discrimination,  
14 right?

15 MR. VARTAIN: Objection. Evidence Code 352.

16 THE COURT: Sustained.

17 MR. KATZENBACH: Q. All right. I'd like to  
18 direct your attention to another item. That's 2008 --  
19 2001.

20 A. What -- which number?

21 Q. No, I'm sorry, not an exhibit. Date. 2001.

22 A. 2001, okay.

23 MR. VARTAIN: I am going to object, Your Honor.  
24 We have been over 2000, 2001, 2000, 2001. Evidence Code  
25 352.



1 THE COURT: Overruled.

2 MR. KATZENBACH: Q. Did you make this -- this  
3 was an incident where Dr. Kao had a reaction to Prozac?

4 A. I believe that was 2002.

5 Q. 2002. Okay.

6 A. Right. I referred to it a little bit earlier  
7 today.

8 Q. Yes. Okay.

9 Did you make the decision -- did Dr. -- did you  
10 make any decisions regarding whether Dr. Kao would teach  
11 that semester?

12 A. No, I did not. The -- the -- my recollection  
13 of this was the -- the -- late in the evening, the night  
14 before the semester began, Dr. Kao's sister called me  
15 and said that he had this adverse reaction to taking  
16 Prozac, that he was suffering hallucinations, and he  
17 would not be able to teach this semester. Those were  
18 essentially her words.

19 And I did not make that decision, but I  
20 immediately got on the phone, spoke to Tristan Needham,  
21 who was then the Associate Dean, to try to reorganize  
22 the schedule so that we could accommodate the  
23 possibility that Dr. Kao would not be working that  
24 semester. But I never decided when he would work or not  
25 work.

1 Q. All right.

2 A. I was department chair at that time, so I was  
3 in charge of the schedule, but I was not in charge of  
4 anything else.

5 Q. All right. Do you recall after this -- did you  
6 call -- after this conversation you had with Stephanie  
7 Kao, did you have another -- did you leave a message for  
8 her at her office for her to call you back?

9 A. I don't know. I probably -- I'm sure I wanted  
10 to talk to her, but I -- I -- this is ten years ago. I  
11 really don't remember the sequence of who I spoke to. I  
12 know I spoke to her more than once during this time.

13 Q. Did you speak to Dr. Kao at any time?

14 A. I did not speak to him until, you know,  
15 probably at least a month or two later when he was on  
16 campus.

17 Q. All right.

18 A. Yeah, just, you know, incidentally.

19 Q. At any time did Dr. Kao tell you that he was  
20 not able to teach that semester?

21 A. He did not.

22 Q. At any time did Tristan Needham tell you that  
23 he had spoken to Dr. Kao?

24 A. I'm not aware of that.

25 Q. Did you ever tell -- in your interview with

1 Martha Peugh-Wade, did you ever tell her that it would  
2 be okay with you if Dr. Kao came back so long as he was  
3 normal?

4 A. I don't recall my exact words, but again, the  
5 issue for me is not the person, but the behavior. And I  
6 think what I wanted to get across to Martha Peugh-Wade  
7 was that I was extremely upset, extremely frightened,  
8 not just for myself but even my family, and the complete  
9 breakdown of collegiality replaced with unpredictable,  
10 seemingly delusional hostility that seemed to be  
11 changing was profoundly upsetting. And if I could have  
12 a job where that was not part of my job, I'd be happy.  
13 So that's the context of those words.

14 Q. Well, do you think that Dr. Kao was mentally  
15 disturbed when you used the phrase "normal"?

16 A. Again, I'm not a doctor, but that -- some form  
17 of mental disturbance is the simplest way for me to  
18 understand the behavior that I was -- that I was  
19 unfortunately witnessing.

20 Q. And you wouldn't attribute it -- strike that.

21 And the two incidents you related both concern  
22 Dr. Kao's concerns over this search, right?

23 MR. VARTAIN: Objection. 352.

24 THE COURT: Sustained.

25 MR. KATZENBACH: That's all I have.

1 THE COURT: All right.

2 Mr. Vartain, do you have any more questions?

3 MR. VARTAIN: My stomach is growling.

4 I have no questions of this witness. And if I  
5 did, I would suggest we go to lunch anyway, but I have  
6 no questions of him.

7 THE COURT: Jurors, do you have questions?

8 Yes. We will not hold you any longer.

9 Ladies and gentlemen, remember the admonitions.  
10 Do not form or express any opinion on this case until  
11 it's finally submitted to you for your decision. Do not  
12 discuss among yourselves or with others until that time.  
13 Please be back in your places at 1:30 according to the  
14 courtroom clock. Remember to leave your notebooks and  
15 instructions behind.

16 All right. Jurors and alternates have left the  
17 courtroom. Counsel for both sides remain.

18 Anything that needs to go on the record?

19 MR. KATZENBACH: Your Honor, we have submitted  
20 a brief on the litigation privilege issue to the Court  
21 and we filed a hard copy. I don't know if the Court  
22 wants to rule -- wants to make another ruling on that or  
23 consider the issue further.

24 They also raised an issue concerning whether  
25 the qualified privilege applies. That's an issue we did

1 address in our trial brief, but if the Court had  
2 questions on that or wants to revisit it further, I'd be  
3 happy to respond.

4 THE COURT: Well, it's up to you. I can go  
5 either way. I don't feel a crying need for more of it,  
6 but I welcome all the help I can get.

7 MR. KATZENBACH: Well, Your Honor, I guess the  
8 only thing that I would add in particular is that these  
9 are both affirmative defenses and it would seem to me  
10 for both of them, they are going to have to put on some  
11 evidence.

12 And for the litigation privilege, they would  
13 have to put on some evidence that at the time they were  
14 consulting Dr. Reynolds, that there was litigation  
15 contemplated and that he was being consulted and  
16 reference to such a litigation. There is no new  
17 testimony to that effect.

18 And as to the qualified privilege, they would  
19 have to have some -- that is -- that's a privilege  
20 involving interested persons. There would have to be  
21 some testimony that Dr. Reynolds was an interested  
22 person. And I guess what I would say by that, that he  
23 was basically part of their team at the time of that --  
24 of that communication, and it was communicated to them  
25 not as an independent physician but as somebody who was

1 part of the defense team, as it were, or the  
2 University's team at the time of that. Because if he is  
3 not part of the University's team, then I don't see how  
4 he would fall as an interested person. He would just be  
5 an outsider and a purportedly independent person with no  
6 connection to the University. And I also would raise  
7 the issue with the evidence of malice arising from lack  
8 of investigation and I have addressed that in our brief  
9 as well.

10 But it seems to me in either case there is  
11 going to have to be evidence from the University on  
12 their affirmative defense and they are going to have to  
13 put on evidence in order to prove their affirmative  
14 defense. So therefore nonsuit would be, I think,  
15 inappropriate because it's their case and not ours.

16 THE COURT: It sounds like you are going to  
17 argue it in turn and decide it now.

18 MR. KATZENBACH: No, Your Honor, I guess I was  
19 just pointing out those facts.

20 THE COURT: I'm a little confused. You spoke  
21 at some length about your position and now you are  
22 saying you don't want -- you don't want the matter  
23 decided.

24 MR. KATZENBACH: No, I'd be happy to have the  
25 matter decided.

1 THE COURT: Okay. Let's give the defendant a  
2 chance to...

3 MR. VARTAIN: The only part of that that I  
4 think needs addressing is that the plaintiff has  
5 addressed it with the exception of one witness who does  
6 not have evidence bearing on this. So it is timely to  
7 bring a motion for a nonsuit, and it does not need to  
8 wait for the defense case, because plaintiff's case  
9 shows that the privilege applies.

10 THE REPORTER: "That the privilege"?

11 MR. VARTAIN: Applies. The rest is in our  
12 brief, Your Honor. I know you have read the briefs.

13 THE COURT: Anything further, Mr. Katzenbach?

14 MR. KATZENBACH: The question of the Supreme  
15 Court in action departments [sic] described in  
16 Heddensburg in the litigation privilege as a question of  
17 fact. I think that the jury decides questions of fact.

18 THE COURT: What question of fact is there for  
19 the jury to decide?

20 MR. KATZENBACH: Whether or not the  
21 communication with Dr. Reynolds was related to a  
22 imminent seriously considered lawsuit and that that was  
23 the purpose of the communication.

24 THE COURT: Okay. I think my understanding is  
25 the defendant's burden, the defendant has produced

1 nothing, there is nothing in the evidence you produced  
2 that would support a conclusion that Dr. Reynolds was  
3 part of the USF team.

4 MR. KATZENBACH: Correct.

5 THE COURT: I can rely on everything I have  
6 heard up to now in deciding whether anymore would be  
7 needed than we already have to characterize Dr. Reynolds  
8 as a member of the University's team.

9 MR. KATZENBACH: Yes, Your Honor, you could  
10 rely on that. Yes. But it still might be a question of  
11 fact that actually the jury would have to decide,  
12 since --

13 THE COURT: Excuse me. Go ahead.

14 MR. KATZENBACH: And I point only that the  
15 testimony from their side has been that he was hired as  
16 an independent contractor with no connections to the  
17 University.

18 THE COURT: I can take judicial notice of the  
19 fact that the case ended up in litigation is irrelevant.

20 MR. KATZENBACH: Any case can -- I mean, you  
21 build a snow blower and end up in litigation. You know,  
22 I don't think -- I think that there's cases that require  
23 imminent litigation and litigation becoming seriously  
24 contemplated, not just an argument over what the legal  
25 standards should be or a claim that I think if you



1 continue on this course you might be violating the law  
2 or even a discussion of what the law is; there's more  
3 than that.

4 THE COURT: What if the University said we  
5 propose to ban you from campus. If you come on campus,  
6 we'll sue you and get an injunction to prevent you from  
7 ever coming back again; wouldn't that qualify as  
8 imminent litigation?

9 MR. KATZENBACH: No, because that would be the  
10 normal consequences of any trespassing. It would be  
11 like saying, if you engage in discrimination, you'd get  
12 sued. If you build a faulty product, you get sued. If  
13 you breach a contract, you'd get sued.

14 In other words, one can get sued for many  
15 things in engaging in normal activities. If you push  
16 the litigation privilege down that far down the stream,  
17 virtually any conversation with anyone would -- you  
18 know, could arguably be in connection with a litigation  
19 that might be sometime in the future.

20 The cases in the Supreme Court and others  
21 require more imminency. In other words, not just even  
22 statements of I think you're violating the law, but  
23 rather require imminency and serious contemplation.

24 The usual cutoff point -- the cutoff point  
25 that's been typical is the case you cited, Your Honor,

1 and that involves a demand letter where at that point  
2 things are crystallized a bit. And the courts have  
3 said, okay, that's downstream. Even though that's  
4 downstream, that's enough.

5 I don't have -- the cases we've cited, I think,  
6 when you go just to the pre -- long before there is even  
7 a demand letter, there is just a sort of a disagreement,  
8 that's not enough.

9 THE COURT: Wasn't the University making  
10 demands on Dr. Kao to stay off campus, that he submit to  
11 an examination?

12 MR. KATZENBACH: Exactly. And those demands  
13 had -- may or may not result in litigation, depending on  
14 a large number of other factors. But I don't think that  
15 at that point it could be viewed as either side was  
16 seriously contemplating litigation, it was -- as far as  
17 litigation was imminent, it was simply a party's  
18 discussing of what the law may or may not require.

19 THE COURT: And I think in response to my  
20 question you said no, it wouldn't make any difference if  
21 he says stay away or we'll sue you, and the University  
22 said submit to the examination. If you don't, you'll be  
23 fired, and if you want, you can sue us.

24 MR. KATZENBACH: At that point, Your Honor, I  
25 think that first -- two things. First, I don't think

1 that's still more than just a search into the legal  
2 rights. I don't believe that that shows an imminency of  
3 a lawsuit.

4 Secondly, I would note that to the extent that  
5 the University made such comments, it was not until --  
6 it was not until the same time as the letter that they  
7 sent to Dr. Reynolds. And I still think at that point  
8 the possibility of a lawsuit was not imminent, not  
9 within the meaning of the Supreme Court and other courts  
10 in California have applied. It's too far downstream.

11 THE COURT: Does anyone want to add anything?

12 MR. VARTAIN: The only -- I don't want to add  
13 because I have briefed it, Your Honor, but in my brief,  
14 the one piece I do want to add is that Mr. Katzenbach  
15 argued that it wasn't -- the litigation privilege  
16 doesn't apply because the possibility of the litigation  
17 was too remote on the theory that Dr. Kao hadn't yet  
18 refused to go for the medical evaluation, but, in fact,  
19 Mr. Katzenbach's letter in this chain actually flatly  
20 stated a flat refusal on Dr. Kao.

21 That's the only minor point I'd like to bring  
22 out. Other than that, I think it's been well briefed  
23 and tendered to Your Honor.

24 THE COURT: Submitted?

25 MR. VARTAIN: Yes, Your Honor.

1 MR. KATZENBACH: Yes, Your Honor.

2 THE COURT: Motion for nonsuit as to defamation  
3 theory of recovery is granted.

4 MR. VARTAIN: May we have -- may we bring a  
5 proposed order and judgment for Ms. Peugh-Wade tomorrow  
6 morning, Your Honor?

7 THE COURT: Sure.

8 MR. VARTAIN: Thank you, Your Honor.

9 THE COURT: Anything else before we go to  
10 lunch?

11 MR. KATZENBACH: No.

12 THE COURT: See you at 1:30.

13 (Whereupon, the proceedings were adjourned  
14 for lunch at 12:13 P.M.)

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1 AFTERNOON SESSION

1:33 P.M.

2 THE COURT: I apologize for holding you up.

3 Jurors and alternates are present. Counsel  
4 from both sides are present. Plaintiff is personally  
5 present. The witness is back on the stand, and we have  
6 some questions from the jurors, which I will read to you  
7 and you can answer them.

8 THE COURT: Was there an opportunity for the  
9 math faculty to volunteer for the 2007/2008 search  
10 committee?

11 THE WITNESS: Yes. Anyone in the department  
12 could volunteer.

13 THE COURT: Did Dr. Kao volunteer in the  
14 2007/2008 search committee?

15 THE WITNESS: He did not.

16 THE COURT: Had Dr. Kao ever volunteered to be  
17 on a search committee and been denied?

18 THE WITNESS: No.

19 THE COURT: Did Dr. Kao volunteer to serve on  
20 the search committees that organized the process that  
21 yielded the hiring of Stephen Yeung in 2006?

22 THE WITNESS: I recall him stating an intention  
23 to be on a search committee at -- at some point, but  
24 then deciding not to do it for some reason, but I don't  
25 remember which one.

1 THE COURT: The next couple of questions, which  
2 I don't know, but let's give it a try.

3 The hiring and appointing of Van Cott in 2008?

4 THE WITNESS: Same response.

5 THE COURT: Subsequent hires?

6 THE WITNESS: Subsequent hires after Van Cott?

7 THE COURT: I think that's what it means, yes.

8 THE WITNESS: No.

9 THE COURT: Is the chair position on a search  
10 committee also voluntary in nature?

11 THE WITNESS: Yes. Someone volunteers to do it  
12 and the Dean -- the Dean will make a final decision.

13 But it's -- in my -- I have been on five search  
14 committees, chaired two of them, and it's always been  
15 completely voluntary.

16 THE COURT: Had Dr. Kao ever volunteered or  
17 request to serve as a chair of a search committee?

18 THE WITNESS: No.

19 THE COURT: Did the objections Dr. Kao voiced  
20 at the February 6th search committee meeting include  
21 substantive or definitive evidence that the circulation  
22 of a print listing would be any greater than the reach  
23 of an online listing?

24 THE WITNESS: Not to my knowledge.

25 THE COURT: The circulation of a print listing

1 would be anymore diverse of that of an online listing?

2 THE WITNESS: Not to my knowledge.

3 THE COURT: The quantity of applicants,  
4 was it --

5 THE WITNESS: Pardon?

6 THE COURT: The quantity of applicants, was it  
7 in any way directly proportional to either quality or  
8 diversity of lead candidates/finalists?

9 THE WITNESS: I'm not sure I know how to answer  
10 that question, because it depends on which year. But  
11 all I can say is -- is that this particular search had  
12 fewer -- objectively fewer candidates and subjectively  
13 higher quality candidates.

14 THE COURT: Did Dr. Kao, during the  
15 February 6th meeting or at any subsequent time, attempt  
16 to disprove the actual results of searches where  
17 diversity of finalists was concerned?

18 THE WITNESS: I don't understand the question.

19 THE COURT: Do you have to look at it to --

20 THE WITNESS: Sure. Thank you.

21 Did Dr. Kao, during the February 6th meeting or  
22 at any subsequent time, attempt to disprove the actual  
23 results of the searches where diversity of finalists was  
24 concerned?

25 Well, the -- nothing that I would understand.

1 And again, in this -- in this particular search in terms  
2 of diversity, we had four finalists, three were female,  
3 and we hired a woman. And -- but there was no -- there  
4 was no mathematics involved to prove or disprove.

5 I'm sorry, I can't answer the question. I  
6 don't really understand it.

7 THE COURT: During the ethnic and gender  
8 diversity of the finalists pools for searches, from 2006  
9 to 2009, is it your understanding that Dr. Kao's  
10 primary, in quotes, "motivation," was to challenge the  
11 results of the fact searches or merely the print  
12 advertisement distinction?

13 THE WITNESS: I think it would be speculation  
14 what Dr. Kao's motives were. I can say objectively of  
15 the -- the searches that I have been involved with,  
16 since 2006 we've had four searches, including one that  
17 just concluded yesterday, and we have hired zero white  
18 males during that time.

19 And we've had online ads most of that time,  
20 too, but, you know, I -- I don't know what the  
21 motivation was. All I know is the behaviors, which I've  
22 described.

23 THE COURT: Is there an institution, like the  
24 Women's Study of Mathematics of America, that you're  
25 aware of, did Dr. Kao ever suggest a similarly targeted



1 society of, quote, "minorities," close quote, of the  
2 mathematics community that could utilize to increase  
3 affirmative action efforts?

4 THE WITNESS: Well, there are other -- other  
5 journals that -- there's a journal for -- aimed at  
6 Hispanic Latino scientists and engineers, for example.  
7 There are a few other publications of that sort. But we  
8 did not place ads in -- in that, just in the AWM.

9 THE COURT: Is it your understanding an  
10 appointment of the mathematics department chair is --  
11 and I'll read all three options -- based on  
12 volunteering, based on a vote process, a formal or  
13 informal process outlining in any institutional  
14 document?

15 THE WITNESS: All three, actually. It is --  
16 technically, it -- we, the department chair, is a union  
17 officer, and the elections is done under the auspices of  
18 the -- of the -- the committee of science chairs, which  
19 is an executive committee of the union, and the election  
20 has to be run by that.

21 It's often done more informally because it's --  
22 because we're unionized, nobody really wants to do it  
23 often and so it's like who wants to be chair, and then  
24 somebody -- and we'll say you should do it, you haven't  
25 been chair. And no one is forced to do it.

1           So it's a combination of both formality and  
2 informality with a -- a designated higher structure  
3 within the union.

4           THE COURT:   Anymore questions, Mr. Vartain?

5  
6           REXCROSS-EXAMINATION BY MR. VARTAIN

7           MR. VARTAIN:   Q.   Professor, you have just  
8 mentioned that there's been a search that's just been  
9 concluded?

10          A.   Correct, as of yesterday literally.

11          Q.   What search was that in, what was the  
12 conclusion?

13          A.   The -- it was a mathematics search, and we made  
14 an offer to a fellow who -- who just said yes.  And he's  
15 Hispanic.

16          Q.   What do you mean he said "yes"?

17          A.   He accepted our offer and is going to work at  
18 the University.

19          Q.   Is that as of yesterday?

20          A.   As of yesterday, yes.

21          Q.   Okay.  That's the same person we've heard --

22          A.   Right, but the search was not concluded until  
23 yesterday.  So, yeah, yeah.

24          Q.   I see.  So he's coming?

25          A.   Yes.  Yeah.

1 MR. VARTAIN: Thank you, Your Honor.

2 THE COURT: Mr. Katzenbach, any follow-up  
3 questions?

4 MR. KATZENBACH: Yes.

5

6 REDIRECT EXAMINATION BY MR. KATZENBACH

7 MR. KATZENBACH: Q. Did you understand at the  
8 meeting on February 6th that Dr. Kao was presenting the  
9 statistics to show that the search had a discriminatory  
10 impact on minorities?

11 A. I understood that he had concerns about the  
12 search, but I did not understand that he was making an  
13 argument or presenting -- presenting evidence. That's  
14 not my sense of how that meeting was conducted.

15 Q. Did he use the word "discrimination"?

16 A. Quite possibly.

17 Q. And was that in -- when he used the word  
18 "discrimination," did he state that he thought the pool  
19 was biased or discriminatory?

20 A. I cannot speculate what he was thinking.

21 Q. And in the search that we're talking about,  
22 2008 --

23 A. Yes.

24 Q. -- the finalists -- the six semifinalists were  
25 four women and two males?

1           A.    The six semifinalists were five females and one  
2 male, to my recollection.

3           Q.    No minorities?

4           A.    I don't know.

5           Q.    The finalist group -- the four finalists, four  
6 females and one male?

7           A.    Correct.

8           Q.    No minorities?

9           A.    I'm not sure.

10          Q.    The search immediately prior to that when  
11 Dr. Yeung was hired, do you recall the ethnic and gender  
12 breakdown of that search?

13          A.    There were three finalists: One was female,  
14 two were male. The two males were ethnically of Chinese  
15 in origin.

16          Q.    Thank you.

17          A.    Female, I cannot speculate.

18          Q.    As to their ethnic, right?

19          A.    Excuse me?

20          Q.    As --

21          A.    As to ethnicity, yes, because I'm not allowed  
22 to ask. Unless there's, you know, positive evidence, I  
23 don't know.

24          Q.    Okay. Has there ever been a -- anything other  
25 than a hand -- showing of hands vote for a chair, a

1 chair in the math department, that you recall?

2 A. I'm not sure. I really don't remember how the  
3 procedures were done. I didn't pay much attention to  
4 them until I was chair.

5 Q. How were you elected chair?

6 A. I don't remember. I'm not trying to be  
7 evasive, but I don't remember how formal or informal it  
8 was.

9 Q. You don't recall there being any vote at all,  
10 do you?

11 A. I don't recall the procedure.

12 Q. Okay. Thank you.

13 That's all -- I have one other question.

14 In connection with this search, was the  
15 advertising method you chose an effort to reduce the  
16 number of applicants?

17 A. The search in 2008?

18 Q. Yeah.

19 A. Not -- not as our -- our primary goal. But  
20 we -- what we were interested in was -- was trying to  
21 get candidates to self-select who -- who would be the --  
22 candidates who would be interested in working at the  
23 University of San Francisco.

24 Q. To your knowledge, was the 2008 search the  
25 first search for a math department faculty member where

1 the advertising was entirely online?

2 A. I think so.

3 MR. KATZENBACH: Thank you. That's all I have.

4 THE COURT: Anything further, Mr. Vartain?

5 MR. VARTAIN: No, thank you, Your Honor.

6 THE COURT: May this witness be excused?

7 MR. VARTAIN: Yes, Your Honor.

8 MR. KATZENBACH: Yes, Your Honor.

9 THE COURT: Mr. Zeitz, thank you very much.

10 Next witness for the defense.

11 MS. ADLER: The University calls Professor  
12 Stephen Yeung, Your Honor.

13 THE CLERK: Sir, before you sit down, please  
14 raise your right hand.

15 STEPHEN YEUNG

16 having been duly sworn, testified as follows:

17 THE WITNESS: Yes.

18 THE CLERK: Please be seated.

19 Spell your name and spell it for the record.

20 THE WITNESS: My name is Stephen Yeung.

21 S-T-E-P-H-E-N, Y-E-U-N-G.

22  
23 DIRECT EXAMINATION BY MS. ADLER

24 MS. ADLER: Q. Good afternoon, Professor  
25 Yeung.

1 A. Good afternoon.

2 Q. I am going to be asking you some questions  
3 about the 2008 spring semester.

4 During that semester, were you on a search  
5 committee?

6 A. Yes, I was.

7 Q. Okay. And was this is a search that ultimately  
8 ended up in the hiring of Cornelia Van Cott?

9 A. Yes.

10 Q. Okay. Did the search committee meet with the  
11 math department during this semester?

12 A. Yes.

13 Q. Do any of those meetings stand out in your  
14 mind?

15 A. Yes. In a meeting where the search committee  
16 was presenting its findings to -- to the rest of the  
17 department -- you know, normally in such a department  
18 meeting -- remember, these are college professors, so we  
19 just talk. And at that time Paul, that's Professor Paul  
20 Zeitz, was the chair of the search committee, and he was  
21 doing most of the talking, telling the rest of the  
22 department what the committee thinks and getting  
23 feedback from everybody else. And somewhere in the  
24 middle, Dr. Kao, he -- he started talking about certain  
25 things.

1           And in that meeting -- it was already towards  
2           the end of the search, so the -- the -- the candidates  
3           have already presented to a lot of people, and the major  
4           purpose of that meeting was to rank the candidates to  
5           decide who to hire. And towards the end of this  
6           process, this search, Dr. Kao was all of a sudden  
7           talking about the procedure, the -- the process that we  
8           used to conduct this search. And that's -- that's this  
9           mismatch between the topics.

10           So Paul was trying to, you know, get things  
11           going, because we didn't -- we needed to come to a  
12           decision, but Dr. Kao would not let that happen. And he  
13           was just talking. Not -- not -- not just talking. I  
14           would say yelling. And -- again, normally in a faculty  
15           meeting, most of the -- most faculty members will be  
16           sitting around a table and we talk. But at that time  
17           Dr. Kao -- I don't remember exactly when, but he was  
18           standing, and he was talking about a lot of things.  
19           I -- I didn't fully understand what he was talking about  
20           because a lot of it was rambling. And he would be  
21           saying things that were beyond me. I didn't understand  
22           what he was trying to say.

23           I guess he's trying to say that the search was  
24           conducted in a wrong way, and the procedure was wrong,  
25           and we should not make any offer. We should just cancel



1 the search and not hire anyone. And when people were  
2 trying to get back to the business of the day, he would  
3 cut people short and he would -- basically, he would not  
4 let people talk.

5 And the scary thing is I -- I remember, we were  
6 sitting around a table, and that's -- at least one  
7 person was between Dr. Kao and me. So I was sitting,  
8 that person was sitting, and Dr. Kao was standing. And  
9 when he's talking about all these things, he would move  
10 his whole body very rapidly and erratically. And even  
11 though there is a person between him and me, I felt kind  
12 of intimidated, and I -- I don't know how to say it,  
13 because right now we have a court room, and when -- when  
14 I -- before I come into this room, outside at the door  
15 of the building I had to go through some metal detector,  
16 and I suppose some security guards, so we felt  
17 relatively safe here in this room. But at that time, I  
18 really had no idea what would happen. Because, again,  
19 he -- he -- he was just beside -- I mean, his concern  
20 about the search. And if he were talking about these  
21 things in a normal way, like a regular college  
22 professor, I wouldn't be bothered.

23 I understand that we have different opinions,  
24 we disagree, we can argue it. But the way he did it  
25 I -- I was very afraid. I -- I was afraid that it would

1 be not just verbal but get physical. And, you know, I  
2 have no idea what he's carrying and I fear for the  
3 worst.

4 And so I -- I was very confused, upset and I  
5 had no idea what he's trying to say to do to -- to -- to  
6 whatever.

7 Q. Professor Yeung, can you describe for me, you  
8 said that you were very scared and it was intimidating.  
9 Could you describe Dr. Kao, what his face looked like,  
10 his body language, what --

11 A. He -- again, it's hard for me to describe,  
12 because I just didn't understand it. Again, when people  
13 disagree, we will usually present our arguments  
14 logically. Remember, we are in the math department. We  
15 value logic, so we would normally be presenting our  
16 argument in a way that other people can understand. He  
17 wasn't doing that. He was just moving around.

18 He was -- may I or -- he was standing up and  
19 leaning towards people -- sorry, leaning towards people.  
20 And while he's doing all these things, his facial  
21 expression was -- I can't tell you. I don't like  
22 looking at people into their eyes when they are doing  
23 certain things, because I don't like being  
24 confrontational.

25 And when I sensed that he -- he was -- I don't

1 know, very upset, very angry, very -- whatsoever. I  
2 tried not looking into his eyes, but I could sense that  
3 he -- he's out of control. He's very upset about  
4 something. About what, I don't know.

5 Because again, I was a member of the search  
6 committee. And if he's upset about the procedure,  
7 it's -- it's nothing personal. He shouldn't have to  
8 direct all these things to people. He could just sit  
9 down, present his argument, and we would all listen to  
10 it and we could much better come to a conclusion. But  
11 the way he talked, he's not listening, he was just  
12 saying his own things. And his expression, I -- I don't  
13 know. I don't know how to describe it, but the way I  
14 would say it is he looked bizarre, out of control, and  
15 not normal.

16 And I hope I have given you a sense of --

17 Q. Professor, what about his speech, did you  
18 notice anything different about his speech?

19 A. I would say very incoherent and bizarre.  
20 Again, I could catch individual words but it made no  
21 sense. So most of the time, he's -- when I could  
22 understand what he's saying, he would be complaining  
23 about this procedure.

24 The thing is when you think about it, we were  
25 having that meeting in February, and the job asked those

1 things -- went out like half a year ago, because we are  
2 in a college. When we hire a new professor, this is  
3 the -- so the whole process basically will start one  
4 year in advance, and he had so much time. If he cared  
5 about this whole procedure, he had so much time to say  
6 something, to change something, to do something. He  
7 didn't.

8 He waited until the end when we were already --  
9 what's the word -- wrapping things up to -- to try to  
10 come to a conclusion of whom to hire. All of a sudden  
11 he would talk about these things. So it's totally  
12 illogical to me.

13 And again, I just don't get it. I don't --  
14 it's not just about -- that's the part I understand.  
15 He's complaining about the procedure, the process. The  
16 part I don't understand is most of the time he's --  
17 excuse me, he's just rambling.

18 And I remember some of us were trying to tone  
19 down the conversation, to try to get some sense of this  
20 whole thing. He wouldn't let people talk. He would  
21 tell people -- he would cut people short in the middle  
22 of a sentence and the -- the whole thing is just out of  
23 control, and that's why I felt so uncomfortable, so  
24 scared.

25 Q. And Professor Yeung, did you feel that he was

1 angry at you, that he was directing anger at you? You  
2 said that you were intimidated?

3 A. I really don't know because my sense is that at  
4 that time he was out of control. And from my  
5 perspective, I would feel that at certain moments he was  
6 directing his anger at me. But at some other moments  
7 perhaps he was directing his anger at some other people.  
8 I just don't know.

9 I can tell you that's the most scary part. If  
10 I understand what he's doing, at least it wouldn't be  
11 that scary. If I know what he's trying to do, trying to  
12 accomplish, et cetera. But at that time I had  
13 absolutely no idea what he wanted, what he's trying to  
14 do, and I don't know.

15 The thing that I don't understand, I can't  
16 predict his -- what's the word -- abnormal behavior.  
17 But this out of control thing. Because, again, in this  
18 country some people have -- excuse me. Some people have  
19 guns, and in the college environment, in the faculty  
20 meeting, you know, when things get out of control,  
21 when -- when people are talking and getting physical and  
22 I think who knows what will happen.

23 Q. Professor Yeung, did you speak to anyone who  
24 was at the meeting after the meeting?

25 A. At the meeting I believe everybody was

1 confused, frustrated, et cetera. And at the end of the  
2 meeting, I remember talking to Paul, that's Dr. Paul  
3 Zeitz, and at that time, because he was the chair of the  
4 search committee, I was a member -- regular member, not  
5 the chair, but a member of the search committee, so we  
6 all talk about these things in particular. That's the  
7 first time that I participated in a search committee at  
8 USF, University of San Francisco. So I had absolutely  
9 no clue what was happening, how to make sense of it.

10 So I did talk to Paul about trying to  
11 understand what just happened. It was completely beyond  
12 me. So I did talk to Paul about this and we were both  
13 frustrated, confused and -- I don't know. It's -- the  
14 atmosphere was very unpleasant.

15 Q. What did you tell Professor Zeitz?

16 A. I told him that I felt very uncomfortable,  
17 very -- what's the word -- confused. And I -- I felt  
18 frightened because -- again, even though there were so  
19 much people in -- in the room, the fact is if anything  
20 happened, you know, we -- we were very vulnerable. So  
21 I -- I -- I felt very unsafe, very frightened, very  
22 concerned that I -- I just -- I just didn't understand  
23 what was going on. So I was telling Paul about these  
24 things, and -- so that's basically what happened.

25 Q. And prior to this meeting that we've been

1 talking about, had you ever been frightened of Professor  
2 Kao before?

3 A. No.

4 Q. Okay. Still talking about the same semester in  
5 spring 2008, did anything else happen that semester that  
6 caused you to be afraid of Dr. Kao, say, in the hallways  
7 or --

8 A. After that meeting, once that took place, I --  
9 look, I have a brain, I have eyes, I could put things  
10 together. Once I started noticing the abnormal  
11 behavior, like -- like those things in the meeting, I  
12 started paying attention, and I saw a lot of maybe  
13 bizarre behavior in particular.

14 For example, I remember that one time I was  
15 going to the photocopier room and Dr. Kao would do some  
16 dramatic like a -- excuse me, theatrical bow to me, and  
17 it made me very uncomfortable. That particular thing,  
18 it wouldn't bother me that much, but all these things  
19 together. I think he was mocking me, making fun of me  
20 or -- I really don't know.

21 But again, that, in a sense -- I could take a  
22 lot of verbal insults as mocking and all these things,  
23 but one thing that really got to me was -- I think it  
24 was late in the spring semester, maybe early summer in  
25 that year, I -- I was -- I was at the bathroom and I got

1 out of the bathroom, entering the corridor, and Dr. Kao  
2 was walking in the opposite side of the corridor, and  
3 all of a sudden, I don't -- I didn't understand why, all  
4 of a sudden he took a sharp turn, and he started  
5 walking -- maybe walking is not the right word, this is  
6 so quick. I would say charging. He was charging toward  
7 me and then right before collision actually took place,  
8 he would turn.

9 It started like this, I was coming out of the  
10 bathroom, this is the corridor, I'm coming out, he was  
11 approaching on this direction. All of a sudden he  
12 turned like this, and I remember backing off a little  
13 bit and it all happened very fast, so I -- I don't  
14 remember exactly what happened down to the last detail,  
15 but I backed off and I remember he was very close to me,  
16 so he was doing this and then going away and then he  
17 said nothing. It just happened.

18 And I remember I was thinking, what happened?  
19 Did I get hit? I looked around. No, I think I was  
20 okay. And I was in a very confused mode and -- it's not  
21 just verbal, it's getting -- when I put all these things  
22 together, I just don't know what would happen next and  
23 that scares me.

24 THE COURT: The witness illustrated his  
25 testimony by taking one hand and veering it close to his



1 other hand and then veering it away.

2 MS. ADLER: Q. So if I understand you  
3 correctly, Professor Yeung, you said that Professor Kao  
4 actually made a movement, he changed from his path to  
5 actually come towards you suddenly; is that correct?

6 A. Correct. Remember, I was on one side of the  
7 corridor, he was on the opposite side. If -- for  
8 example, if he were losing his balance, if the floor was  
9 slippery, if it's an accident, he wouldn't be that close  
10 to me.

11 And also, if it were an accident, right after  
12 it happened, I would expect some form of some verbal  
13 communication, "Oh, I'm sorry," that sort of stuff. No,  
14 nothing. As far as I could tell, he deliberately took  
15 this turn to approach me and then moved away.

16 And again, I -- as far as I could tell, I did  
17 not actually get hit, but it's just bizarre. And again,  
18 next time maybe I wouldn't be that lucky. Maybe he  
19 would actually hit me, and who knows what he's caring in  
20 his hands or body or whatever. So I -- again, I just  
21 couldn't understand what was going on. I was very  
22 frightened.

23 Q. Okay. Did you tell any of your colleagues in  
24 the math department about this incident where Professor  
25 Kao charged --

1           A.    Yes.

2           Q.    -- towards you?

3           A.    I remember talking to, for example, Tristan  
4    Needham, and -- the reason is -- well, Tristan Needham,  
5    his office -- at that time my office and Tristan's  
6    office were close to each other.  And also when I was  
7    hired several years ago, Tristan and Paul were in the  
8    hiring committee, so naturally I talked to them a lot.  
9    And also I trust him.  Not just as a coworker, but also  
10   as a -- almost a senior person.  He -- by the time I got  
11   to USF, he had been there for, I don't know, about 20  
12   years or something like that.  He had also been in some  
13   senior position, like being an associate.  So I trust  
14   his judgment on a lot of things because he's experienced  
15   in a lot of these things.  So when these strange things  
16   happened, I would naturally ask him what's happening,  
17   what shall I do.  That sort of stuff.  So, yes, I did  
18   talk to Tristan Needham about this.

19          Q.    Okay.  And did you come to learn during the  
20   semester that similar things had happened to your other  
21   colleagues in the math department?

22          A.    I think after I told Tristan about these things  
23   and then at some point I think I heard about such things  
24   happening to other people, which made me even more  
25   scared, because, again, I'm a college professor.  I have

1 a brain. When I think about all these things, when I  
2 put the past together -- mathematicians like to think  
3 about patterns. So when I think about the pattern  
4 that's emerging, it's very scary. I just don't know  
5 what would happen next.

6 Q. So you're saying that you learned that there  
7 were other incidents that other people had with Dr. Kao  
8 that caused them to be afraid?

9 A. I think so.

10 Q. Okay. And you mentioned that it made you more  
11 scared because it was a pattern?

12 A. Uhm-hum. Yes.

13 Q. What were you afraid of?

14 A. Again, I -- excuse me.

15 I can tell you I'm not a very brave person. I  
16 want to be alive. And I think -- when I think about all  
17 these things, I -- I feel it's my physical safety that's  
18 being threatened. This is my life by which -- I don't  
19 mean by way of living, I mean whether I will actually be  
20 alive or not. And -- so I -- excuse me. I find that  
21 very depressing and very stressful and -- excuse me.

22 The fact is I have a young son. He's -- he's  
23 not even five years old, and if anything happens to me,  
24 who will be there to provide for him.

25 I -- I can tell you I -- the moment he was born

1 when -- when the nurse in the hospital -- when she's  
2 holding him in front of me, I promised him that I would  
3 be there for him. He couldn't possibly understand. He  
4 was only a baby. But I told him, I will be there for  
5 you. Now I'm not so sure whether I can keep that  
6 promise or not. And I can't -- he's not even in  
7 kindergarten. I want to see him grow up. I want to see  
8 him go to college.

9           Again, I am a college professor. Every year at  
10 commencement I see all these students walking in front  
11 of me wearing caps, gowns, graduating. I feel happy for  
12 them. And I think about a few years later, 15, 20 years  
13 later, my son will be doing that. I want to see that  
14 moment. Excuse me. I want to see him grow up.

15           I want to play with him. I can tell you every  
16 evening I -- excuse me. Every evening I give him a  
17 bath. I will do silly things with him. Sing silly  
18 songs, play silly games, I throw him up in the air,  
19 catch him, hold him in my arms, spin him around --  
20 excuse me.

21           MS. ADLER: May I approach, Your Honor?

22           THE COURT: Yes.

23           THE WITNESS: Thank you.

24           I want to do these things with him. And I can  
25 tell you, I would take all sorts of verbal insults, but

1 being physically threatened, being not sure whether I'll  
2 live through that day. That's too much for me to bear.

3 MS. ADLER: Q. And just a couple of more --  
4 did you -- what you just told me, did you tell any of  
5 your colleagues that during the semester? Did you have  
6 any conversation?

7 A. Maybe not exactly, but I certainly have  
8 expressed my concerns to some of the people about, you  
9 know, thinking about how this whole thing will end --  
10 and harm --

11 THE REPORTER: I'm sorry, can you repeat that?

12 THE WITNESS: I have talked to other people  
13 about how this thing will end, will come to a  
14 conclusion, how -- whether anybody will be harmed, any  
15 particular -- whether I believe or not. And about --  
16 worrying about my son. And, yes, so I have worried  
17 about these things and I have talked to other people.

18 MS. ADLER: Q. And who do you recall having  
19 conversations with about your fears of what Dr. Kao  
20 would do?

21 A. I remember, for example, in particular I talked  
22 to Tristan, that's Tristan Needham, about it. I -- I --  
23 I remember talking to him in his office about such  
24 things.

25 Q. Okay. And just a few more questions.

1           Did you go to human resources to report any of  
2 John Kao's behaviors during that semester?

3           A. No. You -- you can say I'm foolish. I -- I --  
4 you can say I'm burying my head in the sand, whatever,  
5 but I am not a confrontational person. In situations  
6 like this, the last thing I want is to make things  
7 worse. I don't want to -- for instance if I report  
8 these incidents, I don't know what will happen. I don't  
9 want to trigger anything.

10           The way I look at things -- you can say I'm  
11 naive, but the way I look at things, we can all disagree  
12 on a lot of things and we have emotions. We can have  
13 ups and downs, and sometimes we get angry, frustrated.  
14 We can say things that we don't mean. And usually after  
15 things have cooled down, what have I said, what have I  
16 done, and apologize to each other and get on with our  
17 lives. And life will go on, everything is okay. So I  
18 didn't want to trigger anything.

19           That's why I didn't report anything to human  
20 resources, but eventually human resources contacted me,  
21 asking me about what was happening. And when that  
22 happened, I cannot lie. I -- I didn't -- please  
23 understand it, I don't want any confrontation.

24           I keep wondering why can't we all just be in  
25 the department and do our work and teach our students

1 and, you know, do our work. That's why the University  
2 exists, we want to teach students but somehow -- some  
3 people didn't want that to happen. And again, I didn't  
4 want to make a situation worse. That's why I didn't  
5 report to human resource. But when they came to me, I  
6 couldn't lie. Don't ask me to lie to -- to -- to  
7 protect a person, to pretend nothing had happened. I  
8 cannot -- I had to tell the truth. So when human  
9 resources came to me asking me what's happening, I told  
10 them what was happening.

11 MS. ADLER: All right. Thank you.

12 THE WITNESS: Thank you.

13 THE COURT: Mr. Katzenbach.

14 MR. KATZENBACH: Yes, Your Honor, I have a few  
15 questions.

16 THE COURT: Mr. Katzenbach, it's his turn.

17 MR. KATZENBACH: He's getting --

18  
19 CROSS-EXAMINATION BY MR. KATZENBACH

20 MR. KATZENBACH: Q. You mentioned that -- at  
21 the close of your direct testimony that you did have a  
22 conversation with human resources?

23 A. Yes.

24 Q. That was in January 2009, wasn't it?

25 A. Yes.

1 Q. So that was approximately ten months after the  
2 meeting on February 6th?

3 A. You are talking about the meeting in which  
4 Dr. Kao was doing all these abnormal things, yelling at  
5 people?

6 Q. No, I'm talking about the search meeting.

7 A. Which search? Could you please clarify?

8 Q. I'm talking about the meeting where you  
9 discussed candidates in 2008.

10 A. Please understand that we had several faculty  
11 searches, so could you please clarify which meeting  
12 you -- you -- you --

13 Q. The meeting in February 2008.

14 A. 2008.

15 Q. Do you recall that meeting?

16 A. In that meeting when -- yes, when Dr. Paul  
17 Zeitz was the chair of the search committee, that  
18 meeting?

19 Q. That's right.

20 Okay. Do you recall Dr. Kao handing out some  
21 statistics?

22 A. I remember that he were handing out some pieces  
23 of paper.

24 Q. Did you read them?

25 A. Let me try to remember. I don't think so. At



1 least not carefully, because at that time things were  
2 very confusing and my primary concern was trying to  
3 understand what was happening, and I probably did not  
4 pay close attention to the information on the piece or  
5 pieces of paper.

6 Q. Okay. Take a look at Exhibit 17.

7 Your Honor, may I approach?

8 THE COURT: You may.

9 MR. KATZENBACH: Q. Let me just help you  
10 because there's too many books.

11 This volume, 17. See? Okay?

12 A. Should I read it now or what should I do?

13 Q. I'm just asking you to look at it.

14 A. Okay.

15 Q. Do you have Exhibit 17 in front of you?

16 MR. VARTAIN: He is asking you if you would  
17 like him to read it, Mr. Katzenbach.

18 MR. KATZENBACH: Q. Is Exhibit 17 a document  
19 that Dr. Kao gave out at the meeting about the  
20 candidates?

21 A. I do not remember seeing this piece of paper.

22 Q. Okay. Do you recall seeing this paper at any  
23 time?

24 A. Excuse me?

25 Q. Do you recall seeing Exhibit 17 at any time?

1 A. I don't remember.

2 Q. Okay. Now, do you recall when Dr. Kao was  
3 talking at this meeting about candidates, do you recall  
4 him expressing concerns that there were no minorities in  
5 the final group of people?

6 A. Something along that line.

7 Q. Excuse me?

8 A. Something along that line. I don't remember  
9 the exact wording. Something along that line.

10 Q. Okay. Did he mention P-values at this meeting?

11 A. Yes.

12 Q. All right. Did he mention P-values in  
13 connection with the fact that there were no minorities  
14 in this search? I'm sorry, no minority candidates among  
15 the finalists?

16 A. Can you please ask the question again? I am  
17 confused.

18 Q. That's fine.

19 A. You changed your phrasing in the middle, so  
20 will you please ask that again. What was your question?

21 Q. All right. Did Dr. Kao state that he was  
22 concerned that there were no minorities among the  
23 finalists in this search?

24 A. I think he did.

25 Q. Now, after this meeting on -- that discussed

1 the searches, what other meetings did you go to where  
2 Dr. Kao was also present?

3 A. I don't remember every single one, but I know I  
4 attended if not all of them then most of the faculty  
5 meetings. And I think in most of them, Dr. Kao was  
6 there, the regular faculty -- I mean, departmental  
7 meetings.

8 Q. Did you have any interactions with Dr. Kao at  
9 any of these meetings that caused you concern?

10 A. What do you mean by "interaction"?

11 Q. Did Dr. Kao say anything at those meetings --  
12 at any of the other faculty meetings that caused you  
13 concern?

14 A. I would say it's not about the things that he  
15 say, it's about the things that he actually do -- I  
16 mean, did.

17 I remember in one of the meetings he, towards  
18 the end -- not towards the end of the meeting, but in  
19 one of the meetings we were having a discussion about a  
20 certain topic, and Dr. Kao stormed out of the room in a  
21 very, I would say unhappy maybe even angry way. And his  
22 behavior, not just his words.

23 So when you ask me did anything he say, how do  
24 you say, bother me, concern me, I would say it's not  
25 just the things he actually said but the things he did

1 that -- that -- that bothered me, that concerned me.

2 Q. Okay. At the meeting you were just referring  
3 to where he -- Dr. Kao left, was that a meeting where  
4 the chairmanship of the department was being discussed?

5 A. Yes.

6 Q. Was that a meeting where Dr. Kao had  
7 volunteered to be chair?

8 A. Yes.

9 Q. Was that a meeting where Peter Pacheco then  
10 said -- Dr. Needham said, no, there's going to have to  
11 be an election?

12 A. I do not remember whether Tristan Needham said  
13 there would be an election. I remember -- let me  
14 reconstruct that meeting -- that --

15 So in the department meeting, Peter Pacheco,  
16 who was the chair of the department at the time, he said  
17 that sometime later he would be in sabbatical, and so we  
18 would need to find somebody to fill in when he's in  
19 sabbatical when he couldn't be chair.

20 And at that time -- I don't remember the exact  
21 sequence of events, but there were some -- some time  
22 and -- and I don't know. I don't remember exactly what  
23 happened, but I remember at some point Dr. Kao said that  
24 "I will do it."

25 And then there was some concern about, wait a

1 second, are we doing things the right way? Because --  
2 please understand, I thought it was in 2006, and when we  
3 had that discussion I was -- I hadn't been there for  
4 that long time, and there were a lot of procedural  
5 things that I don't know.

6 Again, I -- yes, I can teach my classes, those  
7 things, but I understand that each university has its  
8 own set of rules. So when it comes to figuring out who  
9 will step in when Peter is in sabbatical, at that time I  
10 had no idea what the proper procedure was.

11 And when Dr. Kao volunteered himself saying "I  
12 will do it," I remember there was some discussion about  
13 whether it was actually proper or not for us to be  
14 having this discussion, shouldn't it be the Dean's  
15 office that makes the decision or isn't there some other  
16 organization? I don't know the name of those -- again,  
17 I was a very new person and -- there was some discussion  
18 about how we should go about it.

19 And I remember towards the end of the meeting,  
20 basically no conclusion was made. And we -- I guess the  
21 consensus was, okay, let's try to first figure out what  
22 we are supposed to do before naming a successor -- or  
23 maybe "successor" is the wrong word, because at that  
24 time it was not clear whether that person who is  
25 stepping in for Peter, whether he would just be acting

1 chair for one semester one year or whether he would just  
2 take over as the regular chair. So I remember that --  
3 at the end of that meeting, there was no definite  
4 conclusion.

5 Q. Well, let me see if I can reconstruct it and  
6 see if you and I understand it correctly.

7 Peter Pacheco mentions that's going on  
8 sabbatical?

9 A. Yes.

10 Q. He said does somebody want to be chair while  
11 I'm on sabbatical?

12 A. Something like that.

13 Q. He asked for volunteers?

14 A. I don't remember whether he was asking for  
15 volunteer, but he certainly indicated that, well,  
16 clearly somebody has to be the chair.

17 If your question is about whether he's asking  
18 for volunteer or whether asking for nomination or asking  
19 for what, that -- that -- that part, I don't remember.  
20 But he indicate -- he indicated that we, the whole  
21 department has to find somebody to fill in.

22 Q. Did anyone other than Dr. Kao volunteer to fill  
23 in?

24 A. In that meeting?

25 Q. In that meeting.

1           A.    I don't remember anybody volunteering, but --  
2   but -- but whether it's because nobody wanted to  
3   volunteer or whether it's just that they were thinking  
4   and Dr. Kao said something first, that I don't know.

5           Q.    Well, after Dr. -- let me -- did Dr. Kao  
6   volunteer?

7           A.    Yes.

8           Q.    All right. And you don't recall anyone else  
9   volunteering, right?

10          A.    I don't remember.

11          Q.    And after Dr. Kao volunteered, somebody says,  
12   well, there has to be some procedure; is that right?

13          A.    Something along that line. Again, I don't have  
14   a photographic memory. If you're asking me who said  
15   such thing, I don't remember. But I remember there's  
16   some consensus among the department that maybe this is  
17   not the right way of doing things.

18          Q.    Now, let me ask, Mr. Devlin -- Professor Devlin  
19   is currently the chair, correct?

20          A.    Correct.

21          Q.    How was he elected?

22          A.    Let me try to remember. He certainly was not  
23   elected in that meeting that you were talking about. It  
24   was sometime later.

25          Q.    Uhm-hum.

1           A.    It's quite late, much later, because -- let me  
2    try to remember all the days.  I think when Peter --  
3    that's Dr. Peter Pacheco, when -- when he indicated that  
4    he would be on sabbatical, I think is not the fall  
5    semester that immediately followed, it was maybe two  
6    semesters later or maybe even later.

7                    But again, because we work in a college  
8    environment, these things, we just have to figure it out  
9    one year in advance, that's academic year, so we can't  
10   figure things out two weeks in advance.  That's too  
11   tight.  So we were thinking about these things way  
12   ahead.

13                   And eventually when Peter Pacheco was on  
14   sabbatical, Dr. Devlin, that's Dr. Steve Devlin, he  
15   became the chair.  But if you ask me exactly on which  
16   day he was elected, I -- I need to go over the record.  
17   I don't remember for sure.

18           Q.    How -- was he elected by a show of hands?

19           A.    I don't remember.  But again, I can tell you  
20   the way our department works, and that is most of the  
21   time we are normal people.  We -- we do things in normal  
22   ways.  And most of the time when somebody says, hey, why  
23   don't we do this, like why don't we require this course  
24   as a prerequisite or some other course, and teach this  
25   course in fall rather than spring, et cetera.  Most of



1 the time people will say sure, that's a good idea, and  
2 we go ahead. We do a lot of things by consensus. It's  
3 rare that we have a formal vote on things.

4 So if you're asking me how this whole process  
5 happened, I don't remember. But I -- I remember that --  
6 I remember that's the consensus, that Steve is the --  
7 that Dr. Steve Devlin, he is the right person to do it.

8 Q. So you remember Professor Devlin was selected  
9 chair by some form of consensus?

10 A. He was elected at some point, yes.

11 Q. Was that by consensus?

12 MR. VARTAIN: I am going to object. This is  
13 really not relevant.

14 THE COURT: Overruled.

15 THE WITNESS: I don't remember the exact  
16 procedure, but let me see -- so there were certainly  
17 some -- let me see, was there a formal vote? I don't  
18 remember.

19 MR. KATZENBACH: Q. Okay. Do you think it's  
20 possible that in this meeting where Dr. Kao volunteered  
21 to be chair that when -- that he felt insulted by the  
22 proposal that he somehow couldn't volunteer to be chair?

23 MR. VARTAIN: Speculation. Objection.

24 THE COURT: Sustained.

25 MR. KATZENBACH: Q. Did Dr. Kao appear to you

1 to be insulted by the events at the meeting  
2 concerning his --

3 A. Did Dr. Kao appear to me?

4 Q. No. Did he appear -- did he look -- I'm sorry.  
5 Did he look like he felt insulted?

6 A. I would say when he stormed out of the room,  
7 when he stormed out of the meeting, he certainly looked  
8 unhappy, probably angry. But whether he was insulted by  
9 what happened, that I don't know. I'm not him, I'm not  
10 a psychologist. I really don't know what was crossing  
11 his mind.

12 Q. Well, did you -- strike that.

13 Did the incident -- you described an incident  
14 where Dr. Kao bowed at you?

15 A. Yes. That was --

16 Q. Will you stand up and show the jury what he  
17 did?

18 A. May I?

19 THE COURT: Sure.

20 THE WITNESS: So imagine that -- that's my  
21 office, I'm coming out of my office over there, and this  
22 is like a photocopy room. This is the door there. So  
23 Dr. Kao was here, I was there. And then he -- I was  
24 coming out of my office approaching the photocopier room  
25 to maybe retrieve a printout or something like that, he

1 was near that door. And when I saw that, I was -- I was  
2 trying to enter that room. And the way I look at it,  
3 okay, if I try to go into that room, it's too crowded,  
4 so I'll let him go first, let people get out of the room  
5 first.

6 And -- and then all of a sudden, out of nowhere  
7 he did something like -- I'm probably not doing it well  
8 because I'm not an actor, so I could just give you some  
9 idea of what happened.

10 It was something like this. He was -- this is  
11 like the door, he moved quickly to one side, and then  
12 bowed down very deeply, and swinging his arm, something  
13 like this, as if to indicate "This way, please." That  
14 sort of thing. So he was doing something very dramatic.  
15 It was like I was watching a play, an act on stage.

16 He was doing something like this, and then he  
17 walked away like -- at that time his office was in that  
18 direction, the photocopy room, and then he walked away.  
19 And I remember he was doing something like walking in a  
20 strange way and also laughing loudly. I was standing  
21 there totally confused.

22 I remember I was somehow thinking is something  
23 on my face? And I'm thinking -- it made no sense.  
24 He -- I just don't understand why he's doing all these  
25 things.

1 THE REPORTER: I can't hear you.

2 THE WITNESS: I just don't understand why he's  
3 doing all these things, so I was very confused. And I  
4 think maybe he was mocking me or maybe -- I don't know.  
5 I don't know what, maybe. He -- I was dumbfounded. I  
6 had no clue why he's doing all those things.

7 MR. KATZENBACH: Q. Okay. Did you typically  
8 allow Dr. Kao to go through doors ahead of you?

9 A. Excuse me? Should I keep standing or should I  
10 sit down?

11 Q. Yeah, please sit down. I'm sorry. You don't  
12 have to stand up.

13 Did you typically allow Dr. Kao to go through  
14 doors ahead of you when you both approached a door?

15 A. I don't keep track of those things. If you ask  
16 me whether it's 50 percent of the time, I don't know.  
17 But I can tell you normally I -- for example, when I'm  
18 driving in front of -- at an intersection, I don't fight  
19 for the way. I will, you know, stop at a stop sign and  
20 if there's any confusion, I don't want a collision, so I  
21 will usually let people go first. And likewise if I'm  
22 walking in the corridor and, again, I don't want any  
23 collision, so if there's any confusion about who should  
24 walk first, I normally let other people walk first.

25 MR. KATZENBACH: Okay.

1 THE COURT: The witness illustrated his  
2 testimony by moving to his left, exaggerating bending of  
3 his knees, and going into a series of exaggerated bows,  
4 sort of like an Alphonse and Gaston act.

5 MR. KATZENBACH: Your Honor, now we are going  
6 to need expert testimony.

7 MR. VARTAIN: And would you call the expert,  
8 too, Mr. Katzenbach?

9 MR. KATZENBACH: Sorry, Your Honor.

10 THE COURT: Carry on, Mr. Katzenbach.

11 MR. KATZENBACH: Very well, sir.

12 Q. Do you recall when this bowing incident took  
13 place?

14 A. Excuse me?

15 Q. Do you recall when this bowing incident took  
16 place?

17 A. Either towards the end of the spring 2008  
18 semester or maybe near the beginning of the summer.  
19 It's that time frame.

20 Q. Okay. Now you also referred to -- between --  
21 I'm sorry, between the February meeting where the  
22 candidates were discussed, and that bowing incident, did  
23 you have any other incidents with Dr. Kao that you  
24 recall?

25 A. That's -- this is -- what do you call that --

1 impersonation. Remember that this faculty meeting in  
2 which Peter, that's Dr. Peter Pacheco, said something  
3 and then changed his mind.

4 And then sometime later I was in the department  
5 office -- I forget why, maybe getting water, maybe  
6 retrieving my mail, some routine things -- and I was  
7 there with another person, and all of a sudden Dr. Kao  
8 appeared at the door, and he would just say "I'll show  
9 you something," and then he would put on a show.

10 He would -- as far as I could tell, he's trying  
11 to mock Peter, and I -- I think he actually said "I  
12 would show you" -- "pretend to be Peter," something like  
13 that. And then he would do something dramatic. He'll  
14 say, "I'll do it. I'll do it. I'll do it. I'll do  
15 it," with some rapid bodily movement and some strange  
16 facial expression.

17 And again, that didn't cause me any harm in a  
18 sense, that episode alone. But when you put all these  
19 things in context, when you see all this strange  
20 behavior, this, you know, yelling, leaning towards  
21 people in meeting, and this impersonation, this -- this  
22 theatrical bow, this almost bumping into me, all these  
23 things together, I just couldn't understand what was  
24 going on.

25 Q. Let me just --

1 THE COURT: Ladies and gentlemen, remember the  
2 admonition. Do not form or express any opinion on this  
3 case until it's finally submitted to you for your  
4 decision. Do not discuss among yourselves or with  
5 others until that time. Please be back in your places  
6 at 2:40 according to the courtroom clock.

7 MR. KATZENBACH: Doctor, we always break on the  
8 half hour. That's why. Just so you are not caught by  
9 surprise.

10 (Recess taken.)

11 THE COURT: Jurors and alternates are all  
12 present. Counsel from both sides are present.  
13 Plaintiff is personally present. Mr. Yeung is taking  
14 the witness stand.

15 Mr. Katzenbach is advancing to the podium.

16 MR. KATZENBACH: Thank you, Your Honor.

17 Q. The incident where you just described just  
18 before the break where Dr. Kao appeared to be marking --  
19 mocking Peter Pacheco, do you recall that?

20 A. Yes, I recall that incident.

21 Q. Okay. That would have been after the meeting  
22 of -- where the issue of Dr. Kao volunteering for the  
23 chair came up, correct?

24 A. I think so.

25 Q. Okay. So you were identifying a bowing

1 incident, the mocking of Peter Pacheco, right? Do you  
2 see that? Do you recall those --

3 A. There were two separate incidents.

4 Q. Yes.

5 A. Uh-huh.

6 Q. Okay. Between the meeting on the chair and the  
7 meeting about the faculty search committee, what  
8 interaction did you have with Dr. Kao that caused you  
9 any fear?

10 A. Not much, because in a college environment each  
11 professor has his or her own office. So even though Dr.  
12 Kao's office and my office were kind of close, that's  
13 one extra office, that's Dr. Tristan Needham's office in  
14 between our two offices. We -- the two of us, I mean  
15 Dr. Kao and myself, we didn't interact that much.

16 However, I -- once that February meeting took  
17 place, once I started paying attention to -- obviously  
18 to things, I realized that there were a lot of strange  
19 things.

20 I can tell you normally I don't worry about  
21 such things too much because a lot of people have funny  
22 habits, especially in academia, a lot of us are, you  
23 know, we -- we have our own strange way of doing things,  
24 but certain things are just way too strange, even for  
25 academics.



1           And, for example, I would -- once I started  
2     paying attention, I would very often notice that Dr. Kao  
3     would be laughing loudly, chuckling in a very loud way  
4     in his office. And I had no idea what he's doing,  
5     because the geometrical setup of these rooms is that I  
6     could not see his room clearly. His room is rectangular  
7     in shape, and I believe that his desk and chair was  
8     towards the end of the room.

9           So even if his door were open, I could only see  
10    the area as close to the door but not the far end of the  
11    inside. So I had no clue -- I couldn't see but I could  
12    hear that he was laughing very loudly.

13         Q.    Okay. Anything else, other than laughing  
14    loudly in his office?

15           MR. VARTAIN:  Objection.  Ambiguous.

16           MR. KATZENBACH:  Okay.  I'll rephrase it.

17           MR. KATZENBACH:  Q.  Between the meeting about  
18    the search and the meeting about the chair, other than  
19    laughing in his office, what did Dr. Kao do that caused  
20    you to be scared?

21         A.    Sir, please understand that I was very afraid.  
22    And, if possible, I am trying not to be too close,  
23    especially on one-on-one basis with Dr. Kao, because,  
24    really, I -- I feared for my safety. So I didn't pay --  
25    I tried not to, for example, monitor the situation.

1           But I would say once in a while if Dr. Kao were  
2     in the corridor at the same time -- it's very hard for  
3     me to describe what's going on, but his face -- his  
4     facial expression was -- I would say distorted. It's --  
5     it's -- it's not a normal expression.

6           And again, normally, absent anything else, I  
7     probably wouldn't worry about these things so much.  
8     Maybe he just had a long day, maybe -- I got a lot of  
9     maybes. I can think of a lot of maybes. But again,  
10    when I put together all these things, I can feel that  
11    he's not very happy or maybe in some state of mind that  
12    I couldn't comprehend, and I just didn't understand what  
13    was going on.

14           And I can tell you I'm a college professor and  
15    most of the time I'm happy because I'm teaching  
16    students, and I'm teaching intelligent things that I  
17    like. And even if I don't get paid, I'll say such  
18    things to other people. But I get paid to be a college  
19    professor, so I'm very happy most the time. And I just  
20    don't understand how Dr. Kao could have this strange  
21    facial expression so often, and appeared to be so, I  
22    don't know, stressed. I don't know how to describe it.  
23    All I can say is it's very abnormal, very -- it made me  
24    uncomfortable. It made me feel that I -- I don't want  
25    to be around.

1           Again, I have to worry about my physical  
2 safety, so I try not to get too close, pay too much  
3 attention, and I try to keep some distance.

4           Q.    Okay. Do you recall a time when Dr. Kao didn't  
5 wear a suit to work?

6           A.    Excuse me?

7           Q.    Do you recall a time when Dr. Kao didn't wear a  
8 suit to work?

9           A.    I don't remember.

10          Q.    Okay. Now, I'd like to ask you about this  
11 incident where you described Dr. Kao charging towards  
12 you.

13                   Do you recall that?

14          A.    Yes.

15          Q.    All right. And you were in the bathroom at the  
16 time?

17          A.    I was coming out of the bathroom.

18          Q.    Now, which way did the door open for the men's  
19 bathroom?

20          A.    If I am coming out of the bathroom entering the  
21 corridor, I would pull the door, so that's how -- the  
22 way in which the door opens.

23                   Does that answer your question?

24          Q.    Yes. So in other words, in order to get past  
25 the door, you have to step back away from the entrance;

1 is that right?

2 A. Can you say that again, I'm trying to  
3 understand what you're describing.

4 Q. Sure.

5 The door opens inward, right? You're pulling  
6 the door inward, so you're stepping back to get around  
7 it, correct?

8 A. Normally, yes.

9 Q. And that's what happened on this time, right?

10 A. That particular time, I don't remember.

11 Because again, please understand that every -- in that  
12 instant, everything happened so fast. I was very  
13 confused. My primary concern was my physical safety,  
14 was I okay.

15 And I can tell you, it could be either way.  
16 Maybe it's possible, and maybe I actually did pull the  
17 door open and then got out of the room, if that's  
18 important to you, but it's maybe possible that maybe the  
19 door was propped opened.

20 Because I can tell you very often -- for  
21 example, if a janitor has been working there, they may  
22 put a wedge under the door, in between the door and the  
23 floor to keep the door open, especially if they have  
24 cleaned the floor so as to let the floor dry.

25 So if you're asking me that particular time

1 whether I had to pull the door open, that I don't  
2 remember.

3 Q. Do you recall making eye contact with Dr. Kao?

4 A. When I got out of the bathroom, all of a sudden  
5 I noticed that somebody was approaching me from the  
6 right-hand side and at some point I recognized that it  
7 was Dr. Kao, so I saw him at some time. But whether he  
8 saw me and whether we actually made eye contact, I don't  
9 know. I did see him, that I am sure. But whether he  
10 did see me, that I don't know.

11 Q. So you are not sure that Dr. Kao ever saw you?

12 A. You can say that because I'm not Dr. Kao, I  
13 have no idea whether he saw me or not.

14 Q. Well, he didn't make eye contact with you,  
15 right?

16 A. That I'm not sure. Again, I could see him.

17 Q. You could see him but you are not sure if he  
18 could see you?

19 A. You can say that, although I have to say that  
20 I'm a scientist, I know how the human eyes work. And  
21 given that I was getting out of the bathroom, I was  
22 moving. If he's walking on the other side of the  
23 corridor and he's suddenly turning towards me and moving  
24 away, it would be hard for me to imagine that I didn't  
25 pick up the visual signal that somebody was entering the

1 corridor from the bathroom.

2 But, of course, these are -- but, of course,  
3 these are only my understanding. If you want to know  
4 whether Dr. Kao saw me or not, you have to ask him. I  
5 do not know.

6 Q. Let's just try it again.

7 Let me -- you are walking -- he's walking down  
8 the corridor and he's across -- he's coming from your --

9 A. Right-hand side.

10 Q. Right. And he's walking down the side of the  
11 corridor where the women's bathroom is?

12 A. Say that again?

13 Q. He's walking down the side of the corridor  
14 where the women's bathroom is?

15 A. Correct.

16 Q. At some point you see him move across the  
17 bathroom as you were --

18 A. Across the corridor not bathroom.

19 Q. I'm sorry. Move across the corridor, right, at  
20 the same time you're sort of exiting the bathroom,  
21 correct?

22 A. Approximately at that time.

23 Q. And as you're exiting the bathroom, all of a  
24 sudden he turns away from you?

25 A. He first approached me and then he turned away

1 from me, so there were two -- just like two-step  
2 process.

3 Q. I understand.

4 So the first thing that happens -- you are not  
5 sure when he saw you, correct, if at all?

6 A. I have no idea. I'm not him.

7 Q. All right. So -- so did it look to you that he  
8 was -- when he was turned away from you, did it look  
9 like he was trying to avoid you?

10 A. That I don't know. Because by that time when  
11 he was turning away from me, he was already so close to  
12 me, I was already so confused. And my only -- I  
13 shouldn't say "only," but my primary concern was to  
14 avoid a collision.

15 So I remember backing up somewhat, and to make  
16 sure that we didn't collide because -- again, you have  
17 to understand that at that time, as far as I can  
18 remember, there were only two people, Dr. Kao and  
19 myself, in that area. And when he's approaching me like  
20 that, it's like somebody was charging towards me and  
21 it's somewhat frightening, and I had no idea whether  
22 he's holding anything in his hand. And -- I have to  
23 worry about a lot of -- a lot of things were crossing my  
24 mind. So when he's approaching me, I back off to avoid  
25 a collision, and then at some point he turned away from

1 me.

2 So did that answer your question? I'm not sure  
3 what you're trying to get at.

4 Q. Well, did he have something in his hand?

5 A. As far as I could tell, no actual collision  
6 occurred. And whether he was holding something in his  
7 hand, I have no idea.

8 Q. Okay. Now, when did this event happen?

9 A. It was the year 2008, either towards the end of  
10 the spring semester or maybe towards the beginning of  
11 the summer break. That -- that ballpark, that -- that  
12 time frame.

13 Q. Okay. Now, in your direct testimony you made a  
14 statement, I believe, that you were worried about the  
15 people in this country might have guns?

16 A. I do not worry about that; it's a fact some  
17 people have guns.

18 So what is exactly is your question?

19 Q. I'm just directing your question to that area.

20 Did you ever think Dr. Kao had a gun?

21 A. I do not know for sure whether he has a gun or  
22 not.

23 Q. Well, you indicated that you told -- strike  
24 that.

25 You had discussions with Tristan Needham and



1 Paul Zeitz about Dr. Kao during the spring semester; is  
2 that correct?

3 A. Yes.

4 Q. Did you tell them the same sort of things you  
5 just told the jury here?

6 MR. VARTAIN: Objection. "Same sort of things"  
7 is vague.

8 MR. KATZENBACH: Let me rephrase it. I'll  
9 rephrase it.

10 Q. Did you tell them about your concerns about  
11 your son?

12 A. Yes, I did.

13 Q. Did you tell them that you were frightened of  
14 Dr. Kao?

15 A. Yes, I did.

16 Q. And did you tell them you thought Dr. Kao might  
17 be carrying a gun?

18 A. That I don't remember. But what I remember is  
19 I did worry about my safety. And again, when I say  
20 "safety," I -- I -- I --

21 Q. Did they tell you that Dr. Kao --

22 A. Could you please let me finish. I haven't  
23 finished my sentence. Just give me some time.

24 When I say I worry about my safety, it's not  
25 just about being bumped into, being hit. I mean,

1 whether he -- whether I will be alive or dead, that kind  
2 of physical safety.

3 Q. What I'm trying to get to is this: Did Tristan  
4 Needham or Paul Zeitz urge you to go to public safety?

5 A. That I do not remember one way or another.

6 Q. Did they suggest you go to public safety to  
7 have a confidential discussion with public safety --

8 A. I do not remember.

9 Q. Let me finish my question, sir.

10 A. Sorry.

11 Q. A confidential conversation with public safety  
12 about your concerns?

13 A. I don't remember.

14 Q. Did they suggest you go to human resources to  
15 have a confidential conversation about your concerns?

16 A. I don't think so.

17 Q. Did they tell you to go to public safety to  
18 find out if Dr. Kao had a gun?

19 A. No.

20 Q. Did they tell you that Dr. Kao was a martial  
21 arts expert?

22 A. I don't remember, sir.

23 Q. Okay. Now, the faculty search -- you were on  
24 the search committee in 2008, right?

25 A. Uhm-hum. Yes.

1 Q. All right. And the first time -- isn't it true  
2 that the first time the search committee tells the  
3 faculty, you know, who the finalists are would be at the  
4 first faculty meeting?

5 A. What do you mean by "first"? Starting from  
6 what time frame?

7 Q. Okay. Good question.

8 There are two meetings with the search  
9 committee and the faculty in the search, right?

10 MR. VARTAIN: Objection. You mean departmental  
11 meeting with the departmental faculty?

12 THE COURT: I'll let the witness answer.

13 THE WITNESS: So I have to answer or --

14 THE COURT: Yes.

15 THE WITNESS: Could you please rephrase your  
16 question, because I don't understand your time frame and  
17 what's first, what's second.

18 Could you please clarify your question?

19 MR. KATZENBACH: Q. Sure.

20 There's something called the first meeting with  
21 the faculty.

22 A. Could you please give me a date so that I know  
23 approximately which meeting you're talking about? I  
24 don't know which meeting you are referring to.

25 Q. Okay. You recall one meeting -- you do recall

1 one meeting where Dr. Kao was talking, right?

2 A. There are meetings in which Dr. Kao was  
3 talking.

4 Q. There was a meeting where you got frightened?

5 A. Okay. The one meeting, around February. Is  
6 that the one you're referring to?

7 Q. Around February, yes.

8 A. Okay.

9 Q. Okay. Was there a meeting with the faculty  
10 before that to discuss the candidates?

11 A. There was a meeting in January when the  
12 department came together, and the purpose of that  
13 meeting was for the search committee to present to the  
14 department about which candidates we were inviting to  
15 campus. So this -- this meeting in which we tried to  
16 decide whether to invite these candidates to campus and  
17 then after the candidates had already visited the  
18 campus, gave their talks, meeting with deans, et cetera,  
19 there was another meeting where the search committee and  
20 the whole department together would try to decide the,  
21 what do you call it, the ranking of the candidates.

22 Q. Okay. Before the first meeting that you've  
23 just described --

24 A. Okay.

25 Q. -- did the search committee -- had the search

1 committee told the department who the candidate  
2 finalists were going to be?

3 A. Not that I know of. My understanding is that  
4 it was the purpose of that meeting. I suppose that's  
5 what you're talking about when you say the first  
6 meeting. So it was the purpose of that meeting for the  
7 search committee to discuss the finalist status whom we  
8 will be inviting to campus. That's the purpose of that  
9 meeting.

10 Before that, I -- to the best of my knowledge,  
11 I don't think we have -- "we" meaning the search  
12 committee, have presented these findings because the  
13 time frame is such that to -- in December, we would --  
14 "we" meaning members of the search committee -- would  
15 reveal the candidates' files, the applications. And  
16 then in January we would go to a national meeting, we  
17 call that a joint meeting, that's the joint meeting  
18 between the American National Science Team and I think  
19 Mathematical Association of America, but some meetings  
20 on a national scale where a lot of people would be  
21 there, and we would meet with a large pool of  
22 candidates. And after that, we would narrow down the  
23 field to a few people whom we will invite to campus.

24 So the time frame was very tight. And I don't  
25 think anybody had talk about whom to invite to the rest

1 of the department before that meeting, to the best of my  
2 knowledge. I certainly have not talked about that at  
3 all.

4 Q. As to Dr. Kao in particular, had you -- prior  
5 to that first meeting of the faculty you've described,  
6 had you or anyone else in the search committee told Dr.  
7 Kao as to the identity and ethnic makeup of the  
8 finalists?

9 MR. VARTAIN: Objection. As to other people,  
10 the question is speculative.

11 MR. KATZENBACH: I'll rephrase that.

12 Q. Prior to this first meeting, had you told  
13 Dr. Kao what the ethnic makeup of the finalists would  
14 be?

15 A. I had not.

16 Q. Are you aware of anyone who did?

17 A. Not that I know of.

18 Q. Normally, this is -- normally the search  
19 committee's work is confidential until that first  
20 meeting; is that correct?

21 A. Yes.

22 Q. Okay. So would it be accurate to say that this  
23 first meeting was the first time that Dr. Kao would have  
24 learned that the finalists did not include any  
25 minorities?

1 MR. VARTAIN: Objection. Calls for  
2 speculation.

3 THE COURT: Sustained.

4 MR. KATZENBACH: Q. Are you aware of any time  
5 before this first meeting where Dr. Kao would have known  
6 that the finalists were not -- there were no minorities  
7 in the finalists group?

8 MR. VARTAIN: Objection. Speculation.

9 THE COURT: Sustained.

10 MR. KATZENBACH: Q. At this first meeting did  
11 Dr. Kao ask about whether or not Professor Duchin had  
12 identified herself as a minority?

13 A. Excuse me, would you please say that again?

14 Q. Sure.

15 At this first meeting did Dr. Kao ask the  
16 committee if Professor Duchin had identified herself as  
17 a minority?

18 A. I didn't catch the beginning.

19 Are you referring during the meeting or before  
20 the meeting or what?

21 Q. Fair enough.

22 During the meeting, the first meeting, did Dr.  
23 Kao ask the committee if Dr. Duchin, one of the  
24 candidates, had identified herself as a minority?

25 A. I do not remember.

1 Q. Now, during the spring of 2008, did you have  
2 any concern that Dr. Kao's behavior might be dangerous  
3 to students?

4 A. Sir, I have to tell that you that, yes, I do  
5 worry about these things, because I don't know how much  
6 you know about these things, but if you read the  
7 newspaper, once in a while you see these horrible  
8 stories about people shooting up in college campuses and  
9 a lot of harm to a lot of people.

10 There's, for example, Virginia Tech, there's  
11 the Alabama-Huntsville, there's Northern Illinois  
12 University --

13 THE REPORTER: I'm sorry, can you repeat that,  
14 I didn't hear you.

15 THE WITNESS: There's Virginia Tech, there's  
16 the University of Alabama-Huntsville, there's Northern  
17 Illinois University. So there are a lot of such campus  
18 shootings where people are harmed, injured and sometimes  
19 killed.

20 Q. All right.

21 A. And so, of course, I have to worry.

22 Q. Well, did you express those concerns to  
23 Professors Needham or Yeung? I'm sorry, Professors  
24 Needham or Zeitz?

25 A. I don't remember for sure, but I can tell you



1 in general I was afraid. I was afraid. But if you're  
2 asking me whether I actually said those things aloud,  
3 then I don't remember. I could tell you that I was very  
4 worried.

5 Q. All right. Did you raise those concerns about  
6 the safety of students with anyone during that spring  
7 semester?

8 A. Again, I can tell you I was worried inside  
9 myself with my heart, but also I can tell you I did not  
10 file any formal complaint, concern, anything. But if  
11 you're asking me whether, in private conversations  
12 whether I said that, I do not remember.

13 Please understand, I'm not a videotape. I  
14 don't retain everything. But I can tell you, I -- if  
15 you want to accuse me of being a coward, being a, what  
16 do you call that, an ostrich, burying my head in the  
17 sand, you can say that, but I didn't -- on the one hand,  
18 I'm concerned; on the other hand, I didn't call public  
19 safety or any official. That's because, again, I did  
20 not want to make anything worse. I didn't want to  
21 trigger any -- please know that I'm not trained in  
22 dealing with such situations.

23 For example, if you are a cop and you -- that's  
24 a person who is unstable, you would have a trained  
25 person to handle such a situation. You don't just do

1 things your way because you may make things worse. And  
2 that's the last thing I want. I didn't want to make  
3 things worse.

4 And I was afraid that if I were to do anything,  
5 say, file a formal complaint, A, I may trigger something  
6 and I may only make things worse and, B, at that time  
7 you -- again, you can say I'm a fool if you want to, but  
8 at that time I was still hoping that maybe people will  
9 come to their senses.

10 Again, as I said before, I understand that we  
11 are humans, we have emotions. But normally, after these  
12 emotions aside, we just come back and do our normal  
13 things. Do our normal business. At that time I was  
14 still hoping that maybe these things would just quiet  
15 down and we would still be together.

16 And the fact is, in a college environment, many  
17 of us will be coworkers for many years. Sometimes tens  
18 of years. And I don't want anybody to have a hard time,  
19 and I don't want to make life hard for anybody,  
20 including -- even if I don't feel comfortable with a  
21 certain person. I hope that if he comes back to his  
22 senses, it's possible that maybe -- at that time he was  
23 still in the department, so at that time that's the  
24 possibility that maybe we would still be coworkers for a  
25 long time, and -- sir, please know that I don't like

1 saying bad things about people. And it's just not me.

2 I can tell you right now I feel very  
3 uncomfortable saying all these things in front of so  
4 many people. It's almost like I was committing some  
5 crime, although rationally I know I'm just telling the  
6 truth. But emotionally I feel very uncomfortable.

7 At that time, I was hoping that maybe things  
8 would work out, and I -- that's why I didn't file any  
9 complaint. I hoped that things would just go back to  
10 normal and we could get on with our lives and do our  
11 job, teaching the students and nobody will be harmed.  
12 That's my wish.

13 Q. Okay. Did you -- you indicated you didn't want  
14 to file a complaint. Did you discuss with Drs. Needham  
15 or Zeitz the possibility of meeting informally and --  
16 sorry, meeting confidentially with anyone to discuss  
17 your concerns?

18 MR. VARTAIN: Your --

19 THE WITNESS: What do you mean by "anyone"?

20 MR. VARTAIN: Withdrawn.

21 MR. KATZENBACH: Q. Well, I think I asked you  
22 about public safety and I've asked you about human  
23 resources.

24 A. If you are -- if there were anyone, you're  
25 referring to official authorities like public safety,

1 human resources, et cetera. Again, please know that I  
2 don't like confrontations. I believe in trying to  
3 resolve things in a peaceful way, in a way that's  
4 acceptable to everybody.

5 I don't want to escalate this whole thing  
6 because at that time, at least as far as I know, up to  
7 that point nobody had been physically harmed.

8 And my last -- what's the word, my -- my -- the  
9 last thing I wanted would be if I took some drastic  
10 actions. If, for example, I filed a formal complaint or  
11 if there's a confidential meeting or whatsoever, if bad  
12 things happened as a consequence of that -- and by "bad  
13 things" I mean events where people are physically  
14 harmed, if bad things happened like that, I would feel  
15 very, very bad and I don't want that.

16 I can -- all the time I was hoping that this  
17 whole thing could be resolved in a civilized way, not  
18 violently, not -- not -- not -- not in a way where  
19 people are harmed.

20 So I -- I didn't file any complaint and I  
21 didn't talk to anybody about filing any complaint.  
22 Nothing formal, nothing official.

23 Q. Okay. Let me just back this up.

24 Now -- let's try it a different way.

25 You have described -- I believe you have

1 described Paul Zeitz as a mentor for you?

2 A. Yes.

3 Q. And you -- and that's like a big brother or  
4 uncle, something like that?

5 A. In that informal say, you can say that, but  
6 what are you getting at? I don't understand your  
7 question.

8 Q. Did you ask Paul Zeitz for his advice as to  
9 what you should do about your fears?

10 MR. VARTAIN: Objection. Irrelevant. And  
11 wasting time. 352.

12 THE COURT: Overruled. The witness will  
13 answer.

14 THE WITNESS: Please understand that when I  
15 joined the University of San Francisco in 2006, Paul  
16 Zeitz was --

17 THE REPORTER: I'm sorry. "Please understand  
18 that"? I missed that.

19 THE WITNESS: When I joined the University of  
20 San Francisco in 2006, I was a new person there, and  
21 usually how things work is somebody in a department  
22 would act as my, I guess, mentor, big brother, uncle,  
23 whatever you want to call it. That person would  
24 basically help me out on many things. Like if I don't  
25 know how certain things work in this new environment,

1 that person will tell me, you should do this, don't  
2 worry about that, that sort of stuff. So of course Paul  
3 and I would talk a lot about a lot of things.

4 So does that answer your question?

5 MR. KATZENBACH: Q. Not quite.

6 A. Okay. What exactly -- what exactly do you want  
7 to ask about? What do you want me to get to?

8 Q. Did you talk to Paul Zeitz about your concerns  
9 and your fears?

10 MR. VARTAIN: Okay. I am going to object.  
11 We've had three questions in the last hour on his  
12 conversation with Zeitz and this is now asked and  
13 answered.

14 THE COURT: I will let the witness answer.

15 THE WITNESS: Again, Paul is, again, my mentor,  
16 big brother, whatever. So we have talked about a lot of  
17 things and it's entirely possible that I have expressed  
18 to him my concerns about this.

19 For example, right after that meeting in  
20 February 2008, when we were leaving the room, walking in  
21 the corridor, I certainly did talk to Paul about my  
22 fear, my frustration, my confusion, my -- a lot of  
23 things.

24 So did I answer your question?

25 I guess I don't understand what you're asking

1 about. I thought I had already answered your question,  
2 but if you want me to say more, please be specific.

3 What are you asking about?

4 MR. KATZENBACH: Q. Okay.

5 Did you ask -- did you express to Paul Zeitz  
6 your concern about not escalating anything?

7 A. That I do not remember. But please understand  
8 that nobody lives in a vacuum. So by that time in 2008  
9 in the spring semester, at that time I had been at USF  
10 for more than a year, maybe two years, something like  
11 that, so people know who I am, how I function, and I  
12 know how other people do things -- how they do things  
13 their way. So I guess that's their understanding, okay,  
14 if you want to escalate, not escalate, I guess it's just  
15 normal.

16 So nothing stood out in particular, and I  
17 believed that, yes, we did talk about things, but  
18 nothing stood out in particular.

19 Q. At the start I think I asked you -- I confirmed  
20 with you that the only time you talked to human  
21 resources was in January/February 2009?

22 A. Around that time.

23 Q. Yeah. That was already after Dr. Kao called  
24 you to ask you for the numbers of applicants on the  
25 search that was going on in 2008 and 2009?

1 A. Correct.

2 Q. Did you tell him the numbers?

3 A. To the best of my recollection, no, I did not  
4 tell him the number.

5 Q. Did you tell him they were confidential?

6 A. I don't remember whether I used that word, but  
7 I remember saying that please refer -- I referred him to  
8 the Dean's office.

9 MR. KATZENBACH: Okay. Thank you. That's all  
10 I have.

11 THE COURT: Thank you, Mr. Katzenbach.

12 Ms. Adler?

13 MR. VARTAIN: We don't have any questions, Your  
14 Honor.

15 THE COURT: Jurors, do you have any questions?

16 I see no hands.

17 May the witness be excused?

18 MR. KATZENBACH: Yes.

19 MR. VARTAIN: Yes.

20 THE COURT: Mr. Yeung, thank you very much,  
21 sir, you are free to go.

22 The next witness for the defense.

23 MR. VARTAIN: Dean Brown.

24 Professor Needham, could you step outside and  
25 get Dean Brown.



1           Now, Professor Brown, he's been -- he's back on  
2 the faculty.

3           MS. ADLER: The University calls Professor  
4 Brandon Brown.

5           THE CLERK: Before you sit down, Professor,  
6 will you please stand and raise your right hand.

7                                 BRANDON BROWN,  
8           having been duly sworn, testified as follows:

9  
10           THE WITNESS: I do.

11           THE CLERK: You may be seated.

12           Please state your name and spell it for the  
13 record.

14           THE WITNESS: I'm Brandon Brown.  
15 B-R-A-N-D-O-N, B-R-O-W-N.

16  
17                                 DIRECT EXAMINATION BY MS. ADLER

18           MS. ADLER: Q. Good afternoon, Professor.

19           A. Good afternoon.

20           Q. Are you currently employed by the University?

21           A. I am employed by the University of San  
22 Francisco.

23           Q. And what do you do there?

24           A. I'm a professor of physics and astronomy.

25           Q. Okay. And have you ever served in an

1 administrative position at the University?

2 A. I was the Associate Dean for Sciences from  
3 summer 2004 to summer 2008.

4 Q. And what happened after the summer of 2008?

5 A. I went back to the faculty, back to being a  
6 professor in physics and astronomy.

7 Q. Okay. I want to focus you on the spring 2008  
8 semester, which begins in January.

9 A. Okay.

10 Q. Did you have any interactions with Professor  
11 Kao that stand out in your mind?

12 A. Yes. One in particular.

13 Q. Okay.

14 A. Very early on in the semester.

15 Well, it was, as I recall, January 3rd, 2008.  
16 It was my first time back on campus after the winter  
17 break. The University closes down between Christmas and  
18 New Year's. I had a bit of a bad cold at the time, but  
19 I thought I'll come in to work and get through as much  
20 e-mail and paperwork as I can.

21 When I was opening the door to my office, I was  
22 confronted by Dr. Kao who had come up in the hallway, I  
23 guess. It was very, very deserted. Most people still  
24 took this kind of day off at the University. I said  
25 "Hi, John. I'm not taking meetings today." And he

1 said, "Well, this will just take a minute," and he went  
2 right past me into the offices of the associate dean  
3 there.

4           Already I felt like something wasn't right.  
5 His posture was very tense. He was coiled, he seemed  
6 very, very angry. His -- I remember his fists being  
7 clenched. I actually paused at the door and thought,  
8 okay, I'm not taking meetings, something doesn't feel  
9 right here. I could just leave and go back to my car,  
10 but he's in my office and I -- you know, let's give this  
11 a go.

12           I walked in through -- there's sort of an  
13 antechamber where my -- the assistant to the associate  
14 dean, administrative assistant usually sits. I don't  
15 recall her being there that day, so then that opens up  
16 through another door into the associate deans' office.  
17 So I went in there.

18           And Dr. Kao immediately began shouting about  
19 the mathematics job search. He was just incredibly  
20 agitated, enraged, really, about the placement of these  
21 job ads. I was frightened because he was -- he gave  
22 every sign of rage. Every nonverbal sign of rage. I  
23 can imagine he was quivering all over. Again, his fists  
24 were clenched, and he was shouting in a completely  
25 unprofessional way.

1           I remember two thoughts I had were I hope  
2 someone can hear this. I know it's very deserted and a  
3 lot of people are taking this day off from work, I hope  
4 someone can hear this. And the other thing -- some --  
5 really just the geometry of the office.

6           John sits on the couch where I received  
7 visitors there when I was associate dean, and I sat on a  
8 chair across from that couch, but the couch is much  
9 closer to the door in my office and that's the only  
10 door. And I'm frightened. He seemed so angry to be  
11 close to losing control, and I didn't know what could  
12 happen next.

13           And it sounds absurd, but I thought if this  
14 goes up a level, if he gets more enraged or becomes  
15 physical or attacks or something, I don't think I could  
16 get to the door before he did, what am I going to do.  
17 So this is some of the internal dialogue.

18           I did try to say soothing things. I heard him  
19 out about his concerns about the ad placement, which was  
20 he really wanted ads in print in a certain journal. And  
21 I promised I would get back to him with the details  
22 about how we had advertised this job search in  
23 mathematics, because I had not memorized -- I didn't  
24 have on the top of my head exactly where we had placed  
25 those ads. I was confident I had done what the math

1 department had asked me to do in placing the ads, and I  
2 worked with my administrative assistant on that.

3 But he -- he left and we hadn't finished this  
4 exchange about the mathematics job ads, and I was very  
5 shaken, I was probably embarrassed at my emotional  
6 reaction. Like surely I don't need to be afraid. Maybe  
7 he's so enraged because there is a huge problem with the  
8 job ads and I'll look into this. So I think I really  
9 doubted my emotional reaction.

10 I did place ad couple of phone calls. I called  
11 my boss, Jennifer Turpin. I called my closest friend at  
12 the University, who is an English professor, and he was  
13 on the East Coast. I wasn't able to reach him. And I  
14 also -- I left a message for my wife as well.

15 I just got right back to work with all the  
16 e-mails I needed to get to and whatnot.

17 Q. What emotions were running through you as  
18 Professor Kao was standing there in your office shaking  
19 in anger and, as you described a couple of times,  
20 enraged?

21 A. I was frightened. I'd never been in a  
22 situation like that in the working world. Or anywhere  
23 else, really. I just -- he was giving -- if you want to  
24 give someone nonverbal clues that you are about to  
25 attack them, from my reading that's what was going on.

1 So I was very frightened.

2 Q. Now, prior to this meeting in your office in  
3 early January, had you ever previously been afraid that  
4 Professor Kao would hit you?

5 A. No, I'd never been afraid of any physical  
6 violence or things escalating to that point. Never  
7 before January 2008.

8 Q. Had you ever seen Professor Kao angry prior to  
9 this incident?

10 A. I could say I had seen Professor Kao angry  
11 about topics of great interest to him before. I don't  
12 have the exact dates on the top of my head, but dating  
13 back to 2005, 2000 -- 2006 even. I mean, things where I  
14 might even think it was a little strange or -- that the  
15 anger didn't quite match the topic at hand, they seemed  
16 pretty divergent. But nothing that made me frightened,  
17 more just concern like I wonder if everything is okay.  
18 I wonder how he's doing.

19 Q. I see. And as part of your duties as Associate  
20 Dean, did professors come to you asking for help?

21 A. Oh, sure. I would say that's one of the main  
22 functions of an Associate Dean. I used to tell my  
23 friends it was kind of like being a dean-lit [sic],  
24 so -- you are just a go-between the Dean and the  
25 professors, and you're really trying to help the

1 professors get a lot of things done. And these can even  
2 be all kinds of issues of complaint, certainly come  
3 to -- come to the associate dean pretty readily.

4 Q. That's the next thing I was going to ask you.  
5 As Associate Dean if you're accustomed to having  
6 professors come to you with their complaints and their  
7 problems?

8 A. Definitely. That would be one of the main  
9 parts of the job.

10 Q. Have you -- as Associate Dean, did you deal  
11 with opinionated faculty?

12 A. Yes. I would say close to a hundred percent.

13 Q. Did you deal with irascible faculty, people  
14 that were upset over various issues?

15 A. Yes. Faculty can get very passionate about  
16 things.

17 But if I can distinguish, on January 3rd what  
18 was really upsetting -- to me what was chilling is the  
19 divide between the topic at hand and the rage and my --  
20 just inability, I felt like, for us to achieve  
21 communication.

22 Whereas I've seen angry people before but never  
23 been -- never been afraid because I could still connect  
24 the dots and feel like I could connect to them and  
25 someone say, hey, I know I'm upset about this, but

1 here's why. This was in a whole different aura.

2 Q. Okay. And in your dealings as Associate Dean  
3 with faculty who are upset at various issues and angry,  
4 have you ever feared for your physical safety during  
5 your interactions with any of those professors?

6 A. No.

7 Q. During the same time period around January 3,  
8 did you come to learn that anyone else had had a similar  
9 experience with Professor Kao in their office?

10 A. I did. I received a phone call from a  
11 Professor Paul Zeitz in the mathematics department, and  
12 he had reported a disturbing encounter with Dr. Kao that  
13 had been incredibly upsetting to him and he wanted to  
14 meet with me about it.

15 Q. Did you end up meeting with him?

16 A. I did. Within the week I met with Dr. Zeitz,  
17 in my office, to hear him out. I had never seen him so  
18 upset. I've known him -- I think he's been there longer  
19 than I have, so 14 -- 14 years now or so.

20 Q. And what did he tell you?

21 A. Well, somewhat similar. He described Dr. Kao  
22 barging into his office and then starting to scream  
23 about the placement of the mathematics advertisement.  
24 And he felt completely unable to talk to Dr. Kao or  
25 connect with him. And Dr. Zeitz's office, I think at



1 the time, was very small and he was very frightened. He  
2 said he had been losing a lot of sleep over it and  
3 didn't have his normal feeling of peace and ability to  
4 do his normal job that he had come to expect at the  
5 University.

6 Q. How did that make you feel, hearing that  
7 another similar incident happened to another faculty at  
8 around the same time as you?

9 A. More than anything, terrible. You -- I tend to  
10 want to think you have seen an isolated incident, so I  
11 said, wow, this is a situation. They -- it's more  
12 serious than just one frightening blowup in one office.

13 Now personally and selfishly, I think it made  
14 me be feel less embarrassed to hear that someone had a  
15 similar experience. And I was also disturbed. I had a  
16 hard time admitting my fear to people, you know, other  
17 than close family and friends. But it was easier to  
18 hear that someone else was scared.

19 Q. During the semester, as Associate Dean, you  
20 have said already that people come to you for help  
21 and -- and with their concerns.

22 Did other faculty or administrators share with  
23 you any worrisome encounters that they had with  
24 Professor Kao that semester?

25 A. Absolutely. I heard especially from Dean

1 Turpin in April immediately after she had had an  
2 encounter in the parking lot with Dr. Kao.

3 As I recall it, she was leaving work and  
4 encountered him in the parking lot and asked as to the  
5 health of his mother, hoped she was doing well. And he  
6 became visibly enraged, replied something like "How is  
7 your mother?" "How is your mother?" And really loomed  
8 over her. And she really, really thought, from what she  
9 told me, that he was going to hit her.

10 And she walked quickly to her car and he  
11 followed her very, very closely behind her and stood by  
12 her car as she started the car and got out of there.  
13 And then she -- I recall her calling me from her cell  
14 phone in her -- I don't know where she was driving at  
15 the time, but from her car.

16 There were -- another report I had was in June  
17 but that's slightly after the spring semester, after  
18 classes had ended.

19 Q. I have a few more questions about the incident  
20 you just described that Dean Turpin reported to you.

21 How long had you worked with her?

22 A. She is the administrator who hired me as  
23 Associate Dean, so directly, with weekly conversations,  
24 et cetera, since 2004.

25 Q. So would you say you worked closely with her?

1           A.    Very, very closely with the Dean.

2           Q.    Okay.  And how would you describe -- when she  
3 described this incident to you and all the times that  
4 you've discussed it, how did she appear?

5           A.    Well, it was on the phone when she first told  
6 me.  She was absolutely terrified.  I hadn't heard her  
7 like that.  It had become a nonwork issue for her.  It  
8 had become one of personal safety, and she didn't know  
9 what her next step was going to be in terms of coming  
10 back to campus or whatnot.  And that's when she was  
11 first frightened.

12          Q.    Is she the kind of person that gets rattled  
13 easily?

14          A.    I don't believe so.  She's been a very  
15 successful administrator and can deal with really a  
16 million stressful issues at once as an executive at the  
17 University.  So essentially I have a very high opinion  
18 of her.  Her abilities and her ability to handle stress.  
19 I have not known her to become emotional, especially.

20          Q.    Did you observe that the Dean did anything  
21 differently after this April incident?

22          A.    Yes, absolutely.  And we had both talked about  
23 this, and we consciously altered the schedule with which  
24 we came and left the building, so we would be less  
25 predictable in case someone wanted to find us easily,

1 like Dr. Kao.

2 I walked her to her car a number of times when  
3 she worked later to make her feel more safe. I started  
4 leaving the building and -- through a different exit  
5 than normal, and parked in a completely different place  
6 so I wouldn't have to pass by the mathematics  
7 department.

8 THE COURT: Ladies and gentlemen, remember the  
9 admonitions. Do not form or express any opinion on this  
10 case until it's finally submitted to you for your  
11 decision. Do not discuss among yourselves or with  
12 others until that time. Please be back in your places  
13 at 3:40 according to the courtroom clock.

14 (Recess taken.)

15 THE COURT: Jurors and alternates are all  
16 present. Counsel from both sides are present.  
17 Plaintiff is personally present. Professor Brown is on  
18 the stand.

19 Ms. Adler, you may continue your inquiry.

20 MS. ADLER: Thank you, Your Honor.

21 Q. You had testified that during the course of the  
22 semester in your capacity as Associate Dean that various  
23 math faculty came to you with concerns about Professor  
24 Kao?

25 A. Yes, that's correct.

1 Q. Can you describe to me the kinds of things that  
2 were being reported to you and who reported them?

3 A. Sure.

4 I definitely had a couple of lengthy  
5 conversations with Professor Peter Pacheco, who was the  
6 mathematics department chair at the time. I spoke with  
7 Tristan Needham once, that would be just right after the  
8 semester. Circa March, I had -- one of the  
9 conversations -- sometimes I get these things out of  
10 order, but I remember in detail one long conversation  
11 with Dr. Pacheco about the feasibility of talking to Dr.  
12 Kao.

13 He had mentioned that most of the department  
14 was functioning with their doors closed or working at  
15 home. He described a couple of math department meetings  
16 that didn't go very well, and he said he didn't -- he  
17 said -- I think the quote, if I can remember, was, "John  
18 is just down hostile to me now when we talk about," you  
19 know, "as chair, could you broach this topic of  
20 behavior."

21 Now, the more detailed set of behaviors I heard  
22 about in June in conversing with Dr. Needham --

23 Q. Actually, can I have you -- ask you more  
24 questions about your conversation with Dr. Pacheco.

25 A. Sure.

1 Q. How did that conversation come about?

2 A. Oh, okay. So Jennie and I were -- I'm sorry,  
3 Dean Turpin and I were looking for ways for -- we were  
4 looking to problem solve, and it's a very difficult  
5 situation. We -- we had incidents at that time  
6 specifically reported by Dr. Zeitz and myself about some  
7 worrisome behavior.

8 So I believe it was in February of 2008 that we  
9 met with Martha Peugh-Wade, who is working in human  
10 resources, and an outside consultant, I believe there  
11 was a psychologist named Dr. Good, and we brainstormed  
12 on what can we do with this situation to be very good  
13 and fair to Dr. Kao, and address people being scared by  
14 behavior, and people feeling like, including myself,  
15 that we wouldn't be able to have a productive  
16 conversation about behavior with him.

17 And Dr. Good talked about an array of things  
18 with us about psychology. We tried to say, well, what's  
19 the best way to approach this conversation? And his  
20 advice was, I remember, it was from the lowest power  
21 level possible. So not from a dean, not from an  
22 associate dean, maybe from a close colleague. And this  
23 led to one of my conversations with Dr. Pacheco, because  
24 it was determined, hey, Brandon why don't you talk to  
25 the chair of mathematics and see if he'll have this

1 conversation about behavior with Dr. Kao.

2 Q. Was he someone, Dr. Pacheco, that you  
3 understood to be on friendly terms with Professor Kao  
4 previously?

5 A. Historically I thought they were on friendly  
6 terms, yes.

7 Q. Okay.

8 A. And in this conversation in March, he recounted  
9 times when they had had conversations about difficult  
10 topics before. Not behavior, but difficult departmental  
11 politics, topics before. And he said but now I think  
12 that would be impossible. He said "I think me bringing  
13 a conversation of behavior with Dr. Kao will have less  
14 than a one percent chance of getting through, having  
15 some success, having some productive outcome." He said,  
16 "I don't know how to gauge the chance of a negative  
17 outcome." And by that he was worried about a rage  
18 episode or who knows what else. A negative outcome.

19 Q. Did you understand that he was concerned about  
20 triggering a reaction, a negative reaction towards him  
21 from Professor Kao?

22 A. Yes.

23 MR. KATZENBACH: Objection, Your Honor.  
24 Speculation that somebody else understands.

25 MS. ADLER: Q. Did he tell you he was

1 concerned about --

2 THE COURT: Ms. Adler, there is an objection  
3 pending.

4 MS. ADLER: Sorry.

5 THE COURT: Motion to strike. And granted.

6 MS. ADLER: Q. Did Professor Pacheco tell you  
7 during the conversation that he was worried about what  
8 Professor Kao's reaction would be?

9 MR. KATZENBACH: Objection, Your Honor. That's  
10 hearsay.

11 THE COURT: I share that belief.

12 MS. ADLER: I'm offering it under Evidence Code  
13 1250 to show Professor Pacheco's mental state at the  
14 time that he had this conversation with Brandon Brown.

15 THE COURT: Admissible hearsay. Overruled.

16 THE WITNESS: Yes, Dr. Pacheco was very worried  
17 about the possible negative behavioral outcome from Dr.  
18 Kao.

19 MS. ADLER: Q. And what was the outcome of  
20 your conversation? What was the decision in terms of --

21 A. Well, to Dr. Pacheco's credit, he said, "Look,  
22 if you and the Dean want me to try this conversation,  
23 I'm scared of it, but I will try it if that's what you  
24 guys think the best course is."

25 And I said, "Well, Dr. Pacheco, hold on. Let



1 me go talk to the Dean and let me share with her your  
2 worries and your reaction to this idea."

3 And when I talked to the Dean about it,  
4 together we decided that we would not ask Dr. Pacheco to  
5 try that conversation.

6 Q. And why was that?

7 A. The chances of a positive outcome seemed very  
8 believable. And, again, Peter Pacheco had said he had a  
9 pretty good open line of dialogue with Dr. Kao for many  
10 years in the department, but at that time it had just --  
11 it seemed to be only a very hostile bearing towards  
12 Dr. Pacheco, and he said "I know if I bring this up,  
13 it's just going to make him really, really angry."

14 Q. All right. Now, you talked earlier about some  
15 other professors that came to you with concerns,  
16 conversations you had.

17 You mentioned Tristan Needham. What did he  
18 report to you during that semester?

19 MR. KATZENBACH: Objection. Hearsay.

20 MS. ADLER: Evidence Code 1250 to show  
21 Professor Needham's mental state at the time.

22 MR. KATZENBACH: Not as phrased.

23 THE COURT: What?

24 MR. KATZENBACH: Not as phrased.

25 The question asked what Dr. Needham said, not

1 any description of his mental state.

2 THE COURT: Beg your pardon?

3 MR. KATZENBACH: The question, Your Honor,  
4 asked -- asked the witness what Dr. Needham had said, it  
5 wasn't directing him to any mental state -- any issue of  
6 mental state.

7 THE COURT: Well, the mental state, which  
8 underlines the actions taken by the University, is at  
9 issue in how do we get through his statements.  
10 Overruled.

11 THE WITNESS: Well, Dr. Needham had reported a  
12 number of things to me. I'll try to remember all of it.

13 He reported that he was doing his work almost  
14 exclusively at home, and that every -- every professor  
15 he knew, with the exception of Dr. Bob Wolf, was if they  
16 were at work, they were working with their door closed,  
17 and were uneasy or all the way to frightened of  
18 interacting with Dr. Kao.

19 He said it was having a significant effect on  
20 Professor Stephen Yeung who is a relatively new  
21 assistant professor in the department. Apparently,  
22 Dr. Yeung had some interactions in the close-knit little  
23 hallways of the mathematics department there that were  
24 very alarming to him. It included behavior he found  
25 nonsensical. I recall it involved a theatrical bow at

1 one time, letting Dr. Yeung into the copier room, and  
2 then Dr. Kao running into his office and having some  
3 kind of long peal of what I remember the quote was a  
4 "maniacal laughter." This is all through Dr. Needham.

5 And then he described having a -- and this is  
6 why I reported it up the chain of command to human  
7 resources. He reported some shoulder bumps, that  
8 Stephen Yeung had nearly had an encounter in the hallway  
9 of apparently Dr. Kao changing his course in the  
10 hallway, coming up really close, almost running into him  
11 and then stopping. And Dr. Needham realized, wow, I  
12 have had a shoulder bump episode from Dr. Kao. And when  
13 they conferred with Dr. Zeitz, Dr. Zeitz had had one or  
14 more physical shoulder bumps in the hallways.

15 I wrote in my normal understated way to human  
16 resources that this seemed like a very odd coincidence  
17 and I was worried. The hallways of this building in the  
18 main Harney Science, second floor, are quite wide. I  
19 can't remember running into anyone in my 14 years there.

20 MS. ADLER: Q. All right. And if I could  
21 direct your attention to the binder that's in front of  
22 you to your left.

23 A. To Tab 210?

24 Q. Yeah.

25 A. Okay.

1 Q. To Exhibit -- Tab 210 of the exhibit identified  
2 with 210.

3 A. Yes, I have it here, I think.

4 Q. All right. Do you have a duty to report  
5 significant reports that you receive about concerning  
6 behaviors to your superiors?

7 A. Absolutely. My understanding was that it was  
8 negligent to not report such an incident to human  
9 resources.

10 Q. Okay. And what is this document, Exhibit 210?

11 A. This is an e-mail I wrote to Martha Peugh-Wade,  
12 who was working in human resources, and Donna Davis and  
13 my supervisor, Dean Jennifer Turpin.

14 Q. All right. And when did you prepare this  
15 e-mail?

16 A. I wouldn't remember offhand but the date-stamp  
17 is Thursday June 5th.

18 Q. Okay. And was it your practice to update your  
19 superior, Dean Turpin, by e-mails?

20 A. I -- more often I would talk to Dean Turpin.  
21 But when I had a significant report such as this, yes,  
22 she would be included on the e-mail.

23 Q. And when did you prepare this e-mail in  
24 relation in time to when you had this conversation with  
25 Tristan Needham that you're recording in this e-mail?

1           A.     Given what I saw as the seriousness of the  
2     situation, it would have been nearly immediately. I  
3     want to say it was the same day but I don't remember  
4     that. It would have to have been within 24 hours.

5           MS. ADLER:   And, Your Honor, I would like to  
6     offer this Exhibit 210 as a business record. It's been  
7     admitted for limited purpose as Plaintiff's Exhibit 66.  
8     I'd like to offer this as a business record at this  
9     time.

10                   (Whereupon, Defendants' Exhibit 210 was  
11                    marked for identification.)

12           THE COURT:   Under Section 1271 you have a  
13     quadripartite foundation to lay.

14           MS. ADLER:   Q.   Okay. Did you prepare this  
15     e-mail in the ordinary course of business?

16           MR. KATZENBACH:  Objection. Legal conclusion.

17           THE COURT:   I don't think so. Overruled.

18           THE WITNESS:  Absolutely. This was just -- I  
19     saw this as a No. 1 part of my job as a low level  
20     administrator.

21           MS. ADLER:   Q.   Okay. And you said already  
22     that you prepared it shortly after your conversation  
23     with Tristan Needham?

24           A.     Yes.

25           Q.     Okay. And you prepared this e-mail -- is an

1 e-mail that you typed?

2 A. If I can clarify, this is definitely my e-mail.

3 So the intake was yesterday, so that would have been

4 Wednesday, June 4th, according to the text here.

5 Q. Okay. And the source of your -- what was the

6 source of your information?

7 A. Talking with Professor Needham.

8 MS. ADLER: I'd like to renew my offer of this

9 exhibit as a business record.

10 THE COURT: Any objection?

11 MR. KATZENBACH: Yes, Your Honor. May I voir

12 dire?

13 THE COURT: Yes.

14

15 VOIR DIRE EXAMINATION BY MR. KATZENBACH

16 MR. KATZENBACH: Q. You reported what

17 Dr. Needham told you, correct?

18 A. That's correct.

19 Q. You didn't observe anything that Dr. Needham

20 observed, did you?

21 A. I was not a direct witness to the behaviors in

22 the e-mail we are talking about.

23 Q. It's not part of your -- it doesn't -- the --

24 how many such -- strike that.

25 Did you have any direct observations or

1 anything that Dr. Needham reported to you?

2 MR. VARTAIN: Asked and answered. Objection.

3 MR. KATZENBACH: You are right. It is asked  
4 and answered. He said no, he didn't.

5 Q. How frequently do you report on what people  
6 tell you to your superiors?

7 A. I would say almost constantly.

8 Q. Okay. And is the only observation that you  
9 made here what Dean -- what you were told by a third  
10 party?

11 MR. VARTAIN: Objection. Asked and answered.

12 MR. KATZENBACH: You're right. Okay.

13 Your honor, I renew my objection. There is no  
14 evidence that this is done in the regular course --

15 THE COURT: You identified the second layer of  
16 hearsay. Would you say you have to have a second  
17 exception?

18 MR. KATZENBACH: Yes.

19 MS. ADLER: Your Honor, may I?

20

21 DIRECT EXAMINATION BY MS. ADLER (resumed)

22 MS. ADLER: Q. Does this e-mail accurately  
23 reflect your conversation with Professor Needham?

24 A. Absolutely.

25 MS. ADLER: Your Honor --

1           THE COURT: You still have two layers of  
2           hearsay and only one exception. The objection is  
3           sustained.

4           MS. ADLER: Under Evidence Code 1250 it also  
5           reflects Professor Needham's state of mind at the time  
6           and explains why it is that he reported these incidents  
7           to Professor -- Associate Dean Brown.

8           THE COURT: But it also includes it as hearsay,  
9           so the whole thing can't be there. Part of it is  
10          admissible hearsay; part of it isn't.

11          MR. VARTAIN: The part -- may I address, this  
12          Your Honor?

13          THE COURT: Yes.

14          MR. VARTAIN: The part that Professor Yeung is  
15          reporting to Professor Needham, we don't offer that part  
16          for its truth, but for this -- merely to show the state  
17          of mind of Professor Yeung as reported to Professor  
18          Needham. So that limited part is not offered for its  
19          truth. The part that Professor Needham is recorded by  
20          Professor Brown is saying of Professor Needham's own  
21          experience is offered for its truth as a business  
22          record.

23          MR. KATZENBACH: Three level of hearsay.

24          THE COURT: Say again?

25          MR. KATZENBACH: Three level of hearsay: Young



1 to Needham to Brown. Tinkers to Evers to Chance.

2 Your Honor, Objection. Hearsay, not leading to  
3 business records. Three levels of hearsay.

4 THE COURT: We don't have enough exceptions to  
5 cover them all. Well, let's not argue in front of the  
6 jury, we can take it up during the attorneys' time.

7 MS. ADLER: Okay.

8 Q. These reports that you received from the math  
9 faculty that we've been talking about, did you report  
10 these incidents as you received them to Dean Turpin and  
11 others in the administration?

12 A. I did, I reported them to Dean Turpin and  
13 especially to Martha Peugh-Wade in human resources.

14 Q. All right. Did you speak to Martha Peugh-Wade,  
15 the director of human resources at the University during  
16 this semester, about Professor Kao?

17 A. I did. I did have a conversation with Martha  
18 Peugh-Wade. I remember that being in her office,  
19 relatively early in the semester after my experience  
20 with Dr. Kao in my office and after I had talked to  
21 Professor Zeitz about his encounter with Dr. Kao.

22 Q. Okay. And did you tell her about your concerns  
23 for yourself regarding Professor Kao?

24 A. I did. It's not easy to do in a work  
25 environment but I did tell her I was afraid.

1 Q. Did you tell her about the incident in early  
2 January in your office where Professor Kao yelled at  
3 you?

4 A. I did. I described the incident from  
5 January 3rd.

6 Q. Okay. Did you report concerns that other  
7 faculty had shared with you?

8 A. At that point it was Dr. Zeitz's experience and  
9 his -- his fear.

10 Q. Okay. Did you tell ever Martha Peugh-Wade that  
11 you were concerned about what might happen to you if  
12 Professor Kao filed a lawsuit against the University?

13 A. I did at the same meeting. I had never known  
14 someone to retain legal counsel and be cc'ing them on  
15 work-related e-mails or whatnot. So I just -- I didn't  
16 know what happened in the case of a lawsuit and I wanted  
17 to ask her.

18 Q. And what did Martha Peugh-Wade tell you?

19 A. She said that as long as I was performing my  
20 job duties as described, the University would provide  
21 representation. If there was a lawsuit, I would be  
22 covered essentially.

23 Q. Okay. Was it your understanding that you'd be  
24 protected by the University in the event of a lawsuit?

25 A. Yes, absolutely.

1 Q. Okay. Did you continue to be concerned about a  
2 potential lawsuit after she told you that?

3 A. No.

4 Q. During the same semester that we've been  
5 talking about, the spring 2008 semester, did you warn  
6 anyone else about Dr. Kao's behaviors?

7 A. Well, I certainly talked to my wife about it.  
8 I thought the behavior is so unpredictable, that I  
9 described it to her. And if she encountered him, what I  
10 wanted her to do, if she saw him in front of the house  
11 or anything like that.

12 But I definitely talked to my assistant,  
13 Carissa Harvey, because she's sort of the front line of  
14 my office. And after I talked to Martha Peugh-Wade, I  
15 realized that I could, if I wanted, refuse meetings with  
16 Dr. Kao. And I wanted Carissa to know that. I wanted  
17 her to know that there were people who were frightened  
18 and if she ever had any concerns or witnessed something  
19 that made her uncomfortable or anything, to let me know,  
20 or if she wanted to work with her door closed sometimes  
21 more often. We went over all these kinds of things.

22 Q. And just to be clear, Carissa Harvey, your  
23 assistant, does she sit in front of your office?

24 A. Right. So there's the two rooms that are  
25 connected to one another, and her office connects

1 directly to the main circulation hallway, and that  
2 office was between the Associate Deans' office and the  
3 hallway. So she was really the frontline of my office  
4 at that time.

5 Q. Okay. You talked earlier about the incident  
6 that -- early January that Professor Zeitz told you  
7 Professor Kao had the rage outburst in his office.

8 Did you report that to Dean Turpin?

9 A. I did report that to Dean Turpin.

10 MS. ADLER: Okay. I'd like to -- this next  
11 exhibit which is identified as Defendant's 275, which is  
12 not in the binder.

13 (Whereupon, Defendants' Exhibit 275 was  
14 marked for identification.)

15 THE COURT: Do I get a copy?

16 MS. ADLER: Oh, yes.

17 MR. KATZENBACH: Your Honor, object to the  
18 admission of this document for not providing a copy to  
19 the Court.

20 THE COURT: I beg your pardon?

21 MR. KATZENBACH: Never mind, Your Honor. I  
22 apologize.

23 MS. ADLER: May I approach the witness?

24 THE COURT: Yes.

25 MS. ADLER: Q. Could you please tell me what

1 this document is?

2 A. This is an e-mail from myself to Dean Turpin on  
3 January the 3rd at 2:46 in the p.m.

4 Q. And why did you prepare this e-mail?

5 A. This was to inform Dean Turpin of the intake  
6 meeting I had had with Dr. Paul Zeitz and how upset he  
7 was about the behavior of a colleague. I do not state  
8 by name here but the colleague was Dr. Kao.

9 Q. Okay. And when did you prepare this e-mail?

10 A. Shortly after I got off the phone with  
11 Professor Zeitz. Yeah, this is an e-mail that Paul  
12 Zeitz made an appointment for an intake with me. Sorry,  
13 this was about the phone call and how upset he was.

14 Q. So you spoke to Paul Zeitz on January 3rd?

15 A. I spoke to him on January 3rd.

16 Q. And you prepared this e-mail after that on  
17 January 3rd?

18 A. Correct. I prepared this e-mail after talking  
19 to Professor Zeitz on the phone.

20 Q. Okay. And did you prepare this e-mail in the  
21 ordinary course of business?

22 A. Absolutely. This is -- I felt like something I  
23 absolutely had to do in my job duties.

24 Q. Okay. And does it accurately reflect what Paul  
25 Zeitz told you?

1           A.    Yes.  It describes him being very distraught by  
2   a colleague, and a colleague acting in an emotional,  
3   disturbing and inappropriate manner.

4           Q.    And did you type this e-mail yourself?

5           A.    I definitely typed this e-mail.

6           MS. ADLER:  I'd like to offer this as  
7   Defendant's 275 as a business record.

8           MR. KATZENBACH:  I don't believe she's laid a  
9   foundation for a business record, but I am not going to  
10   object to the e-mail.

11          THE COURT:  All right.  It's in evidence.

12                   (Whereupon, Defendants' Exhibit 275 was  
13                   admitted into evidence.)

14          MS. ADLER:  Thank you.

15          THE COURT:  Are you sitting down?  Are you  
16   through with your questioning, Ms. Adler?

17          MS. ADLER:  Yes.  Thank you.

18          MR. KATZENBACH:  You caught me by surprise.  I  
19   apologize.

20          THE COURT:  Mr. Katzenbach, you may inquire.

21          MR. KATZENBACH:  Thank you, Your Honor.

22  
23                   CROSS-EXAMINATION BY MR. KATZENBACH

24          MR. KATZENBACH:  Q.  Can you just help me with  
25   the time frame here.  You indicated, I think, that Dr.

1 Kao was waiting for you at your office door at some  
2 point, the -- around the beginning of January?

3 A. January the 3rd.

4 Q. January the 3rd?

5 A. When I -- I remember it being when I arrived at  
6 work that day, so in the morning.

7 Q. Which is the question. When did you arrive at  
8 work?

9 A. I want to say it was between with the 9:30 and  
10 10:30 on that day.

11 Q. School was out of session, wasn't it?

12 A. That's correct. I don't think -- we have a few  
13 classes in something called intersession, but that  
14 hadn't started yet.

15 Q. So there weren't any students around at that  
16 point usually, right?

17 A. No students, very few professors, and very few  
18 administrators even on that -- I recall it being the  
19 first day back after the holiday for New Year's.

20 Q. Okay. First day back after the holiday for New  
21 Year's would be the second. Do you recall being the 2nd  
22 or the 3rd?

23 A. I definitely recall it as being on the 3rd.

24 Q. Okay. And you definitely recall this being in  
25 the morning?

1           A.    Yeah, I recall it being in the morning or when  
2           I arrived certainly.  I was -- I was ill, so it's  
3           possible I arrived later than I remember.

4           Q.    Okay.  And when you arrived, you hadn't spoken  
5           to Paul Zeitz at that point, had you?

6           A.    No, I had not spoken to Paul Zeitz.

7           Q.    I'm sorry, I'm sure you had spoken to him  
8           sometime.

9                     You haven't spoken to him on --

10          A.    No, on January 3rd before I got to my office,  
11          that's correct.

12          Q.    Right.  And you spoke to him sometime later in  
13          the day?

14          A.    That's correct.

15          Q.    Okay.  Taking a look at what's already been  
16          handed to you as Exhibit 275, do you have that e-mail in  
17          front of you still?

18          A.    Yes.

19          Q.    Okay.  The -- there is a time stamp on that of  
20          14:42:52?

21          A.    I see 14:45:52, yes.

22          Q.    Sorry.  I apologize.  That would be about 2:46  
23          in the afternoon?

24          A.    Yes.

25          Q.    And is it your understanding that you met



1 with -- with John Kao in the morning then sometime,  
2 what, afternoon, Paul Zeitz called you and then you sent  
3 this e-mail?

4 A. Roughly. I don't -- I just don't remember the  
5 exact time, but that's the correct order. I just don't  
6 know how much time was in between these things.

7 Q. I think you indicated to counsel's question  
8 that you wrote Exhibit 275 shortly after the events  
9 occurred, shortly after your phone call with Dr. Zeitz?

10 A. Yes, I would say that -- that means given how  
11 much was going on and how much e-mail is flying around,  
12 that would be within two hours, certainly.

13 Q. All right. Now, why don't you read Exhibit 275  
14 to the jury.

15 A. Okay.

16 I'll start with the text of the e-mail.

17 Q. Right. We don't need the e-mail header.

18 A. "Thanks. Paul Zeitz made an appointment with  
19 me today, and he is upset about the behavior of a  
20 colleague. This led him to lose sleep and really worry  
21 about the future collegiality about the entire  
22 department. He feels this one colleague has acted in an  
23 emotionally disturbing and inappropriate manner. Hope  
24 we get a chance to talk about this. See you later.

25 BB."

1 Q. Okay. Now, first I would like to ask, you  
2 don't mention anything in this e-mail about your  
3 encounter with Dr. Kao, do you?

4 A. That's correct.

5 Q. And in this e-mail you don't relate anything  
6 about Paul Zeitz telling you that he was afraid of Dr.  
7 Kao?

8 A. The word "afraid" is not in that e-mail.

9 Q. Well, fear doesn't appear there either, does  
10 it?

11 A. No.

12 Q. The words you used was "upset about the  
13 behavior," right?

14 A. Yes, "upset about the behavior."

15 Q. And when you talked to Dr. Zeitz, immediately  
16 prior to writing this e-mail, did you understand that  
17 Dr. Zeitz had talked to -- was reporting a conversation  
18 he'd had with Dr. Kao on that same day?

19 A. That I cannot remember, if his meeting with Dr.  
20 Kao had been that day. That's -- my recollection is I  
21 thought it was the same day, but I don't know.

22 Q. All right. But he called you something around  
23 noon or a little later?

24 A. I just can't place it exactly in time.

25 Q. All right. And he didn't call you, he didn't

1 leave any message for you for the -- from the prior day,  
2 did he?

3 A. Not that I recall.

4 Q. Didn't say -- there is no message with your  
5 secretary saying Paul Zeitz wants to speak to you?

6 A. Not that I recall.

7 Q. And you'd agree with me, wouldn't you, that if  
8 this incident with Dr. Kao happened on January 3rd, that  
9 Paul Zeitz couldn't be losing sleep over that incident  
10 as you refer to in your e-mail dated January 3rd?

11 MR. VARTAIN: Vague as to what incident.

12 MR. KATZENBACH: Oh, okay. I'll rephrase it.

13 Q. When Dr. Zeitz told you he was losing sleep,  
14 you said -- the phrase you used is "it led him to lose  
15 sleep and really worry about the future collegiality of  
16 the entire department."

17 What did you understand he was losing sleep  
18 about?

19 A. Dr. Kao's behavior.

20 Q. And, in fact, if that behavior occurred on  
21 January 3rd, it wouldn't be likely that Dr. Zeitz had  
22 slept in the interval, correct?

23 A. Well, some of Paul's concerns -- I mean, it  
24 certainly went to a whole new orbit in January 2008, but  
25 it wasn't rosy and collegial in December of 2007, as I

1 remember.

2 Q. Well, what happened in December 2007 that you  
3 thought caused Dr. Zeitz to lose sleep?

4 MR. VARTAIN: Objection. The witness didn't  
5 say that. You're arguing with him.

6 THE COURT: Overruled. The witness may answer.

7 THE WITNESS: I was just -- there was tension,  
8 as I've -- I think I stated earlier. Professor Pacheco  
9 had said things had become just very hostile.

10 Now, let me say, my memory is this e-mail means  
11 that he had lost sleep based on this barging into his  
12 office and shouting episode.

13 MR. KATZENBACH: Q. Right. And if that  
14 happened on January 3rd, he couldn't have lost sleep  
15 when you write an e-mail describing that also on January  
16 3rd, right?

17 A. That's logically true.

18 Q. Well, you are a physicist, it's also physically  
19 true, isn't it?

20 A. That makes sense. What you're saying makes  
21 sense to me.

22 Q. Right. I mean, we aren't quarks?

23 MR. VARTAIN: Objection.

24 MR. KATZENBACH: I'm sorry.

25 MR. VARTAIN: Counsel -- Your Honor, I think

1 this is a pretty serious thing right now. The witness  
2 is testifying he's upset and Counsel is making a joke  
3 out of it. I object.

4 THE COURT: The objection is noted.

5 MR. KATZENBACH: Q. Do you recall a deposition  
6 you took in this action?

7 A. I do recall a deposition.

8 Q. Do you recall being asked about certain notes  
9 that you maintained on your computer?

10 A. Yes.

11 Q. Do you recall being shown those notes?

12 A. Yes, I believe you showed me those notes.

13 Q. All right. And those were identified as  
14 Exhibit 1 to your dep -- let me do this.

15 Do we have the deposition? You can give it to  
16 the Judge.

17 Q. I'd like you to read to the jury, if you would,  
18 your testimony beginning on page 16, Line 18, and  
19 continuing through the end of your answer to the  
20 question, page 17, Line 16.

21 A. Sorry. I stop at 17 and 16?

22 MR. KATZENBACH: May I approach, Your Honor?

23 THE COURT: Yes.

24 THE WITNESS: Start at Line 22 on page 16.

25 MR. KATZENBACH: Q. No, I think start on my

1 question. Line 18.

2 A. Okay.

3 Q. And continue through your full answer.

4 A. Okay. Got it. All right.

5 The question was "Showing you a document marked  
6 as Exhibit 1, it bears the numbers 298 and 0299 in the  
7 lower right-hand corner, can you identify what Exhibit 1  
8 is?"

9 And I said, "Exhibit 1 was prepared when USF  
10 requested anything I had in writing pertaining to your  
11 client, anything whatsoever. What these are are careful  
12 and complete excerpts of any entries in my personal  
13 typed daily logs from my time as Associate Dean for  
14 Sciences. I searched based on his name. And all of  
15 these -- it's just a slew of Microsoft Word documents,  
16 roughly one per month of my time on the job. So what  
17 you would see here on Exhibit 1, I haven't totalled the  
18 length of these logs overall, but I would say it's on  
19 the order of one to two percent of the whole or less.

20 "I wrote daily reminders to myself of tasks  
21 that needed to be completed, tried to keep track of  
22 things I was working on. Then I could review these  
23 documents, come in on a Thursday, look at Tuesday and  
24 Wednesday's logs and say here is what I didn't get done.  
25 Here is the phone calls I need to make. Here are grants

1 I need to review and proposals I need to sign off on,  
2 people I need to call meetings with, et cetera."

3 Q. All right. Taking a look at what was Exhibit 1  
4 to your deposition, that contains a number of entries  
5 concerning Dr. Kao?

6 A. Yes.

7 Q. Please look at the document, Exhibit 1 to your  
8 deposition. There is a tab on the side.

9 A. Okay.

10 Q. No, no, no. Exhibit 1 to your deposition, sir.  
11 The tab on the side of the -- here we go.

12 MR. KATZENBACH: May I approach Your Honor?

13 THE WITNESS: I get it. Sorry.

14 MR. KATZENBACH: Q. That's okay. That's fine.  
15 Those were the logs that we were referring to?

16 A. Yes.

17 Q. And that exhibit contains your logs that you  
18 just described, correct?

19 A. Excerpts from the logs, yes.

20 Q. All right. Concerning my client?

21 A. Yes.

22 Q. Dr. Kao?

23 A. Yes.

24 Q. There is no entry in there for any meeting with  
25 you on January 3rd, 2008, is there?

1 A. There is no entry from 2008.

2 Q. Now, after this incident with you on 2008 --  
3 may I have it back?

4 After this incident where you spoke to Dr. Kao,  
5 January 2008, did you have any other encounter with Dr.  
6 Kao that you found objectionable?

7 A. After January 3rd, 2008?

8 Q. Right.

9 A. No, I had no encounter with Dr. Kao that I can  
10 remember.

11 Q. Now, at the time of this incident -- these two  
12 incidents happened, the incident with Dr. Zeitz and you  
13 in early January, at that time, I think, you indicated  
14 there wasn't any -- there were no students on campus,  
15 generally, and very few faculty, correct?

16 A. Yeah. That's right. The campus was like a  
17 ghost town.

18 Q. Did you ask anyone to speak to Dr. Zeitz [sic]  
19 about his behavior at that time?

20 A. To Dr. Zeitz?

21 Q. To Dr. Kao.

22 A. No, I did not.

23 Q. You met with Martha Peugh-Wade approximately  
24 January 8th. Do you recall that?

25 A. That's approximately the right date, give or



1 take.

2 Q. Did you ask her to have someone speak to Dr.  
3 Kao about either of these two incidents?

4 A. I did not ask her to have someone else speak to  
5 him.

6 Q. Did you ask anyone from public safety to speak  
7 to Dr. Kao about either of these incidents during this  
8 intersession period?

9 A. No. We were -- started talking about public  
10 safety but we didn't ask them to speak to your client.

11 Q. Now, I'd like to ask you -- you talked about --  
12 you described Professor Pacheco as stating, "He was  
13 downright hostile to Dr. Kao."

14 Do you recall that testimony?

15 A. That's not what I recall. I recall Peter  
16 Pacheco saying Dr. Kao was downright hostile to him,  
17 Pacheco.

18 Q. I'm sorry. You're sure he didn't say -- that  
19 Peter didn't say that Dr. Kao was borderline hostile?

20 A. No, I'm not sure of the adjective.

21 Q. Okay. So it could have been borderline  
22 hostile?

23 A. Possibly, yes.

24 Q. Or some other word?

25 A. Sure.

1 Q. Okay. Now, taking a -- you recall speaking to  
2 Dr. Good before the meeting with him?

3 A. Before the meeting with Dr. Good?

4 Q. Yeah.

5 A. I did. I had -- basically Dr. Good interviewed  
6 me on the phone before an in-person meeting.

7 Q. Okay. During that meeting, that interview with  
8 Dr. Good, did you inform him of anything about your  
9 experiences with Dr. Kao?

10 A. I believe I would have, but I don't have a  
11 strong recollection of that phone conversation.

12 Q. Did you tell him anything about Dr. Zeitz's  
13 experience with Dr. Kao?

14 A. I believe I would have. That would be the  
15 subject of the phone call.

16 Q. Now, take a look, if you would, at Exhibit 12.

17 A. I'm sorry, I need to be referred to a binder.

18 Q. Oh, it's -- right.

19 May I approach, Your Honor?

20 THE COURT: You may.

21 MR. KATZENBACH: I'll try to help you here.

22 THE WITNESS: "Dear Brandon"?

23 MR. KATZENBACH: Q. Yeah, that's the right  
24 one.

25 A. Okay.

1 Q. Exhibit 12, can you identify what that is?

2 A. This is an e-mail from Dr. Kao to me cc'ing  
3 Dean Turpin and, I think, yourself and perhaps another  
4 attorney.

5 Q. Okay. And taking a look at Exhibit 12, does  
6 that contain -- does that contain a -- at the last page  
7 of the -- second and third page, does that contain an  
8 e-mail you sent to Dr. Kao?

9 A. Yes, it does. An e-mail I sent on January the  
10 4th.

11 Q. Okay. And that refers to your January -- that  
12 refers to your January -- January 3rd meeting?

13 A. Well, it refers to subsequent work I did to try  
14 to get him the information he wanted about the job ad  
15 placement. It doesn't really refer to the meeting.

16 Q. All right. Does it -- and how does the -- can  
17 you tell me, does it refer at all to any concerns you  
18 had about his behavior at that meeting?

19 A. This e-mail does not refer to such concerns.

20 Q. Okay. I apologize for not projecting out  
21 there.

22 Can you read to the jury what you wrote to  
23 Dr. Kao?

24 A. In its entirety?

25 Q. In its entirety. Yes, sir.

1           A.    "Hi John, I wanted to thank you for bringing  
2 your concerns to my attention and I seek to follow up  
3 with information quickly by sending this note.

4                    "The math job announcement ran in two different  
5 outlets, both print and online in each case, according  
6 to what USF paid for, the EIMS, Employment Information,  
7 and the Mathematical Sciences started running the ad  
8 online on October 1st, with print copies in October,  
9 November and December. The AWM Association for Women in  
10 Mathematics started running the ad online starting  
11 October 26th, at the latest, with newsletter print  
12 versions of the announcement in the November and  
13 December issues. These were the outlets requested by  
14 the search chair and I approved the requests.

15                    "We also run all faculty position ads, I  
16 believe, in the Chronicle of Higher Education. I hope  
17 this information is helpful. If you would like to  
18 discuss this further, please schedule a meeting via  
19 Carissa Harvey. Best wishes. Brandon."

20           Q.    Okay. Now, I'd like to ask you: First of all,  
21 was it your understanding that the outlets that were  
22 used for advertising the mathematics job, were those  
23 proposed by the search committee?

24           A.    Yes, absolutely. It was my understanding the  
25 search committee came to a unanimous approval of how to

1 advertise their job announcement in mathematics and  
2 conveyed that to our office.

3 Q. And then you approved?

4 A. I approved it.

5 Q. Okay. And you also indicated that -- that the  
6 faculty positions are also advertised in the Chronicle  
7 of Higher Education?

8 A. Yes, I was incorrect.

9 Q. Why did you -- why did you tell that to Dr.  
10 Kao?

11 A. That was a mistake on my part. I thought we  
12 used to -- in general at USF, ran all faculty job ads in  
13 one outlet. And I still think that is true but it was  
14 out of date information. And even then probably the  
15 wrong -- the wrong journal, Chronicle of Higher  
16 Education.

17 THE COURT: Ladies and gentlemen, remember the  
18 admonitions. Do not form or express any opinion on this  
19 case until it's finally submitted to you for your  
20 decision. Do not discuss among yourselves or with  
21 others until that time.

22 Please be back in your places at 9:00 tomorrow  
23 morning. Please remember to leave your notebooks and  
24 instructions behind.

25 MR. KATZENBACH: Do you want the original

1 exhibit that's handed to him? Yeah.

2 THE CLERK: Thank you.

3 JUROR: Yesterday or last week we posed the  
4 question about, like, time left or a time frame for  
5 finishing, wrapping this up. I'm wondering if tomorrow  
6 you can ask the same question to see if we're still on  
7 the same target?

8 THE COURT: Sure.

9 JUROR: Thank you.

10 (Jurors exit the courtroom.)

11 THE COURT: Jurors and alternates have departed  
12 the courtroom. Counsel for both sides and the plaintiff  
13 remain.

14 A juror approached me. His request was that we  
15 get an update on the time estimate needed to complete  
16 the trial. I said I'd pass that request on to you and  
17 you can have a number for him tomorrow.

18 Do we want to discuss Exhibit 210 anymore  
19 that's for admission pending hearsay objections?

20 MR. KATZENBACH: No, I think I made my  
21 objections.

22 THE COURT: Okay. Anything more from the  
23 defense side?

24 MR. VARTAIN: Sure, Your Honor. I would like  
25 to be heard a bit.

1 THE COURT: Okay. I'm attentive.

2 MR. VARTAIN: The basic -- the basic argument  
3 is that the four elements of 1271 after the testimony of  
4 a witness that this is a reasonable record, further --  
5 so Your Honor's concern was that there's multiple levels  
6 of out-of-court statements in that, and the way I  
7 proposed to deal with that was to --

8 THE COURT: Admitted for a limited purpose, but  
9 it gets complicated.

10 MR. VARTAIN: It gets complicated, but the  
11 bottom level of the purpose is still the state of mind  
12 of the second declarant, which is Professor Yeung. He's  
13 stating his state of mind to Professor Needham, and he's  
14 also explaining-- he's explaining his state of mind  
15 with -- with a statement of his conduct. I think that  
16 deals with the bottom level.

17 The next level is Needham's statement, but  
18 that's -- that's the business record that the witness is  
19 recording in the document. So we really -- we really  
20 only have two levels. We have Needham and then Needham  
21 saying his own views -- his own knowledge and then  
22 Needham saying what Yeung stated. But what Yeung stated  
23 to Needham, according to this document, is Yeung's state  
24 of mind and explanation for his state of mind.

25 THE COURT: Tell you what, if you can write an

1 instruction that makes what you just said clear, I'll  
2 accept the idea.

3 MR. VARTAIN: I am going to take the  
4 instruction you have already written. I think it can be  
5 modified a little bit or added to for this document.

6 THE COURT: That's just an initial draft. I  
7 don't guarantee that the exhibits are complete at all.

8 MR. VARTAIN: I know. We're still waiting on  
9 Mr. Katzenbach's --

10 THE COURT: I know it's quite a mess.

11 MR. VARTAIN: Yeah. But the body of it, I'll  
12 suggest tomorrow an additional sentence or two for this  
13 one.

14 THE COURT: Anything else that needs to go on  
15 the record?

16 MR. VARTAIN: No. I just wanted to give the  
17 Court the day tomorrow. So we forgot to clue you in  
18 today, so I don't want to have that mistake again.

19 So tomorrow, for Your Honor's knowledge, I  
20 think we'll finish with the current witness. Naturally,  
21 I don't think that will go too long, and we have two  
22 witnesses after that, James Missett, and he is going to  
23 be traveling here and I am going to call him after that.

24 Dean Turpin -- and that's because he's getting  
25 on a plane tomorrow. And then Dean Turpin will be here



1 tomorrow. Either she or Professor Pacheco will come  
2 right after Dr. Missett. And that's how we'll get the  
3 day going.

4 THE COURT: All right.

5 MR. KATZENBACH: Is that going to be all your  
6 witnesses tomorrow, you think?

7 MR. VARTAIN: I've got to come up with a backup  
8 one and I'll tell you just in case we don't finish. I  
9 think Mr. Philpott is coming into town tomorrow, so  
10 he's --

11 MR. KATZENBACH: And so -- just so that I can  
12 get an idea of estimate of when the trial might be over,  
13 do you have any -- are there any other day of witnesses  
14 for you after that?

15 MR. VARTAIN: We have our experts, as you know.

16 So just for Your Honor and Mr. Katzenbach, our  
17 goal is to rest our case sometime on Thursday. And I'm  
18 trying to move it along such that maybe His Honor would  
19 have time to duly, you know, start the instructions of  
20 the jury on Thursday; if not, fresh on Friday morning.

21 THE COURT: I will have to set aside some time  
22 for conferring about the instructions.

23 MR. KATZENBACH: Yeah, I think that's what he  
24 was referring to, conferring about instructions, not  
25 instructing the jury.

1 MR. VARTAIN: I wasn't talking about  
2 instructing. But His Honor reminds me, we have some  
3 conference to do, too. Maybe that will be on Thursday  
4 or Thursday afternoon, if we get our witnesses done.

5 THE COURT: I don't want to get us jammed on  
6 instructions. I hate to run into a situation where the  
7 jury comes back for the instructions and we are not  
8 ready.

9 MR. VARTAIN: Your Honor, that reminds me, I  
10 have a binder of our instructions with all our -- copies  
11 of all our authorities, like copies of case decision and  
12 statutes.

13 It looks like a hodgepodge of stuff but it  
14 might be useful to His Honor. I would bring it tomorrow  
15 and just lodge it, and if Mr. Katzenbach wants to look  
16 at it when you're not looking at it.

17 Would you like me to do that?

18 THE COURT: As I said, I can use all the help I  
19 can get.

20 MR. VARTAIN: Yeah. I'll bring that tomorrow.

21 THE COURT: I don't guarantee I'll read every  
22 word of it.

23 MR. VARTAIN: No, but if you want to find  
24 certain cases, it will be right next to the jury  
25 instruction that we say comes off of that case.

1 THE COURT: Okay.

2 MR. KATZENBACH: I assume the Court will accept  
3 similar assistance from our side?

4 MR. VARTAIN: No way.

5 THE COURT: Absolutely.

6 MR. KATZENBACH: I'm sure, Your Honor.

7 All right. See you tomorrow.

8 THE COURT: Off the record.

9 (Proceedings adjourned at 4:39 P.M.)

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## 1 REPORTER CERTIFICATE

2 I hereby certify that the foregoing proceedings  
3 were taken before me at the time and place herein set  
4 forth; that this transcript is a true record of the  
5 proceedings, as reported to the best of my ability by  
6 me, a duly certified shorthand reporter and a  
7 disinterested person, and was thereafter transcribed  
8 under my direction into typewriting by computer.

9  
10 I further certify I am neither financially  
11 interested in the action nor a relative or employee  
12 of any attorney or party to this action.

13  
14 IN WITNESS WHEREOF, I have this date  
15 subscribed my name.

16 Dated: September 23, 2012

17 \_\_\_\_\_  
18 SANDRA L. CARRANZA  
19 CSR No. 7062  
20  
21  
22  
23  
24  
25

1 IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

2 FIRST APPELLATE DISTRICT

3 ---o00---

4 JOHN S. KAO,

5 Plaintiff/Appellant,

Appellate No. A135750

6 versus

SUPERIOR COURT CASE

No. CGC-09-489576

7 UNIVERSITY OF SAN FRANCISCO,  
8 et al.

9 Defendants/Respondents.

10 \_\_\_\_\_/

11  
12 APPEAL FROM THE JUDGMENT OF THE  
13 SUPERIOR COURT OF CALIFORNIA  
14 COUNTY OF SAN FRANCISCO

15 THE HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE

16 REPORTER'S TRANSCRIPT ON APPEAL

17 VOLUME 10, Page 2092 through Page 2287

18 Wednesday, February 22, 2012

19  
20  
21 REPORTED BY: SANDRA L. CARRANZA, CSR No. 7062

22  
23 SANDRA L. CARRANZA  
24 Certified Shorthand Reporter  
25 13 Joan Avenue  
Novato, California 94947  
(415)893-1861  
sandycarranza@comcast.net

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SAN FRANCISCO

3 ---oOo---

4 HON. WALLACE P. DOUGLASS, JUDGE

DEPARTMENT 318

5 JOHN S. KAO,

6 Plaintiff,

7 vs.

Case No. CGC-09-489576

8 UNIVERSITY OF SAN FRANCISCO,

9 et al.

10 Defendants.  
\_\_\_\_\_ /

11  
12 REPORTER'S TRANSCRIPT OF PROCEEDINGS

13 Wednesday, February 22, 2012

14 - - -

15  
16 A P P E A R A N C E S:

17 For the Plaintiff:

18 KATZENBACH & KHTIKIAN

19 By: CHRISTOPHER W. KATZENBACH and

CONOR MACK, ATTORNEYS AT LAW

1714 Stockton Street, Suite 300

San Francisco, California 94133

21 For the Defendants:

22 VARTAIN LAW GROUP

23 By: MICHAEL J. VARTAIN and LINDA K. ADLER,

ATTORNEYS AT LAW

601 Montgomery Street, Suite 540

San Francisco, California 94111

25 REPORTED BY: SANDRA L. CARRANZA, CSR No. 7062, RPR

I N D E X

February 22, 2012

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DEFENDANTS'

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Curriculum Vitae of  
James Missett, M.D., Ph.D.

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1 SAN FRANCISCO, CALIFORNIA

9:42 A.M.

2 - - -

3 THE COURT: Jurors and alternates are all  
4 present. Counsel from both sides are present.  
5 Plaintiff is personally present. Professor Brown is on  
6 the stand.

7 I owe you an estimate of how the trial is going  
8 to go.

9 I consulted with Counsel and the estimate is  
10 we'll be finished with the presentation this week, which  
11 leaves jury instructions, arguments and deliberations.  
12 That will take some of next week. We can't predict how  
13 long it will take you to deliberate. We certainly can't  
14 predict that one.

15 It's difficult to predict how long the  
16 instructions are and this will take -- the instructions  
17 are easier, and the instructions will take 45 minutes or  
18 so for me to read the instructions. Probably we'll be  
19 finished before the end of next week, and that's --  
20 that's giving generous amounts of time.

21 The possibility exists that after you return  
22 your verdict, you might have to take additional  
23 evidence. It won't be more than an hour or two on an  
24 additional issue and vote on it. I can't predict  
25 whether that's going to be the case or not.

1           Have we fairly covered what we discussed,  
2 Counsel?

3           MR. KATZENBACH: Yes, Your Honor.

4           MR. VARTAIN: I'm not sure I join in this  
5 estimate, as you know, Your Honor. I think we can get  
6 done a lot sooner than that. Mr. Katzenbach has agreed  
7 to waive closing statements.

8           Just joking, of course.

9           MR. KATZENBACH: No, no. I thought that was  
10 you, you were the one.

11          MR. VARTAIN: I'll limit mine to ten minutes,  
12 if you'll limit yours to 30.

13          MR. KATZENBACH: Yeah. We plan to rest our  
14 case tomorrow.

15          THE COURT: Okay. Mr. Katzenbach is making his  
16 way back to the lectern.

17          Dr. Brown, the oath you took yesterday is still  
18 in effect today. You're still testifying under oath.

19          Mr. Katzenbach, you may inquire.

20          MR. KATZENBACH: Yes, Your Honor. Thank you.

21  
22          CROSS-EXAMINATION BY MR. KATZENBACH (resumed)

23          MR. KATZENBACH: Q. Dr. Brown, I'd like to  
24 just go over a few items.

25          First, did anyone raise to you any concerns

1 about safety involving Dr. Kao before January of 2008?

2 A. I don't know if safety was the right word, but  
3 there was one incident in the fall of 2007, the  
4 convocation.

5 Q. Uh-huh. And did -- in that instant, did  
6 Jennifer Turpin tell you that she thought that Dr. Kao  
7 was carrying a gun to that convocation?

8 A. I do not remember her saying anything about him  
9 carrying a gun. She -- she was worried.

10 Q. Uh-huh. And what was she worried about?

11 A. She wasn't specific. But I think she was  
12 worried about a violent act of some kind.

13 Q. Uhm-hum.

14 A. She said "Do you think he might do something?"  
15 That's what I remember.

16 Q. And did you say "yes" or "no"?

17 A. I said "I don't think so. But, Jenny, you know  
18 what, I'm going to sit right in front of him in the  
19 audience, and I think you should go ahead with your  
20 speech at the convocation."

21 The convocation is a -- the beginning of the  
22 semester meeting where all the faculty gets together and  
23 the Dean gives a speech.

24 Q. Okay. And you sat in front of Dr. Kao?

25 A. I did.

1 Q. And what did Dr. Kao do during the convocation?

2 A. During the convocation, I was looking forward.

3 He was sitting behind me, so I didn't see him do

4 anything unusual.

5 Q. Okay. And did Dean Turpin explain to you what

6 made her concerned about Dr. Kao?

7 A. Again, that would be before the convocation?

8 Q. Yes.

9 A. I think Dr. Kao's behavior was a little unusual  
10 before the convocation.

11 Q. Did you observe that?

12 A. I did. He was one of the first people to get  
13 to the theatre and sat in the middle, the second row by  
14 himself with no one else sitting in the theatre yet.  
15 And his gaze was fixed on Jenny a lot of the time, when  
16 I saw him.

17 Q. Okay. Let me -- the convocation, my  
18 understanding there are two convocations on that day?

19 A. Yeah. I think the first one might not have the  
20 same title, but the President gives a "Welcome Back  
21 Troops" and then you meet by the college, so then just  
22 Arts and Sciences met, and the Dean gave a "Welcome  
23 Back."

24 Q. All right. I am going to just go over that in  
25 case...

1           First, there is a whole meeting of the whole  
2 school?

3           A.    Yes.

4           Q.    And then each of the colleges break down and  
5 have a sort of "Welcome Back" meeting with their  
6 particular dean?

7           A.    More or less.  I'm not sure each college does  
8 but...

9           Q.    And so -- and there is a period of time between  
10 the two events?

11          A.    Yes.

12          Q.    Okay.  And did you see where Dr. Brown -- I'm  
13 sorry, Dr. Kao came from when he sat in the middle of --

14          A.    No, I didn't.

15          Q.    Do you know whether Dr. Kao was present during  
16 the earlier -- during the "All Faculty" convocation?

17          A.    I don't remember seeing him there, but it's a  
18 long time ago and it was very crowded.

19          Q.    Okay.  So the first one was very crowded,  
20 right, and then everyone breaks up?

21          A.    Yes.

22          Q.    Is The College of Arts and Sciences in the same  
23 auditorium as the general meeting?

24          A.    The same auditorium.

25          Q.    Okay.  So did it appear to you that Dr. Kao was

1 moving from one seat that he might have sat in during  
2 the general convocation to another seat for the purposes  
3 of the college convocation?

4 A. Well, since I didn't see him at the first one,  
5 I just don't have any information. I didn't see him  
6 take that seat.

7 Q. Okay. Now, following that -- following that  
8 event, were there any other reports to you concerning  
9 Dr. Kao and safety issues after or before January of  
10 2008?

11 A. Not that I recall.

12 Q. And did any faculty members at the College of  
13 Arts and Sciences -- sorry. Yeah, any faculty members  
14 of The College of Arts and Sciences report to you any  
15 concerns about Dr. Kao committing acts of violence?

16 A. No.

17 Q. During that period of time, prior to  
18 January 2008?

19 A. No.

20 Q. Okay. During the period of January 2008  
21 through the end of January, did anyone from the College  
22 of Arts and Sciences report to you any concerns about  
23 Dr. Kao committing an act of violence?

24 A. Through the end of January 2008?

25 Q. Yeah.

1           A.    Well, as I mentioned yesterday, I had that  
2 meeting with Professor Zeitz.

3           Q.    Okay.

4           A.    And he was really scared of what could happen.

5           Q.    All right.

6           A.    He was frightened by the possibility of  
7 violence.

8           Q.    All right.  And that was -- did you have a  
9 meeting with anyone other than Dr. Zeitz during January  
10 of 2008?

11          A.    By the end of January 2008, other than me  
12 meeting with my superiors and discussing these things,  
13 no, I don't remember reports.  If I have the order of  
14 things correct, yeah, not by the end of January 2008.

15          Q.    Okay.  All right.  Now going to what Dean  
16 Turpin told you about this incident she experienced with  
17 Dr. Kao in April 2008, do you have that in mind?

18          A.    Yes.

19          Q.    I'd like to go over a few of the things that  
20 she told you.

21                Did she tell you that that incident took place  
22 in the parking lot?

23          A.    Yes, I remember that being on the way to her  
24 car.

25          Q.    Do you remember her stating that Dr. Kao kept



1 repeating "How is your mother? How is your mother?"

2 A. I remember at least once. Yes, "How is your  
3 mother."

4 Q. Well, repeating it at least once or saying it  
5 at least once?

6 A. I remember her telling me he said it twice.

7 Q. Do you remember her telling you that Dr. Kao  
8 followed her to her car?

9 A. Yes.

10 Q. And do you remember her telling you that Dr.  
11 Kao stood next to her car during this incident?

12 A. Yes.

13 Q. Right. Now, is it possible that you're  
14 confusing what Dr. Turpin told you with another prior  
15 incident where a student had threatened a faculty member  
16 in the parking lot?

17 A. No, I don't think that's possible. I don't  
18 recall a student threatening a faculty member.

19 MR. KATZENBACH: Okay. Now, I'd like to have  
20 this marked as Plaintiff's 116.

21 (Whereupon, Plaintiff's Exhibit 116 was  
22 marked for identification.)

23 MR. KATZENBACH: Thank you.

24 May I approach the witness, Your Honor?

25 THE COURT: Yes.

1 MR. KATZENBACH: Q. Showing the witness a  
2 document marked for identification as Plaintiff's 116 or  
3 116.

4 Can you identify that document?

5 A. This is an e-mail from then Dean Jennifer  
6 Turpin to Martha Peugh-Wade and Donna Davis.

7 Q. And are you copied on this e-mail?

8 A. I am cc'ed, yes.

9 Q. Did you receive this e-mail?

10 A. Best I can remember, yes.

11 MR. KATZENBACH: I'd like to move 116 into  
12 evidence?

13 MR. VARTAIN: No objection.

14 THE COURT: Received.

15 (Whereupon, Plaintiff's Exhibit 116 was  
16 admitted into evidence.)

17 MR. KATZENBACH: Q. Taking a look at  
18 Exhibit 116, what's the date of this e-mail?

19 A. Thursday, January the 3rd, 2008.

20 Q. Now taking -- and the time of this e-mail  
21 appears to be approximately 5:00 o'clock?

22 A. 5:00 p.m., yeah, just about.

23 Q. That's a couple of hours after you sent an  
24 e-mail, which is Exhibit 275.

25 Do you recall that e-mail?

1           A.    The January 3rd e-mail from myself to Jennifer  
2 Turpin?

3           Q.    Yes.

4           A.    Yes.  We talked about it yesterday.

5           Q.    This would be a couple of hours later?

6           A.    Okay.

7           Q.    Do you agree with that?  Would you like me to  
8 show you --

9           A.    No.

10          Q.    That's fine.  Right.

11                   Now, would you please identify who Martha is?

12          A.    Martha is Martha Peugh-Wade, working in human  
13 resources.  I'm not sure she was at a VP level that  
14 particular year.  I don't remember her exact title.

15          Q.    All right.  And can you identify who Donna is?

16          A.    Yes.  That's Donna Davis, one of our University  
17 counsels, one of the lawyers working for the University.

18          Q.    She's general counsel, isn't she?

19          A.    Yes.

20          Q.    All right.  Can you read the e-mail to the  
21 jury?

22          A.    Sure.  "Attorney/client privileged.  Martha and  
23 Donna.  First, happy new year.  Donna, I don't know when  
24 you're returning, but I'm happy to meet with the two of  
25 you soon to discuss some issues around John Kao.

1 Brandon may also attend the meeting. Donna, we could  
2 also plug you in by phone, if that's better for you.  
3 I'm available except for January 10 through 14 when I'm  
4 out of town. Thanks and wishing you both well. Jenny."

5 Q. What were the issues around John Kao that you  
6 understood were going to be discussed at this proposed  
7 meeting?

8 A. My understanding, and this is the first I've  
9 seen this e-mail since 2008, but it would be what I had  
10 told Jenny about my experience with John's behavior and  
11 what Dr. Zeitz had reported to me as well.

12 Q. Well, was this meeting going to be concerning  
13 issues of alleged dangerousness from Dr. Kao?

14 A. I don't remember. We had two people who had  
15 been frightened. We wanted, as always, to deal in a  
16 very fair way with Dr. Kao, and try to get advice from  
17 people in human resources and legal about the best ways  
18 to move forward.

19 Q. All right. So during -- from the date of this  
20 e-mail, January 3rd until the end of January, are you  
21 aware of anyone who spoke to Dr. Kao about his actions  
22 in connection with the meeting with either you or  
23 Dr. Zeitz?

24 A. I'm not aware that anyone spoke to Dr. Kao.

25 Q. Are you aware that -- was there any decision at

1 that point not to speak to him?

2 A. I don't remember.

3 MR. KATZENBACH: Okay. I'd like to have this  
4 one marked as next in order. This will be Exhibit 117.

5 (Whereupon, Plaintiff's Exhibit 117 was  
6 marked for identification.)

7 MR. KATZENBACH: Thank you.

8 May I approach the witness, Your Honor?

9 THE COURT: Yes.

10 MR. KATZENBACH: Q. Showing the witness, for  
11 identification, an exhibit marked 117.

12 Dr. Brown, can you take a look at Exhibit 117  
13 and can you identify that?

14 A. Yes. This is an e-mail from myself to Martha  
15 Peugh-Wade, Donna Davis, and I'm cc'ing Dean Turpin, on  
16 Friday the 4th of January.

17 Q. Does this concern Dr. Kao?

18 A. It involves Dr. Kao's worries in filing a  
19 complaint about the ad placement for the mathematics  
20 job.

21 MR. KATZENBACH: I'd like to move Exhibit 117  
22 into evidence, Your Honor?

23 THE COURT: Any objection?

24 MR. VARTAIN: No objection.

25 THE COURT: It's received.

1 (Whereupon, Plaintiff's Exhibit 117 was  
2 admitted into evidence.)

3 MR. KATZENBACH: Q. Again, looking at Exhibit  
4 117, what is the date of this e-mail?

5 A. Fourth of January, 2008.

6 Q. Who is copied on this e-mail?

7 A. Dean Turpin.

8 Q. Who else does this e-mail go to?

9 A. In the main address line, Martha Peugh-Wade and  
10 Donna Davis.

11 Q. Taking a look at the bottom of the e-mail,  
12 would you please read the text of this e-mail to the  
13 jury?

14 A. Sure.

15 "Attorney/client privilege. Hi Martha, Donna.  
16 John Kao has told me and told the math search chair,  
17 Paul Zeitz, that he will be filing a complaint about our  
18 ad placement on an affirmative action basis. For your  
19 reference, see below. If you want more information,  
20 I've done extensive back-up work on who posts what math  
21 ads where. I'll have that on hand when we need it in  
22 case you want it. I'm very satisfied that this position  
23 was advertised correctly at or beyond the level of what  
24 we have done for other faculty searches in Arts and  
25 Sciences. Best wishes, Brandon."

1 Q. Would it be accurate to say -- did you learn  
2 from Paul Zeitz that Dr. Kao would be filing a complaint  
3 about the ad placement on an affirmative action basis?

4 A. No, I think Dr. Kao told me that directly.

5 Q. All right. And you wrote here that "John Kao  
6 has told me and the math search chair, Paul Zeitz, that  
7 he will be filing a complaint about our ad placement on  
8 an affirmative action basis."

9 Is that information that you also received from  
10 Paul Zeitz?

11 A. Based purely on reading this e-mail, I would  
12 think that's true.

13 Q. Thank you. Now, after the incident with Dr.  
14 Kao that you described that occurred in early January,  
15 what did you do in terms of it -- what did you do in  
16 terms of additional security for the math department?

17 A. I cannot remember the exact date this was put  
18 in place. But Jenny and I met with -- in one of the  
19 meetings Dan Lawson the director of public safety on  
20 campus was there.

21 Q. Is that a meeting in April?

22 A. I don't recall.

23 Q. Was that meeting concerning the incident  
24 involving Dean Turpin?

25 A. There were certainly meetings involving the

1 incident with Dean Turpin.

2 Q. Can you recall any -- more than one meeting  
3 where Dan Lawson was present?

4 A. I cannot.

5 Q. All right. What did you do -- in January of  
6 2008, did you do anything to protect students from Dr.  
7 Kao?

8 A. No, we weren't especially worried about  
9 students. It seemed like the intense anger was focused  
10 on people who had any kind of authority, even -- be it a  
11 committee chair. So if someone was a committee chair,  
12 department chair or administrator. We'd never heard a  
13 complaint from a student, as far as I'm aware.

14 Q. All right. Did you do anything to protect  
15 students from the possibility that Dr. Kao might become  
16 enraged with one of these authority figures in the  
17 presence of students?

18 A. No, that didn't seem logical, those groups  
19 didn't -- didn't mix.

20 Q. Well, people walk up and down the halls, don't  
21 they?

22 A. I see what you're saying, but no, we didn't do  
23 anything.

24 Q. All right. Did you do anything to protect  
25 students from observing Dr. Kao chuckling to himself as



1 he walked up and down the halls?

2 A. I don't recall the chuckling of which you're  
3 mentioning, but no, nothing was done on behalf of  
4 students.

5 Q. Did you do anything to protect students against  
6 the possibility that Dr. Kao might commit some act of  
7 violence against some professor, an authority figure and  
8 that students might see that?

9 A. No, we were -- I would have to say we were in  
10 an information gathering mode. We felt like we wanted  
11 more expertise.

12 Q. And do you recall that you had talked to a  
13 Dr. Chang in January?

14 A. I don't remember talking to Dr. Chang in  
15 January.

16 Q. You do remember talking to a Dr. Good in  
17 January or February?

18 A. In that time period certainly. On the phone  
19 and then one in-person meeting.

20 Q. Right. And then what did you do after speaking  
21 to Dr. Good to address these concerns of Dr. Kao?

22 A. What I recall of that brainstorming session,  
23 Dr. Good said if -- if communication could work, it  
24 would have to come from the lowest possible level of  
25 perceived power. So that would be as close as we could

1 get to just a colleague in the math department and  
2 certainly not an administrator.

3 Q. Okay. Did you ask Bob Wolf to speak to Dr.  
4 Kao?

5 A. We discussed that possibility because they have  
6 a dialogue. But we decided that would not be advisable.

7 Q. Did you ask -- did you call any of Dr. Kao's  
8 attorneys to ask them to speak to Dr. Kao?

9 A. I certainly didn't. I don't think the  
10 University did.

11 Q. Did you ask -- did you inquire of other faculty  
12 members if any of them would be willing -- strike that.

13 Did you try to figure out other than Bob Wolf  
14 if there were other faculty members that might be  
15 willing to talk to Dr. Kao?

16 A. Well, I can recall two in the mathematics  
17 department.

18 Q. All right. Who?

19 A. On a very informal level when I met with  
20 Dr. Zeitz in early January 2008 and he was describing  
21 his fears, I said, "Do you think Dr. Kao is aware of  
22 this effect he's having on you? And do you think you  
23 could talk to him about it?" And Professor Zeitz said  
24 "I don't see how."

25 We then, after the meeting with Dr. Good,

1 decided the chair of the department, Peter Pacheco,  
2 would be a good option, as good an option as we could  
3 get to attempt this conversation, and I had a follow-up,  
4 long phone conversation with Dr. Pacheco about the  
5 feasibility of this.

6 Q. Okay. Do you know Millie Lehmann?

7 A. I do, I know Dr. Lehmann, emeritus. Yeah.

8 Q. She is emeritus professor in the math  
9 department?

10 A. She is.

11 Q. Did you ask her to talk to Dr. Kao?

12 A. We did not.

13 Q. She has a husband, Michael?

14 A. Her husband, Michael Lehmann.

15 Q. Michael Lehmann. Did you ask him to talk to  
16 Dr. Kao?

17 A. We did not.

18 Q. Did you try to find out at all who Dr. Kao's  
19 friends among the faculty were that might be candidates  
20 to talk at the lowest possible level to talk to him?

21 A. We certainly brainstormed it, but I don't  
22 remember each part of that conversation.

23 MR. KATZENBACH: All right. Now, I'd like to  
24 have this marked as Exhibit 118.

25 ///

1 (Whereupon, Plaintiff's Exhibit 118 was  
2 marked for identification.)

3 MR. KATZENBACH: May I approach, Your Honor?

4 THE COURT: Yes.

5 MR. KATZENBACH: Q. Showing the witness an  
6 exhibit that's been marked for identification as  
7 Exhibit 118 and ask the witness if he can identify that  
8 exhibit.

9 A. This is an e-mail of January 9th, 2008.

10 Q. This is an e-mail you wrote?

11 A. From myself.

12 Q. Yes?

13 A. To myself.

14 Q. Okay. Now, does it concern Dr. Kao?

15 A. It does.

16 Q. All right.

17 MR. KATZENBACH: Your Honor, at this point I'd  
18 like to move Exhibit 118 into evidence?

19 THE COURT: Any objection?

20 MR. VARTAIN: No objection.

21 THE COURT: It's received.

22 (Whereupon, Plaintiff's Exhibit 118 was  
23 admitted into evidence.)

24 MR. KATZENBACH: Q. Now, taking -- taking a  
25 look at Exhibit 118, this refers to -- can you please

1 begin reading -- can you please read the first  
2 paragraphs before some near-term feedback to this latest  
3 message?

4 A. Sure.

5 Q. Okay.

6 A. "For internal use only. Parenthetically, the  
7 following was reported verbally to Jenny Turpin and  
8 Martha Peugh-Wade on January the 8th, 2008. In addition  
9 to the above, I described the August 2007 convocation  
10 incident where Jenny Turpin and I discussed if he was a  
11 threat at that event and whether or not she should go on  
12 stage. I sat in front of John in case he had a weapon  
13 or would attempt something harmful. It is difficult to  
14 admit our state of mind, but his bizarre behavior around  
15 Jenny and his pattern of irrational communication led us  
16 to this level of worry."

17 Q. All right. Taking a look at this paragraph,  
18 does that help your recollection as to whether Dean  
19 Turpin at that point had concerns that Dr. Kao had a  
20 weapon in the convocation in August of 2007?

21 A. It doesn't change my recollection. I don't  
22 remember her saying "weapon" or "gun." I felt like it  
23 was unspoken.

24 Q. All right. And what bizarre behavior around  
25 Jenny were you referencing in this e-mail?

1           A.    Well, this I only -- I had not observed  
2 directly but I had heard from Dean Turpin.

3           Q.    What bizarre behavior around Jenny did she  
4 identify?

5           A.    I don't recall it exactly but he was very angry  
6 about the grievance.

7           Q.    What grievance was that?

8           A.    I don't know the exact timing.  But the  
9 grievance had gone through, I think in the previous  
10 academic year or was still ongoing.

11          Q.    Is that his complaint of race-based  
12 discrimination?

13          A.    I believe so, but I have not read the  
14 grievance.  I knew he was unhappy, according to Dean  
15 Turpin, with the outcome because he had requested things  
16 like a joint appointment and those were not forthcoming  
17 as a result of grievance.

18          Q.    Okay.  What bizarre behavior did Jenny  
19 identify?

20          A.    I don't recall the specifics.  I think it was  
21 just facial contortions, glaring, things like that.

22          Q.    All right.  What was his pattern of irrational  
23 communication that she identified?

24          A.    I don't recall details.

25          Q.    Is a pattern of irrational communication, is

1 that something that she told you or is that something  
2 that you observed yourself when you wrote this sentence?

3 A. Well, it's something she had told me, but I  
4 found some of the very recent to this e-mail  
5 communication about the job ad placement somewhat  
6 irrational.

7 Q. Okay. And what was this level of worry that  
8 you were referring to in your e-mail?

9 A. This level of worry is such that to reassure  
10 Dean Turpin I would actually sit in front of John.

11 Q. Okay. That was referring to the convocation?

12 A. Referring to the convocation, yes.

13 Q. Now, I'd like to refer your attention, if I  
14 could, to the second page of this exhibit.

15 Now, looking at Paragraph 3, Paragraph 3 refers  
16 for the first time, in any of your e-mails that we've  
17 looked at, that Zeitz felt offended and even scared.

18 A. The second paragraph on the page labeled 3?

19 Q. Yes. I apologize.

20 A. It does have the word "scared."

21 Q. Well, it says "even scared"?

22 A. Yes.

23 Q. And -- now -- and again this is the first  
24 time -- in the next paragraph it says this is the first  
25 time you write down anything about John's presentation

1 of this material in your office; is that right?

2 A. For the items we've gone over, I think that's  
3 correct in the timeline.

4 Q. All right. Now, take a look at the next  
5 paragraph, if you would.

6 A. Yes.

7 Q. It states at the end of the first sentence  
8 there that he -- he has -- you state in this "He has  
9 disturbed me with an irrational -- with emotional  
10 manner, including extremely raised voice, visible  
11 quivering" --

12 THE REPORTER: I'm sorry, can you repeat that.

13 MR. KATZENBACH: Q. Sorry. "Including  
14 extremely raised voice, visible quivering and when it  
15 equates with extreme anger and foam forming at the edges  
16 of his mouth on a number of occasions over the last  
17 several years."

18 On what occasions had John behaved in that  
19 manner towards you over the prior several years?

20 A. A couple of hallway encounters is what I  
21 remember most, most clearly.

22 Q. About what issues?

23 A. If I recall it correctly, the dual degree  
24 program and teacher preparation.

25 Q. Okay. That was an issue that John was



1 concerned about?

2 A. Yes, he served on the curriculum committee for  
3 that, that educational program.

4 Q. Well, other than the dual degree program, what  
5 other occasions over the last several years did Dr. Kao  
6 appear angry, visibly quivering or foaming at the mouth  
7 with you?

8 A. I think those were the main times. I know he  
9 had brought his concerns about search procedures to me  
10 earlier. I was able to direct him to the information he  
11 wanted, and I could tell he was agitated about that, but  
12 I don't recall the quivering and the extremely raised  
13 voice on those occasions.

14 Q. On any of the occasions prior that Dr. Kao had  
15 behaved in this manner, did you talk to him about this  
16 being inappropriate?

17 A. No, I did not.

18 Q. Did you ask anyone else to talk to him about  
19 this being inappropriate behavior?

20 A. No, I did not.

21 Q. Did you make any note to the file -- strike  
22 that.

23 Did you make any -- did you have a discussion  
24 with human resources about whether this was -- about  
25 this behavior?

1 A. No, I did not.

2 Q. Prior to this -- prior to January 9th of 2009?

3 A. Prior to January of 2008?

4 Q. Right.

5 A. No.

6 Q. Now, taking a look at the next paragraph in  
7 this -- the last paragraph in the paragraph you've  
8 numbered 3.

9 A. You mean "Including"?

10 Q. Yes, "Including the conversations." Can you  
11 read that to the jury?

12 A. "Including conversations of the last week, I  
13 have had three professors requesting anonymity, tell me  
14 they fear John may be capable of some sort of great  
15 violence." Quote, "I would not be surprised if he  
16 harmed himself or others at some point," end quote, "is  
17 a typical type of quotation."

18 "Like me, none of these people are qualified to  
19 assess John's mental state, but they're of significant  
20 worry and I need to inform you of it."

21 Q. Did Dr. Zeitz, in his conversations with you,  
22 state any -- state his fear that John may be capable --  
23 I'm sorry -- of some sort of great violence, the  
24 conversations he had with you in January 2008?

25 A. As best I remember, yes.

1 Q. And where is that reflected? Is that reflected  
2 in any of the e-mails we've looked at prior to this one?

3 A. Not verbatim, no.

4 Q. All right. Now, who were the other -- who were  
5 the three professors that told you they feared that John  
6 may be capable of some sort of great violence?

7 A. As best I would remember, certainly Dr. Zeitz,  
8 Dr. Needham. And as best as I can recall from this,  
9 Dr. Pacheco.

10 Q. When did Dr. Needham tell you that he feared  
11 that John may be capable of some sort of great violence?

12 A. I don't recall.

13 Q. When did Dr. Pacheco tell you that John can be  
14 capable of some sort of great violence?

15 A. I don't recall. Any period before this e-mail,  
16 but I don't recall the exact time or conversation.

17 Q. All right. Do you have any notes of such a  
18 conversation that you're aware of?

19 A. Not that I'm aware of.

20 Q. Do you have any notes of the conversation  
21 that -- strike that.

22 Do you have any notes of a conversation with  
23 Tristan Needham where he stated that John would be  
24 capable of some sort of great violence?

25 A. Not prior to this date-stamp that I'm aware of.

1 Q. All right. After you heard this information,  
2 three professors requesting anonymity that they --  
3 that -- about this fear that John may hurt himself or  
4 may be capable of great violence, what actions did you  
5 take during the remainder of January to protect  
6 students, faculty or staff from an act of great violence  
7 that these professors were referring to?

8 A. I knew there were conversations with public  
9 safety, especially between Dean Turpin and public  
10 safety. To the best of my memory, that started well  
11 before April that we requested them to increase patrols  
12 in the Art and Science Center, but I don't have a memory  
13 of exactly the date of that starting.

14 Q. Did you take John Kao off campus in January of  
15 2008 in order to protect students, faculty or staff from  
16 an act of great violence?

17 A. No.

18 Q. Did you take him off of campus in February 2008  
19 in order to protect students, faculty and staff from an  
20 act of great violence?

21 A. No.

22 Q. Did you take him off the campus in March 2008  
23 in order to protect faculty, staff or students from an  
24 act of great violence?

25 A. No.

1 Q. Did you take him off of campus in April of 2008  
2 in order to protect faculty, staff or students from an  
3 act of great violence?

4 A. No.

5 Q. Did you take him off campus in May 2008 in  
6 order to protect students, faculty or staff from an act  
7 of great violence?

8 A. No.

9 Q. Isn't it a fact that the first time you took  
10 Dr. Kao off campus was at the end of June -- the end of  
11 June 2008?

12 A. I honestly don't know the date. And when you  
13 say "you" -- but I wasn't involved in that decision.

14 Q. Would it be accurate to say that as of  
15 January 9th, 2008, the University was looking for a way  
16 to get rid of Dr. Kao?

17 A. Absolutely not.

18 MR. KATZENBACH: That's all I have.

19 THE COURT: Okay. Redirect?

20 MR. VARTAIN: May I stay here, Your Honor, it  
21 will be very brief?

22 THE COURT: Of course.

23  
24 REDIRECT EXAMINATION BY MR. VARTAIN

25 MR. VARTAIN: Q. You stopped being the

1 Associate Dean at the end of the spring semester 2008,  
2 that is around end of May 2008?

3 A. A lot of my duties were ending at that time.  
4 It was a transitional period where I kept some of the  
5 duties -- I'm sorry, it's mushy, but I kept some of the  
6 duties especially related to the new science building as  
7 a new person was coming on.

8 Q. So you weren't involved with the decision to  
9 take Professor Kao off campus in late June because you  
10 were transitioning away from being Associate Dean?

11 A. That's correct.

12 MR. VARTAIN: No further questions.

13 THE COURT: Mr. Katzenbach, further questions?

14 MR. KATZENBACH: If I may from here, Your  
15 Honor.

16 THE COURT: Sure.

17  
18 RE-CROSS-EXAMINATION BY MR. KATZENBACH

19 MR. KATZENBACH: Q. Prior to the end of  
20 June 2008, you were the Associate Dean?

21 A. That's correct.

22 Q. Thank you. So you would be the Associate Dean  
23 all the way from January through the end of May?

24 A. That's correct.

25 MR. KATZENBACH: Thank you. That's all I have.

1 THE COURT: Anymore from the defense?

2 MR. VARTAIN: No further questions, Your Honor.

3 THE COURT: Jurors, do you have questions of  
4 Professor Brown? Yes.

5 The jury has questions, Professor Brown.

6 Did you ask for public safety to be present for  
7 the 2007 convocation?

8 THE WITNESS: No, I don't recall that. The  
9 worries arose at the last minute.

10 THE COURT: Do USF faculty or staff have a  
11 quote, "duty to warn," close quote, or request -- or  
12 report perceived risks to student safety, parentheses,  
13 i.e. possessing a gun, close parenthesis, on campus?

14 THE WITNESS: Let me see if I can answer this  
15 as best as I can.

16 I think that would absolutely be true if we had  
17 evidence or strong suspicions that someone had a gun on  
18 campus. Now, in the convocation incident, I did not  
19 think there was a gun on campus.

20 I hope that answers the question. I was trying  
21 to reassure my supervisor.

22 THE COURT: Is there a process for this duty to  
23 warn protocol that you need to follow?

24 THE WITNESS: I don't know of a protocol to  
25 follow in the event that you really believe someone has

1 a weapon. I know you call public safety immediately.

2 THE COURT: Go ahead, Dr. Brown.

3 THE WITNESS: If I may, part of the issue  
4 through spring of 2008 is an overwhelming, in my view,  
5 respect for being fair to Dr. Kao and not -- not taking  
6 a worried professor as an expert of who could or  
7 couldn't be violent or what might be happening.

8 THE COURT: Following questions, Mr. Vartain?

9 MR. VARTAIN: Q. Just explain that last  
10 statement, "not taking a worried professor as an expert  
11 of who could or could not be violent." Just explain  
12 that to the jury what you meant by that.

13 A. Right. I don't think a professor, like myself  
14 being trained in physics or a professor in mathematics,  
15 is -- is -- without things like verbal threats, I don't  
16 know that they're an expert in who is likely to or who  
17 is not likely to become violent. That's one reason Dean  
18 Turpin and I wanted to bring in outside expertise.

19 Q. Is that namely Dr. Missett -- first Dr. Good  
20 and then Dr. Missett?

21 A. Dr. Good and Dr. Missett are the two I know of.

22 MR. VARTAIN: Thank you, Your Honor.

23 THE COURT: Mr. Katzenbach?

24 MR. KATZENBACH: Yes, just a few.

25 Q. After the convocation incident, did you ask



1 public safety to investigate Dean Turpin's concerns?

2 A. No, I didn't.

3 Q. Do you know whether Dean Turpin or anyone else  
4 asked public safety to investigate her concerns?

5 A. I don't know.

6 Q. All right. You were answering about -- in  
7 regards to the question about duty to warn regarding  
8 threats to students' safety, you were replying, I think,  
9 in terms of the time of the -- in connection with the  
10 convocation.

11 How about in general?

12 A. I don't understand.

13 Q. Well, is there generally a duty on the faculty  
14 to warn the administration concerning if they were  
15 concerns about -- issues of student safety?

16 A. Absolutely.

17 Q. And is that something that would be -- and one  
18 of the places you could go would be public safety,  
19 correct?

20 A. Yes.

21 Q. And public safety could conduct an  
22 investigation; isn't that right?

23 A. That seems logical, yes.

24 Q. And another place you could go would be human  
25 resources?

1 A. Okay, sure.

2 Q. And would human resources then conduct an  
3 investigation?

4 A. Yes.

5 Q. Another place to go would be, for example, your  
6 office?

7 A. Yes.

8 Q. And if it came to you, would you conduct an  
9 investigation?

10 A. For human resources or safety matter, I would  
11 not feel my office would be the appropriate one, as  
12 Associate Dean for sciences, to cover that.

13 Q. Would you refer them to public safety or human  
14 resources?

15 A. Yes.

16 Q. All right. Now, you discussed in answer to  
17 counsel's question you were asked about qualifications  
18 to determine whether someone was a threat.

19 Do you recall those questions?

20 A. Yes.

21 Q. Now, do you believe that human resources and/or  
22 public safety have the qualifications to investigate the  
23 facts concerning any incident?

24 MR. VARTAIN: Vague. Objection.

25 THE COURT: Sustained.

1 MR. KATZENBACH: Q. Apart from an opinion as  
2 to what might be the cause of an event, right, apart  
3 from the opinion as to an expert opinion, does human  
4 resources investigate the facts concerning an employee's  
5 actions?

6 MR. VARTAIN: Objection. Vague.

7 THE COURT: Overruled. The witness may answer.

8 THE WITNESS: As best as I'm aware, as an  
9 employee, I'm very pleased with how our human resources  
10 office works.

11 MR. KATZENBACH: Q. Have you been involved in  
12 any disciplinary actions as a dean?

13 A. I have.

14 Q. Have you -- and when human resources has  
15 investigated matters, have they typically obtained both  
16 sides of the story?

17 A. I'm trying to think of a case that's warranted  
18 a full investigation from human resources. I know they  
19 conducted one in spring of 2008, but I wasn't directly  
20 involved. I know Martha Peugh-Wade, I think, was  
21 interviewing people.

22 Q. All right. That's the only one you recall?

23 A. Yes.

24 Q. All right. Public safety, do you understand  
25 that they investigate the facts concerning any threats

1 to public safety at the University of San Francisco?

2 MR. VARTAIN: Objection. Calls for speculation  
3 on how public safety works.

4 THE COURT: Overruled. The witness may answer.

5 THE WITNESS: As far as I'm aware, they do  
6 conduct their own investigations. At times they go to  
7 external sources to run an investigation, but I don't  
8 know very much about how public safety works at all.

9 MR. KATZENBACH: Q. During the period of  
10 January through May 2008, are you aware of any  
11 investigations by public safety of any issues concerning  
12 Dr. Kao?

13 A. Dean Turpin had informed me that she was going  
14 to be closely in touch with them in conjunction with  
15 Martha Peugh-Wade. I recall that. I don't recall  
16 exactly what they were going to do beyond increasing  
17 foot patrols in the Art and Science Center.

18 Q. All right. You don't recall any investigation  
19 by public safety of any incident involving Dr. Kao  
20 before the end of April?

21 A. No.

22 MR. KATZENBACH: That's all I have.

23 MR. VARTAIN: No further questions, Your Honor.  
24 Thank you.

25 THE COURT: All right. Can Professor Brown be

1 excused?

2 MR. VARTAIN: No. We are good.

3 MR. KATZENBACH: Okay. Let them --

4 THE COURT: You may be excused.

5 MR. VARTAIN: Thank you, Your Honor.

6 THE COURT: Ladies and gentlemen, remember the  
7 admonitions. Do not form or express any opinion on this  
8 case until it's finally submitted to you for your  
9 decision. Do not discuss among yourselves or with  
10 others until that time.

11 Please be back in your places at 10:10  
12 according to the courtroom clock.

13 (Recess taken.)

14 THE COURT: Jurors and alternates are all  
15 present. Counsel from both sides are present.  
16 Plaintiff is personally present.

17 Are you feeling okay now?

18 JUROR: I'm feeling a lot better. Thanks.

19 THE COURT: Juror 4, you are not feeling well?

20 JUROR: Not at all. I'm trying to maintain  
21 though.

22 THE COURT: Why don't you step out of the jury  
23 box and we can talk to you in the hall, so we don't have  
24 to broadcast it to everybody.

25 JUROR: Okay.

1 (Discussion off the record and outside the  
2 presence of the jury.)

3 THE COURT: Ms. Sargent is going to follow  
4 Ms. Tanner's example and tough it out at least until  
5 noon and we'll see how she feels then. She has  
6 permission to leave precipitously if the need arises.

7 All right, Mr. Vartain, you're calling a  
8 witness?

9 MR. VARTAIN: Just so happens I am going to  
10 call a doctor, Your Honor.

11 JUROR: Just what we need.

12 MR. VARTAIN: Dr. James Missett, MD, Ph.D.

13  
14 JAMES MISSETT, M.D. Ph.D.,  
15 having been duly sworn, testified as follows:

16  
17 THE WITNESS: I do.

18 THE CLERK: Please be seated. State your name  
19 and spell it for the record.

20 THE WITNESS: My name is James, J-A-M-E-S,  
21 Missett, M-I-S-S-E-T-T.

22 THE COURT: Mr. Vartain, you may inquire.

23 MR. VARTAIN: Thank you, Your Honor.

24  
25 DIRECT EXAMINATION BY MR. VARTAIN

1 MR. VARTAIN: Q. Good morning, Dr. Missett

2 A. Mr. Vartain.

3 Q. How long have you been a physician?

4 A. Since 1970.

5 Q. How long have you practiced medicine in  
6 California?

7 A. Since 1974 -- well, from '70 through '71 I was  
8 an intern and then from 1974 on.

9 Q. Where, since 1974, have you practiced medicine  
10 within the State of California?

11 A. My office -- well, initially for four years I  
12 was a resident and chief resident in psychiatry at  
13 Stanford University Hospital. And starting in 1978, I  
14 opened an office in Menlo Park, and I'm in the same  
15 building now as I was 34 years ago.

16 Q. How long have you been involved with the  
17 medical aspects of evaluating people's behaviors as to  
18 whether those are a risk of danger or not? How long  
19 have you --

20 THE REPORTER: "A risk of what," I'm sorry?

21 MR. VARTAIN: Q. Danger or not. How long have  
22 you been doing that?

23 A. Starting in 1975.

24 Q. How long have you been a physician who takes  
25 care of patients, that is treats patients in their own

1 psychiatric issues?

2 A. Again, starting in 1974 when I was a resident  
3 and it just continued from then until now.

4 Q. Would it -- is it correct that you're both a  
5 treating psychiatrist and an evaluating psychiatrist,  
6 you do both of those things and have done them  
7 throughout your career?

8 A. That's true.

9 Q. Give the jury, if you would -- I'm going to  
10 give them your CV later, so they can look at your  
11 experience and your education, but I'd like you to just  
12 give the jury and the judge an overview of your  
13 education and then I'm going to ask you after you're  
14 done with that, an overview of your medical practice  
15 throughout the years.

16 First your education.

17 A. I have a bachelor's and then a master's degree  
18 in philosophy from the Catholic University of America in  
19 Washington, DC, in 1963 and 1964. And I was then for  
20 two years a teaching fellow in the Philosophy of Science  
21 at Saint John's University in New York City. And  
22 eventually through and after medical school, a doctorate  
23 in the philosophy of science from there in 1973.

24 In the meantime, I've been -- between 1966 and  
25 1970, a medical student at Yale University School of



1 Medicine. And when I graduated from there, I came to  
2 the Department of Medicine at Stanford Hospital as an  
3 intern.

4 Q. What's does the Department of Medicine do at  
5 Stanford Hospital?

6 A. Almost everything that's physically wrong with  
7 you where they don't want to cut you. Basically, they  
8 treat you with medication, they'll x-ray things, they'll  
9 do all other kinds of exams, but by and large they won't  
10 do what surgeons do. And at least as an intern, you do  
11 it for 36 hours and you get 12 hours to rest and come  
12 back for another 36.

13 Q. And one hour of pay?

14 A. We never thought of that.

15 Q. So continue with your education, then, after  
16 you became an intern at Stanford.

17 A. I'd already been since -- the first day of  
18 medical school, really, I was a commissioned officer in  
19 the United States Public Health Service, and so I had an  
20 active duty requirement.

21 When I finished the internship, I started the  
22 active duty requirement as the assistant to an  
23 administrator of a large federal agency in Washington,  
24 and was there for three years. Then it -- then I came  
25 back to Stanford as a resident in psychiatry.

1           Q.    You said you were the chief resident.  What  
2    does that mean?

3           A.    Well, to be a resident means that the chief  
4    resident tells you what to do; to be chief resident  
5    means you tell others what to do.  That's the basic  
6    difference.  You work out schedules, you make sure  
7    people show up, you make sure things get done.  But by  
8    and large, the work, whether you're a resident or a  
9    chief resident, are pretty much the same, I'm sure it is  
10   now as it was then.

11          Q.    I think we probably finished your core  
12   education.

13                Would you tell the judge and the jury what your  
14   practice of medicine has been over the years.  And I'd  
15   like you, if you could, to distinguish between the part  
16   of your practice where you take care of patients versus  
17   the part of the practice where you do evaluations of  
18   people, separate from treating them as patients.  Just  
19   an overview, please.

20          A.    Well, the -- the treatment part started earlier  
21   as I mentioned, as an intern and a resident.  The  
22   evaluation part began at 3:30 in the morning on April  
23   the 14th of 1975, when I woke up to a shadow passing  
24   between my bed and an outside light.  And I didn't know  
25   who the person was but it was obviously a person and the

1 only other adult in the house was next to me in bed, and  
2 the only other person was seven months old.

3 So I got out of bed, took a light, I turned it  
4 upside down, turned down the alarm, alarm clock, turned  
5 down the light. And my wife woke up and said to  
6 herself, you know, I've always thought this guy was a  
7 bit goofy, but he's really gone over the edge. There he  
8 is standing with a lamp upside down in the bedroom. And  
9 I was just telling her I have to go to work, it's 3:30.  
10 I have to leave.

11 And the next thing she heard I was on the phone  
12 with the police, and then she thought that I'd really  
13 gone over the edge, that -- and now there was no way to  
14 call it back, the police would be here, and I would be,  
15 as it were, a 5150 within a half hour, which meant they  
16 would put me in a mental hospital.

17 Well, it turns out that --

18 Q. You're joking?

19 A. No, I'm serious. I got started in this as a  
20 crime victim essentially.

21 It took him about half an hour to catch the  
22 person that had been in the house. I was the last of  
23 six houses he hit that night. I testified against him  
24 in court. And when I testified against him in court,  
25 the judge appointed me to do an evaluation of somebody

1 for him.

2 Q. You were already a psychiatrist at that point?

3 A. I was a resident. A resident. And you  
4 mentioned about money, I didn't have any money, so this  
5 was one way to earn it. The district attorney hired me  
6 to evaluate somebody for him, and the public defender  
7 hired me to evaluate somebody for him.

8 So all of a sudden I had three people. And  
9 then the probation department in Santa Clara County  
10 hired me to do evaluations for them. So essentially I  
11 was doing the evaluation part pretty early on in this  
12 whole process, but it's not one where I would care to be  
13 tracing my steps.

14 Q. Tell the jury and His Honor what kinds of  
15 organizations over the years you have been retained to  
16 do evaluations, you know, medical psychiatric  
17 evaluations of people that work in those organizations.  
18 Just give us the range.

19 And maybe you could talk about them. If you  
20 don't want to put the names of the organizations, you  
21 could talk about the counties in California where you've  
22 been retained over the years to do evaluations.

23 A. Evaluations are in the hundreds. At least  
24 initially so far as employees were concerned. They were  
25 county governments, for the most part; sometimes city

1 governments, particularly with regards to people that  
2 were employed by them. Police departments, fire  
3 departments. More police departments than otherwise.

4 A significant number of those evaluations were  
5 done when the officer had become involved in something  
6 that was problematic: a shooting would be one, a  
7 killing would be one, a motor vehicle accident would be  
8 one. A question of whether the person was intoxicated  
9 when they showed up for duty would be one. The -- some  
10 of the training facilities for officers. And then  
11 the -- some of the larger Silicon Valley companies:  
12 IBM, Intel, Hewlett-Packard. And then a modest number  
13 of smaller companies than that.

14 And those were all over the West Coast. So I'd  
15 fly to Seattle for one, I'd go to Portland for another,  
16 I'd go to Corvallis for another, I'd go to the Central  
17 Valley for yet another one.

18 So it was in a lot of different places, mostly  
19 in California; sometimes out of the State of California.

20 Q. And these were including issues where the  
21 concern was whether the person was safe in the  
22 workplace, whether there were any risks of physical  
23 harm, were those among the kinds of evaluations you've  
24 done over the years?

25 A. Well, those were the ultimate focus and then

1 there were other questions that might have come before  
2 that.

3           You know, for instance, the question of the few  
4 officers who'd shown up and there was a question of  
5 whether they'd been drinking or not. The -- ultimately,  
6 it's the issue of safety but it's also other things.  
7 It's can it be relied upon not to damage county  
8 property, can it be relied upon to exercise good  
9 judgment when they're making a traffic stop or  
10 encountering somebody. It was really fairly  
11 straightforward and it wasn't terribly complicated.

12           Q. But it involves the psychology of the person  
13 and those kinds of mental health issues?

14           A. Their history, medically and psychologically  
15 and educationally and employmentwise, all kinds of  
16 things were going on with their life at the present  
17 time, whether it was different from what had gone on  
18 before. If it was different, had they worked out  
19 different ways of coping with it; if they hadn't, what  
20 kinds of things were they thinking about? That sort of  
21 thing.

22           Q. In the course of developing your medical  
23 practice of evaluating people who are employees, did you  
24 start to work with the United States Secret Service in  
25 Washington and when did that start? Tell us a bit about

1 that.

2 A. It started first in about 1982 or '3, when I  
3 testified against in a federal court, in Santa Clara,  
4 and the jury in its wisdom had decided that the three  
5 agents who were meticulously dressed, well spoken, very  
6 articulate and knew their stuff were more reliable as  
7 witnesses than I was, so the fellow was convicted.

8 And a month or two later I got a call from the  
9 man who identified himself as the head of the San  
10 Francisco office, and asked if he could come and meet  
11 with me. And I figured I was in for it then, that I  
12 didn't know what I'd done, but trouble was coming.

13 And what he said was that they had been told by  
14 Washington, this was after John Hinckley had shot  
15 President Reagan, that they were to identify a  
16 psychiatrist, somewhere in the West Coast, and that --  
17 that they would then utilize that person as a  
18 consultant, and that I shouldn't get any ideas in my  
19 head, I was not their first choice. So I said sure, I'm  
20 interested, and shook hands, they went away and a year  
21 later they called and asked if they could come back down  
22 and talk to me again. I figured they found something on  
23 the background check that I wasn't going to like.

24 So they showed up and they said they wanted to  
25 offer me a job and that I still wasn't their first

1 choice, but it took me 20 to 25 years to find out how I  
2 ended up with the job when I wasn't their first choice.

3 And it was that I had been such a straight  
4 shooter, as it were, and drug free throughout my  
5 educational career, that it fit in with the Secret  
6 Service no tolerance, absolutely no tolerance for drug  
7 use by anybody at any point in time in their lives if  
8 they were ever going to work for them, and apparently I  
9 was the only one.

10 Q. You were the only one that was --

11 A. I was the only one they could find.

12 Q. The last man standing.

13 So you have -- have you done threat assessments  
14 for the President's Secret Service over the last 25  
15 years and have you done education of the Secret Service  
16 agents?

17 A. It started in 1985 and has continued up to at  
18 least the end of last year. The job entailed teaching  
19 of agents. And it's principally how do you teach a  
20 Secret Service agent or a -- whose background is usually  
21 a policeman, to think like a psychiatrist or a  
22 psychologist, and to meld that into how it is they go  
23 about informing themselves of how worried they should be  
24 about a given individual.

25 It involves doing assessments of people about



1 whom they are worried or anxious, and then going over  
2 what it is that I think might reinforce their -- might  
3 make them more anxious than they were to start with or  
4 make them less anxious than they were to start with,  
5 because they're basically a preventive agency.

6 Their job is to prevent people from hurting not  
7 only the President but then there's a list of what they  
8 call "protectees," people in the family, vice  
9 presidents, former presidents' families, things like  
10 that.

11 So I would teach classes, and I -- we would go  
12 out to groups, hospitals, prisons, public agencies,  
13 where people were more likely to encounter somebody who  
14 might make a chance remark or do something that would  
15 cause somebody to become anxious.

16 And we do -- usually it would be myself and  
17 another -- and an agent, go -- we'd give talks all the  
18 way from here to Seattle and out to Hawaii and -- great  
19 job. And a very good 25 years.

20 Q. In the course of working for the Secret  
21 Service, did it come to pass that you began working to  
22 assist educational institutions and was there a  
23 connection between, interestingly enough, the Secret  
24 Service and schools?

25 A. Yes. The -- there were two parts to this. The

1 first part was that when I started work for them in  
2 about 1985 or '6, the -- the focus was on profiling of  
3 individuals.

4 The Service's problem was that profiling people  
5 did not identify for them the people about whom they  
6 felt, in retrospect, they had the most to worry. And so  
7 the question became then how can you develop a way of  
8 assessing people even before something happens, that  
9 would raise the likelihood of being able to interfere  
10 with whatever it is that might happen.

11 And so what they did was they had a meeting in  
12 Washington; there were about ten of us there, myself and  
13 seven or eight agents and statisticians and others. And  
14 what we determined was that the best thing to do was we  
15 knew who the people are, in retrospect, who are  
16 dangerous. People who shot an actress, people who shot  
17 a governor, people who shot this, people who did that,  
18 and they were in the prisons or they're out of prison.  
19 And so what they did is they interviewed each one of  
20 them, according to a pattern that we had laid out in  
21 that meeting.

22 That was the first part, and that was called --  
23 the publication that came from that was called Ten  
24 Questions, and it was essentially ten questions that an  
25 individual evaluator could ask of a given individual or

1 ask of themselves in making an evaluation that would, in  
2 all likelihood from everything they could tell, increase  
3 the accuracy of what they were doing.

4 Then there was a spate of school shootings in  
5 the early 1990s, particularly, and the Secret Service  
6 was appointed as the lead federal agency to develop a  
7 program that was made available to schools, school  
8 districts and others to prevent this kind of thing that  
9 was happening in the schools that was parallel to what  
10 they were concerned about what was happening with  
11 politicians.

12 Q. Do you know why the Secret Service ironically  
13 became involved and then you became involved in  
14 assisting educational organizations and how that was  
15 appointed?

16 A. It's located in Washington, it's close to the  
17 Department of Education, and it's a protection agency.  
18 Its focus is on protection as contrasted with the  
19 arresting people. The best way to get arrested is to  
20 counterfeit money or, you know, do something that would  
21 cause a problem with a protectee. But by and large,  
22 they are a protection and that's what the focus was on.

23 And then the same thing went on that had  
24 earlier gone on with the Ten Question publication, and  
25 that was -- it was called the Safe School Initiative.

1 And it resulted in, again, another publication.

2 Basically it was written in such a way by the Secret  
3 Service, the same people who had authored the first one,  
4 a Harvard psychologist, Robert Fein and a senior agent,  
5 Brian Vasco, that had authored the earlier one.

6 And it was just -- basically the job was I'd go  
7 around here and I'd give talks to sheriff's departments  
8 or we'd bring people out from Washington and they'd meet  
9 DeAnza College or people who ran schools, colleges,  
10 universities, and whatever, as to things to look for and  
11 what they can do to get assistance in dealing with  
12 whatever worried them.

13 Q. So over the years, have you done  
14 Fitness-for-Duty Evaluations of teachers, school  
15 employees, professors, even judges? Have you done them  
16 of judges? Could you give the jury an sense of your  
17 practice in that area?

18 A. I have done a lot so far as the teachers are  
19 concerned. Professors and students. That really  
20 started at Stanford, because I was on the faculty there  
21 so I could be sent to somebody to do an evaluation.

22 There would be all kinds of things, people who  
23 acted improperly on campus, people who were improper  
24 about the way they handled their relationships with  
25 other people. Professors who beat up secretaries.

1 Students who'd become involved -- they'd be drinking on  
2 campus and then be involved in an accident on campus  
3 where they'd hit a tree and somebody would die. All of  
4 these kinds of things.

5 And then it sort of went out from there to  
6 other kinds of schools to doctors. So I think ten for  
7 15 years I was doing similar kinds of evaluations for  
8 the State, for the Medical Board, for the State Bar, for  
9 the Department of Education.

10 Q. So you've been doing Fitness-for-Duty  
11 Evaluations for -- of lawyers, of doctors, of  
12 professionals of all sorts?

13 A. Right. And the last is a Commission on  
14 Judicial Performance. Same kind of thing. That means  
15 there is something going on with this person that might  
16 interfere with his or her ability to function adequately  
17 as a judge.

18 Q. Do the appointments to ---do the  
19 Fitness-for-Duty Evaluation of these employees come from  
20 the employer, the organization itself typically?

21 A. Typically.

22 Q. You mentioned the safe schools publications put  
23 out by the Secret Service. Did that have a way of  
24 identifying what kinds of behaviors by school employees  
25 are risky and need evaluation in order to let that

1 person stay on campus?

2 A. It could. It was a fairly long publication.  
3 60, 70 pages, single space, typewritten, so it took up a  
4 lot of space.

5 Q. And you mentioned ten questions?

6 A. Right.

7 Q. Were those ten questions the kinds of things to  
8 ask about a person to see if there needed to be further  
9 risk evaluation of that person's behaviors?

10 A. Yes, amongst other things.

11 Q. Could you describe for the jury the kinds of --  
12 the kinds of things in here, in those ten questions that  
13 were developed by the Secret Service and that were used  
14 to assess potential for harm at schools?

15 A. The basic presentation, both in the earlier  
16 Presidential Protection material and later the School  
17 Protection material, was pretty much the same and it  
18 went along the lines of harm, physical harm to other  
19 people being much more rarely something that is  
20 completely impulsive and an utter surprise and shock to  
21 everybody. Doesn't mean it can't happen.

22 But the majority of really violent activity --  
23 hitting, shooting, things that result in people  
24 sustaining serious injury or death -- is often -- most  
25 often the result of a person thinking about something

1 for a long period of time, a person experiencing mood  
2 changes in association with this.

3 It can be either beforehand. There can be  
4 depression, which is a mood change, the onset of  
5 depression. The onset of a mania, where they start  
6 thinking more and more quickly than before. The onset  
7 of an anxiety on their part, that they're going to lose  
8 their job. An onset of changes in their thinking, that  
9 they're convinced that their boss is setting them up for  
10 a reprimand or being fired. That -- it goes along like  
11 this. Basically it is -- it is something that you can  
12 make a relatively reliable and educated judgment on if  
13 what you do is you approach it in a systematic way.

14 Now, systematic way means, for instance, in any  
15 kind of hierarchical organization, like the government,  
16 are there indications that this person has had trouble  
17 in their relationships with authority figures in the  
18 course of his or her life. Authority figures for most  
19 of us are parents. We're starting out. Then you start  
20 in school. Where did you first go to school? How were  
21 things for you in the first grade? Where did you go for  
22 the second grade? And you go all the way through year  
23 by year by year.

24 Who were your teachers? Who did you like the  
25 best? Who did you like the least? Why did you like

1 that person the most? Why did you like that person the  
2 least? What did you do with your spare time? Were you  
3 alone? Did you hang out with others? Who did you hang  
4 out with? What did you do? Did you play baseball? Did  
5 you smoke weed? It's things like that. Then you come  
6 up into junior high school. What teams did you play on,  
7 if any?

8           And you notice what is avoided here is really  
9 much in the way of questions about grades. Grades --  
10 and that's because grades are principally of importance  
11 in as much as they indicate a certain ability to  
12 discipline one's self. If you are really going to get  
13 good grades, you have to work for it for the most part.

14           And then the teams they played on. Did they  
15 play little league? How did they get along with the  
16 coach? The big deal. What kind of sports did they  
17 like? Much better to be a team player, like being on a  
18 team even if it's football. But baseball, basketball,  
19 then play -- play in sports, they're more isolated.  
20 Swimming. Because when you're swimming, you're by and  
21 large by yourself all the time. You are in that water.  
22 Or tennis in that a lot of times when you are on the  
23 court, you are all by yourself. You're doing singles.  
24 Maybe all you do is play doubles. Much better if  
25 someone is making an assessment of you later on. That's



1 the sort of thing.

2 And we are not telling people this beforehand,  
3 we're just asking. How was life here? How did you get  
4 along with the teachers in high school? What kind of  
5 problems, if any, did you have whether at home or with  
6 the police or school administration or whatever. How  
7 did you -- what kind of jobs did you have? What did you  
8 do? How long did you keep it? Why did you switch?

9 Now, why did you switch or why did you leave  
10 really means did you get fired or did you leave on your  
11 own accord. I mean, that's -- that's the sort of thing,  
12 it's how to ask questions. So basically it's  
13 philosophy. You want every question to start with who,  
14 what, when, where, how, or why.

15 So how did it work out for you and where did  
16 you go from there? Why did you change? I mean,  
17 that's -- that's -- that's all that it was.

18 Q. The ten -- the ten -- the ten --

19 A. And basically it was to try and see what kinds  
20 of thoughts have you -- what kind of involvement have  
21 you had in, you know, being involved in angry situations  
22 with other people? How did you handle it? How have  
23 things been for you recently? What's been going on  
24 there?

25 Q. Is one of the -- is one of the ten school

1 violence predictor items that most people who commit  
2 violence at schools actually did not overtly threaten  
3 their targets before the commission of violence?

4 A. That's true. Most people do not overtly  
5 threaten the people they later hurt. On the other hand,  
6 there are changes -- most people do have changes in  
7 their thinking, they do become prickly, they do become  
8 paranoid, they do -- they do show a concern that they're  
9 not -- their talents and beliefs are not being  
10 recognized. They are angry at what they see or how they  
11 see other people as treating them. And they might be  
12 right. Just because a person -- somebody complained  
13 about them doesn't mean that they're not correct in  
14 their thinking.

15 Q. Is then one of the Secret Service's profiling  
16 characteristics for school violence whether a person had  
17 excessively felt persecuted in their employment or in  
18 their educational environment?

19 A. Yes, and thereby justified in terms of doing  
20 what they might do or do do.

21 Q. Is one of the predictors that -- that although  
22 there might not have been overt threats, there have been  
23 a source -- a sense of aggressive behaviors by that  
24 person and is that among the characteristics that then  
25 need assessment, if you want to do a prevention?

1           A.    If you're taking aggressive behavior in a  
2 broader sense, emotional outbursts, rage attacks,  
3 behavior that other people find threatening, it can be  
4 almost anything.  Coming too close to somebody with a  
5 car.  As you're leaving the lot, the person is standing  
6 there, you come closer.

7           Q.    You clip them, almost clip them?

8           A.    Almost clip them.  Or you are driving  
9 erratically.  Or -- all of the kinds of things that we  
10 would normally say there's something wrong here, most of  
11 us really wouldn't go beyond that.

12                   The only thing the Secret Service is doing  
13 they're taking it and they're characterizing it in a way  
14 that is of service to them and to people who are  
15 responsible for safety on -- in school situations.

16           Q.    So when the University of San Francisco asked  
17 you to assist them vis-a-vis Dr. Kao, did you bring all  
18 this expertise and years of experience to that  
19 assistance of the University?  I guess that's sort of an  
20 obvious question, but -- and then could you -- go ahead.

21           A.    It wasn't any different.  I mean, it was a  
22 standard presentation, I thought, by Ms. Peugh-Wade, and  
23 it was fairly straightforward, and then it was a  
24 question of what kinds of things might you think we're  
25 doing.

1 Q. So what were the things that you found notable  
2 about the presentation that Ms. Peugh-Wade made to you  
3 about what the reported behavior of Dr. Kao's? What  
4 were the notable things for you in terms of what you  
5 eventually suggested to the University?

6 A. I think at the top of the list were the number  
7 of faculty members that Ms. Peugh-Wade said had either  
8 approached her directly or otherwise approached other  
9 people in the administration with complaints about  
10 Professor Kao and --

11 Q. You -- did you -- I'm sorry, go ahead.

12 A. With the focus being their fear for their  
13 personal safety. And their being able to describe, at  
14 least ultimately through maybe other people or directly  
15 to her, what it was that they found to be a source of  
16 fear for them.

17 Impulsivity was one. Never knowing how things  
18 were going to be with Professor Kao on any given  
19 situation was another. The other would be the erratic  
20 nature of his behavior on something as simple as  
21 approaching them in the hallway, so that as they get  
22 closer and closer, it at least is -- on enough  
23 occasions, not necessarily every occasion, their sense  
24 that Professor Kao is going to impact them physically.

25 Now, that doesn't mean he ever hit them, that

1 his shoulder ever came in contact with them, but that it  
2 was one of the repeated complaints that came up. That  
3 was another one.

4 That they found him to be impulsive in terms of  
5 his behavior in departmental activities, that they were  
6 never sure what was going to happen next. And that  
7 included, you know, all the way from nothing happening  
8 next to things really frightening them next.

9 Q. And what were the -- were there visual  
10 behaviors that Martha Peugh-Wade described to you? In  
11 other words, things about his presentation, his demeanor  
12 that you considered in your recommendations to the  
13 University as to what they should do about this?

14 A. Well, one part had to do with glaring, that was  
15 a statement that more than one of them described. This  
16 is all now coming to me through Ms. Peugh-Wade. And  
17 there are three of us at this table, Ms. Wade and  
18 somebody else, I think it was a man. I'm not certain it  
19 was a man but it was somebody else at the table.

20 The glaring. Glaring is hard because you  
21 honestly don't know whether glaring is in the mind of  
22 the beholder or the eyes of the beholder or the glare  
23 person, the person who is glaring. That was one of the  
24 things they cited.

25 The outbursts in meetings and an apparent

1 inability on his part to control himself in the course  
2 of meetings despite being admonished to -- to whatever,  
3 act more appropriately. Because then the question is is  
4 there something going on with this person's thinking or  
5 control over the expression of his or her emotions such  
6 that they don't have control, at least intermittently or  
7 briefly or even with more frequency. But there is  
8 something that -- this is without my meeting any of  
9 these people, so I'm not making judgments about them.  
10 They could all be goofy themselves, really. But the  
11 fact was that at least she was saying we have been  
12 getting this increasingly and we don't know what to do  
13 about it.

14 Q. So what was it that you advised the University  
15 to do?

16 A. It was a fairly straightforward piece. I  
17 basically just said what I think they knew already.  
18 They had an affirmative obligation as any employer in a  
19 school to provide a safe environment where people can  
20 either work or go to school. Every employer has that as  
21 an obligation, every school has that as an obligation.

22 So basically we started at the beginning, that  
23 you've got an affirmative obligation which means you are  
24 the ones that's the school. You have to do something.  
25 And, you know, what you want to do is pretty much up to

1 you.

2 I mean, it sounds like you don't know too much  
3 of what might be going on with Professor Kao. If that's  
4 the case, it might be helpful for you to require him to  
5 undergo a Fitness-for-Duty Evaluation, just to make sure  
6 that to the extent you can tell, you have some sense of  
7 whether this might be manageable for him. It might be  
8 something that he can deal with over time.

9 Or on the other hand, whether that's not the  
10 case and then you really do have to worry and you have  
11 to do something to make certain that no matter what,  
12 your faculty and your students and your employees,  
13 custodial staff, the secretarial staff, whoever it is is  
14 in a safe environment.

15 And -- I mean, this -- this was not made -- I  
16 did not tell them the things -- I interviewed a man and  
17 evaluated a man who was a janitor at Cal State Fullerton  
18 in 1976 and murdered seven other employees of that  
19 university at 6:30 or 7:00 o'clock in the morning. That  
20 was his wake-up call.

21 So -- and I dealt with other people who have  
22 committed murders or homicides or assaults on school  
23 grounds.

24 I was a psychiatrist for Theodore Streleski  
25 after he had hammered his professor to death on

1 August of 1978. So it wasn't as if these things occur  
2 in a vacuum. The fact is bad things do happen to  
3 people. Some of those things are predictable.  
4 Streleski's was predictable. And in part, he was found  
5 guilty of less than a first degree murder largely  
6 because the person who was his defense attorney made  
7 certain that it was not Streleski who was on trial, but  
8 it was Stanford University and its department in which  
9 Streleski had just been given a doctorate degree.

10 Q. Because they hadn't done the things that maybe  
11 they need to do?

12 A. And because they behaved in a way that --

13 MR. KATZENBACH: Objection. That's purely  
14 speculation.

15 THE COURT: The motion to strike is granted and  
16 the objection is granted.

17 Ladies and gentlemen, remember the admonitions.  
18 Do not form or express any opinion on this case until  
19 it's finally submitted to you for your decision. Do not  
20 discuss among yourselves or with others until that time.  
21 Please be back in your places at 11:15 according to the  
22 courtroom clock.

23 (Recess taken.)

24 THE COURT: Jurors and alternates are all  
25 present. Counsel from both sides are present.



1 Plaintiff is personally present. The witness is on the  
2 stand.

3 You may continue your inquiry.

4 MR. VARTAIN: Thank you, Your Honor.

5 Q. Was it at this meeting with Martha Peugh-Wade  
6 that you told her it was advisable to send Dr. Kao for  
7 the Fitness-for-Duty Evaluation?

8 A. Yes.

9 Q. Did you discuss with her the idea of the "when"  
10 to do it? And tell the jury when it was you met with  
11 Martha Peugh-Wade and where it was that you met with  
12 her.

13 A. Well, I met with her -- it would -- at either  
14 her office or human resources office at the University  
15 of San Francisco. I don't know the campus, so I can't  
16 be certain what office we were in, but it was an open  
17 office where there were two or three women about 25 to  
18 35 feet away, and there were the three of us down in the  
19 other corner of the office.

20 Q. And were you there for the better part of the  
21 afternoon?

22 A. Well, a little after 12 to a little -- about  
23 three hours, I think.

24 Q. Did you discuss with Ms. Peugh-Wade what your  
25 advice was as to the timing of sending Dr. Kao to a --

1 the Fitness-for-Duty Medical Evaluation?

2 A. Yes. I told her that since school was out,  
3 there was an opportunity for the school to make  
4 arrangements for such an evaluation of Professor Kao, if  
5 they were going to do it, and have the entire process  
6 finished by the time the students return in the fall, so  
7 that if the results were favorable for Professor Kao, he  
8 could resume teaching along with everybody else when  
9 September came. And if they were unfavorable, then they  
10 could make a decision during the vacation season as to  
11 what kind of action they were going to take, if any,  
12 with respect to him.

13 Or what kind of arrangements they might make to  
14 reassure themselves that there would be, you know, less  
15 in the way of disruptive conduct or scary conduct from  
16 Professor Kao in the future.

17 So there was a certain urgency to it. It was  
18 not something that they had a leisure with respect to it  
19 because they were describing something that had gone on  
20 for, at that period of time, maybe six or eight months.

21 Q. Did you make any recommendations regarding  
22 having Dr. Kao stay off campus while this evaluation  
23 process was going to happen, go on?

24 A. I don't remember having done that. I wouldn't  
25 be surprised if I did, but I don't remember having said

1 that to them.

2 Q. Why do you say you wouldn't be surprised? Have  
3 you advised those kinds of actions in other occasions?

4 MR. KATZENBACH: Objection, Your Honor.  
5 Relevance.

6 THE COURT: Overruled. The witness can answer.

7 THE WITNESS: Well, when I say I wouldn't be  
8 surprised, the fact is that if you are an individual who  
9 is informed by your employer or your supervisor at work  
10 that they want you to undergo a psychiatric evaluation,  
11 that's usually an unpleasant and anxiety provoking  
12 experience for anybody.

13 And if you are already stressed for any other  
14 number of reasons in your life and you're still going to  
15 be functioning afterwards in connection with the people  
16 that you've got most complaints about, it would be  
17 harder to assess how things are going, say with  
18 Professor Kao, or how much risk, if any, was posed to  
19 other people until you have the material back from  
20 whoever it is you're sending this person to have the  
21 evaluation done.

22 MR. VARTAIN: Q. Did the University ask you to  
23 suggest some names of potential doctors to do the  
24 Fitness-for-Duty Evaluation?

25 A. Yes.

1 Q. Did Ms. Peugh-Wade ask you for some names?

2 A. Yes.

3 Q. And did you give her some names?

4 A. I did.

5 Q. Would you tell us how you went about giving her  
6 names and on what basis you gave her some names of  
7 doctors?

8 A. Well, I clearly remember giving her the name of  
9 Dr. Norman Reynolds. My belief also is that I gave two  
10 other names to her, one was Dr. -- Dr. White who is a  
11 psychologist in San Francisco who specializes in  
12 workplace violence as such. And the other is a  
13 Dr. Holberg in Oakland who does a lot of evaluations for  
14 police departments, both at hiring and when there are  
15 incidents that occur when they need an evaluation  
16 afterwards.

17 But of the three I told her -- and -- and I do  
18 remember telling her this, that of the three, I thought  
19 that from her description, the individual who would most  
20 likely be most appropriate would be Dr. Norman Reynolds.  
21 And the reason is that he is a psychiatrist, and the  
22 biggest difference in terms of psychiatry and psychology  
23 in that situation is how much experience does the  
24 individual have dealing with individuals who may  
25 actually be psychotic.

1           Now, it doesn't mean that it was saying that  
2 Professor Kao was or is psychotic or has ever been that  
3 way in the course of his life, but that is one of the  
4 things that you have to include in an assessment. Is  
5 this person thinking okay. Or are they having  
6 hallucinations or are there delusions or are they  
7 obsessed about things that you can't measure quite as  
8 well.

9           Q. Do all those come under the psychosis?

10          A. Under the psychosis. It's not saying the  
11 individual has any of this, but it is saying it is one  
12 of the things that you have to at least attend to  
13 because that is one of the possible sources for people  
14 acting in ways that may constitute a harm to somebody  
15 else: physically, mentally, psychologically, whatever.

16          Q. Did you have -- had you had any opportunity to  
17 see Dr. Reynolds in action doing a Fitness-for-Duty  
18 Evaluation of anyone in an educational environment  
19 prior --

20          A. I have.

21          Q. -- prior to recommending him?

22          A. I had about a dozen interactions with him over  
23 time where he was on the other side, and --

24          Q. What do you mean by "the other said"?

25          A. The other side was whoever it was that called

1 me -- if it was the employer, then there was an attorney  
2 or somebody who would retain Dr. Reynolds. Or  
3 alternatively, it was the lawyer who called me or a  
4 doctor who called me, and the City had retained  
5 Dr. Reynolds.

6           So I'd read a lot of his reports, I knew how he  
7 thought. I knew how he -- I never met the man before.  
8 And on this particular day, I was called by a union, a  
9 teachers' union, and asked to go to an assessment that  
10 Dr. Reynolds was going to be conducting, as to an  
11 individual's ability to return to work after something  
12 or other had happened.

13           And so I went --

14           Q. This is a teacher?

15           A. It was a teacher. And we met late in the  
16 afternoon after school, and --

17           Q. So you were actually observing or evaluating  
18 Dr. Reynolds doing a Fitness-for-Duty Evaluation; is  
19 that right?

20           A. That's exactly right. Much more so than making  
21 an evaluation of the person.

22           And I was then, and I am now, unbelievably  
23 impressed by what happened in that two hours. It was  
24 thorough, it was well thought out, it was all written  
25 down beforehand, the questions that would be asked.

1 Dr. Reynolds was appropriate, sensitive, responsive,  
2 inquiring. He covered lots of different areas in the  
3 person's life, and I walked out of there amazed because  
4 this is a man whom I dealt with over the telephone or  
5 through things that -- I would write a report, he would  
6 write a report that would say I didn't know what I was  
7 talking about or I would write a report that would say  
8 the same about him. And here meeting this man, it was  
9 extraordinary.

10 And he was the fellow that I thought would be  
11 the most sensitive to Professor Kao and also be the most  
12 thorough in providing the University with what I thought  
13 it needed in terms of a thorough evaluation, this is of  
14 Professor Kao, by a reputable individual who is  
15 experienced in doing what he was doing, who had a lot of  
16 support, at least -- this is mostly in Santa Clara  
17 County but not completely. It goes beyond that.

18 And so I did. And I gave him the -- I gave her  
19 some other names, and I do think Drs. White and Berg  
20 [sic] were the two.

21 Q. Did you have -- at the time you gave the advice  
22 to the University to -- that the Fitness-for-Duty  
23 Evaluation was an appropriate way to assess Dr. Kao and  
24 the situation, did you have any knowledge of what would  
25 be the outcome of such an evaluation were Dr. Kao to go

1 and submit himself to it?

2 A. No. These -- these evaluations can have any  
3 kind of outcome, that's why they're an evaluation. And  
4 I think the other part of it was that everything I was  
5 hearing that day was coming through third parties. It  
6 was coming from Ms. Peugh, it was coming from another  
7 faculty member. Somebody came for a brief period of  
8 time, was coming through that person. But these are all  
9 third-hand reportings.

10 I had never met Professor Kao. I had  
11 absolutely no idea how things would go at the end of  
12 that evaluation. The only thing was I did think, in  
13 view of what Ms. Peugh was indicating the faculty were  
14 complaining about with regards to their own concerns  
15 about their own physical safety, that the University had  
16 to do something.

17 Didn't have to be a fitness for duty, I'm not  
18 sure what else it could have been, but they had an  
19 affirmative obligation to do something. This was not  
20 something you could sit on and then see where things  
21 were going to go. You needed to do it and you need to  
22 do it soon. But does it have to be that? No.

23 Q. What, in your experience, were the advantages  
24 to the employee in -- in connection with submitting to a  
25 fitness for duty evaluation in circumstances such as



1 this one?

2 A. Well, I think there were two main ones. I  
3 mean, one is that a lot of times you can get suggestions  
4 from who is ever doing an evaluation as to, well, I  
5 don't know, have you ever thought of such and such or  
6 have you tried such and such or is there a possibility  
7 that -- there's a whole series of things that can be  
8 part of this assessment, because it's confidential, that  
9 can be asked and they are answered or not, but they  
10 don't determine that person's future.

11 On the other hand, very often the person is  
12 found to be able to function in the environment in which  
13 they were functioning before, and they may even be  
14 entitled to some accommodations, some changes in terms  
15 of how the employer relates to them or the kind of job  
16 they have or the people they have to deal with or the  
17 circumstances.

18 There are a lot of ways in which it can work to  
19 that person's advantage. And the problem is usually --  
20 if you are asked to undergo a Fitness-for-Duty  
21 Evaluation, you generally have to comply, you've got to  
22 go. It doesn't mean you got to do anything, but you've  
23 got to go at least.

24 Q. And when you've done Fitness-for-Duty  
25 Evaluations of professionals, whether they be teachers,

1 lawyers, judges, from time to time do you find them fit  
2 for duty but recommend certain limitations on what they  
3 can do and changes in the workplace?

4 A. Much more often than not. I mean, that's what  
5 you'd like to have, you'd like to have people come out  
6 of a situation better than things were for them when  
7 they went in. I mean, you know, why be a doctor if you  
8 are essentially killing off every patient that walks in  
9 the door.

10 On the other hand, we are not the people that  
11 make the final decision. The most we do is we do an  
12 evaluation, we do it honestly, and the -- in the end, we  
13 are allowed to tell the employer no more than this  
14 person is psychologically and psychiatrically fit and  
15 able to do the job, they are not able to do the job  
16 psychologically, or alternatively they should be able to  
17 do the job if, and then you -- with circumstances.

18 The problem is the circumstances you list  
19 cannot indicate to the employer any kind of psychiatric  
20 diagnosis. So that no matter what the opinion is as  
21 regards what's going on with the person, man or woman,  
22 that is never communicated to the employer. It's  
23 against the law to communicate it to the employer. The  
24 only thing you can say is "fit," "not fit," or "fit" if  
25 certain things were able to come about.

1 Q. Did Ms. Peugh-Wade indicate to you what the  
2 University -- what kind of outcome the University wanted  
3 from a Fitness-for-Duty Evaluation, or did she indicate  
4 anything whatsoever about what the best answers were for  
5 the University in this process?

6 A. She said that there were many things about  
7 Professor Kao's activities on the campus that had them  
8 want to keep him, that he'd been there a significant  
9 period of time, that he was a good teacher, that the  
10 complaints that they had with respect to Professor Kao  
11 had not really come from the students, they'd come more  
12 from people who were working with him rather than, you  
13 know, as students for him. And that if they had their  
14 druthers, they'd like to have a situation where they  
15 could work things out where there weren't as many people  
16 who were -- some of them were frightened and others of  
17 whom were terrified in their interactions with him.

18 Q. Did you consider Dr. Reynolds to be someone,  
19 from your observations in that case and otherwise, who  
20 would be fair to both the University and Dr. Kao?

21 A. If he was anything like the way I seen him  
22 earlier, absolutely, very much so.

23 Q. What happened with that teacher?

24 A. With -- with the teacher?

25 Q. The one you observed Dr. Reynolds doing the

1 Fitness-for-Duty Evaluation?

2 A. I think we met on a Tuesday and he was back to  
3 work the following Monday.

4 MR. VARTAIN: I'd like to submit Dr. Missett as  
5 an expert in psychiatry and in Fitness-for-Duty  
6 Evaluations and assessment of behaviors of potential  
7 dangerousness.

8 THE COURT: Any objections?

9 MR. KATZENBACH: Not at all.

10 THE COURT: I declare Dr. Missett to be an  
11 expert in the fields of the science and counseling.

12 MR. VARTAIN: Your witness, Mr. Katzenbach.

13  
14 CROSS-EXAMINATION BY MR. KATZENBACH

15 MR. KATZENBACH: Q. Dr. Missett, you used the  
16 phrase in your testimony where you said "this was not  
17 something that you could sit on."

18 Do you recall saying that?

19 A. Well -- or words to that effect.

20 Q. What did you mean by that?

21 A. That the school had an -- at least in my  
22 opinion, an affirmative obligation to take action with  
23 respect to Professor Kao, and that the one that appeared  
24 to offer both them and Professor Kao the most in a way  
25 of good -- a possible good outcome would be a

1 Fitness-for-Duty Evaluation.

2 Q. Okay. When you say "not sit on it," you mean  
3 act promptly?

4 A. Yes. I think I used the word "urgent." It was  
5 of urgent nature to the need to do something.

6 Q. In other words, you would agree that if you had  
7 credible reports that Dr. Kao was frightening people,  
8 then you'd want something to be done sooner not later?

9 A. I think at least at the time I was being asked,  
10 and so that's June, students had left, that is -- that's  
11 a tad bit different than making a decision in the middle  
12 of the school year where almost anything you do is  
13 likely to be disruptive to the lives of the students,  
14 Professor Kao, to the University, to the department,  
15 whatever. But in general the answer is yes, act  
16 quickly.

17 Q. Right. So if you knew something -- you thought  
18 you had credible reports that Dr. Kao was going to --  
19 people believed that Dr. Kao would engage in a great act  
20 of violence before the students arrived on campus, you'd  
21 expect prompt action then too, wouldn't you?

22 A. Well, if there were credible reports. I don't  
23 know that anywhere in there I saw what I would say is a  
24 credible report that requires, whatever, immediate  
25 action. Difference between immediate being -- and

1 urgent, immediate would be, say, a weapon. Or an actual  
2 witnessed assault. That sort of thing.

3 Q. Well -- okay. So you didn't see anything in  
4 the reports that they were giving you that suggested to  
5 you that there was anything imminent about any action by  
6 Dr. Kao; is that what you're saying?

7 A. Well, it depends on when -- incidents of  
8 increased severity are occurring with increased  
9 frequency over time as to when that reaches the point  
10 where you need to do something. My opinion was this is  
11 summertime, people are gone, you need to do something.

12 Q. You were not consulted in this matter until  
13 about May 2008?

14 A. I think somebody may have called in May, and I  
15 think we met in June.

16 Q. Okay. And the somebody who called you to  
17 inquire as to your availability for this matter, who was  
18 that?

19 A. I don't remember.

20 Q. Did Mr. Vartain call you to advise you of the  
21 possibility of doing work for the University of San  
22 Francisco in this matter?

23 A. I think the first call came from the  
24 University.

25 Q. Did you speak to Mr. Vartain in connection with

1 this matter in May or June 2008?

2 A. I know I spoke with him; I don't know if it was  
3 before I went or after I went, but I do know I spoke to  
4 him.

5 Q. Would that be May or June 2008 in that time  
6 frame?

7 A. Time frame, yes.

8 Q. All right. And you don't recall whether it was  
9 before or after you met with people from the University  
10 of San Francisco?

11 A. I'm pretty sure I had not talked with him  
12 beforehand, but pretty sure is not the same as swearing  
13 it with certainty. So I -- all I know is I did talk to  
14 him at some point in time; I just don't know whether it  
15 was before or after.

16 Q. Well, you had a number of conversations with  
17 the University of San Francisco, people from the  
18 University of San Francisco, right?

19 A. You mean with respect to Professor Kao or other  
20 people?

21 Q. Well, with respect to Professor Kao.

22 A. I did.

23 Q. And you had a meeting about May 20th?

24 A. There were -- there were at least two or three  
25 meetings and then maybe half a dozen phone calls.

1 Q. All right. Let's -- would you please take a  
2 look at Exhibit 47 in the binders in front of you.

3 MR. VARTAIN: That's the wrong binder. There's  
4 two sets. I'll help you. You are in the wrong set.

5 THE WITNESS: Yes.

6 MR. KATZENBACH: Q. Taking a look at  
7 Exhibit 47.

8 A. Yes.

9 Q. That's a bill that you submitted to the  
10 University of San Francisco?

11 A. In late 2008, that's right.

12 Q. And I'd like to direct your attention  
13 particularly to the line referring to a telephone  
14 conversation of the University staff on 6/18/08.

15 Do you see that?

16 A. Yes.

17 Q. All right. As of that point, had you spoken to  
18 Mr. Vartain's office about Dr. Kao?

19 A. I'm sure I had.

20 Q. Now, did you -- did you review any of the  
21 correspondence that was going to be sent to Dr. Kao  
22 concerning the Fitness-for-Duty Evaluation?

23 A. I did.

24 Q. Which letters do you recall reviewing?

25 A. I reviewed one letter informing him of the need



1 to contact Dr. Reynolds and what he might expect that  
2 the interview or the evaluation would include. At least  
3 that.

4 Q. All right. Taking a look again back at  
5 Exhibit 47, this is your bill. There's a reference to a  
6 black binder.

7 Do you see that?

8 A. Yes.

9 Q. What was the black binder?

10 A. It's one of these black binders here.

11 Q. Did you bring your records with you?

12 A. I did.

13 Q. Do you have the black binder that you looked at  
14 with you?

15 A. I'm sure I do.

16 Q. Would you find it.

17 A. At least two.

18 Q. What?

19 A. There's at least two.

20 Q. Can you tell us what they are?

21 A. Well, one is entitled "Kao File," and the title  
22 on the first page is "Report and Addendum, Submitted to  
23 the Assistant Vice President for Human Resources at  
24 University of San Francisco, August 15th, 2007," and  
25 then the contents and a cover letter for the addendum;

1 41 pages of the body of the addendum; 118 pages of  
2 source documents for the appendix to the addendum; two  
3 pages of a cover letter for discrimination; 112 pages  
4 report of the body of the discrimination complaint; and  
5 then 369 pages as an appendix for the source document  
6 for the report of discrimination.

7 Q. Now, that completes the contents of that black  
8 binder?

9 A. I think so.

10 Q. And there's another black binder you brought  
11 with you?

12 A. Yes.

13 Q. What is that black binder?

14 A. This has a -- a number of different sections to  
15 it. The first one is "USF's Second Amended Response to  
16 Plaintiff's First Set of Interrogatories;" "Plaintiff's  
17 Response to USF's First Set of Interrogatories;"  
18 "Deposition of Provost Jennifer Turpin on July 23,  
19 2010;" "Exhibits to the Deposition of Provost Jennifer  
20 Turpin on July 25, 2010;" and then there's a series of  
21 tabulated pages after that up through -- well, 36  
22 different tabs. 31 different tabs.

23 Q. Following Ms. Turpin's deposition?

24 A. Following her deposition, yes.

25 Q. Okay. Anything else in that black binder?

1           A.    Well, there are exhibits to her deposition,  
2    Ms. Turpin's deposition, a "Third Amended Notice of  
3    Deposition" with a request for documentation.

4    Various -- apparently e-mail citations from Dr. Turpin.

5           Q.    These are all exhibits to Dr. Turpin's  
6    deposition, as far as you can tell?

7           A.    Well, as far as I can tell.  You know, they're  
8    consistent with it, but it doesn't mean, like, each one  
9    is marked "Exhibit."

10          Q.    Well, in fact, isn't each one marked "Exhibit"?

11          A.    Well, each one -- well, most of them have a  
12    number on it, yes, it does say "Exhibit number" and it  
13    goes on from there.

14          Q.    Okay.  As you get to the last of the exhibits  
15    to her depositions, is there anything else in the black  
16    binder?

17          A.    A summary of faculty interviews, that's just  
18    the last one.

19                THE REPORTER:  "A summary of what," I'm sorry?

20                THE WITNESS:  A summary of faculty interviews.

21                MR. KATZENBACH:  Q.  All right.  And that's the  
22    last document in that black binder?

23          A.    Yes.

24          Q.    All right.  And that's another document that  
25    has an exhibit tag on it?

1           A.    Yes.

2           Q.    All right.  So would it be accurate to say the  
3 stuff you got in the second black binder all relates to  
4 documents that were created at the start of this case?

5           A.    I'm not sure when the case started.  So if you  
6 can tell me that, I can probably give you the answer.

7           Q.    All right.  All of those documents that you've  
8 just reviewed concern matters, pleadings, depositions,  
9 things like that were provided to you that are captioned  
10 about this case, correct?

11          A.    Yes.

12          Q.    All right.  So that black binder all concerns  
13 things that occurred after this litigation commenced,  
14 correct?

15          A.    You know, I don't know because I never really  
16 was looking at it from that perspective, but I think so.

17          Q.    Okay.  So that second black binder you're  
18 talking, that wouldn't -- that wouldn't be the black  
19 binder that you're referring to in this bill, would it?

20          A.    I don't know.

21          Q.    Well, what's the first document -- what's the  
22 date of the first document in the black -- the second  
23 black binder?

24          A.    Well, the citation on the outside is  
25 "Deposition of Dr. Missett.  Discovery Materials,

1 Dr. Missett's Binder."

2 Q. So that's -- that's fine, but what's the date  
3 of the first document in that black binder?

4 A. June 17th, 2009.

5 Q. All right. So is there any document in that  
6 black binder, other than the exhibits to Ms. Turpin's  
7 deposition, that is earlier than 2009?

8 A. I don't think so.

9 Q. All right. So looking at your bill here, which  
10 goes through -- it goes through July 2008, you'd agree  
11 with me that the black binder that you were referring to  
12 in this bill is not the second black binder you're  
13 talking about?

14 A. I think that's true.

15 Q. So it really would be the only -- the first  
16 black binder that we talked about?

17 A. That was dated before.

18 Q. So is that the black binder that you're  
19 referring to in your bill?

20 A. It looks like that's probably most likely.

21 Q. Do you have a firm memory one way or another?

22 A. No.

23 Q. Now, did you -- do you recall having your  
24 deposition taken two times in this case?

25 A. Yes.

1 Q. All right. At the first deposition, did you  
2 produce your medical file on Dr. Kao?

3 A. I don't know what I produced on that first  
4 deposition.

5 Q. All right. Do you have your medical file with  
6 you here now?

7 A. My medical file on Dr. Kao?

8 Q. Yeah. Let me -- let's take out the word  
9 "medical," let's just call it file.

10 A. I have that material, I have my deposition. I  
11 don't know what else there would be. I'm not aware of a  
12 medical file on Dr. Kao.

13 Q. At your deposition did you produce a file on  
14 Dr. Kao?

15 A. Well, if I did, it certainly is part of the  
16 record to the deposition.

17 Q. All right.

18 MR. KATZENBACH: May I show the witness Exhibit  
19 1 from his deposition?

20 THE COURT: Yes.

21 MR. KATZENBACH: Q. Handing the witness his  
22 deposition.

23 Please take a look at Exhibit 1 to that  
24 deposition.

25 MR. VARTAIN: Which deposition is this,

1 Counsel?

2 MR. KATZENBACH: The deposition of -- on  
3 Thursday, September 9th, 2010.

4 MR. VARTAIN: Thank you.

5 THE WITNESS: I'm sorry, I think I do have  
6 these. I wouldn't call them medical records, but...

7 MR. KATZENBACH: Q. Let's just focus on the  
8 documents that you have right there, attached as Exhibit  
9 1.

10 A. Right.

11 Q. Okay. And are these the complete records that  
12 you produced at your deposition concerning Dr. Kao?

13 A. I have no reason to believe otherwise.

14 Q. They're attached -- they were apparently  
15 produced pursuant to subpoena?

16 A. Yes.

17 Q. And now, taking a look at -- keeping Exhibit 1  
18 to your deposition in front of you, right?

19 A. Right.

20 Q. Could you please take a look -- I would like  
21 you to also take a look now at Exhibits 83 and 84 in the  
22 binder.

23 MR. KATZENBACH: May I approach, Your Honor?

24 THE COURT: Yes.

25 ///

1                   (Whereupon, Plaintiff's Exhibits 83 and 84  
2                   were marked for identification.)

3                   MR. KATZENBACH: Q. Taking a look at Exhibits  
4                   83 and 84, is there any copy of those in the records you  
5                   produced at your deposition, which are Exhibit 1 to your  
6                   deposition?

7                   A. I don't think so. I just looked, but --

8                   Q. I want you to confirm that they're not there.

9                   A. Well -- I don't see it, so I presume it's not.

10                  Q. You don't see a copy of Exhibit 83 in your  
11                  records?

12                  A. No.

13                  Q. And do you see a copy of Exhibit 84 in your  
14                  records?

15                  A. Well, if I'm restricting it to what you have  
16                  given me back...

17                  Q. Yes. Exhibit 1 to your deposition?

18                  A. It doesn't appear that there is. No, I don't  
19                  see any here.

20                  Q. So no copy of Exhibit 83 or 84 that's contained  
21                  in the records that are attached as Exhibit 1 to your  
22                  deposition; that's correct?

23                  A. That's correct.

24                  Q. All right. And the documents -- and at the  
25                  time you produced these records, did you make a



1 declaration as to the records that you were going to  
2 produce?

3 A. I'm sure we did.

4 Q. Why don't you take a look at the fourth page of  
5 Exhibit 1 to your deposition.

6 Is that a declaration?

7 A. Well, I'm not sure yet. You're talking about  
8 page 4?

9 Q. I believe it's the document entitled  
10 "Declaration," page 4 -- the fourth page of Exhibit 1 to  
11 your deposition.

12 A. Okay.

13 Q. Do you have it?

14 A. I do. It says -- it's the one that says  
15 "Declaration"?

16 Q. Yes.

17 A. Okay. I do.

18 Q. All right. Now, could you please read -- do  
19 you see right below the line that says "Declaration,"  
20 can you please read to the jury the four lines that are  
21 contained there?

22 A. Under No. 1?

23 Q. No. Just below the words "Declaration,"  
24 beginning "James R. Missett."

25 A. "MD, 1187 University Drive, Suite 8, Rohnert

1 Park, California 94025. Records pertaining to John  
2 Kao."

3 Q. All right. Can you please read the next  
4 paragraph beginning "Certification of Records Copied"?

5 Can you read that out loud to the jury?

6 A. Oh, "I am" -- custodian's initials, those are  
7 mine -- "I am a duly authorized custodian of records or  
8 other qualified witness for the above-named business.  
9 As such I have the authority to certify these records.  
10 The photocopied records submitted herewith are true  
11 copies of all records described in the deposition  
12 subpoena/authorization. To the best of my knowledge,  
13 all such records are prepared or compiled by personnel  
14 of the above-named business in the ordinary course of  
15 business at or near the time of the acts, conditions or  
16 events recorded. No documents have been withheld in  
17 order to avoid there being photocopied. If we have only  
18 part of the records described in the deposition  
19 subpoena/authorization, as such records as available are  
20 provided."

21 Q. All right. And you have checked that second  
22 section of this Declaration, correct?

23 A. Yes, and signed it.

24 Q. And it's a -- your initials are there and you  
25 signed it. And that's your signature on the bottom?

1 A. Yes.

2 Q. And it's even witnessed?

3 A. Yes.

4 Q. And what's the date you signed it?

5 A. April 29, 2010.

6 Q. Thank you.

7 THE COURT: I'll ask Juror No. 4, Ms. Sargent,  
8 to remain, and the rest of the jurors, we are taking a  
9 lunch break.

10 Remember the admonitions. Do not form or  
11 express any opinion on this case until it's finally  
12 submitted to you for your decision. Do not discuss  
13 among yourselves or with others until that time.  
14 Remember to leave your notebooks and instructions  
15 behind.

16 JUROR: You can go ahead, it's fine.

17 THE COURT: The jurors and alternates have  
18 departed. Counsel for both sides and plaintiff remains.

19 You were telling us earlier that you felt  
20 malaise and nausea and you would stick it out to the  
21 noon hour.

22 How are you doing?

23 JUROR: I still don't feel good but I'm  
24 sticking through it still.

25 THE COURT: You are going to have to speak up,

1 I'm a little deaf.

2 JUROR: I still don't feel good but I'm  
3 maintaining. I'm going to go home and take a nap.

4 THE COURT: Are you able to follow what's going  
5 on, pay attention?

6 JUROR: Yes.

7 THE COURT: Do you want to come back this  
8 afternoon? Can you hang in there?

9 JUROR: Yeah, I can come back.

10 THE COURT: Okay. See you in the afternoon.

11 Ms. Sargent has left the courtroom.

12 Counsel for both sides and the plaintiff  
13 remain.

14 Anything you want on the record,  
15 Mr. Katzenbach?

16 MR. KATZENBACH: No, Your Honor.

17 THE COURT: Defense?

18 MR. VARTAIN: No, thank you.

19 THE COURT: Okay. See you at 1:30.

20 (Whereupon, the proceedings were adjourned  
21 for lunch at 12:01 P.M.)

22 --- oOo ---

23

24

25

1 AFTERNOON SESSION

1:30 P.M.

2 THE COURT: Jurors and alternates all present.  
3 Counsel for both sides are present. The plaintiff is  
4 personally present. Dr. Missett is on the stand.

5 Go ahead.

6 MR. KATZENBACH: Thank you, Your Honor.

7 Q. Dr. Missett, would you please take a look at  
8 Exhibit 38.

9 MR. KATZENBACH: May I approach, Your Honor?

10 THE COURT: Yes.

11 MR. KATZENBACH: Q. Do you have Exhibit 38 in  
12 front of you, sir?

13 A. I do.

14 Q. Let's take a look at the second page. I'd like  
15 to direct your attention, if you could, to the language  
16 at the bottom of that document which describes what a  
17 comprehensive psychiatric evaluation will consist of.

18 Do you see that?

19 A. I do.

20 Q. All right. The first sentence there says  
21 "Review and analysis of complete history and background,  
22 e.g, current difficulties, medical history, legal and  
23 financial history, education" -- "educational and work  
24 history, family and social history."

25 Do you see that?

1           A.    Yes.

2           Q.    Is that standard for a Fitness-for-Duty  
3 Examination?

4           A.    Pretty much.  It depends on what the  
5 Fitness-for-Duty Evaluation is occasioned by.  You know,  
6 sometimes this might -- this might be more than was  
7 required; other times it might be less.

8           Q.    Okay.  And the Fitness-for-Duty Examination  
9 that you were recommending for Dr. Kao, which of those  
10 items do you think shouldn't be there?

11          A.    Should not be there?

12          Q.    Should not be there.

13          A.    I think there are reasons for each one of them.

14          Q.    Okay.  So then you would have expected the  
15 Fitness-for-Duty Examination for Dr. Kao to cover all  
16 those points?

17          A.    To a greater or lesser extent.

18          Q.    Okay.  Then we have -- how about the Mental  
19 Status Examination, is that typical for a  
20 Fitness-for-Duty Examination?

21          A.    I don't know about typical, it's certainly not  
22 uncommon.

23          Q.    Well, was that the sort of examination you  
24 expected to be done regarding Dr. Kao?

25          A.    I would, because it is basically a standardized

1 way of describing a person's orientation, the time,  
2 place and person; their memory for immediate recent or  
3 remote events; their ability to concentrate and pay  
4 attention; their ability to answer in a goal-directed  
5 way without going off on tangents or speaking around the  
6 subjects.

7 So it's the kind of thing that one way or  
8 another you have to address and -- at least for yourself  
9 afterwards.

10 Q. All right. Take the next one, Psychological  
11 Test Results; is that standard for a Fitness-for-Duty  
12 Examination?

13 A. In terms of administering the psychological  
14 test results?

15 Q. Yes.

16 A. Yes.

17 Q. Laboratory Results?

18 A. Well, it would depend on -- it would depend on  
19 what it was the individual was looking for. If there  
20 were reasons for it, what you'd be checking for is to  
21 make sure there aren't any laboratory-based indications  
22 of some kind of disorder that the individual might have.  
23 It could be diabetes, it could be some kind of -- other  
24 metabolic problem. It could be some kind of electrolyte  
25 problem.

1 I mean, there's any number of things it could  
2 be. And if it were there, it would make an enormous  
3 difference in terms of the correctability of what was  
4 found or the lack of correctability.

5 Q. Laboratory Test Results, would that normally  
6 include drug and alcohol testing?

7 A. It might. It would really depend on whether  
8 there was a question in the individual's history or the  
9 way it was described of drug and alcohol abuse. It  
10 might.

11 Q. When you considered Dr. Kao's situation, did  
12 you think that was the case where there might be drug or  
13 alcohol abuse?

14 A. I don't know that you could rule it out. I  
15 certainly wouldn't criticize giving him laboratory  
16 tests, but on the other hand, what you do is you have to  
17 secure the person's permission for doing it and having  
18 the tests run. But what they're telling him beforehand  
19 is that this is what he can expect.

20 Q. All right. And taking a look at the next one,  
21 Diagnostic Assessment, was that typical for a  
22 Fitness-for-Duty Examination?

23 A. Absolutely. The critical thing, though, is  
24 that it's not communicated, nor are any of the findings  
25 communicated to the employer.



1 Q. I understood. When you say "none of the  
2 findings," you mean the diagnosis?

3 A. Well, diagnosis, but it also includes other  
4 findings as such. I mentioned earlier what the  
5 restrictions are, fit for duty, not fit for duty, fit  
6 for duty under some circumstances.

7 Q. What about a description of the employee's  
8 condition, even if that wasn't a diagnosis, would that  
9 be something you would normally communicate?

10 A. What do you mean a "condition"?

11 Q. Whatever the doctor says about someone's  
12 condition, other than fitness for duty.

13 MR. VARTAIN: Vague. Objection.

14 THE COURT: Sustained.

15 MR. KATZENBACH: Q. Well, if someone was asked  
16 to -- a doctor was going to disclose to the University  
17 of San Francisco Dr. Kao's condition, do you think that  
18 would include a diagnosis?

19 MR. VARTAIN: Objection. Vague.

20 THE WITNESS: Not legally.

21 MR. KATZENBACH: Q. Well, I understand not  
22 legally.

23 THE COURT: There is an objection pending.

24 Overruled.

25 MR. KATZENBACH: Q. "Not legally" is the

1 answer?

2 A. Pettis v. Cole said you shall not communicate  
3 to the employer, directly or indirectly, the diagnosis  
4 of the -- for the individual who is being evaluated.

5 Q. So a report of someone's condition, even if not  
6 labeled diagnosis, might be an indirect way of  
7 reporting -- reporting a diagnosis?

8 MR. VARTAIN: Objection. Calls for speculation  
9 and vague.

10 THE COURT: Overruled.

11 The witness may answer.

12 THE WITNESS: The people in Pettis v. Cole were  
13 told by the Supreme Court that their attempts to get  
14 around that were resulted -- what resulted in their  
15 getting an adverse decision from the Court; namely, they  
16 put in, We would suggest that this person, Mr. Pettis,  
17 might think of entering an alcohol program.

18 And for the Court that was enough to say this  
19 was a required exam and you have no right to give  
20 anything to the employer aside from fit, not fit, or fit  
21 under certain circumstances.

22 MR. KATZENBACH: Q. Okay. Thank you.

23 Now, I'd like you, if you would, to take a look  
24 at the same -- moving up slightly.

25 I'd like you to look at the last two bullet

1 points above the paragraph we have just been discussing.  
2 Going to the distal point up here, "Dr. Reynolds will  
3 not."

4 Do you see that?

5 A. Is this the one that says "Provide me or my  
6 designee"?

7 Q. "With a copy of the psychiatric report or a  
8 copy of Dr. Reynolds' records."

9 Do you see that?

10 A. I do see it.

11 Q. Is that standard for a Fitness-for-Duty  
12 Examinations.

13 A. Yes.

14 Q. Is it your understanding that a  
15 Fitness-for-Duty Examination that Dr. Kao was being  
16 asked to go to, he would not be entitled to see what  
17 Dr. Reynolds told the University?

18 A. That's not true. That's not what it says.

19 Q. All right. He wouldn't get to see the  
20 psychiatric report that Dr. Reynolds prepared, correct?

21 A. At least for himself, that's true. The only  
22 thing he can see is what went to the University in terms  
23 of: I find this person fit, I find him not fit, I find  
24 him fit under certain circumstances.

25 Q. And he is also not entitled to a copy of

1 Dr. Reynolds' records, right?

2 A. That's true.

3 Q. So he wouldn't know if there was anything in  
4 those records that indicate that Dr. Reynolds had told  
5 something to the University verbally?

6 A. He might not know that, that's true.

7 Q. Now, are you familiar with consent forms?

8 A. Consent forms?

9 Q. Yes.

10 A. In some circumstances. I don't know which  
11 circumstance you're talking about, but in some.

12 Q. There are a couple of laws that actually govern  
13 them, right?

14 A. Well, I'm willing to listen to your explanation  
15 about what a consent form is and how it works but...

16 Q. Well, as part of your practice in doing  
17 Fitness-for-Duty Examinations and as part of your  
18 expertise in that area, do you use consent forms?

19 A. You mean with regards to a person consenting to  
20 a given procedure or examination or evaluation?

21 Q. Yes.

22 A. Yes, that is correct.

23 Q. If anyone is referred to you for a  
24 Fitness-for-Duty Examination, isn't it necessary for  
25 that person to sign a consent form?

1           A.    Yes.

2           Q.    And if this person is referred to you for a  
3 psychiatric Fitness-for-Duty Examination, aren't there  
4 specific things that need to be in that consent form?

5           MR. VARTAIN:  Objection.  "Need to be" vague.  
6 Calls for a legal opinion.

7           MR. KATZENBACH:  That one I agree with, so I'll  
8 rephrase, Your Honor.

9           THE COURT:  Of course.

10          MR. KATZENBACH:  Q.  In the forms that you use,  
11 do you use a special form when you're asking for  
12 psychiatric records?  Are there consent of disclosure of  
13 psychiatric records?

14          MR. VARTAIN:  Objection.  Compound.

15          THE COURT:  Overruled.

16          THE WITNESS:  Usually.

17          MR. KATZENBACH:  Q.  Now, you use a form, don't  
18 you, that describes the specific purpose that the  
19 psychiatric records are going to be used for?

20          MR. VARTAIN:  Objection.  Vague, "psychiatric  
21 records."

22          THE COURT:  Doctor, do you understand the  
23 question?

24          THE WITNESS:  The consent form or the form that  
25 goes to the party for whom the records are being

1 requested would, in a general way, state what the  
2 records are being used for.

3 THE COURT: He answered the question, he  
4 understood it --

5 THE REPORTER: Your Honor, I'm sorry, I can't  
6 hear you.

7 THE COURT: I understand Dr. Missett answered  
8 the question by communication, meaning that he  
9 understood it; therefore, the objection to the question  
10 as being vague or unintelligible is overruled. The  
11 answer will stand.

12 MR. KATZENBACH: Q. And the authorization form  
13 used for -- asking for psychiatric records also has to  
14 have the signature of the individual's records that are  
15 being requested; isn't that right?

16 A. Yes.

17 Q. And they have to -- and doesn't that form also  
18 have to describe -- the form that the individuals whose  
19 records are involved has to sign also include a  
20 statement of the specific purpose of the request for  
21 those psychiatric records?

22 A. At least in a general way.

23 Q. And doesn't it also have to include a statement  
24 that -- of the amount of time those psychiatric records  
25 will be retained?

1 A. Meaning by the party that's receiving them?

2 Q. Yes.

3 A. I know some have; I don't know that all have.

4 Q. Is that -- is that a standard requirement or  
5 standard practice in the Fitness-for-Duty Examination  
6 area to include that such information in any request  
7 authorization -- request for authorization for release  
8 of psychiatric records?

9 A. Again, I've seen it. I don't -- when you use  
10 the word "standard," I don't know if "standard" means  
11 that everybody has to do it or not.

12 Q. Does it need to contain a statement that the  
13 information, psychiatric information will not be used  
14 for any other purposes than identified in the form?

15 A. Yes.

16 Q. And does it have to contain a statement that  
17 the information will be destroyed or returned when the  
18 retention period is over?

19 A. Yes.

20 Q. Taking a look at the consent form in front of  
21 you, which is part of Exhibit 38, does the consent form  
22 in that form state anything about the length of  
23 retention of psychiatric records?

24 A. But that's not the kind of report this is. Or  
25 release it is.

1 Q. At the very top of it, what does it say it's a  
2 release for?

3 A. It's a -- it's regarding the release of  
4 psychiatric, medical and/or alcohol/drug abuse records,  
5 and that would be from Dr. Reynolds to blank. And this  
6 is not Dr. Reynolds requesting records from some third  
7 party.

8 Q. This is a form that Dr. Kao was going to be  
9 asked to sign to authorize the release of medical  
10 records, right?

11 A. That's the way it looks.

12 Q. Does it contain any information as to the --  
13 does it contain any specific information as to the  
14 intended use of any psychiatric records?

15 A. Yes.

16 Q. And what's the specific intended use?

17 A. Quote, "Specific, he is permitted to release to  
18 my employer a statement that I am fit for duty or that I  
19 am not fit for duty and specify functional limitations,"  
20 close quote.

21 And then the next one is, quote, "Dr. Reynolds  
22 is not permitted to release information regarding  
23 causation or any other matters," close quote.

24 Q. How would Dr. Reynolds get any psychiatric  
25 records on Dr. Kao?



1 A. You mean from other people?

2 Q. Yeah.

3 A. I expect that if he felt it was necessary, he  
4 probably would have to request it.

5 Q. And Dr. Kao would have to authorize it, right?

6 A. Yes.

7 Q. Okay. Now, in terms of -- would you please  
8 take a look at Exhibit 34.

9 I'd like to direct your attention to the first  
10 page of that exhibit and the paragraph numbered five.

11 A. I'm sorry, paragraph number?

12 Q. Five.

13 A. Five.

14 Q. Thank you.

15 MR. VARTAIN: May he have a chance to read the  
16 document, Counsel?

17 MR. KATZENBACH: Certainly.

18 MR. VARTAIN: Because I don't think he's seen  
19 this document.

20 MR. KATZENBACH: That was my first question.

21 Q. Did you ever see this document?

22 A. I think so.

23 Q. All right. Did you see this document on or  
24 about the time it is dated, which is June 24, 2008?

25 A. I don't know. I mean, obviously, I didn't see

1 it before then. I doubt it I saw it on that date. But  
2 how soon afterwards, I don't know.

3 Q. Well, were you -- did the University ask you  
4 for advice as to what should be told to Dr. Kao when  
5 they were demanding a Fitness-for-Duty Examination?

6 A. My memory is that they weren't asking me about  
7 what should be told to him, as they were asking me what  
8 it was that would be included in a Fitness-for-Duty  
9 Evaluation, and what it was that they might expect would  
10 be communicated to them.

11 Q. All right. Taking a look at No. 5, which  
12 states, "The IP will provide the University a report  
13 setting forth his opinion as to your condition and  
14 fitness to perform your faculty functions in a manners  
15 that is safe and healthy for you."

16 Did you review that language at any time with  
17 the University?

18 A. No. I mean, review it with them? No.

19 Q. Yes. Did you discuss whether that was an  
20 appropriate thing to demand?

21 A. Well, I don't think this is a demand, I think  
22 it's a statement, a declarative statement.

23 Q. Fair enough. Did you ask the -- did you  
24 discuss with the University whether this is an  
25 appropriate declarative statement to make?

1           A.    No.  I do believe it is, but that doesn't mean  
2   I don't remember at all discussing it with them.

3           Q.    Well, you -- in other words, you understand a  
4   report setting forth his opinion as to your condition  
5   that would not be a type of report prohibited by Pettis  
6   versus Cole?

7           MR. VARTAIN:  Objection.  Ambiguous.  Misstates  
8   the document.

9           THE COURT:  Sustained.

10          MR. KATZENBACH:  Q.  Do you believe that it  
11   would be proper under Pettis versus Cole, which you  
12   described earlier, for Dr. Reynolds to have informed the  
13   University of his opinion as to Dr. Kao's condition?

14          MR. VARTAIN:  Objection.  Same objection.  
15   Vague, misstates the document.

16          THE COURT:  Overruled.

17          THE WITNESS:  So long as he doesn't give a  
18   diagnosis and specify it, yes.

19          MR. KATZENBACH:  Q.  Give a diagnosis, either  
20   directly or indirectly, right?

21          A.    No.  The diagnosis is a diagnosis is a  
22   diagnosis.  It is straightforward.  It is not a general  
23   thing like "Doesn't feel well."

24          Q.    Is it your understanding that as long as you  
25   don't actually say "My diagnosis is X," then you can say

1 that a doctor doing a Fitness-for-Duty Examination can  
2 say anything they want about a person?

3 MR. VARTAIN: That's argumentative.

4 THE COURT: So it is. Sustained.

5 MR. KATZENBACH: Q. Is it your understanding  
6 that a statement setting forth a doctor's opinion as to  
7 someone's condition would not constitute a diagnosis?

8 MR. VARTAIN: Objection. Ambiguous.  
9 Argumentative.

10 THE COURT: Sustained.

11 MR. KATZENBACH: Q. Is it your -- is it -- is  
12 it the standard in the industry that it is improper  
13 to -- for a doctor doing a Fitness-for-Duty Examination  
14 to disclose directly or indirectly information that  
15 would describe -- that would constitute -- sorry -- a  
16 diagnosis of a patient -- of a person?

17 MR. VARTAIN: Objection. Ambiguous. Compound.

18 THE COURT: Sustained.

19 MR. KATZENBACH: Q. Do you think it's a  
20 standard in the industry that it is improper for a  
21 doctor doing a Fitness-for-Duty Examination to disclose  
22 information that indirectly showed a diagnosis?

23 MR. VARTAIN: Objection. Ambiguous.  
24 Argumentative.

25 THE COURT: I don't understand the question.

1 Sustained.

2 MR. KATZENBACH: Q. A doctor doing a  
3 Fitness-for-Duty Examination -- strike. Rephrase that.

4 In preparing a report on a Fitness-for-Duty  
5 Examination, is it improper for a doctor to disclose  
6 indirectly a diagnosis?

7 A. I guess I'm supposed to answer?

8 Q. Yeah.

9 A. Yes, it is improper for a doctor to disclose  
10 a -- either directly or indirectly, and that's exactly  
11 what the Supreme Court said in Pettis v. Cole. It said  
12 you -- just because you say this fellow should enter an  
13 alcohol program doesn't get you off the hook. But I  
14 think everybody who read that understood what they  
15 meant.

16 Q. Now, during your conversations with the  
17 University of San Francisco or representatives of it, do  
18 you recall that they -- do you recall that you believe  
19 that the students had made complaints -- sorry. Let me  
20 rephrase it.

21 From the information they gave you, did you  
22 understand that there were student complaints about Dr.  
23 Kao?

24 A. No. My understanding was that they did not  
25 have complaints from students but rather the complaints

1 they had were from faculty and administrators.

2 MR. KATZENBACH: Your Honor, I'd like to read  
3 from page 77, lines 6 through 22 of his deposition on  
4 September 9, 2010, through -- actually I'd like to  
5 continue through page 78, line 2.

6 MR. VARTAIN: Which deposition, Counsel,  
7 there's two?

8 MR. KATZENBACH: September 9, 2010.

9 MR. VARTAIN: Do you want the witness to have a  
10 look at that?

11 MR. KATZENBACH: No, I just want to read it, if  
12 the Court will permit.

13 THE COURT: I'll permit it.

14 MR. KATZENBACH: Q. All right.

15 "Question" -- starting at line 6 on page 77.

16 "Question: Did you receive any information of  
17 any kind from the University that Dr. Kao had any  
18 problems of any nature with students?"

19 "Answer: My memory is, yes; my review of the  
20 materials is no."

21 "Question: Okay."

22 "Answer: I didn't see any in the material.

23 And, in fact, I saw statements that implied that there  
24 were no complaints from students, but my memory of the  
25 time with him was that that was not true.

1 "This is at the time of the meeting?

2 "Right. From that day that there had been  
3 students who had voiced anxieties or concerns.

4 "Okay, but that is not reflected in any of the  
5 documents" --

6 THE COURT: Counsel, you're forgetting to say  
7 question and answer.

8 MR. KATZENBACH: I'm sorry. Let me perhaps do  
9 that -- I'll go back to the answer.

10 "Answer: I didn't see any in the material,"  
11 and the answer continues, "and in fact I saw statements  
12 that implied that there were no complaints from  
13 students. But my memory of the time with him was that  
14 that was not true. This is the time of that meeting.

15 "Question: Right.

16 "Answer: From that day that that there had  
17 been students that had voiced anxieties or concerns.

18 "Question: Okay.

19 "Answer: But that is not reflected in any of  
20 the documents that I have read.

21 "Question: That's fine. You know, you  
22 understand.

23 "Answer: No, I understand, but it was a clear  
24 impression that I had, from that meeting, with respect  
25 to at least a few."

1 Q. Now, in addition, do you recall that the  
2 University at this meeting told you that people had  
3 spoken to Dr. Kao about concerns they had?

4 A. Yes.

5 Q. And did they say -- do you recall them telling  
6 you that they had spoken to him over a period of six to  
7 eight years?

8 A. Yes.

9 Q. And do you recall them telling you during this  
10 meeting or in other conversations that he was estranged  
11 from his sister?

12 A. I don't remember that. It doesn't mean that it  
13 wasn't or it's not in the deposition. If it is, you can  
14 show me.

15 Q. That's fine.

16 Now, do you recall anyone telling you that they  
17 thought that Dr. Kao was suffering from hallucinations?

18 A. The word "hallucinations" came up. Somebody  
19 wondered about that. I'm not sure that the word was  
20 that they thought he was suffering, but I think they  
21 wondered about it.

22 Q. Did they indicate that they were talking about  
23 visual, audio or both, hallucinations?

24 A. I don't think it was specified.

25 Q. All right. And in your discussions with them,



1 did they use the phrase "psychotic"?

2 A. Somebody used the word "psychotic" in some  
3 situation. I don't remember now what it was, whether  
4 they were attributing that word to one of the worries by  
5 one of the other people in the faculty or something  
6 else, I don't remember. I think it was the former, that  
7 one of the people in his department had wondered if he  
8 might be psychotic.

9 Q. All right. And, in fact, isn't the case that  
10 because somebody had -- because of this possibility that  
11 Dr. Kao was psychotic, that that was why you recommended  
12 Dr. Reynolds?

13 A. No. It was that there was -- even independent  
14 of that, if there's a question of a major mental  
15 disorder, I think that you are more likely to get an  
16 accurate assessment of the individual and his or her  
17 problems, and what could be done to help the person  
18 recover from them based on discussions with a a  
19 psychiatrist.

20 Q. Based on -- so is it accurate to say that based  
21 on your discussions with the University of San Francisco  
22 you referred Dr. Kao to Dr. Reynolds -- you recommended  
23 Dr. Reynolds to do a Fitness-for-Duty Examination for  
24 Dr. Kao in part at least because you thought that --  
25 you -- you concluded that there was evidence that the

1 University thought that he was psychotic?

2 MR. VARTAIN: That's ambiguous. Objection.

3 THE COURT: Sustained.

4 MR. KATZENBACH: Q. You referred Dr. -- based  
5 on the information the University gave you, did you  
6 think that they thought that he might be psychotic?

7 A. No. I think it was basically that -- the  
8 question of whether he was suffering from a psychosis or  
9 not had been brought up by somebody. I wouldn't know  
10 one way or the other.

11 Q. Based on the information that you were conveyed  
12 by the University of San Francisco, you suggested that  
13 Dr. Reynolds would be appropriate because there might be  
14 a major mental disorder?

15 A. That was one of the issues that was raised by  
16 one of the people that was complaining about it. I  
17 don't think I knew more than that, but -- I would have  
18 regarded it as being less than responsive to whatever  
19 Dr. Kao's needs may or may not have been, to have sent  
20 him to somebody whom I thought was not up to making an  
21 adequate evaluation of him. That doesn't mean finding  
22 something wrong, it can also mean finding that  
23 everything is okay.

24 Q. I'm just asking you now about the information  
25 that was given to you by the University of San Francisco

1 and how you interpreted it.

2 Did you interpret that information as  
3 indicating that the University felt that Dr. Kao was  
4 suffering from a major mental disorder?

5 A. No.

6 Q. And is the reason you recommended Dr. Reynolds  
7 was because he had experience in major mental -- in  
8 diagnosing major mental disorders?

9 A. That is true, amongst other things.

10 Q. Now, at the time you were discussing these  
11 events, discussing Dr. Kao with the University of San  
12 Francisco, were you involved in a lawsuit?

13 A. What date are we talking about?

14 Q. We are talking about May 20th, 2008.

15 A. I don't know if I was at that time or not.

16 Q. Are you familiar with the case involving an  
17 individual by the name of Blau?

18 A. Blau, yes.

19 Q. In that case, that was an issue where you had  
20 performed a Fitness-for-Duty Examination, correct?

21 A. That's true.

22 Q. And in that case, Dr. Reynolds was hired --  
23 hired to testify essentially that you performed a  
24 Fitness-for-Duty Examination in accord with all proper  
25 standards?

1           A.    I didn't know that.  I knew he was hired, but I  
2 didn't know that was the reason that he was hired.

3           Q.    Well, did you know that he was hired to testify  
4 on behalf of the entity for which you had done the  
5 Fitness-for-Duty Examination?

6           A.    I knew he was hired by the college, yes.

7           Q.    So you knew that he was hired to support the  
8 examination that you had done?

9           A.    Nobody told me what he was hired for, and I  
10 never asked them and never met him.

11          Q.    You knew he was hired by an expert for that --  
12 on your same side of the case, correct, as you were?

13          A.    I don't know who hired him.  I never talked to  
14 him.  I found the woman fit to work.  That was the end  
15 of it.

16          Q.    Were you present when he testified?

17          A.    No.

18          Q.    Do you know what he testified about?

19          A.    No.

20          Q.    You have no idea what he testified about?

21          A.    No.

22          Q.    And in that case, who was the attorney  
23 representing the college?

24          A.    I think there were a couple of -- Mr. Vartain  
25 was one.  I think there were others, but I don't know

1 who they were.

2 Q. Do you recall that that case was being tried in  
3 approximately -- going into trial in approximately  
4 December 2008?

5 A. Could have been.

6 Q. Well, let me show the witness a document and  
7 see if this refreshes his memory.

8 Your Honor.

9 THE COURT: Thank you.

10 MR. KATZENBACH: That's the only copy I have.

11 May I approach, Your Honor?

12 THE COURT: You may.

13 MR. KATZENBACH: Q. Showing you a document,  
14 it's the reporter's transcript of trial proceedings.  
15 I'll ask you to look at that.

16 Does that refresh your recollection that the  
17 case involving -- that the Blau case was being tried in  
18 December 2008?

19 A. That's what it says.

20 Q. And that's when you were testifying in that  
21 case?

22 A. Well, it would be sometime in there, because I  
23 certainly did testify in the case.

24 Q. All right. And that was when Dr. Reynolds  
25 testified in that case?

1           A.    I don't see any record of his testifying.  I  
2    see a curriculum vitae for him but that's all.  No  
3    record of his testifying.

4           Q.    Take a look at the first page.

5                    May I approach, Your Honor?

6           THE COURT:  Yes.

7           THE WITNESS:  Oh, I'm sorry, you're right.  I  
8    was looking in the wrong place.  It is there.

9           MR. KATZENBACH:  Q.  So Dr. Reynolds was also  
10   testifying?

11          A.    Yes, he did.

12          Q.    Thank you.

13                   Now, do you recall you took two depositions in  
14   this action?  Do you recall that?

15          A.    Yes.

16          Q.    Do you recall the second deposition in this  
17   action on August 23rd, 2011, do you recall me asking you  
18   about prior cases in which you and Dr. Reynolds had both  
19   testified?

20          A.    I know you did at some point.

21          Q.    Did you identify the Blau case in your  
22   testimony?

23          A.    I don't know.

24                   MR. KATZENBACH:  Your Honor, I'd like to read  
25   from his deposition of August 23, 2010.  Sorry,

1 August 23, 2011.

2 THE COURT: Go ahead.

3 MR. KATZENBACH: On page 13, beginning in line  
4 18 and continuing through line 21.

5 THE COURT: Okay.

6 MR. KATZENBACH: Q. All right.

7 "Question: First of all, regarding  
8 Dr. Reynolds, have you and Dr. Reynolds testified on the  
9 same" --"in the same case?"

10 And the answer you gave was "I don't know."

11 A. That's true.

12 Q. You didn't know that Dr. Reynolds was  
13 testifying in the Blau case; is that your testimony?

14 A. I did not know then and until now when I saw  
15 this, I didn't know it either.

16 Q. Now, in -- going back to your meetings with  
17 USF, is it correct that your advice to them was based  
18 only on what USF told you?

19 A. You mean -- you know, basically education,  
20 training, experience, the usual kinds of things we have  
21 to use. My comments to them were based on the accuracy  
22 or reliability of what it was they told me.

23 Q. Thank you.

24 Now, did you prepare any report?

25 A. Written report.

1 Q. Written report for the University of San  
2 Francisco?

3 A. No, I was never asked to.

4 Q. You were never asked to by the University?

5 A. By anybody, to prepare a report.

6 Q. All right. And -- so you never -- so it would  
7 be accurate to say that you never -- strike that.

8 Did you take any notes, any written notes of  
9 your conversations with the University of San Francisco?

10 A. No.

11 Q. So do we have any document, either report or  
12 notes, indicating how you applied the ten questions that  
13 you testified about earlier today?

14 MR. VARTAIN: Objection. Vague.

15 Do you mean do you have it, Mr. Katzenbach, or  
16 does he?

17 THE COURT: Sustained.

18 MR. KATZENBACH: Q. Did you prepare any report  
19 explaining how these ten questions applied -- that you  
20 testified about applied to Dr. Kao's case?

21 MR. VARTAIN: Objection. Asked and answered  
22 twice.

23 THE COURT: Overruled.

24 MR. VARTAIN: He said -- excuse me, Your Honor.

25 MR. KATZENBACH: Q. You can answer.



1           A.    I did not and never would because I never  
2 evaluated Dr. Kao.

3           Q.    All right.  Now, did you tell the University of  
4 San Francisco to tell Reynolds that bumping into anyone  
5 by Dr. Kao would constitute a battery?

6           A.    I don't think I've ever told anybody that.  I  
7 do think there is a difference between assault and  
8 battery.  And assault is a threat, like raising your  
9 fists or putting your fists or finger on somebody with  
10 the result being the creation of fear.  That's the  
11 standard for battery, where you actually whack them.

12          Q.    The question is:  Did you tell anyone at the  
13 University of San Francisco to inform Dr. Reynolds about  
14 Dr. Kao's bumping and it might constitute a battery?

15          A.    No, not to tell them -- no, not to have them  
16 tell him.

17          Q.    Did you ever tell anyone at the University of  
18 San Francisco that they were only to convey information  
19 about bumping verbally to Reynolds?

20          A.    I don't think so.  I don't know why I would  
21 ever say that.

22          Q.    Just did you or didn't you?

23          A.    That's not the kind of thing I would say to  
24 somebody.  The first part is the distinction between an  
25 assault and a battery but not the second part.

1 Q. Now, finally, I'd like to talk a little bit  
2 about Fitness-for-Duty Examinations.

3 What limits are there on them traditionally?

4 MR. VARTAIN: Ambiguous.

5 THE COURT: Sustained.

6 MR. KATZENBACH: Q. Other than just the amount  
7 of time the doctor takes, what limits are there as to  
8 the amount of material that the doctor can ask for and  
9 use?

10 MR. VARTAIN: Objection. Lacks foundation.  
11 Ambiguous.

12 THE COURT: Overruled. The witness can answer,  
13 if he knows the answer.

14 THE WITNESS: The only thing I know about  
15 materials are that the evaluator can at least  
16 occasionally request medical and psychiatric records and  
17 employment records, but they have to be returned after  
18 everything is over. They can't be directly cited in the  
19 course of an evaluation, but they can be relied on in  
20 helping the evaluator form his or her opinion.

21 MR. KATZENBACH: Q. Did you understand that  
22 Dr. Reynolds in performing this Fitness-for-Duty  
23 Evaluation for Dr. Kao, whether there were going to be  
24 any limits on the amount of material that he could look  
25 at or request?

1 MR. VARTAIN: Argumentative. Lacks foundation.  
2 Ambiguous.

3 THE COURT: Overruled. The witness can answer.

4 THE WITNESS: I have no idea. My -- what I did  
5 was limit it by informing the people at the University  
6 that I thought he would do an adequate, accurate,  
7 reliable and professional evaluation that they and Dr.  
8 Kao could rely on.

9 MR. KATZENBACH: Q. When you do a  
10 Fitness-for-Duty Evaluation, do you seek out all medical  
11 records from an employee?

12 A. No.

13 Q. Do you seek out all psychiatric records?

14 A. No. As long as you have the word "all" in  
15 there, the answer is no.

16 Q. Did you make an effort to find many psychiatric  
17 records?

18 A. It would depend on when it was that I was  
19 asking for them. If something has come up in the course  
20 of an evaluation where I would regard the records as  
21 important, then I would ask for them.

22 Q. All right.

23 A. If it was a question of things beforehand, I  
24 usually wouldn't ask at all.

25 Q. All right. And would it be accurate to say

1 that the assessment of whether or not particular records  
2 are going to be asked for, that was in Dr. Reynolds'  
3 hands?

4 A. It would have been -- he would have been the  
5 conductor of the evaluation.

6 Q. So if he felt anything was -- whatever he felt  
7 was necessary that was what the doctor would want?

8 A. Well, I don't know. I mean, this was not as if  
9 I had called Dr. Reynolds and outlined the parameters  
10 for the evaluation. I left that to the University.

11 Q. Do you recall in your deposition I asked you  
12 whether there would be any limits on the scope of that  
13 examination by Dr. Reynolds?

14 A. No, I don't.

15 Q. Do you recall that you responded --

16 MR. KATZENBACH: Your Honor, I'd like to read  
17 at this point from page 103, lines 13 through 22, of his  
18 deposition on September 9, 2010?

19 MR. VARTAIN: Would you give me the page again?

20 MR. KATZENBACH: 103 starting at line 13.

21 MR. VARTAIN: And going to where? Because the  
22 last time you read it, it didn't actually say what you  
23 said it said, so I want a chance to read it this time.

24 MR. KATZENBACH: Going to line 22.

25 THE COURT: Which page?

1 MR. KATZENBACH: 103.

2 MR. VARTAIN: May I have an opportunity to read  
3 it before Counsel reads it out loud, Your Honor?

4 MR. KATZENBACH: Starting at line 13.

5 MR. VARTAIN: I don't have a problem if he  
6 reads it, as long as he reads all of it.

7 THE COURT: Where do you propose to end of the  
8 reading?

9 MR. KATZENBACH: Line 22.

10 THE COURT: Okay. Go ahead.

11 MR. KATZENBACH: "Question: Were there any  
12 limits on the scope of that examination?

13 "Answer: I think principally time would have  
14 been the biggest one with all of this. One of the  
15 reasons for suggesting Dr. Reynolds is I believe him to  
16 be thorough and, as I mentioned, organized in his  
17 approach to an assessment. It depends on what comes up  
18 in the course of an evaluation in the work, medical or  
19 psychiatric records, if anything."

20 Q. Now, I'd like to direct your attention, if you  
21 would, back to your testimony -- well, before I go  
22 there, was this examination by Dr. Reynolds to be an  
23 assessment of Dr. Kao's risk of violence?

24 A. I expect that would have been a portion of it.

25 Q. Why wasn't it limited to -- I'm sorry, when

1 your understanding of this, was it limited to an  
2 assessment of Dr. Kao's propensity for violence?

3 A. My assessment of it was that it was more  
4 complex than that and far reaching than that. Violence  
5 was one aspect. It was perhaps the most urgent aspect  
6 of it but involved with that was his ability effectively  
7 to function as a faculty member at the University of San  
8 Francisco.

9 Q. And when you say --

10 A. That involves students, other faculty,  
11 administration, staff, all of those.

12 Q. Now, you described this examination that you  
13 attended with Dr. Reynolds that it impressed you about  
14 Dr. Reynolds' thoroughness.

15 Do you recall that testimony?

16 A. Very much so.

17 Q. That examination that you observed lasted, I  
18 believe, two hours?

19 A. I thought it was two hours. I think it started  
20 around maybe 4:00 in the afternoon and was over around  
21 6:00. It took place in Sunnyvale.

22 Q. Thank you.

23 Now, finally, what -- are you aware of any  
24 legal limitations -- you testified earlier about the  
25 employer's right to demand a Fitness-for-Duty

1 Examination. Are you worried about -- are you aware of  
2 any legal limitations on an employer's right to demand a  
3 Fitness-for-Duty Examination?

4 A. Legal limitations on their rights? Not  
5 specifically.

6 Q. Are you familiar with any limitations on their  
7 rights under the Americans with Disabilities Act?

8 A. Now, we're talking about the employer or the  
9 employee?

10 Q. The employer's right to demand an  
11 examination -- a Fitness-for-Duty Examination.

12 A. Well, I know I understand the circumstances the  
13 employer has the right to require or request an exam. I  
14 don't think I know all of them.

15 Q. My question, I think, was are you aware of any  
16 limitations on the employer's rights?

17 MR. VARTAIN: I am going to object. You're  
18 asking the witness to opine on the law.

19 MR. KATZENBACH: Your Honor, he is qualified as  
20 an expert on Fitness-for-Duty Examinations. I would  
21 assume that he would know what legal limitations there  
22 are around them.

23 THE COURT: Mr. Katzenbach, you can ask part of  
24 it. Overruled.

25 MR. KATZENBACH: I'm sorry, Your Honor.

1 Q. Are you aware of any legal limitations in the  
2 ADA, the Americans with Disabilities Act, as to the  
3 employer's ability to demand a Fitness-for-Duty  
4 Examination?

5 A. Not specifically, no.

6 Q. Are you aware of any legal limitations in the  
7 California Fair Employment and Housing Act as to the  
8 employer's -- that limits the employer's ability to  
9 demand a Fitness-for-Duty Examination?

10 A. Certainly not to the extent that an employment  
11 law lawyer would know.

12 Q. Well, that's why I put the word "any" in there.

13 A. I understand that.

14 Q. So the answer is not to the extent the  
15 employment lawyer might know but what do you know?

16 A. As I said, not to the extent that anyone else  
17 would know who does this professionally.

18 Q. Well, what limit -- are you aware of -- in your  
19 practice, are you aware of any limits imposed on the  
20 ability of an employer to demand a Fitness-for-Duty  
21 Examination under the Fair Employment -- any limits  
22 under the Fair Employment and Housing Act?

23 A. Not specifically.

24 MR. KATZENBACH: That's all I have, Your Honor.

25 THE COURT: Mr. Vartain, have you more direct?



1 MR. VARTAIN: May I remain seated for the  
2 limited amount of redirect, Your Honor?

3 THE COURT: Sure.

4  
5 REDIRECT EXAMINATION BY MR. VARTAIN

6 MR. VARTAIN: Q. Dr. Missett, you don't  
7 function as the employer making the decision when to --  
8 or if to send their employee to the Fitness-for-Duty  
9 Evaluation; is that correct?

10 A. That's true.

11 Q. You are on the receiving end of the assignment  
12 typically, correct?

13 A. It's usually a request for an assignment.

14 Q. Does the -- when you are requested by an  
15 employer to do a Fitness-for-Duty Evaluation of an  
16 employee, do you typically get some information from the  
17 employer in writing as to the behaviors causing the  
18 employer the concern?

19 A. About half the time yes and half the time no.  
20 And that's independent of the size or the nature of the  
21 work conducted by the employer and the location. So  
22 it's half the time yes; half the time no. When it's not  
23 written, it's communicated verbally.

24 Q. Could you please look at Exhibit 36, and in  
25 particular the attachment to 36 which was that Norman

1 Reynolds Consent Form No. 1.

2 Mr. Katzenbach asked you a few questions about  
3 this.

4 A. What's the exhibit, 36?

5 Q. I'm sorry. 36, second page, page 249.

6 JUROR: (1) Isn't that No. 38?

7 MR. VARTAIN: Juror is right on. Thank you.

8 You have it from before, right? Yes. We got  
9 turned around on our numbers. There goes my fee for  
10 today.

11 JUROR: (1) Just leave it to me.

12 MR. VARTAIN: Leave it to you?

13 JUROR: (1) Yeah.

14 MR. VARTAIN: As I said, you are going to get  
15 shit for this. Thirty-eight.

16 Q. That's why I was confusing you, Doctor, when I  
17 said the consent form.

18 Did I hear you correctly, this is a consent  
19 form that regulates what or what not Dr. Reynolds can  
20 release to other parties, mainly the University of San  
21 Francisco?

22 A. This is a consent form -- it's principally a  
23 consent form for Dr. Reynolds to conduct the  
24 examination. And, again, it specifies what things he  
25 may -- either he determines to and the person having the

1 exam agrees to be conducted in the course of the  
2 assessment.

3 Q. And then it determines what he's -- what kind  
4 of -- what he's authorized by -- for example, Dr. Kao,  
5 if he had gone, what Dr. Kao has agreed to let the  
6 University of San Francisco, namely, fit or not fit and  
7 any limitations on fitness, correct?

8 A. That's correct.

9 Q. Is it true that there are separate kinds of  
10 consent forms from this document that doctors, such as  
11 you or Dr. Reynolds, use when you are acquiring medical  
12 records from another entity?

13 A. Oh, yes, very much so.

14 Q. And is that what you meant when you said to  
15 Mr. Katzenbach that this is not the form that  
16 Dr. Reynolds would use if he was going to, like, send to  
17 Dr. Terr, to ask Dr. Terr for her records on Dr. Kao,  
18 correct?

19 A. That's absolutely right. I have would have to,  
20 or Dr. Reynolds would have to, any of us would have to  
21 contact the holder of the records and ask them for a  
22 release to release the records.

23 Q. And have Dr. Kao, in this case, sign --

24 A. Then we'd have to give it to Dr. Kao and we  
25 have to make certain that Dr. Kao understands it when he

1 signs it. And we have to go over with him any  
2 limitations on the records, and then we can send it off.  
3 And it depends on who you are dealing with on that.  
4 Some people are like iron fortresses and others are open  
5 seas.

6 Q. Did I hear you correctly, Dr. Missett, when  
7 Mr. Katzenbach was asking you about all that different  
8 kind of medical workup that was listed in the consent  
9 form, as perhaps Dr. Reynolds would ask of Dr. Kao, did  
10 I hear you say those are the kinds of things that are  
11 typically or frequently done by you and others when  
12 you're doing a psychiatric Fitness-for-Duty Evaluation?

13 A. It is not uncommon to do most if not all of the  
14 types of assessment that Dr. Reynolds was indicating in  
15 this release he was making available to Dr. Kao. This  
16 is what we do.

17 And the problem is if we don't do this, then  
18 we're doing a less than adequate and thorough exam, and  
19 the person may get short changed. And if we do do that,  
20 then we have to be careful we don't overstep the  
21 boundaries of what would be appropriate for the kind of  
22 exam we're being asked to do.

23 Q. When -- do you remember in your meeting with  
24 Martha Peugh-Wade at the University of San Francisco any  
25 discussion of a student mutiny?

1 A. I don't.

2 Q. Do you remember asking the University about  
3 student complaints of a safety nature and them  
4 indicating they didn't have complaints of a safety  
5 nature, it was principally the administrators and  
6 faculty?

7 A. Yes. I did ask for that and she did tell me  
8 that.

9 MR. VARTAIN: No further questions.

10 THE COURT: Mr. Katzenbach, do you have further  
11 questions?

12 MR. KATZENBACH: Just one, two.

13 THE COURT: And the jurors, will you have  
14 questions?

15 Okay. So we'll take our usual break.

16 Ladies and gentlemen, remember the admonitions.  
17 Do not form or express any opinion on this case until  
18 it's finally submitted to you for your decision. Do not  
19 discuss among yourselves or with others until that time.  
20 Please be back in your place at 2:40 according to the  
21 courtroom clock.

22 (Recess taken.)

23 THE COURT: Jurors and alternates are all  
24 present. Counsel from both sides are present.  
25 Plaintiff is personally present. Dr. Missett is on the

1 stand.

2 And Mr. Katzenbach, you have some questions.

3 MR. VARTAIN: Your Honor, we have one exhibit  
4 to offer by agreement, 258, the biography and list of  
5 articles and lectures of Dr. Missett offered into  
6 evidence.

7 THE COURT: Did you say 68?

8 MR. VARTAIN: 268, Your Honor.

9 THE COURT: 268?

10 MR. VARTAIN: I'm sorry, 258. I apologize.  
11 258.

12 THE COURT: Admitted into evidence by  
13 stipulation.

14 MR. VARTAIN: Thank you, Your Honor.

15 (Whereupon, Plaintiff's Exhibit 258 was  
16 admitted into evidence.)

17 THE COURT: Mr. Katzenbach, do you have a  
18 question?

19 MR. KATZENBACH: Yes, I just have a few  
20 questions.

21

22 RE-CROSS-EXAMINATION BY MR. KATZENBACH

23 MR. KATZENBACH: Q. Was it your understanding  
24 that in order to obtain medical information about Dr.  
25 Kao for purposes of this Fitness-for-Duty Examination,

1 that Dr. Kao would then need to sign yet further  
2 authorizations for release of medical information?

3 A. Yes. If the original records were requested,  
4 Dr. Kao would be asked to get permission for that.

5 Q. And that would be part of the normal  
6 Fitness-for-Duty Evaluation?

7 A. Yes. Depending on what the question is and  
8 what the issues are, yes.

9 Q. All right. And finally, the document that you  
10 just -- that was just introduced into evidence as your  
11 curriculum vitae as Exhibit 258, could you take a look  
12 at that?

13 A. Okay.

14 Q. Would you take -- does that include a list of  
15 your publications? I'm particularly looking at page 8,  
16 if that will help you.

17 Do you have that in front of you?

18 A. I do see it in front of me.

19 Q. Is that a list of your publications on page 8  
20 of your curriculum vitae?

21 A. The ones that were available to the public; the  
22 other ones are kept by the government. But aside from  
23 that, the answer is yes.

24 Q. All right. Are any of these publications in  
25 any journal of psychology or psychiatry?

1           A.    No.  Two encyclopedia articles, one medical  
2 education journal, and the other would be General  
3 History of Medicine articles.

4           Q.    Any books that you wrote?

5           A.    No.

6           MR. KATZENBACH:  That's all I have, Your Honor.

7           THE COURT:  Mr. Vartain.

8  
9                    FURTHER REDIRECT EXAMINATION BY MR. VARTAIN

10           MR. VARTAIN:  Q.  Dr. Missett, what is the  
11 frequency that a Fitness-for-Duty Psychiatric  
12 Evaluation, at least when you performed them, will last  
13 a full day, a full workday for the person being  
14 evaluated?

15           A.    It's not uncommon at all.  It takes about three  
16 to four hours to do a history or an adequate history,  
17 and -- if you are giving them a break for five or ten  
18 minutes every hour, and then an hour for lunch.  And if  
19 you are giving any psychological tests, it's three to  
20 four hours at least for that.  Whether the individual --  
21 the doctor himself or herself is giving -- administering  
22 the tests or there's a psychologist who is doing it.

23           MR. VARTAIN:  Your Honor, may I distribute to  
24 the jury -- for those ladies and gentlemen of the jury  
25 who may be interested, just leave copies of



1 Dr. Missett's biography and his lectures and so on, that  
2 is 258 that we just received?

3 THE COURT: Any objection?

4 MR. KATZENBACH: No, of course not.

5 THE COURT: The answer is yes.

6 MR. VARTAIN: Then I have no further questions.

7 I'll just leave them here for anybody who would  
8 like them.

9 THE COURT: Jurors, do you have any of your  
10 questions for Dr. Missett?

11 Yes.

12 (Discussion off the record and out of the  
13 presence of the jury.)

14 THE COURT: Dr. Missett, we have some questions  
15 from the jurors.

16 As an expert in Fitness-for-Duty Evaluation --

17 THE REPORTER: Your Honor, I'm sorry, I can't  
18 hear you. You're turned away. Sorry. Thank you.

19 THE COURT: As an expert in Fitness-for-Duty  
20 Evaluation with a background in philosophy and ethics,  
21 if an individual undergoes such an evaluation and  
22 receives an unfit for duty diagnosis, is that individual  
23 or their employer obliged to share these results with  
24 future prospective employers?

25 THE WITNESS: No.

1           THE COURT: Is it fair to characterize a  
2 Fitness-for-Duty Examination as a, quote, "stress test,"  
3 close quote?

4           THE WITNESS: It shouldn't be a stress test.  
5 Sometimes it's unavoidable but it shouldn't be.

6           THE COURT: Is there harm in sending a  
7 depressed person to undergo a Fitness-for-Duty  
8 Evaluation?

9           THE WITNESS: I think "risk" would be a more  
10 accurate term than "harm." There's always a risk that  
11 an individual who, say, is depressed might be more  
12 depressed at the very fact of having to go or the --  
13 what they regard as a risk to their future or profession  
14 or their livelihood. It's a little different from  
15 actual harm.

16          THE COURT: Can a person refuse to provide  
17 information to the independent medical provider?

18          THE WITNESS: Yes, they can, and it's then up  
19 to the evaluator to determine whether that information  
20 that he or she knows is not being responded to is  
21 important or not. A lot of times it's not.

22          THE COURT: I'm reading the question to you.  
23 Can you direct your answers to the jury rather than to  
24 me.

25          THE WITNESS: I'm sorry.

1           A lot of times it's not.

2           THE COURT: Is there any information that is  
3 exempt from or protected from disclosure by the  
4 independent medical evaluator as part of the  
5 Fitness-for-Duty Evaluation?

6           THE WITNESS: Any information that would not  
7 bear directly on that person's ability to perform the  
8 responsibilities of the job could be considered to be  
9 beyond the bounds. You know, for instance, sexual  
10 activity, drinking activity, if it doesn't have anything  
11 to do with work, it's only something that takes place in  
12 social situations. Childhood activities, things that  
13 went on a long time ago. All of those, I think, would  
14 be beyond the pale unless somebody were able to show  
15 some kind of relationship to what was the -- what the  
16 person does, and that's why one of the things that's  
17 asked for is a job description: What is this person's  
18 job.

19           THE COURT: What would constitute a functional  
20 limitation with regards to a person being found, quote,  
21 "fit for duty," close quote, with functional  
22 limitations?

23           THE WITNESS: A functional limitation -- an  
24 example of it might be an individual who reports that he  
25 or she is unable to, say, teach a class for more than

1 four hours a day.

2 Well, even though in the ordinary course of  
3 what goes on in a given school or college, the average  
4 person may do six to eight hours a day. If their  
5 experience is that it's four hours a day maximum and  
6 after that they're not fit to think or relate to other  
7 people, that's -- that's a reasonable thing to bring up  
8 with the employer and to ask for an accommodation of  
9 some sort.

10 THE COURT: After an FFD Evaluation has been  
11 done, in the case of potential violence, does the IP  
12 make a risk assessment to him or herself of the  
13 probability of a violent outburst? And the other  
14 question is: Does the employer get that information?

15 THE WITNESS: The answer is yes to both counts.  
16 If the evaluator makes an assessment that he or she is  
17 able to document that in his or her opinion that  
18 individual poses a -- it's usually not just a risk but a  
19 substantial risk of physical harm to others, especially  
20 in the workplace or in connection with the workplace,  
21 namely their families, who they associate with, then  
22 that person has an obligation to disclose that to the  
23 employer. At the same time, they've got to weigh the  
24 basis for the opinion that they have.

25 Not to do so would create a problem that they

1 have a -- really all of it -- especially therapists.  
2 Therapists is the word that's specified, but it really  
3 regards mental health professionals and such, have an  
4 affirmative duty if they form a reasonable conclusion  
5 that a person poses an imminent risk of physical harm to  
6 another to warn that other person.

7 The other person may be different from the  
8 employer, but ordinarily the employer is responsible for  
9 what goes on in the workplace.

10 THE COURT: At what probability, open  
11 parentheses, (percentage number) close parentheses, does  
12 the IP relay a, quote, "unfit for duty," close quote,  
13 recommendation?

14 THE WITNESS: I'm sorry, would you repeat that?

15 THE COURT: Sure. At what probability, open  
16 parenthetical (percentage number) close parens, does the  
17 IP relay, quote, "an unfit for duty," close quote,  
18 recommendation?

19 THE WITNESS: I don't know that I can say it in  
20 terms of percentages. The -- I think the safer thing  
21 and the more accurate thing is to say that it's based,  
22 like most other medical decisions, on something that is  
23 demonstrable. Namely, it has to have been a statement  
24 that was made, a test result that was acquired, a  
25 comment, something that you can put your finger on, as

1 it were.

2 Like evidence of a psychosis would be one;  
3 evidence in other areas of a lack of impulse control; a  
4 history of violence; physical violence in any situation,  
5 let's say more than minor or that's occurred after  
6 adolescence, all of those things I think would put the  
7 evaluator in a situation where he or she, I think, is  
8 pretty much required if you are going to follow the  
9 Tarasoff rules to protect. It's not just to warn but to  
10 actually protect the individuals he or she sees as  
11 threatened. And that's even if they're wrong in their  
12 assessment.

13 THE COURT: The next question is pretty long.  
14 I'll read it and then hand it to you so you can have a  
15 look at it, help you understand.

16 In the case of perceived possibility of  
17 violence, wouldn't an IP always recommend an unfit for  
18 duty assessment, as it would cover the IP from making a  
19 wrong assessment? In other words, by allowing that  
20 someone is fit for duty and that person then becomes  
21 violent, doesn't that IP either look bad or is subject  
22 to a lawsuit, loss of reputation, et cetera?

23 THE WITNESS: I think there is always a risk in  
24 doing Fitness-for-Duty Evaluations that someone may get  
25 sued. That just goes with the territory. And it makes

1 sense because jobs are important to us, every one of us.  
2 And it's not just money, it's the way we think of  
3 ourselves, the way we handle ourselves, the way others  
4 think of us. And all of us we work overtime to try to  
5 present ourselves to other people as normal.

6 And so to be found, as it is were publicly, to  
7 be not normal, in other words, not able to do our job,  
8 thinking in a different or strange way, is something  
9 that would be terribly embarrassing for any of us.

10 And if it's our belief -- suppose I were the  
11 one that somebody made that assessment of, and I was  
12 convinced that this other person was wrong, the  
13 evaluator was wrong, or that my employer had really no  
14 grounds on which to refer me, they were just basically  
15 retaliating for something that I had said or done or  
16 would have been mean or something, I think I might think  
17 of a lawsuit.

18 I mean, basically you don't do that to me and  
19 get away it, and I may have grounds for doing that. And  
20 that means if you are the doctor on the other side,  
21 whether you are the one doing the Fitness-for-Duty  
22 Evaluation, it is one of the reasons to stick to the  
23 rules and make sure that you don't say more than is  
24 required, and at the same time you don't do less than  
25 your best to give the employer the benefits of whatever

1 assessments you can make.

2 But the fact is it is a risky business, this  
3 assessment for duty thing. And I think properly so.  
4 It's really important to the person being evaluated, and  
5 if the professional has his or her wits about them, they  
6 will recognize that it ought to be important to them,  
7 too.

8 THE COURT: Okay.

9 THE WITNESS: Thank you.

10 THE COURT: May I have the question back.  
11 Thank you.

12 Mr. Vartain, do you have any follow-up  
13 questions for Dr. Missett?

14 MR. VARTAIN: Q. I think there was one  
15 question that the jury had that wasn't answered, because  
16 I don't think it was read or interpreted correctly, so  
17 I'm going to take a stab at asking this question,  
18 because I think one of the jurors intended to or somehow  
19 wrote it, and I think it was for Dr. Missett to give in  
20 his professional experience or even in his own career,  
21 is there some way you can say the percentage that -- you  
22 have done, what, 500 Fitness-for-Duty Evaluations,  
23 Dr. Missett?

24 A. At least.

25 Q. Would you mind saying in your practice what the



1 percentages might be if you've kept track of them where  
2 the person is found fit, the percentage of the person is  
3 found not fit, and then thirdly the person is found fit  
4 with functional limitations?

5 Was that somebody's question?

6 JUROR: That was basically where I was going  
7 with it. And, yeah, it did go off on a different --

8 THE COURT: The rules say there can't be direct  
9 questioning by jurors unless --

10 MR. VARTAIN: I caused that problem. I  
11 apologize.

12 But that's my question of you, Dr. Missett.

13 If I may, Your Honor?

14 THE COURT: Okay. Any further follow-up  
15 questions?

16 MR. VARTAIN: No, that was my question of  
17 Dr. Missett, was could he answer that question as to  
18 percentages in his own practice?

19 THE COURT: Dr. Missett, can you give your best  
20 shot at answering?

21 THE WITNESS: I could, yes. I think the best  
22 way to think of it is three, two, one, that if it  
23 were -- it's about 600, I think, evaluations, that I've  
24 done all together, and about half of them the person was  
25 found fit, just the person went back to work.

1           About two out of that six -- so that's going to  
2 be about 200, the total, they would have gone back but  
3 with accommodations of one sort or another. Didn't have  
4 to go to work as early, weren't required to stay as  
5 late, needed help on certain areas, or whatever.

6           And then about 15 percent or so I would have  
7 found them fit.

8           MR. VARTAIN: Q. In the fitness, unfitness  
9 finding, that's unfitness for the position or job the  
10 person is doing? That's not necessarily unfitness for  
11 employment as a whole, am I correct?

12          A. It's -- any kind of Fitness-for-Duty  
13 Evaluation, except for those performed for Social  
14 Security Administration, are for the specific job that  
15 person does. Just as a matter of their daily life right  
16 now. In those evaluations, you can have accommodations  
17 and you can make suggestions.

18          For the Social Security Administration, if  
19 you're doing an assessment, unless the doctor finds that  
20 person totally unable to work at any kind of job  
21 whatsoever, Social Security will find a way to keep him  
22 working. So basically you're saying that they're fit.

23          MR. VARTAIN: Thank you.

24          THE COURT: Mr. Katzenbach, any follow-up  
25 questions?

1 MR. KATZENBACH: Just for my clarification.

2 Q. When you indicated you are basing your  
3 percentages on 600 evaluations, were those 600  
4 evaluations including or excluding Social Security  
5 evaluations?

6 A. No. I very rarely do Social Security  
7 examinations unless there's an unusual reason for it.

8 MR. KATZENBACH: I just wanted to clarify that.  
9 And, no, I don't have anything else.

10 THE COURT: Mr. Vartain, do you have anything  
11 else?

12 MR. VARTAIN: Nothing further.

13 THE COURT: May Dr. Missett be excused?

14 MR. VARTAIN: He may.

15 MR. KATZENBACH: He may, Your Honor.

16 THE COURT: Thank you, Dr. Missett, you are  
17 free to go, sir.

18 THE WITNESS: Thank you.

19 THE COURT: All right. Who is next?

20 MR. VARTAIN: Well, I think Dr. Turpin is here.

21 I don't know if you want to do the first  
22 examination, I think, Chris; is that true?

23 MR. KATZENBACH: Yes.

24 MR. VARTAIN: Then that's fine with me.

25 MR. KATZENBACH: Plaintiffs will call

1 Dr. Jennifer Turpin.

2 THE COURT: Okay.

3 THE CLERK: Please raise your hand.

4  
5 JENNIFER E. TURPIN,

6 having been called under Evidence Code 776

7 was duly sworn, testified as follows:

8  
9 THE WITNESS: Yes, I do.

10 THE CLERK: Please be seated.

11 State your name and spell it for the record.

12 THE WITNESS: My name is Jennifer E. Turpin,

13 T-U-R-P-I-N.

14 MR. KATZENBACH: Thank you.

15 THE COURT: Mr. Katzenbach, you may inquire.

16  
17 DIRECT EXAMINATION BY MR. KATZENBACH

18 MR. KATZENBACH: Q. Thank you.

19 Dr. Turpin, you currently have a position at  
20 the University of San Francisco?

21 A. Yes, I do.

22 Q. What's that position?

23 A. I'm the Provost and Academic Vice President.

24 Q. And how long have you had that position?

25 A. Since June 1st of 2010.

1 Q. All right. Now, do you prefer being addressed  
2 as Provost Turpin, Dr. Turpin or Former Dean Turpin?

3 A. Most people call me Jenny, but Dr. Turpin is  
4 fine. Whatever.

5 Q. All right. That's fine.

6 Dr. Turpin, would you please take a look at  
7 what's been previously marked as Exhibits 83 and 84.

8 A. Sir, are these marked by the tabs?

9 Q. Yes, they are.

10 Do you have those exhibits in front of you?

11 A. Yes, 83 through?

12 Q. Eighty-three and 84?

13 A. Eighty-three and 84. Yes, I do.

14 Q. Okay. Taking a look at Exhibit 83, can you  
15 tell me what that is?

16 A. Eighty-three is a memo that I wrote to myself  
17 regarding an encounter that I had with John Kao.

18 Q. Is this an e-mail?

19 A. Yes, it is.

20 Q. And can you tell me what Exhibit 84 is?

21 A. Pardon me. 84 is an e-mail that I sent to  
22 Martha Peugh-Wade regarding that same experience.

23 Q. Is that a forward of an earlier e-mail?

24 A. It is a forward of an e-mail, yes.

25 Q. And it's a forward of an e-mail that is similar

1 to Exhibit 83?

2 A. Yes.

3 MR. KATZENBACH: Your Honor, at this point I'd  
4 like to move Exhibits 83 and 84 into evidence?

5 THE COURT: Any objection?

6 MR. VARTAIN: No objection.

7 THE COURT: They're received.

8 (Whereupon, Exhibits 83 and 84 received into  
9 evidence.)

10 MR. KATZENBACH: Your Honor, I have copies of  
11 Exhibit 83 and 84 I'd like to distribute to the jury for  
12 purposes of this examination. May I do so?

13 THE COURT: Okay with me.

14 I trust there is no objection? I hear none.

15 MR. VARTAIN: No objection, Your Honor.

16 MR. KATZENBACH: Q. Now, taking a -- just so  
17 that -- take a look at Exhibit-- now, if you will take a  
18 look at these two exhibits, both the Exhibit 83 and  
19 Exhibit 84, if you would.

20 Now, I'd like to begin with what we have here,  
21 just so that the jury understands. What I am -- as I  
22 face it, the one I'm pointing to which is to my left  
23 side as I face it, that's Exhibit 84; is that correct?

24 MR. VARTAIN: Hold it. Who are you asking the  
25 question of?

1 MR. KATZENBACH: I'm sorry, asking the question  
2 of her.

3 MR. VARTAIN: Then address her, please.

4 MR. KATZENBACH: I'm sorry, Mr. Vartain.

5 MR. VARTAIN: You're looking at me.

6 MR. KATZENBACH: I'm actually looking at this.

7 Q. The one that is to the left, as the jurors are  
8 facing it, that's Exhibit 84?

9 A. That's correct.

10 Q. And the one on the right, that's Exhibit 83?

11 A. Yes.

12 Q. Exhibit 84 appears to be a forwarded copy of  
13 Exhibit 83?

14 A. It's a forwarded copy, but it's not an  
15 identical copy.

16 Q. Let's just look at this.

17 Now, on the date line for Exhibit 84, it  
18 contains the date of Wednesday 23 April 2008, 8:58 --  
19 8:58:39; is that correct?

20 A. Yes.

21 Q. And that's exactly the same date up here on the  
22 date line of Exhibit 83?

23 A. Yes, it is.

24 Q. In fact, however, these two e-mails have  
25 different language, don't they?

1 A. They have some different language, yes.

2 Q. Well, let's just take a look at some of the  
3 differences.

4 In these exhibits in the initial -- strike.

5 Was Exhibit 83 written by you on or about  
6 April -- on or about April 23rd?

7 A. Yes.

8 Q. And Exhibit 23, you indicated -- Exhibit 84 has  
9 some modified language?

10 A. Yes.

11 Q. Did you modify that language when you forwarded  
12 it?

13 A. I can't be certain but I do sometimes edit  
14 e-mail memoranda to myself.

15 Q. Well, this is -- did you edit it -- do you  
16 recall when you edited this e-mail?

17 A. No.

18 Q. All right. So in exhibit -- in Exhibit 83, you  
19 described Dr. Kao as saying -- saying "Spoke, said  
20 loudly: Fine. Fine. How is your family? How are your  
21 children?"

22 Do you see that language?

23 A. Yes, I do.

24 Q. But in the later one you edited it to say --  
25 edited it to say "He shouted: Fine. Fine. How is your



1 family? How are your children?

2 When did you add the word -- change the word  
3 "spoke loudly" to "shouted"?

4 A. I can't be certain.

5 Q. In the edited e-mail -- sorry, in -- in -- in  
6 Exhibit 83 you --

7 MR. VARTAIN: You want the witness to see it on  
8 the screen, because I don't think she can?

9 MR. KATZENBACH: I'm sorry. The witness also  
10 has the two documents in front of her.

11 MR. VARTAIN: Okay.

12 MR. KATZENBACH: And she can certainly --

13 THE WITNESS: I can scoot over.

14 MR. KATZENBACH: I'm just trying to get -- if  
15 she can't see anything --

16 MR. VARTAIN: I just want to know, do you want  
17 her to follow you on the screen?

18 MR. KATZENBACH: I just want her to look and  
19 see where -- where I'm addressing matters. She can look  
20 at the screen or if she has a question, she can raise it  
21 with me. That's fine.

22 Q. Now, taking a look at Exhibit -- taking a look  
23 at Exhibit -- taking a look at the second page of  
24 Exhibit 83, looking down four lines from the top, you  
25 used the phrase on Exhibit 83 "Hovering over my head."

1 Do you see that?

2 A. Yes.

3 Q. And in Exhibit 84 you changed that phrase to  
4 "Hovering over my back"?

5 A. Yes.

6 Q. All right. And in Exhibit 83, you make the  
7 statement "The whole incident felt as if he was about to  
8 snap and about to hit me," and in Exhibit 84 you changed  
9 that phrase to "It felt as if he was about to snap and  
10 to hit me," correct?

11 A. I'm sorry, can you give me just one second, I  
12 didn't follow where you were.

13 Q. I'm sorry.

14 After the "Hovering over on my back" or the  
15 "Hovering over my head" statement, on Exhibit 83, it  
16 continues "The whole incident felt," and on Exhibit 84  
17 you changed the phrase "The whole incident felt" to "it  
18 felt"; isn't that right?

19 A. Yes.

20 Q. Now, looking again at these two exhibits, both  
21 of them begin with the line stating "Yesterday, Tuesday,  
22 April 24th, 2008," you were really referring to Tuesday,  
23 April 23rd, 2008, correct?

24 A. I was really referring to Tuesday, April 22nd,  
25 and I made a typographical error and called it the 24th.

1 Q. Do you happen to know -- now the --  
2 Exhibit 23 -- I'm sorry, Exhibit -- sorry, Exhibit 84  
3 that was forwarded to Ms. Peugh-Wade on what date?

4 It's hard to see from the copies, I know.

5 A. I believe this says Thursday, June 26th.

6 Q. Thursday, June 26th. Do you happen to know  
7 what the Tuesday closest to June 26th in June 2008 was?

8 A. I think I could derive that.

9 Q. That would be the 24th, wouldn't it?

10 A. Yes.

11 Q. Now, the incident that's described in this --  
12 these two e-mails, did this incident with Dr. Kao take  
13 place in the parking lot?

14 A. It was on the way to the parking lot. There is  
15 a sidewalk that leads directly into the parking lot and  
16 it was on my way to the parking lot.

17 Q. At any time was Dr. Kao in the parking lot?

18 A. No.

19 Q. And when Dr. -- in this incident that you  
20 have -- that you're describing here, does it refer to  
21 Dr. Kao repeating "How is your mother? How is your  
22 mother"?

23 A. I'm sorry?

24 Q. The incident you're describing, at any time in  
25 the two descriptions that you've read about this

1 incident, does it state that Dr. Kao repeated the phrase  
2 "How is your mother? How is your mother?"

3 A. That Dr. Kao said that?

4 Q. That Dr. Kao said that.

5 A. No.

6 Q. All right. Now, at any time did Dr. Kao stand  
7 next to your car in the parking lot?

8 A. No.

9 Q. In fact -- now, I'd like to introduce into  
10 evidence -- let me strike that.

11 At some point, was your office computer  
12 replaced?

13 A. My office computer is replaced on a regular  
14 basis by our IT department.

15 Q. In -- was your office computer replaced  
16 sometime in July -- sometime in August of 2008?

17 A. I actually have no idea when my computer was  
18 replaced.

19 Q. Do you recall it being replaced sometime after  
20 your deposition in this case?

21 A. Hm-mm. You know, I'm not sure if I had a  
22 computer replacement after. I generally don't handle  
23 that in my office, but it's possible.

24 Q. It's possible, all right.

25 Do you recall whether the computer you now have

1 in your office is the same computer you used to write  
2 these e-mails?

3 A. It shouldn't be.

4 Q. At some point it was replaced?

5 A. I would think so, given the length of time that  
6 has passed.

7 Q. And when you do replace a computer, are your  
8 e-mails from your old computer copied over to the new  
9 one?

10 A. In my case they are.

11 MR. KATZENBACH: All right. Your Honor, I'd  
12 like to have marked as Plaintiff's next in order 119.

13 (Whereupon, Plaintiff's Exhibit 119 was  
14 marked for identification.)

15 MR. KATZENBACH: Your Honor.

16 THE COURT: Thank you.

17 MR. KATZENBACH: Q. Showing you a document  
18 that we've marked for identification as Plaintiff's  
19 Exhibit 119.

20 Taking a look at Exhibit 119, can you identify  
21 the signature on the -- on page 4 of that exhibit?

22 A. No, I can't.

23 Q. Okay. Taking a look at the third from the last  
24 page of Exhibit 119, can you identify the signature  
25 there?

1 A. This is on page 5 of the document?

2 Q. Yes.

3 A. Yes.

4 Q. Who is that signature?

5 A. That is B.J. Johnson, who is a Vice Provost and  
6 Dean for Academic and Enrollment Service.

7 Q. Is she authorized to sign a verification of a  
8 discovery document in connection with this litigation?

9 A. I wouldn't know that.

10 Q. All right. I am going to move -- is this  
11 document produced by the University of San Francisco in  
12 connection with this litigation?

13 A. May I ask you to repeat that question?

14 Q. Is Exhibit 119 a document produced by the  
15 University of San Francisco in connection with this  
16 case?

17 A. Yes, I believe so.

18 MR. KATZENBACH: Your Honor, I'd like to move  
19 Exhibit 119 into evidence.

20 THE COURT: Any objection?

21 MR. VARTAIN: No, Your Honor.

22 (Whereupon, Plaintiff's Exhibit 119 was  
23 admitted into evidence.)

24 MR. KATZENBACH: Q. Would you please take a  
25 look at the third page of Exhibit 119, and please read

1 to the jury Request No. 20, the responses to Request  
2 No. 20, and the amended responses to Request No. 20.

3 A. Yes. Please forgive my voice.

4 "Amended Response to Request No. 20."

5 Q. No, start with the Request No. 20.

6 A. The language just below that, the line that I  
7 just stated?

8 Q. Yes.

9 A. "Without waiving the objections" --

10 Q. No, I'm sorry. Starting with the statement  
11 "Request No. 20."

12 A. Okay.

13 Q. That starts on line 10.

14 A. Line 10?

15 Q. Yes.

16 A. Excuse me.

17 "The computers used by Jennifer Turpin to send  
18 and receive e-mails during the period April 21st, 2008  
19 through June 27th, 2008. This demand includes  
20 inspection of the data on these computers relating to  
21 the sending or receipt of e-mails and the content of  
22 e-mails."

23 Q. And would you continue reading the response to  
24 Request No. 20?

25 A. Excuse me. "The University objects to this

1 request on the ground of the privacy rights of employees  
2 of the University and on the ground that it is  
3 irrelevant and burdensome. Notwithstanding these  
4 objections, the University responds that all producible  
5 data has already been produced to plaintiff. The  
6 University will not produce the requested computers for  
7 inspection."

8 Q. Okay. And could you read the Amended Response  
9 to Request No. 20?

10 A. "Without waiving the objections stated below,  
11 the University has produced herewith all e-mails sent or  
12 received by Jennifer Turpin related to John Kao during  
13 the period April 21st, 2008 to June 27th, 2008. See  
14 documents Bates-stamped USF2802-USF2863.

15 "To the extent that this request asks for more,  
16 the University objects to this request on the ground of  
17 the privacy rights of employees of the University and on  
18 the ground that it is irrelevant and burdensome. The  
19 University will not produce the requested computers for  
20 inspection."

21 MR. KATZENBACH: I'd like to have this marked  
22 as next in order, Exhibit 120.

23 (Whereupon, Plaintiff's Exhibit 120 was  
24 marked for identification.)

25 THE COURT: Ladies and gentlemen, remember the



1 admonitions. Do not form or express any opinion on this  
2 case until it's finally submitted to you for your  
3 decision. Do not discuss among yourselves or with  
4 others until that time. Please be back in your places  
5 at 3:40 according to the courtroom clock.

6 (Recess taken.)

7 THE COURT: Jurors and alternates are all  
8 present. Counsel from both sides are present.  
9 Plaintiff is personally present. Jennifer Turpin is on  
10 the stand.

11 Mr. Katzenbach, you may continue your inquiry.

12 MR. KATZENBACH: Yes, Your Honor.

13 Q. Handing the witness a document that's been  
14 marked for identification, which is a series of 61 pages  
15 of documentation bearing the numbers USF28023 through  
16 USF2863. Ask the witness to look at those documents.

17 Those are the same numbers in the amended  
18 response to exhibit -- Amended Response to Request  
19 No. 20 that's part of Exhibit 119; is that correct?

20 A. These -- I'm sorry, could you restate that?

21 Q. The document I have just handed you,  
22 Exhibit 120 which has the Bates stamps USF2802 through  
23 USF2863, those are the same numbers referred -- those  
24 are the same numbers that are contained in the Amended  
25 Response to Request No. 20 on Exhibit 119 the; isn't

1 that correct?

2 A. Yes.

3 Q. Would you please take a look at the  
4 Exhibit 120.

5 And will you tell the jury if a copy of this  
6 e-mail, Exhibit 83, appears in that pile of documents?

7 MR. VARTAIN: Counsel -- Your Honor, I'd like  
8 to interpose. I think we have a real harassing act  
9 going on here.

10 And I'd like to note, we have Exhibit 2776 on  
11 the screen. This -- the counsel is asking the witness  
12 to look for 2776 in a pile that he says begins with  
13 2802.

14 Why are we going to make the witness look  
15 through 63 pages of a document when we know it's a  
16 previously numbered document, it's in a different pile?  
17 This is, like, 352, waste of time.

18 THE COURT: I think that's a rhetorical  
19 question.

20 Mr. Katzenbach can answer it.

21 MR. KATZENBACH: Your Honor, these documents  
22 were produced as copies of all e-mails sent or received  
23 by Jennifer Turpin related to John Kao during the period  
24 April 21, 2008, to June 28 -- June 27, 2008. I want to  
25 see if this pile -- this collection of 61 e-mails -- 61

1 pages includes as part of all the e-mails a copy of  
2 Exhibit 83.

3 MR. VARTAIN: We'll stipulate that it doesn't.  
4 The number -- that document was already produced. It  
5 has a lower number than what you've given her. So  
6 stipulated.

7 MR. KATZENBACH: That's an argument.

8 Does he want to stipulate that the documents  
9 produced as purporting to be all e-mails sent or  
10 received by Jennifer Turpin related to John Kao during  
11 the period April 21, 2008 to June 27, 2008? See,  
12 documents Bates-stamped USF2802 to USF2863, does not  
13 include a copy of Exhibit 83?

14 Is that the stipulation that Counsel would like  
15 to enter into?

16 MR. VARTAIN: The stipulation is, Counsel,  
17 Exhibit 120 that you're making the witness sit there and  
18 flip through does not contain 2776, because the document  
19 you gave her starts with 2802, a higher number. That's  
20 the stipulation.

21 The further stipulation is 2776 was earlier  
22 produced to you by the University; that's why it has a  
23 lower number.

24 MR. KATZENBACH: Your Honor, that's an  
25 interesting -- that appears to be argument. I don't

1 agree to that stipulation.

2 I want the witness to testify whether this  
3 document -- this set of documents would purport to be  
4 all e-mails sent or received by the witness relating to  
5 John Kao during the period April 21, 2008 to June 27,  
6 2008, contains a copy of Exhibit 83.

7 He can make whatever arguments he wants to as  
8 to why that is not so later.

9 THE COURT: Dr. Turpin, have you been looking  
10 at some of the exhibit while this colloquy has been  
11 going on?

12 THE WITNESS: No, sir, I haven't. I began to  
13 look through the documents but I stopped after the  
14 objection.

15 THE COURT: Okay. This is dreadfully in  
16 inefficient way of making a point, so I am going to put  
17 a stop to it.

18 Can you can think of some other way of getting  
19 to the point?

20 MR. KATZENBACH: All right.

21 Q. Take a look at the last -- take a look at the  
22 last four pages of Exhibit 120.

23 Let me make it easier, okay.

24 Take a look at USF -- in Exhibit 120, take a  
25 look at USF2857. How about one earlier, 2856 would be

1 easier.

2 Do you have that in front of you?

3 A. Yes, I do.

4 Q. That's an e-mail chain, the most recent e-mail  
5 of which is dated 9 January 2008?

6 A. Yes, it is.

7 Q. And that e-mail chain ends at USF2858?

8 A. Yes.

9 Q. And the last e-mail in that chain is dated  
10 January 8th, 2008?

11 A. Yes.

12 Q. And the next page in Exhibit 120 is USF2859?

13 A. Sorry, was that a question or a directive?

14 Q. Yes, is that -- is that the next page?

15 A. Yes, it is.

16 Q. That's fine.

17 Taking a look -- that is an e-mail chain of  
18 three e-mails, do you see that, continuing through  
19 USF2861?

20 A. Yes.

21 Q. And those e-mails -- that e-mail chain begins  
22 on April 26th, 2008 and ends on April 28, 2008; isn't  
23 that correct?

24 A. By "beginning" you mean the last one on the  
25 chain?

1 Q. The most recent one, the top of the e-mail  
2 chain --

3 A. The top of the e-mail chain --

4 Q. -- is April --

5 A. -- is April 28th.

6 Q. And the start of the e-mail chain is what date?

7 A. April 26th.

8 Q. And the last two pages are an e-mail -- e-mail.

9 And what's the date at the top of the last two pages,  
10 Exhibit USF -- numbered USF2862 and 2863?

11 A. June 26th, 2008.

12 Q. You would agree that between -- that the  
13 e-mails dated -- sorry.

14 Between the e-mails dated January 9th and the  
15 e-mails that start April 26th, there is no copy of any  
16 e-mail such as Exhibit 83 dated April 23rd?

17 MR. VARTAIN: That question is vague.

18 Objection.

19 THE COURT: Objection is overruled.

20 Witness may answer.

21 THE WITNESS: I'm sorry, could you repeat? It  
22 was from January?

23 MR. KATZENBACH: Q. From the e-mail dated at  
24 the end of Jan -- dated January 9th, which we -- the  
25 e-mail chain dated January 9th, which started on USF2856

1 and continuing to the next e-mail chain, which starts on  
2 USF2859, and which concludes e-mails of April 26th and  
3 April 28th, there is no copy of Exhibit 83?

4 MR. VARTAIN: So stipulated.

5 THE WITNESS: Yes.

6 MR. VARTAIN: So stipulated.

7 He took my stipulation before, Counsel.

8 THE COURT: Well --

9 MR. KATZENBACH: I don't believe so.

10 THE COURT: -- I believe he got a yes answer  
11 and so he seems keen on accepting the answer.

12 MR. VARTAIN: He doesn't, and I believe --

13 MR. KATZENBACH: Your Honor, I really have to  
14 object to that comment.

15 THE COURT: Comment is stricken.

16 MR. KATZENBACH: Q. Finally, taking the last  
17 two pages of Exhibit 120, see that?

18 A. The last two pages?

19 Q. Yes.

20 A. Yes.

21 Q. That is a copy, however, that you produced of  
22 this e-mail, isn't it, Exhibit 84?

23 MR. VARTAIN: Counsel, I am going to object  
24 that "you" is argumentative.

25 MR. KATZENBACH: You are right.

1 Q. That is a copy of Exhibit 84 which is the  
2 forwarded e-mail of June the 26th?

3 MR. VARTAIN: So stipulated.

4 MR. KATZENBACH: Thank you.

5 THE COURT: Does that mean you join?

6 MR. KATZENBACH: Yes.

7 THE COURT: Good.

8 (Whereupon, Plaintiff's Exhibit 121 was  
9 marked for identification.)

10 MR. KATZENBACH: 121, I believe.

11 I'm handing the witness document --

12 May I approach, Your Honor?

13 THE COURT: You may.

14 MR. KATZENBACH: Handing the witness marked as  
15 Plaintiff's Exhibit 121, which is entitled "Defendant  
16 and Cross-complainant University of San Francisco's  
17 Second Amended Response to Plaintiff's Third Set for  
18 Inspection of Documents and Things, Nos. 19, 20, 21."

19 MR. VARTAIN: Counsel, I'll stipulate you can  
20 put that in evidence, if you want.

21 MR. KATZENBACH: All right. I will offer 121,  
22 Your Honor.

23 MR. VARTAIN: You got it.

24 THE COURT: Okay. It's received.

25 ///



1 (Whereupon, Plaintiff's Exhibit 121 was  
2 admitted into evidence.)

3 MR. KATZENBACH: Q. Would you please read from  
4 Exhibit 121, Request No. 20 and the Second Amended  
5 Response to Request No. 20?

6 MR. VARTAIN: Your Honor, I am going to object  
7 to requiring the witness to read a legal document. I'm  
8 happy to have the counsel read it.

9 MR. KATZENBACH: I will be happy to read it,  
10 Your Honor.

11 MR. VARTAIN: Just read it, it's in evidence.

12 THE COURT: Okay. You have made each other  
13 happy. Go ahead.

14 MR. KATZENBACH: You are correct, Your Honor.

15 "Request No. 20: The computers used by  
16 Jennifer Turpin to send and receive e-mails during" --

17 THE REPORTER: Can you slow down while you  
18 read. Sorry.

19 MR. KATZENBACH: "The computers used by  
20 Jennifer Turpin to send and receive e-mails during the  
21 period April 21, 2008 through June 27, 2008, this demand  
22 includes inspection of the data on these computers  
23 relating to the sending or receipt of e-mails and the  
24 contents of e-mail" -- "and the content of e-mails."

25 "Second Amended Response to Request No. 20:

1 Subject to the execution of a confidentiality agreement,  
2 protecting statutory privacy information, the University  
3 would permit the requested inspections except that the  
4 University has performed a diligent search for the  
5 computer used at the stated times for Jennifer Turpin  
6 and the computer is no longer within the possession or  
7 control of the University; therefore, it's not available  
8 for inspection."

9 Q. Now, do you recall, Dr. Turpin, giving a  
10 declaration in this case?

11 A. Yes.

12 MR. KATZENBACH: I'd like -- your Honor, if the  
13 witness could be shown the exhibit binder from her  
14 deposition, which I believe is next to the Court. There  
15 is a separate exhibit binder, I believe.

16 THE COURT: Got it. Handing it to Dr. Turpin.

17 MR. KATZENBACH: Q. Could you please take a  
18 look at Exhibit 24.

19 And I apologize to the witness that apparently  
20 the original copy is not tabbed. I apologize for that.  
21 But it is approximately three-fifths of the way through.

22 A. Okay.

23 Q. Or four-fifths of the way through.

24 A. Could you repeat the number of the exhibit,  
25 please?

1 Q. Twenty-four.

2 A. I'm there.

3 Q. Okay. That's a copy of a declaration you gave  
4 in this action?

5 A. Yes.

6 Q. And that's signed under penalty of perjury?

7 A. Yes.

8 Q. Okay. Would you please look at the second page  
9 of Exhibit 24, which would be on page No. 1 of the  
10 declaration. Please direct your attention to the first  
11 two sentences, in Paragraph Numbered 5, Lines 14 through  
12 16.

13 Do you see that?

14 A. Yes.

15 Q. And in your declaration you state "One specific  
16 occasion occurred on or about April 22, 2008, during an  
17 encounter I had with plaintiff on the University  
18 campus."

19 And the next sentence states, "The incident  
20 took place in the Harney Science Center/Library parking  
21 lot located on the University's campus."

22 It is true, is it not that the incident did  
23 not, in fact, take place in the Harney Science  
24 Center/Library parking lot?

25 A. No, part of the incident did take place in the

1 parking lot.

2 Q. Did you ever get into the -- did Dr. Kao --

3 MR. VARTAIN: Objection. Let her answer the --

4 THE COURT: Objection sustained.

5 Dr. Turpin may finish her answer.

6 MR. KATZENBACH: Q. Finish your answer.

7 A. Part of the incident did take place in the  
8 Harney parking lot.

9 Q. Was Dr. Kao ever in the parking lot?

10 A. Dr. Kao was not standing in the parking lot,  
11 no.

12 Q. Are you referring to the -- the part of the  
13 incident where you're thinking -- where you state that  
14 Dr. Kao was looking into the parking lot?

15 A. I'm referring to the part of the incident when  
16 I very quickly walked away from John and got into my car  
17 in the parking lot and observed him glaring at me as I  
18 was getting into my car and backing out.

19 Q. That's the part of the incident that took place  
20 in the Harney Science building/library parking lot?

21 A. That's correct.

22 Q. Now, I'd like you, if you would, to -- now,  
23 taking a look -- I'd like you to describe -- if I could  
24 show -- project a document up for a web page image and  
25 ask the witness if she can identify what that is.

1           Is that a picture of the area where this  
2 incident occurred?

3           A.    Sorry, I can't see.

4           Q.    Can you see?

5           A.    May I stand up?

6           Q.    Yes, of course. I'm sorry. And you may  
7 actually come closer, if that will help.

8           A.    I can't see very well. It's a very odd photo.

9           If I'm -- if I'm -- if I'm reading the photo  
10 correctly, you're standing in front of Harney, sort of  
11 blocking that to the left there.

12          Q.    Let me see if I can -- as we face the photo,  
13 the Harney Science building would be to our left?

14          A.    Yes.

15          Q.    And the parking lot would be to our right?

16          A.    Yes.

17          Q.    And the parking lot would be where the cars are  
18 parked?

19          A.    You've got cars -- you've got an image of the  
20 cars parked on the street as well as in the lot, as I'm  
21 viewing the picture from here.

22          Q.    Just address the -- just the -- I don't know --  
23 if you just address the cars parked in the lot, is that  
24 the area where your car was parked, where there's a red  
25 car, a white car and maybe another white car and a

1 darker car?

2 A. Yes, it's a very odd angle but that -- that is  
3 the lot, yes.

4 Q. And can you describe where John Kao was  
5 standing when you first met in references to this  
6 picture?

7 A. He was standing just as you exit the sidewalk  
8 on -- from Harney onto -- into the lot.

9 And, I'm sorry, Mr. Katzenbach, this photo may  
10 have been taken place much later, because there's paving  
11 that has been added to the University that I -- I don't  
12 believe was there at that time.

13 But at any rate, John was standing as you -- as  
14 I exited Harney Science Center, which had sort of a  
15 small sidewalk then leading to the parking lot which is  
16 prior to this picture being taken.

17 MR. VARTAIN: Mr. Katzenbach, can we have the  
18 stipulation that this particular photo is not actually a  
19 fully accurate representation of the scene as it existed  
20 at the time in question? Then you can go on with your  
21 questions.

22 MR. KATZENBACH: I will. I'll stipulate. We  
23 have other pictures that are in evidence, but I would  
24 like to start with this and maybe we can find out the  
25 inaccuracies.

1 MR. VARTAIN: Why don't we just go to the one  
2 that's accurate and we skip the inaccuracy.

3 MR. KATZENBACH: Well, that's a good point.  
4 Your Honor prefers black and white satellite.

5 MR. VARTAIN: Colors don't really matter.  
6 Let's get to it.

7 MR. KATZENBACH: Fine.

8 MR. VARTAIN: I have a witness that's coming  
9 off bronchitis. I really do care about time here.

10 MR. KATZENBACH: I appreciate that,  
11 Mr. Vartain.

12 Q. Would you please take a look at Exhibit 87?

13 A. I'm sorry, did you say Exhibit 87?

14 Q. Eighty-seven, yes.

15 A. I have to find that.

16 Q. Can I help you?

17 A. I have to find the right book here.

18 Q. That's unfortunately the case.

19 A. I'm looking at Exhibit 87.

20 Q. Exhibit 87 consists of three photographs.

21 A. Pardon me?

22 Q. Exhibit 87 consists of three photographs. Can  
23 you identify each of the three photographs?

24 A. Yes.

25 Q. Are those photographs of the Harney Science

1 building and the Harney Science building parking lot?

2 A. Yes.

3 Q. Okay. Please take a look at the second page of  
4 Exhibit 87.

5 MR. KATZENBACH: At this point, I'd like to  
6 move 87 into evidence.

7 THE COURT: Any objection?

8 MR. VARTAIN: All pages?

9 MR. KATZENBACH: Yes, all pages.

10 MR. VARTAIN: No problem.

11 THE COURT: Exhibit 87 is received in evidence.

12 (Whereupon, Plaintiff's Exhibit 87 was  
13 admitted into evidence.)

14 MR. KATZENBACH: Q. So here is another -- this  
15 is another photograph of the area.

16 Do you see that?

17 A. No, I'm sorry, I can't see.

18 Q. You can take a look at the one in front of you.

19 A. Oh, okay.

20 Q. I'm sorry, it's more convenient for you.

21 And, again -- and perhaps maybe the third -- if  
22 you take a look at the third page of Exhibit 87, that  
23 might be a slightly better representation for you to  
24 start with.

25 Do you have that in front of you?



1 A. Yes.

2 Q. Okay. So Dr. Kao was standing where in -- on  
3 this photograph?

4 A. Now, if I can just clarify again, I believe  
5 these photographs have -- and I can't be sure; I don't  
6 remember when the University put in these big pavers on  
7 the walkway there, but I don't believe that these pavers  
8 were there at that time, so I don't know when this image  
9 was taken, but there's been a tremendous renovation of  
10 the area there.

11 So what I'm looking at on the photo looks to me  
12 like these new pavers, but -- but it is -- it is the  
13 area -- but the area changed quite a bit with the  
14 renovation.

15 Q. Fair enough.

16 Did the Harney Science building move?

17 A. No, it didn't.

18 Q. Did the library move?

19 A. The library did not move.

20 Q. And we'll check finally now, the parking lot,  
21 did it move?

22 A. The parking lot did not move.

23 Q. So at least we can get an idea. All right.

24 Taking a look at Exhibit 87, a clear page of  
25 Exhibit 87, can you tell -- I am going to ask you, is

1 Dr. Kao standing approximately in this area? And I'm  
2 indicating an area to the right of the picture before we  
3 begin at the edge of the sidewalk to the right -- to the  
4 left, sorry?

5 A. Again, I'm sorry to nitpick, but I can't  
6 exactly see where you're pointing to, but the -- the --  
7 before pavers were put in, this was a much narrower  
8 walkway and so the sidewalk extended further out from  
9 Harney Science Center than it does after the pavers were  
10 put in, so the whole positioning would be affected by  
11 that.

12 I'm -- I'm happy to describe where Dr. Kao was  
13 but I'm just not sure that on this image that you're  
14 showing me that it's going to really reflect that time.

15 Q. Okay. Do you recall being shown these exhibits  
16 at your deposition?

17 A. I don't recall if these were the same exhibits  
18 I remember -- I remember you asking me about location,  
19 but I don't remember if these were the exhibits that you  
20 used.

21 MR. KATZENBACH: Your Honor, if the witness  
22 could refer to the exhibits in the exhibit binder.

23 Q. Do you have the exhibit binder from your  
24 deposition in front of you?

25 A. Yes, I do.

1 Q. Would you look at Exhibit 20.

2 A. Yes.

3 Q. When I asked you about these pictures in your  
4 deposition, did you indicate any similar reluctance to  
5 describe the location of Dr. Kao?

6 A. No, I didn't. I didn't notice this.

7 Q. All right. Now, in relation to the parking lot  
8 at Harney, where was Dr. Kao standing when you last saw  
9 him?

10 A. He was standing at the -- at the edge of the  
11 sidewalk before the sidewalk goes down to the parking  
12 lot.

13 Q. And can you identify where that would have been  
14 on Exhibit 87, page 3?

15 A. I'm sorry, you want me to identify it on this  
16 picture?

17 Q. You can just describe where that would be on  
18 the picture that's the third page of Exhibit 87.

19 A. It would have been about where the -- where the  
20 sidewalk that meets the -- the pavers that are here now,  
21 it would have been approximately in that area.

22 Q. On the -- I'm sorry, just so -- the left side  
23 or the right side, as you face it?

24 A. It would have been -- it would have been out  
25 from the left side but not all the way over to the right

1 side.

2 Again, there was a narrower pathway, as I  
3 recall here, than what this shows.

4 Q. Okay. That's fine.

5 So somewhere away from the side to the -- to  
6 the right and towards -- and a third of the way towards  
7 the left?

8 A. It's difficult to place it with this, but I  
9 could very clearly see him when I was -- when I got to  
10 my car, so he was -- he would have been -- he would have  
11 been close enough to the right that he was visible to me  
12 as I went to my car.

13 Q. Were the plantings that are reflected on  
14 Exhibit 87, were they there at the time?

15 A. I don't know. I think, you know, that was part  
16 of the renovation, so probably some of them were there,  
17 but probably some of them were not.

18 Q. All right. Thank you.

19 Now, do you recall at your deposition I asked  
20 you a number of questions concerning your computer,  
21 concerning the two e-mails we discussed earlier?

22 MR. VARTAIN: Objection. Compound. Vague.

23 THE COURT: Overruled.

24 Witness may answer.

25 THE WITNESS: May I ask you to repeat the

1 question, please?

2 MR. KATZENBACH: Q. Of course. Do you recall  
3 at your deposition I asked you a number of questions  
4 about the two e-mails describing the incident with Dr.  
5 Kao?

6 A. Yes.

7 Q. And we went over the differences in the two  
8 e-mails extensively?

9 A. Yes.

10 Q. All right. And at the time, do you recall  
11 being -- that I asked you if you still had your computer  
12 that you wrote those e-mails on in your office?

13 A. I don't recall.

14 Q. Would you please take a look at --

15 MR. KATZENBACH: Your Honor, if the witness  
16 could be shown page 16 of her deposition.

17 Q. No. Those are the -- I think that's -- do you  
18 have a copy of your deposition in front of you?

19 A. Yes.

20 Q. Page 16, lines 8 through 9.

21 A. I'm not sure this is paginated, actually, but  
22 let me see.

23 Q. The short ones usually -- the exhibits usually  
24 have a pagination on the bottom of each of the little  
25 pages. They're designed to make it hard for people to

1 read.

2 A. I don't actually see page numbers at the bottom  
3 of this.

4 Q. I'm sorry. You are probably looking at the  
5 exhibits.

6 A. Okay.

7 MR. KATZENBACH: Your Honor?

8 THE COURT: Yes.

9 MR. KATZENBACH: Can I hand her my copy or you  
10 can hand her yours. Why don't you --

11 THE COURT: I'm closer.

12 THE WITNESS: Thank you.

13 MR. KATZENBACH: Q. Do you recall me asking  
14 you -- I'd like to read from page 16 -- on page 16,  
15 lines 8 and 9.

16 A. Yes. You'd like to read that or you would like  
17 me to read it?

18 Q. No, no, I'll defer to counsel and I'll read it  
19 myself, if that's okay with you.

20 A. Okay.

21 Q. Line -- page 16, line 8 begins "Question: Is  
22 this the same computer you still have?

23 "Answer: I believe it is."

24 Those are all the questions that I have for the  
25 witness, Your Honor.

1 Oh, no, I'm sorry. Strike that.

2 I am sorry. I forgot one area. I apologize.

3 MR. VARTAIN: No, you can't take it back,  
4 Chris.

5 MR. KATZENBACH: Okay, to an extent I can.

6 MR. VARTAIN: No, no, no.

7 MR. KATZENBACH: Q. Ms. Turpin, I'd like to  
8 direct your attention to the convocation that occurred  
9 in 2007 at the University of San Francisco?

10 A. Yes.

11 Q. That would have been in August of 2007?

12 A. That's correct.

13 Q. At that point, did you believe that Dr. Kao was  
14 carrying a gun to the convocation?

15 A. I can't say I believed that he was carrying a  
16 gun, but the question arose in my mind.

17 Q. Did you send an e-mail to Donna Davis, the  
18 University's general counsel, concerning Dr. Kao  
19 possessing a gun at that convention -- convocation?

20 MR. VARTAIN: Objection. That calls for  
21 attorney/client communications.

22 THE COURT: Overruled.

23 Witness may answer "yes" or "no," that's all.

24 THE WITNESS: No.

25 MR. KATZENBACH: Q. Did you bring some -- did

1 you bring documents here -- are you here pursuant to a  
2 subpoena my office issued?

3 A. Yes.

4 Q. Did you bring documents pursuant to that  
5 subpoena?

6 A. Yes, I did.

7 Q. Did you bring documents relating to  
8 communications concerning the -- communications about  
9 Dr. Kao concerning the 2008 -- sorry, 2007 convocation?

10 A. I believe those were among the documents that  
11 you requested.

12 Q. Is there any e-mail in that pile that refers --  
13 among those documents that refers to Dr. Kao carrying a  
14 gun at the 2007 convocation?

15 A. No.

16 Q. Did you believe he had a weapon of any kind?

17 A. I didn't know.

18 Q. Did you ask Brandon Brown to do anything in  
19 connection with Dr. Kao at that convention [sic]?

20 A. Excuse me, I didn't ask him to do anything. I  
21 told him that I was concerned.

22 Q. And where was -- what did Brandon Brown do, if  
23 anything?

24 A. Well, Brandon was concerned when I shared with  
25 him that I was afraid, and my memory is that he went and



1 sat in front of John and that he or I also informed our  
2 general counsel.

3 Q. And did you inform public safety?

4 A. Not in that moment.

5 Q. Any time after that, before the end of 2007?

6 A. I don't think so.

7 Q. Did you think that Dr. Kao was dangerous at  
8 that convocation because of his reaction to the  
9 University's response to his formal complaint?

10 A. No.

11 MR. KATZENBACH: Those are all the questions I  
12 have.

13 THE COURT: Mr. Vartain, any questions for this  
14 witness?

15 MR. VARTAIN: I have a few, Your Honor.

16  
17 CROSS-EXAMINATION BY MR. VARTAIN

18 MR. VARTAIN: Q. Dr. Turpin, would you tell  
19 the jury what happened at the convocation, just put the  
20 jury there as best in your words as to why you felt some  
21 fear?

22 A. Yes.

23 So the -- every year in the fall when the  
24 University reconvenes, we have an event, it's called the  
25 President's Convocation, and the whole University is

1 invited to a big theatre, auditorium that we have.

2 And the -- the first hour of that is a -- is a  
3 distinct meeting, it's the President's meeting, it's  
4 called the President's Convocation, he gives to talk.  
5 I'm sorry, the first hour is my meeting. I was Dean of  
6 the College of Arts and Sciences, and it was the faculty  
7 meeting and that was followed by the President's  
8 Convocation. I believe that's the order.

9 So it's a very -- it's an exciting time. The  
10 faculty are buzzing, you know, everyone is back to  
11 school. And as Dean of the College, I gave an address  
12 to the entire faculty. And so it was also -- it was  
13 exciting, but also stressful for me, demanding, because  
14 to stand up and talk to 250 really smart people and  
15 hopefully say something, you know, that will inspire  
16 them to make a run at the academic year. And so the  
17 faculty are really excited to see each other.

18 So before the speaking begins, there's coffee  
19 and -- and pastries out -- in the outer area, and -- so  
20 the faculty hang out together and they're all excited to  
21 see each other and they're talking and that's happening.  
22 And while that's happening, I'm sort of getting myself  
23 together to prepare to go up on stage and give this  
24 talk.

25 And so I was inside the auditorium, whereas the

1 faculty were out, for the most part, having their coffee  
2 and catching up. And I looked up and saw John come  
3 right up to the front of the auditorium while I was  
4 preparing, you know, checking the mic and going to the  
5 podium, going over my remarks, and he just came and sat  
6 and just glared at me, like intensely and angrily.

7 And, you know, I wondered if he was angry at me  
8 because he had -- he had gone through a complaint  
9 situation with the University, and it felt like he  
10 wasn't happy with the outcome of it. I felt like maybe  
11 he was angry about that. But it was very frightening.  
12 I just -- I don't know how to tell you what, you know,  
13 it was like to look out and see him glaring at me like  
14 that while everybody else was out, you know, doing their  
15 happy time.

16 And I thought, oh, my God. I just felt, you  
17 know, afraid. My heart was racing, so I went and said  
18 to Brandon, "I don't know what's going on with John but  
19 he's just glaring at me," and I did say, "Oh, my God,  
20 what if he has a gun?" And Brandon -- you know, it's  
21 hard to admit that we were that -- in that state of  
22 mind, but he was anxious about it, too, and I went and  
23 told our general counsel, Donna Davis. Donna.

24 But I was also in the moment of I needed to get  
25 up and stand and deliver, and I didn't really know what

1 was going on. I didn't really -- is it unsafe, is he  
2 going to do something? But it's time, it's time for me  
3 to get up and give the big, you know, inspiring talk to  
4 the faculty.

5 So I told Brandon, I told Donna. Brandon went  
6 and sat near John, amazingly, to look out for me. And I  
7 got up and gave my talk, and I was, you know, very  
8 anxious but I did it.

9 Q. Thank you. Would you now tell us what happened  
10 that day in April?

11 A. Yes.

12 Q. 2008?

13 A. So I was leaving the building where I had my  
14 office as the Dean of Arts and Sciences was in this  
15 building, Harney Science Center, and I had to -- in  
16 another moment of delivery, I had to go up to Lone  
17 Mountain, which is in the upper part of our campus, and  
18 meet with the executive committee of our board of  
19 trustees. I had to make a presentation to them, so  
20 that's kind of a special, extraordinary moment for a  
21 dean. You know, now that I'm Provost, I meet with the  
22 board of trustees all the time, but as Dean of Arts and  
23 Sciences it wasn't as common, so I was going up there  
24 really wanting to do a good job.

25 And as I walked out of the building, I saw John

1 where he'd commonly stood outside the building, and I  
2 knew that he had been going through a difficult  
3 situation with his mother medically, because he had  
4 shared that with me. So as I was walking out, I did  
5 feel a little bit like unsure how he was going -- if he  
6 was going to speak to me or what, but I saw him and I  
7 thought, you know, I should greet him, and so I did.

8 I said "John" -- I said, "Hello, John, how is  
9 your mother doing?" Because I really wanted to try to  
10 express the same, you know, compassion that I would to  
11 any faculty member, and -- and I was just totally  
12 shocked that when I said this, he just looked like he  
13 was enraged, you know, me asking how his mother was  
14 doing. He kind of clenched his jaw and he looked mean  
15 and mad and he got right in my face and said, "Fine.  
16 Fine. How are you and how are your children doing?"  
17 And I thought oh, my God, my children, you know, just  
18 the thought.

19 So -- so I thought, well, maybe he knew my  
20 daughter had been hospitalized around the same time that  
21 his mother was having medical problems, so maybe there  
22 was some overlap or -- I was trying to make sense of  
23 what was going on, but I just figured I better make a  
24 beeline to my car and -- and I had these trustees  
25 waiting for me up the hill, so I did. I just, you know,

1 got by him and I zoomed to my car and got in my car. I  
2 was really shaking. And I looked over, you know,  
3 starting my car, and he was standing there with clenched  
4 fists glaring at me, like leaned over looking at me  
5 angrily. And I was just -- I was kind of in disbelief,  
6 like, oh, my God, did that just happen? You know, I was  
7 really scared.

8 And so on my way up the hill I got my cell  
9 phone out and I called Martha Peugh-Wade, our HR  
10 director, and left her a message saying I can't -- you  
11 know, oh, my God I just had this crazy encounter with  
12 John. And I called Brandon. And then I had to go up  
13 the hill and tried to pull off this meeting with the  
14 trustees, which I did.

15 And then I told my supervisor at the time, who  
16 was the Provost before me, Jim Weizer. And then I went  
17 home. I told my husband and -- and then I called Martha  
18 that night. That night I told her what had happened.  
19 And I spoke with Dan Lawson, our director of public  
20 safety, and we got some foot patrols organized in -- in  
21 the building.

22 Q. The public safety came?

23 A. Yes.

24 Q. In the letter in your file memo that you wrote,  
25 there was this part about getting close and hovering

1 over your back or your head.

2 Would you tell the jury what happened with  
3 that.

4 A. Yeah. Well, you know, he -- when I encountered  
5 him, when he got really angry, he was right in my face,  
6 and then I -- I turned to go past him to my car, and I  
7 could just feel -- you know how you can feel kind of  
8 with your hair, that you can feel that somebody is right  
9 there, and I could feel him right there. So I just, you  
10 know, made a beeline out of there.

11 THE COURT: Ladies and gentlemen, remember the  
12 admonitions. Do not form or express any opinion on this  
13 case until it's finally submitted to you for your  
14 decision. Do not discuss among yourselves or with  
15 others until that time. Be back in your places at  
16 9:00 o'clock tomorrow morning. Please remember to leave  
17 your notebooks and instructions behind.

18 Jurors and alternates have departed the  
19 courtroom; counsel for both sides and the plaintiff  
20 remain.

21 Anything you want on the record,  
22 Mr. Katzenbach?

23 MR. KATZENBACH: No, nothing at this point,  
24 Your Honor.

25 THE COURT: Anything on the record for the

1 defense?

2 MR. VARTAIN: No, thank you, Your Honor.

3 THE COURT: All right. Off the record. Out of  
4 session.

5 MR. VARTAIN: I do have one thing, Your Honor.

6 THE COURT: On or off?

7 MR. VARTAIN: Might as well do it on.

8 THE COURT: Back on the record.

9 MR. VARTAIN: I have a binder for  
10 Mr. Katzenbach and for you that I am going to leave with  
11 your clerk that has our jury -- our proposed jury  
12 instructions with the legal authorities that go with it.  
13 It's sort of -- just the special instructions, and I'm  
14 going to go over it once and leave it with your clerk.  
15 That's all.

16 THE COURT: One binder?

17 MR. VARTAIN: One binder for you and one binder  
18 for Mr. Katzenbach.

19 THE COURT: Two binders, okay.

20 MR. VARTAIN: Maybe it will help us work  
21 through the jury instructions whenever we do that.  
22 Thank you.

23 THE COURT: Back off the record. Thank you.

24 (Proceedings were adjourned at 4:31 P.M.)

25



## 1 REPORTER CERTIFICATE

2 I hereby certify that the foregoing proceedings  
3 were taken before me at the time and place herein set  
4 forth; that this transcript is a true record of the  
5 proceedings, as reported to the best of my ability by  
6 me, a duly certified shorthand reporter and a  
7 disinterested person, and was thereafter transcribed  
8 under my direction into typewriting by computer.

9  
10 I further certify I am neither financially  
11 interested in the action nor a relative or employee  
12 of any attorney or party to this action.

13  
14 IN WITNESS WHEREOF, I have this date  
15 subscribed my name.

16 Dated: September 23, 2012

17 \_\_\_\_\_  
18 SANDRA L. CARRANZA  
19 CSR No. 7062  
20  
21  
22  
23  
24  
25

1 IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

2 FIRST APPELLATE DISTRICT

3 ---o00---

4 JOHN S. KAO,

5 Plaintiff/Appellant,

Appellate No. A135750

6 versus

SUPERIOR COURT CASE

No. CGC-09-489576

7 UNIVERSITY OF SAN FRANCISCO,  
8 et al.

9 Defendants/Respondents.

10 \_\_\_\_\_/

11  
12 APPEAL FROM THE JUDGMENT OF THE  
13 SUPERIOR COURT OF CALIFORNIA  
14 COUNTY OF SAN FRANCISCO

15 THE HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE

16 REPORTER'S TRANSCRIPT ON APPEAL

17 VOLUME 11, Page 2288 through Page 2501

18 Thursday, February 23, 2012

19  
20  
21 REPORTED BY: SANDRA L. CARRANZA, CSR No. 7062

22  
23 SANDRA L. CARRANZA  
24 Certified Shorthand Reporter  
25 13 Joan Avenue  
Novato, California 94947  
(415)893-1861  
sandycarranza@comcast.net

1           IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2                   IN AND FOR THE COUNTY OF SAN FRANCISCO

3                                   ---oOo---

4           HON. WALLACE P. DOUGLASS, JUDGE

DEPARTMENT 318

5           JOHN S. KAO,

6                   Plaintiff,

7           vs.

Case No. CGC-09-489576

8           UNIVERSITY OF SAN FRANCISCO,

9           et al.

10                   Defendants.

\_\_\_\_\_ /

11

12                   REPORTER'S TRANSCRIPT OF PROCEEDINGS

13                   Thursday, February 23, 2012

14                                   - - -

15

16           A P P E A R A N C E S:

17           For the Plaintiff:

18                   KATZENBACH & KHTIKIAN

19                   By: CHRISTOPHER W. KATZENBACH and

CONOR MACK, ATTORNEYS AT LAW

1714 Stockton Street, Suite 300

San Francisco, California 94133

20

21           For the Defendants:

22                   VARTAIN LAW GROUP

23                   By: MICHAEL J. VARTAIN and LINDA K. ADLER,

ATTORNEYS AT LAW

601 Montgomery Street, Suite 540

San Francisco, California 94111

24

25           REPORTED BY: SANDRA L. CARRANZA, CSR No. 7062, RPR

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February 23, 2012

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1 SAN FRANCISCO, CALIFORNIA

9:02 A.M.

2 - - -

3 THE COURT: Jurors and alternates are all  
4 present.

5 THE CLERK: Your Honor, we're missing just one  
6 person.

7 THE COURT: Oh, my goodness.

8 (Discussion off the record.)

9 THE COURT: Jurors and alternates are all  
10 present. Counsel from both sides are present.  
11 Plaintiff is personally present.

12 Dr. Turpin is on the stand and you may continue  
13 the examination.

14 MR. VARTAIN: Thank you for the permission to  
15 continue the examination but I had actually discontinued  
16 it precisely at 4:30 yesterday, so I don't have anymore  
17 questions.

18 THE COURT: All right.

19 Mr. Katzenbach, do you have any questions?

20 MR. KATZENBACH: I have a few, Your Honor.

21 THE COURT: The oath you took yesterday is  
22 still in effect today.

23 THE WITNESS: Yes.

24 REDIRECT EXAMINATION BY MR. KATZENBACH

25 MR. KATZENBACH: Q. Dr. Turpin, in the --

1 after you reported this incident to -- this incident in  
2 April to Public Safety, did you ask Public Safety to  
3 take any photographs of the area?

4 A. No.

5 Q. Do you know whether they did?

6 A. Pardon me?

7 Q. Did they take any photographs of the area?

8 A. Not to my knowledge.

9 Q. Now, the -- taking a -- in your -- in your  
10 testimony, I believe you indicated that at the  
11 convocation in 2007, that you perceived that -- you felt  
12 that Dr. Kao was upset over some -- over the outcome of  
13 a complaint?

14 A. I don't believe I said I felt that. I believe  
15 I said I wondered about it.

16 Q. You wondered -- and what -- what was the  
17 outcome of the complaint that you believe that Dr. Kao  
18 might be upset over?

19 A. Well, the only thing that -- that I remember  
20 wondering about was that John wanted me to give him a  
21 joint appointment in computer science, and I indicated  
22 that I had never given anyone a joint appointment, I  
23 don't believe in joint appointments, and that I couldn't  
24 make that exception.

25 Q. That was in part of Dr. Kao's original

1 complaint to human resources?

2 A. I believe it was a -- one of the -- one of  
3 items in the complaint. I don't remember if it was  
4 written in the complaint. But I do remember, when we  
5 were trying to discuss some resolution, that was  
6 something that John wanted.

7 Q. Okay. And was there also a discussion of  
8 appointing Dr. Kao to committees?

9 A. Yes.

10 Q. And did -- did -- at some point did you offer,  
11 prior to the convocation, to appoint Dr. Kao to a  
12 trustee's committee?

13 A. I don't -- I didn't actually have the authority  
14 to make an appointment, but I did have the authority to  
15 make a nomination to the Provost, and I did so.

16 Q. Okay. Do you recall when you made such a  
17 nomination to the Provost?

18 A. I don't know exactly. There is kind of a  
19 routine way in which the Provost would ask the deans for  
20 nominations of when they're -- when vacancies became  
21 available on those committees.

22 Q. Okay. And that would have -- would that have  
23 been sometime before the convocation in 2007?

24 A. I think so.

25 Q. Could it have been after that?



1           A.    Hm-mm.  It's hard to remember when -- when that  
2   took place.  It's possible that it took place after.  
3   I'm -- I'm not exactly sure.

4           Q.    Would that nomination have been in writing?

5           A.    It might have been.  The Provost would often  
6   send a message to the dean saying, you know, here are  
7   the committees, please submit your nominations.  And it  
8   might have been done by e-mail or it may have been done  
9   face to face with the Provost when I met with him.

10          Q.    But it would have at least occurred before the  
11   time you were Provost?

12          A.    Yes, that's right.

13          Q.    Okay.  And the prior Provost was Jim Weizner?

14          A.    Jim Weizer.

15          Q.    Weizer.  I'm sorry.  No N.

16          A.    Correct.

17          Q.    Yes.  Okay.  Thank you.

18                   And I'd like to just get, if I could, the date  
19   -- do you recall the convocation occurring in the last  
20   week or two of August 2007?

21          A.    That's normally when it would take place.  I  
22   don't remember the exact date.

23          Q.    Okay.  And projecting on the -- for the jury,  
24   Exhibit 4, and that's the addendum to the -- Dr. Kao's  
25   complaint.

1           If you can look at Exhibit 4 in the binder. Do  
2 you have Tab 4?

3           A.    I do.

4           Q.    Thank you. And do you recall that that  
5 addendum was filed on August 15th, 2007?

6           A.    Yes, yes.

7           Q.    That would have been a week or so prior to the  
8 convocation?

9           A.    Approximately, yes.

10          MR. KATZENBACH: That's all I have. Thank you.

11          THE COURT: Mr. Vartain, anything further?

12          MR. VARTAIN: Yes, please.

13          May I do my remainder from here?

14          THE COURT: Sure.

15  
16                    REXCROSS-EXAMINATION BY MR. VARTAIN

17          MR. VARTAIN: Q. But there was a prior  
18 grievance in 2006, even before this one that counsel  
19 just displayed, correct?

20          A.    Yes.

21          Q.    And was that prior grievance in 2006 as to  
22 which you had a meeting with Dr. Kao where the issue was  
23 would you give him a joint appointment?

24          A.    Yes.

25          Q.    And you had explained to him that, you know,

1 that's not something you as dean have ever done?

2 A. That's correct.

3 MR. VARTAIN: No further questions, Your Honor.

4 THE COURT: Mr. Katzenbach?

5  
6 FURTHER REDIRECT EXAMINATION BY MR. KATZENBACH

7 MR. KATZENBACH: Q. Did you understand that  
8 the prior grievance issue concerning the dual  
9 appointments was Dr. Kao's belief that the dual  
10 appointments had favored white males?

11 A. I didn't really receive it as such. I did  
12 think that he felt other people had been given joint  
13 appointments by my predecessor and that he wanted one,  
14 too.

15 Q. And was he concerned that there were no --  
16 there were no apparent standards for that joint  
17 appointment?

18 A. I don't recall that -- that statement.

19 Q. But you recall that that was part of the  
20 complaint that he filed?

21 A. I recall that he -- part of the complaint that  
22 he filed was about wanting a joint appointment.

23 MR. KATZENBACH: Okay. And we can look at --  
24 that's in evidence and people can look at that.

25 Thank you. I have nothing further.

1 THE COURT: Anything further, Mr. Vartain?

2 MR. VARTAIN: I have no further questions of  
3 this witness.

4 THE COURT: Jurors, do you have any questions  
5 for Dr. Turpin?

6 Yes.

7 (Discussion off the record and outside the  
8 presence of the jury.)

9 THE COURT: In the event that Dr. Kao agreed to  
10 submit to a Fitness-for-Duty Examination by Dr.  
11 Reynolds, if you --

12 THE REPORTER: Your Honor.

13 THE COURT: Thank you.

14 If Dr. Kao hadn't accepted -- consented to a  
15 Fitness-for-Duty Examination by Dr. Reynolds, did USF  
16 have any plans in place as to what to do in the event  
17 that the outcome was fit for duty or fit for duty with  
18 limitations or not fit for duty?

19 In other words, a plan of action depending on  
20 what Dr. Reynolds came up with?

21 THE WITNESS: We hadn't really gone, you know,  
22 that far. We had been advised by Dr. Missett that it  
23 was our responsibility to require a fitness for duty,  
24 that was the only way we could reliably assess whether  
25 or not John was fit, and -- so, you know, we took that

1 step. I can't say that there was a plan for how to  
2 respond in the event of what came out of that exam.

3 You know, we were all hoping that John would go  
4 for the exam and that would provide us with some  
5 guidance and information so we could try to move ahead.

6 THE COURT: Mr. Vartain, follow-up questions?

7 MR. VARTAIN: No, thank you, Your Honor.

8 THE COURT: Mr. Katzenbach, follow-up  
9 questions?

10 MR. KATZENBACH: No, Your Honor.

11 THE COURT: All right. May Dr. Turpin be  
12 excused?

13 MR. VARTAIN: Yes, Your Honor.

14 MR. KATZENBACH: Yes, Your Honor.

15 THE COURT: Dr. Turpin, thank you very much.  
16 Enjoy your day. You are free to go.

17 THE WITNESS: Thank you.

18 THE COURT: As I recall, Mr. Katzenbach, you  
19 have one additional exhibit to introduce and then you  
20 are going to rest?

21 MR. KATZENBACH: I believe, Your Honor, we were  
22 going to introduce the cross-complaint against Dr. --

23 THE COURT: That's the exhibit I had in mind.

24 MR. KATZENBACH: Yes, Your Honor. So we would  
25 ask the court to take judicial notice of the

1 cross-complaint.

2 It's 115, Your Honor.

3 THE COURT: Okay. So 115 I will judicially  
4 notice it and receive it in evidence.

5 (Whereupon, Plaintiff's Exhibit 115 was  
6 admitted into evidence.)

7 MR. KATZENBACH: Your Honor, we did -- after  
8 Dr. Turpin's testimony, we did have one other document  
9 that we would request the Court to take judicial notice  
10 of.

11 MR. VARTAIN: Maybe we can do that outside the  
12 jury?

13 MR. KATZENBACH: We are happy to do that  
14 outside the presence of the jury at lunch.

15 THE COURT: Okay.

16 MR. KATZENBACH: In other words, other than  
17 that, we rest.

18 THE COURT: All right. We can take up the  
19 defense case again. I see Ms. Adler on her feet.

20 MS. ADLER: The University calls Alan Ziajka.

21 THE CLERK: Please stand. Raise your right  
22 hand.

23 ALAN ZIAJKA,

24 having been duly sworn, testified as follows:

25

1 THE WITNESS: I do.

2 THE CLERK: Please be seated.

3 State your name and spell it for the record.

4 THE WITNESS: My name is Alan Ziajka. The  
5 first name is A-L-A-N; the last name is spelled  
6 Z-I-A-J-K-A.

7

8 DIRECT EXAMINATION BY MS. ADLER

9 MS. ADLER: Q. Good morning. Are you  
10 currently employed by the University?

11 A. I am.

12 Q. And how long have you been at the University?

13 A. I have been there since 1983.

14 Q. Okay. And what is your job title?

15 A. I'm Director of Institutional Research and I'm  
16 also special assistant to the president for special  
17 projects.

18 Q. Okay. And what are your job duties as Director  
19 of Institutional Research?

20 A. I'm largely responsible for gathering  
21 institutional data throughout the University and  
22 compiling it into various reports and documents, that  
23 then the University disseminates to various external and  
24 international audiences.

25 For example, we submit a number of reports to

1 the federal government each year, and we also submit  
2 reports to our accrediting agencies, the most important  
3 of which is the Western Association of Schools and  
4 Colleges; that's the umbrella crediting agency that  
5 essentially determines whether or not a school is fit to  
6 continue to operate.

7 So it's a very important agency, and, of  
8 course, the federal government is equally important in  
9 terms of accuracy and timeliness in terms of the  
10 submission of documents. So I'm largely responsible for  
11 that process. There's many of us involved in that, but  
12 I'm the key person.

13 Q. All right. And could you tell us a little more  
14 about the University's obligations to report statistical  
15 data regarding ethnic diversity and gender diversity to  
16 the federal government?

17 A. Yes, of course. The federal government  
18 requires that our students and our staff and faculty be  
19 reported on in terms of their ethnic diversity, and  
20 these are reports that are -- that are absolutely  
21 critical, and they have been for many, many years. We  
22 don't have a choice in it. We have to do it, and we  
23 have to do it as accurately as we possibly can. So the  
24 data we supply to the federal government is -- is very  
25 important.



1           The federal government has a tremendous amount  
2 of power over institutions of higher education. For  
3 example, if we don't submit reports in a timely and  
4 accurate fashion, there could be severe penalties,  
5 including the loss of financial aid for our students  
6 and federal grants for our faculty. For an institution  
7 like USF, that's absolutely critical. Over 50 percent  
8 of our students right now do get federal financial aid.  
9 And were we not to submit these reports in a timely and  
10 accurate fashion, we would risk losing financial aid.  
11 So it's absolutely critical that it be done and it be  
12 done accurately and in a timely fashion.

13           Q. All right. And could you tell us about the  
14 University's obligations to report to the accrediting  
15 agency, WASC?

16           A. Yeah. The accrediting agency likewise is  
17 critical for the well being of any university and at the  
18 University of San Francisco, the Western Association of  
19 Schools and Colleges, known as WASC, plays a vital role.

20           And so periodically the Western Association of  
21 Schools and Colleges sends a team of other faculty  
22 administrators to institutions of higher education,  
23 including USF, to spend a great deal of time evaluating  
24 an institution, its educational effectiveness, its  
25 capacity to perform its duties. And we have to annually

1 submit reports to WASC and then periodically they come  
2 for a full site visit. We had such a visit in 2009.  
3 And we were reaccredited by WASC in 2010 for a period  
4 of -- of ten years, so we were very pleased, of course,  
5 about that.

6 But part of what I do is I prepare the  
7 documents, the tables, the charts, the graphs that make  
8 possible our accreditation. And again, I work very  
9 closely with a number of people at USF, but my role  
10 is -- is fairly important in terms of preparing many,  
11 not all, but many of the documents that go into our WASC  
12 report, and I work directly with our WASC liaison  
13 officer at the University of San Francisco who is the  
14 direct contact with the Western Association of Schools  
15 and Colleges.

16 Q. All right. And if I could direct your  
17 attention to the documents marked as Exhibit 200.

18 And, Your Honor, may I approach to assist him?

19 THE COURT: Yes.

20 MS. ADLER: Thank you.

21 Q. If I could direct your attention to the second  
22 document behind in Exhibit 200.

23 A. Uh-huh.

24 Q. That's entitled "University of San Francisco  
25 Fact Book and Almanac 2008"?

1           A.    Yes.

2           Q.    Could you please tell me what this document is.

3           A.    This is a document that I prepare every year  
4 and it's the summary statement of all of the vital  
5 statistics, if you will, the vital data about the  
6 University of San Francisco. I started doing these  
7 documents back in 2006 and I have done them every year  
8 since. They're posted on our University of San  
9 Francisco website so anyone in the world can take a look  
10 at some of the vital statistics about the University of  
11 San Francisco.

12                   And to compile this document, I work with many  
13 offices here at USF. I gather data from the colleges, I  
14 gather data from my colleagues in institutional  
15 assessment, I gather data from business and finance, all  
16 of the offices at USF, virtually, that have various  
17 types of information.

18                   I work with, I collect it, I write the fact  
19 book and almanac. I check for its veracity and then go  
20 ahead and print it and post it online on our website at  
21 the University of San Francisco. And much of the data  
22 that I've just talked about that is supplied to WASC and  
23 to the federal government, I put in here as well.

24                   So it's kind of a snapshot of some, not all,  
25 but some of the vital pieces of information that we

1 supply to the federal government and to our accrediting  
2 agency.

3 Q. If I direct your attention to page 5 of this  
4 almanac.

5 A. Yes, I have it before me.

6 Q. And it's -- to the section entitled "Student  
7 Ethnicity" and -- and there I see there's a series of  
8 statistics for ethnic composition of the students in  
9 2008.

10 A. That's correct.

11 Q. Is this data that was reported to the federal  
12 government and to WASC?

13 A. Yeah, it's exactly the data that we support,  
14 that we supply to both the federal government and to our  
15 accrediting agency, WASC. It's -- it's precisely down  
16 to the decimal point what we supply to those important  
17 agencies. And here I simply captured it for the public  
18 at large, should they be also interested. And many,  
19 understandably, parents and families are interested in  
20 the ethnic composition of any university and this is a  
21 reflection as of 2008 of our ethnic composition.

22 And if I could draw your attention to a couple  
23 of issues, but something that is important, I think, to  
24 note is that the University of San Francisco is rated  
25 extremely highly in terms of its ethnic diversity.

1           For example, I start off this particular  
2 section by indicating USF is rated 19th in the ethnic  
3 diversity with students among 262 national universities,  
4 and this is recorded by the US News & World Report, some  
5 of you may have seen that. And we're also 18th among  
6 366 institutions of higher education in the 2008  
7 Princeton Review. So we take a great deal of pride in  
8 the fact that within our student population, we are very  
9 diverse.

10           And in fact getting back to WASC, one of the  
11 things they highlighted and they praised us for was how  
12 diverse our institution was compared to other  
13 institutions across the country. And even in terms of  
14 the Jesuit institutions, we're one of 28 Jesuit schools  
15 in the United States to have -- and they all have  
16 similar missions and to a degree they all stress the  
17 importance of ethnic diversity among the student  
18 population, and WASC reported that, even among those 28,  
19 we are exceptional in terms of our diversity of our  
20 student population. We very actively recruit students  
21 from various ethnic populations within -- within the  
22 nation and indeed throughout the world.

23           Q. All right. And the same question as to page 7  
24 of that document, which lists some statistics for USF  
25 faculty in terms of gender and ethnicity.

1           Is this also data that was reported to the  
2 federal government and to WASC?

3           A.    Yes.  It's exactly the same data that we supply  
4 to our accrediting agency, WASC, and to the federal  
5 government.  And as you can see on -- in this document,  
6 we also do extremely well in terms of our gender and our  
7 ethnic diversity.

8           For example, in 2008, fully 46 percent of our  
9 faculty members were -- were female.  And if you look at  
10 the ethnic diversity of our -- of our faculty, we also  
11 are doing exceptionally well:  5.3 percent African  
12 American, 8.9 percent Asian/Pacific islander, 5.8  
13 percent Latino, 1 percent Native American.  And it's  
14 increased since then, by the way.  Our diversity, both  
15 in our students and our faculty, continues to increase  
16 and has since 2008.

17           In fact, right now, as we sit here, only about  
18 60 percent of our faculty are -- are white.  The rest  
19 represent one or more ethnically diverse groups.  So we  
20 continue to increase our diversity, both within our  
21 faculty population and within our student population and  
22 we're almost becoming very close to being 50/50 in terms  
23 of gender balance.  We have, as we sit here today, of  
24 our full-time faculty 52 percent are male and 48 percent  
25 are female.

1           So projecting ahead, it will probably be just a  
2 very short period of time before we're basically  
3 equivalent in terms of gender equality among faculty at  
4 the University of San Francisco.

5           Q.    And if I could have you take a look at the  
6 first page of Exhibit 200, which is a pie chart  
7 entitled, "Student Body, Minority and Nonminority."

8           A.    Yes.

9           Q.    Have you reviewed this chart?

10          A.    I have indeed.

11          Q.    And does it accurately reflect the data that is  
12 contained in the almanac that you were testifying about?

13          A.    It's an exact representative sample of that  
14 data compiled and synthesized but those figures are  
15 exactly the same as what's in the almanac.

16                MS. ADLER:  Your Honor, I'd like to move  
17 Exhibit 200 into evidence?

18                MR. KATZENBACH:  No objection, Your Honor.

19                THE COURT:  Received.

20                        (Whereupon, Defendant's Exhibit 200 was  
21 marked for identification and admitted into  
22 evidence.)

23                MS. ADLER:  And, Your honor, I actually have an  
24 excerpt of the two pages that we discussed from the  
25 almanac and I made copies for the jury.

1           Might I distribute it to them?

2           THE COURT: Sure, unless there is an objection?

3           I hear none. Go ahead.

4           MS. ADLER: Q. And could I direct your  
5 attention to Exhibit 201.

6           A. Uhm-hum. Yes.

7           Q. And to the second document, which is entitled  
8 "Reaffirmation of Accreditation, July" --

9           A. Yes, I have it here.

10          Q. "July 15, 2009."

11          A. Yes.

12          Q. Could you please tell us what this document  
13 does?

14          A. This is a very small part of the very hefty  
15 volume that we submitted to the Western Association of  
16 Schools and Colleges, WASC, for purposes of the  
17 reaffirmation of our accreditation.

18                 As I was saying before, it's very important  
19 that we submit very comprehensive data to our  
20 accrediting agency for purposes of being accredited, and  
21 this is part of a multivolume series of documents that  
22 we submitted to the Western Association of Schools and  
23 Colleges.

24                 As you see, it's dated July 15th, 2009, so it  
25 includes data up through the end of 2008. And the year



1 after this they were satisfied with the documentation  
2 that we presented and they went ahead and reaffirmed our  
3 accreditation, as I said earlier, for a full decade.

4 Q. Okay. Thank you.

5 Can I ask that you step a little bit away from  
6 the mic?

7 A. Sure. There's a little echo.

8 Q. Thank you. Thank you.

9 THE CLERK: Ms. Adler. Ms. Adler, what exhibit  
10 is this?

11 MS. ADLER: This is Exhibit 201.

12 (Whereupon, Defendant's Exhibit 201 was  
13 marked for identification.)

14 MS. ADLER: Q. And if I could have you take a  
15 look at the first chart of Exhibit 201, which is  
16 entitled "Full-time Faculty Members, Minority and  
17 Nonminority" --

18 A. Yes, I have it.

19 Q. "USF, 2008."

20 Have you reviewed this chart --

21 A. I have, I have.

22 Q. -- for its accuracy?

23 A. Yes. It is accurate.

24 Q. Okay. And the following chart entitled  
25 "Full-time Faculty Members by Gender"?

1           A.    I have reviewed that chart and it is -- it is  
2 accurate.

3           MS. ADLER:   Okay.  Your Honor, I'd like to move  
4 Exhibit 201 into evidence?

5           THE COURT:   Any objection?

6           MR. KATZENBACH:  No objection.

7           THE COURT:   Received.

8                       (Whereupon, Defendant's Exhibit 201 was  
9                       admitted into evidence.)

10          MS. ADLER:   Thank you.

11          THE COURT:   Ms. Adler, you packed up and left  
12 the lectern.  Are you through with this part of the  
13 questioning?

14                 You left the lectern, are you through with your  
15 questioning?

16          MS. ADLER:   Yes, Your Honor.  No further  
17 questions.

18          THE COURT:   Mr. Katzenbach, do you have any  
19 questions?

20          MR. KATZENBACH:  Yes, Your Honor, I just have a  
21 few questions.

22  
23                       CROSS-EXAMINATION BY MR. KATZENBACH

24          MR. KATZENBACH:  Q.  Is it Mr. or Doctor?

25          A.    I do have a doctorate, but you can call me Alan

1 if you'd like.

2 Q. Well, I think it's a little informal for that,  
3 but doctor will be fine.

4 A. Whatever you're comfortable with.

5 Q. So I take it from your testimony, would I be  
6 correct in saying that diversity is very important at  
7 the University of San Francisco?

8 A. That is correct.

9 Q. And would it be accurate to say that the  
10 administration takes diversity seriously?

11 A. That's accurate.

12 Q. And would it be accurate to say that the  
13 administration's diversity performance is very important  
14 to the individual deans, associate deans, Provosts, vice  
15 presidents at the University?

16 A. That's a fair statement.

17 Q. And taking a look at the -- when you have these  
18 WASC visits, that's a visit -- you indicated it was a  
19 2009 recertification?

20 A. Well, they actually started the whole process  
21 in 2005. They visited us twice over the period of time  
22 from 2005 to 2009. And we submitted various documents  
23 during that period, of which that exhibit is the latest  
24 in the series, July 2009, just before they made their  
25 visit in the fall of 2009. And then, as I indicated

1 before, they recertified us or reaccredited us in March  
2 of 2010. So it's really quite a lengthy process going  
3 on for several years.

4 Q. Okay. Now -- all right. Just so I understand  
5 it or the jury understands it --

6 A. Okay.

7 Q. -- you said it starts in 2005. There is a  
8 visit in 2005?

9 A. Actually, what we do is we submit a proposal  
10 about how we, as an institution -- it's called a  
11 self-study, how we propose to handle the reaccreditation  
12 process. So that's the first document that goes out to  
13 the Western Association of Schools and Colleges. They  
14 review that document and then they ask us questions or  
15 they ask us to submit further information; then the  
16 actual visit will come approximately two years later  
17 after we've submitted still another document.

18 So there's several documents that need to be  
19 submitted, and they do visit us, at least in this last  
20 instance, on two separate occasions, meeting with deans,  
21 with faculty, with administrators. It's a very  
22 comprehensive, very thorough process. And they spend,  
23 for example, a full week with us one time and they come  
24 back and spend another week with us two years later. So  
25 it's quite a lengthy process.

1 Q. Okay. Do you recall the years -- the years of  
2 the two visits, the most recent two visits?

3 A. Yeah, they visited us in the fall of 2007 and  
4 in the fall of 2009.

5 Q. Now, when the visits occur, you indicated it's  
6 a -- how many visitors are there?

7 A. There's typically three, four. When they  
8 both -- when they came last time, I believe there were a  
9 total of four on the visiting team.

10 Q. Do they talk to each of the departments?

11 A. They talk to most of the departments and I  
12 think -- I believe they talked to all the executive  
13 officers at one point or another. I -- I do believe  
14 they talked to most of the department heads and most of  
15 the administrators. We have a large number of faculty  
16 and staff at the University. I don't know how many  
17 exactly they spoke to, but it was a very thorough visit,  
18 I can assure you of that.

19 Q. And the -- when they visit -- when they visit,  
20 did they look into hiring practices?

21 A. That was one of the areas that I think they  
22 looked into. I can't say for absolute sure. They did  
23 see all of the documents that we supplied which, in  
24 fact, touched upon hiring and touched upon our overall  
25 ethnic and gender diversity.

1 Q. And when we're talking about hiring, are we  
2 talking about primarily faculty hiring?

3 A. Faculty is certainly a major part of -- of the  
4 situation. But there's also tables -- they are  
5 interested in the hiring of staff and we have tables  
6 that we supplied on that as well.

7 Q. All right. And would it be accurate to say  
8 that -- let me strike that.

9 Now, you've been handed a couple of exhibits  
10 that show diversity of -- you know, diversity of  
11 faculty, correct?

12 A. Correct.

13 Q. Take a look at Exhibit 200. And looking at  
14 page 7 of your report.

15 A. Yes, I have it here.

16 Q. Right. Now, that's taking a look at -- this is  
17 a snapshot of 2008?

18 A. That's correct. It would have been as of  
19 November 1st of 2008, to be exact.

20 Q. And at that point, the -- at that point, the  
21 full-time faculty was approximately 76.0 percent white?

22 A. That is -- that is correct.

23 Q. So you've improved since then?

24 A. We have.

25 Q. And now I notice that you -- your charts and

1 information in these -- in these exhibits do not break  
2 it down by department?

3 A. They do not. Neither WASC nor the federal  
4 government asks us to segregate it by department.

5 Q. Well, I understand that, but I just wanted to  
6 clarify.

7 So when we're talking about 76 percent white in  
8 2008, we're really talking about the school as a whole?

9 A. Correct, the entire University.

10 Q. Okay. Now, are there particular departments  
11 that are -- that you're aware of that have less than, at  
12 that -- in 2008, had less than 76 percent?

13 A. Well, we have some very small departments, and  
14 I'd have to look at each department to really answer  
15 that question.

16 If you have a department that has six people in  
17 it or seven people, one or two people could make a huge  
18 difference in the percentage. So I'd have to really  
19 look at every single department to tell you whether or  
20 not any one department is above or below the 76 percent.

21 Q. Okay. Would it be accurate to say that  
22 generally -- generally at the University the sciences  
23 tend to have less diversity than, for example, social  
24 sciences, English, soft sciences, let's call it?

25 A. Once again, I'd have to look at the exact

1 breakdown by department to answer that question with --  
2 with accuracy. I don't want to make any general  
3 statements that may not be reflective of the -- of the  
4 accuracy of where the University stands right now or how  
5 it stood back in 2008.

6 Q. Well, when you reviewed this, when you were  
7 preparing this, you're looking at raw data, right?

8 A. I am looking at raw data.

9 Q. And raw data -- do you look at the raw data by  
10 department?

11 A. It comes to me from each college and it is  
12 generally broken down by department.

13 Q. Okay. So based on your best recollection of  
14 the data, wouldn't it be accurate to say that the  
15 diversity in the science -- hard sciences was somewhat  
16 less than diversity in other areas?

17 A. Again, I'd have to go back and look at the hard  
18 data to answer that, to be honest with you.

19 Q. All right.

20 A. I don't want to make a statement that would not  
21 be accurate.

22 Q. Well, I'm not asking you to.

23 A. Yeah. No, I understand. But I really -- it  
24 was back in 2008, and I'd have to go back and look at  
25 individual departments to really answer that question.



1 Q. Could you give an estimate, overall estimate as  
2 to whether or not sciences were behind other -- the hard  
3 sciences were behind other departments in ethnic  
4 diversity in 2008?

5 A. Again, I really would have to look at the  
6 individual departments.

7 Q. Okay. You talked about the diversity in the  
8 students and you had some very good numbers there --

9 A. Uh-huh.

10 Q. -- and I take it -- I take the University of  
11 San Francisco is very proud of its diverse student body?

12 A. I think that's a fair assessment, yes.

13 Q. And fair to be?

14 A. Fair to be, yes.

15 Q. And I don't mean to --

16 A. No.

17 Q. -- to ask you.

18 But at this point, do you think that -- would  
19 you agree with me that one of the -- one of the benefits  
20 of diversity is providing role models for diverse  
21 student body?

22 A. I think diversity has a lot of positive  
23 features associated with it. Providing role models  
24 certainly is one. I think having students have an  
25 opportunity to experience other cultural and linguistic

1 and social backgrounds is -- is very critical. That may  
2 actually be the most important part.

3 I know the Supreme Court has ruled along those  
4 lines, that exposure to different points of view,  
5 different cultural backgrounds, different socioeconomic  
6 backgrounds is an important part of what education  
7 should be about in this country.

8 Q. And among those, for example, would you agree  
9 with me that in, say, for example, mathematics, it's  
10 important that students, divert ethnic students see that  
11 there are ethnic professors to encourage them to pursue  
12 careers along those lines?

13 A. Well, let me answer it this way: A mathematic  
14 student at the University of San Francisco is exposed to  
15 a wide range of professors across many disciplines: in  
16 the general education area, in the elective area.

17 So a mathematics student, even though that may  
18 be their major, would be exposed to faculty from  
19 numerous departments throughout both the College of Arts  
20 and Sciences and they may take elective courses in other  
21 schools, such as business.

22 So I think the exposure that a student would  
23 have to a faculty member as a role model would come not  
24 just from a particular department, it would come from  
25 the entire University faculty to whom they would be

1 exposed both informally and -- and formally. Both in  
2 class and outside of class.

3 Beyond that, I would say the exposure to other  
4 role models, staff, support people, administrators,  
5 that's all part of the composition of a University. All  
6 of whom are, in fact, role models for students. Not  
7 just a particular faculty member, in a particular  
8 department. It's much broader than that.

9 Q. You said in and outside of class, you mean --  
10 when you say "in class," I think we all know what being  
11 "in class" is like?

12 A. Uhm-hum. Uhm-hum.

13 Q. When you say "outside of class," do you mean  
14 extracurricular activities?

15 A. Or cocurricular activities. Meeting faculty  
16 informally over lunch, meeting faculty out in the plaza.  
17 Seeing administrators perhaps at basketball games.  
18 There is a wide range of cocurricular activities in any  
19 university. And I think students at the University of  
20 San Francisco, as at other universities, have multiple  
21 opportunities to interact with faculty and staff outside  
22 of class, and that's an important part of what any  
23 university, and certainly the University of San  
24 Francisco is all about. We actually try and encourage  
25 that. The cocurricular part of the University is -- is

1 very important.

2 Q. And co -- and just so that we're not locked  
3 into terms, "cocurricular" means what I would -- would  
4 be clubs, things like that?

5 A. Exactly. That's -- that's correct.

6 Q. I'm -- just --

7 A. No, no.

8 Q. We're all victims of the language of our  
9 profession.

10 A. Any field has a lot of esoteric terms. I grant  
11 you that.

12 MR. KATZENBACH: That's all I have. Thank you  
13 very much.

14 THE COURT: Cross from the defendant?

15 MS. ADLER: Your Honor, no further questions.  
16 I'd just like to note that I'll have copies distributed  
17 of the pie charts that were referenced in Exhibits 200  
18 and 201 later today.

19 MR. KATZENBACH: For the jury?

20 MS. ADLER: For the jury.

21 THE COURT: Okay. No further questions.

22 Jurors, do you have any questions for this  
23 witness?

24 Yes.

25 (Discussion off the record and outside the

1 presence of the jury.)

2 THE COURT: Some questions from the jurors.

3 For the purpose of reporting to the federal  
4 government and/or WASC regarding faculty diversity, is a  
5 distinction made between tenured, tenured track  
6 positions, and other faculty positions?

7 THE WITNESS: There are. The WASC report, in  
8 fact, does include separation by faculty rank, full  
9 professors, associate professors, instructors, assistant  
10 professors, tenured and nontenured. So that is -- that  
11 is part of what we report to the federal government and  
12 to WASC.

13 THE COURT: Are the number of grievances filed  
14 against USF reported to the accrediting agency, WASC?

15 THE WITNESS: To my knowledge, there has never  
16 been a grievance filed by the Western Association of  
17 Schools and Colleges. And I've -- I've actually studied  
18 that matter. I have written a history of the  
19 University. And I went all the way back to 1950, which  
20 is when WASC came into existence, and in going through  
21 all of our records and checking with WASC there's never  
22 been a grievance filed by the accrediting agency against  
23 the University of San Francisco.

24 THE COURT: Are the grievances against USF that  
25 have settled in favor of the person or persons filing

1 the complaint reported to WASC?

2 MR. VARTAIN: Your Honor, may I interpose.

3 I think that -- I wasn't in the meeting, but my  
4 guess is the juror has the question of whether  
5 grievances filed by faculty members internally to the  
6 University, are those reported on to WASC.

7 I don't think the question was does WASC file  
8 grievances, does WASC have a grievance against the  
9 University?

10 THE COURT: You will have a chance to follow up  
11 and make any clarifications that are needed.

12 THE WITNESS: I'm not aware of any grievances  
13 filed internally or externally that have gone to the  
14 Western Association of Schools and Colleges.

15 So my knowledge is perhaps just as -- it's  
16 limited but that's exactly what I know or don't know.  
17 As far as I know, there have never been any grievances  
18 that have gone as far as the Western Association of  
19 Schools and Colleges.

20 THE COURT: Mr. Vartain, you may follow up.

21 MR. VARTAIN: Well, since I had the bad form to  
22 interrupt you, Your Honor, let me have the good form to  
23 now take you up on it.

24 Q. Does WASC, as part of its getting information  
25 from universities, does it require that the

1 universities, in general, or USF, in particular, file a  
2 report of the numbers of grievances the faculty members  
3 have in regards to their employment?

4 A. No, it does not.

5 Q. So you don't collect that kind of --

6 A. No, no. Nor does WASC ask for it.

7 Q. Okay. What about the federal government?

8 A. The federal government also does not ask for  
9 that.

10 Q. So you don't collect information about how many  
11 union grievances, how many sexual or unlawful  
12 discrimination grievances are --

13 A. I do not collect any of that information.

14 MR. VARTAIN: Thank you.

15 THE COURT: Follow-up questions, Mr.  
16 Katzenbach?

17 MR. KATZENBACH: Yes.

18 Q. When WASC visitors come to talk to the school  
19 and the departments, they also talk to faculty members?

20 A. They do. In fact, there's often an open forum  
21 where faculty members can actually come and speak to the  
22 members of a WASC visiting team; that is correct.

23 Q. So there would be an opportunity, for example,  
24 for faculty members to raise with WASC concerns about  
25 discrimination?

1 A. They can raise concerns about anything.

2 Q. There would be an opportunity for faculty  
3 members to raise concerns about grievances that they had  
4 concerning diversity?

5 A. They could.

6 Q. There'd be an opportunity to discuss what  
7 happened to those grievances?

8 A. They could.

9 Q. There'd be an opportunity to look -- for the  
10 visitors to look at the University's response to such  
11 grievances?

12 A. Theoretically.

13 Q. That's all information that could be -- that  
14 would -- that there would be an opportunity for the WASC  
15 reviewers to gather, consider, and ponder about in  
16 connection with their review?

17 A. If they wanted. If they so desired, that is  
18 true.

19 MR. KATZENBACH: Thank you. That's all I have.

20 MR. VARTAIN: No further questions?

21 THE COURT: May this witness be excused?

22 MS. ADLER: Yes, Your Honor.

23 THE COURT: Yes.

24 MR. KATZENBACH: Yes, Your Honor.

25 THE COURT: Thank you very much.



1 Sir, you are free to go.

2 THE WITNESS: Thank you.

3 THE COURT: Ladies and gentlemen, remember the  
4 admonitions. Do not form or express any opinion on this  
5 case until it's finally submitted to you for your  
6 decision. Do not discuss among yourselves or with  
7 others until that time.

8 Please be back in your places at 10:10  
9 according to the courtroom clock.

10 (Recess taken.)

11 THE COURT: Jurors and alternates are all  
12 present. Counsel from both sides are present.  
13 Plaintiff is personally present.

14 The defense may call its next witness.

15 MS. ADLER: The University calls Dr. Hossein  
16 Borhani.

17 HOSSEIN BORHANI,  
18 having been duly sworn, testified as follows:

19

20 THE WITNESS: Yes, I do.

21 THE CLERK: Please be seated.

22 State your name and spell it for the record.

23 THE WITNESS: My name is Hossein,

24 H-O-S-S-E-I-N,

25 Borhani, B-O-R-H-A-N-I.

1 THE COURT: Ms. Adler, you may inquire.

2 MS. ADLER: Thank you, Your Honor.

3  
4 DIRECT EXAMINATION BY MS. ADLER

5 MS. ADLER: Q. Good morning.

6 A. Good morning.

7 Q. What is your current occupation?

8 A. I'm an economist at the ERS Group, a consulting  
9 firm.

10 Q. Okay. And what do you do at ERS?

11 A. ERS Group is a consulting firm which is  
12 involved in analysis of economic data, especially in  
13 labor area.

14 At ERS I work with other economists to collect  
15 data, organize them, and analyze them and prepare  
16 reports for our clients, which are usually either  
17 companies or individual claimants.

18 Q. Okay. And could I direct your attention to the  
19 exhibit binder in front of you, to Exhibit 273.

20 (Whereupon, Defendant's Exhibit 273 was  
21 marked for identification.)

22 THE WITNESS: Yes.

23 MS. ADLER: Q. Could you please tell us what  
24 that document is.

25 A. This is my resume.

1 Q. Okay. I'd like to have you walk us through  
2 your resume, starting with -- I see your current job at  
3 ERS Group is the first listing there.

4 It states "Oversee construction of large and  
5 complex analytical databases. Apply research in labor  
6 economics and econometrics to employment decision-making  
7 processes such as compensation, promotion, hiring, and  
8 termination in the corporate private sector and public  
9 institutions."

10 Could you tell me what that means and also tell  
11 me what "econometrics" is.

12 A. Econometrics is application of statistics in  
13 the area of economics and sometimes in labor economics.  
14 And my specialty is in application of statistics in  
15 labor economics.

16 What happens in the -- in these cases that we  
17 work on, if there is a complaint from employees that  
18 there is a discrimination going on in the company or in  
19 an institution, our job is to go back and review,  
20 usually electronic data, personnel data, pay history  
21 data, promotion data; collect all that information, put  
22 them in large databases, and do statistical and economic  
23 analysis to shed some light on this allegation, whether  
24 this allegation that, for example, women are not being  
25 promoted at the same rate that men are being promoted.

1 We look at the personnel data and HR data, human  
2 resource data, payroll data, combine them, build  
3 analytical databases. And from those analytical  
4 databases, we try to answer those questions that come up  
5 in those cases.

6 Q. Okay. And have you calculated alleged losses  
7 in employment cases?

8 A. In many cases, more than a hundred cases.

9 Q. Okay. And those more than a hundred cases  
10 where you've calculated alleged losses, can you give me  
11 a breakdown of how -- what kinds of issue those  
12 employment cases involved, like termination or failure  
13 to promote and so forth?

14 A. A lot of these -- the cases that I work on  
15 these days involve the allegation about hours of work,  
16 and whether the employees have been paid correct amount  
17 of pay for the hours that they have worked.

18 Overall -- I've worked in ERS Group for the  
19 last 25 years. Overall, about 70 percent of the cases  
20 have been involved with discrimination cases on  
21 promotion, termination, age discrimination and, again,  
22 for promotion or for termination. And compensation  
23 issues within certain group of employees are treated  
24 unfairly compared to other group. So about 70 percent  
25 are termination and promotion cases, and about

1 30 percent hours and pay issues.

2 Q. So the more than hundred cases where you've  
3 calculated alleged losses in employment cases,  
4 70 percent -- approximately 70 percent involve cases  
5 where the allegations are wrongful termination or  
6 failure to promote; is that correct?

7 A. That's correct.

8 Q. Okay. And what is your educational background?

9 A. I have a Ph.D. in economics. When I was  
10 getting my course work done for Ph.D., I took a lot of  
11 statistics courses, too. So after graduation, I have  
12 focused on econometrics, which is the application of  
13 those statistics from economics and labor issues.

14 Q. Okay. And if you could tell me where you  
15 received your degrees and what degrees.

16 A. I received my degree from Florida State  
17 University.

18 Q. Your Ph.D.?

19 A. Ph.D., yes.

20 Q. And do you hold any certifications?

21 A. Yes. That certification was a very interesting  
22 course in time series analysis; it's another area in  
23 econometrics that I was interested in.

24 Q. Okay. And do you have any teaching experience  
25 at colleges and universities?

1           A.    Yes, I do.  I did work in -- as adjunct  
2 professor in Florida State University from 1999 to 2004.  
3 I taught statistics to business, people who were -- they  
4 were in last year of graduating from business school.

5           Q.    Okay.

6           A.    And they were required to take this  
7 second-level statistics course.

8           Q.    These are people who are about to graduate with  
9 their MBAs?

10          A.    They were -- actually most of them were going  
11 to MBA, but they were graduating from their bachelor  
12 degree in business and -- and this statistics was one of  
13 the requirement.

14          Q.    All right.  And any other teaching experience?

15          A.    Yes, I have taught also in the -- it says here  
16 in the Tallahassee College.  There I taught  
17 microeconomics and macroeconomics.  I have also taught  
18 in these classes that we conduct every year for  
19 attorneys seminars, for attorneys and their clients.

20          Q.    And I see on your resume there's a listing for  
21 the Florida Department of Environmental Regulation.  
22 What --

23          A.    Yes.  That was a -- about a one-and-a-half year  
24 appointment and the -- at the time acid rain was very  
25 top issue in Florida, and there was a grant to do an

1 impact analysis of acid rain, and how -- or how much it  
2 will cost to fix the power companies or generators so  
3 they do not emit so much gluten (phonetic) in the air  
4 that causes acid rain.

5 Q. Under the heading of "Specialization" on your  
6 resume, I see it lists econometrics, labor economics,  
7 international monetary systems, and natural resources  
8 economics.

9 Could you tell us about that?

10 A. Right. Econometrics are -- of course I have  
11 been practicing for the last 25 years and -- and the  
12 same goes for labor economics, most of the work that I  
13 have done is about labor economics. International  
14 monetary system and national resources are the areas  
15 that I was working on when I was doing my dissertation,  
16 so I did look at the international monetary system.

17 Q. All right. I see you have some publications  
18 and research papers listed in your resume.

19 Could you walk me through those?

20 A. Sure. I have -- again, in this area,  
21 unfortunately, because usually the data is proprietary  
22 and we can't really publish that data, there is not much  
23 chance for publication but I did do these publications.

24 There were some issues in the court back in  
25 1994 on -- on how to test this kind of statistical

1 situations and -- and I was writing about the -- both in  
2 2004 and in 1994. Both of those papers are statistical  
3 in nature, but they are analyzing labor economic  
4 situation.

5 Q. Now, describing the title, the first paper I  
6 see there is "The Use of Interactions in Analyzing  
7 Gender, Race Differences in Compensation."

8 A. Right. So the -- a lot of -- in a lot of  
9 cases, the employment data becomes very complicated, and  
10 the issue in this case was that there was an  
11 organization, an engineering firm, a defense contractor  
12 actually, which was being sued for not paying enough to  
13 women. In other words, women were earning less than  
14 men.

15 The problem was when we went and we looked at  
16 the data, we saw that some of the engineers in that  
17 company during the -- during those days that dot.com  
18 was -- before the bubble burst in California, some of  
19 the engineers in this defense contractor, which was in  
20 the East Coast, they had moved to California, and they  
21 were -- they had been offered a lot higher salaries  
22 compared to old salaries.

23 But after the bubble burst, these engineers had  
24 gone back and they had said to their employers that,  
25 look, we already know your system, and we have also



1 gained this experience in outside world or high-tech  
2 area. Would you hire us back with our existing  
3 salaries? And the company had accepted that.

4 The problem was most of the people who had  
5 moved to California and then came back, they were all  
6 men. And the company, they brought them back, they put  
7 them in the same jobs that they had before but now with  
8 higher salary. And the problem was that women who were  
9 sitting in those jobs and they had not left, their  
10 salaries now was a lot -- was a lot lower than men.

11 So it took a lot of effort to figure this out.  
12 It was not really obvious from the data, but this was  
13 the issue that I was discussing in this paper, that it's  
14 not -- you can't just look at the gender differences and  
15 say that, oh, there's discrimination. You have to also  
16 look at other issues. In this case maybe these people  
17 who came back, if now they have more experience and --  
18 or some other experience, then maybe they should be put  
19 in a different department or different job category than  
20 before.

21 Q. All right. And I see there's -- you have a  
22 number of presentations and seminars listed in your  
23 resume entitled, "Bias and Measuring Bias"?

24 A. Correct. That was -- that was a presentation.  
25 Actually, it was an invited paper. I was invited by the

1 American Bar Association to do a paper and there was a  
2 panel discussion on how do you usually measure, you  
3 know, discrimination. And what happens sometimes that  
4 you actually don't really measure it right, and there is  
5 a bias and you're assessing the bias.

6 So the point was that you have to be very  
7 careful in these and you have to take into account a lot  
8 of factors before you can say that, yes, there might be  
9 a mistreatment of certain groups that's going on.

10 Q. Okay. And the next presentation, "Tests for  
11 Homogeneity of Odds Ratios in Employment Litigation."

12 Who asked you to present that?

13 A. Right. Yes. Actually, this was presented  
14 in -- in the American Western Economic Association  
15 meetings, so it was a technical paper. And, again,  
16 there were some issues in the industry about the  
17 software and I was writing about that.

18 Q. Okay. And the last presentation, "Current  
19 Trends in Wage an Hour Litigation, Economic, Legal, and  
20 Statistical Issues," what was that about?

21 A. This one is actually the -- one of those  
22 seminars that I mentioned earlier, that this is an  
23 annual seminar that we conduct for attorneys.

24 Essentially, it contains some topic in statistics, but  
25 mostly going through some of the cases.

1           We have a panel. We have someone from the  
2 plaintiff's side; we have someone from defense side.  
3 These are actual attorneys. And then we have someone  
4 who comes in as a survey expert. And then there are two  
5 of us, two economists, and we all get -- discuss the  
6 various issues in labor economics in this panel.

7           Q. All right. And have you done -- I see there's,  
8 under "Pro Bono" in your resume, an entry for the  
9 "Innocence Project Pro Bono Work."

10           Have you done any pro bono work in your field?

11           A. Yes, several. And I've listed one of them  
12 here. The -- this -- this one actually did have an  
13 economic loss calculation component to it.

14           There was a -- a man was arrested for, I  
15 believe it was for robbery and rape. He was  
16 incarcerated for 18 years, but after 18 years they found  
17 out that he's innocent. This is due -- they checked  
18 some DNA evidence. So he was free.

19           So in this case I was asked to do an economic  
20 loss damage calculation for him. And this was in  
21 Georgia. You can't really sue government in Georgia,  
22 but there is a legislative avenue that -- so my  
23 report -- the attorneys took my report to that session,  
24 legislative session and they were able to use that  
25 report to get some funding for the freed man.

1 Q. And I think we've gone through your resume  
2 here.

3 Does it accurately reflect your qualifications?

4 A. Yes.

5 MS. ADLER: Your Honor, I'd like to move  
6 Exhibit 273 into evidence.

7 MR. KATZENBACH: No objection.

8 THE COURT: It's received.

9 (Whereupon, Defendant's Exhibit 273 was  
10 admitted into evidence.)

11 MS. ADLER: All right.

12 MS. ADLER: Q. Have you been approved by the  
13 Court to distribute damages calculations previously?

14 A. Yes. Actually, recently there was a class  
15 action case in which there were about 6,500 claimant  
16 [sic] in the case. I was on the defense side, but --  
17 and the case went to court, but in the first or second  
18 day of court, parties agreed to settle the case.

19 I was approached by the opposing side counsel  
20 to do the calculation for the damages for that case and  
21 come up with a plan so the Court can approve that -- the  
22 way that the plan works, the individuals, claimants will  
23 be getting a fair share of the settlement fund after  
24 it's been distributed.

25 So I wrote the plan and submitted it to Court,

1 and the Court approved the plan and then said the  
2 distribution was based on that plan.

3 Q. All right. And have you been qualified by a  
4 Court as an expert in labor and employment economics  
5 before?

6 A. Yes. Actually, there -- there was a case  
7 against FDIC, which is Federal -- Federal Deposit  
8 Insurance Corporation. This was a hiring age case. So  
9 the allegation was that because the person was older  
10 than 40, he's not being hired at FDIC. So I testified  
11 in that case.

12 Q. All right. Thank you.

13 What were you asked to do in this case, and  
14 please also discuss your opinions and your basis for  
15 them.

16 A. In this case?

17 Q. Yes.

18 A. I was asked to look at the data, publicly  
19 available data in this matter, which is related to the  
20 job prospects for someone with Dr. Kao's credential.

21 Q. Okay. And were you asked to look at any other  
22 issues?

23 A. In -- in -- in looking at that data, I was -- I  
24 was looking to see what jobs are or what the trends are  
25 for mathematicians in the United States. So I looked at

1 some of the data which is available from -- from the  
2 publication called "Occupational Outlook," and that  
3 publication essentially looks at the industry, uses the  
4 historical data industry and how the demand for  
5 different industries are going, and then they do these  
6 projections to the future.

7 So when I looked at that data, I see that they  
8 say that because the --

9 MR. KATZENBACH: Your Honor?

10 MR. VARTAIN: You are interrupting.

11 MR. KATZENBACH: I don't believe the witness  
12 has been qualified as an expert yet to offer any  
13 opinions as to what the data may show us.

14 MS. ADLER: Your Honor, I move to offer  
15 Dr. Borhani as an expert economist and labor economist.

16 MR. KATZENBACH: To testify in what area?

17 MS. ADLER: Labor and employment economist.

18 MR. KATZENBACH: I don't believe -- may I voir  
19 dire the witness, Your Honor?

20 THE COURT: Yes.

21  
22 VOIR DIRE EXAMINATION BY MR. KATZENBACH

23 MR. KATZENBACH: Q. Dr. Borhani, do you have  
24 any experience in vocational rehabilitation?

25 A. No.

1 Q. Do you have any experience in job placement?

2 A. No.

3 Q. Do you have any experience helping people get  
4 work?

5 A. No.

6 Q. Do you have any experience as to the  
7 requirements for maintaining a job as a university  
8 professor?

9 A. No.

10 MR. KATZENBACH: Your Honor, we would object to  
11 any testimony on those areas. We would object to his  
12 testimony as to the availability of jobs or any of those  
13 areas because I do not believe he's qualified as an  
14 expert in those areas.

15 MS. ADLER: Your Honor, his experience in labor  
16 economics is applied to wrongful termination of  
17 lawsuits, such as this case, involving calculating the  
18 amount of alleged loss for employees in wrongful  
19 termination, promotion and compensation cases.

20 MR. KATZENBACH: I don't believe he's been -- I  
21 believe that his ability to do a mathematical  
22 calculation is not in question. It's his ability to  
23 opine on the availability of jobs and what the  
24 requirements are that is in question, and for which I  
25 believe they are going to be offering him as an expert.

1 He has just indicated he has no expertise in those  
2 particular areas.

3 THE COURT: Well, he knows a lot more about it  
4 than the man on the street. He certainly knows more  
5 about it than I do.

6 I'll qualified him to be an expert and any  
7 shortcomings in his qualifications if they come into  
8 equation in deciding what weight to give his testimony.

9 MR. KATZENBACH: Thank you, Your Honor.

10 THE COURT: Ms. Adler, maybe you better back up  
11 and do your questioning again.

12 MS. ADLER: Q. You were talking about your  
13 findings upon your -- you were talking about researching  
14 the Occupational Outlook?

15 A. Correct. In Occupational Outlook, as I stated  
16 earlier, the data which is collected shows projections  
17 for about 800 U.S. occupations, so they -- they have  
18 various occupations. They have a code, actually, for  
19 each occupation, but then they collect data from  
20 industry and -- and also they have surveys of -- from  
21 households that --

22 THE REPORTER: I'm sorry, "they have"?

23 THE WITNESS: They collect data from industry  
24 and also they have surveys from households. And using  
25 those combined data, they make projections about each



1 occupation.

2 In that document or in that publication, they  
3 have projected that mathematicians -- and this is again  
4 one of the jobs that they have specified in this data,  
5 mathematicians are those occupations that require a  
6 Ph.D. in mathematics.

7 So they tell us that mathematicians' occupation  
8 will have much higher growth than average in the next  
9 ten years more or less. And the reason they give for  
10 that is that the American economy is going through this  
11 change and the companies are becoming a lot more  
12 sophisticated, a lot more technological, and that  
13 creates this demand for this profession.

14 I mean, some jobs are disappearing, as we know.  
15 Actually, I looked at the bottom of that list, and the  
16 job of -- I think it was postal clerk, was one that it  
17 had -- they were projecting that it's going to have,  
18 like, 50 percent decrease in next ten years. On the  
19 other hand, some jobs are -- have a lot more are growing  
20 at a lot higher growth rate. The top one was home  
21 health aide, and that's because of the population is  
22 getting older in the United States, that occupation will  
23 see tremendous growth, 70 percent. Physiotherapy and  
24 biomedical engineering was also on the very top.

25 Q. Okay.

1           A.    I'm sorry, you asked me a question I didn't  
2 answer.

3                    Did you ask me about the opinion in this case?

4           Q.    Yes, I asked you to state all your opinions in  
5 this case.

6           A.    Okay.  In -- in regard to the damage  
7 calculation in this case, too?

8           Q.    That's right.

9           A.    Okay.  I was also asked to look at the economic  
10 loss calculation that had been performed in this case.  
11 As Dr. Ogus explained, the two-and-a-half to \$3 million  
12 that she calculated as economic loss in this case is  
13 based on the assumption that for next 25 years Dr. Kao  
14 will not be working, and I think that's a -- that's an  
15 unreasonable assumption.  I know that there are other  
16 issues going on in this case, but in terms of economic  
17 loss calculation, I think that that's an unreasonable  
18 assumption for that calculation.  And let me explain  
19 just a little bit why.

20                    The way that labor economists look at the labor  
21 market and how labor market works, it's based on a very  
22 simple idea.  It's very well known, and widely  
23 university accepted, but it's in -- it's based on very  
24 simple idea.  Let me try to explain that idea.

25                    You and I, you know, we invest on things,

1 because we have this incentive later on we will be  
2 gaining some benefit from these investments. We go and  
3 we try to buy a second home so we can rent that home to  
4 a tenant and, you know, if the payment or the rent that  
5 we are collecting is higher than mortgage, then we are  
6 getting some cash flow. And when we are finished with  
7 the mortgage, we are going to have a stream of income  
8 that is going to come to us.

9 The idea of economists in terms of labor  
10 economics, is very similar to this. They say that what  
11 we do in real life, we go and invest in ourself, we  
12 invest from our human capital. So it's not financial  
13 capital or real estate capital, it's human capital.

14 We invest in how we get education. We get all  
15 these degrees so we can show at a given point how much  
16 knowledge, how much know-how we have, and then we take  
17 that human capital to the labor market and we try to  
18 sell that and get a rent on that human capital and that  
19 becomes our salary. That's how we economists look at  
20 the labor market.

21 So going back to this case, you know, assuming  
22 that this human capital that is still -- that Dr. Kao  
23 will stay dormant for the next 25 years, it doesn't make  
24 sense from an economic point of view.

25 This is just like a situation that a -- someone

1 who has rented his house to somebody else and the tenant  
2 leaves and you say that, well, you either come back and  
3 rent it again or I will not rent this to anybody else.  
4 You know, it doesn't make sense in that context and it  
5 doesn't make sense in this context, too.

6 Q. Thank you.

7 Going back to your first opinion about the  
8 growth in the field of -- in mathematics jobs and the  
9 potential jobs out there for mathematicians, did you  
10 look to see where mathematicians worked?

11 A. Yes, I did.

12 Q. Could I have you turn to Exhibit 268, please.

13 (Whereupon, Defendant's Exhibit 268 was  
14 marked for identification.)

15 MS. ADLER: Q. So what -- what did you do in  
16 terms of research in the issue of where mathematicians  
17 work?

18 A. So this is based on, again, one of the data,  
19 the databases that government puts together. It's a  
20 survey of 1.2 million establishment [sic] in the  
21 United States. So they send these data -- I'm sorry,  
22 they send this survey to 1.2 million establishments in  
23 the United States and they ask them answer questions  
24 about what type of jobs they have in their establishment  
25 and how much earnings or how much wages they are paying

1 for these jobs. And, again, all of this data comes in  
2 and goes through the process of identifying which jobs  
3 they are.

4           Again, you know, mathematician will go to the  
5 specific code that it has, and other jobs, other 800  
6 jobs go to their appropriate place. And -- and so I  
7 looked at that data and I only looked at mathematician  
8 job and then looked at industry for mathematicians. And  
9 when I look at that, I see that federal government has  
10 about 38 percent of those jobs. So mathematicians are  
11 employed in federal jobs, about 38 percent of them, and  
12 the next one is scientific and research organizations,  
13 29 percent. Colleges and universities are 14 percent,  
14 and consulting firms is about 9 percent. Architects and  
15 engineering is 7 percent, and insurance carrier is  
16 2 percent.

17           Q.    Okay. In looking at Exhibit 268 I see a  
18 colored pie chart followed by what looks like a database  
19 printout.

20                    Could you describe what Exhibit 268 is? Did  
21 you, for example, prepare this chart and what is the  
22 source of the information on the chart entitled "Where  
23 do Mathematicians Work?"

24           A.    Correct. The pie chart is based on the --  
25 based on the data which comes after the chart. And, as

1 you can see, it gives the -- the third column in the  
2 data gives you the occupational code. So occupational  
3 code for mathematician is 152021, I believe. And so  
4 what I told computer to do is to go through this -- this  
5 data and whenever it sees that code, pick that line of  
6 data. And then by aggregating that -- those lines, we  
7 have come up with this pie chart for -- for  
8 mathematician. Because in that data it gives the  
9 industry, so it shows that in which industry  
10 mathematicians are working.

11 Q. And the data in the source document comes from,  
12 once again?

13 A. This is a -- this is a publication -- it's from  
14 Bureau -- Bureau of Labor Statistics and it's a survey  
15 of 1.2 million establishments in the United States.

16 Q. Okay. And what's the Bureau of Labor  
17 Statistics?

18 A. The Bureau of Labor Statistics is a division of  
19 Department of Labor in the United States, and its  
20 function is basically to collect data on industry on  
21 employment, unemployment, all those issues.

22 Q. Okay. So your source document, this data is  
23 from the government?

24 A. Correct.

25 Q. And does the data contained in the chart

1 entitled "Where do Mathematicians Work" that you  
2 prepared, which is at USF3048, does it accurately  
3 reflect the data in the source document from the  
4 government?

5 A. Correct.

6 MS. ADLER: Okay. Your Honor, I'd like to  
7 offer Exhibit 268 into evidence.

8 THE COURT: Any objection?

9 MR. KATZENBACH: Yes. May I voir dire one  
10 second?

11 THE COURT: Okay. I'll hear the objection  
12 and --

13 MR. KATZENBACH: In that case -- in that case,  
14 I am going to withdraw the objection. I'll just do it  
15 on cross-examination.

16 THE COURT: Okay. Proceed.

17 (Whereupon, Defendant's Exhibit 268 was  
18 admitted into evidence.)

19 MS. ADLER: Your Honor, I have copies of the  
20 pie chart. May I distribute them to the jury?

21 THE COURT: If there is no objection.

22 MR. KATZENBACH: No.

23 THE COURT: Hearing none, so go ahead.

24 MS. ADLER: Q. Dr. Borhani, could you just  
25 walk me through the chart?

1           A.    Sure.

2                    The pie chart shows that -- essentially that's  
3 where -- where do mathematicians work, and it shows by  
4 industry the percentage of mathematicians that show up  
5 in this data that I just described. Mathematicians show  
6 up 38 percent of the time in federal government jobs,  
7 and I believe the median income for -- that's the median  
8 income next to that --

9           Q.    106,950?

10           A.    -- one, 106,950. And then the next -- right  
11 across from that segment of the pie chart is the  
12 scientific researches, which is the next -- that's  
13 29 percent.

14           Q.    So 29 percent for scientific research services?

15           A.    Right. So that's the -- the median income is  
16 slightly higher for that group. It's 114,820.

17           Q.    114,820?

18           A.    Correct. And the next one is colleges and  
19 universities, and that's 14 percent and the median is  
20 72,840.

21           Q.    So for colleges and universities that's  
22 actually quite a bit lower than the government and for  
23 research; that's 14 percent?

24           A.    Correct.

25           Q.    Okay. And the median salary there is 72,840?



1           A.    Correct.

2                   And then you have nine percent in management  
3   scientific consulting industry with \$97,430 median  
4   income.  The next category is agriculture and  
5   engineering services; that's seven percent, and the  
6   median income is 83,690.  And finally insurance carriers  
7   is three percent, and the median income is \$90,340.

8           THE COURT:  Ladies and gentlemen, remember the  
9   admonitions.  Do not form or express any opinion on this  
10  case until it's finally submitted to you for your  
11  decision.  Do not discuss among yourselves or with  
12  others until that time.

13                   Please be back in your places at 11:10  
14  according to the courtroom clock.

15                   (Recess taken.)

16           THE COURT:  Jurors and alternates are all  
17  present.  Counsel from both sides are present.  
18  Plaintiff is personally present.

19           Ms. Adler may continue her inquiry.

20           MS. ADLER:  Thank you, Your Honor.

21           Q.    Dr. Borhani, just earlier you had testified  
22  about some assumptions regarding Professor Kao's ability  
23  to return to work.  I just wanted to make it clear, were  
24  you referring to the opinion of Dr. Margo Ogus who  
25  testified here in court earlier?

1 A. That's correct.

2 Q. Have you reviewed the testimony and report of  
3 Dr. Margo Ogus?

4 A. Yes, I have.

5 Q. Thank you.

6 Did you look at -- we've already talked about  
7 where mathematicians work. Did you look at, in  
8 particular, what industries hire mathematicians with  
9 Ph.Ds such as Dr. Kao?

10 A. Yes. Actually, the Society for Industrial and  
11 Applied Mathematicians has a lot of information about  
12 that issue, and I have a table in -- as one of the  
13 exhibits, which shows that mathematicians are hired in  
14 aerospace, chemical and pharmaceutical companies,  
15 communications services, computer services and software  
16 firms, consulting firms, electronic and computer  
17 manufacturers, energy system, engineering research  
18 organizations, and federally funded contractors,  
19 financial services and investment management.

20 Q. And, Dr. Borhani, are you referring to  
21 Exhibit 267?

22 A. That's correct, yes.

23 Q. If I could just ask you a few questions about  
24 that. You said it's -- the source for this document is  
25 the Society for Industrial and Applied Mathematics?

1 A. Correct.

2 Q. What is that?

3 A. That's a trade group for mathematicians who  
4 have a Ph.D., and provide a lot of information about,  
5 you know, how many people are being graduated from  
6 universities in -- in -- with mathematics degree and  
7 also what are the job opportunities for mathematicians.

8 Q. And do economists commonly rely on data  
9 provided by this Society in their research?

10 A. Yes. It is important because the --  
11 traditionally mathematicians, they got their Ph.D. and  
12 they went to university and taught mathematics. But in  
13 recent years, there have been a lot of movement by  
14 mathematicians themselves, their trade association, to  
15 work with them to -- to try to offer their knowledge  
16 base and their expertise in other areas, in different  
17 industries. And they have been very successful in that,  
18 and --

19 Q. Does the data reflected in this two-page chart  
20 accurately reflect the data from the Society for  
21 Industrial and Applied Mathematics?

22 A. Yes.

23 MS. ADLER: Your Honor, I'd like to move  
24 Exhibit 267 into evidence.

25 THE COURT: Any objection?

1 MR. KATZENBACH: No objections.

2 THE COURT: Is that "yes" or "no"?

3 MR. KATZENBACH: No objection. I'm sorry.

4 THE COURT: All right. It's received.

5 (Whereupon, Defendant's Exhibit 267 was  
6 admitted into evidence.)

7 MS. ADLER: Your Honor, I have copies of this  
8 exhibit that I would like to distribute to the jurors.  
9 May I do that?

10 THE COURT: I hear no objections. The answer  
11 is yes.

12 THE WITNESS: By looking at this chart, one  
13 thing to note is that the mathematics is becoming very  
14 important in these -- different industries here, because  
15 a lot of these industries need -- a lot of these  
16 companies, they need simulation, and mathematics is  
17 essential for simulation. You know, aerospace needs  
18 simulation. And these days a lot of the simulation are  
19 done in computer, and a lot of these companies need  
20 robotics.

21 Again, a lot of mathematics is involved in  
22 those. So to -- you know, to these industries, you have  
23 to develop all this software which is -- a large part of  
24 it is based on mathematics. And that's why the  
25 mathematicians are really demanded in this industry,

1 especially computational mathematics, which is actually  
2 Dr. Kao's specialty.

3 MS. ADLER: Q. What is computational  
4 mathematics?

5 A. It is the application of mathematics to  
6 different areas, different areas of the science.

7 Q. And you said it's a specialty sought after?

8 A. It is, because, you know, in all of these  
9 areas, because the technology is improving and the  
10 companies want to improve their technology, they are  
11 looking for these new ways of working with software and  
12 simulation.

13 Q. What about Silicon -- being in Silicon Valley  
14 here? Are Silicon Valley employers looking for  
15 computational mathematicians?

16 A. Yes, a lot of industries that you see in this  
17 area, actually. You know, animation, I mean, has a lot  
18 of mathematics. Google, search engines are based on  
19 mathematical --

20 Q. So Google, Yahoo and those kinds of companies  
21 here are looking for that?

22 A. Yes.

23 Q. Okay. And in terms of Ph.Ds in computational  
24 mathematics, what -- what are employers looking for?  
25 Are there particular programs that people graduated from

1 that are more highly sought after than others?

2 A. Well, they're -- the better well known the  
3 university is the better the chances. I mean, it's --  
4 it's a fact that people pay attention to the name of the  
5 university. Princeton is usually ranked first in  
6 mathematics, but sometimes in the top three.

7 Q. And Dr. Kao went to Princeton to obtain his  
8 Ph.D., correct?

9 A. Correct.

10 Q. You're saying it's often ranked No. 1 in the  
11 country for Ph.Ds in math?

12 A. That's correct.

13 Q. Okay. And certainly within the top three, is  
14 what you're saying?

15 A. Yes.

16 Q. Okay. Now, take a look at your chart over here  
17 at "Industries that Hire Mathematicians," is this the  
18 chart of the different industries and the examples of  
19 some of the employers that hire Ph.D. mathematicians?

20 A. Correct.

21 Q. Okay. So we have aerospace and companies like  
22 Boeing and the car companies, Lockheed and --

23 A. Correct.

24 Q. Okay. And chemical and pharmaceutical  
25 companies, like DuPont?

1           A.    And -- and these are -- these are the name of  
2   the companies that this societies, Society for  
3   Industrial and Applied Mathematics, they are tracking,  
4   because, you know, they have a relationship with these  
5   industries and -- and they want their graduates, after  
6   they finish their Ph.D. to be able to go to these  
7   companies.  So they track, you know, who's going where,  
8   and this data is based on that system.

9           Q.    Okay.  We have "Communication Service" on  
10  there, like Verizon, the phone companies are looking for  
11  Ph.D. mathematicians?

12          A.    Correct.

13          Q.    Okay.  And I think you talked about this a  
14  little bit earlier, the computer service and software  
15  firms like Adobe and Google, Microsoft, Palo Alto  
16  Research Center, right over here?

17          A.    Correct.

18          Q.    Okay.  And then "Consulting Firms."  What are  
19  those kinds of jobs?  What -- what does that mean  
20  "consulting firms"?

21          A.    Consulting firms -- I mean, either in the area  
22  of finance or other finance issues, mathematicians have  
23  become, in recent past, very active again.  You know,  
24  looking at the trends of the market and trying to  
25  predict what's going to be happening or automating some

1 of the trades in -- in the stock exchange system.

2 There is also -- mathematics is involved in the  
3 government. FCC distributes broadband frequencies.

4 People usually, or companies, bid for those bands. They  
5 are very expensive, and there is a very high level of  
6 competition to get those broadbands. And mathematicians  
7 actually help -- I'm just trying to explain some of this  
8 work that these consulting firms do.

9 The consultants help those industry who want to  
10 get this broadband, and they are bidding for those  
11 broadbands. With mathematical formulas, they help them  
12 to put a bid, so there is a higher probability for them  
13 to actually win the bid.

14 Q. And "Electronics and Computer Manufacturers,"  
15 like Hewlett-Packard and Philips Research, Motorola?

16 A. Right.

17 Q. And "Energy Systems Firms," like Lockheed, what  
18 kinds of jobs are those?

19 A. Well, again, Lockheed, as you know, they  
20 manufacture C130 airplane, which is transportation  
21 airplane, and they also manufacture F22, F16, those are  
22 fighter jets.

23 And actually I have worked for Lockheed and  
24 they gave me a tour of the facility, and it's very, you  
25 know, top level kind of engineering and mathematical



1 company, because they have to do all these simulation  
2 for their planes, and a lot of those simulations are  
3 done on computer, not -- I mean, they have all these  
4 actual models that they do simulation on but the  
5 majority of their simulation is done in computer. So  
6 for those simulation, mathemat -- people who know  
7 mathematics is essential.

8 Q. Okay. And "Engineering Research  
9 Organizations"?

10 A. Again, mathematicians are -- are -- you know,  
11 in -- in figuring out the viability of the mines or oil  
12 fields, mathematicians are helpful in that area.

13 Q. So mines and oil fields, oil companies are  
14 saying --

15 A. That's correct.

16 Q. -- hire mathematicians, Ph.Ds in math.

17 "Federally funded contractors," what kinds of  
18 jobs are available there?

19 A. Rand Corporation, for example, they do all  
20 sorts of policy based analysis, but they -- they do need  
21 mathematicians, because, again, they are doing  
22 forecasting to the future and they have to use this  
23 mathematical model to do that.

24 Q. So they need Ph.Ds in math to create these  
25 models?

1 A. Correct.

2 Q. "Financial Service and Investment Management  
3 Firms," you've got listed there Citibank and Rudy's  
4 Corporation?

5 A. Correct. Again, those are -- that's -- the  
6 figures have become more -- these companies are using  
7 mathematicians in -- in calculating the expected return  
8 for the financial instruments, so they use mathematical  
9 models to come up with those.

10 Q. And on the second page of the exhibit,  
11 "International Government Agencies," what is that  
12 category?

13 A. These are more outside US companies or  
14 agencies, French Atomic Energy, National Research  
15 Council for Canada.

16 This is, again, another indication that society  
17 is saying that, look, there is also jobs available in  
18 the international market for mathematicians, because,  
19 you know, some of their graduates have moved to those  
20 agencies.

21 Q. So there's lots of opportunities in both the US  
22 and outside the US?

23 A. Correct.

24 Q. Okay. "Medical Device Company"?

25 A. Again, it's in -- because for -- these days in

1 medical science, you need a lot of simulation, so  
2 computer graphics and -- and simulation is very  
3 important and math is essential for those.

4 Q. And see under the category "Nonprofit  
5 Organizations," American Institute of Mathematics is  
6 listed. What is that?

7 A. This is another actually trade group for -- for  
8 mathematicians, and this tells me that actually some of  
9 the mathematicians went and worked for these groups, for  
10 these trade groups, so there were job opportunities  
11 actually there.

12 Because a few years they -- they started --  
13 there was this panic among mathematicians that a lot  
14 of these jobs in university, a lot of -- a lot of  
15 faculty, they just stay there, they don't retire. And  
16 so that doesn't help really with new opportunities for  
17 mathematicians.

18 So there was -- this was back in 2000. 2000,  
19 2002, there was a great effort by mathematicians and  
20 mathematician trade groups to come and put together data  
21 on, wait a minute, I mean, it's not just university;  
22 what about other areas? Are industry interested in --  
23 are there other industry which might be interested in  
24 mathematicians?

25 The government traditionally hired a lot of

1 mathematicians. But private industry was the one that  
2 they started focusing on, and tracking the data on that  
3 to see where graduates can go.

4 Q. All right. I see a couple of categories,  
5 "Producers of Petroleum and Petroleum Products,"  
6 "Publishers." And then this category "University-based  
7 Research Organization," like Institute for Advanced  
8 Study, Institute for Mathematics and its Applications.

9 What are these university-based research  
10 organizations?

11 A. So these could be not directly related to  
12 teaching, but faculties who are hired to work on these  
13 projects that either the government or private agencies  
14 provide grants for those projects. So there are these  
15 topic -- research topics that these university-based  
16 research organizations are involved in and apparently  
17 they hire mathematicians.

18 Q. Then I see "US Government Agencies and  
19 Government Labs and Research" also, and I see quite a  
20 bit of different agencies. And as I recall correctly  
21 from your previous chart, 38 percent of Ph.D.  
22 mathematicians --

23 A. Correct.

24 Q. -- work for the government; is that right?

25 A. Correct.

1           Q.    And earlier in talking to you, I remember you  
2 described for me some very fascinating jobs that Ph.D.  
3 -- work that Ph.D. mathematicians are doing today. You  
4 gave me a couple of examples of the kinds of things that  
5 people, like myself, wouldn't necessarily think of as  
6 being jobs that mathematicians do, but --

7           A.    Well, I mean, it's fascinating because they  
8 involve -- they -- they involve different industries,  
9 and -- you know, Pixar Animation, for example, they use  
10 mathematicians because a lot of animation -- a lot of  
11 software that they have to look for doing the animation,  
12 mathematics is very essential for that.

13                Google I mentioned before. I mean, it's a  
14 fascinating company to work for, but essentially Google  
15 is based on mathematics, because all it does is collects  
16 all of the information from all of the board. But then  
17 if you are not able to organize that information  
18 correctly and have a system that can go and find that  
19 information, then that collection is not very useful.  
20 So mathematics is the area that is essentially for  
21 this -- for this. You have to write search algorithms,  
22 and you have to keep improving that -- those search  
23 algorithms because information changes.

24           Q.    Okay. And did you look at any studies about  
25 whether people who work in the field of mathematics are

1 generally satisfied with their occupation?

2 A. Yes. Actually, there's a popular survey that  
3 they do on jobs, and mathematics usually comes up in  
4 terms of people who are actually working in the area.  
5 Mathematics comes up as either No. 1 or among number --  
6 the top three actuarial -- I believe actuarial, which is  
7 application of statistics in insurance. That one came  
8 first, I believe last year, but the year before that  
9 mathematics was on the top.

10 Q. So in terms of job satisfaction, mathematics  
11 typically ranks at the top --

12 A. Correct.

13 Q. -- top No. 1 or in the top three?

14 A. That's correct.

15 Q. Okay. And if I have -- you've been looking at  
16 Exhibit 266, the second document, the Wall Street  
17 Journal, "The Best and Worst Jobs"; is that what you  
18 were referring to?

19 A. That's correct. That's one of the -- one of  
20 the reports on that survey that I was referring to.

21 Q. Okay. And the document before that in  
22 Exhibit 266 called the "Occupational Outlook Handbook,  
23 2010-11 Edition," is that the document that you were  
24 referring to earlier when you were talking about the  
25 above average growth in jobs in the math field?

1           A.    That's -- that's correct.  Actually, it says --  
2    I'm trying to find the exact --

3           Q.    And "above average growth," that means more and  
4    more jobs?

5           A.    As I was saying, much higher.  That's why I  
6    was --

7           Q.    That means --

8           A.    Yes, it says the employment of mathematicians  
9    is expected to grow much faster than average.

10          Q.    Okay.  And so we could expect to see  
11   significantly more jobs in math going forward?

12          A.    I mean, keep in mind that there are not many  
13   Ph.D mathematicians to begin with, so -- so it's not a  
14   huge area, but for that group, yes, what is being said  
15   here, the growth will be much higher than average.

16          Q.    And because there aren't that many people with  
17   Ph.Ds in mathematicians, does that mean that they are in  
18   great demand?

19          A.    Correct.  If -- I mean, if the industry is  
20   going through this change and because they require new  
21   technologies and they are going to be renovating their  
22   old technologies, then they're going to be needing more  
23   mathematicians.

24                MS. ADLER:  Your Honor, I'd like to offer  
25   Exhibit 266 in evidence.

1 MR. KATZENBACH: No objection.

2 THE COURT: It's received.

3 MS. ADLER: Okay.

4 (Whereupon, Defendant's Exhibit 266 was  
5 marked for identification and admitted into  
6 evidence.)

7 MS. ADLER: Q. I'd like to ask you about your  
8 second opinion in this case, that it would take a year  
9 or less for someone with Dr. Kao's qualifications to  
10 obtain other employment.

11 Were there any assumptions that you relied on  
12 in reaching your opinion?

13 A. Well, the only -- the only assumptions that I'm  
14 making here is that I'm looking at the data which is at  
15 the level from, again, government publication. It says,  
16 overall, when people lose their job, they are finding a  
17 job -- at this point last December the number was 40.3  
18 weeks. It takes an average of 40 weeks for people to  
19 get another job.

20 Q. And are you operating under the assumption that  
21 a person is actively looking for a job? In other words  
22 --

23 A. Correct. I mean, as we discussed before, I  
24 mean, you have to take that human capital to the market  
25 and offer it. I mean, if you don't take it to the



1 market, of course, nobody will be coming looking for  
2 you.

3 So the assumption is that if you go and look  
4 for a job, on average -- again, this is across nation,  
5 across all occupations, on average it's taking about 40  
6 weeks to go back to work.

7 Q. Okay. And what is the unemployment rate in the  
8 United States right now?

9 A. Right now it's 8.3. As of last year, December,  
10 December of last year, it was 8.6 percent.

11 Q. Okay. And is this the unemployment rate -- so  
12 you're saying right now it's 8.3, the unemployment rate?

13 A. As of the end of January it was 8.3.

14 Q. Okay. And is the unemployment rate different  
15 among, for example, high school graduate versus people  
16 with college degrees?

17 A. Yes. And, again, we can see that human  
18 capital, see how it works here, that education does pay.  
19 The -- when we say that unemployment rate in  
20 United States is 8.3, well, that unemployment rate for  
21 high school graduates is a lot higher compared to people  
22 who have college degree.

23 Q. Okay. If I could have you turn to Exhibit 271,  
24 please. There is a chart that is entitled "Unemployment  
25 Rate by Educational Achievement," and then there are

1 some -- there is a document that follows it.

2 (Whereupon, Defendant's Exhibit 271 was  
3 marked for identification.)

4 MS. ADLER: Q. Is this the -- first of all,  
5 did you prepare this chart?

6 A. Yes.

7 Q. And what is the source material for the chart?  
8 The document that follows the chart?

9 A. Yes, it's from US Bureau of Labor Statistics.

10 Q. All right. And so the data on this chart is  
11 from this data put out by the government?

12 A. That's correct.

13 Q. And does -- is the data on the chart, does it  
14 accurately reflect the data in your source document from  
15 the government?

16 A. Yes.

17 MS. ADLER: Okay.

18 Your Honor, I'd like to move Exhibit 271 into  
19 evidence?

20 THE COURT: Any objection?

21 MR. KATZENBACH: No objection, Your Honor.

22 THE COURT: It's received.

23 (Whereupon, Defendant's Exhibit 271 was  
24 admitted into evidence.)

25 MS. ADLER: Your Honor, I have copies for the

1 jury. May I distribute them?

2 MR. KATZENBACH: Certainly.

3 THE COURT: Yes.

4 MS. ADLER: Okay.

5 MS. ADLER: Q. May I have you walk us through  
6 this chart?

7 A. Sure.

8 This is, again, based on the last December  
9 data.

10 Q. So 8.6 was the employment rate?

11 A. So 8.6 overall was across all -- across  
12 everyone with any degree. But if you go and break that  
13 data down by education, we see that people who have less  
14 than high school diploma, their unemployment rate is  
15 13.8 percent.

16 Q. So 13.8 percent for someone who does not have a  
17 high school diploma?

18 A. Correct. People with high school graduate  
19 but -- but no college education, they are at  
20 8.7 percent. And people who have some college but they  
21 don't really -- they haven't really graduated from  
22 college, the four-year college, that's 7.7 percent, and  
23 people who have bachelor degree or higher is only  
24 4.1 percent.

25 Q. Okay. So the unemployment rate at this time

1 was overall 8.6 percent, but only 4.1 percent for those  
2 with bachelor's degrees or higher?

3 A. Correct.

4 Q. Okay. Did you look to see if there was any  
5 difference between the unemployment rate between people  
6 who have bachelor's degree versus people with advanced  
7 degrees, such as masters or Ph.Ds?

8 A. Yes, actually I did.

9 Q. Okay. And can I have you turn to Exhibit 272,  
10 please.

11 A. Yes.

12 (Whereupon, Defendant's Exhibit 272 was  
13 marked for identification.)

14 MS. ADLER: Q. The first page of Exhibit 272  
15 is a chart entitled, "Unemployment Rate Among College  
16 Graduates."

17 Did you prepare this chart?

18 A. Yes.

19 Q. Okay. And what is the source material that the  
20 data on that chart is from?

21 A. Again, this is from Bureau of Labor Statistics.

22 Q. Okay. It's the document that follows the  
23 chart?

24 A. Yes.

25 Q. Okay. And the Bureau of Labor Statistics, that

1 means the data is from the government?

2 A. Correct.

3 Q. And does the data on this chart accurately  
4 reflect the source document?

5 A. Yes.

6 MS. ADLER: Your Honor, I'd like to move  
7 Exhibit 272 into evidence.

8 THE COURT: Any objection?

9 MR. KATZENBACH: No, Your Honor.

10 THE COURT: Received.

11 (Whereupon, Defendant's Exhibit 272 was  
12 admitted into evidence.)

13 MS. ADLER: Your Honor, I just distributed the  
14 chart, Exhibit 271 to the jury.

15 MR. KATZENBACH: Oh, this one I want to object,  
16 Your Honor.

17 No, Your Honor.

18 THE COURT: 271 and 272 are both in evidence.

19 MS. ADLER: Q. Can I have you walk us through  
20 this chart, what these different one shows?

21 A. Sure. This one shows the unemployment rate  
22 among people who have graduated from college.

23 Q. I see at the bottom you've got listed here a  
24 legend for -- the dotted line is for people with  
25 bachelor's degree; is that correct?

1           A.    Correct.  So the dotted line is representing  
2   the people with bachelor degree, the --

3           Q.    The top dotted line?

4           A.    The broken line, the red line --

5           Q.    This red line right here beneath?

6           A.    That's correct; that shows the people with  
7   master degree.  And a continuous line, blue line --

8           Q.    This line here?

9           A.    -- shows people with a doctorate degree.

10          Q.    Okay.  And the breakdown in here is at the  
11   bottom?

12          A.    Yes.  This is a historical data; it goes back  
13   to 1992, and it shows that consistently people who have  
14   doctoral degree have lower unemployment rate compared to  
15   people who have master degree or bachelor degree.  
16   Again, you know, the idea of human capitalism at work  
17   here, and you can see that there is consistency across  
18   all these years.

19          Q.    And if we take a look at 2011 at the end there,  
20   what is the unemployment rate for people with Ph.Ds in  
21   2011?

22          A.    Right.  If you remember in the last chart we  
23   said that the people who had bachelor degree and higher,  
24   they had 4.5 unemployment rate.  And here you can see  
25   that people who have -- in 2011, people who have

1     doctoral degree have about two-and-a-half percent  
2     unemployment.

3           Q.     Two-and-a-half percent versus four and a half  
4     for the undergraduate degree versus the unemployment  
5     rate at the time, overall, which is 8.6; is that  
6     correct?

7           A.     Correct.

8           Q.     Okay.

9           A.     And then people who have a master degree are  
10    about 3.5, and people who have a bachelor degree is  
11    above, it looks like about 5 percent.

12          Q.     If I can have you turn to Exhibit 270, please.  
13    I believe you testified earlier the number of weeks on  
14    average that takes for people to find another job, and I  
15    think there's the data as of December 2011?

16          A.     Correct.

17          Q.     What are the documents? Can you describe the  
18    documents in Exhibit 270? Did you rely on these in  
19    forming that opinion?

20          A.     Yes. There is a documentation on actual data  
21    and there are some historical graph in relation to  
22    unemployment. But the numbers that I gave you are from  
23    tables in the back which -- which says "Unemployed  
24    Persons by Occupation Industry and Duration of  
25    Unemployment."

1           So in that chart it gives the industry or  
2           occupation on the left side, and then it also gives you  
3           the duration of unemployment in the last two columns.

4           Q.    Okay.  And the -- the data in this document  
5           entitled "Household Data," where does that come from?

6           A.    Again, this comes from the data which is  
7           collected by government, and it's -- they call it  
8           Monthly Labor Review, because they do this survey of  
9           60,000 household -- this is both survey that actual  
10          people go to door and ask question and also telephone  
11          survey.  Most of it is telephone survey.

12          But they -- they call these randomly selected  
13          household, and they ask them questions about have you  
14          been unemployed or employed, you know, those kind of  
15          question.  And then if they have been unemployed, they  
16          ask them how long have you been unemployed.  And they  
17          collect data.

18          MS. ADLER:  Your Honor, I'd like to move  
19          Exhibit 270 into evidence.

20          THE COURT:  Any objection?

21          MR. KATZENBACH:  No objection.

22          THE COURT:  Received.

23                 (Whereupon, Defendant's Exhibit 270 was  
24                 marked for identification and admitted into  
25                 evidence.)



1 MS. ADLER: Your Honor, I have copies of part  
2 of the exhibit that I would like to distribute to the  
3 jury.

4 THE COURT: Okay. Go ahead.

5 MS. ADLER: Thank you.

6 MS. ADLER: Q. Dr. Borhani, you described you  
7 had printed out some numbers of the average weeks and  
8 the median weeks. Could you walk us through this?

9 A. Is that 3202?

10 Q. Yes.

11 A. Okay. So this is the summary of the survey  
12 that Monthly Labor Bureau receives and it shows that on  
13 the left side of the table, first column, they show you  
14 the occupation.

15 Q. And here I see it's "Professional Related  
16 Occupations," the category you looked at?

17 A. Correct. So that's the one that I -- I was  
18 looking at. There are, of course, data for other, you  
19 know, jobs like sales and production and all that kind  
20 of stuff, but for our purposes here, professional and  
21 related occupation is more appropriate.

22 And if you follow that line, it gives some  
23 distribution in those columns, but then the last two  
24 columns it gives the 40.3 as average duration and --

25 Q. So 40 -- does that mean it takes 40.3 weeks on

1 average to find another job --

2 A. Correct.

3 Q. -- after losing your job? Okay.

4 A. Correct. So when people were asked were you  
5 unemployed, you know, and asked weeks and whether you  
6 are working right now and they ask how long it took you  
7 and they analyze that answer, on average people are  
8 saying that it took them 40.3 weeks to go back to work.

9 Q. And this data is from December -- as of  
10 December 2011; is that right?

11 A. Correct.

12 Q. Okay. And what's the next column, "Median  
13 Duration"?

14 A. Next column is the median, which is another  
15 measure for -- another statistical measure that we take  
16 a look at. If the distribution is not normal, then we  
17 also look at the median. Essentially, median -- it says  
18 median is where 50 percent of the respondents answer one  
19 way and 50 percent answered the other way, so --

20 Q. And that number is?

21 A. That -- that number is 21.6 weeks.

22 Q. And what's the significance of having both the  
23 average and the median number --

24 THE REPORTER: Can you repeat that, I didn't  
25 hear you.

1 MS. ADLER: Q. And what's the significance of  
2 having data for both the average and the median number  
3 of weeks it takes to get a job?

4 A. The significance of it is that in this case it  
5 tells me that a lot more people find occupation or new  
6 employment before 40 weeks.

7 Q. So that means people are -- more people are  
8 actually finding jobs in a shorter time than the 40.3  
9 weeks that is up there, that is the average?

10 A. Correct. The average is, you know, affected by  
11 some -- some extreme variables.

12 THE REPORTER: By some what? "Extreme"?

13 THE WITNESS: Extreme variables.

14 MS. ADLER: Thank you.

15 THE WITNESS: Welcome.

16 THE COURT: Ladies and gentlemen, remember the  
17 admonitions. Do not form or express any opinion on this  
18 case until it's finally submitted to you for your  
19 decision. Do not discuss among yourselves or with  
20 others until that time.

21 Please be back in your places at 1:30 according  
22 to the courtroom clock. Please leave your exhibits,  
23 notebooks and instructions behind.

24 (Jurors are excused.)

25 THE COURT: Jurors and alternates have departed

1 the courtroom; counsel for both sides and the plaintiff  
2 remain.

3 Mr. Vartain, when we were discussing the juror  
4 questions posed to Dr. Turpin, I just wanted to inquire  
5 what plans, if any, does the University have to how to  
6 respond to Dr. Reynolds reigning of the plaintiff -- the  
7 plaintiff submit to the examination? You weren't keen  
8 on that question.

9 I ask anyway, did you want a record of your  
10 objection?

11 MR. VARTAIN: No. I told you -- you overruled  
12 me and I said you make the big bucks so -- but no. I  
13 said it was outside the scope of what it was, but I  
14 don't really think that's a material objection in this  
15 case. So no, I don't want to make a record of it.

16 THE COURT: Okay. Anything that anyone wants  
17 to put on the record?

18 MR. KATZENBACH: Yes, Your Honor, we wanted to  
19 offer one additional exhibit.

20 And what we would like to offer is -- marked as  
21 next in order is a Notice of Motion to Compel Production  
22 of Computers and Backup Data for Examination, dated --  
23 filed July 14, 2001 -- sorry, 2011. And this is in  
24 connection with the discovery responses that were  
25 introduced yesterday.

1 MR. VARTAIN: Your Honor, this is another  
2 one -- I'm going to object to this and I bet he's got  
3 another six more that he's not told me about. We have  
4 had a series of documents in this case without any  
5 notice to the other side.

6 I'd like an opportunity -- you had previously  
7 ordered Mr. Katzenbach to disclose all documents. This  
8 was not disclosed, and I bet he's got more lined up as  
9 well that he hasn't disclosed, so I'd -- I'd like to  
10 enforce the order that he disclose all other documents,  
11 give me an opportunity to review them, and give me an  
12 opportunity to then state and argue my objections, if  
13 any.

14 MR. KATZENBACH: Well, Your Honor, I think that  
15 this is part of -- this was part of dealing of  
16 examination of an adverse witness for impeachment  
17 purposes. I hardly think that it is a requirement that  
18 I have to disclose every impeachment document that I  
19 intend to use in a case to opposing counsels in advance.

20 MR. VARTAIN: Well, now that we have released  
21 the witness, Counsel, now you're trying to bring forward  
22 more what you call impeachment documents.

23 The witness has been excused. And if that's  
24 your purpose, it's irrelevant, because the witness is  
25 not on the stand, so impeachment is, in fact, out of

1 bounds.

2 THE COURT: I hear Mr. Vartain saying that he'd  
3 like some time to examine the documents so he can  
4 formulate a position on them.

5 MR. VARTAIN: And all. And I'd like -- I'd  
6 actually like to request an order or a reissuance of the  
7 order for production of all documents. It's been  
8 violated numerous times in this case that I haven't  
9 brought up, and it's continuing to be violated.

10 So would you please order the counsel for the  
11 plaintiff to disclose this and any other documents that  
12 he plans to offer?

13 MR. KATZENBACH: Well, would Mr. Vartain like  
14 to cite some legal authority for that?

15 MR. VARTAIN: I'd like to cite the --

16 THE COURT: He is not a walking legal  
17 encyclopedia, so I don't expect him to be --

18 MR. KATZENBACH: I don't believe, Your Honor,  
19 that's an appropriate order, and I don't believe -- I  
20 certainly don't believe it would be an appropriate order  
21 to be one-sided. If he wants to state that he's willing  
22 to subject himself to the same order, that would be  
23 fine.

24 MR. VARTAIN: Actually, Your Honor, the order  
25 was already issued as to Mr. Katzenbach. Your Honor did

1 say it and it's been violated. So now I'd like it maybe  
2 reissued and now said that by the time we come back from  
3 lunch, all documents be disclosed.

4 MR. KATZENBACH: No, not for purpose -- not the  
5 ones I'm going to use for purposes of impeachment of a  
6 witness. I don't think I have to disclose those in  
7 advance, Your Honor.

8 We disclose documents --

9 THE COURT: Who was the author of the previous  
10 order?

11 MR. VARTAIN: Your Honor wasn't the author,  
12 Your Honor was the issuer of it on the record, Your  
13 Honor. It wasn't in writing.

14 THE COURT: As a general principle, anything  
15 that either side wants to introduce, display, or refer  
16 to should be revealed to the other side. And if there  
17 is an objection to --

18 What number exhibit is this, Mr. Katzenbach?

19 MR. KATZENBACH: 122, I think.

20 (Whereupon, Plaintiff's Exhibit 122 was  
21 marked for identification.)

22 THE COURT: Okay. So --

23 MR. VARTAIN: Therefore, I object, Your Honor.  
24 It has not been revealed to the other side. It wasn't  
25 in the exhibit binder and it wasn't -- the witness

1 wasn't examined on it.

2 THE COURT: I understand that, and if you  
3 decide to object to the admission of the exhibit and  
4 their failure to divulge it early on as required, I'll  
5 consider it in deciding on how to rule on your  
6 objection.

7 MR. VARTAIN: Would you then now order counsel  
8 to disclose by -- actually now so I can look at them  
9 during lunch, all of their documents that he intends to  
10 use other than to cross-examine a witness?

11 THE COURT: Mr. Katzenbach has some exhibits  
12 lined up?

13 MR. KATZENBACH: Not other than for purpose of  
14 cross-examination. And I don't even believe, except for  
15 -- well, that's not true. We have subpoenaed a witness  
16 for rebuttal and he has been subpoenaed to bring  
17 documents. I have no idea what those documents show,  
18 because I have never seen them before. But, yes, they  
19 may be introduced into evidence, if they show what I  
20 think they may.

21 THE COURT: Okay. Failure to comply, which is  
22 what I am telling you you should do, which is to reveal  
23 to each other any documents you are going to use, can be  
24 grounds for exclusion of the document.

25 MR. KATZENBACH: Then I'll disclose that I have



1 subpoenaed Mr. Gallagher, I have asked him to bring his  
2 documents concerning the dates that Ms. Turpin's  
3 computer was, you know, replaced. But I don't know what  
4 those documents are because I have never seen them  
5 before.

6 MR. VARTAIN: That's not what I'm talking  
7 about, Your Honor. I see that he has got a whole bunch  
8 of documents in a manila folder and --

9 MR. KATZENBACH: Which manila folder is that,  
10 sir?

11 MR. VARTAIN: I'll accept the Court's order. I  
12 don't want to bother the Court with anymore time. I  
13 know the import of Your Honor. Thank you.

14 THE COURT: Okay. Anything else?

15 I'll see you at 1:30.

16 (Whereupon, the proceedings were adjourned  
17 for lunch at 1:30 PM)

18 --- oOo ---  
19  
20  
21  
22  
23  
24  
25

1 AFTERNOON SESSION

1:31 PM

2 THE COURT: Jurors and alternates are all  
3 present. Counsel from both sides are present.  
4 Plaintiff is personally present.

5 MS. ADLER: I have just a couple of more  
6 questions, if I may?

7 THE COURT: Okay. You're asking to reopen your  
8 examination is granted.

9 MS. ADLER: Thank you, Your Honor.

10 Q. Dr. Borhani, you testified earlier that you  
11 reviewed the opinions of Dr. Margo Ogus, the economist  
12 on behalf of plaintiff; is that correct?

13 A. That's correct.

14 Q. Okay. And you testified that you believe that  
15 her opinions were unreasonable. Do you recall that?

16 A. Yes, I do.

17 Q. And could you tell us why it is that, in your  
18 opinion, her -- that her opinions are unreasonable?

19 A. I'm saying that because, as Dr. Ogus testified,  
20 the assumption behind the numbers that she has for  
21 economic losses.

22 Q. And what are those numbers?

23 A. It's almost 3.2 million. And in another  
24 scenario, this 3.2 million, when she takes the damages  
25 to age 70 and she has another number, which is about

1 2.7 million, in both of those -- for calculating those  
2 two numbers, her assumption is that the odds of Dr. Kao  
3 getting another job is zero. Probability of getting  
4 another job is zero.

5 Q. So if I may, so her assumption is that there is  
6 a zero chance that he's going -- he's not going to work  
7 for the rest of his career; is that right?

8 A. That's correct. And that's why I'm saying it's  
9 not reasonable because -- but looking at the data that I  
10 looked at, I mean, it appears to be plenty of jobs, very  
11 interesting jobs and very high-tech areas available with  
12 Dr. Kao's credential.

13 Q. Given Dr. Kao's background in computational  
14 mathematics, is it unreasonable to assume that he will  
15 not be employed as a mathematician in the future?

16 A. I think that's really unreasonable. I mean,  
17 these days, there's a lot of need for computational  
18 mathematicians.

19 Q. And given the fact that he has a Ph.D. in  
20 mathematics from Princeton, which you described as the  
21 No. 1 institution in terms of math Ph.Ds, is that  
22 unreasonable?

23 A. Right. That's another factor that essentially  
24 increase his odd (sic) of getting employment.

25 Q. And given the testimony that you've given

1 regarding the kinds of employers in Silicon Valley and  
2 the specific math background that they're looking for,  
3 computational mathematics, is it unreasonable to assume  
4 that there will not be any offset earnings for plaintiff  
5 going forward?

6 A. That is really unreasonable. That's correct.

7 MS. ADLER: Okay. Thank you.

8 THE COURT: Thank you, Ms. Adler.

9 Mr. Katzenbach?

10 MR. KATZENBACH: Thank you, Your Honor.

11  
12 CROSS-EXAMINATION BY MR. KATZENBACH

13 MR. KATZENBACH: Q. So, Dr. Borhani, as I  
14 understand it, you think Dr. Kao has got great  
15 credentials?

16 A. Yes.

17 Q. Really good?

18 A. Really good.

19 Q. He can get a job anywhere, right?

20 A. I didn't say that.

21 Q. Pretty much anywhere, correct?

22 MR. VARTAIN: You are arguing. Objection.

23 MR. KATZENBACH: Q. Is that your opinion?

24 THE COURT: What was the objection?

25 MR. VARTAIN: Argumentative.

1 THE COURT: Overruled. The answer will stand.  
2 The motion to strike is denied.

3 MR. KATZENBACH: Q. He can get a job anywhere?

4 A. The odds of Dr. Kao getting another job is very  
5 high; that's what I'm saying.

6 Q. Oh, okay. Well, let's just -- so if he's got  
7 all these qualifications, right?

8 A. Yes.

9 Q. Why didn't USF hire him back?

10 MR. VARTAIN: Argumentative. Objection. Lacks  
11 foundation.

12 THE COURT: Overruled.

13 The witness may answer, if he knows the answer.

14 THE WITNESS: I don't know the answer to that  
15 question.

16 MR. KATZENBACH: Q. Well, is USF a job that  
17 Dr. Kao should apply for?

18 MR. VARTAIN: Argumentative.

19 THE COURT: Sustained.

20 MR. KATZENBACH: Q. Did you consider Dr. Kao's  
21 ability to get his job back at USF?

22 A. I have not looked at the specific employment  
23 situation here.

24 Q. Well, would it have been unreasonable -- would  
25 it be unreasonable for USF to rehire Dr. Kao?

1 MR. VARTAIN: Objection. Argumentative.

2 It's obviously part of this case, Counsel.

3 MR. KATZENBACH: He's giving an expert opinion,  
4 Your Honor.

5 MR. VARTAIN: No, he's -- actually it's not  
6 relevant because he hasn't been offered as an expert on  
7 whether the University would take him back, given the  
8 underlying issues in this case.

9 THE COURT: This witness seems to be not able  
10 to know what USF was thinking. Sustained.

11 MR. KATZENBACH: Very well, Your Honor.

12 Q. Let's go back to some other things.

13 You talked about human capital, correct?

14 A. Yes.

15 Q. Okay. And I think the analogy you used was  
16 like a house, renting a house?

17 A. No. I was saying that the same way that you  
18 invest in financial matters or real estate matter, you  
19 invest in yourself, in your human capital.

20 Q. Okay. Let's just pursue that analogy for a  
21 minute.

22 You'd agree -- and I think what you were saying  
23 is that when one tenant leaves, it would be unreasonable  
24 not to rent the house to a new tenant; is that right?

25 A. Right. The real estate is the same with you.

1 Q. Okay. And so if some truck driver came along,  
2 took his 18-wheeler and put it through your front door  
3 at 60 miles an hour, you'd have to repair the house  
4 before you'd rent it, wouldn't you?

5 A. If the house is destroyed, that's correct.

6 Q. Well, I think that was implicit in my analogy.  
7 But, yes, so you'd want to fix the house, right?

8 A. Sure.

9 Q. And if the government came along and said we're  
10 condemning your house, it's an unsafe building, it's  
11 unsafe for people to live in, you'd have to take care of  
12 that, too, wouldn't you?

13 A. That's correct, yes.

14 Q. Right. So by analogy just to say -- just to  
15 follow this back up to human capital, so if someone was  
16 declared to be an unsafe employee, you think that that's  
17 something they'd like to fix before it was likely that  
18 they were going to be able to reap an investment on  
19 their investment in human capital?

20 MR. VARTAIN: Objection. Argumentative. Lacks  
21 foundation.

22 THE COURT: Sustained.

23 MR. KATZENBACH: Q. Let's take a look at Dr.  
24 Kao's human capital.

25 His degree from Princeton, right?

1 A. Correct.

2 Q. He spent 17 years teaching in a university?

3 A. Correct.

4 Q. How many years has he worked in industry?

5 A. I don't know.

6 Q. How many years has he worked in government?

7 A. I don't know.

8 Q. What security clearances does he have?

9 A. I don't have that information.

10 Q. But you would agree that he spent almost -- as  
11 far as you know, he spent his entire career in an  
12 academic setting?

13 A. I have not seen any other evidence to  
14 contradict that.

15 Q. All right. And he was a tenured professor?

16 A. That's correct.

17 Q. "Tenured" means that there're restrictions on  
18 the ability to be fired, right?

19 A. I'm not really an expert on the legal issues on  
20 tenure.

21 Q. Well, do you understand what "tenure" is?

22 A. I understand in layman's term what tenure is;  
23 that's correct.

24 Q. Well, you have been to a university, haven't  
25 you?



1 A. Yes.

2 Q. You have met teachers there, haven't you?

3 A. Yes.

4 Q. And those teachers -- and you are a graduate  
5 student, right? You were a graduate student at the  
6 University of Florida, right? Florida State University,  
7 I'm sorry.

8 A. I'm sorry, what --

9 Q. You were a graduate student?

10 A. I was a graduate student.

11 Q. And you were familiar with professors?

12 A. Yes.

13 Q. And you knew there was a distinction between  
14 tenured professors and untenured professors?

15 A. Well, I know that there are all those  
16 categories, but I'm saying that I don't know the legal  
17 ramification of when people can be hired or not. That's  
18 not what I'm -- or fired from their job or not.

19 Q. Well, you also testified, didn't you, that  
20 mathematicians stay in their jobs forever?

21 A. Right.

22 Q. So that's because they're tenured, isn't it?

23 A. Right.

24 Q. Okay. Now, taking a look at all the jobs that  
25 you indicated that Dr. Kao was able to get, how many of

1 those jobs were in universities?

2 A. Which jobs are you referring to?

3 Q. Well, I think the jobs you were testifying  
4 about -- why don't you take a look at Exhibit 272 --  
5 267. That's your examples of organizations,  
6 corporations, and research institutions that hire  
7 mathematicians and computational scientists.

8 A. Correct.

9 Q. How many of those jobs are in universities?

10 A. There is a category which says  
11 "University-based Research Organizations."

12 Q. Well, I understand you have university-based  
13 research organizations. How many of them, those jobs on  
14 this exhibit, are professors teaching at universities?

15 A. That I don't know. I mean, people might have  
16 dual appointments.

17 Q. Okay. Maybe.

18 How many -- let's take a look at the -- going  
19 back to this exhibit, how many of these jobs -- in how  
20 many of these jobs do people have protections of tenure?

21 A. These are not teaching jobs.

22 Q. Okay. How many of these jobs have protections  
23 like tenure?

24 A. I'm sorry?

25 Q. How many of these jobs have protections like

1 tenure?

2 A. I have no idea about protections. So that's  
3 why I was saying that I don't know the legal  
4 ramification of tenure. That's why I'm not comfortable  
5 to describe -- comparing the different jobs, tenure and  
6 nontenure.

7 Q. How many of these jobs have -- how many of  
8 these jobs require the employer to have good cause  
9 before they fire somebody?

10 A. I don't have any information on that.

11 Q. Okay. Now, why don't you take a look at your  
12 pie chart, which is part of Exhibit 268, that's the  
13 world of mathematicians work. That's this pie chart.

14 Do you see that? You've got that in front of  
15 you?

16 A. Yes.

17 Q. Okay. Now, you agree with me that you have  
18 indicated 14 percent of mathematicians work in  
19 universities and colleges?

20 A. Correct.

21 Q. How many of those positions have tenure?

22 A. I have not looked at that.

23 Q. All right. Is that segment growing or  
24 shrinking?

25 A. It's shrinking.

1 Q. How about for tenured positions?

2 A. Same, shrinking.

3 Q. So it's harder and harder to get a tenured  
4 position?

5 A. That's correct. That's why -- that's why I was  
6 referring to the effort on part of mathematicians  
7 themselves to market themselves to the industry and that  
8 effort started back in 2000, and they have been -- they  
9 are successful in that.

10 Q. As a whole, right?

11 A. Correct.

12 Q. All right. Now we're talking about federal  
13 government over here; that's 38 percent.

14 Do you see that?

15 A. Correct.

16 Q. How many of those positions are in  
17 defense-related industries, are in defense-related work?

18 A. I don't know.

19 Q. Okay. How many of those require security  
20 clearances?

21 A. I don't know.

22 Q. Over here in the area of industry, how many of  
23 those require security clearances?

24 MR. VARTAIN: I am going to object. Asked and  
25 answered.

1 THE WITNESS: I don't know.

2 THE COURT: Overruled.

3 Witness may answer.

4 Answer will stand.

5 MR. KATZENBACH: Q. Okay. So we have the --  
6 the -- how many in -- okay.

7 Now, how many of the jobs have you looked at  
8 are obtained without applying for them?

9 A. I'm sorry? Would you repeat that?

10 Q. Isn't it typical that when you apply for a job  
11 you fill out something called an employment application?

12 A. Yes.

13 Q. That employment application asks things about  
14 you, right?

15 A. Yes.

16 Q. It asks, for example, what your degrees are?

17 A. Sure.

18 Q. And also asks where you last worked?

19 A. Correct.

20 Q. And it often asks for references?

21 A. Sure.

22 Q. And it often asks why you are no longer at your  
23 prior job, right?

24 A. Sure.

25 Q. And are you aware that -- a lot of applications

1 ask were you fired or discharged from your prior  
2 employment?

3 A. I don't have any knowledge of that at -- at  
4 this level of professional jobs, whether they ask that  
5 kind of question.

6 Q. You don't know?

7 A. I don't know.

8 Q. Okay. Now, taking a look at -- all right.

9 Have you taken a look at the number of tenured  
10 positions advertised?

11 A. What do you mean by that?

12 Q. Okay. Let me rephrase it.

13 Have you taken a look at how many tenured  
14 university professor positions are there available at  
15 any particular time?

16 A. Well, the tenured positions -- what happens is  
17 that when people graduate, they get their Ph.D. They go  
18 and apply to universities, and then they have to go  
19 through this period which they call it evaluation period  
20 during which the newly hired Ph.Ds, they have to write  
21 papers and demonstrate their ability during those years,  
22 and then eventually they are offered tenure or sometimes  
23 they are rejected tenure.

24 Q. All right. So let's just go back to my  
25 question.

1           How many tenured positions in universities were  
2 there available for mathematicians with Dr. Kao's  
3 credentials in the last five years?

4           A.    I have not looked at that data, and I don't  
5 know whether that data is really available, because the  
6 point that I made earlier was that the tenured position  
7 is kind of like internal promotion within the ranks.

8           So they hire you -- they hire you as an  
9 assistant professor and then they watch you for a while  
10 to see whether you are going to get tenure or not, just  
11 like partnership in law firms. And then they award you  
12 tenure.

13           Now, it is possible that someone who is  
14 teaching in a university as a tenured professor, they  
15 leave for some reason, they become ill or they -- they  
16 don't like their job or they go to industry because  
17 industry is paying higher.

18           And if the university is trying to fill those  
19 positions -- I haven't seen really a very vibrant market  
20 for that -- well, one reason is that the tenured  
21 positions are shrinking, the other is that usually these  
22 appointments are -- they're internal, and people  
23 transfer from one university to another university. So  
24 it's not really widely advertised that, oh, we  
25 have somebody asking if they are looking for tenured

1 positions.

2 Q. Okay. So would it be accurate to say that if  
3 Dr. Kao wants to continue teaching, as he's been doing  
4 for 17 years, he's going to have to apply for a  
5 tenure-track position?

6 A. Could you repeat the question?

7 Q. Right. Why don't I rephrase it.

8 The available jobs in the university setting,  
9 as a practical matter, right, are all going to be  
10 tenure-track positions; is that right?

11 A. Correct.

12 Q. Right. So that means if you get a -- if Dr.  
13 Kao went out and tried to look for a tenure-track  
14 position, it's going to take him -- he's going to have  
15 to go through that entire internal process of, say,  
16 about six years, to get to the point where then they can  
17 decide whether to give him tenure?

18 A. No. I think there are -- there are lateral  
19 movements in university setting. People move -- the  
20 person is an associate level, then moves to associate  
21 level in another university.

22 Q. Those are people that are currently teaching in  
23 one university might move to another university?

24 A. Correct.

25 Q. Right. Is Dr. Kao teaching anywhere right now?



1           A.    I don't have that information.

2           Q.    Actually he was fired from the University,  
3 wasn't he?

4           A.    I believe so.

5           Q.    And where are these tenured or tenure-track  
6 positions -- well, let's start this.

7                    Are you aware of any tenured positions that  
8 were available for mathematicians in the San Francisco  
9 Bay Area?

10          A.    As I said before, I haven't looked at that  
11 specific question. My purpose here was to show that the  
12 opportunities for someone that Dr. Kao's credential  
13 coming from, you know, top university in nation, having  
14 a degree, Ph.D. degree which is the highest level of  
15 achievement in education, in a field computational  
16 mathematicians which is very desirable these days, my  
17 purpose was to show that there is a demand for that job.  
18 I wasn't really focused on what kind of jobs are  
19 available right now for Dr. Kao.

20          Q.    Well, would it be accurate to say you weren't  
21 really focused on the availability of any particular job  
22 for Dr. Kao, were you?

23          A.    Well, I believe that he's very qualified. And  
24 all of these jobs that I have been talking about, to me,  
25 he's qualified to apply to those, but -- so the jobs are

1 there. It's just, as we were talking about before, you  
2 have to take your human capital to the labor market.

3 Q. We also talked about having to repair your  
4 human capital, right?

5 A. Yes. I mean -- and you can also damage your  
6 human capital. So you can -- if you are not looking for  
7 a job, that's -- that affects your future job hunt.

8 Q. And somebody else can damage your human  
9 capital, can't they?

10 A. That happens, yes.

11 Q. Okay. And you talked about jobs in industry  
12 and government. Do those jobs involve teaching  
13 students?

14 A. Sometimes they do. Because in a lot of these  
15 situations, because you're applying a very high level,  
16 sophisticated level of education to some other various  
17 sophisticated, you know, industry, for example, if you  
18 are applying mathematics to -- if you are applying  
19 mathematics to chemical industry, there are a lot of  
20 good chemists who are not really as good in math as  
21 someone that -- Dr. Kao's credential.

22 So in this kind of situation, there has to be  
23 some kind of collegial teaching kind of situation that  
24 people can learn about this other area of the science  
25 and how that can be applied to the area that they have

1       been focusing on.

2           Q.    Well, that's pretty different than teaching  
3       college students, wouldn't you say?

4           A.    Well, I mean, I don't know what you mean by  
5       that.

6           Q.    Okay. I'd be happy to -- that doesn't involve  
7       standing -- that doesn't involve preparing a semester's  
8       worth of lessons in a subject, does it?

9           A.    I mean, there are differences. I am not going  
10       to argue that with you.

11          Q.    There are pretty big differences is the point,  
12       isn't it?

13          A.    I don't know how you value a big difference or  
14       a small difference in this situation, but there are  
15       differences, yes.

16          Q.    Well, I mean, let me ask you, you are the  
17       expert.

18                    Big differences or small differences?

19          A.    Between what?

20          Q.    Between teaching in a university, like the  
21       University of San Francisco, and working for Google?

22          A.    Yeah, there's a big difference there. I mean,  
23       it's -- I mean, to me it's a lot more challenging  
24       because now you are working with a lot of other  
25       scientists in other area and you have to work with them

1 directly, so intellectually, to me, it's more  
2 challenging.

3 Q. Did you apply for a job with Google?

4 A. No.

5 Q. The -- so now -- let's take the government.

6 You agree with me that teaching a university --  
7 kids in a university is different than working for the  
8 National Security Agency?

9 A. Yes, there is a difference.

10 Q. Pretty big difference, right?

11 A. Again, there's a difference.

12 Q. Yeah, okay. And, in fact, Dr. Kao's -- to --  
13 Dr. Kao's career has all been in the teaching end of it,  
14 not in the code breaking end of it?

15 A. Well, I mean, a person as -- at Dr. Kao's  
16 position, he can get training very fast. I mean, this  
17 is -- this is -- this is highest level of education.  
18 And I'm not saying that, you know, if you have -- if you  
19 have Ph.D. in this area, then you can do everything else  
20 in the world.

21 What I'm saying is that at that level of  
22 education, when you have Ph.D. from Princeton, math  
23 Ph.D. from Princeton in computational mathematicians,  
24 figuring out how to apply that set of skills in other  
25 environments, I will grant you, yes, it's going to take

1 a little bit of time, but it's not going to be  
2 impossible. It's going to be possible to do that fairly  
3 efficiently at that level of education.

4 Q. Now, the numbers for the average weeks of  
5 unemployment that you -- those are averages, just  
6 general averages, correct?

7 A. Correct.

8 Q. All right. And is there any -- have you taken  
9 a look at how long it would be to get an employment for  
10 someone discharged for misconduct?

11 A. No, I haven't looked at that.

12 Q. Have you taken a look at how long it would be  
13 to take -- get a job for someone who has been accused of  
14 being a danger?

15 A. I don't know whether that kind of data even  
16 exists.

17 Q. Now, you have seen Dr. Ogus' calculations,  
18 right?

19 A. Correct.

20 Q. Okay. And you've seen she's running up the  
21 losses year by year?

22 A. Correct.

23 Q. As a cumulative loss?

24 A. Correct.

25 Q. So where does the jury draw the line?

1 A. What is the question?

2 Q. Where does the jury say no more losses after  
3 this point? What year?

4 A. That's not my place to give opinion on that.

5 Q. Okay. You think you would agree with me that  
6 that depends on the facts of this case?

7 A. Correct.

8 Q. It depends on what real jobs were available to  
9 Dr. Kao, wouldn't it?

10 A. What jobs are available out there for someone  
11 with Dr. Kao's credential.

12 Q. Well, not just a job -- it's not just that  
13 Google has mathematicians, there has to be a  
14 mathematician job open and available that someone can  
15 apply to, even if you were to go in the industry route?

16 A. Right. And that someone has to go and apply.

17 Q. Right. And you --

18 A. That's a very essential element of this  
19 question that you are raising, because, you know, if you  
20 don't apply, then you don't know.

21 Q. And if there is no job, you don't get that  
22 either?

23 MR. VARTAIN: Objection. Ambiguous.

24 MR. KATZENBACH: Well, okay. I'll rephrase  
25 that. All right.

1 Q. When you say "apply," that means there's a job,  
2 right?

3 MR. VARTAIN: No, there's a job vacancy.

4 Objection. Vague. Argumentative.

5 THE COURT: Overruled.

6 The witness may answer.

7 THE WITNESS: Would you repeat the question,  
8 please?

9 MR. KATZENBACH: Q. Sure.

10 To apply for a job at Google, Google, in this  
11 marketplace of jobs, has to say something like we'd like  
12 to hire a mathematician?

13 A. Well, I think Google actually hired recently.

14 Q. All right. And do you have anything -- do you  
15 know anything about the requirements for that job?

16 A. No, I haven't been looking for specific jobs  
17 for Dr. Kao, as I said before.

18 Q. Okay. And you don't know anything about the  
19 requirements for job in terms of job application?

20 A. No, I haven't applied myself.

21 Q. Letters of reference?

22 A. No.

23 Q. Term -- you know, whether this is a job that  
24 has protections of a, say, union contract?

25 A. No. I mean, that's why I'm saying that you

1 have to take your human capital to the marketplace in  
2 order to get those facts. I mean, the best way in this  
3 kind of situation is to do that.

4 I mean, yes, you can look at the Garmin data  
5 about availabilities and all of that, but the -- this  
6 data is available if you go yourself and you know how  
7 qualified you are, which jobs you can apply, which jobs  
8 you cannot apply. And at the same time there are some  
9 help also available, you know. There are organizations  
10 who help in locating and placing very highly educated  
11 employees.

12 Q. You don't know whether any of the jobs that  
13 were available might require a security clearance?

14 A. Some of -- yes, some of the research jobs and  
15 some of the governmental jobs do require a security  
16 requirement.

17 Q. How about other jobs, do you know how many  
18 require background checks?

19 A. I don't know how many but I'm sure there are  
20 some.

21 Q. Do you know how many of those background checks  
22 might, for example, look at public records to see if Dr.  
23 Kao has been sued by anybody?

24 A. Right. I mean -- and that's why I'm saying  
25 that you have to -- you have to go to the market.



1 Q. Well, do you think it would help Dr. Kao's  
2 marketability then to establish that what the University  
3 of San Francisco did to him was wrongful?

4 A. I don't know the facts of this case. So I  
5 mean, that's not really my place to say anything like  
6 that.

7 MR. KATZENBACH: One second.

8 That's all I have.

9 THE COURT: Redirect, Ms. Adler?

10 MR. VARTAIN: Ms. Adler asked me to handle a  
11 question or two on redirect. May I do that, Your Honor?

12 THE COURT: All right.

13  
14 REDIRECT EXAMINATION BY MR. VARTAIN

15 MR. VARTAIN: Q. So this idea, Doctor, of if  
16 you have a human capital you've got to put it out there  
17 if you want to actually get a job. That's what you're  
18 talking about?

19 A. That's correct.

20 Q. Is that sort of like the adage you can lead a  
21 horse to water but he's got to drink it on his own?

22 A. I mean, that's really true, because, you know,  
23 you know about your background and your qualifications  
24 and your interests. I mean, a lot of this is based on  
25 preferences. I mean, somebody else won't be able to

1 figure out for you which job is good for you, and you  
2 are the one who have to -- I mean -- like I said, there  
3 are some help available, you know, but -- but you have  
4 to be actively involved in the process.

5 MR. VARTAIN: Thank you.

6 THE WITNESS: You're welcome.

7 MR. KATZENBACH: Yes, Your Honor. A couple of  
8 questions.

9 THE COURT: Mr. Vartain is sitting down, go  
10 ahead.

11 MR. KATZENBACH: Thank you. Thank you, Your  
12 Honor.

13  
14 RECROSS-EXAMINATION BY MR. KATZENBACH

15 MR. KATZENBACH: Q. Just to pick up the last  
16 analogy on horses.

17 MR. VARTAIN: You got to buy it from me.

18 MR. KATZENBACH: I don't want it.

19 Q. If the horses had broken legs, it would be hard  
20 to drag them to drink the water, wouldn't it?

21 That's probably a bad question. You don't have  
22 to answer it.

23 The question, I guess, I'm really asking you is  
24 this: Dr. Kao made a real investment in his life in  
25 teaching. You agree with that?

1           A.    I agree with that, yes.

2           Q.    And to now make him do some other job means  
3 that all that investment that he's made is gone or  
4 largely gone?

5           A.    Well, I mean, here we are focusing on one thing  
6 and we are saying, just like the analogy that I had  
7 earlier, and we are saying that if this tenant has gone,  
8 then this is it, then he don't have any income from this  
9 rental property.  If you are taking the same attitude,  
10 you are -- you are essentially saying that there is  
11 nothing available out there.  It is available.

12                    I mean, if they -- if he really wants to teach,  
13 I'm sure there are teaching jobs also available.  I  
14 mean, I see all the time advertisement for teaching  
15 positions.  But if that's the only mission in life, that  
16 that's all I'm going to do, only teach, I mean, there  
17 are teaching jobs available, too.

18           Q.    Well, you can't identify any of the -- you  
19 haven't identified any as part of your testimony here,  
20 have you?

21           A.    I didn't look for those.

22           Q.    Okay.  So you are just guessing that there must  
23 be?

24           A.    Like I said, I have seen advertisement but I  
25 haven't really gone and collected data on those.

1 Q. Okay. You've seen advertisements, but you  
2 don't know anything about the jobs, you don't know where  
3 they're located?

4 A. There are plenty of online, actually, databases  
5 which gives you the ability to check where you want --  
6 check the availabilities and you can check on that. I  
7 have not sat there and looked specifically this area or  
8 that area because that was not my purpose.

9 Q. I understand that. And so if there was such a  
10 job in some online database somewhere for a tenure  
11 professor located somewhere close in the Bay Area, I  
12 guess we could all look at it if that existed, couldn't  
13 we?

14 A. Yes.

15 Q. You know, it's a little -- one issue on the  
16 house analogy.

17 It's one thing to rent a house though, isn't  
18 it; it's another thing to have a career for a human,  
19 isn't it?

20 A. I know that economists sometimes sound very  
21 materialistic, but -- but in a sense it's investment in  
22 yourself, and I think it's -- actually, it talks about  
23 all the human qualities, all the knowledge base that you  
24 have and how you can improve that knowledge base, how --  
25 get more education so that human capital improves.

1           But the reward for that, the incentive for that  
2           is the increase in salary that you're going to be  
3           getting in the future. I mean, that's why you go to --  
4           usually that's why you go to university. I mean, of  
5           course, you also want to go because you like the  
6           prestige and all that kind of stuff. But --

7           Q.   Parties.

8           A.   -- you are expecting some increase in stream of  
9           income that you are going to be getting from this  
10          investment that you are going through right now, during  
11          the college. You know, you take these college loans,  
12          student loans, and you have to study all night and all  
13          that. If you don't have that incentive, that financial  
14          incentive in the future, then you might not really go  
15          through that. But that keeps you going.

16          Q.   Well, that's certainly one economist's view.

17                Isn't another view that one of the values of  
18          jobs is how it makes you feel about yourself? That's a  
19          value, isn't it?

20          A.   You know, I referred to prestige and non --  
21          non-pecuniary value of education. Sure, I mean, a lot  
22          of people get education because they like to be  
23          educated, and they like to improve their human capital.

24          Q.   In your chart, the one -- the last pie chart  
25          that you had where there were 14 percent of the jobs

1 were at universities.

2 Do you recall that chart?

3 MR. VARTAIN: You mean mathematicians?

4 MR. KATZENBACH: Q. Fourteen for the -- 14  
5 percent of the mathematic jobs were in universities,  
6 right?

7 A. Correct.

8 Q. And the average pay in that I think you wrote  
9 down was about \$74,000, am I remembering correctly?

10 A. Seventy-two point eight.

11 Q. That's what -- that's like what? That's 30,000  
12 less than your number for government industry, isn't it?

13 A. Yeah, about that, yes.

14 Q. So would it be fair -- do you think a fair  
15 guess that the people in those jobs are doing it because  
16 they like being in universities, they like teaching  
17 kids; that's an important mission in their life and not  
18 just the money?

19 A. Well, I'm sure it is. I mean, some  
20 individuals, you know, when -- when they graduate, they  
21 want to do only academic and some people will go to  
22 industry. But what I'm saying is that during the last  
23 12 years, there has been a realization in the  
24 mathematician community that university-type jobs are  
25 really shrinking, and so there has been this move among

1 mathematicians to move to industry.

2 And, yes, if the jobs are available, you know,  
3 sure, I mean, but you have to consider the economics of  
4 the situation. You can't just say that, okay, this is  
5 what I want.

6 Q. Sure you can, Doctor. You can say this is the  
7 type of job I want. I earned it, I got it, I want to  
8 keep it. Can't you say that?

9 A. Sure. You make choices. That's what I'm  
10 saying. But I'm saying if you don't have choices, if  
11 you don't -- if you don't -- if that job is not  
12 available to you, then you look at your other  
13 opportunities. That's what I'm saying.

14 Q. Why isn't a job in the University of San  
15 Francisco available to my client, Dr. Kao?

16 MR. VARTAIN: Objection.

17 MR. KATZENBACH: Q. Do you know why?

18 MR. VARTAIN: Argumentative in tone.

19 MR. KATZENBACH: Yes, sir, it is.

20 THE COURT: Asked and answered. Sustained.

21 MR. KATZENBACH: Q. Sir, do you know why the  
22 job at the University of San Francisco is unavailable to  
23 my client, Dr. John Kao?

24 MR. VARTAIN: Objection. Argumentative.

25 THE COURT: Assumes a fact not in evidence.

1 Sustained.

2 MR. VARTAIN: Move to terminate the  
3 examination. Counsel obviously is in his mood of  
4 berating the Doctor. Move to terminate the examination.  
5 He has no further questions.

6 THE COURT: You may go ahead and ask him, if he  
7 has them.

8 MR. KATZENBACH: No, Your Honor, I actually  
9 don't have anymore.

10 THE COURT: Okay, Ms. Adler, Mr. Vartain?

11 MR. VARTAIN: Ms. Adler is going to distribute  
12 the documents she previously committed or admitted@ to  
13 the jury.

14 MS. ADLER: The diversity pie chart.

15 MR. VARTAIN: No further questions of this  
16 witness.

17 THE COURT: Do the jurors have questions?

18 Yes.

19 (Discussion off the record and outside the  
20 presence of the jury.)

21 THE COURT: Okay, Dr. Borhani. The termination  
22 from a tenured faculty position -- does termination from  
23 a tenured faculty position get factored into employment  
24 opportunities in the field of mathematics?

25 THE WITNESS: Is the question whether



1 termination from tenured position affect adversely to  
2 employment in --

3 THE COURT: Get factored into employment  
4 opportunities in the field of mathematics?

5 THE WITNESS: I'm -- well, it's not really  
6 something that you can formally evaluate, but I will  
7 just give you anecdotal.

8 One of my colleagues at ERS Group, he has  
9 worked in -- he has a Ph.D. in mathematics and he has  
10 worked as a consultant to government agencies for the  
11 last 40 years, and he was telling me that actually it  
12 might help, because some of the people in industry or in  
13 government they say that, oh, these mathematicians, they  
14 are living in la-la land, and who cares that they have  
15 terminated someone. So -- but I don't know whether that  
16 can be really used as an analysis. It's just anecdotal.  
17 So formally doing that, no, I don't have -- I haven't  
18 seen any data.

19 I did look at -- when people are going through  
20 the tenure evaluation process and there are situations  
21 that at the end -- you know, when they write all those  
22 papers and at the end department decides that no, I'm  
23 sorry, we are not going to give you tenure and the  
24 person leaves, at that situation, I have seen some  
25 correspondence that, you know, people talk to each other

1 and, you know, they keep talking about networking,  
2 talking to other universities, and -- and they say that  
3 there are pretty good chance of getting to another  
4 university and getting that tenure, if you really want  
5 to go to get the tenure.

6 Of course, if you are interested in other areas  
7 of mathematics in industry, I don't think that would  
8 have any bearing on actually getting work in the  
9 industry at that level.

10 THE COURT: The first question, which you just  
11 answered, there's a series of closely related questions.  
12 If you think your answer to answer one covers as close  
13 as possible to any of those, you don't have to elaborate  
14 further if you don't feel like it.

15 The next question is: What impact might it  
16 have on employability? And it's seems clear it's his  
17 termination.

18 THE WITNESS: It does -- it -- you know,  
19 it's -- if you are terminated from a job and you are  
20 looking for another job, of course, they might be asking  
21 you whether you were terminated or not. But like I said  
22 before, it really depends on the type of work that you  
23 are applying for and how much need there is for that --  
24 for that job. So it really depends on the demand of  
25 that occupation.

1           THE COURT: Does being terminated preclude  
2 eligibility for certain types of employment?

3           THE WITNESS: I mean, that story that I gave  
4 before about my colleague that was telling me about a  
5 situation in the government setting, that they don't  
6 even care, he was telling me that they don't even ask  
7 why did you leave or what happened. He was saying that  
8 that's -- that's what he has seen. But the -- the  
9 effect on employability, it might have some effect.

10           But like I said, it is your human capital. You  
11 can show that you have that knowledge, you have those  
12 skills. And if there are jobs that are looking for that  
13 knowledge and for that skill, they're going to be coming  
14 and hiring you.

15           THE COURT: Okay. Would Dr. Kao have great  
16 difficulty in acquiring a new job if his records from  
17 USF are expunged?

18           THE WITNESS: If his records from USF are  
19 expunged?

20           THE COURT: Yes. I think that means become  
21 unavailable.

22           THE WITNESS: I'm sorry, I don't understand the  
23 question. Would you repeat the question?

24           THE COURT: Would Dr. Kao have great difficulty  
25 in acquiring a new job if his records from USF are

1 expunged?

2 THE WITNESS: My assumption of the question is  
3 that if there is no record of what happened in this  
4 situation, whether that's going to affect his  
5 employability or not.

6 Is that -- is that the question?

7 THE COURT: Sounds right to me.

8 THE WITNESS: I mean, the best -- yes, the best  
9 option will be that there is no record of this dispute  
10 that described the incident.

11 THE COURT: Follow-up questions, Ms. Adler?

12 MR. VARTAIN: Oh, I might have a few to follow  
13 up with.

14 Do you want to go first, Mr. Katzenbach?

15 MR. KATZENBACH: I'll be happy to go first, if  
16 that's -- if Counsel would prefer.

17 THE COURT: Pass the witness. Well, it's half  
18 past now. Why don't we take our break and sort out who  
19 goes first.

20 Ladies and gentlemen, remember the admonitions.  
21 Do not form or express any opinion on this case until  
22 it's finally submitted to you for your decision. Do not  
23 discuss among yourselves or with others until that time.

24 Please be back in your places at 2:40 according  
25 to the courtroom clock.

1 (Recess taken.)

2 THE COURT: Jurors and alternates are all  
3 present. Counsel from both sides are present.  
4 Plaintiff is personally present. Witness is on the  
5 stand.

6 Dr. Borhani, I have -- I will read a couple of  
7 questions.

8 Does the pie chart salaries reflect starting  
9 salaries or does it reflect the years of experience that  
10 Dr. Kao has?

11 THE WITNESS: No. The pie chart -- the data  
12 that is reflected in the pie chart is from survey of the  
13 60,000 -- I'm sorry, 1.2 million establishments that we  
14 talked about, so it's current salary for the person who  
15 says that I am in a mathematician position, so it's a  
16 combination of, you know, one-year experience or 30  
17 years of experience, so it's an aggregate number.

18 THE COURT: What was the unemployment rate in  
19 California in 2008?

20 THE WITNESS: In California in 2008, I don't  
21 remember at this point.

22 THE COURT: What is the current unemployment  
23 rate in California?

24 THE WITNESS: I think it's a little bit above  
25 eight percent, but I don't have the exact number, but it

1 is a little bit above eight percent, 8.6 percent that I  
2 said nationally.

3 THE COURT: Is it uncommon in the current  
4 economic situation for professionals with advanced  
5 degrees to change professions or occupations within  
6 their lifetimes?

7 THE WITNESS: Actually, it is very common these  
8 days. I mean, it's a long-gone situation that people  
9 went to this company and then stayed there their whole  
10 life. They -- they -- these days people keep changing  
11 occupation, you know, every few months in my profession.  
12 I mean, there are a lot of movement of people from one  
13 job to another job. So it happens. I myself, I'm the  
14 exception, but a lot of people in my profession also  
15 move around a lot.

16 THE COURT: How many times are modern  
17 professionals with advanced degrees expected to change  
18 their occupations or employers?

19 THE WITNESS: I don't have exact figure but in  
20 recent years, it's pretty high. I mean, it's -- if I  
21 remember correctly, it's three to four times they change  
22 position.

23 THE COURT: Dr. Borhani is a defense witness;  
24 therefore the defense has first opportunity to follow up  
25 unless you want to switch for some reason.

1           MR. VARTAIN: I have more gray hair, so he goes  
2 first, so he's decided to go first.

3           MR. KATZENBACH: But his are shorter.

4           Anyway, I'll be happy to go first.

5           Q. Referring to the pie chart of salaries.

6           A. Yes.

7           Q. You said it was a composite, just to put it in  
8 another term, like an average?

9           A. It is.

10          Q. Okay. And you indicated about changing  
11 professions, but I think, as I recall your direct  
12 testimony, you indicated that in faculty members they  
13 just tend to stay there?

14          A. The tenured faculty, they tend to stay there.  
15 That's correct.

16          Q. Okay. And finally we were talking about  
17 getting a job. Have you ever seen an application for a  
18 government job?

19          A. Have I seen one?

20          Q. Yeah.

21          A. I believe so. I don't remember right now,  
22 but -- but we did have a bunch of cases with government  
23 and part of the process was to go through the  
24 applications and code them and organize them. So I'm  
25 sure I've seen one, but I don't remember exactly right

1 now.

2 Q. Do you recall them asking for prior employment?

3 A. I'm sorry, what was the question?

4 Q. Do you recall those applications asking for the  
5 employee's previous job?

6 A. I don't recall. I mean, I wouldn't be  
7 surprised if they ask it, but -- but I don't remember  
8 exactly.

9 MR. KATZENBACH: Okay. That's fine. Thank  
10 you.

11 Oh, no, I'm sorry. I have one more question.  
12 Sorry.

13 Q. Would you take a look at Exhibit 266 you have.  
14 And if you would look at page 5 of 8.

15 MR. KATZENBACH: May I approach, Your Honor?

16 THE COURT: You may.

17 MR. KATZENBACH: I believe 266 is a defense  
18 exhibit.

19 And I think that was with or without pie chart,  
20 so I apologize for that.

21 266, yes, looks like this. There you go.

22 THE WITNESS: Sorry about that.

23 MR. KATZENBACH: No, that's okay.

24 Q. Take a look at what's page 5 of 8.

25 A. Yes.



1 Q. And that's a section that says "Job Outlook"?

2 A. Yes.

3 Q. And can you read just the first paragraph on  
4 that page to the jury?

5 A. The first sentence right after "Job outlook"?

6 Q. There are two sentences, I believe, yes.

7 A. So the sentence says, "Employment of  
8 mathematicians is expected to grow much faster than  
9 average. However, keen competition for jobs is  
10 expected."

11 MR. KATZENBACH: Okay. Thank you.

12 THE COURT: Is that all for now,  
13 Mr. Katzenbach?

14 MR. KATZENBACH: I am done. I'm sorry.

15 THE COURT: Ms. Adler?

16 MR. VARTAIN: No questions.

17 THE COURT: May this witness be excused?

18 MR. KATZENBACH: Yes, he may.

19 MR. VARTAIN: Thank you, Your Honor.

20 MS. ADLER: Thank you.

21 THE COURT: Dr. Borhani, thank you very much,  
22 sir. You are free to go.

23 THE WITNESS: Thank you, sir.

24 THE COURT: Next witness for the defendant.

25 MR. VARTAIN: Next witness is Mr. James Cawood,

1 certified protection professional.

2 THE CLERK: Would you please stand and raise  
3 your right hand.

4 JAMES CAWOOD,

5 having been duly sworn, testified as follows:

6 THE WITNESS: I do.

7 THE CLERK: Please be seated.

8 THE WITNESS: Thank you.

9 THE CLERK: State your name and spell it for  
10 the record.

11 THE WITNESS: My name is James S. Cawood,  
12 C-A-W-O-O-D.

13  
14 DIRECT EXAMINATION BY MR. VARTAIN

15 MR. VARTAIN: Q. Good afternoon.

16 A. Good afternoon.

17 Q. Thank you for waiting while we finished the  
18 previous witness.

19 The jury has heard a lot of testimony, and we  
20 have been going a long time. You are very close to the  
21 end of the University's witnesses, you may not know  
22 that, but you have not been present just for the last  
23 few minutes; is that right?

24 A. That's correct.

25 Q. Did you write this book?

1           A.    I did.  I coauthored it with Mike Corcoran,  
2    yes.

3           Q.    What's the name of it?

4           A.    "Balance Assessment and Intervention, The  
5    Practitioner's Handbook."

6           THE REPORTER:  I'm sorry, repeat it.

7           THE WITNESS:  "Balance Assessment and  
8    Intervention, The Practitioner's Handbook."

9           MR. VARTAIN:  Q.  What do you do for a living?

10          A.    I'm a violence risk assessor.  I spend time --  
11    people call me when people are exhibiting behavior of  
12    concern and they ask me whether or not the individual  
13    poses a significant risk of harm, physical harm, and to  
14    assess that and then to practically intervene.

15          And I do this for federal agencies and state  
16    agencies and private and public corporations throughout  
17    North America, and I have been doing it since 1985.

18          Q.    And you have been doing it for colleges and  
19    universities?

20          A.    I do, yes.

21          Q.    You never did it for the University of San  
22    Francisco, though, did you?

23          A.    I have not.

24          Q.    You were requested to serve as an expert  
25    witness to give your opinions to the jury in this case;

1 is that true?

2 A. I was.

3 Q. And you were asked to review the depositions of  
4 the witnesses and the -- all the documents, so that  
5 could you get up to speed on what happened here, right?

6 A. Correct.

7 Q. How many years have you been working for  
8 government agencies, universities, and corporations in  
9 the area of preventing violent acts on their properties?

10 A. Twenty-seven years now.

11 Q. Take the jury a little bit through, you know,  
12 how -- your education. I think they want to know a  
13 little bit about -- everyone else got a chance to -- but  
14 take them through your education, how you got into this  
15 field, how you started working in this field and who --  
16 where do you go in this country, what do you do, in  
17 concrete terms, for your job so they know what you  
18 actually do on a day-to-day basis?

19 A. Okay. I kind of backed into this. I started  
20 doing this so long ago that they didn't have a term for  
21 workplace violence. No one had even heard of it as a  
22 concept.

23 I was former law enforcement and went into  
24 corporate security and investigations. Was very  
25 interested in multi-disciplinary fields. I graduated

1 from Berkeley in Ancient Greek political theory, if you  
2 can believe it. So it's kind of a cross --

3 Q. Let's hear some Greek.

4 A. It's been a long time. Ancient Greek at that.  
5 Got involved in corporate security and actually  
6 was introduced to the field by a case. I had a case  
7 involving a situation in Silicon Valley where an  
8 engineer had been taking cocaine and threatened to kill  
9 the CEO because he wasn't going to get promoted. And at  
10 the time no one knew what to do.

11 So what they did was a friend of mine got  
12 called and they said we need someone who can protect  
13 people, we need someone who can sit in on a termination  
14 interview and act like an HR professional, we need  
15 someone who has had some experience doing these kinds of  
16 multi-disciplinary problems. And my friend said I don't  
17 know about that, but I know this crazy guy who probably  
18 will do this for you. And so I was introduced into the  
19 problem. And ultimately that day he -- the engineer had  
20 taken cocaine, he came back the next day with a  
21 38-handgun, attempted to shoot the CEO. We stopped that  
22 from happening.

23 But for me it was an epiphany and it opened up  
24 a world for me of understanding human dynamics and being  
25 able to prevent something from happening versus just

1 waiting for it to happen.

2 When you are in law enforcement and you don't  
3 know the response capabilities, you wait for the crime  
4 to happen and then show up. To be able to do something  
5 proactive was pretty exciting for me, so I ended up  
6 being interested in the problem. Learned that there was  
7 other people interested in this stuff, Chris Hatcher and  
8 others, that were starting to learn about this.

9 There was the One Market Plaza shooting in San  
10 Francisco. I was -- I became the defense expert  
11 actually in the 101 California shooting, so I was one of  
12 the defense experts there.

13 So in the late '80s a number of us were  
14 interested in doing this work, and I got introduced to  
15 those people and had a chance to start doing work.  
16 Eventually I went back to graduate school in forensic  
17 psychology, getting my masters. I am now seeking my  
18 doctorate. So -- but that was a long time after I had  
19 been doing the work.

20 So I started out on the protected side, then I  
21 moved into the assessment side, then --

22 Q. Stop. Stop. What assessment -- no, that's  
23 okay.

24 A. I'm sorry.

25 Q. I wanted you to explain right there what is the

1 assessment side --

2 A. Sure.

3 Q. -- of preventing violence for universities,  
4 corporations and government? What does that mean  
5 "assessment"?

6 A. Right. What we're talking about is taking a  
7 look at behavioral cues, and looking at those behavioral  
8 cues and whether or not that individual with a  
9 combination of behavioral cues and as an individual is  
10 reaching the point where they're going to move from  
11 thought to action. Are they going to be thinking things  
12 that are going to potentially lead to violent acts? And  
13 so we assess it.

14 And then what we do is we look at the  
15 behavioral cues, we look at the sum total of the  
16 individual's behavior, and from that, and using some  
17 structured tools, we can get some fairly good  
18 probabilities as well as an @area of graphic, meaning an  
19 individual sense of that individual and whether or not  
20 they may pose a significant level of risk. And  
21 obviously if they do, then we begin to intervene.

22 Assessment without intervention is absolutely  
23 useless. In other words, if someone in my capacity were  
24 to say, well, this person is a low risk or a moderate  
25 risk or a high risk to violence, what does that mean?

1 It doesn't help you.

2           Once we know that, it helps us craft what we  
3 need to do to intervene to deflect the individual from  
4 proceeding along the pathway that possibly would lead  
5 him to violence. Our goal here is safety. Can we stop  
6 those things from occurring when they otherwise might  
7 have occurred? That's what we are trying to do.

8           Q. And is one of the assessment tools that is used  
9 in the United States these days Fitness-for-Duty  
10 Evaluations?

11          A. It's one of the processes that is used for  
12 assessment. Yes, absolutely.

13          Q. So I sort of interrupted you, if you remember,  
14 you used the word "assessment" --

15          A. Uhm-hum.

16          Q. -- and then can you remember where you were  
17 going or should I ask you another question?

18          A. That would probably help, another question.

19          Q. Okay. All right.

20                 But you were starting to talk about how the --  
21 how different industries, universities, colleges around  
22 the country, what you do in terms of going around and  
23 working with them, so take us through what you do  
24 practically.

25          A. Sure.



1           Well, practically what I do is I do a lot of  
2 caseload. In other words, people call me and they  
3 say -- in fact it happened just today. You know, they  
4 call me and they say, you know, Johnny or Janie is  
5 acting this way or they're saying these things; we don't  
6 know what the level of risk is. Can you help us sort  
7 that out.

8           And so I ask them a lot of questions,  
9 collateral interviews, do a lot of information  
10 gathering, to be able to take a look at that individual  
11 and the individual's behavior, and then determine  
12 that -- and in some cases I fly to the individual and  
13 actually talk to them face to face; in some cases I  
14 don't need to. And that's how we do the assessment  
15 process.

16           But I also educate. So I do teach violence  
17 risk assessment. I taught federal agencies and state  
18 agencies and others how to do this.

19           I was the former Association President of  
20 the Association of Threat Assessment Professions, which  
21 is the largest --

22           THE REPORTER: I'm sorry, sir, you need to slow  
23 down.

24           THE WITNESS: I am so sorry.

25           I'm the former Association President of the

1 Association of Threat Assessment Professionals, which is  
2 the largest association of -- like us in the world. So  
3 we have the -- the behavioral analysis unit that the FBI  
4 are members and Secret Service are members and all these  
5 people, as well as state agencies and private  
6 practitioners get a chance to teach with them, get a  
7 chance to help drive some of the major issues that I  
8 have helped design in California. I helped draft the  
9 Corporate Restraining Order Law in California. Had a  
10 chance to win at some policy issues at the national  
11 level.

12 For instance after the Fort Hood shooting, I  
13 got called by DFD --

14 Q. What's the Fort Hood shooting?

15 A. The -- the psychiatrist who may have had a  
16 shooting at Fort Hood in Texas. After that shooting,  
17 the Department of Defense was doing some research with  
18 experts about how to manage those types of cases in the  
19 future and what things they should be considering.

20 Q. That was essentially an employee, active  
21 employee violence at the employer site, namely the Air  
22 Force, right?

23 A. Actually the Army.

24 Q. The Army?

25 A. But -- yes, it was. It was actually a

1 workplace violence case, and there was some pushback  
2 from the press for using that term, but interestingly  
3 enough it did fall under that category. So I get  
4 involved in doing that kind of consultation on occasion.

5 Q. This book you wrote or co-wrote recently --

6 A. Yes. Second edition --

7 Q. Second edition --

8 A. -- came out in 2009, yeah.

9 Q. You got a chapter in it on colleges and  
10 universities, don't you?

11 A. I do.

12 Q. Tell -- tell the jury, you know, what your  
13 expertise is in preventing violence at post-secondary  
14 institutions, namely colleges and universities?

15 A. I have a number of university and college  
16 clients that have both asked me to come in and teach  
17 their violence risk assessment teams how to manage these  
18 internally, but also to -- then I actually provide case  
19 consultation to them in regard to students that were  
20 having issues, in regards to professors that were having  
21 issues, in regard to staff that were having issues. And  
22 so I get involved with those when I'm asked to do so.

23 I also, as a part of ATAP, The Association of  
24 Threat Assessment Professionals, there's a number of us  
25 in the organization that are actively involved -- they

1 are actually employed by universities and so sometimes I  
2 get involved in helping them rough out some of their  
3 policies and manage some of their concerns just like you  
4 would with any other colleague.

5 Q. But you've never worked with the University of  
6 San Francisco; is that true?

7 A. No, I never have.

8 Q. Or before this case even with me or my firm,  
9 correct?

10 A. No, I have never been employed by them.

11 Q. Some of the -- some of the other publications  
12 that you have authored, "A Plan for Threat Management,"  
13 you wrote and published in 1991?

14 A. Yes. One of the earliest ones that was  
15 published, yeah.

16 Q. You wrote the publication, "Threat Management  
17 of Stalking Cases," you wrote a chapter in the book "A  
18 Psychology of Stalking." You wrote that in 1998?

19 A. Yes, with Reid Meloy.

20 Q. You wrote the book -- chapter book called  
21 "Security," and the book, "Safety, Health, and Asset  
22 Protection Management Essentials," published in 2002?

23 A. I did.

24 Q. Are you remember of the American Psychological  
25 Association?

1 A. I am.

2 Q. The California Hostage Negotiators Association?

3 A. Yes. And I have provided training for them.

4 Q. You are a member of the California Association  
5 of Workplace Investigators?

6 A. Yes.

7 Q. You are a member of the International  
8 Association of Bomb Technicians and Investigators?

9 A. About 20 years.

10 Q. You are a member of the Fire Protection  
11 Association?

12 A. Yes.

13 Q. It looks like about 20 other -- you are an  
14 active member of about 20 other associations that are  
15 involved in this business of protecting or preventing  
16 violent acts inside organizations?

17 A. All different kinds of acts, yes.

18 Q. You gave your deposition for Mr. Katzenbach,  
19 he's asked you what your opinions are in this case. And  
20 I want you to now tell the jury, you know, whether it's  
21 seven or eight, maybe take them one by one -- what are  
22 the key opinions that you have.

23 I guess first of all we'll -- we'll sort of  
24 just ask you the -- I take it there are some  
25 circumstances when a university or an organization

1 either overreacts to a problematic set of behaviors or  
2 underreacts. You probably have seen those cases?

3 A. I have.

4 Q. So let's start with that kind of topic for the  
5 jury. And would you -- after reviewing how the  
6 University handled this situation, what, if any, opinion  
7 do you have of the extent to which the University may  
8 have overreacted, underreacted or any combination  
9 thereof?

10 A. Okay. When you are dealing with a violence  
11 risk assessment case, one of the things that we want to  
12 be careful of is -- violence is a very emotional topic  
13 and there's a lot of energy around the issue of it if  
14 someone were to get hurt. And that's for obvious  
15 reasons.

16 Organizations and individuals, when they get  
17 confronted with a violent situation or potentially a  
18 violent situation, have a tendency to want to be very,  
19 very conservative in how they manage it. And what I  
20 mean by "conservative" is they want to take all the  
21 protective steps necessary so that no one can second  
22 guess them in the future and say that they did something  
23 wrong.

24 The difficulty is is that usually what most  
25 conservative means is it means that they're going to

1 overrespond to the situation and actually do things that  
2 they didn't need to do that can impact someone's life.  
3 So in the work I'm doing, I try to balance the real risk  
4 that the individual poses versus the risk to the  
5 individual if the organization responds.

6 In other words, if you are just scared of  
7 somebody and you call the police, then they have a  
8 police record. If you're just scared of somebody and  
9 you get a restraining order, that can permanently affect  
10 their ability to get employment, in some cases.

11 Q. So what would be -- let's stop you right there.

12 What would be your concern of giving the person  
13 a police record or getting a restraining order?

14 A. Well --

15 Q. At least that would protect your backside from  
16 getting sued for not doing enough.

17 And I'm not asking it in a weird sort of way,  
18 but --

19 A. Right. I mean, I'm a behavioral guy, so the  
20 legal consequences are of some concern but not nearly as  
21 much concern as the actual safety concerns.

22 The biggest concern I have is obviously the  
23 impact on the individual who's -- may be the threatener  
24 [sic]. In other words, trying to make sure they get  
25 treated fairly is the maximum way of safety for my

1 clients. In other words, if we treat someone  
2 appropriately, we interact with them reasonably, it  
3 minimizes the possibility that they are going to build  
4 up a resentment that could actually lead to a violent  
5 act.

6 So if we inappropriately report them to law  
7 enforcement, inappropriately report them and get  
8 restraining orders, we actually could trigger the very  
9 thing we are trying to avoid. In other words, you are  
10 using a big hammer for a problem that wasn't even a  
11 nail. And so we have to look at that on a  
12 reasonableness perspective.

13 So to go back to your question, over and under  
14 response, what we want to do is find that sweet spot  
15 based on the information that we have in the assessment  
16 about where a reasonable response is. What do we  
17 reasonably -- what's the minimum we have to do to be  
18 able to stop violence from occurring? That's really  
19 what I'm looking for. What's the minimum threshold?

20 The difficulty is is you have to go through an  
21 assessment to know what that is. You can't just guess  
22 at it. In other words, you have to have data, you have  
23 to really understand how the person views the world, and  
24 that's what the assessment process is about.

25 The assessment process is trying to understand



1 how this individual at this point in time is choosing to  
2 view the world and does his choices or her choices  
3 encompass actual violences. And if so, under what  
4 circumstances, in what context, against what targets,  
5 right? So violence is a five-part equation, right?

6 It's bio-psychosocial, contextual and  
7 environmental, right? So you have some biological  
8 issues. You could have, as an example, tumors or other  
9 things that could be affecting someone's brain. You  
10 have psychological issues, which goes to the personality  
11 and how they view the world and their perceptions. You  
12 have environmental and contextual issues around who --  
13 how are they being affected, what kinds of concerns do  
14 they have, what's impacting them, what their stressors  
15 are. And then you have social issues, how they're  
16 interacting with others and how they're responsive to  
17 others.

18 Q. So what is your opinion to the fact that the  
19 University directed John Kao to a Fitness-for-Duty  
20 Evaluation? Was that or was that not a reasonable part  
21 of their effort to assess his behaviors, and where does  
22 that fit in this range of overreaction and  
23 under-reaction?

24 A. After review -- I mean, first thing I had to do  
25 was review all the information about what was occurring

1 when they first -- my -- my role -- by the way, maybe I  
2 should define it.

3 My role as an expert was I was asked to take a  
4 look at the process that was being used for -- in terms  
5 of the management of this issue and whether or not  
6 fitness for duty was a reasonable thing that they could  
7 have used, and based on -- based on behavior. So I had  
8 to take a look at all the behavior that was reported by  
9 the individuals that were working with Dr. Kao, and then  
10 had to take a look at the way that they went about  
11 making their decisions, and does it fit a reasonable  
12 pathway, given what we know about the field and what --  
13 and how we do this kind of work.

14 Q. When you say "given what we know about the  
15 field," the field of preventing --

16 A. Correct. The field of violence risk assessment  
17 and how we have grown up and developed an understanding  
18 of how to do this in the best possible way. And as I  
19 said, I started so long ago that there wasn't really any  
20 road map, so I'm lucky enough to have been a part of  
21 helping guide some of this thinking.

22 But, yeah, we've learned a lot in the last 20  
23 years about how to do this and -- and what we can do  
24 wrong and what we can do right.

25 So based on that context, when I took a look at

1 this and I took a look at the behaviors, a couple of  
2 things immediately came to my mind. First is that  
3 colleagues around Dr. Kao were identifying behavior that  
4 they believed was of concern to them. In other words,  
5 we need awareness, we need people to know that that --  
6 that something is going on, and they need to know that  
7 they can report it to someone and that there will be  
8 some process assessment. So that went on. They were  
9 concerned, they reported it, people started to try to  
10 figure out what to do with it.

11 Then the University did something that I also  
12 think was reasonable, and the University recognized  
13 internally they didn't have the expertise to do this.

14 One of the problems we have with organizations  
15 now is because it is so public. For instance, this  
16 situation occurred after Virginia Tech, right? So  
17 Virginia Tech happened in April of 2007.

18 Q. Tell the jury what Virginia --

19 A. Virginia Tech was Cho, the student who went in  
20 and I believe killed 33 -- 32, actually, and himself.  
21 33 and wounded 22 at the Virginia Tech campus. So that  
22 was a seminal event for post-secondary education. It  
23 wasn't that there weren't -- you know, in my book we  
24 have whole reams of prior cases to Virginia Tech --

25 Q. At colleges?

1           A.    At colleges and universities that would have  
2 placed that community on notice, but colleges and  
3 universities are organizations and they are workplaces,  
4 but they're a little insular sometimes about how they do  
5 things in comparison to what the real world is outside  
6 of academia, and so we find that sometimes the uptake on  
7 some of these techniques is a little slower.

8           So in this case, though, the Virginia Tech is  
9 on people's minds and this -- from the testimony of some  
10 of the professors, they referenced Virginia Tech as  
11 being related. They don't know if Dr. Kao's behaviors  
12 are violent or not but what they do know is they're  
13 uncomfortable, and they don't -- and they thought  
14 someone should report it. So they did that.

15          Q.    Okay. Can I stop you right there?

16                Isn't it true that nowadays it is best  
17 practices and part of the government policies that  
18 organizations encourage their employees to report  
19 behavioral concerns about others even if they're not  
20 sure whether it's scary or going to be violent, that --  
21 and why is that, if so?

22          A.    Well, best practice. It's kind of like if you  
23 see it, say it, right? This is the old NYPD phrase. We  
24 would much prefer to assess a thousand cases and find  
25 none of them to be serious than to miss the one that's

1 catastrophic.

2 And the only way that we can do that is if  
3 people report things. And so -- but then we have to use  
4 good judgment, how we go about assessing. We have to  
5 use good judgment because obviously we don't want to  
6 overrespond.

7 So in this case, there were concerns --

8 Q. USF, you mean?

9 A. Any university organization, which is what your  
10 question was. But specific to USF, going back to the  
11 earlier question, they had this behavior, they got this  
12 in one place, they recognized they didn't have the  
13 expertise to do it, to manage it, which was good insight  
14 on their part, they don't.

15 Q. What do you mean by "they got it into one  
16 place"? Tell the jury what --

17 A. Well, it channeled up through the department  
18 and then ended up getting to administrative elements.  
19 So in essence, it concentrated, if you will, and then  
20 moved up the chain.

21 Q. So it was sort of -- it was managed from a  
22 central spot, like HR and -- and -- and it was run from  
23 a central spot?

24 A. Once legal and HR got involved, then, you know,  
25 they brought in Public Safety. And so everyone kind of

1 worked as a -- as a loose team, which is what we've come  
2 to learn to be best practice in terms of this.

3 They didn't have internally the ability to do  
4 assessment. They don't have specialists that know how  
5 to do this, and so they reached out to some people that  
6 should have that expertise. Dr. Good and, obviously,  
7 Dr. Jim Missett. And so they asked them, what's -- this  
8 is the behavior, this is what we know. What should we  
9 do with this? And that's reasonable.

10 They could have called me but they called them  
11 and that's fine. And --

12 Q. You are too expensive.

13 A. Huh?

14 Q. You're too expensive.

15 But let's talk about Dr. Missett.

16 A. Yes.

17 Q. You've reviewed his CV?

18 A. I have.

19 Q. And you've heard about him in the Bay Area?

20 A. I have.

21 Q. What do you think about the University's  
22 decision to involve him and ask him for advice on how to  
23 assess this situation, and what do you think of his  
24 advice to require Dr. Kao to have a Fitness-for-Duty  
25 Assessment, given the facts of the behaviors?

1           A.    Right.  Well, Jim Missett, you know, he is a  
2 member of the Association of Threat Assessment  
3 Professionals, so I met him originally when he -- when I  
4 was the Chapter President here in Northern California,  
5 and obviously kept in contact with him.  He's remained a  
6 member of that association and I have as well.

7                   I was introduced to him because he was doing  
8 contract work for the US Secret Service for threat  
9 assessments against the President and other secret  
10 service protectees.  So my introduction to him was on a  
11 fairly high-professional level, and he came with some  
12 acting secret service agents when I first was introduced  
13 to him.

14                   So when I learned that Dr. Missett was involved  
15 in this case, I certainly was comfortable with taking a  
16 look at what he'd done, but his reputation, to a certain  
17 degree, was already established in my mind.  And I have  
18 not heard in the field anyone claim other than high  
19 expertise on his part.  So I took a look at that.  And  
20 you know I had other dealings with Dr. Missett in the  
21 past, in terms of professional understanding, what --  
22 involvement with other cases.

23                   So I took a look at his work and obviously what  
24 I went back to is the first behaviors:  Were the  
25 behaviors reasonable.  And then I agreed with his

1 conclusion that fitness for duty was an option in this  
2 particular case. I agreed with his judgment.

3 And in this case, in particular, it was  
4 interesting because fitness for duty -- and this goes to  
5 the issue of over or under-responding. Fitness for --

6 Q. Over or under --

7 A. Or under-responding.

8 Q. Okay.

9 A. Fitness for duty was a reasonable step because  
10 it has some built-in protections that other forms of  
11 assessments do not. So in a Fitness-for-Duty  
12 Evaluation, unlike other forms of assessment -- for  
13 instance, if I was to do an assessment at -- if I was  
14 asked hypothetically to come to the USF campus --

15 Q. And you are not an MD?

16 A. And I am not an MD -- and meet with Dr. Kao, I  
17 would not be able to provide him any privilege as a part  
18 of that process. In other words, if he's talking to me  
19 solely as an employee of USF -- and I am not licensed as  
20 a doctor or a psychologist, which I am not -- then  
21 everything he tells me potentially can be exposed to the  
22 client, meaning to USF, even confidential medical and  
23 other information.

24 In a Fitness-for-Duty Evaluation, there is an  
25 expectation of privacy and communication of limited



1 information out of that evaluation, so it's much more  
2 contained. So even though the evaluator using the  
3 process -- and again I don't know what Dr. Reynolds was  
4 going to use as process, but assuming that he was going  
5 to use standard process, he would have asked a very  
6 large number of questions that can be fairly intrusive.

7 He would have asked questions about his medical  
8 history, he would have asked questions about his  
9 psychiatric history, he would have asked questions about  
10 a number of things that I would have asked questions  
11 about as well. But in the context of a fitness for  
12 duty, that's information that actually would not be  
13 shared back to the University.

14 So it was a -- it was a -- it was a good  
15 vehicle in this case for minimizing concerns that  
16 someone would reasonably have that they'd be exposed by  
17 going through the process of assessment. And so I  
18 thought, based on the circumstances, it was a fairly  
19 reasonable contained limited requirement.

20 But based on the behavior, I was absolutely in  
21 agreement that we needed to know more. I don't know  
22 what the outcome of that would have been, but based on  
23 the behavior that was exhibited and the concerns that  
24 were raised, it was reasonable, in my opinion, that they  
25 do an assessment. Absolutely.

1 Q. And that they do the assessment via  
2 Fitness-for-Duty Evaluation?

3 A. I think it was the best vehicle to protect all  
4 the different interests and including Dr. Kao's concerns  
5 and -- about his reputation.

6 Q. And is that because in a Fitness-for-Duty  
7 Evaluation, legally the medical information has to stay  
8 with the doctor and cannot go to the employer?

9 MR. KATZENBACH: Objection. Your Honor, he's  
10 asking for a legal conclusion.

11 THE COURT: Overruled.

12 The witness may answer.

13 MR. VARTAIN: Good.

14 THE WITNESS: I would -- I can't provide the  
15 legal input, I just wanted to say that, but if it's  
16 structured, the way that I have both asked fitness for  
17 duties to be structured when I requested that they be  
18 done for my clients, as well as when others have asked  
19 me to review fitness for duties that have been done, to  
20 check methodology and whether or not the methodology was  
21 adequate before the individual was returned to work --  
22 and I serve both of those roles for my clients -- then,  
23 yes, there would have been a legal structure consent  
24 form with delineated responsibilities and sharing of  
25 information that would have been part of the normal

1 process, I would have both requested or have seen in  
2 other fitness for duties.

3 MR. VARTAIN: Q. By that do you mean that in  
4 the fitness for duty process if done properly, the  
5 employee's medical information is -- does not get  
6 released, their confidential medical information does  
7 not get released by the doctor doing the evaluation, he  
8 doesn't give it to the employer?

9 A. Correct. Specific medical information having  
10 to do with a variety of things is not shared. What is  
11 shared is the summation opinion about level of risk and  
12 issues, if requested, of accommodation, if there is an  
13 accommodation to be made.

14 Q. Like a -- what disability accommodations can we  
15 make for the employee?

16 A. Correct.

17 Q. Okay. What was it is about the reports of the  
18 behaviors, and specify the behaviors that you think made  
19 it reasonable for the University to accept Dr. Missett's  
20 advice and send Dr. Kao to the Fitness-for-Duty  
21 Evaluation?

22 A. The things that immediately come to mind from  
23 the testimony that I have reviewed in deposition are --  
24 was the increase in frequency of the intense feelings  
25 and expression of -- expressions by Dr. Kao.

1           In looking at the history of his interactions  
2 with the University, he has always been viewed as being  
3 a very active faculty member with opinions about how  
4 processes are run in the department. So that was  
5 baseline. And then there are faculty members that don't  
6 have any kind of -- those interactions. So that is a  
7 baseline and that in and of itself was not a concern.

8           What attracted the attention apparently of the  
9 faculty that had been working with him, and what  
10 attracted my attention, was this compression of time  
11 around the late 2007, spring of 2008 time period, where  
12 there seemed to be more interactions and they were  
13 happening more quickly.

14           We had situations involving blow-ups in faculty  
15 meetings. We had situations where he was sitting down  
16 in -- with one of the people in the department and  
17 actually scaring that individual. We had situations  
18 where people believed that he was veering towards them  
19 intentionally, when they were exiting or approaching the  
20 restrooms on that particular area of campus, all of  
21 which were beginning to -- were happening in a very  
22 short period of time. They were happening differently  
23 than they had before, and they're cumulative.

24           And so when we see the increase in frequency  
25 and intensity -- to answer your question now -- of

1 behaviors those are one of the things we look for,  
2 obviously, when we're looking at increase in frequency  
3 and intensity. So that got people's attention, and it  
4 got my attention. So that certainly was one of the  
5 things -- there was a series of behaviors that I saw.

6 The other thing was to the degree of  
7 disturbance in the people that were experiencing this.  
8 In other words, you had professors that were, you know,  
9 not sleeping at night. Their spouses were worried about  
10 their safety. They were talking about, you know, being  
11 concerned about going to parties. That was new. That  
12 was new behavior, as far as I could tell from the  
13 records, that had not been reported before.

14 So the question was why? I mean, one of the  
15 concerns you have in a situation like this is that, you  
16 know, could these people be overreacting? Could they  
17 be? And the answer is -- the problem is maybe. But it  
18 sounds like a bad transmission and you don't know and  
19 you go and have it checked, right?

20 Q. A bad -- a bad automobile transmission?

21 A. Yeah, a bad automobile transmission. You don't  
22 know, right? You are not an expert so you take it to  
23 someone who knows that sound and is it. I learned not  
24 to discount people's instincts. If someone is  
25 concerned -- I don't know yet until I gather the data,

1 learn the information. I don't know whether or not you  
2 should be concerned or not.

3 So if one is concerned and now we have a whole  
4 group of people that seem to be concerned, who am I to  
5 say that it's not reasonable? They're bringing it to my  
6 attention. So now if it's me, I am going to assess it.  
7 We'll figure it out.

8 The good news is if I assess it and find out  
9 that it's not serious, then I can reassure them and then  
10 go back to work and feel more comfortable being around  
11 an individual that they had concerns about. If it turns  
12 out it is serious, good we caught it early, right?

13 And just like any other form of escalating  
14 problem, the earlier you catch a situation, the less  
15 energy you have to spend to divert it and to minimize  
16 it; the later you catch it, the more serious it becomes.

17 Q. So is it your opinion that using this  
18 Fitness-for-Duty Evaluation was, I guess to use your  
19 analogy, taking the transmission in to be checked at the  
20 automobile shop before it actually broke down on the  
21 road?

22 A. Well -- or -- or caused damage to someone else  
23 to the extent after a crash --

24 Q. A crash, right.

25 A. -- the brakes went out and he crashed into

1 someone. Right. Yeah. That's what we're trying to get  
2 to is, you know, who knows best whether or not you have  
3 a problem or not. And Dr. Reynolds, referred by  
4 Dr. Missett, was the individual that was their mechanic,  
5 if you want to use that analogy.

6 And, you know, I want to be careful here  
7 because we are obviously talking about a human being and  
8 not a machine. So I want to be sensitive to that. But,  
9 yes, to the extent of an analogy, that's fine.

10 Q. Yeah. What about the fact that the University  
11 didn't -- did not immediately in the beginning of the  
12 semester send Dr. Kao for a Fitness-for-Duty Evaluation?

13 In other words, what -- what about the  
14 underreaction/overreaction issue that the University did  
15 it at the time it did it, that is in the end of the  
16 semester, and factor in the different behaviors and what  
17 was happening?

18 MR. KATZENBACH: Your Honor, I am going to  
19 object. That seems compound. Vague.

20 THE COURT: Let me ask the witness, do you  
21 understand the question?

22 THE WITNESS: I thought I did, Your Honor.

23 THE COURT: Then you may answer it.

24 Overruled.

25 THE WITNESS: Thank you.

1           When you look at the -- the time frame from  
2           this clustering of behaviors in late 2007 and early  
3           2008, and you look at the period of time it took for the  
4           University to make the decision to ask for the fitness  
5           for duty, one of the reasonable questions that anyone  
6           was going to ask is wait a minute, if this was really  
7           serious, why didn't they get to it faster, right? And  
8           was it just their convenience? Were they really scared?  
9           I mean, what's this about?

10           What's interesting is that they were monitoring  
11           the behavior, and so they were getting -- he's  
12           continuing to teach, they're not disrupting their  
13           students, they are not doing other things that are going  
14           to be impactful to him and his reputation. He's --  
15           they're continuing to monitor his behavior, and they  
16           don't have the answer yet.

17           If you look at the timeline how long it took  
18           them to finally reach the decision to do fitness for  
19           duty, it took them months. Because they were being  
20           careful and -- and not trying to do anything that would  
21           be unreasonable and cause a reputational damage. At  
22           least that was my impression of what they were doing.

23           So -- and it worked for them. They took a  
24           risk. I mean, the longer you wait to do this, they took  
25           a risk because if Dr. Kao had acted out and hurt



1 someone, they would have taken the hit for being too  
2 slow. The fact is that it worked for them. They were  
3 managing it well, nothing happened. They asked for the  
4 assessment, it took them a while to get organized, they  
5 asked for it and then there was an extended period after  
6 they asked for the assessment where there was a back and  
7 forth about whether or not the assessment would be done.  
8 And they extended the deadlines.

9 MR. VARTAIN: Q. I'm going to ask you about  
10 that in a second.

11 A. Sure.

12 Q. But are you aware that it really was very close  
13 to the end of the semester that that really ugly  
14 incident happened out in the parking lot, and that is in  
15 late April, with Dean Turpin?

16 A. Oh, I -- what's really interesting is -- I will  
17 be frank with you -- my impression of the arch of this,  
18 the Dean Turpin incident in the parking lot wasn't that  
19 significant to me as a professional. It just wasn't.  
20 It was one of many things, but some of the other earlier  
21 incidents were actually more of interest to me, on a  
22 professional level --

23 Q. Okay.

24 A. -- because of the way that there appeared to be  
25 a building intensity and inability to release from

1 issues.

2 Q. Who?

3 A. On the part of Dr. Kao. On the point -- on the  
4 part of Dr. Kao. There seemed to be almost an obsessive  
5 quality to what he was doing, and that was actually more  
6 of a concern to me than that particular incident with  
7 Dean Turpin.

8 Q. Why was it of a -- what do you mean by it was  
9 "of a concern to me" and why, that is what you saw as an  
10 obsession?

11 A. Well, first -- professionally -- I mean, when I  
12 take a -- when I'm looking at cases, I'm looking at  
13 emotional intensity.

14 Q. Of?

15 A. Of individuals. Because emotional intensity --  
16 assuming the person is not a psychopath. And there are  
17 about -- you know, my caseload is -- about 14 percent of  
18 my caseload are psychopaths, which is a completely  
19 different construct. Most of the violence that occurs  
20 in organizations is emotionally based. People get  
21 emotional. So I'm looking for emotional intensity and  
22 the building of emotional intensity. And more  
23 importantly the sustaining of emotional intensity.  
24 Because the sustaining of emotional intensity,  
25 particularly around so minor issues -- not minor.

1 Single issues, not minor issues, single issues as they  
2 begin to focus in on those issues, that can lead to  
3 action much better than if I'm generally dissatisfied  
4 everywhere.

5 Q. So you mean it can lead to violent acts, too?

6 A. It can lead to escalated behavior that can  
7 include violence, yes.

8 THE COURT: Ladies and gentlemen, remember the  
9 admonitions. Do not form or express any opinion on this  
10 case until it's finally submitted to you for your  
11 decision. Do not discuss among yourselves or with  
12 others until that time.

13 Please be back in your places at 3:40 according  
14 to the courtroom clock.

15 (Recess taken.)

16 THE COURT: Jurors and alternates are all  
17 present. Counsel from both sides are present.  
18 Plaintiff is personally present. Witness is on the  
19 stand. And you may proceed.

20 MR. VARTAIN: Thank you, Your Honor.

21 MR. VARTAIN: Q. When we left off, I think you  
22 were discussing, Mr. Cawood, emotional intensity as  
23 being a factor that you look for in terms of violence  
24 assessment and prevention.

25 Would you describe what you saw in the reported

1 behaviors of Dr. Kao that caused you concern about  
2 emotional intensity?

3 A. The reports of the meeting that he had, I  
4 believe, with Dr. Brown in his office, where he became  
5 quite agitated, according to Dr. Brown's testimony, was  
6 concerned -- Dr. Brown was actually concerned about, I  
7 believe, whether he could actually leave his own office  
8 if he wanted to, in retrospect.

9 The interaction that he had in the faculty  
10 meeting around the issue of selection of candidates and  
11 whether -- and how contentious, a number of people  
12 remember that meeting being. And then this veering into  
13 or near veering as reported in -- almost near colliding  
14 in the bathroom. The question is whether or not that is  
15 a physical manifestation of intensity that no longer can  
16 be contained.

17 In other words, as an individual almost does  
18 fly-by behavior, if you will, is that -- is that now  
19 someone who can no longer just be thinking about what  
20 their -- their concerns, but now, are they acting. And  
21 you don't know until you talk to them. So all you can  
22 do is look at the behavior and go, okay, we don't know  
23 what this means, but we need to figure out what it  
24 means.

25 And I think that's something I hadn't really

1 explored -- mentioned before and I think I should now,  
2 to be complete. There is an expectation that when  
3 certain behaviors are exhibited, that people are going  
4 to report them and that people are going to actually  
5 assess them.

6 We no longer want to have people, as we talked  
7 about, not getting an opportunity both to have  
8 their feeling -- feeling safe on the work job, on the  
9 job and with their coworkers, but also having people  
10 misperceived as being unsafe when really they're not,  
11 and now unintentional consequences happen to them in the  
12 workplace.

13 And we have all seen it in workplaces where  
14 someone starts acting in ways that are strange or  
15 unusual, everyone starts feeling strange but instead of  
16 actually addressing it and trying to assess it, what  
17 they do is they just start ostracizing the person and  
18 eventually the person feels like they have to leave,  
19 which is also unfair. So it's unfair if we don't openly  
20 address it and deal with it.

21 Q. So Mr. Cawood, what are the best practices, you  
22 know, nationally -- and you know what the best practices  
23 are nationally, don't you? I mean, having written the  
24 books and written all the policies?

25 A. Well -- and certainly in getting a chance to

1 weigh in. What we've developed -- the best I can say is  
2 yes, there is an understanding now about best practice  
3 that we've all come to in the forensic community,  
4 meaning the forensic psychological community which does  
5 the violence risk assessments, as well as in  
6 organizational settings. Yes, we have the general  
7 understanding about what best practices are in terms of  
8 managing this type of thing, and what behaviors we  
9 should be looking for.

10 We know now by empirical study that there are  
11 certain behaviors that are significantly correlated with  
12 types of violences and ones that aren't. And so we know  
13 what to look for in terms of those types of connections.  
14 So yes, there is a standard.

15 And the standard right now is you need to have  
16 a policy that people shouldn't act violently in their  
17 organization, and campus is just another form of an  
18 organizational setting. You need to have an expectation  
19 of behavior which is safe, and of course this meets now  
20 under regulatory requirements under OSHA for providing a  
21 safe workplace.

22 Q. What's OSHA?

23 A. Okay. OSHA, Occupational Safety and Health  
24 Administration.

25 So there's expectations at the regulatory level

1 to provide a safe workplace, and then there are  
2 expectations at the state level to do the same thing.  
3 And then we have these guidelines now around what's best  
4 practice for organizations.

5 And from the 101 California shooting and from  
6 other types of litigation, it's become clear that, you  
7 know, there are expectations that we should have to meet  
8 certain standards. And so those are all brought  
9 together.

10 So there needs to be a policy, there needs to  
11 be an expectation of reporting. Once it's reported,  
12 there needs to be a process to assess what's going on,  
13 make a reasonable conclusion, and there needs to be an  
14 intervention, if necessary, for safety.

15 So that's the general context of what is  
16 reasonable in colleges and universities as well as in  
17 every other form of organization.

18 Q. And did the University act consistently with  
19 these best practices in the way they, through the spring  
20 of 2008, worked through the issue, got advice from  
21 Dr. Missett and then sent Dr. Kao for the fitness for  
22 duty?

23 A. Yes, they were well within the guidelines.

24 Q. The University first talked to Dr. Kao through  
25 their human resources person in June, when Peugh-Wade

1 told Dr. Kao that --

2 THE REPORTER: I'm sorry, "When"?

3 MR. VARTAIN: Q. When -- when the -- I'm  
4 sorry.

5 When the University, through Ms. Peugh-Wade,  
6 told Dr. Kao and Mr. Katzenbach that the University was  
7 considering a fitness for duty, but the University  
8 hadn't actually spoken with Dr. Kao about the behaviors  
9 while they were escalating.

10 You know that, don't you?

11 A. I do.

12 Q. What is your opinion about the fact that the  
13 University did not require any of the professors to tell  
14 Dr. Kao that they had safety concerns?

15 A. That's an interesting question. In an ideal  
16 world, there would be a situation where people would  
17 have training and experience and the ability to  
18 reasonably be able to approach others and talk to them  
19 about their behavior at lower levels. That's an ideal  
20 world.

21 The problem is that we don't want people doing  
22 it when they're uncomfortable and they feel at risk  
23 because then it adds a huge amount of emotional baggage  
24 to the conversation and isn't productive. So you're  
25 kind of caught between a rock and a hard place.



1           In addition, in this situation you have a  
2 situation where no one was trained or comfortable doing  
3 it and you can't demand to put a requirement on someone  
4 you -- you feel uncomfortable, you feel unsafe, you  
5 don't want to talk to them about it, you worry if you  
6 talk to them about it.

7           According to the testimony in deposition, many  
8 of them were worried that if they did talk to him about  
9 it, they might be a target for retaliation, to put them  
10 in a position where you're forcing them to do something  
11 that they, themselves, believe is unsafe for them, is  
12 unfair to them.

13           So ultimately, it would have been ideal if  
14 someone had felt comfortable doing it, but the fact that  
15 there wasn't anyone that felt comfortable doing it, it  
16 then was reasonable that they would get a professional  
17 to do it and follow the professional's advice.

18           Q.    And the professional they got to do it was?

19           A.    First they consulted with Jim Missett and,  
20 again, he said the same thing in his deposition  
21 testimony, that there was no one comfortable talking to  
22 him.  So it was then that Jim -- Dr. Missett talked  
23 about going for the fitness for duty to get that person  
24 that the assessor would be comfortable talking to him.

25           Q.    So it would be Dr. Reynolds who would actually

1 do the intervention and the conversation and he's  
2 trained to do that properly?

3 A. That is my expectation from what I read, yes.

4 Q. Okay. So the University actually retained an  
5 expert to do the intervention with Dr. Kao that -- that  
6 it didn't feel it had the training to do itself?

7 A. They retained Dr. Reynolds for that purpose, to  
8 have that discussion.

9 Q. And that was -- would have been done in a  
10 totally confidential, private setting as opposed to  
11 in -- in a way that Dr. Kao might be asked for  
12 information that would then become nonconfidential?

13 A. Correct.

14 Q. What, if any, opinion do you have that the  
15 University actually invited Dr. Kao to bring his  
16 attorney when it sat down with him and shared this  
17 potential that it would send him to a fitness for duty?

18 A. You know, it's unconventional but I like it.  
19 And I'll tell you why it's unconventional.

20 In a situation like this -- and I've done --  
21 well, I stopped counting at 4,000 cases, so I have done  
22 quite a few. And in making these -- helping  
23 organizations make these calls, I really don't like  
24 random people in the rooms.

25 And I apologize to the Counsel, I'm not saying

1 you're random, but just having any individual in the  
2 room other than the individual themselves, you start  
3 multiplying problems in terms of personalities and  
4 interactions and baggage and the issues can get lost.

5 So you know, some people want to have their  
6 family members come. We have had situations  
7 where family -- well, you know, I want my wife to sit in  
8 on this interview, or I want my child to sit in on this  
9 interview. Any extra person sitting in on the interview  
10 is a risk to the process. And it sets precedent.

11 You start letting the wife or the husband  
12 or the -- and remember, this is an employment situation.  
13 So now you are going to have every employee that decides  
14 they want to have their wife or husband or someone else  
15 sit in is going to be able to sit in now and -- so it's  
16 a risk.

17 But balanced against that is -- is the person  
18 going to feel more confident? Are they going to feel  
19 more comfortable?

20 Q. Which person?

21 A. The individual who's being talked to.

22 Q. Dr. Kao?

23 A. In this case, Dr. Kao. Is he going to feel  
24 more confident? And so you weigh and balance those  
25 things. And so it's unconventional to let someone else

1 be in the room. But the fact that they allowed the  
2 attorney be in the room actually worked very well for  
3 them.

4 Q. Because it gave some feeling of comfort to Dr.  
5 Kao perhaps?

6 A. I don't know, because I haven't seen how he --  
7 how -- there was no testimony I saw about how he  
8 responded to that, but it would be my assumption that he  
9 asked for the attorney to be there to be his witness and  
10 support, and therefore it was at his request.

11 Q. Do you have an opinion of the fact that Martha  
12 Peugh-Wade was not willing or didn't find it appropriate  
13 to give to Mr. Katzenbach, Dr. Kao, the names and dates  
14 and, you know, copies of reports of the concerns when he  
15 asked for more detailed information?

16 A. Well, I'm not in a position of -- of rendering  
17 any legal opinion about why that did or did not happen,  
18 so I'm not going there. But I will say operationally  
19 and -- and with my experience in having helped guide  
20 people that have made similar decisions, there's a real  
21 tension between when eventually the person knows exactly  
22 the behaviors that were delineated and whether or not  
23 there's ever going to be a direct connection to the  
24 individual who made that comment because of the concern  
25 around retaliation and the possibility that the person

1 does pose some form of risk. They now have an  
2 identifiable target.

3 So you are going to be weighing and balancing  
4 the -- the need of privacy and the concerns of the  
5 witness against the need of the individual who is --  
6 you're concerned about their behavior about them having  
7 the ability to know what behavior you are concerned  
8 about and to be able to explain.

9 What's interesting about this is that this  
10 isn't a legal -- at the time, that's not a legal  
11 proceeding, right? You're going to --

12 Q. You mean the meeting --

13 A. The meeting between Peugh-Wade and Dr. Kao was  
14 not a legal proceeding, it was an internal investigative  
15 proceeding.

16 So I would -- I have seen my clients and I  
17 certainly have counseled my clients to -- to weigh in on  
18 the side of talking about the behaviors, which she did,  
19 but not necessarily connecting them to the individual --

20 Q. Which individual?

21 A. -- at that stage.

22 The individuals that have made the claims of  
23 the behavior. I would -- so you -- you need to let the  
24 person know what the behaviors of concerns are, you need  
25 to give them a chance to know at least that.

1 Q. And did they, did the University --

2 A. My -- it's my understanding, from reading the  
3 testimony, that that was provided, there were specific  
4 examples of behavior given of concern. But I'm -- I'm  
5 not sure I would have suggested my clients that they  
6 connect it at that moment to any individual or whether  
7 or not they ever would have.

8 It's not -- it's not from a behavioral  
9 perspective, it's -- the question is how the individual  
10 responds and what they remember about those  
11 interactions, which is critical to make sure you  
12 understand their side.

13 Q. So you are not finding fault with the  
14 University for declining to give name, rank and serial  
15 number to Dr. Kao and his attorney before the fitness  
16 for duty?

17 A. No. In fact, I think they were erring on the  
18 side of protecting -- potentially protecting people that  
19 were already claiming they were concerned about  
20 retaliation. So it was a judgment call, but I don't  
21 disagree with the judgment at all.

22 Q. You were starting to tell the jury before  
23 the -- before we broke for a break and then I sort of  
24 took you off that, about what happened in the next six  
25 months where the University kept asking Dr. Kao to go

1 for the evaluation and kept asking and -- I think in  
2 your deposition you used the word the University gave  
3 something like multiple opportunities for compliance?

4 MR. KATZENBACH: Your Honor, I am going to  
5 object to Counsel testifying and not asking a question.

6 THE COURT: Objection sustained.

7 You interrupted the question, which kind of --

8 MR. VARTAIN: Thank you.

9 Did you know I was going to ask the question?

10 MR. KATZENBACH: No.

11 MR. VARTAIN: Okay. Well, I was.

12 MR. KATZENBACH: I thought you were just  
13 testifying

14 MR. VARTAIN: Like I said, that's what I'm here  
15 to do.

16 THE COURT: Okay, let's stop the colloquy and  
17 get back to examining the witness.

18 MR. VARTAIN: Q. Did the University, from the  
19 record, give Dr. Kao multiple opportunities to comply  
20 with the directive, and what, if anything, do you --  
21 opinion do you have on that as part of best practices in  
22 this area of violence prevention?

23 A. Yes. My understanding of the testimony is that  
24 they gave him multiple chances to attend the meeting  
25 with Dr. Reynolds, and then they kept extending

1 deadlines and they kept offering explanations to  
2 questions that he had about the process to the degree  
3 they could, but it was Dr. Reynolds' process.

4 From the best practice perspective, it is  
5 actually not in anyone's best interest to have this go  
6 on a long period of time. It's frustrating, it's -- it  
7 creates animosity. There is no closure for anyone in  
8 this situation. So it's just not a great thing.

9 But if you are going to err, I'd err on the  
10 side of giving the person every opportunity,  
11 particularly with these consequences, every opportunity  
12 to possibly comply, do everything you can because  
13 ultimately, you know, the decision can be made at the  
14 end, which -- actually which it was in this case, that  
15 when he finally didn't comply, they made the choice to  
16 terminate his employment.

17 So I would -- I'd be very careful before I make  
18 that decision.

19 Q. So do you find any fault with the fact that the  
20 University gave Dr. Kao six or seven months' worth of  
21 opportunity to change his mind and go?

22 A. Well, they took a risk. But again, it worked  
23 for them. And as I said, I believe erring on the side  
24 of being careful, particularly with these consequences,  
25 was reasonable. In fact, more than reasonable.



1 Q. What about the -- do you have any opinion on  
2 the fact that the University told Dr. Kao to stay off  
3 campus during these months and that he was not to visit  
4 the University while he was making up his mind whether  
5 to go for the Fitness-for-Duty Evaluation or not?

6 A. Actually that's standard practice. Once you've  
7 made the decision that you -- you requested that an  
8 individual go for an evaluation in any kind of  
9 organizational setting, be it the university setting or  
10 corporate setting or anywhere else, it's reasonable that  
11 they would not have access to the facilities, because  
12 that gives them access to the -- they are a risk, gives  
13 them access to the individuals, to the schedules of the  
14 individuals, to doing acts that are destructive or at  
15 least concerning. It can result into other issues.  
16 Frankly, it's self-protective for the individual.

17 Q. Which individual?

18 A. For Dr. Kao. If he had shown up on campus  
19 let's say -- and I have a situation with another  
20 professor right now that I'm dealing with where -- for  
21 violence risk assessment -- where the concern you have  
22 is Dr. Kao shows up and he's just going to his office,  
23 he's just going to check his e-mail or he's just going  
24 to work on a paper. But people are so hypersensitive  
25 around the fact that there is a concern about his

1 behavior, that now they begin to micro-examine  
2 everything he does and says.

3 And so ultimately that can raise the level of  
4 fear and anxiety among everyone, but also can raise  
5 some -- some inadvertent accusations or concerns that  
6 weigh against Dr. Kao's reputation because he's there  
7 and people are nervous.

8 So by removing him from the environment, you  
9 are not only lowering the concern that that inadvertent  
10 thing will happen but you also lower the concern that  
11 something real can happen. So it's actually reasonable.

12 And I use these as -- also those boundaries as  
13 a behavioral expectation. In other words, one of the  
14 things we do -- we talked about thresholds before. One  
15 of the things you do in behavioral intervention, you  
16 give them a limit and you see if they're going to manage  
17 the limit. And it helps them -- helps you understand  
18 their level of impulsivity and their ability to follow  
19 direction.

20 So in this case, by asking him not to be on  
21 campus, there was the added benefit that on top of the  
22 other two I talked about, that if he had come onto  
23 campus, it would have been a direct indicator of a  
24 higher level of concern.

25 Q. So did you tell -- did you tell us that the

1 University decision to keep Dr. Kao off campus while he  
2 was deciding whether to go for the evaluation by  
3 Dr. Reynolds was standard practice?

4 A. It's standard practice, absolutely.

5 Q. In your experience working with colleges and  
6 universities, do they generally feel that it's  
7 necessary -- after all these shootings at colleges and  
8 campuses, that it's necessary to do these forms of  
9 assessment when --

10 MR. KATZENBACH: I am going to object again.  
11 The witness -- Counsel seems to be testifying about  
12 things and not asking a question.

13 THE COURT: I don't think we had an entire  
14 question. It's overruled.

15 MR. KATZENBACH: Okay.

16 MR. VARTAIN: Q. In your experience, there are  
17 institutions of higher education determining for  
18 themselves that it's necessary to follow best practices  
19 of behavior assessment in order to run their -- their  
20 institutions?

21 A. Absolutely. It's -- it's an expectation of the  
22 parents that send their students there, it's an  
23 expectation of the faculty members and the staff members  
24 that they are going to have a safe workplace, and it's  
25 an expectation of the community that organizations,

1 including colleges and universities, are going to do  
2 their part to manage problems that could lead to other  
3 people being hurt. Absolutely.

4 Q. And from the point of view of the University of  
5 San Francisco, in your opinions, again, did they  
6 underreact or overreact in any way, shape or form in  
7 this whole process?

8 A. When you are looking at best practice and  
9 you're looking at what we come to learn to be the range  
10 of things that are acceptable, they were well within  
11 that channel.

12 So I -- they didn't overreact, they didn't  
13 underreact. They kind of wove their way down the middle  
14 course in a way which I perceived to be respectful of  
15 the consequences of the process that could have occurred  
16 and what they needed to do to balance for safety.

17 MR. VARTAIN: Thank you.

18 Do you mind if I let the jury look at  
19 Mr. Cawood's book?

20 MR. KATZENBACH: Are you going to put it in  
21 evidence?

22 MR. VARTAIN: Would you like it in evidence?

23 MR. KATZENBACH: I'm just asking you. I don't  
24 think they should look at things that aren't in  
25 evidence. That's all.

1           If you want to put it in evidence, that's fine.  
2       But I think that -- for Mr. Cawood's safety, he should  
3       give copies for each juror.

4           THE WITNESS: I don't control that.

5           MR. VARTAIN: It might give him a conflict of  
6       interest if he waived -- he didn't even give me any for  
7       free. I had to pay full price.

8           THE WITNESS: I have no control over anything  
9       free.

10          THE COURT: Mr. Vartain, do you have anything  
11       further with your questioning?

12          MR. VARTAIN: I've got one more hour.

13          No, I'm just joking. It's Mr. Katzenbach's  
14       turn.

15          Thank you, Your Honor.

16          MR. KATZENBACH: Only half an hour.

17

18                    CROSS-EXAMINATION BY MR. KATZENBACH

19          MR. KATZENBACH: Q. Good afternoon,

20       Mr. Cawood.

21           A. Good afternoon.

22           Q. Hopefully soon to be Dr. Cawood.

23           A. It will be a few years. I'm taking it slow.

24       Slow channel.

25           Q. Now, just to start up a bit here, in response

1 to questions from Counsel, you referred to Dr. Kao being  
2 given multiple opportunities to comply with the  
3 directive to attend the Fitness-for-Duty Examination  
4 with Dr. Reynolds; is that right?

5 A. That's what I remember from the testimony, yes.

6 Q. Well, at any time, did the University offer --  
7 change its position that Dr. Kao had to see Dr. Reynolds  
8 and Dr. Reynolds only?

9 A. Not that I'm aware of.

10 Q. Did they ever offer Dr. Kao an opportunity to  
11 negotiate a doctor to whom he would see?

12 A. Not that I'm aware of.

13 Q. Did they ever -- did they ever discuss limiting  
14 the scope -- the precise scope of what this examination  
15 was going to be?

16 A. They did not, to my knowledge.

17 Q. In fact, don't you recall that they told him  
18 that he would have to fully cooperate with whatever  
19 Dr. Reynolds said?

20 A. I'm not sure I remember that precisely but I  
21 believe that was the tenor of it, yes.

22 Q. Do you recall the meeting that Dr. Kao had with  
23 Mr. Philpott?

24 A. No, I don't think I do.

25 Q. Do you recall anything about that meeting?

1 A. Philpott?

2 Q. Philpott, yeah.

3 A. No, I actually don't.

4 Q. All right. Do you recall a meeting where Dr.  
5 Kao met with Mr. Philpott from Labor Relations?

6 MR. VARTAIN: Objection. Irrelevant. That was  
7 the one person he didn't take a deposition of in this  
8 case, he didn't have a deposition of Philpott.

9 THE COURT: Overruled.

10 MR. KATZENBACH: Q. Do you recall that?

11 A. I do not remember the name Dr. Philpott,  
12 Mr. Philpott, or anyone named Philpott.

13 Q. Did the University provide you any information  
14 as to what occurred in any meetings with Mr. Philpott?

15 A. No, I have no information about Mr. Philpott.

16 Q. Did the University tell you that Dr. Kao had  
17 provided to Mr. Philpott or to anyone else a list of  
18 invitations that he had received to faculty parties?

19 A. No.

20 Q. Baby showers?

21 A. No.

22 Q. End of semester -- end of semester parties with  
23 students?

24 A. Since I have no knowledge of Dr. Philpott -- I  
25 mean, Mr. Philpott and what the conversation was, I have

1 no knowledge of anything he might have offered to  
2 Mr. Philpott.

3 Q. Well, I understand, but I'm trying to get a  
4 little broader just in case you don't recall the name  
5 "Mr. Philpott," maybe you could recall the incident.

6 A. Okay.

7 Q. You know, sometimes a witness says I don't  
8 recall talking to Mr. Obama, but there was somebody who  
9 was tall and --

10 A. Okay. Thank you.

11 Q. That's the only purpose of it, just in case you  
12 don't recall the name. Lot of names here.

13 You don't recall him meeting -- strike that.

14 Do you recall that during this period where Dr.  
15 Kao was given, like you said, an opportunity to comply  
16 with the directive, do you recall Dr. Kao continually  
17 asking for additional information about the allegations  
18 against him?

19 A. Yes, I do believe that.

20 Q. Do you recall that the University, during this  
21 long period of time, gave him a -- any additional  
22 information whatsoever about the allegations against  
23 him?

24 A. That I don't specifically remember, but my  
25 recollection is is that they continued to reiterate that



1 he needed to go to the evaluation.

2 Q. All right. At any point -- you talked about  
3 the danger of identifying -- the risk of identifying  
4 individuals. Do you remember that?

5 When you were talking about the request for  
6 information, I think you said something along the lines  
7 that it was -- you know, you wouldn't necessarily want  
8 to direct -- give information about a particular  
9 individual who made a complaint for fear of retaliation?

10 A. Correct.

11 Q. That wouldn't necessarily apply to general  
12 information describing the event, would it?

13 A. I don't understand the question.

14 Q. Okay. You recall that Dr. Kao was accused of  
15 yelling at meetings?

16 A. Yes.

17 Q. More than one meeting?

18 A. Yes.

19 Q. All right. It wouldn't be, for example,  
20 identifying a particular individual who was complaining  
21 to say that at this meeting you yelled, at that meeting  
22 you yelled and at this other meeting you yelled even  
23 more?

24 A. No, that would not be -- that would not be  
25 identifying an individual.

1           Q.    In fact, that would help Dr. Kao perhaps learn  
2 what had exactly occurred -- what was going on at that  
3 meeting so he could make an intelligent response to such  
4 an allegation; wouldn't you agree?

5           A.    If the individual that was asking the question  
6 felt comfortable asking the question and being able to  
7 then take that information and move it forward if other  
8 things came out during that meeting, then I think that's  
9 fine.  And what I mean is this, there's a line between  
10 when you want to be able to provide the individual an  
11 opportunity to respond and provide their insight about  
12 what may have occurred during than interaction.

13                However, if you do not feel that you have the  
14 capacity or the training that if, as an example,  
15 hypothetically, you would ask the question do you  
16 remember meeting on such and such a date when you --  
17 when someone claimed that you were agitated in the  
18 meeting, and the person says yes, I remember that, I  
19 remember the exact issue, and they start getting  
20 elevated and then they go on and, you know what, and  
21 there's this whole conspiracy theory about what's going  
22 on.  You have no idea what the person is going to say.

23                But once you ask the question, you have the  
24 obligation to manage and -- the whole interaction.  So  
25 as long as you know that risk and you are comfortable

1 doing it, then absolutely you can do it.

2 Q. All right. What I guess I'm getting is there  
3 are all sorts of types of meetings, but let's just sort  
4 of divide them out.

5 There's one-on-one meetings. I can understand  
6 you saying there is a concern if you say, well, it's a  
7 meeting with, you know, Bob Smith -- you know, it's a  
8 meeting with Bob Smith. You may not want to identify  
9 Bob Smith as a complainant.

10 That's one situation, do you agree?

11 A. I do.

12 Q. Then there is a meeting where you have six or  
13 seven or ten people there and say the faculty meeting on  
14 February 6th, it's not really identifying who is  
15 complaining when you say that?

16 A. Correct. You -- you may not be able to  
17 identify it. The person may remember the five or six,  
18 but you are absolutely right.

19 Q. And then if it was more than just one faculty  
20 meeting, say a faculty meeting at some other date, the  
21 same sort of principle would apply, big group meetings,  
22 not much risk in identifying particular complainants  
23 when you're doing that?

24 A. Less risk.

25 Q. Okay. Now -- and you talked about identifying

1 to an individual, you are worried about that  
2 individual's reaction. When you described that, it  
3 seemed to me like you were talking about a face-to-face  
4 conversation?

5 A. You will have to be more specific.

6 Q. Sure. The way you were describing it -- let me  
7 see if I can get it right.

8 You were talking about somebody getting -- you  
9 were describing the meeting and then somebody getting  
10 agitated about it?

11 A. Correct.

12 Q. A little bit like I'm getting agitated now.

13 MR. VARTAIN: So stipulated.

14 MR. KATZENBACH: Yeah, I'll agree to that.

15 Q. And the --

16 MR. VARTAIN: And argumentative.

17 MR. KATZENBACH: And funny because the witness  
18 is laughing.

19 MR. VARTAIN: Well, I will applaud the humor at  
20 4:00 o'clock in the afternoon --

21 THE COURT: Folks, let's cut out the colloquy.

22 MR. KATZENBACH: I'm sorry.

23 Q. What I was getting to was when you were  
24 describing the person getting agitated, it sounded to me  
25 like you were describing a face-to-face meeting between

1 the individual who you were concerned about and somebody  
2 telling you about this?

3 A. It's actually any meeting. It doesn't matter  
4 how many people are in the room. It's about handling  
5 that degree of agitation or the -- not even agitation,  
6 the outflow of that information as it occurs.

7 Q. Okay. But -- what I guess -- if, for  
8 example -- let me move it back.

9 Would you agree there would be less risk if  
10 that information was put in writing to that individual?

11 MR. VARTAIN: I am going to object. What  
12 information? Vague.

13 THE COURT: Do you understand the question?

14 THE WITNESS: I think I do.

15 THE COURT: Then answer it.

16 Overruled.

17 THE WITNESS: No. Whether or not it's -- the  
18 information itself, depending on the individual, may  
19 pose a risk, whether or not it's in written or verbal  
20 form. It depends on whether or not the individual  
21 triangulates the information within that individual and  
22 whether or not that stimulates that individual to be  
23 feeling more animosity toward the one they believe  
24 provided the data.

25 MR. KATZENBACH: Q. Okay. Now, in this case

1 you're aware that Dr. Kao had an attorney?

2 A. I am.

3 Q. All right. And that attorney was available to  
4 discuss -- attorney, that's me, was available to discuss  
5 all these concerns that the University raised. Don't  
6 you agree?

7 A. I have no reason to believe that isn't true.

8 Q. So if the University wanted to say we're  
9 concerned about issues of confidentiality giving you  
10 information, that would be something the University  
11 could raise with me and maybe discuss. Wouldn't you  
12 agree?

13 A. That's certainly an option. It would seem  
14 reasonable they would have.

15 Q. And wouldn't you agree that one of the  
16 functions of an attorney is to advise clients?

17 A. I hope that's not drawing a legal collision but  
18 that's my layman's understanding of their job.

19 Q. Yeah. And wouldn't you agree that advising  
20 clients -- well, in order to advise a client, you'd want  
21 as much information as possible? I mean, you certainly  
22 do when you advise a client?

23 A. I want as much information as possible.

24 Q. And attorneys are the same thing, right,  
25 wouldn't you think?

1 A. It's not my expertise but I'm hoping so.

2 Q. Did you ever hire an attorney?

3 A. You know, I have not.

4 Q. Then no foundation. Okay.

5 MR. VARTAIN: Hey, objection. He is soliciting  
6 for work.

7 THE COURT: Overruled.

8 MR. KATZENBACH: All right. That's an  
9 accusation. Sorry. No.

10 Q. Okay. So let me see if I can move it along.

11 One of the things you also said at the end of  
12 your testimony was that sending him off -- sending Dr.  
13 Kao off campus gave him an opportunity -- the University  
14 an opportunity to see if he complied, right?

15 A. Well, it was an additional benefit. I'm not  
16 sure the University had that knowledge. What I'm  
17 looking at, as a professional, what I was doing was  
18 sharing with the jury the things I do when I suggested  
19 that people remain off campus or don't come back. I was  
20 suggesting to do a variety of things I look at. I have  
21 no knowledge whether or not the University was actually  
22 seeing that as an option at the time or not. There was  
23 no testimony that they specifically had him off campus  
24 just so they could see whether or not he would cross the  
25 behavioral boundary or not. But I saw that as a

1 professional as a correlated -- as a correlate of  
2 benefit.

3 Q. Well, the University didn't actually consult  
4 you until after we filed a lawsuit in this case,  
5 correct?

6 A. They didn't consult me at all, no. I had was  
7 never consulted on this case; I was hired as an expert.

8 Q. Okay. And just to broaden it up, you are not  
9 aware of the University hiring any threat protection  
10 expert for advise?

11 MR. VARTAIN: Objection.

12 THE WITNESS: They actually hired a threat  
13 assessment professional. They hired --

14 THE COURT: Mr. Cawood, there is an objection  
15 pending.

16 THE WITNESS: I apologize, Your Honor.

17 MR. VARTAIN: Withdraw the objection. I'll  
18 withdraw the objection.

19 THE COURT: Okay. Proceed.

20 THE WITNESS: I apologize, Your Honor.

21 They did hire a threat assessment specialist,  
22 they hired Jim Missett.

23 MR. KATZENBACH: Q. And Missett -- other than  
24 Missett, did they hire any other threat protection  
25 specialist?



1           A.    Well, Dr. Paul Good said that he had five to  
2    ten cases, so he may qualify as a threat assessment  
3    expert.

4           Q.    And do you know if any of these threat  
5    assessment experts that the University hired considered  
6    the fact that after being told to stay off campus, Dr.  
7    Kao did?

8           A.    I'm sorry, I didn't understand the question.

9           Q.    Okay. Did you know if any of the threat  
10   assessment experts the University hired took into  
11   account the fact that after given this directive to stay  
12   off campus, Dr. Kao did?

13          A.    I have no information from the testimony and  
14   deposition what they took into account or did not take  
15   into account, beyond what they talked about in the  
16   deposition.

17          Q.    Okay. Now, you also -- you indicated that you  
18   did get information from the University on which you  
19   forwarded -- you formed an opinion; is that right?

20          A.    Well, I got information from counsel about --  
21   from which I formed an opinion.

22          Q.    Sorry. Now, did you keep a record of that?

23          A.    A record of?

24          Q.    What you looked at?

25          A.    Absolutely.

1 Q. Okay. Could you take a look at --

2 MR. KATZENBACH: Your Honor --

3 THE WITNESS: I don't have it with me. I did  
4 keep a record.

5 MR. KATZENBACH: But I do.

6 If you could take a look --

7 Your Honor, if he could look at his deposition,  
8 Exhibit 1 to that.

9 I can -- I can -- Your Honor, if you would like  
10 to follow along, I can hand him my copies. It's not  
11 badly marked up.

12 THE COURT: Okay. Thank you.

13 MR. KATZENBACH: Q. I'm showing you a part of  
14 Exhibit 1 to your deposition. It is marked as page 4 at  
15 the bottom.

16 A. Okay.

17 Q. And is that a list -- and you can go over and  
18 look on the next page, too, just to make sure we're not  
19 missing anything. Is that a list of the things that you  
20 received this case?

21 A. Yes, but since my deposition testimony, which  
22 is where I believe this document was obtained from my  
23 file at that time, I actually did review some additional  
24 materials.

25 Q. All right. Let's just -- the deposition that

1 you gave in this action, that was to obtain your legal  
2 opinion?

3 I'm sorry, that was to obtain your expert  
4 opinion in this matter?

5 A. I believe so, yes.

6 Q. And that's where I got to ask you questions?

7 A. Yes.

8 Q. And you had to sit and answer them?

9 A. Yes.

10 Q. Okay. I'd like to ask you just a few questions  
11 about what's not there.

12 Is Volume 2 of Martha Peugh-Wade's deposition  
13 on the list of document you received?

14 A. Not at this time, but I believe it was the  
15 document -- one of the documents that I reviewed post  
16 deposition.

17 Q. Well, just -- let's start with what you had at  
18 your deposition, we can get to the other documents  
19 later.

20 Deposition of Dayna Soares, is that part of the  
21 deposition information -- information you had at the  
22 time of your deposition?

23 A. Dayna Soares?

24 Q. Soares, S-O-A-R-E-S?

25 A. No.

1 Q. Bob Wolf?

2 A. No.

3 Q. So it's Robert Wolf. Not there?

4 A. Not that I can see.

5 Q. Christine Liu?

6 A. Christine?

7 Q. Liu?

8 A. No.

9 Q. Neither volume of her deposition?

10 A. I do not see that here.

11 Q. Steve Devlin?

12 A. No.

13 Q. Pete Wells?

14 A. No.

15 Q. Now, during the course of your deposition, you  
16 did get a copy of Jennifer Turpin's deposition?

17 A. During -- I'm sorry?

18 Q. You got a copy of Jennifer Turpin's deposition?

19 A. Yes, post -- I believe that was post  
20 deposition. I got a copy of Jennifer Turpin's  
21 deposition.

22 Q. At your deposition you indicated -- let me see  
23 if I can refresh your recollection.

24 Do you recall saying you got Turpin's  
25 deposition but not the exhibits associated with that

1 deposition?

2 A. Is that what it was?

3 Q. Do you recall?

4 A. No, I don't recall what my deposition testimony  
5 was.

6 Q. Why don't you take a look at page 74 starting  
7 at line -- starting at line 10.

8 A. Okay.

9 Q. Just see if that refreshes your recollection.

10 A. Yes, it does.

11 Q. And, in fact, your recollection now is that you  
12 did not receive the exhibits to Jennifer Turpin's  
13 deposition?

14 A. That is correct.

15 Q. And do you recall -- and do you recall  
16 during reading Dr. Turpin's deposition that she  
17 discussed certain e-mails that she had written about  
18 this incident involving her? Do you recall that?

19 A. I have a vague recollection of that.

20 Q. And do you recall stating in your deposition  
21 that you did not ask for the e-mails that were exhibits  
22 as part of her deposition?

23 A. That is correct, I had not asked for those.

24 Q. And they weren't given to you by the University  
25 counsel?

1 A. I don't brief so.

2 Q. And do you also recall that you were not given  
3 interview notes, the direct interview notes from the  
4 faculty witnesses that were interviewed by Martha  
5 Peugh-Wade?

6 A. That is correct, I did not get direct interview  
7 notes.

8 Q. Do you recall anyone telling you that these  
9 individuals told Martha Peugh-Wade or at least one of  
10 these individuals told Martha Peugh-Wade that people  
11 hated Dr. Kao?

12 A. I'm sorry, could you restate the question?

13 Q. Do you recall being given information that --  
14 in -- in the interviews that Martha Peugh-Wade  
15 conducted, one of the faculty members informed her that  
16 faculty members hated Dr. Kao?

17 A. No, I don't remember any use of the word "hated  
18 Dr. Kao."

19 Q. Do you remember in any of these -- do you  
20 remember being given any -- being told that in these  
21 interviews any individual had stated that they hated Dr.  
22 Kao because they were concerned that he was gathering  
23 information for a lawsuit?

24 A. Yes, I do remember that testimony.

25 Q. Do you recall being told that they couldn't

1 trust Dr. Kao because he was gathering information for a  
2 lawsuit?

3 A. That I do not recall.

4 Q. Do you recall being told that any of these  
5 individuals that Martha Peugh-Wade interviewed had asked  
6 Martha Peugh-Wade for protection from any lawsuit?

7 A. I remember that there was a discussion about --  
8 something about if there was a suit, whether or not  
9 there would be some kind of coverage by the University,  
10 but I don't remember the context.

11 Q. All right. Do you recall that in these  
12 interviews that Martha Peugh-Wade conducted that faculty  
13 members initially informed her that Dr. Kao had never  
14 been physical with them?

15 A. Yes. I believe, from what I recall, there was  
16 no -- other than the veering into -- near them, I  
17 believe there was no physical contact.

18 Q. Okay. Now, do you recall an incident involving  
19 -- involved Dr. Yeung?

20 A. I believe there were two, and I believe one of  
21 them was Dr. Yeung.

22 Q. Right. You did get Dr. Yeung's deposition?

23 A. I did.

24 Q. Taking a look at Exhibit 1 to your deposition,  
25 you have some interview notes reviewing Dr. Yeung's

1 deposition?

2 A. Yes, I believe I do. Okay.

3 Do you know what page that is? Oh, here it is.

4 Q. Not by memory, I'm sorry.

5 A. Okay.

6 Q. Taking a look --

7 A. Yeah. Yeah. I see what appears to be a page  
8 with "Depo Stephen Yeung"?

9 Q. Yes.

10 A. Yes.

11 Q. All right. And in your notes there, do you  
12 reflect Dr. Yeung's testimony that he was not sure that  
13 Dr. Kao saw him in connection with this incident?

14 A. Oh, yes. Absolutely.

15 Q. Is that reflected on there?

16 A. "Cutting off. Yelling. Cutting off. Stood up  
17 yelling."

18 Hold on a second.

19 I can't -- I don't see that in the deposition.

20 What I see is "Leaving bathroom. Kao on the  
21 side of hall. Sharply moves toward him. Then away,"  
22 quote, "near collision," end quote. Page 114. That's  
23 what I see about that in my notes.

24 Q. Right. And you don't see his testimony -- you  
25 didn't record the testimony of Dr. Yeung that he was not



1 sure that Dr. Kao even saw him at that moment?

2 A. But I recall it. I don't -- I don't -- I did  
3 not record it, you are correct, but I -- now that you  
4 have reminded me of it, I do recall that he -- there was  
5 someone, whether or not it was Dr. Yeung or not, that  
6 was actually -- made a comment that he wasn't certain  
7 what it was. I -- yes.

8 Q. You don't recall whether that was Dr. Yeung or  
9 somebody else?

10 A. Well, whether or not it was the other  
11 individual who -- I believe there were two veering  
12 incidents?

13 Q. No. I'm asking you, sir, you are the witness.

14 A. Yeah. Well, I believe there were two veering  
15 incidents, I'm not clear which one, but I believe in one  
16 of those there was a question about whether or not what  
17 the intent was.

18 Q. Can I have it?

19 A. Absolutely.

20 Q. Do you recall the other veering incident being  
21 one where Dr. Needham was walking down the hall reading  
22 a piece of -- reading a piece of paper as he was walking  
23 along?

24 A. I don't remember it being Dr. Needham, but I  
25 remember "walking down the hall and reading a piece of

1 paper."

2 Q. Okay. Very good. Now -- now the -- go back to  
3 a few other items.

4 You have not -- you know, you haven't sat in  
5 courtroom here -- in the courtroom here to hear the  
6 testimony as it's come out, have you?

7 A. I have not.

8 Q. So you don't know what these witnesses said to  
9 the jury?

10 A. The only thing I witnessed was this afternoon  
11 with the economist.

12 Q. Okay. So you don't know what -- what any of  
13 these individuals -- any of these witnesses said in  
14 direct or cross-examination in this case in front of  
15 this jury?

16 A. I do not.

17 Q. Thank you.

18 Now, you did indicate, however, that your  
19 impression was that there was certain improper  
20 involvement of legal and HR at some point in this  
21 process?

22 A. Well, I'm sorry, that's -- I don't understand.

23 Q. University of San Francisco's legal office and  
24 human resources office got involved in this process,  
25 right?

1 A. That is my understanding, yes.

2 Q. At what point?

3 A. That is not -- sometime in the spring or in  
4 that range of the first half of 2008 is my  
5 understanding. This eventually went up to the Dean, I  
6 believe, and then Martha Peugh-Wade was involved and HR  
7 got involved, and about that same time is when legal was  
8 also -- I believe became part of that conversation. But  
9 in the information I have, it's just referenced that  
10 legal counsel was aware of it. That's all I'm aware of.

11 Q. You are indicating it was sometime -- it could  
12 have been as early as January 3rd?

13 MR. VARTAIN: Calls for speculation.

14 THE COURT: I have no idea.

15 MR. KATZENBACH: Q. Have you been told --

16 THE COURT: All right, folks, please.

17 MR. KATZENBACH: You are correct, Your Honor.

18 THE COURT: There is an objection.

19 MR. KATZENBACH: I apologize.

20 THE COURT: The objection is sustained. The  
21 answer is stricken.

22 MR. KATZENBACH: Q. Did -- were you informed  
23 in rendering your opinion in this case that legal  
24 counsel and -- the legal office at USF and human  
25 resources at USF was involved in the matters concerning

1 Dr. Kao as early as January 3rd?

2 A. No, I have no direct knowledge of any date when  
3 they may or may not have become involved.

4 THE COURT: Ladies and gentlemen, remember the  
5 admonitions. Do not form or express any opinion on this  
6 case until it's finally submitted to you for your  
7 decision. Do not discuss among yourselves or with  
8 others until that time.

9 Please be back in your places at 9:00 tomorrow  
10 morning, according to the courtroom clock. Remember to  
11 leave your notebooks, instructions and exhibits behind.

12 (Members of the jury are excused for the  
13 day.)

14 THE COURT: Jurors and alternates have left the  
15 courtroom. Counsel for both sides and the plaintiff  
16 remain.

17 I suggest we give ourselves ten minutes and  
18 meet in the conference room across the hall where we  
19 have room to spread our stuff out.

20 MR. KATZENBACH: Yes, Your Honor. I -- before  
21 that, I would like to resolve the issue on whether or  
22 not we can put Exhibit 122 into evidence. That's the  
23 Notice of Motion to Compel.

24 THE COURT: Mr. Vartain, do you have an  
25 objection?

1           MR. VARTAIN: Yes, I do, Your Honor. I have it  
2 on several grounds.

3           No. 1, it's not relevant, it's not a piece of  
4 evidence that bears on any issue in this case. Doesn't  
5 have any tendency to prove anything.

6           Secondly, it was not disclosed timely. The  
7 Court previously ordered that Counsel disclose exhibits,  
8 it was not disclosed.

9           I've tried this case without knowledge that  
10 this exhibit was going to be offered in evidence, and I  
11 have not offered any new undisclosed exhibits which  
12 would then give him -- give plaintiff the right to offer  
13 undisclosed exhibits.

14          THE COURT: We have relevance and chain of  
15 discovery. Why don't you discuss that, Mr. Katzenbach.

16          MR. KATZENBACH: The relevance, Your Honor, is  
17 that this involves the question of the computer and  
18 e-mails that we discussed with Dean Turpin. The  
19 relevancy is this, that we asked to see the computer,  
20 they offered -- they objected, then they offered to  
21 produce these documents which purported to be all the  
22 e-mails from the computers. That didn't satisfy us. We  
23 made a motion to compel. Following our motion to  
24 compel, we were told the computers disappeared.

25          THE COURT: So what's the relevance?

1 MR. KATZENBACH: The relevance, Your Honor, is  
2 to show that the computer was -- we were deprived an  
3 opportunity to examine the computer that was used to  
4 create these e-mails only -- and we were told it had  
5 disappeared, only after we made a motion to compel its  
6 production.

7 And we believe it goes to evidence of  
8 credibility as to the e-mails and as to a general  
9 credibility of -- it goes to the credibility of the  
10 e-mails. We feel deprived of the evidence, to examine  
11 their authenticity further.

12 THE COURT: Is there evidence that USF  
13 destroyed, misplaced, or lost evidence?

14 MR. KATZENBACH: Yes.

15 THE COURT: I don't see any tendency to prove  
16 that.

17 MR. KATZENBACH: But it's the timing, Your  
18 Honor. The Second Amended Response to Discovery  
19 Requests that's in evidence where the University  
20 discloses they no longer have possession of the computer  
21 is subsequent in date to the filing of this motion.

22 THE COURT: The motion is made for a failure of  
23 discovery. Objection is sustained.

24 Anything else before we move across the hall?

25 MR. VARTAIN: We are going to do jury

1 instructions, Your Honor?

2 THE COURT: That's my plan.

3 MR. VARTAIN: Do you want me to send out for  
4 dinner or beer? You don't want to do beer?

5 THE COURT: No, thank you.

6 MR. VARTAIN: Thanks for the ten minutes.  
7 We'll be back in ten minutes, Your Honor.

8 THE COURT: All right. See you then.

9 MR. VARTAIN: Okay.

10 (Proceedings adjourned at 4:34 P.M.)

11

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## 1 REPORTER CERTIFICATE

2 I hereby certify that the foregoing proceedings  
3 were taken before me at the time and place herein set  
4 forth; that this transcript is a true record of the  
5 proceedings, as reported to the best of my ability by  
6 me, a duly certified shorthand reporter and a  
7 disinterested person, and was thereafter transcribed  
8 under my direction into typewriting by computer.

9  
10 I further certify I am neither financially  
11 interested in the action nor a relative or employee  
12 of any attorney or party to this action.

13  
14 IN WITNESS WHEREOF, I have this date  
15 subscribed my name.

16 Dated: September 23, 2012

17 \_\_\_\_\_  
18 SANDRA L. CARRANZA  
19 CSR No. 7062  
20  
21  
22  
23  
24  
25



1 IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

2 FIRST APPELLATE DISTRICT

3 ---o00---

4 JOHN S. KAO,

5 Plaintiff/Appellant,

Appellate No. A135750

6 versus

SUPERIOR COURT CASE

No. CGC-09-489576

7 UNIVERSITY OF SAN FRANCISCO,  
8 et al.

9 Defendants/Respondents.

10 \_\_\_\_\_/

11  
12 APPEAL FROM THE JUDGMENT OF THE  
13 SUPERIOR COURT OF CALIFORNIA  
14 COUNTY OF SAN FRANCISCO

15 THE HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE

16 REPORTER'S TRANSCRIPT ON APPEAL

17 VOLUME 12, Page 2502 through Page 2725

18 Friday, February 24, 2012

19  
20  
21 REPORTED BY: SANDRA L. CARRANZA, CSR No. 7062

22  
23 SANDRA L. CARRANZA  
24 Certified Shorthand Reporter  
25 13 Joan Avenue  
Novato, California 94947  
(415)893-1861  
sandycarranza@comcast.net

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SAN FRANCISCO

3 ---oOo---

4 HON. WALLACE P. DOUGLASS, JUDGE DEPARTMENT 318

5 JOHN S. KAO,

6 Plaintiff,

7 vs.

Case No. CGC-09-489576

8 UNIVERSITY OF SAN FRANCISCO,  
9 et al.

10 Defendants.

\_\_\_\_\_ /

11  
12 REPORTER'S TRANSCRIPT OF PROCEEDINGS

13 Friday, February 24, 2012

14 - - -

15  
16 A P P E A R A N C E S:

17 For the Plaintiff:

18 KATZENBACH & KHTIKIAN  
19 By: CHRISTOPHER W. KATZENBACH and  
20 CONOR MACK, ATTORNEYS AT LAW  
1714 Stockton Street, Suite 300  
San Francisco, California 94133

21 For the Defendants:

22 VARTAIN LAW GROUP  
23 By: MICHAEL J. VARTAIN and LINDA K. ADLER,  
24 ATTORNEYS AT LAW  
601 Montgomery Street, Suite 540  
San Francisco, California 94111

25 REPORTED BY: SANDRA L. CARRANZA, CSR No. 7062, RPR

I N D E X

February 24, 2012

DEFENDANTS' WITNESSESPAGE VOL.JAMES CAWOOD

|                                   |      |    |
|-----------------------------------|------|----|
| Cross by Mr. Katzenbach (resumed) | 2505 | 12 |
| Redirect by Mr. Vartain           | 2536 | 12 |
| Recross by Mr. Katzenbach         | 2540 | 12 |

DAVID H. PHILPOTT

|                           |      |    |
|---------------------------|------|----|
| Direct by Mr. Vartain     | 2522 | 12 |
| Cross by Mr. Katzenbach   | 2630 | 12 |
| Redirect by Mr. Vartain   | 2692 | 12 |
| Recross by Mr. Katzenbach | 2698 | 12 |

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E X H I B I T SPLAINTIFF'SIDEVIDVOL.

|     |  |      |      |    |
|-----|--|------|------|----|
| 41  | USF Notes of Meeting,<br>10/28/08 with Philpott<br>(USF 0318 - 0322) | 2631 | 2631 | 12 |
| 42  |  | 2671 | 2671 | 12 |
| 91  |  |      | 2774 | 12 |
| 202 |  |      | 2774 | 12 |

E X H I B I T SDEFENDANTS'IDEVIDVOL.

|     |   |      |      |    |
|-----|---|------|------|----|
| 227 | Related to October 27, 2008<br>Pre-Discipline Meeting with<br>Union and University<br>(USF 0302; USF 0001)                      | 2629 | 2630 | 12 |
| 228 | December 29, 2008 letter<br>from David Philpott to John<br>Kao, Re: Suspension and<br>Compromise Proposal<br>(PL 01635 - 01636) | 2629 | 2630 | 12 |
| 229 | January 12, 2009 letter<br>from John Kao's attorney Re:<br>Rejecting Comporomise Proposal<br>(USF 0011)                         | 2629 | 2630 | 12 |
| 232 | January 23, 2009 University<br>letter re: Last Chance to<br>Comply with Directive<br>(USF 0011)                                 | 2629 | 2630 | 12 |
| 233 | February 3, 2009 University<br>letter Re: Termination for<br>Insubordination (USF 0012)   | 2629 | 2630 | 12 |
| 234 | February 3, 2009 University<br>Directive Re: John Kao<br>Remaining off Campus<br>(USF 0012 - 0013)                              | 2629 | 2630 | 12 |
| 235 | February 2009 Re: Severance<br>payment  | 2629 | 2630 | 12 |

1 SAN FRANCISCO, CALIFORNIA

9:03 A.M.

2 - - -

3 THE COURT: Jurors and alternates are all  
4 present. Counsel from both sides are present.  
5 Plaintiff is personally present.

6 Mr. Cawood is on the stand.

7 MR. KATZENBACH: Yes, Your Honor.

8 THE COURT: Mr. Katzenbach is --

9 Mr. Cawood, the oath you took yesterday is  
10 still in effect today. You are still testifying under  
11 oath.

12 THE WITNESS: Yes, Your Honor.

13  
14 CROSS-EXAMINATION BY MR. KATZENBACH (resumed)

15 MR. KATZENBACH: Q. Now, I was asking you  
16 yesterday about the information of -- let me just go  
17 back to that area about what information was given to  
18 Dr. Kao about the behaviors, just to clarify, just to go  
19 into that.

20 Now, the University gave you information in  
21 order to form your opinion?

22 A. The University gave counsel information at  
23 which point I was -- that was shared with me through  
24 counsel, yes.

25 Q. Okay. So in other words, counsel gave you

1 information about what these events were, so that you  
2 could help form an opinion as to the matters you testify  
3 here today?

4 A. They provided documentation that would allow me  
5 to form my opinion, yes.

6 Q. Could you have formed an opinion without that  
7 documentation?

8 A. I don't believe so, no.

9 Q. All right. And you also recall you were aware  
10 that they contacted James Missett to get his opinion, or  
11 to get his advice?

12 A. I am aware of that, yes.

13 Q. And that they gave -- the University gave  
14 Dr. Missett information about the accusations against  
15 Dr. Kao so that he could formulate his advice, correct?

16 A. Yes. That was reflected in his deposition.

17 Q. Right. And now, are you aware of any  
18 information that was given to Dr. Kao or his attorney  
19 concerning the information -- concerning these events?

20 A. I believe I reviewed a letter as a part of an  
21 exhibit that was provided to Dr. Kao in your presence, I  
22 believe it might have been by Martha Peugh-Wade.

23 Q. All right. Let me project up that letter, if I  
24 can.

25 Now, is that letter dated June 18th?

1 A. I have absolutely no idea.

2 Q. Okay. If you could take a look in your book  
3 there, Plaintiff's Exhibits, take a look at Exhibit 30.

4 A. Plaintiff's Exhibits Volume I or II or --

5 Q. Probably in Volume II.

6 A. Okay. And what's the number?

7 Q. Thirty.

8 A. I am at 30.

9 Q. All right. Is that the letter you were  
10 referring to?

11 A. Yes, it appears to be what I'm thinking of.

12 Q. All right. Now, do you know whether Dr. Kao --  
13 the information that you got was substantially more than  
14 the information provided in this letter, isn't it --  
15 wouldn't you say that?

16 A. If you don't mind, I am going to take a minute  
17 and actually read it.

18 Q. Sure. Of course.

19 A. In the second paragraph, the behaviors as  
20 exhibited are accurately reflected in this letter from  
21 the information I was able to glean from the  
22 depositions. But there is information missing  
23 specifically who experienced these things, and the range  
24 of emotions that people were feeling, when they  
25 experienced these things.

1 Q. It's also missing a date and context?

2 A. Correct.

3 Q. So in other words, the yelling isn't described  
4 in any particular context?

5 A. There is a context in regard to meetings.

6 Q. How many meetings do you recall Dr. Kao  
7 being -- strike that.

8 When there was -- it's not described whether  
9 that's a faculty meeting, a personal meeting, or any  
10 other type of meeting; is that correct?

11 A. It does not appear to be, no.

12 Q. Okay. So -- and we discussed, I think,  
13 yesterday there are some differences between the two  
14 situations, the two contexts, correct?

15 A. There are different contexts, correct.

16 Q. Well, okay, I don't want to debate on that too  
17 much, but let's go on to this point.

18 There's no indication in this letter what this  
19 yelling concerned?

20 A. Correct. I don't see any references to  
21 specific things that were involved.

22 Q. All right. Well, would you agree with me that  
23 the context in which someone is yelling makes a  
24 difference?

25 A. In what way?



1 Q. Well, for example, somebody who is simply  
2 yelling about -- yelling about aliens, you know, aliens  
3 attacking his brain is one thing; somebody yelling about  
4 discrimination is another?

5 A. Yes.

6 Q. Very different situations, wouldn't you agree?

7 A. Different expressions of concern, yes. The  
8 circumstances could be the same.

9 Q. Well, in assessing someone's mental state, do  
10 you think it makes a difference whether they are  
11 complaining about aliens invading his brain versus  
12 discrimination by the University?

13 A. It depends on the context of the assessment,  
14 but yes.

15 Q. All right. Would you agree with me the context  
16 of the events is therefore important?

17 A. Context is always important along with  
18 environment.

19 Q. Do you know whether Dr. Kao asked for -- after  
20 receiving Exhibit 30, the June 18 letter, asked for  
21 additional information?

22 A. I believe there was some information like that  
23 in my review, yes.

24 Q. Projecting on the screen Exhibit 31, take a  
25 look at that. Do you have that in front of you?

1 A. I do.

2 Q. Have you seen that before?

3 A. I believe it was a part of the exhibits I  
4 reviewed, yes.

5 Q. And when you say part of the exhibits you  
6 reviewed, you mean you reviewed before your deposition?

7 A. That I don't recall.

8 Q. All right. Are you aware of any time after  
9 Exhibit 31 when the University provided Dr. Kao any  
10 additional information beyond what's contained in the  
11 June 16 letter?

12 A. Information concerning what?

13 Q. Information concerning the behaviors that were  
14 concerning the University or the context of these  
15 behaviors.

16 A. I have no knowledge of that, no.

17 Q. Okay. Now, I'd like you to take a look at  
18 Exhibit 32.

19 A. I'm looking at it.

20 Q. It appears to be an e-mail from me to  
21 Ms. Peugh-Wade, correct?

22 A. It does.

23 Q. Now -- strike that.

24 And it -- would it be accurate to describe this  
25 request as asking for information so that Dr. Kao could

1 assess the University's demand to go to an examination  
2 with Dr. Reynolds?

3 A. I have to read it.

4 Q. Of course.

5 A. It appears you're making a request for  
6 additional information, yes.

7 Q. Do you know whether the University ever made a  
8 response to this request providing any additional  
9 information as to context of the accusations against Dr.  
10 Kao?

11 A. No, I'm not aware of what they may have  
12 responded.

13 Q. I mean, reviewed -- when the file -- at the  
14 time of your deposition, do you recall that this was  
15 part of the information given to you by the University?

16 A. No, I don't recall exactly what was -- whether  
17 it was or was not.

18 Q. Now, in your deposition, do you recall being  
19 asked -- do you recall testifying about information  
20 given to police and fire -- police and firefighters?

21 A. I remember you asking me that question, yes.

22 Q. Do you recall that you testified that in the  
23 State of California, for at least police and firefighter  
24 cases involving fitness for duty, the law requires the  
25 police and firefighters to be given the actual identity

1 of the individuals involved as well as the behaviors at  
2 issue?

3 A. I don't remember my testimony but I do  
4 understand that being part of the responsibility of --  
5 under firefighter and police contracts in the State,  
6 yes.

7 Q. Well, didn't you indicate that that was because  
8 the legislature of the State of California had said this  
9 is information that has to be provided to police and  
10 firefighters?

11 A. Yes.

12 Q. Okay. And do you recall in your deposition I  
13 asked you what adverse effect had this requirement had  
14 on the operations of the State of California?

15 A. I don't remember that question.

16 Q. Well, please take a look -- I'd like -- would  
17 you please take a look, and I will hand you your  
18 deposition at page -- sorry.

19 Pardon me, Your Honor.

20 My notes are not as good as they should be.

21 MR. VARTAIN: It's 40 at line 8, Counsel, to 41  
22 at line 9.

23 MR. KATZENBACH: Thank you.

24 Taking a look -- why don't we just start at the  
25 question on page 39, line 24, through 40, line 12.

1 Can I read that, Your Honor?

2 THE COURT: Yes.

3 MR. KATZENBACH: Q. Begins with your answer:

4 Twenty-four, "Answer: Except in a situation  
5 where you are a public employee as a police officer or  
6 as a firefighter in the State of California, under those  
7 guidelines for fitness for duty it's required that the  
8 individuals are named as with the behaviors. Outside of  
9 that, no.

10 "Question: Okay. And what is the purpose  
11 of -- why is it different for firefighters and police  
12 officers?

13 "Answer: Because the legislatures said -- the  
14 legislature said so.

15 "Question: All right. And is that as -- in  
16 your experience, has that adversely affected the ability  
17 of the State of California to conduct Fitness-for-Duty  
18 Examinations for firefighters and police officers?

19 "Answer: That's outside the scope of my  
20 knowledge."

21 MR. VARTAIN: The answer was "That is outside  
22 the scope of my knowledge."

23 MR. KATZENBACH: That's fine. I thought I read  
24 that.

25 Q. Now, I would like to -- in general, would you

1 agree that a Fitness-for-Duty Examination is not a  
2 substitute for disciplinary action?

3 MR. VARTAIN: Objection. Vague and ambiguous.

4 THE COURT: Mr. Cawood, do you understand the  
5 question?

6 THE WITNESS: Not really, no, Your Honor.

7 MR. KATZENBACH: Okay.

8 THE COURT: Sustained.

9 MR. KATZENBACH: Q. All right. If somebody  
10 comes in and hits you with a two-by-four in the  
11 workplace, right, that would normally -- in your  
12 experience, would that normally result in a disciplinary  
13 action?

14 A. Yes, it would.

15 Q. Not a Fitness-for-Duty Evaluation?

16 A. They're not mutually exclusive necessarily.

17 Q. No, I agree. But you would agree that hitting  
18 someone with a two-by-four would also trigger a  
19 disciplinary action in most workplaces of which you're  
20 familiar?

21 A. Yes.

22 Q. Same with somebody assaulting somebody with  
23 their fist?

24 A. Yes.

25 Q. Same with someone assaulting somebody with

1 their body?

2 A. Other than the fist, yes.

3 Q. Right. I mean, in other words, you know  
4 hockey, right? If you pound into someone into the  
5 boards, the referee blows the whistle and you go to the  
6 penalty box?

7 A. Yes.

8 Q. It's pretty much the same in the workplace,  
9 wouldn't you say, except you're not in skates?

10 A. Yes.

11 Q. Most workplaces, not hockey rinks.

12 Okay. And you agree with me that before a  
13 Fitness-for-Duty Examination -- I'm sorry.

14 And would you agree with me that when you ask  
15 somebody to explain their conduct, in other words why  
16 they boarded somebody, you know, that that isn't asking  
17 about medical issues?

18 A. Unfortunately I can't quite be that simple.  
19 There are times when there's claims made that behavior  
20 is due to medical issues, and so you could be asking  
21 about medical issues at that time.

22 Q. Well, an employee might volunteer that the  
23 reason they ran into somebody was some medical issue?

24 A. Exactly.

25 Q. But the conversation would normally begin with

1 you ran into somebody?

2 MR. VARTAIN: I am going to object. That calls  
3 for speculation and it's a hypo without any underlining  
4 facts.

5 THE COURT: Overruled. The witness will let us  
6 know if he's not equipped to answer.

7 THE WITNESS: I would normally start the  
8 conversation by asking them what they -- what they  
9 perceived happened.

10 MR. KATZENBACH: Q. Okay. So you would put it  
11 in context, wouldn't you?

12 A. I would ask them what they perceived happened  
13 at that moment, yes.

14 Q. In other words, they would know that you're  
15 talking about sometime when they bumped into somebody or  
16 ran into somebody or hit somebody?

17 A. Not to draw too fine a point on it, but the  
18 fact is that it depends on the circumstance. In many of  
19 my evaluations, I don't actually start with the idea --  
20 in discussing with people, I don't actually ask the  
21 question, so tell me on Friday afternoon what your  
22 perception of what happened is.

23 Many times what I'm looking for is how that  
24 individual is connecting to reality and how they're  
25 connecting to the situation and what their current way



1 of thinking is.

2 So what I might do is start with something very  
3 vague, like tell me about your interactions with your  
4 coworkers, I wouldn't even get to the incident at the  
5 very beginning, and see if they go there by themselves.  
6 And if so, what they choose to tell me about it even  
7 before we start probing.

8 In other words, are they primed for it or not.  
9 So it depends on the circumstance.

10 Q. All right. So you start with some sort of an  
11 open-ended question?

12 A. I would.

13 Q. And then, you know, depending on what the  
14 response were or the context, you might ask more  
15 questions?

16 A. Often.

17 Q. Right. And you know, for example, if an  
18 employee said, "What's my relationship with Bob? Pretty  
19 good." You might say, "Well, how about last week?"

20 A. I'd say "Tell me about that," actually. That's  
21 my favorite phrase.

22 Q. "Tell me about that," right?

23 A. Exactly.

24 Q. "Why would my sister have dated him?"

25 A. Or whatever.

1 Q. Yeah. And you might say, "Well, how does that  
2 make you feel?" "I'm not going to have my sister marry  
3 a creep like that." Right, that would be the sort of  
4 conversation you would imagine, correct?

5 A. It would be an open conversation and trying to  
6 let them guide it.

7 Q. Right. And you'd try to be thorough about any  
8 such conversation?

9 A. I would certainly, by the close of that  
10 conversation, hopefully have all the necessary  
11 information to be able to guide my assessment, yes.

12 Q. And you would think -- and that would be true,  
13 whether you're doing investigation for the employer or  
14 the employer is using in-house services to do such an  
15 investigation? Thoroughness is important, correct?

16 MR. VARTAIN: Ambiguous. Compound.

17 THE COURT: Sustained.

18 MR. KATZENBACH: Q. Any investigation by  
19 anyone --

20 MR. VARTAIN: Vague.

21 THE COURT: Overruled.

22 MR. KATZENBACH: Q. -- should be thorough and  
23 fair, do you agree?

24 A. I believe investigations should be thorough and  
25 fair, yes.

1 Q. Thank you.

2 Now, the University of San Francisco has a  
3 Violence Prevention policy; are you aware of that?

4 A. Yes, I believe so.

5 Q. Projecting up Exhibit 91.

6 Is that a copy of the USF's Violence Protection  
7 policy?

8 I'm sorry, you can look in the book. I  
9 apologize.

10 A. Thank you.

11 Q. Probably in the book -- the number is above 80  
12 something.

13 A. I'm looking at a document with USF 20258?

14 Q. That is correct.

15 A. Yes, that is correct.

16 Q. Is that the USF Violence Protection policy?

17 A. I believe it is. It's titled "Threatening and  
18 Violent Behavior."

19 Q. We've talked about best practices. Is it best  
20 practices to follow the Violence Protection policies in  
21 an institution like USF has adopted?

22 A. If you have a policy, you should follow it,  
23 yes.

24 Q. Okay. In giving your opinion when I took your  
25 deposition, had you given any consideration to whether

1 the University of San Francisco was following its  
2 policies on threatening violent behavior?

3 A. I did.

4 Q. At the time you gave your deposition?

5 A. I believe that I read the document before my  
6 deposition.

7 Q. Did you give any consideration to just -- to  
8 whether it followed that policy?

9 A. I have no reason to believe I wouldn't have.

10 Q. Take a look -- I'd like to read for you page  
11 107, starting at line 25 through line 108. I'm sorry,  
12 page 108, line 4.

13 Page 107, line 25 through 108, line 4.

14 THE COURT: Okay.

15 MR. KATZENBACH: Q. "Question: Okay. Have  
16 you given any consideration to whether the University of  
17 San Francisco was following its policies on threatening  
18 and violent behavior?

19 "Answer. No. That's outside the scope of what  
20 I was asked to opine on."

21 A. Oh, okay.

22 Q. Thank you.

23 A. Thank you for reminding me.

24 Q. Now, looking at best practices generally, would  
25 best practices include complying with applicable state

1 and federal laws?

2 A. In the context of violence?

3 Q. Yeah. For violence prevention.

4 A. Yes.

5 Q. Okay. Are you aware of any restrictions on  
6 medical/psychological examinations under the Federal  
7 Americans with Disability Act?

8 A. I'm aware of some, yes.

9 Q. Would complying with those restrictions be part  
10 of best practices?

11 A. Certainly following the law would be important,  
12 yes.

13 Q. Okay. Are you aware of restrictions on medical  
14 and psychological examinations under the California Fair  
15 Employment and Housing Act?

16 A. Not specifically, no. From a legal  
17 perspective, I should say.

18 Q. I'm sorry, you know, I'm not asking for a legal  
19 opinion. I'm just asking whether or not as part of your  
20 level of expertise, you're aware of restrictions on  
21 medical and psychological examinations under the  
22 California Fair Employment and Housing Act, what that  
23 statute provides in that regard.

24 A. I'm aware of some of the information sharing  
25 portions of that, but I'm not familiar possibly with all

1 the parts of the statute.

2 Q. Are you familiar with restrictions on the  
3 ability of an employer to ask for medical or  
4 psychological examinations contained in the California  
5 Fair Employment and Housing Act?

6 A. Not in my current memory, no.

7 Q. Now, you indicated that you did read -- you did  
8 review Dr. Missett's deposition?

9 A. I did.

10 Q. And you were -- did Dr. Missett give you any  
11 report explaining the basis for the reason he -- the  
12 advice he gave?

13 A. No, I've only seen his deposition.

14 Q. Did you ever talk to Dr. Missett about the  
15 advice he gave?

16 A. I did not. I only saw his deposition.

17 Q. Did you ever ask him to explain what -- what  
18 the information -- what information he had that he  
19 relied on in advising USF?

20 A. The only information I have is from what he  
21 said in his deposition.

22 Q. You indicated that Dr. Missett was part of the  
23 same association, I guess what you're currently a  
24 president of?

25 A. No, I'm the former association president.

1 Q. I'm sorry. That's okay.

2 Did you have any other -- other than reading  
3 his deposition, do you have any other relationship with  
4 Dr. Missett in connection with this case?

5 A. Not in connection to this case, no.

6 Q. Have you had a relationship with Dr. Missett in  
7 regards to other cases?

8 A. I have.

9 Q. Have you worked with him in other cases?

10 A. I have.

11 Q. Have you worked with him with other cases  
12 involving Mr. Vartain?

13 A. I have not.

14 Q. Okay. Now, you indicated, I think in your --  
15 in your testimony, that you were concerned by the  
16 increase in frequency and/or intensity of behaviors that  
17 were reported.

18 Do you recall that testimony?

19 A. I do.

20 Q. When did these behaviors start, as far as you  
21 can recall?

22 A. There were behaviors reported in the year --  
23 year or two prior to the escalation in the spring of  
24 2008.

25 There was an incident involving a department

1 secretary that had occurred prior to that, and I believe  
2 there was at least one meeting where Dr. Kao had acted  
3 in a way which had gotten people's attention prior to  
4 that spring series.

5 There may have been other behaviors as well,  
6 but those are the ones that come to mind.

7 Q. Okay, the department secretary. Do you recall  
8 when that incident was, based on what you were told?

9 A. Based on my reading of the material, my  
10 recollection is it was sometime in the year or -- as I  
11 said, year or two prior to the 2008.

12 Q. And that was based on the information provided  
13 to you by the University of San Francisco?

14 A. It was based on the information provided  
15 through the testimony that was -- deposition testimony  
16 and other materials provided in this case.

17 Q. Do you recall that that secretary was -- went  
18 by the name of Citas (phonetic)?

19 A. I don't remember the name of the secretary.

20 Q. All right. Do you recall -- do you recall that  
21 that incident occurred over ten years earlier?

22 A. I don't remember it being quite that far.

23 Q. All right. And this meeting -- this other  
24 meeting that you refer, when do you recall that meeting  
25 occurring?



1           A.    Sometime in the -- my sense of it is sometime  
2    in June to August, maybe October time frame of the 2007.

3           Q.    What sort of meeting are we talking about?

4           A.    I think it was -- it may have been the Brown  
5    meeting, but -- no, no.  It was a faculty meeting around  
6    an issue to do with something about either changes in  
7    the department or something about selection of a  
8    candidate, something along those lines.

9           Q.    Okay.  And do you recall Dr. -- do you recall  
10   any of these -- sorry.

11                    That's the first incident you recall, right?

12           MR. VARTAIN:  Vague.  Objection.

13           MR. KATZENBACH:  I'm sorry, I'll rephrase that.

14           Q.    Getting to 2008, what's the -- what is the next  
15   incident in this escalating pattern that you recall?

16           A.    There was -- what I recall is then in the  
17   spring of 2008 we had that -- we had a cluster of  
18   behaviors.  I believe there was the meeting with -- it  
19   was either around that time we had the meeting with Dean  
20   Brown, it could have happened before that, in his  
21   office, and then we had a series of -- we had a faculty  
22   meeting.  We had the veering towards him.  Now I recall  
23   there was something about the mimicking of one of the  
24   other faculty members or someone at a copy machine.

25                    Those are the ones that come to mind at the

1 moment.

2 Q. All right. Now, do you recall when this  
3 faculty meeting was?

4 A. Not specifically, other than what I've just  
5 told you.

6 Q. All right. Do you recall it was in  
7 February 2008?

8 A. Not other than what I've just specifically told  
9 you I remember.

10 Q. Do you recall the faculty member meeting  
11 concerned a search for a new faculty hire in the  
12 Department of Mathematics?

13 A. Yes, I do remember that there was a search  
14 issue involved, yes.

15 Q. Do you recall that the issue that -- the issue  
16 that Dr. Kao was discussing at that meeting concerned  
17 discrimination in the search?

18 A. He raised issues concerning the process of the  
19 search, yes. And there was, I believe, a flavor of  
20 discrimination raised, yes.

21 Q. Well, did he say this search -- he felt that  
22 the search was discriminatory, did you understand that  
23 that was what was going on?

24 A. Yeah. What I remember is that there was that  
25 flavor, something about gender and possibly race, yes.

1 Q. Do you recall that -- were you told that Dr.  
2 Kao prepared statistics to try to explain why he felt  
3 the search was -- had an adverse effect on minorities?

4 A. I do recall from the testimony there was a  
5 sheet of paper where there were P-values calculated, but  
6 there was a contention in the materials about whether or  
7 not those -- that document actually was shared with  
8 anyone or not.

9 Q. All right. But the document, as you recall,  
10 had a calculation of just -- of discriminatory impact  
11 because the manner in which the search was conducted,  
12 correct?

13 A. Actually, from my recollection of the  
14 testimony, people weren't really clear what the  
15 statistics were trying to express specifically. There  
16 was some confusion on the part of the people that were  
17 in that meeting.

18 Q. All right. After that meeting where this  
19 discrimination was discussed, what's the very next event  
20 that you recall as part of this pattern?

21 A. Actually, I have a vague recollection. But my  
22 sense would be it was something -- maybe the parking lot  
23 incident with Dean -- with, at the time, Dean Turpin.

24 Q. That would be the end of April?

25 A. I have no specific recollection of where these

1 things are in time.

2 Q. Well --

3 A. Or even in relation to each other.

4 Q. Well, you described it as -- his behavior as  
5 increasing in frequency or intensity, so I'm just trying  
6 to determine which incidents you are noting as involving  
7 such an increase in frequency?

8 A. When I said that, what I'm doing is I'm looking  
9 at the issue of how rare, exotic it was in the year  
10 prior and in the years prior in his employment history,  
11 and then we have in that first quarter of 2008 a cluster  
12 of one event after another as reported by the  
13 individuals of concern leading up to this request for  
14 review.

15 So in essence it's a global estimate and  
16 understanding of the compactness and frequency of  
17 incidents in that period of time, whether or not I can  
18 sequence them out. Certainly at the time I read the  
19 depositions and made notes, I was familiar with the  
20 pattern. But sitting on the stand today testifying,  
21 it's my sense is what I'm conveying.

22 Q. All right. Let's go back to this.

23 During the prior years that you looked at his  
24 behavior, were there searches going on that -- in which  
25 Dr. Kao was raising issues of discrimination?

1           A.    I believe there were some prior searches or at  
2    least one prior search I can recall where he had raised  
3    issues of concern.

4           Q.    Now --

5           A.    And -- uhm-hum.

6           Q.    So now taking this, would you -- would it be  
7    fair to say that the cluster of behaviors that you're  
8    referring to all began when Dr. Kao was raising these  
9    concerns about discrimination?

10          MR. VARTAIN:  Objection.  Vague.

11          You mean in 2008?

12          MR. KATZENBACH:  Q.  Well, the cluster of  
13    behaviors starting that you indicated late sometime in  
14    2007 and perhaps going into 2008 primarily concerned Dr.  
15    Kao's complaints of discrimination in this search?

16          A.    I wouldn't say "primarily" -- I'm sorry.

17          MR. VARTAIN:  Withdraw the objection.

18          MR. KATZENBACH:  Q.  You would not primarily,  
19    okay.

20          A.    I would not say -- I would say in conjunction  
21    in time-wise, yes.

22          Q.    Okay.  All right.

23          A.    Certainly the incident with Dean Turpin did not  
24    involve any claims of discrimination.

25          Q.    Did you investigate whether or not Public

1 Safety had done anything regarding the incident with  
2 Dean Turpin?

3 A. I'm aware, based on the testimony that I  
4 reviewed, that when issues were raised that they  
5 increased the patrols of certain safety personnel in the  
6 building, yes.

7 Q. All right. Are you aware whether Public Safety  
8 conducted an investigation of the incident?

9 A. I am not aware of an investigation of the  
10 incident.

11 Q. Were you aware of anyone from Public Safety  
12 speaking to Dr. Kao about this incident?

13 A. I do not remember any testimony of that, no.

14 Q. Okay. Now, you also refer in your testimony, I  
15 believe, that while pacing of the action by USF, that is  
16 direct -- the time it took from the start to directing  
17 the Fitness-for-Duty Examination taking Dr. Kao off  
18 campus was okay because no one was hurt?

19 A. I believe what I said was is that there is a  
20 concern when you delay but the fact that no one  
21 ultimately was hurt worked for them, yes.

22 Q. All right. Are you familiar with the phrase  
23 "propter hoc ergo propter hoc"? I'm sorry, "post hoc  
24 ergo propter hoc"?

25 THE REPORTER: I'm sorry, can you repeat that?

1 MR. KATZENBACH: Post hoc ergo propter hoc.

2 MR. VARTAIN: I will translate if you want.

3 MR. KATZENBACH: Yes, it's "because of this" --  
4 it says "after" -- "after this, therefore because of  
5 this."

6 MR. VARTAIN: All right. That's not exactly  
7 right. I took four years of Latin in law school.

8 MR. KATZENBACH: Q. Are you aware of the  
9 logical fallacy of assuming that because something  
10 happened it was caused by some preceding event?

11 A. I am aware of the fallacy yes.

12 Q. For example, if I flip a coin (indicating) and  
13 there's thunder, it's logically fallacious to assume my  
14 flipping of the coin caused the thunder?

15 A. Yes.

16 Q. That's very different than who I am.

17 So would it be accurate to say that assuming  
18 that because no one was hurt, that the delay was -- that  
19 therefore the delay was okay, is that the same sort of  
20 logical fallacy?

21 A. No, it's not the same logical fallacy because I  
22 wasn't implying -- I was implying sequencing. I other  
23 words, I wasn't implying it was logical, what I was  
24 implying was that on a practical basis no one got hurt;  
25 it worked.

1 Q. Well, let's look at another -- do you know what  
2 Occam's razor is?

3 MR. VARTAIN: I didn't hear that, Counsel.

4 MR. KATZENBACH: Occam's razor.

5 MR. VARTAIN: Is that Latin?

6 MR. KATZENBACH: No. "Razor" isn't a Latin  
7 word and "Occam" is a name.

8 Q. Isn't that the case that the simplest  
9 explanation is always -- is most likely the true  
10 explanation?

11 A. According to Occam's razor, the simplest  
12 explanation is most often true, yes.

13 Q. So isn't the simplest explanation why no one  
14 was hurt was because John Kao wasn't a danger to  
15 anybody?

16 A. I was not asked to assess his dangers.

17 Q. Now, I'd like to ask you a couple of other  
18 things concerning the background -- your background.

19 Do you recall in your deposition you described  
20 a number of other cases that you've been involved in?

21 A. Could you be more clear?

22 Q. Sure.

23 Do you recall in your deposition describing two  
24 cases involving other universities in the State of  
25 California?



1           A.    I recall that there was some testimony along  
2           that, but I don't remember specifically what I said.

3           Q.    Do you recall a case involving a university --  
4           where there were two cases of issues of years of  
5           violence were raised by the university or the university  
6           staff?

7           A.    Yes.

8           Q.    The university in the north and the university  
9           in the south, is how I believe you described it?

10          A.    I believe so, yes.

11          Q.    And in both cases there was an issue raised as  
12          to whether or not there should be a directive to go to a  
13          Fitness-for-Duty Examination?

14          A.    There was.

15          Q.    And in both cases no Fitness-for-Duty  
16          Examination was actually demanded?

17          A.    Correct.

18          Q.    And in both cases that was because you felt  
19          that the employee would not comply with the  
20          Fitness-for-Duty Examination?

21          A.    Correct.

22          Q.    And in both cases those employees were  
23          professors?

24          A.    Correct.

25          Q.    And as -- and what you did instead was you

1 conducted a training of staff as to how to interact with  
2 those professors?

3 A. On both cases, yes.

4 Q. And you -- what -- what did that training of  
5 staff involve?

6 A. It involved addressing the fears of the staff,  
7 in terms of what types of interactions they'd had with  
8 each one of those professors and should those behaviors  
9 be exhibited in the future, assuming those professors  
10 would return to campus, how to best interact with them  
11 to reduce emotional tension and de-escalate the  
12 possibility of conflict.

13 Q. All right. And do you recall that you  
14 testified in both cases, "The individuals I trained felt  
15 a significant reduction in anxiety, felt much more  
16 control of the possibility that they had tools to manage  
17 it, and it led to the reduction of their concerns"?

18 A. It did.

19 Q. And it also involved role playing?

20 A. It did.

21 Q. And do you recall in your deposition describing  
22 how you used these alternatives? Do you recall stating  
23 that "I don't suggest to my clients that they use  
24 fitness for duties when there is a high probability of  
25 noncompliance"?

1 A. I do.

2 Q. And is that -- continues to be your suggestion  
3 to clients?

4 A. It is.

5 Q. And in the -- at least one of the cases  
6 involving the Northern California University, that  
7 person was not banned from campus?

8 A. Actually, he was banned from campus briefly.  
9 And now has subsequently been banned from campus  
10 permanently.

11 Q. All right. But during the period of time where  
12 you -- after you conducted these trainings, for his past  
13 last year, he was on campus, right?

14 A. That is correct.

15 Q. And so --

16 A. He was allowed to be on campus.

17 Q. And your training of the individuals allowed  
18 everyone to have a better interaction with this person?

19 A. It seemed to continue to reduce their anxiety;  
20 the interactions were still problematic.

21 Q. So it would be accurate to say that you trained  
22 the individual, the individual came back -- you trained  
23 the staff and other professors?

24 A. I did.

25 Q. And then they continued to have interactions,

1 right?

2 A. They did.

3 Q. And it was only the subsequent interactions  
4 that may or may not have been successful or subsequent  
5 behavior by the subject professor?

6 A. Right. There was subsequent behavior that was  
7 problematic and they worked through it, yes.

8 Q. Okay. As part of generally best practices, do  
9 you think that interviewing collateral witnesses to  
10 events is part of the best practice procedure?

11 A. I do.

12 For a violence risk assessment, I'm assuming?

13 Q. Yes. I'm sorry. I think that's what we're  
14 talking about here.

15 I believe that's all I have for you.

16 THE COURT: Thank you, Mr. Katzenbach.

17 Further questions from the defendant?

18 MR. VARTAIN: Yes, please. Thank you, Your  
19 Honor.

20

21 REDIRECT EXAMINATION BY MR. VARTAIN

22 MR. VARTAIN: Q. You just said to

23 Mr. Katzenbach that -- and the jury and the judge that

24 you were not asked to assess the question of whether Dr.

25 Kao was dangerous?

1 A. That is correct.

2 Q. It's true that the person the University asked  
3 to assess that question was the fitness-for-duty doctor,  
4 Dr. Reynolds?

5 A. That is true.

6 Q. So we still -- as of today, the University has  
7 never had an assessment completed of whether or not Dr.  
8 Kao is dangerous?

9 A. That is correct.

10 Q. You testified yesterday about the question of  
11 whether the University was within best practices by not  
12 giving Mr. Katzenbach the names, dates, and other  
13 details of when those behaviors happened?

14 A. Yes.

15 Q. Would you explain to the jury again why that  
16 was within best practices in these situations for the  
17 University to decline to give out those details outside  
18 of it being a Fitness-for-Duty Evaluation? In other  
19 words, just giving them to the attorney or Dr. Kao,  
20 but --

21 A. Yes. There was a high degree -- you will  
22 recall my prior testimony, there's a higher degree of  
23 concern here around retaliation and around how that  
24 information would be used. And so we have to balance  
25 the needs of the assessment and the process against,

1 obviously, the individuals participating as well, and  
2 what their concerns for safety are and their anxiety.

3 And in this particular case I believe it was  
4 reasonable that that information would -- if it were to  
5 be revealed, it would be revealed by the assessor in the  
6 bounds of the fitness for duty.

7 Q. By Dr. Reynolds?

8 A. By Dr. Reynolds during that session and in that  
9 interaction versus prior to that, yes.

10 Q. So you would expect that Dr. Reynolds would  
11 have the expertise to -- if he felt it appropriate, to  
12 reveal those details and then manage how Dr. Kao might  
13 respond to having that information?

14 A. Exactly.

15 Q. Did I hear you correctly yesterday that you  
16 testified that in this country after Virginia Tech, the  
17 Alabama shootings, the psychiatrist shooting down at  
18 Fort Hood, it is -- colleges and universities generally  
19 believe that it is necessary to their business to  
20 properly assess the kind of behaviors that were reported  
21 to the University on the part of Dr. Kao?

22 A. Yes. It's the -- it is now a necessity for all  
23 organizations, including colleges and universities, to  
24 take responsibility for having -- that when behaviors  
25 are reported to them that raise issues of safety, that

1 they then appropriately and professionally -- well,  
2 within professional guidelines, assess those behaviors  
3 and determine whether or not there is a level of risk  
4 and if so then to intervene appropriately.

5 Q. And in your experience, is it best practices  
6 and is it necessary for institutions to select an  
7 assessment tool, such as a Fitness-for-Duty Evaluation,  
8 that will safeguard the confidentiality of the person  
9 being evaluated, namely Dr. Kao?

10 A. That is a consideration in every evaluation is  
11 how to manage your confidentiality and your privacy.  
12 And in this particular case, I believe it was the right  
13 choice based on the concerns of privacy that were  
14 involved here, yes.

15 Q. So you would agree that it is necessary for a  
16 university when deciding what tool to use to assess  
17 these behaviors to select a tool like fitness for duty  
18 that will account for confidentiality protection for the  
19 employee?

20 A. I think it's a necessity to have a process  
21 that's well thought out and does accommodate all the  
22 needs of a particular situation in its complexity. And  
23 in this particular case, the best choice was fitness for  
24 duty.

25 MR. VARTAIN: Thank you.

1 THE COURT: Thank you, Mr. Vartain.

2 MR. VARTAIN: Thank you. Yes. I'm exiting the  
3 lectern.

4 THE COURT: There is a signal from  
5 Mr. Katzenbach to get up.

6 MR. KATZENBACH: It is. Perhaps, Your Honor,  
7 if -- Your Honor, for future trials, if we could perhaps  
8 install a button -- lights here so we can turn the  
9 monitor off.

10 THE COURT: We're too poor.

11 MR. KATZENBACH: Perhaps in the May or June  
12 budget revise.

13

14 RECROSS-EXAMINATION BY MR. KATZENBACH

15 MR. KATZENBACH: Q. Sir, you indicated in your  
16 testimony here, just in response, that there were  
17 privacy issues involved here?

18 A. There were privacy issues raised, yes.

19 Q. Well, what privacy issues were those?

20 A. The concerns that Dr. Kao had about how the  
21 information was going to be used and what questions he  
22 was going to be asked during the fitness for duty.

23 Q. Well, I'm sorry, whose privacy are we talking  
24 about?

25 A. Dr. Kao's.



1 Q. Well, what privacy was there involved in the  
2 question whether Dr. Kao was grimacing?

3 A. I'm sorry, I don't understand.

4 Q. Well, I'm sorry. I mean, what privacy issue  
5 was raised in asking Dr. Kao how come you're grimacing?

6 A. I don't believe I intimated that that was a  
7 direct connector to the answers.

8 Q. Okay. What privacy issue was raised by asking  
9 Dr. Kao "Have you been assaulting people"?

10 A. Again, I'm not clear what connection you're  
11 trying to make here.

12 Q. Okay. What privacy issue was Dr. Kao being  
13 protected about in having him go down and see a  
14 psychiatrist as opposed to asking him about these  
15 behaviors directly?

16 A. The concern was, as raised by Dr. Kao, that  
17 during the Fitness-for-Duty Examination -- well, during  
18 the assessment, that private information concerning his  
19 medical history and other information was going to be  
20 exposed to the University. And the fitness for duty was  
21 specifically designed to shield the University from  
22 having that information and therefore protecting Dr.  
23 Kao's privacy around those issues.

24 Q. Well, let's see if we can put this in order.

25 Dr. Kao didn't propose having a fitness for

1 duty, did he?

2 A. Dr. Kao did not propose a fitness for duty.

3 Q. It was the University that said we're sending  
4 you for a fitness for duty and in connection with  
5 that -- that direction, you have to give the doctor all  
6 your medical information, right?

7 A. I think the wording was you need to comply with  
8 providing the information the doctor requests as a part  
9 of the fitness for duty. Whether or not -- I don't  
10 recall whether or not they specifically knew the range  
11 of all the information that Dr. Reynolds was going to  
12 ask for.

13 Q. Well, they sent him to a psychiatrist, right?

14 A. I believe Dr. Reynolds is a psychiatrist, yes.

15 Q. Yeah. And so to send somebody to a  
16 psychiatrist, it's not rocket science to think that that  
17 psychiatrist is going to be looking at medical records,  
18 right?

19 A. It would certainly be common for a psychiatrist  
20 to ask questions to do with someone's medical history,  
21 yes, in my understanding of their practice.

22 Q. Right. And you recall whether the letter  
23 directing Dr. Kao to see Dr. Reynolds in fact stated  
24 that he had to provide all medical records to  
25 Dr. Reynolds?

1           A.    My recollection of it is that they talked about  
2   needing to provide information that may include medical  
3   records.  I'm not sure how specific they were about  
4   that.

5           Q.    Well, that's in writing, we don't have to talk  
6   about it anymore on that.

7                    But what I'm trying to say is that Dr. Kao  
8   raised no concerns about privacy until after the  
9   University said go to the Fitness-for-Duty Examination,  
10  isn't it that the sequence?

11          A.    My recollection is he was concerned after he  
12  was made aware of the fitness for duty, yes.

13          Q.    Okay.  So prior to the fitness for duty what  
14  privacy issues -- so let me get this straight.

15                    So the University says go to the fitness for  
16  duty, give Dr. Reynolds all this information, right?

17           MR. VARTAIN:  Objection.  Compound.

18           MR. KATZENBACH:  Q.  Okay.  Go to the fitness  
19  for duty, right?

20          A.    Correct.

21           MR. VARTAIN:  Objection.  Vague.

22           THE WITNESS:  I apologize.

23           MR. VARTAIN:  It's all right.  I'm too late.  
24  I'll withdraw the objection.

25           THE COURT:  All right.

1 MR. VARTAIN: Sorry.

2 MR. KATZENBACH: Okay.

3 Q. Prior to when the University -- before --  
4 pardon me, bad word.

5 Before the University demanded a  
6 Fitness-for-Duty Exam, did Dr. Kao raise any issues of  
7 confidentiality?

8 A. I do not believe so, no.

9 Q. Okay. What would be confidential in asking Dr.  
10 Kao about "Did you run into somebody"?

11 MR. VARTAIN: Objection. Asked and answered.

12 THE COURT: Overruled.

13 THE WITNESS: I'm sorry, could you rephrase the  
14 question?

15 MR. KATZENBACH: Q. Sure.

16 Why is it more important to have -- why is it  
17 more protective of Dr. Kao's confidentiality to have  
18 Dr. Reynolds ask Dr. Kao why did you veer at somebody as  
19 opposed to somebody from Public Safety asking that  
20 question?

21 A. The information underneath the fitness for duty  
22 is going to be -- the information coming out of the  
23 Fitness-for-Duty Examination is going to be limited to  
24 that information which has to do with the direct  
25 question without all the specific information.

1           If Dr. Kao had -- hypothetically if Dr. Kao had  
2       been approached by Public Safety and asked those  
3       questions, that information would have been exposed to a  
4       larger number of people. The answers to that -- those  
5       questions would have been exposed to a larger number of  
6       people than the information being exposed coming out of  
7       a fitness for duty.

8           Q.    Well, but -- so if Dr. Kao said to Public  
9       Safety when they asked him this question, "I didn't do  
10      anything like that," where is the privacy issue?

11          A.    That would be determined by the individual who  
12      gave the information whether or not they perceived it to  
13      be a privacy issue or not.

14          Q.    And when you said "the person who gave the  
15      information," you're referring to the person asking the  
16      question or Dr. Kao answering it?

17          A.    The privacy issues are on both sides. One is  
18      what the perception of the individual asking the  
19      question is and under what guidelines they're required  
20      to maintain information, and the second is the  
21      perception of the individual providing the information  
22      and whether or not they perceive it to be a privacy  
23      violation.

24          Q.    Well, I just asked you: Do you perceive asking  
25      someone "Did you hit somebody" to be raising a privacy

1 issue?

2 A. Again, I can only speak to one half of that  
3 equation. I have asked questions as simple as that and  
4 had individuals believe that it was a privacy issue.

5 Q. Okay. So the individual in response to your  
6 question said, "That's private, I don't have to tell you  
7 why I hit him"?

8 A. And I say "Tell me about that."

9 Q. Okay. Fine. And he could say "yes" or "no"?

10 A. He can.

11 Q. Okay. Now, what -- now, the person who  
12 allegedly is his victim, right, they are familiar with  
13 the fact that -- or supposedly familiar with the fact  
14 that there is an allegation somebody hit him?

15 A. The victim? I'm sorry.

16 Q. If somebody is saying "Dr. Kao veered into me,"  
17 right, intentionally, right?

18 A. Yes.

19 Q. That person making that statement is aware of  
20 Dr. Kao's alleged conduct, right?

21 A. Correct.

22 Q. And if Dr. Kao was intentionally doing this,  
23 right, Dr. Kao was aware of who he was intentionally  
24 doing it to, correct?

25 A. Assuming he was intentionally doing it, yes.

1 Q. Okay. So that asking Dr. Kao "Did you  
2 intentionally veer into Stephen Yeung," doesn't disclose  
3 anything other than the fact of that event, does it?

4 A. It also reveals his intent.

5 Q. Well, it's asking him about his intent,  
6 correct?

7 A. And if he answers it, then it's revealing his  
8 intent.

9 Q. Well, okay. So if -- are you familiar with --  
10 Public Safety at USF is composed of ex-San Francisco  
11 police officers. Did you know that?

12 A. I am aware that there are some members of that  
13 Public Safety Department that are ex-San Francisco  
14 police officers. I should say former, yes.

15 Q. And you are aware that the head of that was a  
16 former police captain in San Francisco?

17 A. I was not. I was aware that he was a former  
18 officer of some level, yes.

19 Q. Thirty years of experience?

20 A. I was -- I don't recall that.

21 Q. Well, in the context of that, do you think he  
22 has had occasion to interview people accused of bad  
23 behavior?

24 A. I would imagine so.

25 Q. And he knows how to conduct such an interview?

1 A. I would imagine so.

2 Q. And so do officers under him?

3 A. I would hope so.

4 Q. Now, you indicated, too, that in this case you  
5 were concerned about retaliation if Dr. Kao got any  
6 information or was given specific information, right?

7 A. I think my testimony was that people that  
8 brought forward information were concerned about  
9 retaliation.

10 Q. Had anyone ever -- okay. Fine.

11 So we're looking at here the situation where it  
12 seems to me -- well, strike that.

13 What efforts did the University make other than  
14 sending Dr. Kao to the psychiatrist to deal with any  
15 alleged fears?

16 A. They had ongoing communications with those  
17 professors that had raised those issues. Had asked  
18 them, I believe on several occasions, whether or not  
19 someone would be willing to talk to Dr. Kao, and none of  
20 them were willing to talk to Dr. Kao.

21 Q. Dr. Pacheco?

22 A. I don't remember the specific names at this  
23 moment.

24 Q. Do you know whether Dr. Pacheco expressed his  
25 willingness to talk to Dr. Kao?



1           A.    I think initially there was someone.  There may  
2    have been someone that said that they would.  If  
3    requested they would do it, but then subsequently they  
4    declined or said that they were all of a sudden not  
5    doing it.

6           THE COURT:  It's time for the first morning  
7    break.

8           Let me take a moment, ladies and gentlemen, to  
9    give you the results of conversations Counsel and I had  
10   last night about where we're going as far as the  
11   scheduling is concerned.

12           We hope to finish with the testimony today.  
13   And we propose to take Monday off, as far as you folks  
14   are concerned.

15           Last night's conference revealed there are some  
16   serious disagreements about what the law is in my  
17   instructions I give you.  And what's going to happen is  
18   that Mr. Vartain and Mr. Katzenbach are going to try to  
19   work out those differences over the weekend.  And if as  
20   it's anticipated they don't do a complete job of that  
21   come to agreement on everything, we can have Monday then  
22   to sort it out for me to decide how the instructions are  
23   to be worded, and have them in shape to give you on  
24   Tuesday when you will be instructed and hear the  
25   arguments.

1           What I want to avoid is a situation that  
2 happened a couple of years ago, it was very embarrassing  
3 to me. I asked the jury to come back, and I wasn't  
4 ready. And we hadn't worked out the differences on the  
5 instructions, and so we had to sit down, turn around and  
6 go back and come back the next day. I don't want that  
7 to happen to you.

8           So it could mean that we don't have a lot to do  
9 on Monday, but it could be we do have a lot to do, and I  
10 don't want you sitting around if it turns out to be the  
11 latter case.

12           So I anticipate -- so, anyway, if we are able  
13 to get through with the testimony today, then Monday is  
14 off, Tuesday the case goes to you, and then it's just a  
15 question of how long you need to deliberate.

16           Remember the admonitions. Do not form or  
17 express any opinion on this case until it's finally  
18 submitted to you for your decision. Do not discuss  
19 among yourselves or with others until that time.

20           Please be back in your places at 10:10,  
21 according to the courtroom clock.

22           (Recess taken.)

23           THE COURT: Jurors and alternates are all  
24 present. Counsel from both sides are present.  
25 Plaintiff is personally present. Mr. Cawood is on the

1 stand. Mr. Katzenbach is the at the lecturn. He may  
2 continue his inquiry.

3 MR. KATZENBACH: Thank you, Your Honor.

4 Q. Mr. Cawood, I think when we -- did the  
5 University -- the University gave you information  
6 indicating that faculty members were -- whoever reported  
7 these behaviors were too anxious to meet with Dr. Kao to  
8 talk about them?

9 A. There was information that I reviewed that they  
10 were -- yes, they were not comfortable talking directly  
11 to Dr. Kao.

12 Q. During the spring 2008, did these same faculty  
13 members attend faculty meetings with Dr. Kao?

14 A. I believe they did, yes.

15 Q. In addition to the -- I'd like to ask you based  
16 on -- this is about the information that the University  
17 of San Francisco provided to you on these issues, okay,  
18 directing the information that Dr. -- that was given to  
19 you by the University of San Francisco.

20 Did the University of San Francisco give you  
21 any information as to whether or not there were other  
22 faculty members who might be willing to talk to Dr. Kao?

23 A. First of all, I'd like to clarify, as I've said  
24 before, the University has not given me any information  
25 directly. It's all come through counsel.

1           So the information from counsel that I received  
2 to review for this case did involve information about  
3 the fact that some faculty members were not comfortable  
4 pursuing a conversation with Dr. Kao.

5           Q.    How about other faculty members?

6           A.    I believe that -- from what I read, that there  
7 were a number of individuals who were asked if they'd be  
8 willing to do it, and that the vast majority of them  
9 were not willing to do it.  Whether or not they asked  
10 every particular faculty member, I don't recall there  
11 being a list I saw of all the people they asked and what  
12 their specific responses were.

13          Q.    Do you recall him telling you that they had  
14 considered asking Bob Wolf to talk to Dr. Kao?

15          A.    I do remember the name Bob Wolf; I don't recall  
16 it in that context.

17          Q.    Was Bob Wolf a friend of Dr. Kao's?

18          A.    My recollection is that Dr. Wolf was mentioned  
19 as an individual who had a good relationship with Dr.  
20 Kao, yes.

21          Q.    Okay.  Any other faculty persons mentioned as  
22 having a good relationship with Dr. Kao?

23          A.    Not that I can recall at this time.

24          Q.    All right.  Did they suggest -- do you recall  
25 any discussions as to whether or not they could ask

1 Millie Lehmann to talk to Dr. Kao?

2 A. That I do not remember.

3 Q. Do you have any recollection of the University  
4 discussing the -- giving you information concerning  
5 whether they considered having Michael Lehmann talk to  
6 Dr. Kao?

7 A. Again, I don't remember reviewing -- I don't  
8 remember that name from my review.

9 Q. Did the University -- did you receive any  
10 information directly or indirectly from the University  
11 indicating that the University had considered asking Dr.  
12 Kao's family to speak to him about the University's  
13 concerns?

14 A. That I do not recall.

15 Q. Did you have -- did you receive any information  
16 directly or indirectly from the University that the  
17 University had considered what administrators might  
18 speak to Dr. Kao about the University's concerns?

19 A. The "administrator" defined as who?

20 Q. Deans.

21 A. I believe there was a mention of someone who  
22 either had been a dean or was a dean and whether or not  
23 there may -- that might have been an avenue, but that's  
24 very vague.

25 Q. Okay. How about did the University discuss

1 with you whether or not HR could speak to Dr. Kao about  
2 any of these concerns?

3 A. Well, I believe, actually, Martha Peugh-Wade is  
4 HR and she did talk to Dr. Kao.

5 Q. That was in June 2008. How about before then?

6 A. I don't recall whether or not she did or did  
7 not have any conversations with Dr. Kao prior to this --  
8 in regard to this -- in this series of events.

9 Q. Well, how about at the start of these events,  
10 when the first events occurred, do you recall any  
11 discussion of reasons why HR could not speak with Dr.  
12 Kao at the start of these events?

13 A. I believe there was no discussion about whether  
14 or not they would or would not. I believe that they  
15 were information gathering at the time with the  
16 professors and information coming up from the  
17 professors.

18 Q. Direct you back to January 3rd, 2008.

19 Do you recall that there were some incidents  
20 or -- alleged incidents on or around on that date?

21 A. I believe there were some incidents in early  
22 January, yes.

23 Q. Right. Was HR informed of those incidents, so  
24 far as you know?

25 A. Sitting here today, I don't recall specifically

1 whether or not they had -- they were informed at that  
2 time or not.

3 Q. Do you recall being given any information as to  
4 why HR was unable to speak to Dr. Kao at the time -- in  
5 January of 2008 about these initial incidents?

6 A. I don't remember any discussion about their  
7 reasoning why they did not or did.

8 Q. Okay. Do you recall being given any  
9 information from the University as to why Public Safety  
10 was not asked to talk to Dr. Kao about any of these  
11 incidents?

12 A. Not specifically, no.

13 Q. Do you recall any information given to you by  
14 the University directly or indirectly as to why the  
15 University did not ask Dr. Kao's attorneys to talk to  
16 him about these incidents?

17 A. No. But from a practical standpoint, that  
18 would be problematic, I believe.

19 Q. Really? You saw the e-mail that I sent asking  
20 for some additional information so that I could advise  
21 Dr. Kao? Did you see that e-mail?

22 A. I did.

23 Q. Do you recall any discussion or information  
24 from the University saying why they could not have  
25 provided information to Dr. Kao's attorneys as to any of

1 these incidents if they were concerned about Dr. Kao's  
2 behavior?

3 A. From that memo they said they chose not to.

4 Q. Okay. Do you have any information as to why --  
5 from the information you received from the University,  
6 was there any indication that the University had  
7 considered asking Dr. Kao's doctors about any of  
8 this information -- about any of these behaviors?

9 A. I don't recall that discussion, no.

10 Q. At any time did the University hire a threat  
11 professional to assess -- sorry.

12 At any time did the University hire a threat  
13 professional to come and talk to Dr. Kao about any of  
14 these behaviors?

15 A. They did not hire a threat professional to talk  
16 to Dr. Kao. At that time they did hire one,  
17 Dr. Reynolds, to talk to him as a part of the fitness  
18 for duty.

19 Q. Not before then?

20 A. Not to talk to Dr. Kao, no.

21 Q. Okay. During the -- I think that's all I have.  
22 Thank you.

23 THE COURT: Thank you, Mr. Katzenbach.

24 Mr. Vartain, do you have further questions?

25 MR. VARTAIN: No further questions, Your Honor.



1 Thank you.

2 THE COURT: Jurors, do you have questions,  
3 please?

4 Yes.

5 (Discussion off the record and out of the  
6 presence of the jury.)

7 THE COURT: Mr. Cawood, some questions from the  
8 jurors.

9 If after participating in a Fitness-for-Duty  
10 Exam an employee is found fit for duty, can the employer  
11 challenge the finding?

12 THE WITNESS: They could, yes. What would  
13 normally happen, though, is the question is why.  
14 Technically they could, they could ask for a second  
15 fitness for duty if they believed that somehow the  
16 evaluation had not been competent, but it's pretty rare.

17 I have gotten involved in situations, as I said  
18 before in my earlier testimony yesterday, where I'm  
19 consulted around taking a look at the methodology that  
20 people use for Fitness-for-Duty Evaluations, and  
21 determining whether or not, in fact, the methodology  
22 that the individual used for dangerousness assessment  
23 meets the current forensic standard. Unfortunately,  
24 there are individuals out there that practice that do  
25 not meet the current forensic standard.

1           So I do get involved in those things, but it's  
2 pretty rare that individuals that are deemed to be fit  
3 and the process is shown to be adequate for the defense,  
4 that they -- that they don't comply with what the doctor  
5 said.

6           The concern here is obviously the doctor is  
7 using inappropriate methodology and they allow the  
8 person to come back on campus and they have chosen the  
9 doctor to make the review that then there could be some  
10 exposure to them by not having used an adequate provider  
11 and then someone gets hurt.

12           THE COURT: Is there some sort of established  
13 procedure or protocol for challenging the findings for a  
14 Fitness-for-Duty Exam? What steps must the employer  
15 take?

16           THE WITNESS: I can't answer that from a legal  
17 conclusion, but I can from an operational perspective in  
18 terms of how these things work.

19           What would happen is that you -- and I have  
20 seen this happen, that an individual gets determination  
21 from the doctor that they're not fit for duty, and then  
22 what they do is they negotiate with the employer to get  
23 a second opinion, if you will.

24           And then should that second opinion find the  
25 fitness for duty, then in many cases what they'll do is

1 they will end up, unfortunately, having to go to a tie  
2 breaker, if you will, where an independent medical  
3 professional reviews the two and then chooses one. That  
4 is the most well grounded. And then that becomes the  
5 one that eventually gets accepted.

6 THE COURT: Is all information disclosed during  
7 a Fitness-for-Duty Exam confidential?

8 THE WITNESS: All information specific to  
9 protected types of information, yes; the conclusion, no.

10 Obviously, what they want is a conclusion of  
11 whether or not this person, in fact, is or is not going  
12 to pose a significant risk. And then the elements, not  
13 necessarily the specific behaviors, but the elements  
14 that were a part of that as -- they need to be shown as  
15 methodology.

16 So as an example, hypothetically you find an  
17 individual has a series of substance abuse-related  
18 psychosis, episodes of violence, or has other head  
19 injuries that can affect the ability to be violent. You  
20 wouldn't disclose that specific information, but what  
21 you might do is say something like there is -- has been  
22 trauma that specifically can impact this -- that it was  
23 folded into this opinion. There have been prior  
24 incidences of chemicals that have affected this  
25 individual's behavior.

1           So you don't give specifics about exactly what  
2           occurred or when it occurred or those types of things,  
3           but you give general understandings of the types of  
4           information that were relevant to the assessment. I  
5           have seen that happen.

6           THE COURT: Based on the facts you have  
7           reviewed in this case, do you feel there would have been  
8           a benefit or a concern if Dr. Kao was able to have a,  
9           quote, "clear the air meeting," close quote, with  
10          members of the math faculty instead of a  
11          Fitness-for-Duty Exam?

12          THE WITNESS: Based -- I can only base my  
13          opinion on the information that I reviewed from the  
14          professors.

15          Let me give you an analogy that would help  
16          understand this.

17          Two individuals get into an altercation on the  
18          schoolyard and one believes they're being bullied and  
19          the other one is maybe the bully. And now you bring  
20          them together and you're, quote, going to mediate this,  
21          you are going to clear the air. Often that doesn't  
22          really help.

23          What it does is it just creates a situation  
24          where now everyone is more tense and the dynamic never  
25          improves. Both parties have to be willing to

1 participate and be comfortable participating with the  
2 result to really make that effective. I've never found  
3 forcing people to do things they don't want to do to be  
4 very effective.

5           So I believe, based on the information that I  
6 had from what the people -- the concerns that were  
7 raised, that having them get together and clear the air  
8 actually wouldn't have done anything but made people  
9 even more anxious, which is why using an independent  
10 objective process I believe was the right thing to do in  
11 this case.

12           THE COURT: Do you think once people start  
13 talking about their dislikes/fears of Gam (phonetic),  
14 that it could have fed into a type of mass hysteria?

15           THE WITNESS: I do think that there are --  
16 once -- once people begin to feel uncomfortable, yes,  
17 it's a natural human tendency to begin to accumulate  
18 things that support your own perspective. That's  
19 absolutely true. And we do want to break that cycle.  
20 And the only way to break the cycle is actually provide  
21 a concrete objective, a framework for them to be able to  
22 see it out in the open.

23           In other words, having a way to have someone  
24 come in and say, yes, you've raised these concerns and  
25 you've raised these specifics behaviors of concern, and

1 I've considered these behaviors. And now, based on the  
2 context of where that -- those behaviors fit into a  
3 violence risk assessment framework, let's take a look at  
4 that now and see it for what it really is. And wherever  
5 on the continuum that is, that's the best way to break  
6 that cycle.

7 But, yes, over time I've -- there are  
8 situations where individuals and environments build and  
9 continue to build until, frankly, sometimes it can be  
10 problematic. Yeah.

11 THE COURT: Follow-up questions, Mr. Vartain?

12 MR. VARTAIN: Q. Did you see any evidence of a  
13 mass hysteria here from the depositions that you read of  
14 the math faculty members and whatever concrete examples  
15 they gave of their own fears?

16 A. You know, I didn't. And, actually, that's one  
17 of the things I look for. I look for bias. And, you  
18 know, the question Mr. Katzenbach asked me yesterday  
19 concerning, you know, why I didn't note the fact that  
20 one of the professors had said about the veering  
21 incident, the fact that he -- that later he thought, you  
22 know, he wasn't sure that -- that Dr. Kao was even aware  
23 he had done it.

24 To me, that is actually -- first of all, in  
25 many cases I wouldn't note that only because it's not an

1 actual behavior. So I try to be careful, too, that I'm  
2 not biased by other people's interpretations of events,  
3 and I go right back to actually physically what they saw  
4 rather than getting caught up in it.

5 But I do look for those types of things, and  
6 note them, as I said in yesterday's testimony. I made  
7 note of those in my head because I'm looking for bias.  
8 I'm looking for someone who may be overresponsive,  
9 overreacting, if you will. And the fact that that  
10 particular professor was able to say, you know, what  
11 I -- I'm not sure it was intentional, to me goes to the  
12 issue of someone trying to be reasonable and manage  
13 their -- this -- their impression and being open to the  
14 possibility that they were wrong. They just didn't  
15 know.

16 And so I -- and I saw that consistently through  
17 a number of the testimony that I read, is that no one  
18 was saying he was a bad guy, no one is saying he's evil,  
19 no one is saying -- what they're doing is they're just  
20 saying they're really uncomfortable and they don't  
21 understand why he's doing it and they don't know the  
22 level.

23 So actually I didn't see mass hysteria, what I  
24 saw is people trying to manage their own concerns and  
25 yet at the same time trying to be somewhat fair and

1 reasonable.

2 MR. VARTAIN: No further questions.

3 THE COURT: Mr. Katzenbach, follow-up  
4 questions?

5 MR. KATZENBACH: I do, Your Honor.

6 Q. Did you see the videotape of Dr. Yeung's  
7 deposition?

8 A. No, I never saw any videotape of any of the  
9 depositions.

10 Q. Now, to follow up on a couple of questions, do  
11 you recall being given any information that indicated  
12 that the University had discussed the possibility of a  
13 clear-the-air meeting with any of the faculty members  
14 who were making complaints?

15 A. I believe that there was discussion about a  
16 prior interaction that one of the professors had had  
17 with Dr. Kao on a prior issue that was attempting to  
18 come to some form of understanding. And subsequent to  
19 that when these issues were raised, the professor was  
20 pinned on the issue of whether or not that he would be  
21 willing to have a conversation, and I believe based on  
22 his prior interaction with Dr. Kao, his comment was I  
23 don't think that that would be productive. But I don't  
24 remember exactly which professor that was.

25 Q. Okay. That's a little different. What I guess



1 I'm saying is this. You're aware that Dr. Kao proposed  
2 a clear-the-air meeting on June 18th and thereafter?

3 A. Actually, I'm not aware of the date. I'm  
4 aware -- I believe that I remember testimony where Dr.  
5 Kao suggested that sitting -- that he would be willing  
6 to sit down with people and talk with them about their  
7 concerns, yes.

8 Q. Do you recall Dr. Kao using the phrase  
9 "clear-the-air meeting"?

10 A. I don't actually.

11 Q. Okay. After Dr. Kao made that proposal, was  
12 there any -- did you see anything to indicate that the  
13 University had gone to any of these professors to find  
14 out what their position was on having such a  
15 clear-the-air meeting?

16 A. I don't remember the sequencing other than what  
17 I earlier testified to that I know that there was an  
18 attempt by the University to ask at least one, if not  
19 more, professors whether or not they'd be willing to  
20 talk to Dr. Kao at that point in time, and the  
21 University response at that point was that the  
22 professors believed it was beyond a point where they  
23 felt comfortable doing that.

24 Q. That was before Dr. Kao proposed a  
25 clear-the-air meeting?

1           A.    I believe it was before Dr. Kao proposed the  
2 meeting because I believe he proposed the meeting around  
3 the time of talking to Martha Peugh-Wade.

4           Q.    All right. Do you recall any -- were you given  
5 any information that the University had conveyed any  
6 specific concerns about a clear-the-air meeting to Dr.  
7 Kao or his counsel?

8           A.    No, I don't remember that specifically.

9           Q.    Do you recall any communications from the  
10 University concerning a clear-the-air meeting that  
11 discussed -- well, how does -- any procedures, how this  
12 meeting could occur?

13          A.    I don't remember that.

14          Q.    Do you recall any -- do you recall any  
15 information from the University indicating that the  
16 University had suggested any alternative to  
17 clear-the-air meeting other than going to Dr. Reynolds?

18          A.    I believe that the University offered this  
19 fitness for duty as a way to manage their assessment.

20          Q.    Do you recall the University responding to Dr.  
21 Kao's proposal for a clear-the-air meeting by saying,  
22 well, we could do it if we had these people present or  
23 those people present?

24          A.    I'm sorry, I'm --

25          Q.    I'll strike that. Let's rephrase it.

1           You're aware that there are professional  
2 mediators?

3           A.    I am.

4           Q.    Are you aware that there are professional  
5 facilitators?

6           A.    I am.

7           Q.    Do you recall any response to Dr. Kao's  
8 clear-the-air meeting by the University indicating the  
9 possibility of using a professional mediator or a  
10 professional meeting facilitator to have such a  
11 clear-the-air meeting?

12          A.    I don't, but I would never have suggested that  
13 under these circumstances anyway. Professional  
14 mediators and facilitators are not present to manage  
15 situations involving aggression and the possibility of  
16 harm.

17          Q.    Well, you indicated earlier that the  
18 individuals apparently reporting these things weren't  
19 really able to say whether these were aggressive acts or  
20 just accidents?

21          A.    To do with the veering, yes; but to do with the  
22 actual agitation during one-on-one meetings and in  
23 faculty, meetings, the word "aggression" was raised.

24          Q.    And these are the meetings that continued to  
25 occur throughout the semester, right?

1           A.    They were episodic meetings where this -- these  
2 concerns were raised post meeting, based on Dr. Kao's  
3 conduct, yes.

4           Q.    You referred to one of the incidents involving  
5 a mocking that was one of the post-incident meetings  
6 that you recall?

7           A.    Involving what, I'm sorry?

8           Q.    Mocking? Impersonating a character?

9           A.    Yes, there was an incident, and I don't, again,  
10 know sequencing-wise where it was in front of or behind,  
11 but I recall there was an incident involving what was  
12 perceived to be Dr. Kao doing an impression of another  
13 faculty member at a copy machine, if I believe, that was  
14 later described as unusual and possibly mocking that  
15 professor, yes.

16          Q.    Do you recall that that occurred after Dr. Kao  
17 had volunteered to be chair and this faculty member had  
18 then said no, he wouldn't accept Dr. Kao's offer?

19          A.    I do remember that there was a situation where  
20 he -- where it was -- Dr. Kao had offered and had not  
21 been accepted to be the chair. Whether or not this  
22 particular incident of mocking occurred before or after  
23 that, I'm not clear about.

24          Q.    Okay. And you had a question -- there was a  
25 question on what happens if -- there were some questions

1 about what happens if parties challenge a  
2 Fitness-for-Duty Examination.

3 Do you recall those questions?

4 A. Just now, yes.

5 Q. Yes, just now. Right.

6 If the employee is found fit for duty, right,  
7 would it be accurate to say that the employer is --  
8 compliance with that determination would be voluntary on  
9 the part of the employer?

10 A. That may mean a legal conclusion. That's  
11 beyond my scope.

12 Q. Okay. Let's put it this way.

13 What forces the employer to comply with a  
14 finding of fit for duty?

15 A. Again, I apologize. I think that's a legal  
16 conclusion. I have no idea what forces them or doesn't.  
17 In my experience, practices, that that's -- it's  
18 understood that they're asking for this analysis and  
19 that they most often honor that analysis when provided.

20 Q. All right. And you also indicated as to a  
21 question on confidentiality, I was a little con -- you  
22 said all protected types of information would be  
23 confidential.

24 What did you mean by "protected types of  
25 information"?

1           A.    Well, there are medical information and other  
2 forms of information do have special protections. Some  
3 do. Financial information, as an example, have special  
4 protections under certain statutes. And, again, I'm not  
5 a lawyer, so I don't know specifically what those  
6 statutes are. But it's my understanding through my  
7 practice that they have special protections. So  
8 financial information, medical information, disability  
9 information, those types of things. Medications.

10          Q.    What information is not protected?

11          A.    In what context?

12          Q.    Fitness-for-duty evaluation.

13          A.    The opinion about whether or not the person is  
14 fit for duty or not, in some cases the information  
15 concerning the -- the behaviors that have been reported  
16 to the individual by the employer, as an example. So if  
17 the employer were to provide a series of documents  
18 around the behaviors, or declarations or other  
19 information about what had led to the fitness for duty,  
20 it's my understanding that that information is not  
21 privileged because it's been provided by the employer  
22 and hopefully shared completely with the individual.

23                So the information that would be protected  
24 would be information that the employer was not aware of  
25 that was provided by the individual being examined

1 during that fitness for duty that fell under certain  
2 classifications.

3 MR. KATZENBACH: I think that's all I have.  
4 Thank you.

5 THE COURT: Follow up, Mr. Vartain?

6 MR. VARTAIN: Yes, Your Honor.

7 Q. That protected information that doesn't come  
8 out -- doesn't leave the fitness for duty doctor's  
9 office is the -- includes both financial and medical  
10 information that the employee gave to the fitness for  
11 duty doctor?

12 A. It can contain both specific financial and  
13 specific medical information that the individual gives  
14 to the doctor during the course of that examination,  
15 right.

16 MR. VARTAIN: Thank you, Your Honor.

17 MR. KATZENBACH: Nothing further. No  
18 follow-up.

19 THE COURT: May this witness be excused?

20 MR. VARTAIN: Yes, Your Honor.

21 MR. KATZENBACH: Yes.

22 THE COURT: Mr. Cawood, thank you very much,  
23 sir. You are free to go.

24 THE WITNESS: Thank you, Your Honor.

25 THE COURT: Further evidence?

1 MR. VARTAIN: Yes, Your Honor. The University  
2 requests Mr. David Philpott to be a witness.

3  
4 DAVID J. PHILPOTT,  
5 having been duly sworn, testified as follows:  
6

7 THE WITNESS: Yes.

8 THE CLERK: Please be seated.

9 State your name and spell it for the record.

10 THE WITNESS: My name is David J. Philpott,  
11 P-H-I-L-P-O-T-T.

12 THE COURT: Mr. Vartain, you may inquire.

13 MR. VARTAIN: Thank you, Your Honor.  
14

15 DIRECT EXAMINATION BY MR. VARTAIN

16 MR. VARTAIN: Q. Mr. Philpott, would you  
17 introduce yourself to the Judge and jury a little bit by  
18 stating where you work, what do you do for a living, and  
19 why you have been sitting here for the last day waiting  
20 to testify?

21 A. Yes. My name is David Philpott. I am the  
22 Director of Employee and Labor Relations at the  
23 University of San Francisco. I have worked in the  
24 Office of Labor Relations since the summer of 1993. My  
25 responsibilities have progressively grown over the



1 years.

2 USF is the only fully private unionized  
3 university west of the Mississippi, so there are eight  
4 unions that I deal with directly.

5 There are two other unions that are part of the  
6 University community, but we employ them through  
7 contractors. And because San Francisco is a union town,  
8 all of our building sites are staffed by union  
9 employees, union contractors. Occasionally our office  
10 gets involved in those.

11 The eight unions that we deal with directly  
12 would be the full-time faculty union, which Professor  
13 Kao was covered under. We have a part-time faculty  
14 union which, depending on the semester, we can have as  
15 many as 500 adjunct professors teaching in the four  
16 colleges, which would be the School of Nursing, College  
17 of Arts and Sciences, which Professor Kao taught in,  
18 School of Management, and School of Education. Our Law  
19 School is separate. They have their own collective  
20 bargaining agreement. The Association of Librarians and  
21 Law Faculty, their contract is currently in advance, but  
22 we still work within those parameters.

23 We have a Clerical Union, it's low key, Local  
24 3. The second largest union -- third largest union we  
25 have on campus represent all the clerical employees in

1 every department, I think from admin assistants to  
2 working in the mailroom to our office of the registrars.

3 We have the Labors and Gardeners, Local 1877.  
4 They're responsible for making all the deliveries on  
5 campus, doing the landscaping. Stationary and Operating  
6 Engineers Local 39. I would say the Faculty Association  
7 --

8 Q. Stop right there. Tell the -- I'm sorry,  
9 excuse me. Didn't mean to interrupt you.

10 Local 39, tell the jury and the Judge what  
11 those workers do at the University?

12 A. Yes.

13 Q. What their importance is.

14 A. Yes. An argument could be made at our  
15 University that the Faculty -- full-time Faculty Union  
16 is the most important union because they educate our  
17 students. The most powerful union would be the  
18 Stationary and Operating Engineers, because they run our  
19 boilers, monitor our water flow, electricity. So if we  
20 upset Local 39, the power can be turned off, heat can be  
21 turned off, computers come to a screeching halt.

22 Q. And you are the guy who is, among other things,  
23 supposed to make sure the unions don't become unhappy;  
24 is that true?

25 A. I believe that's my job. Sometimes people have

1 a difference of opinion on that, but that is one of my  
2 responsibilities at work.

3 So Stationary Engineers. Then we have Public  
4 Safety Officers, they are our dispatchers, our full-time  
5 law enforcement unit on campus. They were the last  
6 group to be unionized.

7 We have the stage workers. So we have a  
8 theater on campus. So all the men and women who monitor  
9 the lighting, the voice boards, they are also covered by  
10 a collective bargaining agreement.

11 The two other unions that we work with through  
12 contractors would be our janitorial service, they are  
13 members of Local 1877 as well, and the food service  
14 workers, which is Local 2, Michael Casey's union. So we  
15 work very closely with Bon Appetite, they are the  
16 vendor, and the University is occasionally drawn into  
17 their disputes, anything from collective bargaining,  
18 possibly to disciplinary cases because it's that big  
19 gray area.

20 USF is a very small school, and many of our  
21 long-term employees in these unions identify themselves  
22 as USF employees, not employees of the other specific  
23 outside vendors.

24 Q. So what is -- and because I want to tie this  
25 back to your involvement with the issues of Professor

1 Kao and his situation with the University, I want to ask  
2 this question: What is the University's stance in  
3 dealing with the unions that represent not just the  
4 faculty but its other employees? Overall, what's its  
5 philosophy?

6 A. The philosophy has evolved. In the '70s, when  
7 the University was being organized by the Faculty  
8 Association, I think it's safe to say based on the  
9 documentation that I've read and the communications that  
10 I have had with professors who were on the picket lines,  
11 it was, at the time, a very adversarial relationship.  
12 There were real hard feelings, destructive behaviors by  
13 both sides. No winners, except maybe the attorneys who  
14 were hired to represent those.

15 Q. I wasn't there.

16 A. I'm sorry. No, you were not.

17 But over time some of those wounds have been  
18 patched up, some of the key players in some of those  
19 disputes have moved on. And in 2000 USF had a new  
20 president, Father Steve Privett, and he was aware of the  
21 history at USF, he was aware of some of the bad  
22 feelings, and I think he made a wise decision in sending  
23 a very clear message to all the employees on campus,  
24 union and nonunion, that he wanted to put the history  
25 behind us and try to work closely together and do some

1 more problem solving.

2 He had seen the expenses of some of the legal  
3 challenges from the collective bargaining side, he was  
4 aware of some of the destructive behavior through the  
5 collective bargaining process and the outcomes. So that  
6 message was sent and I believe the working relationship  
7 dramatically improved.

8 Now, some of the key players retired or moved  
9 on to other jobs. So it was an opportunity to turn over  
10 a new leaf, a new chapter for the University. And I'd  
11 like to represent in the last 10 or 12 years  
12 partnerships have been established, we're -- there's  
13 always room for more improvement, but I think there is  
14 labor peace and we are able to work together. Not  
15 always on our terms, certainly not always on the terms  
16 of the union, but we have a forced partnership and one  
17 that I think is being productive at this time.

18 Q. I want to go directly to a meeting that you  
19 participated in on October 27, 2008, while Professor Kao  
20 was on leave from the University and under a directive  
21 to go to the Fitness-for-Duty Evaluation.

22 You were there, correct?

23 A. Correct.

24 Q. And were you the person who set that meeting  
25 up?

1           A.    Yes.

2           Q.    And what did that meeting have to do with the  
3 contract between the Faculty Union and the University?  
4 Where did that meeting fit into the established  
5 processes for dealing with disputes?

6           A.    A decision was made that we now needed to go  
7 down a road of progressive discipline.

8           Q.    And that -- was that progressive discipline  
9 decision because up until then Dr. Kao had refused the  
10 instruction of the Dean and the HR Director to go to --  
11 to see Dr. Reynolds?

12          A.    That's correct.

13          Q.    It had been about three or four months since  
14 that directive had been issued and still Dr. Kao had not  
15 gone, correct?

16          A.    Yes.

17          Q.    Setting up a kind of a meeting that you set up,  
18 and we'll get to what it was, is that part of the  
19 process that's required by the Collective Bargaining  
20 Agreement, the union contract?

21          A.    Yes.

22          Q.    How did you go about setting that meeting up,  
23 and was it your -- well, let me back up.

24                 It was your purpose to start the progressive  
25 discipline process; is that true?

1           A.    Yes.

2           Q.    And was it your intention to use progressive  
3 discipline to persuade Dr. Kao to comply with the  
4 instruction?

5           A.    Yes.

6           Q.    Does the University -- do you, as the Director  
7 of Labor Relations, use progressive discipline to  
8 persuade faculty members and other employees to do what  
9 you think they're supposed to be doing, following  
10 instructions?

11          A.    That is a good piece of my job responsibility,  
12 yes.

13          Q.    Tell the jury how -- what it is your job  
14 responsibility around this issue of progressive  
15 discipline.

16          A.    Each contract is different.

17          Q.    Each union contract?

18          A.    That's correct.  Each union contract is  
19 different.  In many areas they are similar in language,  
20 but in contracts it clearly lays out how one would go  
21 about progressive discipline.

22                And in the context of Professor Kao's case,  
23 there is a right there for management to call a meeting  
24 and put someone on notice.

25                My role in Labor Relations, I'm the point of

1 contact for administering discipline for all USF  
2 employees that are covered by Collective Bargaining  
3 Agreement. Occasionally non-represented employees as  
4 well.

5 Q. And so tell the jury -- I'm just going to hold  
6 that thought for a second.

7 Tell the jury -- I'm sure many of them know  
8 this -- what the word "discipline" means in terms of the  
9 lowest level then going on.

10 For example, Dr. Kao had already been given an  
11 instruction in writing to go to the doctor evaluation?

12 A. That's correct.

13 Discipline can be invoked in different ways,  
14 again depending on the contract. A supervisor could put  
15 an employee on notice, a clerical employee who has an  
16 attendance problem. That would be viewed at the lowest  
17 level, and that could be a verbal counseling or a small  
18 write-up.

19 If it is approaching the next level, it  
20 requires our office to get involved. Our commitment to  
21 the unions that we work closely with is that discipline  
22 will be administered by our office.

23 Q. By whose office?

24 A. The Office of Labor Relations which I'm  
25 responsible for.



1 Q. Is it fair to say that, be humble here, but  
2 nobody can get fired at the University of San Francisco  
3 unless you decide that they have been given a fair  
4 process?

5 A. I don't have that much power.

6 Q. Okay.

7 A. I'm not sure if my boss would agree with that,  
8 but in the case of a disciplinary issue, there are  
9 people that are consulted. So before someone is  
10 disciplined, suspended or terminated, the dean or  
11 supervisor of that college or vice president of that  
12 division would be consulted. We review the process,  
13 make sure it's in order, and then normally I am the  
14 messenger to either put someone on notice that they're  
15 being suspended or terminated, and normally I'm the  
16 person that would write the letter.

17 Q. Let me ask the question differently, because I  
18 think you're being a little humble, and that's okay.

19 If you, upon being consulted by the people who  
20 are managing the department where the professor or  
21 employee worked, if you say I don't think we're in  
22 compliance with the union contract or I don't think this  
23 is legal or I don't think this is fair, you have the  
24 right to try to put the brakes on that?

25 A. That is correct, I have the right and the

1 responsibility to put the dean, vice president or  
2 supervisor on notice that their decision or their action  
3 not only would jeopardize the specific disciplinary case  
4 that we're dealing with but possibly our working  
5 relationship with the union on all future interactions  
6 with them.

7 Q. Is it the policy of the University -- I am  
8 going to be sort of simplistic here -- to comply with  
9 the union contracts and not engender grievances that are  
10 going to be valid grievances?

11 A. In the last 10 to 12 years that has clearly  
12 been our approach.

13 Q. While you have been the Director of Labor  
14 Relations?

15 A. Yes.

16 Q. So back to calling the meeting on October 27th,  
17 2008 wherein you started the progressive discipline  
18 process to try to get Dr. Kao to -- to continue to try  
19 to get Dr. Kao to go to Dr. Reynolds, tell us how you  
20 went about setting that meeting up and explain to the  
21 jury why you went about setting it up in the precise way  
22 that you did.

23 A. This meeting was different than traditional  
24 disciplinary meetings. Normally, when we're interacting  
25 with an employee, a faculty member in a disciplinary

1 case, they are represented by their union rep, normally  
2 by the president of the union. In this case, it would  
3 have been Elliott Neaman, who is the president of the  
4 Faculty Association.

5 Q. Spell the last name, please.

6 A. N-E-A-M-A-N.

7 Q. Okay. It's not Tristan Needham, correct?

8 A. That is correct.

9 Q. Okay. Thank you.

10 A. And if it is one of the clerical unions, the  
11 engineers or laborers or gardeners, they have business  
12 reps who have full-time jobs off site. So we would  
13 coordinate a meeting with them.

14 In this case, we -- a request was made by John  
15 Kao's legal team that they attend a meeting. And the  
16 practice over the years, when I first started in this  
17 role, I was advised never to meet with an employee if  
18 they brought their legal counsel with them. I'm not an  
19 attorney.

20 So it creates a dynamic -- sometimes that's --  
21 I'm not suited to deal with. And I have been advised  
22 that if an attorney comes to a meeting, we have to bring  
23 an attorney which, again, changes the dynamic. But in  
24 this case it was unique. Somewhat of an awkward  
25 meeting, but we allowed Professor Kao and his attorney

1 to attend.

2 The meeting was not held at the University.  
3 The meeting was held at a conference room down in the  
4 financial district at a neutral site. Normally we hold  
5 the meetings on campus; occasionally we might hold a  
6 meeting at a union hall, if that was requested by the  
7 union. So we proceeded with the meeting, neutral sites.

8 The other thing is I normally do not attend a  
9 meeting with a unionized employee and their union rep  
10 alone. The practice is you always bring a colleague  
11 with you, preferably the immediate supervisor, dean or  
12 vice president, so there is an additional witness on  
13 behalf of the institution.

14 Q. Are you saying, Mr. Philpott, you met alone  
15 with Dr. Kao and his attorney without bringing another  
16 University person there, like you normally do?

17 A. That is correct.

18 Q. Are you also saying that you did not bring the  
19 University counsel, Ms. Davis, to this meeting, even  
20 though Dr. Kao was given permission to bring his  
21 attorney?

22 A. Yes.

23 Q. Are you saying that it is highly unusual to let  
24 an employee who is going to start going through  
25 progressive discipline to have his own personal attorney

1 rather than just his union rep?

2 A. Yes.

3 Q. Why did you make these accommodations for Dr.  
4 Kao?

5 A. This is a unique case. We have not moved in  
6 this direction with an employee similar to John's case.  
7 There were safety concerns, there were colleagues of  
8 mine and the dean's office who would normally attend  
9 meetings such as this that would accompany me.

10 Q. So would Dean Turpin normally or Dean Brown  
11 have been the persons who would normally accompany you  
12 to a meeting, a discipline meeting that involved a  
13 faculty member such as Dr. Kao?

14 A. Yes.

15 THE COURT: Ladies and gentlemen, remember the  
16 admonitions. Do not form or express any opinion on this  
17 case until it's finally submitted to you for your  
18 decision. Do not discuss among yourselves or with  
19 others until that time.

20 Please be back in your places at 11:10  
21 according to the courtroom clock.

22 May I please talk to counsel for a minute.

23 (Recess taken.)

24 THE COURT: Jurors and alternates are all  
25 present. Counsel from both sides are present.

1 Plaintiff is personally present. Mr. Philpott is on the  
2 stand.

3 Mr. Vartain, you may continue your inquiry.

4 MR. VARTAIN: Thank you, Your Honor.

5 Q. Thus, October 27, 2008, you did not have the  
6 normal thing where you would have other people in a  
7 supervisory role with you at a discipline meeting.

8 Were you there alone?

9 A. Yes.

10 Q. And who is there with Dr. Kao?

11 A. Dr. Kao was present, Mr. Katzenbach, one of the  
12 other attorneys in Mr. Katzenbach's firm, I'm not sure  
13 of her name, and Elliott Neaman, President of the  
14 Full-Time Faculty Association.

15 Q. Okay. And is he there as a union  
16 representative of Professor Kao?

17 A. Yes.

18 Q. And you did not bring any attorneys from the  
19 University?

20 A. No.

21 Q. Why did -- why did you not bring an attorney,  
22 sort of balance out that Mr. Katzenbach was there?

23 A. We discussed it and we weighed our options, and  
24 it was the consensus, and the one that I supported, by  
25 bringing our own legal counsel would only elevate the

1 issue and not try to find the common ground that I was  
2 hoping we would reach that day, or some breakthrough.

3 Q. So was it your feeling that if you brought an  
4 attorney, it would just degenerate into legal sparring  
5 and you were looking for a compromise?

6 A. That is correct.

7 Q. Why did you not get Dean Turpin or Associate  
8 Dean Brown to come?

9 A. They were concerned for their safety and that  
10 is why we scheduled the meeting at a neutral site  
11 downtown. And they just -- you know, we weighed the  
12 options on that as well and what they would add to the  
13 conversation versus their fears and being uncomfortable;  
14 we thought it was in our best interest not to bring them  
15 along.

16 Q. Is it customary for the University to take a  
17 meeting like this off campus?

18 A. I could count the number of times I have had  
19 meetings with unionized employees off campus.

20 Q. And why did you do so in this situation? Was  
21 it because Dr. Kao had an order not to come on campus?

22 A. Yes. Dr. Kao or his attorney requested that  
23 the meeting be held on campus, and we felt it was -- we  
24 were better off to either hold it at Mr. Katzenbach's  
25 office or at a neutral site.

1 Q. Did you actually invite Mr. Katzenbach to  
2 have -- you know, say we would go to your office?

3 A. Yes.

4 Q. Do you remember asking me if I could find you a  
5 conference room in my big office building downtown?

6 A. Yes.

7 Q. And I did?

8 A. Yes, you did.

9 Q. But I didn't come?

10 A. No, you did not.

11 Q. You didn't invite me either?

12 A. No.

13 Q. Take the jury to the meeting, give the jury an  
14 overview of how the meeting began, basically what  
15 happened, but I also want you to describe for the jury  
16 what, if anything, there was that was new and different  
17 to your eyes about Professor Kao.

18 Maybe you ought to start with, did you have --  
19 had you had some interaction with Professor Kao in years  
20 gone by?

21 A. I did.

22 Q. Tell the jury about what those interactions  
23 were in years gone by with Dr. Kao.

24 A. I believe the first time I met Professor Kao  
25 was around '93 or '94 when I started my job, and one of



1 my colleagues and a good friend, Liza Locsin, was the  
2 administrative assistant to Dean Stanley Nel.

3 Q. And she actually came and testified in this  
4 case, did you know that?

5 A. Yes, I did.

6 And Dr. Kao and Liza were friends, and she  
7 introduced me to Professor Kao. And following that  
8 interaction, I used to see Professor Kao standing  
9 outside the Harney Science building. Used to stand  
10 outside, occasionally had a smoke and we exchanged  
11 pleasantries.

12 And in my role, I have very few friends, let  
13 alone acquaintances, on campus, so it was nice to have  
14 someone say hello once in a while. And as --

15 Q. What do you mean you have very few friends?

16 A. I think it's safe to say I probably received  
17 the fewest Christmas cards on campus, just by the very  
18 nature of my job.

19 Q. Okay. So you're management?

20 A. Yes.

21 Q. And for those in unions or in -- you might --  
22 they don't necessarily want to get close to you?

23 A. For various reasons. I think it's understood  
24 that my role at USF is -- I do the discipline, I do the  
25 discharge.

1           So if I appear at an office or someone finds  
2 out that they have to meet with me, normally it's not  
3 group hugs, it's, you know, try to send a message and  
4 that message sometimes can vary to we need a change in  
5 your work style to unfortunately we have to suspend or  
6 terminate you.

7           So after being an acquaintance of Dr. Kao, I  
8 was involved for a period of time hosting amateur boxing  
9 events in the City, and Professor Michael Lehmann, who  
10 was the founding president of the Faculty Association,  
11 was still teaching economics at USF, and by -- some of  
12 my colleagues, Mike Lehmann's reputation was someone  
13 that my former boss did not exchange pleasantries with.  
14 They were not very close.

15           Q.    Because that was when the union and the  
16 University were at odds in the back years?

17           A.    They had been at odds during the '80s and up  
18 and through the '90s. Professor Lehmann had stepped  
19 down from president, I believe in '88 or '89.

20           Q.    President of the union?

21           A.    Correct. And -- but Professor Lehmann had a  
22 presence and he had an opinion on a lot of issues. I  
23 admired him for that, and we established a friendship.

24                   And Professor Lehmann was very fond of amateur  
25 boxing, and he extended an invitation to me to attend

1 the Golden Gloves at the Annex at the Cow Palace, so I  
2 accepted the invitation. And I believe that first event  
3 I attended Dr. Kao was also one of the guests of  
4 Professor Lehmann, so we sat next to each other. Small  
5 talk.

6 And then I had started hosting amateur boxing  
7 events for fundraisers, for various groups, scholarship  
8 funds, and I extended an invitation to Professor  
9 Lehmann. And I made it very clear that he was -- I  
10 encouraged him to bring some other people along, that I  
11 would provide seats for them and host them for the  
12 evening.

13 And I think the first events Dr. Kao was one of  
14 his guests, Father George Shultz, a Jesuit priest, also  
15 attended, and there was another gentleman who was a  
16 friend of Professor Lehmann. And then that progressed.

17 The following year we hosted the same event  
18 again. And then I got involved in actually being the --  
19 part of the advisory board with the San Francisco Golden  
20 Gloves.

21 Q. Is this in the '90s?

22 A. Fair question. I believe the first event that  
23 I attended when Professor Lehmann hosted me and  
24 Professor Kao was in attendance was '98 or '99.

25 Q. Okay.

1           A.    And in the early 2000s, along with some  
2 friends, we started hosting some of these boxing events  
3 that were sanctioned by USA Boxing.

4                    I then had the opportunity to get involved in  
5 hosting the Golden Glove tournament for  
6 Northern California at the San Francisco Civic  
7 Auditorium, and we pulled a lot of strings. We had an  
8 exciting time, kind of turned it into an event similar  
9 you would see in Las Vegas. Full lights, celebrities,  
10 MVPs. And there was an opportunity for Professor Kao to  
11 be my guest. Professor Kao attended with Professor  
12 Lehmann and a few others.

13                   And I think that -- at least the first or the  
14 second time John was hosted, he had an opportunity to  
15 meet my wife, and they sat ringside. Safe to know that  
16 my wife was sitting next to some reasonable rational  
17 people, because at boxing events you get a very colorful  
18 crowd. We had elected officials --

19           Q.    Elected officials are colorful?

20                   A.    Well, at the time, Terrance Hallidan, the  
21 mayor. And then we had the leadership of three  
22 different chapters of the Hells Angels all sitting in  
23 ringside. So it was an interesting event. But I felt  
24 safe that my wife was with Professor Lehmann, Professor  
25 Kao. They were in a safe corner of the room.

1           And so through that. I would occasionally  
2 interact with John on campus.

3           Q. In the 2000s, you mean?

4           A. That is correct.

5           Q. Okay.

6           A. I think my last interaction with John was  
7 formally face to face in the meeting in October 2008.

8           Q. So it had been a couple of years, though, since  
9 you had actually had much interaction with him; would  
10 that be fair to say?

11          A. I think the last time I helped host Golden  
12 Gloves was in 2006, 2007, right around the time my  
13 children were born and I had other responsibilities.  
14 And I think the last invitation that I extended to Dr.  
15 Kao and/or Professor Lehmann, I think it was through  
16 Professor Lehmann, was when the Mexican National Boxing  
17 team came to town and they were going to fight the US  
18 National Boxing team at the Civic Auditorium.

19          Q. So what year would that be?

20          A. I believe that was spring of 2008, possibly. I  
21 did not attend the actual --

22          Q. Okay. So you didn't see Dr. Kao then?

23          A. No.

24          Q. Okay. So back to the important thing.

25                So -- what I was going to ask you to tell the

1 jury, take the jury to that meeting, review what the  
2 purpose of the meeting was, what happened, and I'm  
3 particularly interested in what, if anything, you  
4 visually observed that was new and different.

5 A. Yes. I think I stated earlier, it was a unique  
6 meeting. I actually entered the room with Professor  
7 Elliott Neaman, if I'm not mistaken, president of the  
8 union. Formally we're viewed as adversaries at these  
9 meetings. Professor Lehmann sat on the same side of the  
10 table with me. Again, very odd. Usually the  
11 union president is on the other side.

12 I introduced myself to Mr. Katzenbach. It was  
13 pleasant. Very nice exchange with Professor Kao. He  
14 inquired about my wife, asked how she was doing. So a  
15 little small talk. And then we proceeded to have a  
16 conversation at a conference table with John and his two  
17 legal counsels on the other side.

18 I had a couple of objectives going into the  
19 meeting. One, I needed to send a clear message, direct  
20 message to Professor Kao and his attorneys that the  
21 University was bringing this issue under the Collective  
22 Bargaining Agreement, and with that we were putting him  
23 on notice that if he failed to participate in a fitness  
24 for duty, that was grounds for discipline, up to and  
25 including termination. The other objective that I was

1 personally hoping to have is to interact with John in  
2 some informal setting.

3 In the world of labor relations, a lot of times  
4 things can be accomplished if it's a different messenger  
5 or different voice or someone different that you might  
6 know.

7 Q. What did you want to accomplish through your  
8 personal acquaintanceship with Dr. Kao, if you could  
9 accomplish it?

10 A. I was hoping that John would either agree to  
11 participate in the fitness for duty or possibly come up  
12 with some other scenarios, other than "I'm not  
13 participating," that I could take back to my colleagues  
14 and try to use that as leverage to change our mind or  
15 change our position. Some type of a -- something, other  
16 than "I'm not participating."

17 Q. And in that meeting, did anybody say "I'm not  
18 participating"? And what was the message back from Dr.  
19 Kao's side.

20 A. I believe the conversation was mostly with  
21 Mr. Katzenbach, who was inquiring on what legal right we  
22 had to request a fitness for duty, and I deferred these  
23 type of questions to my boss and the outside legal  
24 counsel that we were relying on for their expertise and  
25 guidance.

1           I'm not an attorney; I don't fully understand  
2           some of the legal intricacies, other than the Collective  
3           Bargaining Agreements, that's my comfort zone, and we  
4           believed we had the right to request it and try to  
5           alleviate any concerns that we had for safety.

6           Q.    And you told that to Mr. Katzenbach and Dr. Kao  
7           that you believed that your contract with the union  
8           allowed you to do this?

9           A.    That is correct.

10          Q.    Did you tell them that the fitness-for-duty  
11          assessment was because the University wanted to assess  
12          whether it had serious safety problems?

13          A.    Yes.

14          Q.    At the upshot -- at the close of the meeting,  
15          did you get any message back from Dr. Kao's side of the  
16          table as to what their position was and what they would  
17          do?

18          A.    I left the meeting with a clear understanding  
19          that Professor Kao was not going to participate in the  
20          fitness for duty.

21                They were kind enough to provide some  
22                supporting documents, it was a sizable binder, to  
23                educate the University -- or they requested that I share  
24                this information with the University.  And in it there  
25                were documents, e-mails from colleagues who had extended



1 invitations to John. There was a letter in there from  
2 my colleague, Martha Peugh-Wade, to John about the  
3 fitness for duty, as well as, if I'm not mistaken, data  
4 to referring to an incident that took place a few years  
5 prior regarding discrimination on a search for a faculty  
6 position.

7 Q. Mr. Philpott, at any time during that meeting,  
8 or at any time thereafter up until when the University  
9 terminated Dr. Kao, did Dr. Kao or his attorney tell you  
10 that he had not done the things that were laid out in  
11 Martha Peugh-Wade's letter to him of June 24, 2008?

12 A. No.

13 Q. In that meeting, did Mr. Katzenbach say he  
14 never did these things?

15 A. No. He requested examples and wanted to know  
16 the dates and times and specific individuals.

17 Q. And did you tell him that that issue had  
18 already been dealt with by Martha Peugh-Wade and that  
19 the University wasn't comfortable doing that?

20 A. I believe that's how I responded, yes.

21 Q. What, if anything, did you see with your eyes  
22 that was new and different in that meeting?

23 A. When I was delivering the difficult message  
24 that the University was planning on invoking progressive  
25 discipline if Dr. Kao did not participate, I observed

1 behaviors that I had read about from some of John's  
2 colleagues, and it was the first time that I had  
3 witnessed it in my interactions with John over the 10 to  
4 12 years that I had known him. He was leaning back in  
5 his chair, he was -- he had clenched fists. I could see  
6 the whites of his knuckles. He was --

7 Q. What do you mean by that, "He had clenched" --  
8 you were demonstrating?

9 A. Yes.

10 Q. Describe your demonstration, if you would,  
11 please.

12 A. His hands were in front of him on the  
13 conference table, his fists were clenched like this  
14 (indicating) for an extended period of time, therefore  
15 you could see the whites of the tops of his knuckles.  
16 He was occasionally nodding his head, rapidly blinking  
17 his eyes, and had a grin on his face that -- something I  
18 had not seen. And based on what I had read and had  
19 heard from others, that I could see how someone could  
20 feel uncomfortable if they had witnessed that.

21 Q. What had you read from others about Dr. Kao's  
22 behaviors that was similar to what you were seeing in  
23 this meeting?

24 A. I believe one professor described Professor Kao  
25 in his office with a smile on his face for an extended

1 period of time, nodding his head, I believe, and just  
2 behavior that I had not witnessed before. And I believe  
3 his colleagues had expressed concern in the spring of  
4 2008. This was new behavior and behavior that was  
5 concerning to them.

6 Q. Had you read or heard about the incident with  
7 Dean Turpin in the parking lot? That is, had you heard  
8 about any reports of that incident where Dr. Kao was  
9 assertedly exposing his hands in a fist-like fashion?

10 A. Yes.

11 Q. You had read about or heard about that before  
12 this meeting with Dr. Kao in late October 2008?

13 A. That is correct.

14 Q. So when you saw his hands in a fist-like  
15 fashion for an extended period of time and white  
16 knuckles, what did that remind you of?

17 A. It reminded me of what I had read and heard  
18 from some of his colleagues and how uncomfortable they  
19 were by that type of behavior.

20 Q. In that meeting, and at any time in the next  
21 couple of months when you were working through this  
22 process -- and I'm going to take you through this  
23 process of progressive discipline -- did Mr. Katzenbach  
24 or the other attorney or Dr. Kao at any time suggest  
25 there were any circumstances under which he would agree

1 to go to a Fitness-for-Duty Evaluation?

2 A. Unfortunately, no.

3 Q. Did he ever ask you if you -- if you were  
4 willing to renegotiate who the doctor would be?

5 A. No, but I was advised before the meeting if  
6 that option was put on the table, that we would explore  
7 it and we'd take it very seriously.

8 Q. Okay. But did -- did Mr. Katzenbach or Dr. Kao  
9 even say they didn't want to have the evaluation by  
10 Dr. Reynolds?

11 A. I'm sorry, can you repeat that?

12 Q. Did Mr. Katzenbach or Dr. Kao say in this  
13 meeting that they objected to Dr. Reynolds?

14 A. I don't believe they objected to Dr. Reynolds  
15 specifically. I think they just objected to the request  
16 by the University.

17 Q. Right. They had -- in principle, he said he  
18 wasn't going to any Fitness-for-Duty Evaluation,  
19 correct?

20 A. That is correct.

21 Q. He didn't say he would go to one if it wasn't  
22 Dr. Reynolds, correct?

23 A. Correct.

24 Q. Did he say anything to suggest that San Jose  
25 was too far away or that there were too many hours

1 involved in the evaluation? Did Dr. Kao say that in  
2 that meeting?

3 A. No.

4 Q. Did Mr. Katzenbach or the other attorneys say  
5 that in that meeting?

6 A. No.

7 Q. At any time -- let me back up.

8 In that meeting, did you indicate in one way or  
9 another that you were available to discuss things  
10 further with Mr. Katzenbach?

11 A. I'm not sure.

12 Q. Fair enough.

13 Did Mr. Katzenbach -- did you signal in any way  
14 that you were not open to having further discussions  
15 with them?

16 A. No. One of my other objectives to come out of  
17 the meeting by having a union rep present is that any  
18 time during the meeting Professor Kao or his attorney  
19 said they wanted to file a grievance, then having a  
20 union present -- union president in the room, I would  
21 have immediately accepted the grievance because I felt  
22 it was important to bring it under the Collective  
23 Bargaining Agreement.

24 Q. And did you tell Dr. Kao and Mr. Katzenbach  
25 that he had a right to file a grievance against the

1 University's instruction that he go see the doctor?

2 A. Yes.

3 Q. What was the response? Did they say, okay,  
4 we'll file a grievance and take it to an independent  
5 arbitrator?

6 A. No, they did not.

7 Q. Did Mr. Katzenbach and Dr. -- or Dr. Kao ever  
8 say they would follow the union contract procedure and  
9 get an independent arbitrator or even the union to  
10 evaluate whether the University was in the right in  
11 asking him to go see Dr. Reynolds?

12 A. Not in that meeting. And when we made that  
13 offer at a later date formally in writing, it was  
14 rejected.

15 Q. Did the meeting end cordially?

16 A. Yes.

17 Q. Was the conversation cordial? In other words,  
18 was there any disrespectful behavior by you or -- other  
19 than Dr. Kao's visual gestures, was there anything that  
20 worried you in that meeting?

21 A. No. To the credit to everyone in the room,  
22 people were professional, cordial. Greetings when we  
23 arrived and pleasantries as we were leaving. So that,  
24 in my mind, was a positive.

25 Q. After the meeting, did you send -- I'm going to

1 bring out the correspondence later, but I don't want to  
2 interrupt the storyline.

3 After the meeting, a couple of weeks later, did  
4 you send a letter thanking Mr. Katzenbach and Professor  
5 Kao for coming to the meeting?

6 A. I did. And I believe in that letter we also  
7 said we would take under advisement the documents that  
8 they had presented.

9 Q. Okay. And did you actually review some or all  
10 of the documents that Mr. Katzenbach and Dr. Kao had  
11 given you?

12 A. I did.

13 Q. What -- in any of those documents, did Dr. Kao  
14 say that he had never engaged in any of those behaviors  
15 that people said scared them?

16 A. No.

17 Q. Is that why you didn't go to Martha Peugh-Wade  
18 or the Dean and ask them to change their decision for  
19 the fitness for duty?

20 A. Yes.

21 Q. Is it also the case that because you witnessed  
22 certain behaviors that seemed to coincide with what  
23 people had told you they had seen, you concurred that  
24 this was the right way to go for the University, the  
25 fitness for duty?

1 A. Yes.

2 Q. Did there come a point in time, several weeks  
3 later in December, that you took the discipline to the  
4 next level and notified Dr. Kao and his attorney that  
5 the University was giving him a formal written  
6 suspension for not going to the evaluation?

7 A. Yes.

8 Q. Is that pretty much standard in your union  
9 contracts that you -- the next level of progressive  
10 discipline?

11 A. Yes.

12 Q. And why does the University then go to this  
13 suspension from employment level? What's the purpose in  
14 the progressive discipline process for doing that thing?

15 A. Normally there is no cookie cutter approach to  
16 discipline, but there is informal stages, there's  
17 interaction with the employee, depending on the issue.

18 And based either on insubordination or not  
19 meeting minimum performance expectations, the next step  
20 is a suspension. The suspension, in our role of labor  
21 relations, is sending a -- hopefully a very clear  
22 message that we either need to work together or we need  
23 a change in behavior or change the process. And there  
24 is also a financial implication when you suspend  
25 someone.



1           And in this case, we were informing Dr. Kao  
2           that he was no longer going to receive a paycheck. And  
3           depending on the financial -- for an employee, their  
4           financial situation, a suspension could have a dramatic  
5           effect. And sometimes it will change behavior and other  
6           times it will certainly get their attention. I don't  
7           think the vast majority of our colleagues are wealthy  
8           enough they can go an extended period of time without a  
9           paycheck.

10          Q.    But the idea is to get a change of the behavior  
11          and get the person to not be insubordinate any longer.  
12          Is that -- was that your goal?

13          A.    In this case, yes.

14          Q.    Dr. Kao had been on a -- a sick leave, but he  
15          had not -- he really hadn't been receiving a paycheck,  
16          because he hadn't gone on sick leave. What was your  
17          understanding about that?

18          A.    I believe at the time in fall of 2008 Professor  
19          Kao was out on a paid sick leave.

20          Q.    But if he -- if he was or he wasn't, your  
21          purpose in giving a suspension was really to clear -- to  
22          give a clear message that whatever it was, he wasn't  
23          going to get anymore money?

24          A.    That is correct.

25          Q.    And you were hoping that that would get him to

1 rethink the issue?

2 A. Yes.

3 Q. Did you send copies of all these letters to  
4 Mr. Katzenbach at the same time as you did to Professor  
5 Kao?

6 A. Yes. I think early in the process, either  
7 leading up to the October meeting or after the October  
8 meeting, Mr. Katzenbach and John had requested that his  
9 attorney, Mr. Katzenbach, be copied or be included in  
10 all our written communications.

11 Q. In the end of December and early January, did  
12 you send a letter proposing that the parties pick an  
13 independent neutral arbitrator if Professor Kao was  
14 still unwilling to follow the instruction and see if the  
15 arbitrator could decide if the University or Professor  
16 Kao was in the right?

17 A. I believe in that written communication we gave  
18 two options.

19 Q. Tell the jury what those were.

20 A. One option was that we could take this issue to  
21 an arbitrator or we could bypass. In all the labor  
22 relations, there's usually steps before you get to  
23 arbitration, but we would be willing to bypass those  
24 steps and go straight to arbitration to have an  
25 arbitrator to rule on the decision of the University.

1           And then the second option that we put forward  
2 was to have a retired jurist to look at the legal side,  
3 again providing at least two options, to try to remedy  
4 the situation or at least find some common ground and  
5 get past the lock-in we had on this issue of fitness for  
6 duty.

7           Q.    Why did you make those proposals and is this --  
8 is this the period of time in -- in early -- in December  
9 and January when you gave him these chances to -- these  
10 options?

11          A.    I think the general feeling was we didn't want  
12 to move to terminate. We were trying to find a  
13 different way, a creative way. We were exploring all  
14 options. And our hope was by proposing two, it would  
15 open up the door for a conversation that either they  
16 could propose some other options or they would take us  
17 up on the two that we had put forward, which we thought  
18 were reasonable based on other situations at other  
19 institutions or other employers, again, trying to  
20 prevent that final decision of moving to terminate.

21          Q.    Eventually you got a letter from Mr. Katzenbach  
22 that rejected the options that you proposed?

23          A.    That is correct.

24          Q.    And did one of his letters say that part of why  
25 he was rejecting it was he wanted to leave Dr. Kao free

1 to sue the University even if the arbitrator or judge,  
2 retired judge, said you gotta go to the Fitness-for-Duty  
3 Evaluation Dr. Kao wanted to keep his rights to sue in  
4 court?

5 Remember that's what he said?

6 A. That is correct. And in our letter we included  
7 a line of binding arbitration, which is a term in labor  
8 relations we throw around; that the perception was if we  
9 had gone down that road and it was binding arbitration,  
10 it would prevent Professor Kao from taking any legal  
11 action if the arbitrator ruled in the favor of the  
12 University.

13 Q. So did you take that off the table? Did you  
14 send a letter back to Dr. Kao and Mr. Katzenbach and  
15 say, okay, we'll go along with it, you can still sue if  
16 you disagree with the neutral arbitrator or the retired  
17 judge?

18 A. That is correct.

19 Q. And why were you so compromising? It seems  
20 like a -- sort of a -- not like you to be, like, that  
21 flexible?

22 MR. KATZENBACH: Is that a question?

23 THE COURT: No. It's stricken.

24 MR. VARTAIN: Okay.

25 Q. Why -- did you consider that you were being

1 flexible in -- in giving Dr. Kao the benefit that he  
2 could still sue even if he went through this neutral  
3 arbitration or neutral retired judge process?

4 A. I don't think I'm as rigid as some people think  
5 I am; my wife might disagree.

6 But in this case I think the intent was, again,  
7 let's put all options on the table. And if removing  
8 binding arbitration would be viewed as attractive,  
9 because normally we can secure an arbitrator in a three-  
10 to four-month period and we could expedite the process,  
11 then we would not be -- and we would not deny Professor  
12 Kao the opportunity to sue us.

13 I thought that was reasonable. My colleagues,  
14 when we discussed it, we thought that was perfectly  
15 fine.

16 Q. And you conveyed that in writing to Professor  
17 Kao and the attorney?

18 A. That is correct.

19 Q. And did you, in those letters, say that the  
20 University would refrain from discharging Dr. Kao  
21 while -- during the time it would take to have the  
22 retired judge rule on the case?

23 A. Yes.

24 Q. Did you make that clear in your letters, that  
25 the University would step back and not terminate him for

1 not going to the medical evaluation, if it took that  
2 long for the judge, the retired judge to rule?

3 A. Yes. That's what we put in writing and that's  
4 also what I discussed with Professor Neaman, the  
5 president of the Faculty Association.

6 Q. During this time were you keeping Dr. Kao's  
7 union representative informed that -- of what the  
8 University's intention was, to try to make an agreement?

9 A. That is how we approached -- I have approached  
10 all our dealings with the unions. We don't want to play  
11 "gotcha." In my experience, when we have done that in  
12 the past, you jeopardize your working relationship with  
13 the union leadership.

14 So normally when we approach a disciplinary  
15 case, in this case Professor Kao, you try to keep  
16 your -- the union apprised of your approach, what your  
17 outcomes you're hoping for, and how you wish to proceed.  
18 And many times we are open to their suggestions. It's  
19 another set of eyes and someone else you're working with  
20 on how best to proceed.

21 So that's why we shared it with Professor  
22 Neaman.

23 Q. The President of the union?

24 A. Correct.

25 Q. Did the President of the union ever indicate to

1 you that he thought the University was violating the  
2 union contract in the way it was proceeding?

3 A. We had a specific conversation about that and  
4 he said --

5 Q. What did he say?

6 A. Professor Neaman said no, we had the right to  
7 proceed under the Collective Bargaining Agreement to  
8 make this request.

9 Q. Did he have any comments or objections to --  
10 that the University was making these other compromised  
11 proposals to Dr. Kao and his attorney? That is, did the  
12 President of the union object?

13 A. I don't believe he objected, but he saw the  
14 writing on the wall and expressed his opinion to that  
15 effect.

16 Q. What was the writing on the wall that the  
17 president of the union expressed to you?

18 A. In his mind he was convinced that John wanted  
19 to sue the University and was anxious to go in that  
20 direction. He was not interested in pursuing the  
21 collective bargaining process for bringing this under  
22 the contract in the form of a grievance or possibly  
23 arbitration.

24 Q. There was -- in one of these letters here in  
25 January, Mr. Katzenbach mentioned that the -- that Dr.

1 Kao was still willing to meet with the math department  
2 faculty for a clear-the-air meeting?

3 A. Yes.

4 Q. You were here when Mr. Katzenbach asked the  
5 previous witness about whether that would have been  
6 advisable or not?

7 A. Yes.

8 Q. Did you inform Mr. Katzenbach and Dr. Kao that  
9 really what the University needed was the reassurance  
10 from a fitness-for-duty doctor and that was what it  
11 would need to be able to bring Dr. Kao back to work?

12 A. I believe that was the message that I attempted  
13 to articulate that day in the meeting.

14 Q. And did you articulate that in writing in one  
15 of your letters?

16 A. In the follow-up, yes.

17 Q. What was your thinking on that? Why -- why was  
18 it that you did not think a -- bringing Dr. Kao on  
19 campus for a meeting would be wise?

20 A. In response to that question, we relied on  
21 outside experts because this was a unique situation, not  
22 a traditional employee issue that I normally deal with  
23 on a daily basis. We had retained the services of  
24 outside experts. We thought this was beyond our comfort  
25 level and beyond our expertise.



1 Q. Is that Dr. Missett?

2 A. That is correct. And we relied on his advice  
3 on how best to proceed. And based on his directive, we  
4 felt that was a reasonable way to proceed and not allow  
5 a clear-the-air meeting.

6 Q. Was it true you really weren't willing to take  
7 the risk that a clear-the-air meeting could cause harm  
8 or make the situation worse?

9 A. Based on the information that I had and what  
10 had been shared with me, I don't believe many of John's  
11 colleagues would have attended that meeting.

12 Q. The union contract actually has a provision in  
13 it that requires the University in -- in managing issues  
14 with faculty to comply with laws, doesn't it?

15 A. Yes, I believe the article is adherence to law  
16 for this contract.

17 Q. And in that adherence to law provision of the  
18 contract that you negotiated with Dr. Kao's union, it  
19 requires the University to follow all laws, whether they  
20 be health and safety laws, occupational health and  
21 safety, all laws, correct?

22 A. That is correct.

23 Q. And in making your decisions to continue to  
24 require Dr. Kao to go for the assessment, the  
25 Fitness-for-Duty Assessment, were you cognizant and were

1 you thoughtful that, hey, the University has a duty  
2 under its union contract to comply with health and  
3 safety laws?

4 A. Yes.

5 Q. You're familiar with the provisions of the laws  
6 that require an employer to have a safe and healthy  
7 workplace for its employees?

8 A. Yes.

9 Q. At the time in question, was it still the case  
10 that the University didn't know whether Dr. Kao was, you  
11 know, dangerous or that he wasn't dangerous, they just  
12 wanted to have an outside assessment by the fitness for  
13 duty?

14 A. Yes. And that's why when we first started this  
15 process with Professor Kao and we decided to go through  
16 human resources instead of making this immediately a  
17 labor relations issue.

18 Q. So I notice on this -- I don't know if you can  
19 see this, Mr. Philpott, but you sort of are side by side  
20 with Martha Peugh-Wade in two boxes, so you have  
21 different functions; is that right?

22 A. That's correct.

23 Q. So would you -- I'm not going -- I don't want  
24 to insult you, but would it be fair to say that  
25 Ms. Peugh-Wade, in human resources, is the more policy

1 and softer side of the house and you are maybe the more  
2 of the enforcer side of the house?

3 A. Martha gets more Christmas cards than I do, so  
4 yes.

5 Q. Okay. Is that -- it's a way of saying yes?

6 A. My apologies. Yes.

7 Q. Okay. So was that -- part of the decision was  
8 to approach Dr. Kao and his attorney in the first  
9 instance using Martha in an attempt to persuade, it was  
10 only when that didn't work that it came over to the  
11 discipline side of the house?

12 A. That's correct. That's the way we approached  
13 it.

14 Q. Was it the case that you, as Director of Labor  
15 Relations, did not feel that the University could carry  
16 out its health and safety obligations to its faculty  
17 employees and put Dr. Kao back to work until and unless  
18 it had an assessment report of -- a Fitness-for-Duty  
19 Assessment Report from Dr. Reynolds that gave you a  
20 green light?

21 A. Yes.

22 Q. Did you make that clear to Mr. Katzenbach and  
23 Dr. Kao when you met with them in October, in one way or  
24 another?

25 A. That is what I hoped to articulate. I'm not

1       sure if they heard it that way, but yes, that was my  
2       intent.

3           Q.     And when you wrote your letter to them, you  
4       actually said that the University could not accept Dr.  
5       Kao's word for being safe, they needed the word of  
6       somebody who was qualified, independent profession?

7           A.     Yes.

8           Q.     Is it the case in labor relations at the  
9       University that insubordination, that is refusal to  
10      follow an instruction by an employee, an employee's  
11      refusal to follow an instruction is considered grounds  
12      for discipline up to discharge?

13          A.     Yes.

14          Q.     Has that always been the stance of the  
15      University of San Francisco?

16          A.     As long as I've been employed, yes.

17          Q.     What's the business need for having employees  
18      that carry out the instructions of management and  
19      particularly where it's a safety-related instruction?  
20      Could you describe that to the jury?

21          A.     Well, the safety issues vary from employee  
22      group to employee group. So when we're dealing with our  
23      stationary engineers, we have some very strict  
24      guidelines on how they are to perform their jobs when  
25      they're dealing with a high voltage line to the cogen to

1 --

2 Q. Cogen?

3 A. Cogeneration plant. So we have a plant on  
4 campus that generates our own electricity, 20 to  
5 25 percent of the electricity used on campus. So they  
6 are putting themselves at risk every day at their job.

7 We have other employees who drive vehicles, we  
8 have policies in place on how they should operate those  
9 vehicles. Clerical employees, the policies, how safety  
10 issues are -- are less because they're not exposed to  
11 the cogeneration plant. They are not exposed to driving  
12 vehicles around busy city streets.

13 So the policies and procedures are in place for  
14 a good reason, for good business needs. And it is our  
15 hope that the employees will follow them.

16 Q. Is it the case that instructions are made to  
17 comply with the Directors of Management so you can have  
18 a safe campus?

19 A. That is the intent, yes.

20 Q. And did you see in the letters that you wrote  
21 and that Martha Peugh-Wade wrote that Dr. Kao was told  
22 that there were safety issues and that was why he needed  
23 to comply with these instructions?

24 A. Yes.

25 Q. The contract with the union, does it have a

1 clause in it that allows the University to terminate  
2 faculty members even with tenure, if there's good cause  
3 for doing so?

4 A. Yes, I believe it's the just clause -- just  
5 cause clause.

6 Q. And was that negotiated with Dr. Kao's union,  
7 that the University would have that right to terminate  
8 if there was a just cause for doing that?

9 A. Yes.

10 Q. Did you, in your letters and in your meeting  
11 with Dr. Kao, remind him that that's what could happen  
12 here if he didn't go to the doctor?

13 A. Yes.

14 Q. Now, at any time in these months -- I'm --  
15 I'm -- it may sound like I'm being a little redundant  
16 here, but I want to make -- ask you this: Can you see  
17 this, Mr. Philpott? Okay.

18 From June 18th -- you got involved in this  
19 process in -- after August, and you were involved for  
20 the last four or five months in this process, right?

21 A. Yes.

22 Q. You had the meeting October 27th, and then you  
23 had letters back and forth -- which, after the lunch  
24 break, we'll walk through a little bit with the jury and  
25 His Honor -- at any time did you get a phone call, an

1 e-mail from Mr. Katzenbach or Dr. Kao saying can we talk  
2 some more? Can we figure something out? Anything like  
3 that at all?

4 A. No.

5 Q. When Dr. Kao was terminated, did the University  
6 give him a severance pay?

7 A. We did. Under the contract, a faculty member  
8 is eligible for six months of their last year of salary.

9 Q. And the University has the right under the  
10 contract to not pay that six months' pay if it's -- if  
11 it's a moral turpitude violation?

12 A. Yes.

13 Q. And did you make the decision, well, I don't  
14 want to go that direction, I want to give the severance  
15 pay to Dr. Kao anyway?

16 A. That is correct.

17 Q. So he -- he received six months of pay that he  
18 otherwise, that is, if he hadn't been terminated, he  
19 wouldn't have gotten that from the University, correct?

20 A. Correct.

21 Q. I'm not saying it was a gift, I'm just saying  
22 that came to him in or around his termination, it came  
23 in a check to him?

24 A. Yes.

25 Q. At any time -- and you sent the termination

1 letter, did you?

2 A. No, I believe the Dean sent the termination  
3 letter.

4 Q. Okay. Did you transmit it or did you -- did  
5 you approve it in any way?

6 A. I was part of the process of drafting that  
7 termination letter.

8 Q. Okay. After you finally more or less pulled  
9 the plug and -- and sent the termination letter, did Dr.  
10 Kao or Mr. Katzenbach ever call you up and say, okay, we  
11 see you really meant it, can we now work something out  
12 and figure this out?

13 A. No. The follow-up communication was how we  
14 were going to transition John's personal effects in his  
15 office to him and how we were going to vacate the  
16 office.

17 Q. Did you have communications with Mr. Katzenbach  
18 trying to find a way to get him his belongings without  
19 having him come on campus?

20 A. Yes.

21 Q. Because he was still under the  
22 do-not-come-to-campus instruction?

23 A. Correct. There was a request made by John's  
24 attorney to allow him to come -- requesting that John  
25 come and pick up his items. There was concern with the



1 staff if John did come to campus, so the University  
2 proposed that the retrieval of personal effects could be  
3 picked up on a Friday morning or a Friday afternoon.

4 I'd be the person of contact, and our game plan was that  
5 we would remove all staff, faculty members from that  
6 area so there wouldn't be any awkward interaction.

7 And when that proposal was made, eventually the  
8 University, I believe through communication, agreed that  
9 we would hire a moving company, we would pack John's  
10 personal effects. I observed that. They would pack it  
11 up --

12 Q. What do you mean you observed it, you were  
13 there?

14 A. Thank you. I was there. I did not physically  
15 pack John's personal effects; I observed it.

16 They documented every item that was logged, and  
17 we attempted to make arrangements to deliver those  
18 personal effects directly to John's residence, and that  
19 eventually we made a decision that we would transport  
20 those items to a storage unit and Mr. Katzenbach and  
21 John could make arrangements at a time convenient for  
22 them to retrieve those effects from the storage unit.

23 Q. When you were -- on this point in time, now  
24 we're in around February when Dr. Kao's employment  
25 ended, did you have the locks changed in the -- in or

1 around the Math Department and what, if any, contact did  
2 you have with the math faculty?

3 A. Our math colleagues, staff members in the area  
4 were -- there was growing concern, there was tension,  
5 some of our colleagues, faculty members who were  
6 concerned that John might come back, and they kept  
7 asking over and over what's going on.

8 MR. KATZENBACH: Objection, Your Honor.  
9 Hearsay.

10 MR. VARTAIN: Just --

11 THE COURT: On what ground?

12 MR. KATZENBACH: Hearsay, Your Honor.

13 MR. VARTAIN: It's for the state of mind of the  
14 faculty members.

15 THE COURT: Okay. It's time to take our lunch  
16 break.

17 Ladies and gentlemen, remember the admonitions.  
18 Do not form or express any opinion on this case until  
19 it's finally submitted to you for your decision. Do not  
20 discuss among yourselves or with others until that time.

21 Please be back in your places at 1:30 this  
22 afternoon. Please remember to leave the instructions,  
23 exhibits and notebooks behind.

24 Juror No. 7, please remain.

25 (Discussion held among counsel, the Court

1                   and Juror No. 7 outside the presence of the  
2                   jury.)

3                   THE COURT: Alternates and jurors, except for  
4 Juror No. 7, have left the courtroom. Counsel for both  
5 sides and the plaintiff remain.

6                   How do you pronounce your name, ma'am?

7                   JUROR: Maria Missic (phonetic).

8                   THE COURT: Missic?

9                   JUROR: Missic.

10                  THE COURT: Ms. Missic, we got your note.

11                  Anything you'd like to add to what you put in  
12 the note?

13                  JUROR: My concern is that the case is  
14 continuing on a much longer amount of time than I  
15 anticipated. I've already missed -- I'm -- two  
16 meetings. I'm potentially missing this third meeting,  
17 and then the week after I'm supposed to go to a meeting  
18 in Dallas, and I'm feeling this intense pressure and --  
19 and -- from this whole experience of how much work I  
20 will have to make up and filling the time. And it's  
21 creating stress for me.

22                  And this additional time that now is going to  
23 be extended, I don't even know if we'll get the case by  
24 Wednesday the way this is all proceeding, so I have a  
25 lot of concerns about that.

1           THE COURT:  You're anxious about the demands  
2           that have already been made for you, if my projections  
3           are correct.  But on top of that, according to you, they  
4           might not be correct, they might be worse than what I  
5           predict?

6           JUROR:  I'm sorry, I don't understand what you  
7           just stated.

8           THE COURT:  Well, I gave you some time  
9           estimates this morning.

10          JUROR:  Right.

11          THE COURT:  And those time estimates are longer  
12          than what you were expecting?

13          JUROR:  Right.

14          THE COURT:  And cause for concern?

15          JUROR:  Right.

16          THE COURT:  And as an added cause for concern,  
17          do you think the time estimates might be wrong if  
18          they're underestimates and you might be in for a longer  
19          wait?

20          JUROR:  Yes, that too, because this is leading  
21          to -- as I said, I've -- I've already missed a few  
22          meetings, tried to anticipate the -- in my head, and  
23          maybe that's where I -- I went wrong.

24                 I anticipated that somehow we may be done by  
25          next Wednesday, when I have this other meeting, and now

1 the potential that we may not even get the case until  
2 that day, and then the fact that I have another meeting  
3 after that. And so I'm just feeling a lot of stress  
4 from this situation.

5 THE COURT: Do you think that these feelings of  
6 pressure on you are interfering with your ability to pay  
7 attention?

8 JUROR: A little bit.

9 THE COURT: Counsel, any questions you'd like  
10 to pose to Ms. Missic?

11 MR. VARTAIN: Not questions, just a comment  
12 maybe, Your Honor.

13 You know, I think, given what's happened this  
14 morning, I think it's virtually certain that the case  
15 will end today for purposes of evidence, and that the  
16 jury will get the case on the morning of Tuesday.

17 And I bet, I won't speak for Mr. Katzenbach,  
18 but if Your Honor was willing to indulge the jury and  
19 they could start their deliberations on Tuesday, I don't  
20 know if it would help Juror No. 7 if they took Wednesday  
21 off and she did her meeting and came back on Thursday.  
22 And if they hadn't finished their deliberations on  
23 Tuesday -- I mean, they may finish them on Tuesday, or  
24 if not, so that she could do her meeting and come back  
25 on Thursday and finish up, if it came to that.

1           That might be a suggestion to -- and each juror  
2 that's been on the jury has been investing a lot in  
3 this. And to use that analogy, return on an investment.

4           THE COURT: And we hate to see the investment  
5 in time and --

6           MR. VARTAIN: Yeah.

7           JUROR: Exactly. And I understand that, too.

8           MR. VARTAIN: But would that be something,  
9 Mr. Katzenbach, you would find willing for us to jointly  
10 propose to His Honor that if Maria -- if Maria needs to  
11 go to this meeting and for whatever reason the jury  
12 hadn't finished on Tuesday, that she could go on  
13 Wednesday and come back on Thursday?

14          THE COURT: I'll go over it with the balance of  
15 the jurors.

16          MR. VARTAIN: But only if they would agree.

17          MR. KATZENBACH: Well, I don't want to put the  
18 jurors in conflict over that. That's my concern. You  
19 know, I mean, on a personal level, of course, I mean,  
20 I'm happy -- it's -- I'm not the one who's taking an  
21 extra day off, you know, for other things. I mean, all  
22 the jurors I'm sure have concerns on that.

23                 I don't want to -- I don't want to take her  
24 rights to depend on some sort of -- if she's going to  
25 go, I don't think she should be asking her fellow jurors

1 to sort of give her approval. I don't think that's  
2 appropriate.

3 THE COURT: I think we have a picture of  
4 Ms. Missic's problem now. And if there are no questions  
5 you have for her --

6 MR. KATZENBACH: I don't have any questions.

7 MR. VARTAIN: Maybe we should discuss it  
8 without her, Your Honor?

9 THE COURT: That would be my suggestion.

10 MR. KATZENBACH: Yeah, okay.

11 THE COURT: Ms. Missic, thanks very much. See  
12 you at 1:30.

13 (Juror No. 7 is excused.)

14 THE COURT: Ms. Missic has departed. The  
15 plaintiff -- both counsel and the plaintiff remain.

16 Anything else you'd like to put on the record?

17 MR. VARTAIN: I'd just like to suggest, maybe  
18 we can take this up when we finish our evidence and  
19 maybe we can give a revised estimate to her and the  
20 other jurors?

21 THE COURT: Okay. See you at 1:30.

22 Is there something you want on the record,  
23 Mr. Katzenbach?

24 MR. KATZENBACH: We have a witness under  
25 subpoena that's not here, that we were going to call on

1 rebuttal, Mr. Gallagher. So I would like him here at  
2 the end -- at the close of the evidence of --  
3 defendant's evidence so we can call him. He's an  
4 employee of the University. I would hope --

5 THE COURT: I'm going to ask Mr. Vartain's help  
6 in getting the witness here. I don't think we need to  
7 put that on the record.

8 MR. KATZENBACH: Okay.

9 THE COURT: Off the record, out of session.

10 (Whereupon, the proceedings were adjourned  
11 for lunch at 12:07 PM)

12 --- oOo ---  
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1 AFTERNOON SESSION

1:34 PM

2 THE COURT: Jurors and alternates are all  
3 present. Counsel from both sides are present.  
4 Plaintiff is personally present. Mr. Philpott is on the  
5 stand.

6 Mr. Vartain, you may continue your inquiry.

7 MR. VARTAIN: Thank you, Your Honor.

8 Q. Mr. Philpott, would you look at Exhibits 227  
9 through 235 and tell me if those are the letters that  
10 you sent to Mr. Katzenbach and Dr. Kao from October 3,  
11 2008 right up through the letter of termination of  
12 employment and the severance pay letter as well?

13 A. Do you want me to go individually on each one?

14 (Whereupon, Defendant's Exhibits 227 through  
15 229 and 232 through 235 were marked for  
16 identification.)

17 MR. VARTAIN: Q. Just -- just flip through  
18 them and tell me if those exhibits represent the  
19 correspondence back and forth between you, Dr.  
20 Kao/Mr. Katzenbach, leading -- leading from when you  
21 first convened the union meeting right up until  
22 termination of employment and the giving of the  
23 severance pay.

24 A. Okay. Yes, Exhibits 227 through 235 reflect  
25 the correspondence between myself and Mr. Katzenbach.

1 Q. And Dr. Kao was addressee or CC'ed on all of  
2 those letters that you sent?

3 A. That is correct.

4 MR. VARTAIN: I offer 227 through 235 into  
5 evidence.

6 MR. KATZENBACH: Sorry. 227 through 235?

7 MR. VARTAIN: Yes.

8 MR. KATZENBACH: No objection. I believe two  
9 of them may already be in evidence, but I don't mind --

10 THE CLERK: 230 and 231 are already in  
11 evidence.

12 (Whereupon, Defendant's Exhibits 227 through  
13 229 and 232 through 235 were admitted into  
14 evidence.)

15 MR. VARTAIN: No further questions at this  
16 time, Your Honor.

17 THE COURT: Fine.

18 Mr. Katzenbach.

19 MR. KATZENBACH: Yes, I have a few questions.  
20 That's a lawyer "few."

21  
22 CROSS-EXAMINATION BY MR. KATZENBACH

23 MR. KATZENBACH: Q. Now, would you please take  
24 a look at what's been marked as Exhibit 41.

25 A. Yes, sir.

1 (Whereupon, Plaintiff's Exhibit 41 was  
2 marked for identification.)

3 MR. KATZENBACH: Q. Do you have that in front  
4 of you?

5 A. I do not. It's probably in one of these  
6 binders.

7 Q. Yes. Plaintiff's Exhibit 41 should be in the  
8 second binder, binder No. 2?

9 A. Yes, sir.

10 Q. Can you identify that document?

11 A. Looks like my handwriting or it's my  
12 handwriting and there's some of my personal notes.

13 Q. Are those notes that you took of your meeting  
14 with Dr. Kao on -- in October 2008?

15 A. There is no date on the document, sir, but I  
16 believe they are the notes from that day.

17 MR. KATZENBACH: Move Exhibit 41 into evidence.

18 THE COURT: Any objection?

19 MR. VARTAIN: No objection.

20 THE COURT: It's received.

21 (Whereupon, Plaintiff's Exhibit 41 was  
22 admitted into evidence.)

23 MR. KATZENBACH: Q. Now, taking a look at --  
24 strike that.

25 When did you write the notes, on Exhibit 41?



1 convey -- you intended and did convey at this meeting?

2 A. "We request eval (fitness for duty by IP), this  
3 summer and declined."

4 Q. All right. And it says -- the next one says?

5 A. "Currently on leave."

6 Q. What's the third one say?

7 A. "Must complete eval, then we will discuss your  
8 return."

9 Q. What did that mean?

10 A. That Professor Kao would have to attend the  
11 Fitness-for-Duty Exam, and then we would discuss his  
12 return to the University, depending on the outcome of  
13 the evaluation.

14 Q. Well, if it was fit for duty, then there  
15 wouldn't be anything to discuss, would there?

16 A. If the report came back that John was fit to  
17 return?

18 Q. Yeah.

19 A. I believe the plan was that we would work with  
20 Professor Kao on returning to his employment.

21 Q. What would you have to work with him about?

22 A. I'm not a medical practitioner, sir, so I'm  
23 not -- so if you want to give me some assumptions --

24 Q. He's fit for duty, what did you have to work  
25 with him about?

1           A.    Response back was that he was fit to return to  
2 work and he was not a threat to his colleagues, then  
3 there might be room for a conversation on his  
4 communication style and how he would behave with his  
5 colleagues, how he would interact with them on a  
6 day-to-day basis.

7           Q.    Why not have that conversation right then on --  
8 in October?

9           A.    Based on the outside counsel that we had  
10 secured, the professionals doing threat assessments, the  
11 recommendation was that it was in the best interest of  
12 the University to have John go for a Fitness-for-Duty  
13 Evaluation.

14          Q.    How would it hurt the University to discuss  
15 John's behaviors with him at the meeting we had -- that  
16 you had with him in October?

17               MR. VARTAIN:  I am going to object to the  
18 argumentative tone of Counsel.

19               MR. KATZENBACH:  Your Honor, with due respect,  
20 I do not think the tone is overly argumentative in  
21 comparison to some of the way that Counsel has argued  
22 with some of my witnesses.

23               THE COURT:  Sustain the objection.

24               MR. KATZENBACH:  Rats, Your Honor.  All right.

25               I'm sorry that's -- I won't go there.

1 Q. All right. Were you aware of any barrier to  
2 having -- discussing his behaviors at this meeting you  
3 had with him in October?

4 A. I don't quite understand what you mean by  
5 "barriers," sir.

6 Q. Were there any obstacles -- that's the same  
7 word, isn't it?

8 Were there any reasons why you didn't discuss  
9 his behavior with him at this meeting in October?

10 A. The October meeting was -- the reason for the  
11 meeting was to bring to his attention of his  
12 insubordination. HR was dealing with the performance  
13 issues, I was involved with the insubordination,  
14 refusing to participate, therefore, the need for  
15 disciplinary action.

16 Q. Well -- very well. We'll get there in a  
17 minute, but let me -- let's go back to the last of the  
18 four bullet points.

19 What does the last one say?

20 A. The last one says "The University will exercise  
21 our rights under the Collective Bargaining Agreements,  
22 SUST" -- it was my abbreviated version for  
23 suspension/termination, "you must participate."

24 Q. And what the purpose -- was this note to -- for  
25 the purpose of conveying to Dr. Kao that he must

1 participate in the Fitness-for-Duty Evaluation or he  
2 would be fired?

3 A. That was the intent, sir.

4 Q. All right. Now, take a look down at the -- you  
5 wrote down two articles, Article 40 and Article 9.

6 A. Yes.

7 Q. All right. Let me just ask you, what are those  
8 articles of?

9 A. I believe it was in reference to the Collective  
10 Bargaining Agreement between the University of San  
11 Francisco and the University of San Francisco Full-Time  
12 Faculty Association.

13 Q. All right. And just so we're clear on this,  
14 those are -- Article 40, what in Article 40 refers to a  
15 Fitness-for-Duty Evaluations?

16 A. I apologize, sir, we've bargained this  
17 contract, articles do change. It could be the grievance  
18 procedures, but I'm not positive.

19 Q. All right. Well, let me just ask generally,  
20 what in the Collective Bargaining Agreement states that  
21 an employee -- Faculty Collective Bargaining Agreement  
22 states that an employee has to go to a Fitness-for-Duty  
23 Examination?

24 A. The contract is silent on that.

25 Q. All right. So neither of these two provisions,



1 to your knowledge, address that point?

2 A. If Article 40, since I don't have the section  
3 listed, if Article 40 is referring to the grievance  
4 procedure, sir, then I believe that point was to advise  
5 John that he could file a grievance under the Collective  
6 Bargaining Agreement.

7 Q. Now -- okay. Article 9, "Relationship." Does  
8 that have anything to do with going to Fitness-for-Duty  
9 Examinations?

10 A. It does not.

11 Q. That talks about collegial relationships among  
12 the faculty, doesn't it?

13 A. It does.

14 Q. Right. And so the collegial relationship among  
15 the faculty means the faculty should get along with each  
16 other?

17 A. We would hope.

18 Q. But faculties are going to disagree, right?

19 A. Faculty by their very nature disagree about a  
20 lot of things.

21 Q. Okay. Now, this wasn't the -- this meeting in  
22 October, in October 2008, this wasn't the first time  
23 that Dr. Kao had been told that he'd be fired if he  
24 didn't go to this examination, was it?

25 A. It was not.

1 Q. In fact, if you look at Exhibit 37 -- I'm  
2 sorry. Yeah, take a look at Exhibit 37. Do you have  
3 that in front of you?

4 A. Is that the letter from Dean Turpin to John  
5 dated July 8, 2008?

6 Q. Yes. That's -- that's a letter from Dean  
7 Turpin to John. And does that refer to John being  
8 fired?

9 A. In the fifth paragraph it states the following:  
10 "If, however, you continue to fail to carry out the  
11 instructions, we will need to reassign your classes for  
12 the fall semester and when classes begin in August, you  
13 will not be placed on paid" -- "on paid sick pay status  
14 and instead the University will commence proceedings  
15 under the USFFA Agreement, Article 40, Discipline and  
16 Discharge."

17 Q. So was this meeting that you were conducting in  
18 October was that part of the efforts to commence  
19 proceedings under Article 40, Discipline and Discharge?

20 A. Yes.

21 Q. All right. So now looking at this letter -- by  
22 the way, does that refresh your recollection whether at  
23 the time of the October meeting John was on paid or  
24 unpaid leave?

25 A. I'm sorry, sir, you're referring to the

1 July 8th, 2008 memo?

2 Q. I believe in your opening testimony you  
3 indicated that you thought that John was on paid leave  
4 status. And so in looking at this, does that refresh  
5 your recollection that perhaps he was on unpaid status?

6 A. I was under the impression that he was on sick  
7 leave during the summer of '08 through the fall of '08.

8 Q. All right. And is your impression that that  
9 would be paid status?

10 A. Yes, sir.

11 Q. In order to get sick leave, what do you have to  
12 file?

13 A. There's a couple of different ways one can  
14 pursue that. A faculty member or librarian that's  
15 covered by the Collective Bargaining Agreement can  
16 request sick leave, they can provide medical  
17 documentation that they need to be out. There is also a  
18 clause in the contract where the Dean can put someone  
19 out on sick leave.

20 Q. How is sick leave paid?

21 A. I believe for this contract the faculty and  
22 librarians have three months' worth of accrued sick  
23 leave every year.

24 Q. All right. And in order to get that sick  
25 leave, you have to file something that says you're sick?

1 A. That is one way one could file, yes.

2 Q. That would be pretty much, I would think, the  
3 normal way, wouldn't it?

4 A. There is paperwork that is included but the  
5 Dean could also request it, so that's another option.

6 Q. Okay. So in either case -- wouldn't you agree  
7 that in either case you gotta be sick to get sick leave?  
8 I don't mean to be sounding silly, but is that your  
9 understanding of it, it's not like vacation time?

10 A. No, it's not like vacation time.

11 Q. You don't get to take sick leave and say I'm  
12 going to Las Vegas?

13 A. Some people do.

14 Q. Do they stay employed?

15 A. Normally, no.

16 Q. So they have to do really well in Las Vegas if  
17 it's going to work?

18 A. No comment.

19 Q. Okay. I'm sorry.

20 So normally to file sick leave, you gotta  
21 file -- you gotta say I'm sick?

22 A. You have to say you're sick or the Dean can put  
23 you out on sick leave.

24 Q. Because the Dean says you're sick?

25 A. Or has concerns, yes.

1 Q. Okay. All right.

2 Now, going back to your notes, which are  
3 Exhibit 41, looking through your notes, do you see  
4 anything in there that refers to any observations you  
5 made of Dr. Kao's behavior at this meeting?

6 A. No, sir.

7 Q. And there's nothing in there that said you  
8 observed John's behaviors as similar to those that were  
9 reported by these other faculty members?

10 A. No.

11 Q. Thank you.

12 Now, you indicated that you had some  
13 conversation with Union President Neaman about the  
14 allegations against John?

15 A. Yes.

16 Q. Is that before or after this meeting?

17 A. Before and after.

18 Q. Okay. Was John present during either of those  
19 meetings?

20 A. No.

21 Q. Was John advised to be at either of those  
22 meetings?

23 A. No.

24 Q. Were his attorneys advised to be at either of  
25 those meetings?

1           A.    No.

2           Q.    What was the role of you speaking to the union  
3 without John's presence or presence of any of John's  
4 representatives?

5           A.    That is my practice on how we administer labor  
6 relations at the University.

7           Q.    Okay.  So when you spoke to Union President  
8 Neaman -- I'm going to call him "Union President Neaman"  
9 so we don't get all these close sounding names too  
10 confused.

11                    When you spoke to Union President Neaman, what  
12 information did you give to him?

13           A.    When I communicate with the President of the  
14 Faculty Association, it could be every day, it could be  
15 every other week.  We're constantly looking at different  
16 issues that are on campus.  Concerns.  Sometimes they're  
17 elevated to where our office has to get involved; other  
18 times it's just more passing commentary so there's an  
19 understanding of some of the dynamics in play.

20                    In leading up to this case, I believe I advised  
21 Elliott Neaman that we were -- there was concerns about  
22 John, concerns about John's behavior.  I believe he was  
23 aware of some of those behaviors because his own  
24 members, also covered by the Collective Bargaining  
25 Agreement, had raised them.

1           Many advised Professor Neaman that we were  
2 proceeding with caution and we were coordinating it with  
3 outside legal, outside experts, and our Human Resource  
4 Department, and it was our hope that John would  
5 participate in a fitness for duty.

6           As things proceeded, I believe before John met  
7 with Martha Peugh-Wade, I advised Elliott that that  
8 meeting was going to take place. And in preparation of  
9 leading up to this meeting, I know on more than one  
10 occasion I had asked Elliott if he had spoken to John  
11 because, again, I was hoping to bring this issue under  
12 the Collective Bargaining Agreement with a possibility  
13 of a grievance that could be addressed in an area that  
14 I'm comfortable with, what I do on a daily basis.

15           John, I do not believe, communicated with  
16 Elliott, leading up to the meeting on the 29th, and I  
17 don't believe they communicated after that meeting. And  
18 I think the last conversation I had before Professor  
19 Neaman -- strike that, before Professor Kao was informed  
20 that he was going to be terminated, I did contact  
21 Elliott, informed him of what we had planned to do that  
22 day, and what the hope or the expectation that maybe  
23 John had reached out to his union, and that could have  
24 delayed the process if a grievance was in the works.  
25 And we would not have moved to terminate on that day, we

1 would have given it some additional time.

2 Q. So how many conversations, specifically about  
3 John Kao did you have before John met with Martha  
4 Peugh-Wade on June 18th?

5 A. I don't recall.

6 Q. More than one?

7 A. Yes.

8 Q. More than five?

9 A. That might be a reasonable number, in that  
10 range.

11 Q. Okay. In those conversations, did you tell --  
12 what information did you convey to Elliott Neaman  
13 concerning the behaviors that John Kao was accused of?

14 A. I believe I presented it in a broad way and  
15 without identifying a specific faculty member other than  
16 these issues had been raised. And I believe Professor  
17 Neaman was aware of these issues, the behaviors in  
18 meetings because he had been in communication with his  
19 other members in the Math Department, the Associate Dean  
20 and possibly even the Dean.

21 Q. Taking a look at Exhibit 30, if you would. I  
22 hate to have you jump around but --

23 A. It's okay, no problem.

24 Q. So take your time.

25 A. Is that the June 18, 2008 memo to Professor



1 Kao?

2 Q. It is.

3 A. From Martha Peugh-Wade?

4 Q. It is.

5 A. Yes.

6 Q. And you see the paragraph describing behaviors?

7 A. The second paragraph, yes.

8 Q. All right. Now, just to be clear, taking a  
9 look at that letter, can you tell me, did you describe  
10 all those -- excuse me.

11 Did you describe all those behaviors to Union  
12 President Neaman?

13 A. I can't say if I described every one of them.

14 Q. All right. Let's just go bit by bit.

15 Taking a look at the first behavior there,  
16 "There are reports of you yelling."

17 What do you recall telling Union President  
18 Neaman before June 18th about these reports of yelling?

19 A. I doubt very much I referenced Professor Yeung,  
20 but I'm pretty confident that I raised the issue of  
21 yelling because that's one of my pet peeves.

22 Q. All right. You made a reference -- did you  
23 tell Dr. Neaman -- did you tell Union President Neaman  
24 where that yelling had taken place?

25 A. I don't recall, sir.

1 Q. Did you tell him that it occurred at faculty  
2 meetings?

3 A. I might have.

4 Q. Did you tell him it involved any particular  
5 individuals?

6 A. I might have.

7 Q. Do you recall telling him it involved  
8 Dr. Zeitz?

9 A. I don't recall.

10 Q. Did you tell him that it involved Brandon  
11 Brown?

12 A. I don't recall.

13 Q. All right. Just so that you're clear, you were  
14 aware that Dr. Zeitz was on the Union Policy Board?

15 A. Professor Zeitz is currently on the Policy  
16 Board; I'm not sure if he was on the Policy Board at  
17 that time.

18 Q. Okay. Now, did you identify -- strike that.

19 The next one is "Exhibiting highly contorted  
20 facial expressions that suggest unfeigned anger.  
21 Staring, glaring, for example, or e.g."

22 What did you tell -- what did you tell Union  
23 President Neaman about those -- that allegation prior to  
24 the meeting on June 18th with Martha Peugh-Wade?

25 A. I don't recall specifics.

1 Q. Did you tell him that Dr. Kao was doing  
2 something like that?

3 A. Strong possibility, yes.

4 Q. Did you tell him when those highly contorted  
5 facial expressions had occurred?

6 A. I don't recall.

7 Q. Did you tell him that -- did you tell him, that  
8 is Union President Neaman, that Dr. Kao had any  
9 encounter with Dean Turpin?

10 A. I most likely did.

11 Q. Did you tell Union President Neaman where that  
12 encounter -- did you describe that encounter to Union  
13 President Neaman?

14 A. I don't recall.

15 Q. Did you say that occurred at the end of April?

16 A. I don't recall, sir.

17 Q. Did you tell him that there was an encounter in  
18 the parking lot at Harney?

19 A. I don't recall.

20 Q. Did you tell him that Dean Turpin claimed that  
21 Dr. Kao had come up to her car?

22 A. I don't recall.

23 Q. Okay. The next one there is "Impeding or  
24 attempting to impede others' physical movements, e.g,  
25 sudden movements in the hallway that caused people to

1 believe he will suddenly run into them or impede their  
2 pathway."

3 Did you tell Union President Neaman about that  
4 before the meeting on June 18th?

5 A. I don't recall.

6 Q. Did you identify any instances of alleged  
7 veering in your conversations with Union President  
8 Neaman?

9 A. I don't recall.

10 Q. Did you tell him -- did you identify any of the  
11 individuals who claimed that there were sudden movements  
12 in the hallway, veering of this kind?

13 A. I don't recall.

14 Q. Did you tell him when those incidents took  
15 place?

16 A. I don't recall, sir.

17 Q. Did you tell him that Martha Peugh-Wade was  
18 investigating those incidents?

19 A. I don't recall.

20 Q. Did you tell him that Martha Peugh-Wade had  
21 interviewed people about these incidents?

22 A. I don't recall.

23 Q. Did you tell him that you were concerned that  
24 Dr. Kao was possibly assaulting or attempting to assault  
25 other faculty members?

1 A. I don't recall.

2 Q. All right. Now, next one is "Similarly bumping  
3 and/or nearly bumping into people in a manner that  
4 suggests intent to do so."

5 What did you tell Union President Elliott  
6 Neaman about this issue before the meeting with Martha  
7 Peugh-Wade on June 18?

8 A. I don't recall.

9 Q. How many times did you talk to Union President  
10 Neaman about this issue before the meeting with Martha  
11 Peugh-Wade?

12 A. I don't recall.

13 Q. Did you identify any of the individuals who  
14 claimed that this bumping or nearly bumping occurred?

15 A. I don't recall.

16 Q. Did you describe any of the circumstances under  
17 which this bumping or nearly bumping occurred?

18 A. I don't recall.

19 Q. Did Elliott Neaman ask you to describe any of  
20 the circumstances under which this bumping and/or nearly  
21 bumping occurred?

22 A. I don't recall.

23 Q. Did he ask you for anymore details about this  
24 alleged bumping and/or nearly bumping?

25 A. I don't recall.

1 Q. Did he ask you for -- sorry.

2 Next one is "Rapidly repeating the same words  
3 during meetings and conversations."

4 Did you tell anything about that to Union  
5 President Neaman before the Martha Peugh-Wade meeting on  
6 June 18?

7 A. I don't recall.

8 Q. Next one is "Displaying an expression or  
9 gesture that indicates you cannot or do not want to  
10 listen to what others have to say."

11 Did you tell that -- say anything about that to  
12 Union President Neaman before the meeting with Martha  
13 Peugh-Wade on June 18th, 2008?

14 A. I don't recall.

15 Q. All right. And then the next one is "Bizarre"  
16 -- "Bizarre chuckling in an intimidating tone that  
17 conveys the message that you were doing so to frighten  
18 whomever may hear it."

19 Did you say anything about that to Union  
20 President Neaman before the meeting on June 18?

21 A. I might have because that's one that stood out  
22 to me, along with the yelling.

23 Q. All right. Do you recall how many times you  
24 said that to Union President Neaman?

25 A. I don't recall.

1 Q. Do you recall what -- at any time did Union  
2 President Neaman ask you for more details as to any of  
3 these matters?

4 A. I believe his response throughout is "Keep me  
5 posted if anything changes and keep me advised," is kind  
6 of our working relationship.

7 Q. All right. So he said -- and did you tell him  
8 not to tell this information to John Kao?

9 A. I don't believe so, no.

10 Q. Did he tell you that your conversations with  
11 him were confidential?

12 A. I don't believe so.

13 Q. Did you tell him that he couldn't tell John Kao  
14 about these allegations that were being made against him  
15 because that might pose a risk to the faculty that were  
16 making these complaints?

17 A. I don't recall.

18 Q. Did you tell him -- did he ask you for anymore  
19 details about any of these incidents?

20 A. I believe the way I presented it is that I  
21 would keep him advised, as we have done with all other  
22 performance issues or work-related issues under the  
23 contract, and that we have a strategy and this is the  
24 strategy we're moving forward with.

25 Q. And the strategy was to do a Fitness-for-Duty

1 Examination?

2 A. That is correct.

3 Q. And you told him that was the strategy that the  
4 University was pursuing?

5 A. Yes.

6 Q. And when did you first tell him that?

7 A. Most likely before Martha Peugh-Wade met with  
8 Professor Kao and yourself.

9 Q. How much before?

10 A. I'm not sure.

11 Q. A week, a month?

12 A. The academic year normally concludes around the  
13 end of May, but I believe that summer we were bargaining  
14 at least four union contracts, so there would be a  
15 strong possibility that Professor Neaman would be on  
16 campus in the months of June and July.

17 Q. All right. In addition to May?

18 A. Yes. Thank you. Yes.

19 Q. No, I'm just --

20 A. No, no, it's very clear. Yes, we normally  
21 commence bargaining as we get close to the end of the  
22 semester and bargaining sessions usually start the week  
23 or so after.

24 Q. Do you have any notes of your conversations  
25 with Union President Neaman concerning John Kao?



1           A.    Not that I'm aware of, no, sir.

2           Q.    Do you have anything in your diary that  
3 indicates that you spoke to Union President Neaman about  
4 John Kao at any time?

5           A.    I don't have a diary.

6           Q.    Do you have anything on your computer that  
7 indicates that you spoke to Union President Neaman about  
8 John Kao?

9           A.    I don't document those type of conversations.

10          Q.    Okay.  So basically those -- there is no  
11 documentation you would have as to when you had these  
12 conversations?

13          A.    That is correct.

14          Q.    Thank you.

15                Probably that was an easier question to have  
16 asked the first time, right?

17          A.    That's okay.

18          Q.    That's all right.

19                Now, at any time did Union President Neaman  
20 tell you that he had actually spoken to Dr. Kao about  
21 any of these things?

22          A.    I don't believe so.

23          Q.    Did Union President Neaman ever tell you that  
24 he had asked -- he asked Dr. Kao for his side of the  
25 story as to any of these matters?

1           A.    I don't believe so.

2           Q.    Did he tell you that -- did Union President  
3 Neaman ask you who were the people you were -- the  
4 University was consulting with about this  
5 Fitness-for-Duty Evaluation?

6           A.    No.  I believe I just presented it in broad  
7 terms on how we were proceeding.

8           Q.    Did you tell him that you were consulting with  
9 Dr. Missett?

10          A.    Unlikely.

11          Q.    You don't have a recollection?

12          A.    No.

13          Q.    All right.  How about -- did you tell him that  
14 the Fitness-for-Duty Evaluation was going to be  
15 performed by Dr. Reynolds?

16          A.    No.

17          Q.    Okay.  Do you recall when the first time you  
18 told him there was going to be a Fitness-for-Duty Eval  
19 -- I'm sorry, I think I have asked that question.  
20 Sorry.

21                    Now, after the meeting with Martha Peugh-Wade  
22 in -- on June 18th, did you continue to speak to Elliott  
23 Neaman about John Kao?

24          A.    I believe I spoke to John Kao and yourself  
25 first before I spoke to Professor Neaman.

1 Q. And that would be the meeting of October -- in  
2 October?

3 A. No, sir. I believe it was the afternoon of the  
4 June 18th meeting you had with Martha Peugh-Wade.  
5 Professor Kao and yourself were at the bottom of the  
6 stairs of Lone Mountain at the bus stop, and I was  
7 coming from bargaining and it was the first time I met  
8 you.

9 Q. Okay. I don't even recall what we said. So  
10 anyway, did we say "hi"?

11 A. We did, and John made a few comments to me.

12 Q. All right. John introduced me to you?

13 A. He did.

14 Q. Now -- all right. Now, after that -- in that  
15 conversation, did you identify anything specific that  
16 John Kao had done concerning -- that was of concern to  
17 the University?

18 A. No.

19 Q. Okay. Now, after that meeting -- by the way,  
20 how did John Kao look at that meeting, at the time you  
21 ran into him at the bus stop?

22 A. You were at the bottom of the stairs of Lone  
23 Mountain on Turk Boulevard. In my mind, John was  
24 visibly upset, and I knew the meeting was taking place.

25 As I was walking up the street -- Chabot

1 intersects with Turk, so as I am proceeding, I'm asking  
2 myself do I want to engage in conversation because I  
3 knew what had taken place. And we exchanged  
4 pleasantries with John, I believe said, "They're trying  
5 to get rid of me."

6 Q. And what did you say in response to that?

7 A. I believe my response was "I hope we can work  
8 something out."

9 Q. Just out of curiosity, did you deny that you  
10 were trying to get -- that the University was trying to  
11 get rid of him?

12 A. I don't think we were trying to get rid of him  
13 at that time, sir.

14 Q. Did you know that John Kao was being  
15 surveilled, video surveillance at that time?

16 A. No, I was not.

17 Q. At any time have you been told that the  
18 University had arranged for private investigators to be  
19 filming John Kao coming and going from the  
20 June 18th meeting with Martha Peugh-Wade?

21 A. I was not.

22 Q. Now, going back to your notes, if we could.

23 A. Exhibit 41, sir?

24 Q. Yes.

25 A. Yes.

1 Q. Taking a look again at Exhibit 41. Going down  
2 to the -- those initials on the side "JK" and it looks  
3 like "DQP"?

4 A. That would be my initials, sir. Sorry for my  
5 poor penmanship; that is DJP.

6 Q. DJP. It's okay. That's why you're here.

7 No, not the poor penmanship; to read the  
8 things.

9 Taking a look at the first comment that's  
10 attributed to you on this, on your notes, you write  
11 down -- what do you write down right -- it looks to me  
12 "Unpaid and benefit"?

13 A. "Plus benefit." Yes.

14 Q. So does that refresh your recollection that Dr.  
15 Kao was currently on an unpaid leave of absence?

16 A. If that's what I wrote down, then I assume  
17 that's true.

18 Q. Okay. Now, taking a look at the next page, if  
19 you would.

20 A. Yes.

21 Q. From the bottom of the first page up to the --  
22 through the bullet points on the second page, those were  
23 reflecting comments by one of Dr. Kao's attorneys?

24 A. Yes.

25 Q. And that's "K" -- looks like "KH"?

1 A. Yes.

2 Q. Do you know who KH is? I can give you hints,  
3 if you don't recall.

4 A. I believe it's a gentleman that's questioning  
5 at the moment.

6 Q. "KH" would not be the gentleman who's  
7 questioning. It would be -- would Kim Hancock strike  
8 you as the right name?

9 A. That would -- that was your colleague there  
10 that day, yes. I apologize.

11 Q. It's okay.

12 I'm just -- Kim is a female, so I was a little  
13 concerned.

14 So -- so the first thing Ms. Hancock tells you  
15 is same as before?

16 A. "No legal right."

17 Q. In other words, you had no legal right to  
18 demand a fitness for duty?

19 A. That is correct.

20 Q. Okay. So now going on to the top of the second  
21 page.

22 A. Yes.

23 Q. It continues with the remarks by Ms. Hancock.

24 A. Yes.

25 Q. All right. And let's just take a look at

1 those, what she said to you.

2 A. The first note I have here is "You have fired  
3 him."

4 Q. So looking at that, does that refer to the fact  
5 that you basically put him on involuntary leave, the  
6 University had put him on involuntary leave?

7 A. Yes.

8 Q. Okay. And the next thing, what is -- what do  
9 you record her saying?

10 A. "No basis to do -- invade his privacy."

11 Q. And what's the next thing she says?

12 A. "How do you want to resolve this?" and "legal  
13 option."

14 Q. And there is also another name opposite, "How  
15 do you want to resolve" -- I'm sorry, strike that.

16 "How do you want to resolve this," and then she  
17 answers there's a legal option, right?

18 A. Yes.

19 Q. Do you record any response to you as to the  
20 question, "How do you want to resolve this?"

21 A. I don't, sir.

22 Q. All right. And the next thing Ms. Hancock  
23 says, can you read that?

24 A. "I will not file a grievance. Not appropriate.  
25 There is legal standards."

1 Q. Okay. And when she says "legal standards," did  
2 you ask her what she meant?

3 A. I might have.

4 Q. Do you recall what you asked her and what she  
5 responded?

6 A. No, sir.

7 Q. Was she identifying the legal standards under  
8 the Fair Employment and Housing Act?

9 A. I don't recall.

10 Q. Okay. By the way, in arbitration under the --  
11 strike that. Never mind.

12 And then can you read your next note there?

13 A. "Reserve admin." I'm not quite sure what that  
14 means, sir.

15 Q. Okay. Thank you.

16 And then the next one -- note appears to be a  
17 comment by you?

18 A. Yes.

19 Q. And can you read that to the jury?

20 A. "Insubordination could result in suspension and  
21 termination." A little asterisk below it, "No basis."

22 Q. And that "No basis" would be referred to a  
23 comment by whom?

24 A. I believe by counsel, John's counsel.

25 Q. Okay. Now, as we're talking about this, at



1 this meeting, what options did you propose -- did you  
2 propose at this meeting other than a Fitness-for-Duty  
3 Examination by Dr. Reynolds?

4 A. I don't believe I formally proposed anything.

5 Q. Okay. Did you informally propose anything?

6 A. Can you give me a minute to look at my notes,  
7 sir?

8 Q. Please. I'm sorry, this is not a trap, you  
9 take as much time as you need.

10 A. I don't.

11 Q. You don't see any proposals that you made  
12 during that meeting?

13 A. No, I do not.

14 Q. Okay. Now, go down, if you will, to the next  
15 note that you have. And what does that say?

16 A. I'm sorry, sir, are you referring to my  
17 notation?

18 Q. I am indeed.

19 A. Okay. So the second one, "No evidence of  
20 threat. Never produced evidence."

21 Q. Okay. Is that something that Dr. Kao or his  
22 counsel told you?

23 A. Yes.

24 Q. And the "Never produced evidence," do you  
25 understand what that refers to?

1           A.    I believe it's in reference to the University  
2 not providing names or dates of incidents that might  
3 have occurred.

4           Q.    All right.  And did you tell Dr. Kao that he  
5 could talk to Union President Neaman who knew all about  
6 this?

7           A.    My notes don't reflect it, but Professor Neaman  
8 was in the room and it was my hope that I could get John  
9 to engage in conversation with his union and bring this  
10 issue under the Collective Bargaining Agreement where I  
11 believed it belonged.

12          Q.    When in response to the statement you "never  
13 produced evidence," did you tell Dr. Kao or his counsel  
14 that, yeah, you've talked this over with Elliott Neaman,  
15 Union President, and you can find out any information  
16 you need from him?

17          A.    I don't believe I said it that way.  I don't  
18 believe I --

19          Q.    Did you refer Dr. Kao to Elliott Neaman at all?

20               MR. VARTAIN:  Motion.  Please let the witness  
21 finish his sentence.  Objection.

22               THE COURT:  Mr. Philpott, do you need more time  
23 to answer the question?

24               THE WITNESS:  I believe I can answer it, sir.

25               I don't recall.

1 MR. KATZENBACH: Q. Looking at your notes, is  
2 there anything in there that you indicate to Dr. Kao or  
3 his counsel that you have been talking to Elliott  
4 Neaman?

5 A. No.

6 Q. Is there any comments by Elliott Neaman  
7 recorded in this meeting at all?

8 A. No. I think Professor Neaman sat at the  
9 meeting and didn't say anything.

10 Q. So when Dr. Kao's counsel said, "You never  
11 produced any evidence," right, Elliott Neaman didn't  
12 say -- didn't stand up and say "Oh, no, he's talked to  
13 me"?

14 A. President Neaman did not say that.

15 Q. Or anything like that? Well, strike that. If  
16 he was quiet, he didn't say anything like that?

17 A. Correct.

18 Q. Okay. Thank you.

19 Now, the next note that we have on this is --  
20 says what?

21 A. "No responsibility to attend. Article 19."

22 Q. Do know what that --

23 THE REPORTER: I'm sorry, "To attend"?

24 THE WITNESS: "No responsibility to attend.  
25 Article 19."

1 MR. KATZENBACH: Q. What's that mean?

2 A. I'm not quite sure what Article 19 is, sir.  
3 Again, these contracts do adjust. So if you can refresh  
4 my memory of what Article 19, I could answer.

5 Q. Okay. Could you please take a look at, I  
6 believe is Exhibit 8.

7 A. Yes.

8 Q. That's a copy of the Collective Bargaining  
9 Agreement?

10 A. That is correct.

11 Q. And what is Article 19?

12 A. Article 19 outlines the professional  
13 responsibilities of faculty.

14 Q. Okay. And so the "No responsibility to  
15 attend," that means to attend the Fitness-for-Duty  
16 Examination?

17 A. It could be.

18 Q. And there was a reference to article -- and in  
19 response to that, there is a reference to Article 19 of  
20 the Collective Bargaining Agreement?

21 A. Yes.

22 Q. And it -- which describes professional  
23 responsibilities of the faculty?

24 A. Yes.

25 Q. And in Article 19, is there any requirement

1 that the faculty attend a Fitness-for-Duty Evaluation?

2 A. No.

3 Q. And can you turn now and go to the next  
4 notation you have on Exhibit 41.

5 A. "What extent should I be asked to do. JK."

6 Q. "What extent should I be asked to do."  
7 What does that mean?

8 A. I don't recall.

9 Q. And that's a comment that Dr. Kao made?

10 A. Yes.

11 Q. All right. Thank you.

12 Now, I'd like to move on to page 3 of your  
13 notes.

14 A. Yes.

15 Q. Pardon me. Darn it, okay.

16 Looking at page 3 of your notes, what's the  
17 first entry on page -- page 3 refer to?

18 A. The initials "JK" and following that "Copy of  
19 prior issue," the word "binder" circled.

20 Q. All right. At that time did Dr. Kao hand you a  
21 copy of the prior Complaint of Discrimination?

22 A. I believe Dr. Kao put forward a fairly thick  
23 binder with a number of items included.

24 Q. And was that the Complaint of Discrimination  
25 that he had filed?

1 A. I believe that was in the binder, yes.

2 Q. All right. And did Dr. Kao explain to you why  
3 he was handing you this binder?

4 A. He did.

5 Q. And what did he say?

6 A. He had some information that he would like to  
7 present to -- to me, and I believe with the hope that I  
8 would share it with the University and the information  
9 would help the University better understand his  
10 position.

11 Q. And did that concern -- at this point, did Dr.  
12 Kao indicate that he felt that this demand for a  
13 Fitness-for-Duty Evaluation was perhaps retaliatory?

14 A. I don't recall.

15 Q. And then the next line in there, that says --  
16 appears to me to say "New info. JK"?

17 A. Yes.

18 Q. What's that?

19 A. There was some new information that Professor  
20 Kao wanted to put forward to make sure that in my role I  
21 was aware of it, and with the hope that I would share it  
22 with people that I reported to and worked with.

23 Q. All right. And -- so what did Dr. Kao tell  
24 you?

25 A. The first note here, "I was never approached in

1 Spring '08 regarding these issues. Outside meeting.

2 Martha Peugh-Wade" -- "MPW," Martha Peugh-Wade.

3 Next line it says, "First time." So it was the  
4 first time that this information was shared with John.  
5 "No facts or evidence. Not given a chance to change  
6 behavior."

7 Q. All right. Now, in the course of this meeting,  
8 did Dr. Kao offer to meet with people to discuss any  
9 fears or concerns they had?

10 A. I'm not sure if he raised it during the meeting  
11 or at a later date. It was put in writing, so I was  
12 aware of that offer.

13 Q. Okay. Now, you communicated with Dr. Kao about  
14 that offer, didn't you?

15 A. I'm not sure if I communicated to Dr. Kao  
16 during the course of this meeting or if it was in my  
17 written correspondence to him.

18 Q. Fair enough.

19 Take a look at -- if you would, take a look at  
20 Exhibit 43, if you would.

21 A. Is that the January 23rd, 2009 letter from me  
22 to Professor Kao?

23 Q. It is.

24 A. Okay. Yes.

25 Q. And that references the offer for a

1 clear-the-air meeting?

2 A. Give me a minute to review it, please.

3 Q. Sure. I'll give you a minute to try to call it  
4 up, too.

5 A. Yes, I'm responding to your offer to allow John  
6 to meet with his colleagues to clear the air. I was  
7 responding to that.

8 Q. All right. And taking a look at what -- why  
9 don't you read to the jury what you said there,  
10 beginning with the paragraph that begins "Your  
11 attorney"?

12 A. Okay. "Your attorney has once again suggested  
13 that the University resolve this matter by accepting a  
14 letter from you or allowing you to attend a meeting in  
15 which you would assure the University you intended no  
16 harm to anyone.

17 "While it is undeniably true that the  
18 University seeks such assurances and has sought such  
19 assurance since it first directed you to participate in  
20 the evaluation, in light of your behavior, you are not  
21 the one who can provide the level of assurance the  
22 University requires. The assurance the University  
23 requires must come from someone with the necessary  
24 expertise, i.e., an independent position."

25 Q. First question I'd like to ask you about this,



1 at -- at the meeting or in this letter, did you tell Dr.  
2 Kao that the University was not allowing -- did not want  
3 to conduct any meeting because people were afraid of  
4 him?

5 MR. VARTAIN: Objection. Compound and  
6 ambiguous.

7 THE COURT: Overruled. The witness may answer.

8 THE WITNESS: I'm not sure if I communicated  
9 that to Dr. Kao in our October meeting. And the letter  
10 states what it states.

11 MR. KATZENBACH: Q. That's fine.

12 And throughout this period of time, from the  
13 date the demand was made for a Fitness-for-Duty  
14 Examination through your letter that we just read, the  
15 only independent physician that the University had  
16 stated that Dr. Kao needed to go to was Dr. Reynolds?

17 MR. VARTAIN: So stipulated. We've actually  
18 entered into that stipulation, so it's irrelevant.

19 THE COURT: Well, Mr. Katzenbach, do you want  
20 to try the stipulation or try to carry on without it?

21 MR. KATZENBACH: I think the answer would be  
22 shorter than the stipulation, but I'll be happy to enter  
23 into that stipulation.

24 THE COURT: Okay.

25 MR. KATZENBACH: Q. That means, sir, you don't

1 have to answer the question.

2 A. Okay.

3 Q. Now, I'd like to go back again -- and I'm sorry  
4 to jump around on you again, but back to your notes  
5 on the -- back to your notes, which are Exhibit 41.

6 A. Yes.

7 Q. All right. Now, taking a look now, continuing  
8 on the third page of Exhibit 41. Does that begin  
9 listing a series of documents that Dr. Kao provided to  
10 you?

11 A. Yes.

12 Q. And you also after that meeting prepared a  
13 written -- a summary of the documents that he provided,  
14 correct?

15 A. Yes.

16 Q. Take a look -- if you just quickly would jump  
17 to Exhibit 42.

18 A. Yes.

19 Q. Is that a list of the documents Dr. Kao  
20 provided to you?

21 A. Yes, sir.

22 Q. All right. And how many -- on Exhibit 42 --

23 MR. KATZENBACH: Excuse me, at this point I'd  
24 like to move Exhibit 42 into evidence.

25 THE COURT: Any objection?

1 MR. VARTAIN: No objection.

2 THE COURT: It's received.

3 (Whereupon, Plaintiff's Exhibit 42 was  
4 marked for identification and admitted into  
5 evidence.)

6 MR. KATZENBACH: Q. How many entries did you  
7 put on Exhibit 42?

8 A. Can you give me a minute to count?

9 Q. Yeah.

10 A. Thanks.

11 Approximately 22.

12 THE COURT: Ladies and gentlemen, remember the  
13 admonitions. Do not form or express any opinion on this  
14 case until it's finally submitted to you for your  
15 decision. Do not discuss among yourselves or with  
16 others until that time.

17 Please be back in your places at 2:40,  
18 according to the courtroom clock.

19 (Recess taken.)

20 THE COURT: Jurors and alternates are all  
21 present. Counsel from both sides are present.  
22 Plaintiff is personally present. Mr. Philpott is on the  
23 stand.

24 You may continue, Mr. Katzenbach.

25 MR. KATZENBACH: Yes, Your Honor.

1 Q. Now, Mr. Philpott, going back to Exhibit 41,  
2 which is your notes of the meeting, again, those notes  
3 reflect -- reflect that Dr. Kao provided you a number of  
4 documents during the meeting?

5 A. Yes.

6 Q. All right. Now -- and -- so going on to the  
7 next page of your notes.

8 A. Yes.

9 Q. And going on to the next page of your notes --  
10 strike that.

11 Looking at the list of documents that he gave  
12 you, I'd like you to look at the number you circled,  
13 three.

14 A. Okay.

15 Q. And taking a look at the number you circled  
16 three, can you read what that paragraph says?

17 A. Yes. "Department minutes. Very active.  
18 Involved. No behavior mentioned."

19 Q. Do you know what that referred to?

20 A. I'm assuming describing the minutes of the  
21 meeting that John attended.

22 Q. Okay. And did you ask John to clarify that?

23 A. I'm not sure.

24 Q. Taking a look -- going down your list at the  
25 next one, what does that address?

1           A.    "Search meeting, January/Feb.  Starts math  
2 club, 4:00 to 6:00.  Friday, 5:00 to 6:00.  No  
3 supervision by others.  Continue all semester."

4           Q.    Do you know what the math club was?

5           A.    Yes, I believe Professor Kao started a math  
6 club on campus.

7           Q.    And what was that -- and when he was  
8 referencing this, what was he referencing -- this was a  
9 student organization you understood?

10          A.    Correct.

11          Q.    Okay.  And -- now, he raised this as an issue,  
12 he raised with you at the meeting?

13          A.    Yes.

14          Q.    And he indicated that this continued all  
15 semester?

16          A.    Yes.

17          Q.    Now, going back to the bottom one, No. 6.

18          A.    Yes.

19          Q.    I'm trying to pull it up in my clumsy little  
20 way.

21          A.    It says, "Meeting.  Evenings/weekend," W stands  
22 for "with," "students."

23          Q.    And did you understand the point that Dr. Kao  
24 was attempting to make there?

25          A.    I believe it was similar to the point he was

1 trying to make in No. 4.

2 Q. Which was?

3 A. That he was around students and that they did  
4 not feel threatened. He was in a safe environment with  
5 them.

6 Q. Thank you.

7 Taking a look at the next page that continues  
8 on with a No. 7.

9 A. Yes.

10 Q. All right. Taking a look at No. 7. Can you  
11 read that -- what does that entry refer to?

12 A. "James Finch. RT," retirement party, "invited.  
13 No meetings at this time. Many faculty presence at one  
14 hour with farmer" or "with former student. Craig's  
15 List. Tristan encouraged him to attend."

16 Q. Okay. And then there is another entry, the  
17 next entry for --

18 A. June.

19 Q. -- June 8?

20 A. That's correct. "Invited to baby shower. Did  
21 not attend. Mother ill."

22 Q. Okay. And then it continues on down. What's  
23 another item he mentions?

24 A. "September 29. Invited to department party.  
25 Chair's home," I believe that was referring to the

1 department chair of the Math Department, "Planning to go  
2 to party. Cancelled to someone's illness."

3 Q. All right. Do you know who the chair of the  
4 department was at that September 29th party?

5 A. I'm not positive. Sorry.

6 Q. Would it be Peter Pacheco?

7 A. Pacheco or Professor Zeitz.

8 Q. All right. And now the last entries on this  
9 page concern e-mail cut off?

10 A. Yes.

11 Q. And I notice there is an asterisk next to the  
12 September 29 remarks. What's that asterisk mean?

13 A. Many times I make asterisks in my notes during  
14 the course of a meeting as something I want to follow up  
15 on.

16 Q. Do you recall following up on that?

17 A. I believe I did.

18 Q. Did you ever report to Dr. Kao the results of  
19 your follow-up?

20 A. No, I did not.

21 Q. Now, taking a look now at the last page of  
22 Exhibit 41.

23 A. Yes.

24 Q. Can you tell us what those entries refer to? I  
25 am going to pull them up here, if I can.

1           A.    It says, "Remedy," and there's three entries  
2 below next to that, "Backpay. Withdraw claims. Will  
3 not sue."

4           Q.    Okay. When you use the word "remedy," what  
5 does that mean?

6           A.    It's a term that we use in labor relations and  
7 sometimes used outside of labor relations arena, but  
8 it's things that are put forward in order to resolve any  
9 outstanding issues. In this case, possibly what John  
10 put forward.

11          Q.    Now, "Withdraw claims," what did that mean?

12          A.    I'm not positive, but it could be referring to  
13 any outstanding claims that might be on the table or in  
14 front of both parties.

15          Q.    And "Will not sue," what did that refer to?

16          A.    That is -- many times when we put together  
17 grievance remedies, it is trying to resolve all  
18 outstanding issues. And with the understanding that if  
19 we reach a settlement or an agreement, that the other  
20 party will not sue. There is kind of a compromise.

21          Q.    All right. And is it your understanding this  
22 was a proposal from Dr. Kao?

23          A.    I don't have his initials next to it, so I'm  
24 not sure who proposed it, sir.

25          Q.    This wasn't a proposal by the University, was



1 it?

2 A. I'd love to take credit for it, but I'm not  
3 sure, to be honest.

4 Q. Okay. Fair enough.

5 And then on the other side of the page we have  
6 two words, and I think the second one is "data" but I'm  
7 not sure what the first word is.

8 A. "Objective data."

9 Q. What does that refer to?

10 A. I don't recall.

11 Q. Was that a reference to Dr. Kao's request for  
12 some -- objective information about the alleged  
13 behaviors of his?

14 A. I don't recall.

15 Q. Okay. Now, would it be correct to state that  
16 Dr. Kao was repeatedly asking for more information on  
17 the allegations against him?

18 A. He asked for it more than once, yes.

19 Q. And when you made these proposals for  
20 arbitration -- do you recall those?

21 A. In the written communications, yes.

22 Q. Yes. Okay. In response to those, did Dr. Kao  
23 continue to ask for more information about the  
24 allegations against him?

25 A. I'm not sure. Can I look at the letters,

1 please?

2 Q. Yes. Yes, Mr. Philpott.

3 And, please, Mr. Philpott, whenever you are not  
4 sure and you think those documents will help you, please  
5 raise it, it's perfectly fair to do that.

6 A. Thank you. What exhibit should I look at, sir?

7 Q. I think you might want to look -- you should  
8 look at Exhibit 227.

9 A. Is that the October 3rd, 2008 letter from me to  
10 you?

11 Q. Yes.

12 A. Okay.

13 THE COURT: What was the exhibit number?

14 MR. KATZENBACH: 227.

15 THE WITNESS: Yes.

16 MR. KATZENBACH: 227.

17 THE COURT: Thanks.

18 MR. KATZENBACH: Q. That's the start of the  
19 scheduling of the meeting, correct?

20 A. Yes.

21 Q. All right. I'd like you to take a look at  
22 Exhibit 231.

23 A. Is that the January 22nd, 2009 letter from your  
24 office to my attention?

25 Q. Yes.

1 A. Okay.

2 Q. Now, will you please read the paragraph labeled  
3 "First" to the jury?

4 A. "This is in response to your letter dated  
5 January 16, 2009 to Professor Kao offering to submit  
6 this matter to a retired jurist that would be advisory  
7 to him and binding only to the University."

8 Q. Okay. Continue.

9 A. "First, Professor Kao must reject this offer as  
10 it would only be" -- "it would only add additional time  
11 and expense in asserting his legal rights. The  
12 nonbinding advisory arbitration procedure prevents  
13 Professor Kao from receiving the full benefits and  
14 protections of a court action.

15 "Your assertion that Professor Kao may have  
16 discovery of whatever the retired jurist approves only  
17 highlights his concern that he will be denied full  
18 discovery rights as to the underlying events the  
19 University is relying upon and that the procedure  
20 confers undue power on the retired jurist to prejudice  
21 Professor Kao's legal rights."

22 Q. Now, at any time, from June 18 to the date Dr.  
23 Kao was discharged, did the University give Dr. Kao any  
24 additional information concerning these allegations?

25 A. To my knowledge, no.

1 Q. They never, for example, told him that some of  
2 this yelling occurred at a particular faculty meeting?

3 A. No.

4 Q. They never told him that some of these events  
5 concerned a bowing incident in June?

6 A. No.

7 Q. None of these -- none of the information said  
8 that some of these incidents included mocking Peter  
9 Pacheco sometime in May?

10 A. No.

11 Q. They never told him that this veering  
12 incident -- that there was a veering incident occurring  
13 sometime in June?

14 A. No.

15 Q. They never told him that they were uncertain of  
16 the dates when these alleged bumping incidents may have  
17 taken place?

18 A. No.

19 Q. Did you interview -- you've seen the interviews  
20 that Martha Peugh-Wade did of the faculty members,  
21 correct?

22 A. I saw a summary of some of the interviews; I'm  
23 not sure if Martha Peugh-Wade was the person who  
24 conducted the interviews.

25 Q. Fair enough.

1           Have you interviewed any faculty members in  
2 addition to those interviewed by Martha Peugh-Wade?

3           A.    No.

4           Q.    Did you interview any of the other attendees --  
5 strike that.

6           If you didn't interview them, you didn't  
7 interview.

8           Now, you dealt with labor relations for the  
9 University for how many years?

10          A.    Approximately 19.

11          Q.    During that time, has anybody -- any employee  
12 gotten written up for discipline for hitting someone  
13 else?

14          A.    Yes.

15          Q.    Have you ever investigated an allegation that  
16 somebody hit -- one employee hit another?

17          A.    A few of them, yes.

18          Q.    When you do that, do you try to get both sides  
19 of the story?

20          A.    If it's a union employee?

21          Q.    Yeah.

22          A.    Yes.

23          Q.    Kao was a union employee, wasn't he?

24          A.    Yes.

25          Q.    When you find -- when you conclude that the

1 evidence shows that Bob hit Bill with a two-by-four,  
2 what happens to Bob?

3 A. Normally in those cases we would put Bob out on  
4 leave and we would investigate it.

5 Q. All right. And after that investigation, what  
6 would you -- that investigation would be the one that  
7 included getting Bob's side of the story?

8 A. Yes.

9 Q. That investigation would determine if Jessie  
10 was a witness?

11 A. Yes.

12 Q. And when you got all of that information, you'd  
13 make a decision on how to proceed?

14 A. Yes.

15 Q. And that decision could include taking  
16 disciplinary action?

17 A. Yes.

18 Q. Up to and including discharge?

19 A. Yes.

20 Q. Now, are you familiar with Last Chance  
21 Agreements as part of the grievance procedure?

22 A. We have used Last Chance Agreements with our  
23 employees, yes.

24 Q. And those agreements are, as I understand it,  
25 essentially you did bad, we're giving you one last

1 chance; you do bad again, you're gone?

2 A. Yes.

3 Q. Sort of last chance?

4 A. Yes.

5 Q. Okay. Now, how many other employees have you  
6 sent for Fitness-for-Duty Evaluations because of  
7 concerns over safety?

8 A. Can you define "safety," because there's  
9 different ways to use safety. There's personal safety  
10 and then there's safety for others around them and  
11 colleagues.

12 Q. Let's take -- you're thinking two or three  
13 categories?

14 A. Three categories.

15 Q. Okay. Let's take safety for them.

16 A. Yes.

17 Q. Safety for others?

18 A. Yes.

19 Q. Safety for colleagues?

20 A. Yes.

21 Q. And the circumstances under which those  
22 Fitness-for-Duty Evaluations have occurred, have they  
23 followed specific events?

24 A. Yes.

25 Q. Can you describe the events that have led you

1 to file for -- require Fitness-for-Duty Evaluations of  
2 those employees?

3 A. There was a Public Safety officer who we sent  
4 and she participated in a fitness for duty. I don't  
5 recall the specifics, but I'm aware that there was a  
6 fitness for duty for a Public Safety officer.

7 We had engaged in conversation with another  
8 faculty member. And I believe there were a couple of  
9 different faculty members over the years. And leading  
10 up to it they made some personal decisions that they  
11 wanted to retire before we went down that road.

12 Q. Did those -- the ones you recall, did those all  
13 involve a question of whether the employee was able to  
14 perform their faculty job?

15 A. Yes.

16 Q. I believe one of them concerned whether the  
17 faculty member was having student complaints against  
18 him, right?

19 A. That is correct.

20 Q. And that was because he appeared not to be  
21 showing up for class?

22 A. That is correct.

23 Q. Or certainly not within the first ten minutes?

24 A. Yes.

25 Q. Okay. Thank you.



1           And there was another faculty member that a  
2 student complained about that involved him repeatedly  
3 speaking favorably about 9/11 terrorists?

4           A.    I don't recall that one.

5           Q.    Okay.  And then there's the Public Safety  
6 officer?

7           A.    Yes.

8           Q.    What was the problem with the Public Safety  
9 officer?  I'm sorry, don't -- what was -- was there a  
10 precipitating incident that you recall, let's put it  
11 that way?

12          A.    I don't recall the specifics.

13          Q.    And the Public Safety officers at USF are  
14 armed?

15          A.    The officers are; community service officers  
16 are not.

17          Q.    Thank you.

18                   Now, was this an armed or an unarmed officer?

19          A.    She had worn two different hats.  She was a  
20 dispatcher and a patrol officer, so there were times  
21 when she did carry a side arm.

22          Q.    And when we say "side arm," we mean gun?

23          A.    Yes.

24          Q.    I don't mean to -- just in case.

25                   Now -- when you received the documents from --

1 after your meeting in October, did you -- from Dr. Kao,  
2 did you give those documents to Ms. Peugh-Wade or Dean  
3 Turpin?

4 A. I discussed them with them. I'm not positive  
5 if I shared the binder or how that information was  
6 shared, but I do recall conversations with them  
7 regarding the documents.

8 Q. Okay. And did they engage any further  
9 investigations, as far as you know?

10 A. We did a -- I was involved in following up on  
11 the e-mails.

12 Q. Did you ask Steve Devlin whether he was --  
13 Professor Devlin whether he was afraid of John Kao?

14 A. I never spoke to Professor Devlin.

15 Q. Did anyone, to your knowledge, speak to  
16 Professor Devlin?

17 A. I believe Professor Devlin was deposed at some  
18 point but not before -- I'm not aware of anyone speaking  
19 to Professor Devlin before John was terminated.

20 Q. Okay. In a grievance procedure -- strike that.  
21 After this meeting with Dr. Kao in October, did  
22 you have any further discussions with Elliott Neaman  
23 from the union?

24 A. I did.

25 Q. How many times?

1           A.    I can't give you an exact number, I'm sorry.

2           Q.    Okay.  Did you continue to discuss the  
3   allegations against Dr. Kao?

4           A.    I believe the conversations consisted of, has  
5   Professor Kao reached out to you?  Is there going to be  
6   a grievance?  Can you talk to Professor Kao?  I believe  
7   that was the intent of my conversations with him.

8           Q.    Are you aware of any time that Dr. Neaman --  
9   Union President Neaman ever talked to Dr. Kao about  
10   these matters?

11          A.    To my understanding they never spoke.

12          Q.    Do you know whether Dr. Neaman is a friend of  
13   Dr. Zeitz?

14          A.    I believe they are friends, yes.

15          Q.    At any time did Dr. Neaman tell you that he was  
16   concerned that his friendship with Dr. Zeitz might  
17   influence his judgment in this matter?

18          A.    No.

19                THE REPORTER:  Excuse me, was that "Neaman"?

20                MR. KATZENBACH:  Neaman.  Union President  
21   Neaman.

22                THE WITNESS:  Why don't you just refer to him  
23   as Elliott, it probably would be easier.

24                MR. KATZENBACH:  Probably would be but seems  
25   too informal.

1 Q. Throughout this issue, what was the safety  
2 issue that concerned you regarding Dr. Kao?

3 A. I think there was overall concern for Professor  
4 Kao's personal safety and for those of his colleagues  
5 and for the University community.

6 Q. Well, to put it in direct terms, was the  
7 concern that they thought that Dr. Kao was mentally  
8 unstable?

9 A. I'm not a trained physician, and my HR  
10 colleagues are not -- to my knowledge, are not trained  
11 in that. There was concerns, and that is why we moved  
12 forward with the Fitness-for-Duty Exam. That was our  
13 intent.

14 Q. Well, I'm just trying to get -- is that why --  
15 after Dr. Kao's termination of employment, he was -- his  
16 ban from campus continued?

17 A. That is correct.

18 Q. And was that continued because of these same  
19 safety concerns?

20 A. Yes.

21 Q. And was that based on a perception that he was  
22 unstable?

23 A. I believe it was based on reassurances to our  
24 faculty and the students and other administrators that  
25 we were going to provide them a safe environment so they

1 could do their jobs.

2 Q. And was that a safe environment because you  
3 perceived Dr. Kao as being unstable mentally?

4 A. I can't draw a conclusion if he was mentally  
5 unstable. We weren't quite sure what was going on and  
6 that's why we wanted the evaluation.

7 Q. In other words, mental instability was a factor  
8 in continuing the ban from campus?

9 A. It could be put into the bucket of concerns  
10 that we had. It was one of -- it was a concern, but I  
11 don't want to say it was mental illness. I'm not  
12 trained in that arena.

13 Q. Now, if -- I'd like you, if you could, to take  
14 a look at what's been marked as Exhibit 35.

15 A. Yes.

16 Q. Please take a look at that.

17 A. Is that the document dated June 26, 2008, a  
18 letter from your firm to Martha Peugh-Wade?

19 Q. It is indeed.

20 A. Okay.

21 Q. Do you have that in front of you?

22 A. Yes, sir.

23 Q. You are much faster than me.

24 Taking a look at the last page of Exhibit 35,  
25 would you take a look at that?

1           A.    The last page I have is a list of CCs; is that  
2           the one you're referring to?

3           Q.    No, the page right before that.  I apologize to  
4           you.

5           A.    Okay.  Page 5.

6           Q.    Page 5?

7           A.    Yes.

8           Q.    Taking a look at page 5, what does the last  
9           paragraph of that page say?

10          A.    "The University's actions appear to be in  
11          retaliation for Professor Kao's internal grievances that  
12          have alleged, among other things, discrimination and  
13          violation of University policies."

14          Q.    Okay.

15          A.    "Indeed Professor Kao recently filed an  
16          informal grievance regarding the department's recent  
17          hiring process and had informed your office that he  
18          would be making this grievance a formal one."

19          Q.    Now, would you please take a look at  
20          Exhibit 36.

21          A.    Is that the document dated June 30, 2008 a  
22          letter from Martha Peugh-Wade to Professor Kao?

23          Q.    Yes, it is.

24                    And again, taking a look at that exhibit,  
25          that's a -- what is that -- the first line of that --

1 first page of that after "Professor Kao," what does that  
2 say?

3 A. "I have received and reviewed your  
4 correspondence of 6/26 and 6/27. Despite your  
5 objections, your appointment with the IME remains in  
6 effect."

7 Q. Taking a look at the remaining part of this  
8 letter, do you see anywhere in there where Martha  
9 Peugh-Wade expressly denies Dr. Kao's claim that he was  
10 being retaliated against?

11 A. No, it does not.

12 Q. Now, do you think it would be fair for the jury  
13 to find retaliation just based on the fact that she  
14 failed to deny it?

15 MR. VARTAIN: Objection. Argumentative.

16 THE COURT: Sustained.

17 MR. VARTAIN: And I'd like a direction to the  
18 attorney, we're now at Evidence Code 352 time where it's  
19 going nowhere. That -- that particular question that  
20 the attorney knows is objectionable evidences the 352  
21 problem.

22 THE COURT: Your request for exclusion pursuant  
23 to 352 again is closed -- is denied.

24 Mr. Katzenbach try and close that line.

25 MR. KATZENBACH: Your Honor, I am as close as

1 we're going to get with this examination at this point.

2 Thank you, sir. I'm through.

3 THE COURT: All right.

4 MR. KATZENBACH: And let me just, if I might --

5 THE COURT: Mr. Katzenbach is done.

6 Mr. Vartain?

7  
8 REDIRECT EXAMINATION BY MR. VARTAIN

9 MR. VARTAIN: Q. Would you please,  
10 Mr. Philpott, open up 231, Mr. Katzenbach's letter to  
11 you rejecting the -- the proposal you made to have the  
12 retired judge decide the dispute?

13 A. That was the January 22nd, 2009 letter?

14 Q. Yes, the letter. I want to ask you one  
15 question about where he says, Mr. Katzenbach "The  
16 procedure confers undue power on the retired jurist to  
17 prejudice Professor Kao's legal rights."

18 A. Yes.

19 Q. Did you understand what Mr. Katzenbach meant by  
20 the retired jurist having power to prejudice Professor  
21 Kao?

22 A. No, I did not.

23 Q. You answered some questions from Mr. Katzenbach  
24 about other cases where the University has, I think you  
25 said "gone down the road," quote/unquote, towards the



1 Fitness-for-Duty Evaluation?

2 A. Yes.

3 Q. There were several times where the University  
4 was indicating to faculty members that it was going to  
5 require that but the faculty members made a decision to  
6 retire before the medical evaluation?

7 A. That is correct.

8 Q. Would it be fair to say that the University  
9 rarely uses the independent medical procedure, it  
10 reserves that for very rare situations?

11 A. Yes.

12 Q. In those situations where it was a full-time  
13 faculty member, in other words the same kind of faculty  
14 member as Dr. Kao that the University was going down the  
15 road for a Fitness-for-Duty Evaluation, did the  
16 University, through you or your predecessor, give a  
17 heads-up to the Union President and let them know this  
18 was coming down the pike?

19 A. Yes.

20 Q. As you did with President Neaman of the union?

21 A. Yes.

22 Q. Is it part of your practice to, in having  
23 amicable labor relations with the unions, to give the  
24 Union President a heads-up before there's going to be  
25 meetings between HR and an employee that's -- that that

1 union represents?

2 A. Yes. And there's a common term that I use with  
3 our union leaders, and they use it back to the  
4 University, and that is "no surprises." We try to keep  
5 each other in the loop right or wrong or indifference,  
6 it's not in our interest to catch them off guard.

7 Q. And it actually helps the Union President such  
8 that if Professor Kao had made a choice to go and ask  
9 for the Union President's advice, then the Union  
10 President would know something with which to start a  
11 conversation with Professor Kao, correct?

12 A. That is correct.

13 Q. Mr. Katzenbach asked you about Last Chance  
14 Agreements?

15 A. Yes.

16 Q. And I think you explained to the judge and jury  
17 that sometimes the University will write an agreement  
18 that the employee -- and accepts that this is your last  
19 chance before you get fired?

20 A. Yes.

21 Q. Isn't it true you gave a last chance letter to  
22 Professor Kao? In fact you gave him several last chance  
23 letters?

24 A. That is correct, several.

25 Q. And in neither one did he comply, he never once

1 said "Okay, I'll go"?

2 A. He did not say he would go.

3 Q. Describe for the jury in closing the types of  
4 functions of a faculty member that there are -- a  
5 full-time faculty member, the number and types.

6 A. There are three areas that a faculty member is  
7 judged, and -- and they are approach to tenure. And as  
8 they continue -- if they secure tenure and their  
9 continued relationship. And the three areas are  
10 teaching and then they're evaluated by their students  
11 and sometimes by the department chairs or dean on how  
12 they teach, based on student written compliments or  
13 complaints. A sumo evaluation, that's a term that we  
14 have. It's all classes have a sumo evaluation, where  
15 they answer a list of questions, critiquing the faculty  
16 members' teaching styles, sticking to the syllabus. It  
17 goes through that list.

18 The next area that they're judged in is  
19 research. USF is not a research institution, but we do  
20 expect our faculty to participate in their discipline,  
21 publishing in their academic journals. Publishing  
22 books, to that effect. So there is a research  
23 component.

24 And then the final piece is service. And there  
25 is service to the University and service to the

1 community. Service to the University would be serving  
2 on committees. We expect our faculty to participate in  
3 the day-to-day operation of their departments, possibly  
4 their school. And there is times when the University  
5 asks faculty members to serve on University-wide  
6 committees, such as the board of trustees on some of the  
7 areas of shared governance.

8 Q. And the University expects these areas of  
9 functions of faculty members to take place on the  
10 University campus. They give them offices, they give  
11 the faculty members offices, correct?

12 A. Yes, all full-time faculty members at the  
13 University have an office.

14 Q. So when there's an issue of safety of a faculty  
15 member, does it affect all three of the functions of the  
16 faculty member? That is, the issue of safety, does the  
17 person need to be assessed for whether they are safe on  
18 campus?

19 A. I believe the greatest weight would be given to  
20 the areas of teaching and to service. Teaching, we want  
21 to make sure that our students, our colleagues feel that  
22 they are in a safe environment, that they can study and  
23 that our faculty colleagues can do their jobs.

24 In the area of service, we expect our faculty  
25 members to behave professionally, interact with their

1 colleagues, interact with the University administration.  
2 And if someone is agitated or having verbal outbursts of  
3 any kind, that certainly prevents any type of committee  
4 meeting or collegiality to -- in an effective way of  
5 getting things done. On the research side maybe less  
6 weight given because they're doing research on their  
7 own. But I believe it does have an impact on  
8 colleagues.

9 If colleagues who are coming to campus to do  
10 research in our library, or as many of our faculty  
11 members do, they do a lot of online research in their  
12 offices, if they're not comfortable in being able to do  
13 research, they don't feel safe, they don't feel that  
14 they are in an environment that they can complete their  
15 work, then I believe that would have an impact on other  
16 faculty members.

17 Q. So is it your conclusion that the questions the  
18 University needed an assessment of, that is the  
19 questions of Dr. Kao's fitness arose from all three of  
20 his faculty functions?

21 A. Yes.

22 MR. VARTAIN: No further questions.

23 MR. KATZENBACH: Q. A few.

24 THE COURT: Mr. Katzenbach.

25 MR. KATZENBACH: If I may.

## 1           REXCROSS-EXAMINATION BY MR. KATZENBACH

2           MR. KATZENBACH: Q. Mr. Philpott, about Last  
3 Chance Agreements. Now, the way I understand it is that  
4 means somebody did something bad, you say instead of  
5 firing you we are going to give you your last chance;  
6 don't do another bad thing. Is that how it works?

7           A. It's one of the ways it works, yes.

8           Q. Well, it doesn't work like you did something  
9 bad, you did something bad, you did the same thing bad  
10 now we're going to fire you and we told you three times  
11 you did it bad.

12          A. In this case, the directive was given, a  
13 directive that I believe, and many of my colleagues  
14 believe we had the right to under the Management Right's  
15 Clause of the Collective Bargaining Agreement. And even  
16 though the contract was silent on fitness for duty and  
17 the contract was silent on a lot of the day-to-day  
18 operations of the University and the prerogative of the  
19 administration, we felt strongly that we had the right  
20 to, and Professor Kao refused the directive from his  
21 Dean and refused the directive from the University  
22 administration to participate in a Fitness-for-Duty  
23 Exam.

24          Q. I understand that. But I guess I'm really  
25 talking about Last Chance Agreements, the particular

1 type of agreement that you testified to in response to  
2 my earlier questions.

3 Do you recall that area?

4 A. Yes.

5 Q. All right. And just let me give you -- an  
6 employee comes out, steals some money -- no, let's make  
7 it easier.

8 An employee is accused of harassing another  
9 employee, right?

10 A. Okay.

11 Q. The last Chance Agreement would be this,  
12 wouldn't it, that what you did was wrong, if you ever  
13 harass this employee another time, you'll be fired and  
14 you agree that if that happens, you won't challenge your  
15 discharge.

16 Isn't that a typical Last Chance Agreement?

17 A. We have framed Last Chance Agreements similar  
18 to that, yes.

19 Q. Now, in this case, that's really a part -- the  
20 Last Chance Agreements are really part of progressive  
21 discipline, wouldn't you say?

22 A. Yes.

23 Q. All right. And progressive discipline usually  
24 is -- is an escalating series of disciplinary actions,  
25 correct?

1 A. Yes.

2 Q. So, for example, we might start with an oral  
3 warning "Don't do this behavior," correct?

4 A. Yes.

5 Q. And then if the behavior occurs again, you  
6 might get a written warning?

7 A. Yes.

8 Q. And if the behavior occurs another time, you  
9 might get fired or suspended?

10 A. Yes.

11 Q. Right. But that would really mean that the  
12 person -- the person did this thing -- did this bad  
13 behavior once for the oral warning, once for the written  
14 warning, and then once for the final warning or  
15 suspension or discharge, right, so there would be three  
16 instances?

17 A. Yes.

18 Q. Now, in this case, the University demanded Dr.  
19 Kao to go to the Fitness-for-Duty Examination in June of  
20 2008?

21 A. Yes.

22 Q. And repeated that demand in October of 2008?

23 A. Yes.

24 Q. And repeated that demand in November and  
25 December and January 2008; is that right?



1 A. Yes.

2 Q. And it was all the same demand, wasn't it?

3 A. Yes.

4 Q. It was all the same thing that they were  
5 demanding Dr. Kao do?

6 A. Yes.

7 Q. And he wasn't -- he wasn't -- it wasn't like  
8 progressive discipline where you go through -- where you  
9 repeat misconduct several times; he was just doing the  
10 same thing saying, "I don't want to go to this exam"?

11 MR. VARTAIN: So stipulated. He was doing it  
12 over and over again. So stipulated.

13 MR. KATZENBACH: Q. That's not progressive  
14 discipline, is it?

15 A. As defined by you, no, but this was a very  
16 different case than many of the other cases I deal with  
17 on a regular basis.

18 Q. I'm not really interested in my view of  
19 progressive discipline, I'm interested in your view of  
20 progressive discipline.

21 Do you think that asking someone to do the same  
22 thing three or four times amounts to progressive  
23 discipline?

24 A. I believe you're comparing apples to oranges,  
25 sir.

1 Q. Well, in the typical case of progressive  
2 discipline, it involves different -- repeated but  
3 different acts, correct?

4 A. Not always.

5 Q. Sometimes you can fire someone right out of the  
6 gate, right?

7 A. Yes.

8 Q. Right. But in cases where you don't do that  
9 and you engage in progressive discipline, it's usually  
10 the second or the third act that gets you fired, not the  
11 first act?

12 THE COURT: I think you're covering the same  
13 ground you've already covered.

14 MR. KATZENBACH: I agree.

15 THE COURT: I don't think you are going to  
16 convince this witness of your view.

17 MR. KATZENBACH: Hope springs eternal, Your  
18 Honor, in any form -- any cross-examination. But  
19 that -- I will ask one more question then.

20 Q. You referred to heads-up to the union, right?  
21 You recall that -- your testimony?

22 A. Yes.

23 Q. But isn't it a fact that you had multiple  
24 conversations with Elliott Neaman, the Union President,  
25 during the spring of 2008 about Dr. Kao?

1           A.    I don't recall how many I had with him, sir,  
2           and the context of how the issue came up.

3           Q.    More than one and less than five, I think your  
4           testimony was?

5           A.    I believe that's what I said, yes.

6           MR. KATZENBACH:   Okay.

7           MR. VARTAIN:   You said that was your last  
8           question, Mr. Katzenbach.

9           MR. KATZENBACH:   I can say many things to that,  
10          Mr. Vartain, but unfortunately --

11          MR. VARTAIN:   Hope springs eternal for me,  
12          though.

13          MR. KATZENBACH:   Yeah, I would hope.

14          That is, however, all that I care about.  
15          Rather, all my questions.

16          THE COURT:    Anymore questions, Mr. Vartain?

17          MR. VARTAIN:    I have no further questions.

18          I thank Mr. Katzenbach for honoring his last  
19          question commitment and the witness.

20          THE COURT:    Jury, do you have questions for  
21          Mr. Philpott?

22          Yes.

23                        (Discussion off the record and out of the  
24                        presence of the jury.)

25          THE COURT:    Some questions from the jurors,

1 Mr. Philpott.

2 THE WITNESS: Yes.

3 THE COURT: Was the USF Office of the Employee  
4 and Labor Relations ever notified of Dr. Kao's choice of  
5 his his 2005/2006 sabbatical to forego working on the  
6 agreed upon department directed assignments and instead  
7 use that paid time to work on his initial formal  
8 complaint regarding the math department's hiring  
9 searches?

10 It's a long question, so I'll hand it to you.

11 THE WITNESS: Thank you, sir.

12 I was aware of that, yes.

13 THE COURT: Long question; short answer.

14 Is there a process by which an employee can  
15 challenge a direct order without being deemed  
16 insubordinate? For example, refusal to obey on  
17 religious grounds?

18 THE WITNESS: Yes. USF is a Catholic Jesuit  
19 University, although I believe 50 percent of our student  
20 body is not Catholic, and the large number of our  
21 faculty are not of Catholic faith, and we embrace all  
22 different religious beliefs. If someone objects, they  
23 can.

24 We do have language in our Collective  
25 Bargaining Agreement that suggests that all classes

1 should start with a prayer. To my knowledge, as a  
2 graduate of USF and my 19 years working at USF, I'm not  
3 aware of any classes starting with a prayer with the  
4 exception of maybe a handful of theology courses.

5 THE COURT: How is the Union President notified  
6 of pending action against one of their members?

7 THE WITNESS: As I believe I shared with you  
8 earlier, in my role, I'm in contact with the union  
9 leadership on a regular basis. My role requires  
10 heads-up, again operating under the premise "no  
11 surprises."

12 So if I'm aware that a faculty member might be  
13 called in for a meeting with their dean, and if the dean  
14 notifies me, I will usually give a courtesy call to the  
15 employee or the faculty member. It serves my role well  
16 that when the faculty member or staff member calls their  
17 union rep, the union rep has somewhat of a filter.

18 It's a difficult conversation. There are times  
19 when employees might only share part of it. There are  
20 times when I only get part of the story from the dean or  
21 the supervisor as well.

22 So it allows the door to be opened for the  
23 union rep to come back to me, the union employee, and  
24 say, gee, what you represented to me earlier is  
25 incorrect. It was actually the dean, vice president

1 supervisor, that raised their voice initially in the  
2 meeting and the employee responded in kind. That's  
3 helpful. Puts things in a context for me.

4 If a union replies back that yes, the employee  
5 really had a bad day, and the reason the employee had a  
6 bad day is their spouse or partner or family member was  
7 hospitalized the night before, they didn't sleep, and  
8 I've got a supervisor or dean or vice president saying I  
9 want this person put on notice for being tardy, it puts  
10 things in context.

11 And in my mind it would be crazy to write  
12 someone up based on a family emergency. It's just good  
13 practice not to pick a fight over something that you  
14 don't need to.

15 There are times when we agree to disagree and  
16 we will move forward with a disciplinary action that we  
17 know in advance that they're going to grieve. And the  
18 union will tell me in advance, you're calling them in,  
19 we disagree with your action, and we're filing a  
20 grievance at the meeting. And that is helpful.

21 So everything has to be in context but the  
22 heads-up is an effective tool for me to accomplish my  
23 job to resolve things at the lowest level. It gets  
24 expensive when things are elevated to an arbitration.  
25 There are expenses involved with that. And when it ends

1 up in a legal action like this, it can get extremely  
2 expensive. So those things are factored in.

3 Sometimes the lowest level is the best way to  
4 resolve issues. And you throw in the cultural  
5 differences. There are some people who are very  
6 uncomfortable sharing their concerns. There are other  
7 people that are very concerned about people knowing  
8 what's going on in their personal life. But it makes us  
9 better managers if we know some of that information  
10 without the employee declaring it, in the sense that  
11 there's a relationship between the administration and a  
12 number of these union leaders. There's trust.

13 And many times I have had a union leader say,  
14 you know, this is one that you don't want to pick on.  
15 Give this employee a chance. Give them a little room.

16 And based on our personal relationships and  
17 trust, sometimes we'll factor that into our  
18 decision-making and we might not write someone up for an  
19 attendance issue. We might not write them up for a  
20 verbal outburst because there's stuff going on at home  
21 that's impacting.

22 So that's when we might endure a conversation,  
23 why don't you tell your member to take a couple of days  
24 off and gather their thoughts. And then I would go back  
25 to the dean or vice president and say I need a favor,

1 let's just give this person a couple of days to get  
2 their thoughts together, get their act together. So  
3 that's kind of the way we approach it.

4 Again, it's that personal relationship. Things  
5 go awry when a new business rep is introduced into the  
6 process. And that does happen in the trades, because  
7 they come from a different approach downtown. We're  
8 viewed at USF as kind of touchy-feely So you're dealing  
9 with the Teamsters, they like a more direct approach.

10 USF, we've had meetings where people light  
11 candles and will burn incense and all that other stuff  
12 to accomplish what we need to. If that's what it takes  
13 to find common ground, that's what we will do.

14 THE COURT: Does the member know that the Union  
15 President has been notified?

16 THE WITNESS: Not always.

17 THE COURT: Under the contract with the union,  
18 what constitutes moral turpitude?

19 THE WITNESS: Situations like that, sir, I  
20 defer to legal counsel to help me better understand  
21 that.

22 THE COURT: Follow-up questions, Mr. Vartain?

23 MR. VARTAIN: I'm not answering these  
24 questions.

25 THE COURT: I didn't want you to answer. I --



1 MR. VARTAIN: No, no. I'm joking, Your Honor.  
2 I have no further questions.

3 THE COURT: Mr. Katzenbach?

4 MR. KATZENBACH: Q. When the Union President  
5 is notified of a pending action as a member, is that  
6 typically done in writing or orally?

7 A. Usually orally.

8 Q. Is it ever done in writing?

9 A. Very seldom.

10 Q. And in this case, was there any written  
11 notification to Union President Neaman concerning Dr.  
12 Kao?

13 A. I don't believe so.

14 Q. And in this case, are you aware of anything --  
15 at any time did the Union President Neaman get back to  
16 you with Dr. Kao's side of the story?

17 A. I don't believe he ever spoke to Professor Kao.

18 Q. And so he wouldn't have ever gotten back to  
19 you?

20 A. No.

21 Q. Okay. In response to the question about  
22 challenging the direct order --

23 A. Yes.

24 Q. For example, would you agree that somebody  
25 could challenge a direct order and say that violates my

1 religious beliefs?

2 A. Yes.

3 Q. That could be raised at any point in the  
4 proceeding?

5 A. Yes.

6 Q. For example, it might be raised early on when  
7 somebody is saying you will disobey a direct order? Why  
8 not? And they say because it violates my religious  
9 beliefs?

10 A. Yes.

11 Q. And the cause that you raised in response to,  
12 you know, an action, a proposed disciplinary action?

13 A. Possibly.

14 Q. And that -- and you could also raise and  
15 challenge a direct order by asserting other legal  
16 grounds for -- other legal objections to the order,  
17 correct?

18 A. Yes.

19 Q. Like you could say that I believe that order is  
20 discriminatory towards me based on my race?

21 A. It could be raised that way, yes.

22 Q. Or age?

23 A. Yes.

24 Q. Or gender?

25 A. Yes.

1 Q. It also -- could you raise those at any time  
2 during the process?

3 A. Yes.

4 Q. And so in this case, do you recall Dr. Kao  
5 raising the issue that he thought that this order to go  
6 to a Fitness-for-Duty Examination was in retaliation for  
7 his prior complaints of discrimination?

8 A. I believe that was mentioned in a written  
9 memorandum to Martha Peugh-Wade.

10 Q. During the process?

11 A. That is correct.

12 Q. Did you ever have a meeting with Dr. Kao over  
13 the sabbatical issue?

14 A. I did not.

15 Q. When did you learn about this issue on the  
16 sabbatical?

17 A. I believe when the sabbatical issue came to the  
18 forefront, my main focus was the other seven Collective  
19 Bargaining Agreements, and I was not the point person  
20 for the full-time faculty contract, I was assisting. So  
21 I was aware of it, but to my knowledge it never went to  
22 a formal grievance meeting or certainly didn't go to an  
23 arbitration.

24 Q. Thank you. I guess what I -- I was really  
25 looking for a year and date, a year and month.

1 Do you recall the year and month that you  
2 learned of that?

3 A. I do not.

4 Q. Was it -- how long before the issue concerning  
5 the Fitness-for-Duty Evaluation came up?

6 A. It was before.

7 Q. And you talked about negotiating union  
8 contracts, do you recall that?

9 A. I'm sorry, can you repeat that?

10 Q. I understand your testimony this issue came up  
11 sometime when you were involved in the negotiation of  
12 union contracts?

13 A. I don't recall saying that. I believe -- stop  
14 me if I'm incorrect, I believe when I mentioned I was  
15 bargaining contracts was the summer of '08 when  
16 Professor Kao met with Martha Peugh-Wade in June of  
17 2008.

18 Q. Was that the first time you heard about this  
19 sabbatical issue?

20 A. No.

21 Q. How much -- how much before that, before June  
22 of 2008 had you heard about it?

23 A. I don't recall, sir.

24 Q. Could you estimate the number of months, years,  
25 decades?

1           A.    If you could refresh my memory of what year  
2 John or Professor Kao raised that issue, that would  
3 probably help me better understand the timeline.

4           Q.    Well -- thank you.

5                    Do you recall who informed you of this?

6           A.    It could have been written communications that  
7 I read. It could have been from the dean. I could have  
8 heard it from the union.

9           Q.    Is it your best recollection that you heard  
10 this before January 2008 or after January 2008?

11          A.    I'm sorry, I don't recall.

12          MR. KATZENBACH: Those are all the questions I  
13 have.

14          THE COURT: Anything further, Mr. Vartain?

15          MR. VARTAIN: No further questions. Thank you.

16          THE COURT: May this witness be excused?

17          MR. VARTAIN: Certainly.

18          MR. KATZENBACH: Yes.

19          THE COURT: Mr. Philpott, thank you very much.

20                    All right. It's 3:40. How are we fixed in  
21 getting all the evidence in?

22          MR. VARTAIN: You know, Your Honor, with the  
23 exception of one or two things that Mr. Katzenbach and I  
24 want to put on the record, the University has completed  
25 all of its evidence.

1           We can do that little bit maybe after, if you  
2 decide to discharge the jury for the day, but we have no  
3 further witnesses and we rest, subject to those one or  
4 two things on the record.

5           THE COURT: Mr. Katzenbach, were you going to  
6 put on some rebuttal?

7           MR. KATZENBACH: Yes, Your Honor. We have one  
8 witness under subpoena, and I don't believe the witness  
9 is here.

10          THE COURT: That's a little difficult to put on  
11 a rebuttal case, isn't it?

12          MR. KATZENBACH: Without a witness. I'd be  
13 happy to testify about what I hoped the witness would  
14 say, but I don't think that's appropriate.

15          MR. VARTAIN: I'll call you. My next witness  
16 is Mr. Katzenbach.

17          THE COURT: You rested.

18          MR. VARTAIN: I hereby request permission to  
19 unrest.

20          MR. KATZENBACH: I get to testify first.

21          MR. VARTAIN: He might be the most important  
22 witness in the case.

23          MR. KATZENBACH: I don't think so. But thank  
24 you very much for answering that.

25          That's where we stand, Your Honor.

1 THE COURT: So on the question -- the question  
2 is: Do you have rebuttal; the answer is I wish I had.

3 MR. KATZENBACH: No. The answer is we  
4 subpoenaed a witness, Your Honor, and so we are going to  
5 have address that issue in a different way, I think,  
6 since the witness is not here.

7 THE COURT: At this stage in the trial, I am  
8 not going to issue a body attachment.

9 MR. KATZENBACH: I didn't expect the Court to  
10 do it. What I guess I was referring to was making a  
11 motion to hold the witness in contempt.

12 THE COURT: Okay. You can prepare an order to  
13 show cause for contempt.

14 MR. KATZENBACH: That's what I intend to do.

15 THE COURT: All right.

16 MR. KATZENBACH: Beyond that, Your Honor --  
17 beyond that, Your Honor, we have no rebuttal. We have  
18 no rebuttal witnesses.

19 THE COURT: So you're regretfully resting?

20 MR. KATZENBACH: I'm regretfully resting.

21 THE COURT: All right. So that takes care of  
22 what needs to be taken care of as far as the jury is  
23 concerned. I can tell them to come back on Tuesday as  
24 we tentatively agreed on last night?

25 MR. KATZENBACH: Yes, Your Honor.

1           THE COURT: All right. So not Monday, but this  
2 coming Tuesday, please come back in your places at  
3 9:00 a.m. in this department for jury instructions, and  
4 you will get your case in your hands in the course of  
5 Tuesday.

6           Remember the admonitions. Do not form or  
7 express any opinion on this case until it's finally  
8 submitted to you for your decision. Do not discuss  
9 among yourselves or with others until that time.

10           Please be back in your places at 9:00 o'clock  
11 this coming Tuesday. Please remember to leave your  
12 instructions, notebooks behind.

13           MR. VARTAIN: Your Honor, I do have one thing.  
14 Did you want to -- we might recycle back to Juror No. 7.  
15 I think we sort of agreed we'd give her the benefit of  
16 an update, that we talked to her at lunchtime and we  
17 said at the end of the day we'd check in.

18           Did you want to do that?

19           THE COURT: Would you like to hang out and --

20           JUROR: Yes, please.

21           THE COURT: Okay. Jurors and alternates, save  
22 for Ms. Missic, have left the courtroom. Counsel for  
23 both sides and the plaintiff remain.

24           Mr. Vartain, Ms. Missic.

25           Ms. Missic, do you have anything to add to what



1 we told you in the lunch time?

2 JUROR: No. I mean, my concerns stand about  
3 the length of time. And it's more really just the --  
4 whether we will complete next week, because at this  
5 point --

6 THE COURT: I'd be surprised if we didn't  
7 complete next week.

8 JUROR: I know, but it's gone longer than  
9 anticipated.

10 THE COURT: I don't think I represented to you  
11 it would be over until the end of next week, did I?

12 JUROR: I guess in my head I had heard that  
13 today would be the last day and we're not with the case  
14 at this point.

15 THE COURT: Counsel, my thinking is that really  
16 there is no cause to dismiss Ms. Missic from the jury on  
17 the basis of what she told us, but if she gets so  
18 distracted by the worries that are bothering her that  
19 she can't function well as a juror, of course that's a  
20 different story.

21 MR. VARTAIN: Yeah. I would return to the  
22 suggestion that we try to see if we could assist her --  
23 from my perspective, there's a fair chance that the jury  
24 will get the case on Tuesday and maybe even decide the  
25 case on Tuesday. But if not and Ms. Missic needs to

1 take Wednesday off, the University will certainly have  
2 no objection for the -- if the Court wanted to excuse  
3 the jury and come back on Thursday, if that would be of  
4 assistance to her.

5 THE COURT: Mr. Katzenbach made a point on that  
6 plan, which is we are in too much danger of pitting one  
7 juror's interests against another juror's.

8 JUROR: And I have concerns about whether or  
9 not that will lead us into the following week, which I  
10 have a whole week of meetings, and I definitely don't  
11 want to miss those versus one meeting next week.

12 THE COURT: So I think where we are is you're  
13 on the jury and if it gets unbearable for you, I can  
14 find good cause to let you off. We'll trust you.

15 JUROR: All right. Thank you for hearing me  
16 out.

17 THE COURT: You are welcome. I wish I could  
18 always make jurors happy.

19 MR. VARTAIN: Mr. Katzenbach and I have agreed  
20 to keep our openings brief -- our closing statements  
21 brief on Tuesday so the jury gets the case quickly.

22 JUROR: But is that lawyer brief or --

23 MR. VARTAIN: Touché. Thank you.

24 MR. KATZENBACH: And the lawyer brief, by the  
25 way, in the Court of Appeals is, what, 14,000 words,

1 15,000 words?

2 JUROR: I'm scared now. Thank you.

3 THE COURT: Thank you, Ms. Missic.

4 (All members of the jury dismissed)

5 THE COURT: Ms. Missic has departed the  
6 courtroom. Counsel for the parties and the plaintiff  
7 remain.

8 Anything that needs to go on the record?

9 MR. KATZENBACH: Yes, Your Honor. I make a  
10 motion for nonsuit on the cross-complaint. There is no  
11 evidence to support any claim that Dr. Kao would go into  
12 campus. Has never been on campus, he's never threatened  
13 to go on campus, and we believe there is no indication  
14 that there is any basis whatsoever for an injunction  
15 against him doing so.

16 THE COURT: Well, it wouldn't be a motion for  
17 nonsuit, since we have had the case for both sides.

18 MR. KATZENBACH: Directed verdict, then.

19 THE COURT: Well, you don't get a verdict in  
20 equity.

21 MR. KATZENBACH: Record decision.

22 THE COURT: Well, what you're asking me to do  
23 is to hear and decide that part of the equitable part of  
24 the case immediately.

25 MR. KATZENBACH: Well, Your Honor, actually...

1 MR. VARTAIN: If he is not going to go on  
2 campus, why do you need a decision now?

3 MR. KATZENBACH: Well, to protect my record.  
4 But, you know, Your Honor, here is the sort  
5 of -- I don't need this decision today, if that's the  
6 question. But this is my concern, and it's a sort of  
7 lawyer-nerdy concern, and I apologize for that.

8 That even though they're only asking for an  
9 injunction, that I believe it's fundamentally case law,  
10 whatever remedy they're asking for, to which we're  
11 entitled to have a jury. They haven't proposed jury  
12 instructions on this. We believe that the fact would  
13 have to be found by a jury, and no reasonable jury could  
14 find that Dr. Kao has threatened to trespass.

15 But while I understand the Court's equitable  
16 point, the reality is that I don't believe that this is  
17 actually a case in equity. It sounds in equity [sic], I  
18 believe it sounds in law.

19 I will be happy to brief the issue, since I  
20 have nothing else to do this weekend.

21 MR. VARTAIN: You have a lot of work with me.

22 MR. KATZENBACH: That's a facetious comment, I  
23 apologize. But that is something I do actually feel  
24 strongly about.

25 THE COURT: I do have a concern, which you

1 haven't mentioned, about management, and that could be  
2 constitutionally --

3 MR. KATZENBACH: Yes.

4 THE COURT: There is a right to travel, as you  
5 know.

6 MR. KATZENBACH: Yes, there's a right to travel  
7 and it's an open campus.

8 MR. VARTAIN: Private property.

9 MR. KATZENBACH: Well, then we need to --

10 THE COURT: Right, there are potential issues.

11 MR. KATZENBACH: Yes.

12 THE COURT: What I would like to do is get the  
13 law part of the case resolved, and then treat what the  
14 jury comes up with as advisory to me irrespective of the  
15 equitable claims, and we can decide whether we need  
16 anymore briefing or how we are going to proceed.

17 MR. KATZENBACH: Your Honor, I'm willing --

18 THE COURT: So --

19 MR. KATZENBACH: Okay.

20 THE COURT: -- your motion, whatever it is, is  
21 denied for the nonsuit.

22 MR. KATZENBACH: Very well, Your Honor, I  
23 appreciate that. And I will think about it a little bit  
24 this weekend if I want to put something in writing, just  
25 so the complexities of my position, poorly articulated

1 today, might be in a written record that somebody in the  
2 future might want to read.

3 THE COURT: Okay. Anything else that needs to  
4 go on the record?

5 MR. VARTAIN: The parties have the stipulation  
6 that Mr. Cawood and any other experts that have been  
7 called but haven't been formally approved by the Court  
8 as experts be approved by the Court as experts. I don't  
9 think we actually put Mr. Cawood's approval of him as an  
10 expert witness in the matters on which he testified. I  
11 don't think we put it on the record, and we'd like to  
12 have that.

13 THE COURT: Do you think the jury cares?

14 MR. VARTAIN: I don't think the jury cares, but  
15 I want it on the record.

16 MR. KATZENBACH: Of course, I'm not going to be  
17 that unreasonable.

18 THE COURT: All right. It goes --

19 MR. KATZENBACH: So stipulated.

20 THE COURT: If you can write it down, and I'll  
21 read the stipulation to the jury, if you think it's of  
22 any help at all.

23 MR. KATZENBACH: I don't think it needs to be  
24 in writing and think he just wants it on the record.

25 MR. VARTAIN: I just want it for the record.

1 Neither one of us can argue from the fact that the  
2 Court -- I take it you will approve the stipulation,  
3 Your Honor?

4 THE COURT: Oh, sure.

5 MR. VARTAIN: Okay. So then we can tell the  
6 jury in our argument that he's been qualified by the  
7 Court as an expert.

8 THE COURT: All right. Anything else that  
9 needs to go on the record?

10 MR. KATZENBACH: Let's see, we want to confirm  
11 that Exhibit 91, and I believe you have a parallel  
12 exhibit in your binder, that's a violence policy?

13 MS. ADLER: It's Exhibit 202. Defendant's 202.

14 MR. VARTAIN: 202 and 91 are stipulated.

15 MR. KATZENBACH: Is it the same document that  
16 we stipulate -- 91 is already in evidence. We'll  
17 stipulate that the parallel exhibit be in evidence as  
18 well.

19 MR. VARTAIN: Thank you.

20 THE COURT: Okay.

21 THE CLERK: The two exhibit numbers?

22 MR. KATZENBACH: Ninety-one and 202.

23 THE CLERK: Ninety-one and 202?

24 MR. KATZENBACH: Yes.

25 THE COURT: Okay. 91 and 202 are entered by

1 stipulation.

2 (Whereupon, Exhibits 91 and 202 were  
3 admitted into evidence.)

4 MR. KATZENBACH: Very well. And let's see,  
5 that's all I have for the record, I believe.

6 THE COURT: All right. Mr. Vartain, anything  
7 more for the record?

8 MR. VARTAIN: No, Your Honor. I will modify  
9 the order dismissing Ms. Peugh-Wade in the manner you  
10 indicated last night. You wanted me to rewrite the  
11 proposed order, I'll do that.

12 THE COURT: Good. All right. Off the record.

13 (Proceedings adjourned at 3:52 P.M.)  
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## 1 REPORTER CERTIFICATE

2 I hereby certify that the foregoing proceedings  
3 were taken before me at the time and place herein set  
4 forth; that this transcript is a true record of the  
5 proceedings, as reported to the best of my ability by  
6 me, a duly certified shorthand reporter and a  
7 disinterested person, and was thereafter transcribed  
8 under my direction into typewriting by computer.

9  
10 I further certify I am neither financially  
11 interested in the action nor a relative or employee  
12 of any attorney or party to this action.

13  
14 IN WITNESS WHEREOF, I have this date  
15 subscribed my name.

16 Dated: September 23, 2012

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18 SANDRA L. CARRANZA  
19 CSR No. 7062  
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COURT OF APPEALS OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

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JOHN S. KAO,

Plaintiff/Appellant,

vs.

Appellate No. A135750  
SUPERIOR COURT CASE  
No. CGC-09-489576

UNIVERSITY OF SAN FRANCISCO,  
ET AL.,

Defendants/Respondents.

\_\_\_\_\_ /

ON APPEAL FROM THE JUDGMENT  
OF THE SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

THE HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE

REPORTER'S TRANSCRIPT ON APPEAL

February 28, 2012

Volume 13 (Pages 2726 - 2886)

For Plaintiff/Appellant:

KATZENBACH & KHTIKIAN  
1714 Stockton Street, Suite 300  
San Francisco, CA 94133  
(415)834-1778  
BY: CHRISTOPHER W. KATZENBACH, Attorney at Law  
CONOR MACK, Attorney at Law

For Defendants/Respondents:

VARTAIN LAW GROUP  
601 Montgomery Street, Suite 540  
San Francisco, CA 94111  
(415)391-1155  
BY: MICHAEL J. VARTAIN, Attorney at Law  
LINDA K. ADLER, Attorney at Law

REPORTED BY: HOLLY MOOSE, RDR-CRR-CCRR, CSR NO. 6438

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

BEFORE THE HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE

DEPARTMENT NUMBER 318

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JOHN S. KAO,

Plaintiff,

vs.

Case No. CGC-09-489576  
Jury Trial

UNIVERSITY OF SAN FRANCISCO,  
ET AL.,

Pages 2726 - 2886

Defendants.

\_\_\_\_\_ /

REPORTER'S TRANSCRIPT OF PROCEEDINGS

February 28, 2012

APPEARANCES OF COUNSEL:

For Plaintiff:

KATZENBACH & KHTIKIAN  
1714 Stockton Street, Suite 300  
San Francisco, CA 94133  
BY: CHRISTOPHER W. KATZENBACH, Attorney at Law  
CONOR MACK, Attorney at Law

For Defendants:

VARTAIN LAW GROUP  
601 Montgomery Street, Suite 540  
San Francisco, CA 94111  
BY: MICHAEL J. VARTAIN, Attorney at Law  
LINDA K. ADLER, Attorney at Law

REPORTED BY: HOLLY MOOSE, RDR-CRR-CCRR, CSR NO. 6438

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I N D E X

Tuesday, February 28, 2012

CLOSING ARGUMENTS

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By Mr. Vartain

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REBUTTAL ARGUMENT

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By Mr. Katzenbach

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1 San Francisco, California

2 Tuesday, February 28, 2012, 9:05 A.M.

3 Department No. 318

4 The Honorable Wallace P. Douglass, Retired Judge

5 ---o0o---

6 THE COURT: Jurors and alternates are present.  
7 Counsel for both sides are present. Plaintiff is  
8 personally present.

9 Slight glitch, ladies and gentlemen. We  
10 managed to get the instructions done, but we had a  
11 misunderstanding as to the division of labor, who's  
12 going to have them reproduced so each person would have  
13 a copy of the instructions to follow along as I read  
14 them. So we're reproducing them now.

15 I estimate 15 minutes. I apologize for the  
16 delay. It could have been worse. I remember bitterly  
17 the day that I had to say to the jury "We aren't ready.  
18 Go home and come back tomorrow."

19 We're not in that situation here, but we are in  
20 a situation of a slight delay, for which I apologize.  
21 So with the admonition in mind, you're free to wander  
22 around or sit right where you are, whatever makes you  
23 happy, for the 15 minutes or so -- 15 or 20 minutes  
24 it'll take to copy the instructions.

25 JUROR 2: So you think at 25 after, we should

1 all be back?

2 THE COURT: Why don't we make it 20 after, just  
3 in case copying goes quickly.

4 (Recess taken.)

5 THE COURT: Back in session. Jurors and  
6 alternates are present. Counsel for both sides are  
7 present. The plaintiff is personally present.

8 Does everyone have a packet of instructions  
9 now? I'd ask the jurors to turn to 3949, October 20,  
10 '08. There are some handwritten notes in the bottom  
11 right-hand corner that got in there by accident. Tear  
12 that or take it out of your packet, pass them down the  
13 row to your left to those at the end of the row.

14 JUROR 13: The entire page?

15 THE COURT: The entire page.

16 Everyone should have now a pile of papers of  
17 which the number 5000 is on top.

18 Okay. I'll read the instructions to you and  
19 we'll proceed to the attorneys' arguments and a little  
20 bit of instructions at the very end, but most of them  
21 I'll give now. So beginning with 5000.

22 "Members of the jury, you have now  
23 heard all the evidence. The attorneys will  
24 have one last chance to talk to you in  
25 closing arguments. But before they do, I

1 will instruct you on the law that applies to  
2 this case. You must follow these  
3 instructions, as well as those I previously  
4 gave you. I have provided each of you with  
5 your own copy of the instructions.

6 "You must decide what the facts are.  
7 You must consider all the evidence and then  
8 decide what you think happened. You must  
9 decide the facts based on the evidence  
10 admitted in this trial.

11 "Do not do any research on your own or  
12 as a group. Do not use dictionaries, the  
13 Internet or other reference materials. Do  
14 not investigate the case or conduct any  
15 experiments. Do not contact anyone to  
16 assist you, such as a family accountant,  
17 doctor, or lawyer. Do not visit or view the  
18 scene of any event involved in this case.  
19 If you happen to pass by the scene, do not  
20 stop or investigate.

21 "All jurors must see or hear the same  
22 evidence at the same time. Do not read,  
23 listen to or watch any news accounts of this  
24 trial. You must not let bias, sympathy,  
25 prejudice or public opinion influence your

1 decision.

2 "I will now tell you the law that you  
3 must follow to reach your verdict. You must  
4 follow the law exactly as I give it to you,  
5 even if you disagree with it. If the  
6 attorneys say anything different about what  
7 the law means, you must follow what I say.

8 "In reaching your verdict, do not guess  
9 what I think your verdict should be from  
10 something I may have said or may have done.  
11 Pay careful attention to all the  
12 instructions that I give you. All the  
13 instructions are important because together  
14 they state the law that you will use in this  
15 case. You must consider all the  
16 instructions together.

17 "After you decide what the facts are,  
18 you may find that some instructions do not  
19 apply. In that case, follow the  
20 instructions that do apply and use them,  
21 together with the facts, to reach your  
22 verdict.

23 "If I repeat any ideas or rules of law  
24 during my instructions, that repetition does  
25 not mean that these ideas or rules are more



1 important than the others are. In addition,  
2 the order of the instructions does not make  
3 any difference.

4 "A party must persuade you by the  
5 evidence presented in court that what the  
6 party is required to prove is more likely to  
7 be true than not true. This requirement is  
8 sometimes referred to as the burden of  
9 proof.

10 "If, after you have weighed all the  
11 evidence, you cannot decide that something a  
12 is more likely to be than not true, you must  
13 conclude that the party did not prove it.

14 "You should consider all the evidence,  
15 no matter which party produced the evidence.

16 "In criminal trials, the prosecution  
17 must prove beyond a reasonable doubt that  
18 the defendant is guilty. But in civil  
19 trials such as this one, the party who's  
20 required to prove something need only prove  
21 that it is more likely to be true than not  
22 true.

23 "Certain facts must be proved by clear  
24 and convincing evidence, which is a higher  
25 burden of proof. The party with this burden

1 of proof must persuade you that it is highly  
2 probable that the fact is true. I will tell  
3 you specifically which of the facts must be  
4 proved by clear and convincing evidence.

5 "Evidence can come in many forms. It  
6 can be testimony about what someone saw or  
7 heard or smelled. It can be an exhibit  
8 admitted into evidence. It can be someone's  
9 opinion.

10 "Some evidence proves a fact directly,  
11 such as testimony of a witness who saw a jet  
12 plane flying across the sky. Some evidence  
13 proves a fact indirectly, such as testimony  
14 of a witness who saw only the white trail  
15 that jet planes often leave. This indirect  
16 evidence is sometimes referred to as  
17 circumstantial evidence. In either  
18 instance, the witness's testimony is  
19 evidence that a jet plane flew across the  
20 sky.

21 "As far as the law is concerned, it  
22 makes no difference whether evidence is  
23 direct or indirect. You may choose to  
24 believe or disbelieve either kind. Whether  
25 it is direct or indirect, you should give

1 every piece of evidence whatever weight you  
2 think it deserves.

3 "You may consider the ability of each  
4 party to provide evidence. If a party  
5 provided weaker evidence when that party  
6 could have provided stronger evidence, you  
7 may distrust the weaker evidence.

8 "You may consider whether a party  
9 failed to explain or to deny some  
10 unfavorable evidence. Failure to explain or  
11 to deny unfavorable evidence may suggest  
12 that the evidence is true.

13 "During the trial, I granted several  
14 motions for the receipt in evidence of  
15 documentary exhibits for purposes other than  
16 proof of the facts and opinions recited in  
17 those exhibits.

18 "You may use these exhibits only for  
19 the limited purpose for which they were  
20 admitted into evidence: to determine what  
21 motivating reason (instruction 2507)  
22 prompted USF to terminate John Kao  
23 (instruction 2500A, 2505), whether John Kao  
24 had a reasonably-based belief that USF was  
25 practicing illegal discrimination in its

1 hiring practices (instruction 2505), what  
2 motivating reason prompted USF to banish  
3 John Kao from the USF campus (instruction  
4 3020), and whether USF acted with malice,  
5 oppression or fraud (instruction 3946), if  
6 you find the exhibits helpful for any of  
7 these purposes. This instruction applies to  
8 Exhibits 3, 4, 14, 17, 32, 35, 49, 51, 52,  
9 53, 56, 57, 60, 6, 62, 63, 64 and 66.

10 "During the trial, you heard testimony  
11 read from a deposition or depositions. A  
12 deposition is the testimony of a person  
13 taken before trial. At a deposition, the  
14 person is sworn to tell the truth, and  
15 attorneys question the person.

16 "You must consider the deposition  
17 testimony that was read to you in the same  
18 way as you consider testimony given in  
19 court.

20 "Before trial, each party has the right  
21 to ask the other parties to answer written  
22 questions. These questions are called  
23 Interrogatories. The answers are also in  
24 writing and are given under oath. You must  
25 consider those questions and answers the

1 same as if the questions and answers had  
2 been given in court.

3 "A party may offer into evidence any  
4 oral or written statement made by an  
5 opposing party outside the courtroom. When  
6 you evaluate evidence of such a statement,  
7 you must consider the following questions:

8 "1, do you believe that the party  
9 actually made the statement? If you do not  
10 believe that the party made the statement,  
11 you may not consider the statement at all.

12 "2, if you believe the statement was  
13 made, do you believe it was reported  
14 accurately?

15 "You should view testimony about an  
16 oral statement made by a party outside the  
17 courtroom with caution.

18 "During the trial, you heard testimony  
19 from an expert witness or expert witnesses.  
20 The law allow us an expert to state opinions  
21 about matters in his or her field of  
22 expertise, even if he or she has not  
23 witnessed any of the events involved in the  
24 trial. You do not have to accept an  
25 expert's opinion. As with any other

1 witnesses, it is up to you to decide whether  
2 you believe the expert's testimony and  
3 choose to use it as a basis for your  
4 decision.

5 "You may believe all, part or none of  
6 an expert's testimony. In deciding whether  
7 to believe an expert's testimony, you should  
8 consider the criteria listed in instruction  
9 107, plus the following:

10 "1, the expert's training and  
11 experience; 2, the facts on which the expert  
12 relied; and 3, the reasons for the expert's  
13 opinion.

14 "The law allows expert witnesses to be  
15 asked questions that are based on assumed  
16 facts. These are sometimes called  
17 hypothetical questions. In determining the  
18 weight to be given to the expert's opinion  
19 that is based on the assumed facts, you  
20 should consider whether the assumed facts  
21 are true.

22 "If the expert witnesses disagree with  
23 one another, you should weigh each opinion  
24 against the others. You should examine the  
25 reasons given for each opinion and the facts

1 or other matters on which each expert  
2 witness relied. You may also compare the  
3 experts' qualifications.

4 "A witness who was not testifying as an  
5 expert gave an opinion during the trial.  
6 You may but are not required to accept that  
7 opinion. You may give the opinion whatever  
8 weight you think is appropriate.

9 "Consider the extent of the witness's  
10 opportunity to perceive the matters on which  
11 the witness based the opinion, the  
12 reasonings the witness gave for the opinion,  
13 and the facts or information on which the  
14 witness relied in forming that opinion.

15 "You must decide whether information on  
16 which the witness relied was true and  
17 accurate. You may disregard all or any part  
18 of an opinion that you find unbelievable,  
19 unreasonable or unsupported by the evidence.

20 "A substantial factor in causing harm  
21 is a factor that a reasonable person would  
22 consider to have contributed to the harm.  
23 It must be more than a remote or trivial  
24 factor. It does not have to be the only  
25 cause of the harm. Conduct is not a

1           substantial factor in causing harm if the  
2           same harm would have occurred without that  
3           conduct."

4           Now we're getting into a group of instructions  
5           that have special instruction designations. I've also  
6           written in hand on the top of each page the number, in  
7           the sequence in which it appears in the official  
8           instruction book.

9           And these all got special instruction  
10          designations because they are -- they had their origin  
11          in a book of instructions that has undergone extensive  
12          revision. And I had put the old numbers on top because  
13          there may be some cross-references which wouldn't make  
14          sense unless I put them there.

15          So 2500A: "John Kao claims that the  
16          university wrongfully required a medical" --

17          UNIDENTIFIED JUROR: We don't have that.

18          UNIDENTIFIED JUROR: Excuse me, Your Honor --

19          THE COURT: They're out of order. 2500A should  
20          go between 2503 and 2430.

21          2430: "John Kao claims that the university  
22          discriminated" --

23          UNIDENTIFIED JUROR: Wait, wait, wait, Your  
24          Honor.

25          (Simultaneous speakers.)



1 THE COURT: Okay. I'm attempting to put them  
2 in sequence of the numbers at the top. So you go 2430,  
3 2500A, 2503, 2504, 2505, 2507 and 3020. You got them?

4 JUROR 7: Could you just tell us, Your Honor,  
5 the order -- the numbers? Then we can just find them.  
6 'Cause it's not in the order you're saying.

7 THE COURT: Oh, I apologize. All right.

8 2430, entitled "Wrongful Discharge In Violation  
9 Of Public Policy (Privacy)":

10 "John Kao claims that the university  
11 discriminated against him in violation of  
12 public policy (privacy) as expressed in the  
13 California Constitution and the California  
14 Confidentiality Of Medical Information Act.  
15 The university denies this claim.

16 "To establish the claim, John Kao must  
17 prove all of the following: 1, that the  
18 university employed John Kao; 2, that the  
19 university discharged John Kao; 3, that the  
20 university required that John Kao authorize  
21 release of confidential medical information  
22 for the medical and psychological  
23 examination (FFD); that John Kao refused the  
24 university's requirement; that John Kao's  
25 refusal was the motivating reason for John

1 Kao's discharge; and 6, that the discharge  
2 caused John Kao harm.

3 "If John Kao proves all of the above,  
4 the university nevertheless avoids liability  
5 by showing that, 1, John Kao refused to take  
6 the FFD examination; and 2, its decision to  
7 discharge John Kao was necessary because  
8 John Kao refused to take the FFD  
9 examination.

10 "Definition of confidential medical  
11 information:

12 "Confidential medical information of an  
13 employee does not include a doctor's  
14 statement to the employer of the doctor's  
15 opinion as to whether or not the employee is  
16 fit to perform his job functions and/or any  
17 functional limitations on the employee's  
18 ability to perform his job functions, if the  
19 doctor's statement to the employer does not  
20 include the medical cause."

21 2500A, "Medical And Psychological Examination  
22 Request":

23 "John Kao claims that the university  
24 wrongfully required a medical and  
25 psychological examination

1 (fitnesses-for-duty or FFD).

2 "To establish this claim, John Kao must  
3 prove all of the following: 1, that the  
4 university required him to have the FFD; 2,  
5 that the university discharged him; 3, that  
6 a motivating reason for the university to  
7 discharge John Kao was because he did not  
8 have the FFD; 4, John Kao was harmed; and 5,  
9 that the FFD was a substantial factor in  
10 causing John Kao's harm."

11 Special instruction No. 1B, corresponding to  
12 2503:

13 "The University of San Francisco  
14 asserts that the medical or psychological  
15 examination (fitnesses-for-duty or FFD)  
16 request was lawful because it was necessary  
17 to the university's business. To succeed,  
18 the university must prove both of the  
19 following: 1, that the purpose of the FFD  
20 was to operate its business safely and  
21 efficiently; and 2, that the FFD would  
22 substantially accomplish this business  
23 purpose."

24 Now go to special instruction No. 1C, which  
25 corresponds to 2504.

1            "If the university proves that the FFD  
2            is necessary to the university's business,  
3            then the FFD is lawful unless John Kao  
4            proves both of the following: 1, that there  
5            was an alternative to the FFD that would  
6            have accomplished the university's business  
7            purpose equally well; and 2, that the  
8            alternative would have had less adverse  
9            impact on John Kao."

10           2505, "Retaliation":

11           "John Kao claims that the university  
12           illegally retaliated against him. The  
13           university denies this claim. To establish  
14           this claim, John Kao must prove all of the  
15           following: 1, that while he was employed by  
16           the university, John Kao opposed what he  
17           reasonably and in good faith believed was  
18           illegal employment discrimination; 2, the  
19           university was aware of John Kao's  
20           opposition; 3, that John Kao's opposition  
21           was a motivating reason for the university's  
22           decision to require that John Kao submit to  
23           the medical and psychological examination  
24           (fitnesses-for-duty or FFD) as a condition  
25           of his continued employment or to discharge

1 him when he refused; 4, that John Kao was  
2 harmed; and 5, that the university's conduct  
3 was a substantial factor in causing John  
4 Kao's harm."

5 2507, "Motivating Reason":

6 "A motivating reason is a reason that  
7 contributed to the decision to take certain  
8 action even though other reasons also may  
9 have contributed to the decision."

10 3020, "Unruh Act, Special instruction 5."

11 There's a 7 at the bottom of the page.

12 "John Kao claims that the university  
13 unlawfully denied him full and equal  
14 privileges allowed to other members of the  
15 public when it instructed him not to come on  
16 campus. The university denies this claim.

17 "To establish his claim, John Kao must  
18 prove all of the following: 1, that the  
19 university denied him full and equal  
20 privileges allowed to other members of the  
21 public; 2, that a motivating reason of the  
22 university was that the university perceived  
23 or regarded John Kao as having a disability,  
24 or a record of John Kao having a disability;  
25 3, that John Kao was harmed; and 4, that the

1 university's instructing John Kao to not  
2 come on campus was a substantial factor in  
3 causing John Kao's harm.

4 "A disability is a mental or physical  
5 condition that limits a major life activity,  
6 such as working, or is perceived to limit a  
7 major life activity."

8 3026: "If you decide that John Kao has  
9 proved his claim against USF under the Unruh  
10 Civil Rights Act (instruction 3020), you  
11 must also decide how much money will  
12 reasonably compensate him for the harm.  
13 This compensation is called damages."

14 (Inaudible discussion.)

15 UNIDENTIFIED JUROR: Start over, please.

16 THE COURT: "If you decide that John  
17 Kao has proved his claim against USF under  
18 the Unruh Civil Rights Act (instruction  
19 3020), you must also decide how much money  
20 will reasonably compensate him for that  
21 harm. This compensation is called damages.

22 "John Kao must prove the amount of his  
23 damages. However, John Kao does not have to  
24 prove the exact amount of the harm or the  
25 exact amount of damages that will provide

1 reasonable compensation for the harm. You  
2 must not speculate or guess in awarding  
3 damages.

4 "The following are the specific items  
5 of harm claimed by John Kao under the Unruh  
6 Civil Rights Act: loss of enjoyment of  
7 access to USF's campus, humiliation,  
8 embarrassment or emotional distress.

9 "In addition, you may offer John Kao up  
10 to three times the amount of his actual  
11 damages as a penalty against USF.

12 "A not-for-profit public benefit  
13 corporation is responsible for the harm  
14 caused by the wrongful conduct of its  
15 employees while the employees are acting  
16 within the scope of their employment.

17 "If you decide that John Kao has proved  
18 any of his claims against USF, you must also  
19 decide how much money would reasonably  
20 compensate John Kao for the harm to him for  
21 which USF is liable. This compensation is  
22 called damages.

23 "The amount of damages must include an  
24 award for each item of harm that was caused  
25 by the wrongful conduct for which USF is

1       liable, even if the particular harm could  
2       not have been anticipated.

3               "John Kao does not have to prove the  
4       exact amount of damages that would provide  
5       reasonable compensation for the harm.  
6       However, you must not speculate or guess in  
7       determining damages.

8               "The damages which John Kao claims for  
9       the harm which he alleges was caused by USF  
10      fall into two categories called economic  
11      damages and noneconomic damages. You will  
12      be asked on the verdict form to state the  
13      two categories of damages separately.

14              "John Kao claims loss of his ability to  
15      earn money as an item of economic damages.

16              "To recover damages for the loss of his  
17      ability to earn money, John Kao must prove  
18      the reasonable value of that loss to him,  
19      which he may do by proving amount of money  
20      which he could have earned to date but was  
21      not able to earn because USF discharged him  
22      and the amount of money which it is  
23      reasonably certain he could earn in the  
24      future but will not be able to earn because  
25      USF discharged him.



1            "If you decide John Kao's" --  
2            apostrophe S doesn't belong there.

3            "If you decide John Kao is entitled to  
4            future economic damages to compensate for  
5            future harm caused by loss of his ability to  
6            earn money, then the amount of those future  
7            damages must be reduced to their present  
8            cash value. This reduction is necessary  
9            because money received now will, through  
10           investment, grow to a larger amount in the  
11           future. Defendants must prove the amount by  
12           which future damages should be reduced to  
13           present value.

14           "To find present cash value, you must  
15           determine the amount of money that, if  
16           reasonably invested today, will provide John  
17           Kao with the amount of his future damages.

18           "You may consider expert testimony in  
19           determining the present cash value of future  
20           economic damages.

21           "John Kao claims the following items of  
22           noneconomic damage: past and future anxiety,  
23           humiliation, and emotional distress.

24           "No fixed standard exists for deciding  
25           the amount of these noneconomic damages.

1           You must use your judgment to decide a  
2           reasonable amount based on the evidence and  
3           on your common sense.

4           " To recover for future anxiety,  
5           humiliation and emotional distress, John Kao  
6           must prove that he is reasonably certain to  
7           suffer that harm.

8           " For future anxiety, humiliation and  
9           emotional distress, determine the amount in  
10          current dollars paid at the time of judgment  
11          that will compensate John Kao for future  
12          anxiety, humiliation and emotional distress.  
13          You should not further reduce this amount of  
14          noneconomic damages to present cash value  
15          because this reduction should only be  
16          performed with respect to economic damages.

17          " If you find that USF is liable for  
18          John Kao's harm, you must not include in  
19          your award any damages to punish or make an  
20          example of USF. Such damages would be  
21          punitive damages, and they cannot now be a  
22          part of your verdict. At this time, you  
23          must award only the damages that fairly  
24          compensate John Kao for his harm.

25          " The arguments of the attorneys are not

1 evidence of damages. If you award damages,  
2 your award must be based on your reasoned  
3 judgment applied to the testimony of the  
4 witnesses and the other evidence that has  
5 been received during the trial.

6 "The university claims" -- this is  
7 2407, "Employee's Duty To Mitigate Damages."

8 "The university claims that if John Kao  
9 is entitled to any damages, the damages  
10 should be reduced by the amount that he  
11 could have earned from other employment. To  
12 succeed with this claim, the university must  
13 prove all of the following: 1, that  
14 employment substantially similar to John  
15 Kao's former job was available to him; that  
16 John Kao failed to make reasonable efforts  
17 to seek and retain this employment; and 3,  
18 the amount that John Kao could have earned  
19 from this employment.

20 "In deciding whether the employment was  
21 substantially similar, you should consider,  
22 among other factors, whether, A, the nature  
23 of the work was different from John Kao's  
24 former position; B, the new position was  
25 substantially inferior to John Kao's former

1 position; C, the salary, benefits and hours  
2 of the job were similar to John Kao's former  
3 job; D, the new position required similar  
4 skills, background and experience; E, the  
5 job responsibilities were similar; F, the  
6 job was in the same locality; and G, the  
7 terms and conditions of employment were  
8 similar.

9 "John Kao is not entitled to damages  
10 for any physical or emotional condition that  
11 he had before the university's conduct  
12 occurred. However, if John Kao had a  
13 physical or emotional condition" --

14 UNIDENTIFIED JUROR: Where are you now, sir?

15 THE COURT: 3927, "Aggravation Of Preexisting  
16 Condition Or Disability."

17 "John Kao is not entitled to damages  
18 for any physical or emotional condition that  
19 he had before the university's conduct  
20 occurred. However, if John Kao had a  
21 physical or emotional condition that was  
22 made worse by the university's wrongful  
23 conduct, you must award damages that will  
24 reasonably and fairly compensate him for the  
25 effect on that condition."

1           3934: "John Kao seeks damages from USF  
2 under more than one legal theory. However,  
3 each item of damages may be awarded only  
4 once, regardless of the number of legal  
5 theories alleged.

6           "You will be asked to decide whether  
7 USF is liable to John Kao under the  
8 following legal theories: 1, wrongful  
9 discharge in violation of public policy; 2,  
10 unlawful requirement of a medical or  
11 psychological examination of an employee; 3,  
12 retaliatory discharge in violation of the  
13 Fair Employment and Housing Act; 4,  
14 discrimination in violation of the Unruh  
15 Civil Rights Act.

16           "The following items of damages are  
17 recoverable only once under all of the above  
18 legal theories: 1, past and future loss of  
19 the ability to earn money; 2, past and  
20 future anxiety, humiliation and emotional  
21 distress.

22           "The following additional items of  
23 damages are recoverable only once for  
24 violation of the Unruh Civil Rights Act:  
25 Loss of the enjoyment of access to USF's

1 campus; 2, penalty of up to three times the  
2 amount of actual damages.

3 "If you decide that the conduct of USF  
4 caused harm to John Kao, you must decide  
5 whether that conduct justifies an award of  
6 punitive damages. The amount, if any, of  
7 punitive damages will be an issue decided  
8 later.

9 "At this time, you must decide whether  
10 John Kao has proved that USF engaged in that  
11 conduct with malice, oppression or fraud.  
12 To make such proof, John Kao must prove one  
13 of the following by clear and convincing  
14 evidence: 1, that the conduct constituting  
15 malice, oppression or fraud was committed by  
16 one or more officers, directors or managing  
17 agents of USF who acted on behalf of USF; or  
18 2, that the conduct constituting malice,  
19 oppression or fraud was authorized by one or  
20 more officers, directors or managing agents  
21 of USF; or 3, that one or more officers,  
22 directors or managing agents of USF knew of  
23 the conduct constituting malice, oppression  
24 or fraud and adopted or approved that  
25 conduct after it occurred.

1            "'Malice' means that USF acted with  
2            intent to cause injury or that the conduct  
3            of USF was despicable and was done with a  
4            willful and knowing disregard of the rights  
5            or safety of another. A person acts with  
6            knowing disregard when he or she is aware of  
7            the probable dangerous consequences of his  
8            or her conduct and deliberately fails to  
9            avoid these consequences.

10           "'Oppression' means that the conduct of  
11           USF was despicable and subjected John Kao to  
12           cruel and unjust hardship in knowing  
13           disregard of his rights.

14           "'Despicable conduct' is conduct that  
15           is so vile, base or contemptible that  
16           reasonable people would look down on it and  
17           despise it.

18           "'Fraud' means that USF intentionally  
19           misrepresented or concealed a material fact  
20           and did so intending to harm John Kao.

21           "An employee is a managing agent if he  
22           or she exercises substantial independent  
23           authority and judgment in his or her  
24           decision-making for the employer so that his  
25           or her decisions ultimately determine the

1 employer's policy.

2 "You must not consider or include as  
3 part of any award attorney fees or expenses  
4 the parties incurred in bringing or  
5 defending this lawsuit.

6 "Martha Peugh-Wade is no longer a party  
7 to this case. Do not speculate as to why  
8 Martha Peugh-Wade is no longer involved in  
9 this case. During your deliberations, you  
10 should not consider possible reasons for the  
11 removal of Martha Peugh-Wade from the case."

12 And that concludes the instructions that I'm  
13 reading before the attorneys argue the case. Maybe  
14 we'll take our break.

15 Remember the admonition. Do not form or  
16 express any opinion on this case until it's finally  
17 submitted to you for your decision. Do not discuss  
18 among yourselves or others until that time. Please be  
19 back in your places at 10:20 according to the courtroom  
20 clock.

21 I do apologize for the delay in getting started  
22 this morning.

23 (Recess taken.)

24 THE COURT: Jurors and alternates are all  
25 present. Counsel from both sides present. Plaintiff is



1 personally present.

2           Next step in the trial, ladies and gentlemen,  
3 will be arguments of counsel. Counsel state in their  
4 arguments questions, not evidence. This is their  
5 attempt to get the evidence organized and persuade you  
6 to their view of where consideration of the evidence  
7 should lead you.

8           Sometimes in the course of the attorney's  
9 argument, the opposing attorney will object on the  
10 grounds that the argument mischaracterizes or misquotes  
11 the evidence. If that happens, I probably will overrule  
12 and instruct you to the following effect: Your memory  
13 is as good as, probably in most cases much better than,  
14 mine. So you consider whether the question -- the  
15 argument complained of mischaracterizes or misquotes the  
16 evidence. If it does, then disregard the argument. If  
17 it doesn't, then give the argument the weight you think  
18 it is due.

19           Mr. Katzenbach, I see you're at the lectern, so  
20 I take it you would like to present an argument.

21           MR. KATZENBACH: I would, Your Honor, if it  
22 please the court.

23           THE COURT: Mr. Katzenbach will have two  
24 chances to talk to you, since he has the burden of proof  
25 in both issues of the case.

1           Go ahead, Mr. Katzenbach.

2           MR. KATZENBACH: Thank you, Your Honor.

3           CLOSING ARGUMENT BY MR. KATZENBACH

4           MR. KATZENBACH: Thank you, the jury. I  
5 appreciate you spending your time here and doing this.

6           Now, this is the opportunity to discuss the  
7 evidence with you. I am not going to be able to discuss  
8 all the evidence. We'd be here for days for me to do  
9 that. I am going to try to discuss what I think is  
10 important, remind you what I believe the evidence shows,  
11 and argue to you how you should decide this case.

12           To begin with, it's traditional, and I think  
13 really appropriate, to thank you for your time here. I  
14 mean, I don't -- and I -- I mean that in the sense that  
15 in a real sense, you have John Kao's life in your hands;  
16 you have his career in your hands. What you decide here  
17 will affect his life. And you have promised to do your  
18 best job in doing that.

19           You have -- John Kao's come here to get a fair  
20 trial, and he's had one. He's come here to put -- to  
21 have the facts put before you. This is the only place  
22 he gets that. He didn't get that in front of Dr.  
23 Missett. He didn't get that at USF. He didn't get  
24 that -- he wasn't going to get that in front of Dr.  
25 Reynolds. We'll go through that. But we can -- he was

1 only -- he wasn't going to get it in front of a paid  
2 arbitrator or a paid retired judge.

3 He's only going to get it here. He's only  
4 going to get it because we can engage in discovery; we  
5 can learn the facts; we can hear the witnesses. They  
6 have to testify in public, a task that is by no means  
7 easy. They have to tell you what the case is about.  
8 They have to tell you what they think. That's where  
9 John Kao gets his chance. You are his opportunity to  
10 restore his career.

11 It's traditional at a point like this to tell  
12 the jurors my client, John Kao, is happy to have the  
13 case in your hands. That would be a lie. He doesn't  
14 want to be here. He wants to be in his classroom. He  
15 wants to be teaching kids. He wants to be going to math  
16 club. He wants to be interacting with people at math  
17 tea. That's where he wants to be. That's what he  
18 dedicated his life to. That's what he dedicated his  
19 honor to.

20 So he dedicated his life to his father, to his  
21 family, to his mother, to his education, to his  
22 teaching, to his teaching life, to his career, to his  
23 family, to his profession, when he works for the math  
24 statistics journal.

25 He even dedicated his life to USF. He

1 dedicated it to bring to USF, a fine institution --  
2 teaching children, teaching kids who are going up to  
3 become the best they can be.

4 He dedicated it to the math club, to teach --  
5 to show kids that math could be fun, that math isn't all  
6 just about a lot of complicated formulas; it can be fun.  
7 You can have exploding bottles; you can have games.  
8 That's what he dedicated it to, and that's where he'd  
9 rather be than here.

10 So I'd be lying to say that he wants this case  
11 to be here. But he's had no choice. This is the place  
12 where he can get a fair trial, where we can get the fair  
13 discovery, where we can get everything we can have to  
14 prove our case, to show that we in fact -- so that John  
15 can show that he in fact has lost the job and the career  
16 that he loved, that he was dedicated to, that he devoted  
17 his life to having, and maybe get it back.

18 Throughout this trial, USF has suggested that  
19 somehow John Kao should have taken another road. Let me  
20 submit to you it's only the power of this open  
21 proceeding, it's only the power of this jury, it's only  
22 the power of courts, it's only the power of discovery,  
23 it's only the power that this proceeding gives us that  
24 lets us find out what occurred.

25 Without the power here, without that ability,

1 John Kao would really have nothing. He would really be  
2 sitting there at the mercy of administrators and faculty  
3 who seem to hate him, administrators and faculty who  
4 seem to want to gag him and shut him up, administrators  
5 and faculty who have said they're afraid of him because  
6 he's filing a lawsuit, not because of anything he did,  
7 administrators and faculty who wanted to manipulate a  
8 process against him by lying -- for example -- by hiring  
9 and paying Dr. Missett to give them advice and then  
10 giving him money as a reward for that advice.

11 We wanted -- we are -- to go to Dr. Reynolds  
12 and secretly, verbal to Dr. Reynolds -- you remember  
13 that -- tell Dr. Reynolds what he's supposed to do, tell  
14 Dr. Reynolds "John Kao was bumping and battering into  
15 people. We don't want that guy back here. We don't  
16 want him back here."

17 This is the only place where John Kao can get  
18 the trial he needs, the trial that's fair. And this is  
19 why we're here.

20 You know, I'm going to do things, by the way,  
21 that all the books tell me you shouldn't do, and that is  
22 I'm going to walk back and look at my notes. I'm sorry.  
23 It's a lot to keep track of. It wouldn't be fair to you  
24 and not -- certainly not to my client, if I didn't at  
25 least try to keep on track.

1           Now, the judge has given you instructions. I'm  
2 going to take them a little out of order, I'm sorry for  
3 that, because I want to start with the idea of the  
4 medical -- the FFD, the medical exam, the psych exam  
5 with Dr. Reynolds.

6           Our position is that was illegal, and this is  
7 why: First, that type of exam is an incredible invasion  
8 of John Kao's privacy. First, it -- he would have had  
9 to turn over everything to Dr. Reynolds. The university  
10 demanded that of him. Give Dr. Reynolds all the medical  
11 records you want.

12           You've also seen the form that Dr. Kao was  
13 going to have to sign, the form was being kept, from  
14 him, a secret, but he was going to have to sign, which  
15 not only was he going to turn over his medical records,  
16 he was going to have to go down there, potentially turn  
17 over financial records, educational records, family  
18 records, other medical records. He was going to have to  
19 have psych testing and drug test. Drug-testing, I ask  
20 you, for alcohol, for drug abuse?

21           This whole exam was nothing but a witch hunt,  
22 an effort to try to find something against Dr. Kao to  
23 get rid of him and to use against him. This whole exam  
24 was set up to hurt John Kao and get him out medically  
25 and keep him out medically.

1           Now, you have been told in this that somehow  
2 Dr. Reynolds would be -- would never have to give any  
3 information. But John Kao would still have to give  
4 information to Dr. Reynolds, whether or not Dr. Reynolds  
5 has some legal restriction on what he could tell the  
6 university.

7           You heard Mr. Cawood testify that "Well, yes,  
8 but in fact, doctors can often get around that a little  
9 bit indirectly, that they don't tell the employer  
10 specific information, but they give a general  
11 understanding of the types of information that were  
12 relevant to the assessment," and he's seen that happen.  
13 That's a nod as good as a wink to a blind horse. Well,  
14 it's maybe the wrong analogy, but it's close.

15           More importantly, Dr. Kao, if he ever signed  
16 that agreement with Dr. Reynolds, would never get to see  
17 what Dr. Reynolds said, never have access to Dr.  
18 Reynolds' file; he'd never know what Dr. Reynolds told  
19 the university. It'd all be a big black box and all he  
20 would know is he was unemployed, or perhaps under some  
21 sort of restrictions the university can imagine, saying  
22 "John, you can't go to faculty meetings anymore; John,  
23 you can't -- you know, you can't make -- file complaints  
24 anymore." Can't do the things that a normal faculty  
25 member would do.

1           Dr. Kao -- Dr. Terr stood here and told you --  
2 sat here and told you how important the patient -- the  
3 psychotherapist/patient relationship is. She told you  
4 that the confidentiality of that is critical to its  
5 success and critical to helping somebody. To expose all  
6 that even to Dr. Reynolds is a violation of that  
7 privacy, a violation of that interest and a violation of  
8 fundamental norms of that relationship.

9           In order to make -- in order to have Dr. Kao  
10 turn all that information over and potentially lose  
11 control over his -- lose control over it, in other  
12 words, when he can prevent -- while Dr. Terr doesn't  
13 have to tell anybody without John Kao's consent, he has  
14 no such control once it's out of that office, once it's  
15 in Dr. Reynolds' hands.

16           So that's a serious and important loss of  
17 rights. It's a serious and important invasion of  
18 privacy. It's the type of invasion of privacy that  
19 shouldn't be required and can't be required without some  
20 important and compelling reason.

21           Now, this exam was unlawful. We've shown you  
22 that, a part of our prima facie case, he was demanded to  
23 take an exam; he refused to go to the exam with Dr.  
24 Reynolds; and he was fired. That's harm by any  
25 standard -- of any standard.



1           So the question really becomes, to you, on --  
2 looking at the lawfulness of the exam, to take a look at  
3 the jury instructions that are going to be governing  
4 that exam in particular.

5           The first issue I want to direct you to is the  
6 first issue; that's USF's burden of proof on that issue  
7 under those instructions re namely to show business  
8 necessity. USF has to show that the purpose of the exam  
9 was to enable USF to operate safely or efficiently.  
10 Let's start, really, right there.

11           What's the evidence in this case show? Well,  
12 the evidence in this case shows this isn't about safety  
13 at all; this is about a couple of professors, really  
14 Tristan Needham, Paul Zeitz, complaining about John Kao  
15 in vague, generalized ways. Nothing that John Kao did  
16 is described in any concrete terms. Nothing is -- the  
17 allegations that he was angry; well, people are angry in  
18 the workplace.

19           Who hasn't been angry sometime in the  
20 workplace? Who hasn't had their face -- or who hasn't  
21 unconsciously let their face show anger? Who hasn't  
22 made an angry gesture? Who hasn't, you know, grimaced?  
23 Who hasn't been upset? Who hasn't, for example, felt  
24 frustrated when people don't listen to you?

25           Even Paul Zeitz described John Kao, when he was

1 distributing these statistics in this meeting, as  
2 shouting. But what? He shouted in frustration. People  
3 weren't listening to him. Well, people don't have to  
4 listen to him, but that doesn't mean you have to sit  
5 there and smile and take it.

6           You heard about the meeting where John Kao was  
7 sort of -- where, as Tristan Needham described it, "We  
8 hadn't got our ducks in a row," and John Kao was  
9 volunteering. Volunteering for a job that no one else  
10 in that meeting ever did -- no one else -- or rather, no  
11 one volunteered for. And you heard how they basically  
12 shut him out deliberately, intentionally, humiliatingly.  
13 Of course he's going to be frustrated on that. Of  
14 course he's going to be a bit upset. If that happened  
15 to anyone, anyone in the world, that's how you would  
16 react.

17           What's astonishing are all the statements in  
18 this case about how Dr. Kao has a flaring-up temper and  
19 white-hot rage. And all those statements, every time --  
20 every time USF does something to him that -- whether to  
21 provoke him deliberately or just by their own  
22 machinations, Dr. Kao takes it.

23           Look at the facts. Dr. Kao files this long  
24 complaint of discrimination. He has meetings with USF.  
25 In evidence, you will see the USF proposal to settle

1 that complaint; you will see Dr. Kao's response saying  
2 he doesn't agree with their terms, partly because he  
3 feels that that would shut him up, partly he feels that  
4 he couldn't -- he doesn't want this stuff confidential  
5 because, as Elsie Tomayo tells him when this whole  
6 process started, even if it wasn't found to be  
7 discriminatory, it could be used to make management  
8 better. So we don't settle that.

9 Does Dr. Kao go crazy and attack anyone because  
10 they're basically shutting him out? No. He files  
11 another complaint. I suppose that's -- as a lawyer, I  
12 guess I could understand that pretty well. And what  
13 happens to that?

14 September 17<sup>th</sup>, Martha Peugh-Wade writes back  
15 to him dismissing everything he said without giving  
16 it -- as far as I can see, giving it two pages, most of  
17 which is just absurd, like, for example, suggesting that  
18 professors can't complain about the hiring process  
19 'cause it's not a job they're applying for.

20 What; the gender, the race, the experience of  
21 the people that are being hired, that they're going to  
22 be their colleagues, is irrelevant to these people, is  
23 irrelevant to professors, irrelevant to John Kao; that  
24 John Kao's ever to explain his concerns about  
25 discrimination can be ignored and forgotten?

1           I mean, the university that rightly takes pride  
2 in elements of its diversity would not at least have the  
3 statement of something more concrete than saying "You  
4 have no right to complain about what you perceive is  
5 discrimination."

6           And as insulting as that statement would be to  
7 anyone -- everyone in this world, Dr. Kao doesn't lose  
8 his temper on that; Dr. Kao doesn't go crazy; Dr. Kao  
9 simply takes it and says "Okay, I'll suck it up."

10           And what happens next? Dr. Kao realizes that  
11 the 2008 search has got a problem. So he presents that.  
12 Now, whatever you want to say about the meetings in  
13 January -- we've gone through those -- let me just  
14 simply say that these are meetings that the description  
15 of them change and vary, depending on how much the  
16 university wants to convince you something bad happened.

17           But you will recall the testimony of Christine  
18 Liu right there in the office when Dr. Kao was meeting  
19 with Paul Zeitz didn't describe a meeting where Dr. Kao  
20 was upset or angry or, more importantly, that Dr.  
21 Zeitz -- or Paul Zeitz was frightened. What did  
22 Christine Liu say? After that meeting, what did Dr.  
23 Zeitz look like? Was he panicked, scared, frightened,  
24 cowering? No. He was frowning and rolling his eyes.  
25 Frowning and rolling his eyes.

1           Now, Dr. Zeitz may not have liked what Dr. Kao  
2 was saying; he may not even take -- took it seriously,  
3 even though everyone, Christine Liu, was concerned about  
4 the fact that applicants seemed to be dropping like a  
5 shock in that search. There wasn't many of them.

6           Dr. Kao then proceeds in the way he's proceeded  
7 every way in this case, to try to put his argument as  
8 best he can. So he prepares -- and for a math  
9 professor, I don't think this ought to be surprising --  
10 he prepares a statistical analysis to try to convince  
11 people that there are problems with this search.

12           He presents that analysis. And the rest of the  
13 math department or -- particularly members of the search  
14 committee, and particularly Tristan Needham and  
15 Professor Zeitz, what's their attitude to that? Are  
16 they saying "Okay, John, I appreciate the effort that  
17 you've put in this. Thank you for your information"?

18           Do they treat him like a colleague? Do they  
19 treat him seriously? Do they treat him like someone who  
20 is trying only to get the best people there and best  
21 department and most diverse department that he can, or  
22 do they just stay angry at him, as Tristan Needham says,  
23 wasting their time on what he considers a mere  
24 formality?

25           The only time in this search process where the

1 faculty get input is, in Tristan Needham's mind, a mere  
2 formality. No one else, of course, says that. But it  
3 tells you what Tristan Needham is thinking.

4           And what does John do when they shut him out  
5 like this? Does he disrupt the meeting? No. The  
6 meeting continues. It completes what they're doing.  
7 Meeting is over, right, and John -- and what -- and does  
8 John Kao fly into some crazy rage? No. Nothing. You  
9 hear no -- nothing. Nothing in this case shows any  
10 evidence that John Kao did anything towards anybody in  
11 the weeks, months after that meeting. No punishment, no  
12 retaliation, no nothing. So again they provoke him.  
13 Nothing.

14           They provoke him at the chair. John just --  
15 meeting. John just leaves. They go -- on  
16 June 18<sup>th</sup> -- on June 18<sup>th</sup>, they have -- they bring  
17 him into the meeting with Martha Peugh-Wade, and Martha  
18 Peugh-Wade says "John, we're about to fire" -- says all  
19 but "John, we're about -- going to fire you. We're  
20 going to send you for a fitness-for-duty, maybe suspend  
21 you, throw you off campus," right.

22           The university films this meet- -- you know,  
23 puts security -- puts a private investigator to film  
24 John coming and going. They don't put officers in the  
25 meeting, of course, to protect Martha Peugh-Wade. No,

1 no evidence of that. They just want to film John coming  
2 and going. And why do they do that? They say "Ah,  
3 maybe John will clench his fist. Maybe he'll make the  
4 scary gesture that" university offered to you on the  
5 video.

6 And what happens? Once again, nothing. John  
7 can be provoked, but he just doesn't fly into the rage  
8 that they keep hoping he will.

9 And so what other exciting events have they  
10 told you about to show John's propensity for anger and  
11 retaliation and all that? After the chair meeting, he  
12 mocks Peter Pacheco twice. He frighteningly fails to  
13 wear a suit one day; he's sick and can't teach classes.  
14 He gives an exaggerated bow to Stephen Yeung. He  
15 laughs.

16 We've shown you in this case -- we presented  
17 testimony of other faculty members and other people at  
18 these meetings in the hallways, in the area. None of  
19 them see the behaviors that the university seems to  
20 think was so frightening that John Kao was doing. How  
21 believable is that? I mean, surely -- surely if Dr. Kao  
22 was doing any of those things, the university could  
23 produce one witness that was independent, one witness  
24 that wasn't on the search committee, one witness that  
25 wasn't part of this group that was plotting against

1 John, planning against John for a semester or more, one  
2 witness that can say "Yeah, I saw those things and they  
3 frightened me."

4 But what do we really have? We have a witness  
5 from -- Dayna Soares; we have Pete Wells; we have Bob  
6 Wolf; we have Christine Liu, department secretary, none  
7 of whom see this, none of whom even hear people  
8 complaining about John in this way.

9 We have best evidence. We have Steve Devlin.  
10 He saw John, he thought, get a little angry, a little  
11 shaky, at the meeting over the search. And he heard  
12 Tristan complaining after that search that he was  
13 concerned and a little upset. But do you have him  
14 saying he was frightened of John? No. He invites John  
15 to a baby shower at the end of the year.

16 So it really comes down to -- virtually, in  
17 this case, the evidence here against John is thin,  
18 almost, I submit, to the point that it's distressing  
19 we're here to argue about it.

20 So let me talk about -- a little bit about a  
21 few of these people, just to go on a little more on this  
22 point that this is not about safety.

23 Tristan Needham stood there, and he was  
24 possibly the witness most committed to the idea -- the  
25 university's plan that John was dangerous. Tristan



1 Needham says "John sees -- glares at me with a white-hot  
2 rage and has been doing it forever."

3 I guess the question that I would ask is if  
4 John's glaring at him with white-hot rage for so long,  
5 how come Tristan Needham can't do more about that? Why  
6 is --

7 MR. VARTAIN: Objection. The witness did not  
8 testify "forever." He said "in that semester."  
9 Misstates the testimony.

10 THE COURT: If the jury concurs that it  
11 misstates the testimony, ignore the part of the argument  
12 you feel is a misrepresentation. If not, give it the  
13 weight you think it is due.

14 MR. KATZENBACH: But what we know about Tristan  
15 Needham, he told you about the fact that he thought this  
16 meeting was a mere formality. Didn't read John's  
17 statistics, didn't care what John said.

18 What we really know about Tristan Needham,  
19 though, is that there's a hostility between them that's  
20 long-standing. What we really know about it is that we  
21 hear Bob Wolf's testimony that Tristan Needham appears  
22 to bear a grudge against John.

23 We know, for example, that Tristan Needham, in  
24 the CCAC affair, was apparently willing to accuse John  
25 Kao of engaging in negotiations behind Tristan Needham's

1 back and was prepared to create emails -- or edit emails  
2 to make it look like John Kao was concealing things from  
3 him.

4 We also know that while Tristan Needham sits --  
5 told you that he apologized, and he couldn't understand  
6 why that apology wasn't accepted, and it was irrational  
7 for John -- he indicated it was irrational to demand  
8 that John Kao -- that he sign anything formal to  
9 acknowledge that.

10 Well, that's the -- everything John says to  
11 Tristan Needham is irrational and unreasonable. And  
12 why? 'Cause Tristan Needham doesn't agree with it. Not  
13 because it's objectively irrational, not because it  
14 doesn't make sense, but -- because even Paul Zeitz  
15 thought writing -- putting something in writing and  
16 signing it made sense -- but no, just 'cause Tristan  
17 Needham doesn't agree.

18 I guess we've all known people who everything  
19 you say to them, they say "That's irrational." And they  
20 don't mean it's irrational -- not -- in the sense it's  
21 irrational; they just mean they don't like it and they  
22 don't agree with it. Different thing. We know that  
23 Tristan Needham ended up having had his boss sign this  
24 agreement -- settlement.

25 We also know that in 2002, John Kao was put out

1 on an unpaid leave of absence when he had that reaction  
2 to Prozac. Who did that? Tristan Needham. John Kao  
3 testified he called Tristan -- when he called Tristan  
4 Needham, Tristan Needham said "You can't come back  
5 unless you have a personal interview with me and you  
6 have another professor in your class watching you."

7           What did Tristan Needham say about that? "I  
8 don't remember that. I wouldn't have made that  
9 decision," he says, "'cause it's above my pay grade." I  
10 mean, really. The university could have put on evidence  
11 to show that someone else made that decision, but they  
12 chose not to do that.

13           I've already told you about Tristan Needham's  
14 hostility over the search in 2008 and that Tristan  
15 Needham blocked John Kao's attempts to become --  
16 volunteering efforts to become chair when no one else  
17 would volunteer and John said "I'll volunteer." It was  
18 Tristan Needham who jumped in to block that.

19           So Tristan Needham's description of that  
20 meeting where he tries to say John Kao was out of  
21 control isn't really supported by anybody else,  
22 including Christine Liu, who was in there. And you have  
23 to wonder if Tristan Needham's perception of what John  
24 Kao was doing at that meeting is so at variance with  
25 everyone else's description of that event, how accurate

1 is anything else Tristan Needham is saying in what he  
2 talks about, John Kao's anger or any of his other, you  
3 know, observations.

4 I would suggest to you that it isn't very  
5 accurate at all, that he's here testifying in a part of  
6 a preconceived plan, a preconceived decision, a  
7 preconceived effort to convince you that John Kao was  
8 somehow dangerous.

9 Tristan Needham denied, for example, knowing  
10 about the sending John to a fitness-for-duty  
11 examination. But you have seen in Exhibit 80, Martha  
12 Peugh-Wade's own notes, that per Tristan -- his warning  
13 against a fitness-for-duty examination because John Kao  
14 was smart and is going to pass. On whole events that  
15 are supposed to be secret and confidential, yet Tristan  
16 Needham seems to know all about them.

17 Finally, Tristan Needham testified in here  
18 today -- in this case that John Kao had interacted with  
19 his wife at the Finch retirement party on May 9<sup>th</sup>  
20 where he repeated "How's your mother, how's your mother,  
21 how's your mother," in their conversation, in a  
22 frightening manner. May 9<sup>th</sup>.

23 Tristan Needham had -- there are at least three  
24 notes of conversations that Tristan Needham had on  
25 May 12<sup>th</sup> after -- actually four: Exhibits 57, 58, 59

1 and 60 -- not one of which reports Tristan Needham  
2 telling Martha Peugh-Wade about this allegedly scary  
3 incident involving his wife.

4           And I would add that this phrase "How's your  
5 mother, how's your mother" seems to have been picked up  
6 by a number of witnesses on USF's side of the case as an  
7 effort to try to portray John as acting irrationally.  
8 Didn't happen.

9           Talked a little bit about Paul Zeitz and his  
10 effort to portray the meeting on June -- January 3 as  
11 frightening. Christine Liu told you what happened on  
12 that and how he wasn't frightening; he was frowning and  
13 rolling his eyes.

14           Dean Brown -- the email Dean Brown wrote about  
15 this, Exhibit 275, didn't make any accusations. He said  
16 he was upset, didn't like John's conduct, but said  
17 nothing about being -- Paul Zeitz was saying, he was  
18 frightened or scared.

19           Dean Brown's testimony that he was frightened  
20 isn't confirmed by any of the emails he wrote. When he  
21 describes Paul Zeitz's report to him, he doesn't say  
22 anything, "By the way, I was terrified and frightened by  
23 John Kao."

24           In fact, the evidence is, in Exhibit 12, where  
25 John -- which is John's response to Brandon Brown's

1 email, Brandon Brown invites John to come back to his  
2 office -- make an appointment and come back and see him  
3 anytime. In fact, Dean Brown's testimony -- Brandon  
4 Brown's testimony was most significant, for a simple  
5 reason, that he testified that this whole scheme to get  
6 rid of John started way back, started early January  
7 where everyone was getting together to talk about John  
8 and find a way to get rid of him. And that whole  
9 semester, people were out there looking for a reason,  
10 looking for a reason. Everything that John was going to  
11 do was going to be looked at through a microscope, a  
12 microscope of "Can we use this as a way to get rid of  
13 him."

14 MR. VARTAIN: Objection. Dean Brown didn't  
15 testify about that at all. That's misstatement number  
16 two.

17 MR. KATZENBACH: Your Honor ...

18 THE COURT: Yes, Mr. Katzenbach.

19 MR. KATZENBACH: I realize that Mr. Vartain  
20 likes to criticize me, but I really think that when I'm  
21 making an argument of inference from evidence, that he  
22 can at least let me finish the point.

23 THE COURT: He's not obliged to if he thinks  
24 you're misquoting or mischaracterizing the evidence.  
25 However, the instruction and the reaction remain the

1 same.

2 Jurors, if you believe that the statement does  
3 not accurately reflect or quote the evidence, then  
4 ignore the argument based on that misperception.

5 MR. KATZENBACH: We also know that Dean Brown,  
6 right after the events in early January, wrote in  
7 Exhibit 117 that Dr. Kao had told both Zeitz and Brown,  
8 Dean Brown, that he was going to be making a complaint  
9 concerning affirmative action issues over the search.  
10 That's Exhibit 117.

11 In fact, virtually the entire case on  
12 dangerousness comes down to this: accusations that John  
13 Kao was bumping into people and accusations that John  
14 Kao -- accusations that John Kao was veering at  
15 people -- and we're talking now about Stephen Yeung --  
16 and an accusation of what happened -- Dean Turpin's  
17 accusation against John regard- -- at the end of April.

18 Stephen Yeung's description of that single  
19 event is that John -- he doesn't know that John even saw  
20 him. He's coming out of the bathroom, you know, in the  
21 bathroom door; John Kao he sees moving around down the  
22 hallway. This is nothing like, of course, the  
23 description that was presented to Missett or others.  
24 And he's not sure that John even saw him trying to  
25 leave. I mean, there really is nothing to it.

1           John Kao told you how he -- that as he walks  
2 down the hall, he occasionally moves over to keep out of  
3 the way of the women's bathroom door. And no one  
4 disputes the facts, as John described them, that the  
5 door in fact opens up into the hallway.

6           So it comes down, really, to issues, as I see  
7 it -- or I'd submit to you -- that these two incidents,  
8 the incident with Turpin and this allegation of bumping,  
9 are what the university's case hinges on.

10           Well, let's take a look at -- we've talked a  
11 lot about the Turpin incident. And let me just remind  
12 you a little bit about that. That's where initially  
13 Dean Turpin told Dean Brown John had basically followed  
14 her in the parking lot, that this occurred in the  
15 parking lot; John had walked up to Dean Turpin's car and  
16 stood next to it. That's what Dean Brown told you  
17 Turpin told him.

18           When Dean Turpin was on the witness stand, she  
19 said that all those facts were not true. In fact, when  
20 Dean -- when confronted with her declaration she  
21 submitted in this action, which said that these events  
22 had occurred in the parking lot, she said "Oh, that  
23 meant that -- that it occurred in the parking lot 'cause  
24 John Kao was looking into the parking lot."

25           I mean, I ask you, ladies and gentlemen of the



1 jury, does Dean -- does Dr. Dean -- Provost Turpin,  
2 Dr. Turpin, really think that there's no difference  
3 between looking into something and being there? That I  
4 can get a tan by looking out at the plaza there?

5 Finally, not only are those inconsistencies,  
6 she wrote emails. And I'm not -- those emails were just  
7 one more effort to edit a version of facts that -- to  
8 get John Kao -- to create some sort of alleged  
9 contemporaneous document for that purpose.

10 The dates on that document are consistent only  
11 with it being written in June, not April. Why would you  
12 write down "yesterday" a day later if you weren't  
13 writing it a month -- two months later, when that  
14 Tuesday was really the 24<sup>th</sup>?

15 That document -- when we asked for them to  
16 produce all emails, when they produced, voluntarily, a  
17 statement in a Interrogatory answer saying "We're giving  
18 you a copy of all emails on Dean Turpin's computer  
19 during -- from April 21<sup>st</sup> through June 28<sup>th</sup>," I  
20 believe, or -7<sup>th</sup> -- all emails from her computer  
21 printed out regarding John Kao, the alleged original  
22 email wasn't there.

23 It wasn't because they had given it to us  
24 before. That wasn't what they said. They didn't say  
25 "We're giving you all emails, other than the ones we've

1 given you before," because, of course, they gave us the  
2 forwarded copy that was really written two months later.

3 So that email is, we would submit to you, email  
4 that was clearly edited, even after the fact. And she  
5 admits -- Dean Turpin even admits as much.

6 That clearly is evidence of the whole reason  
7 that they're looking for reasons to get rid of John Kao  
8 and they're prepared to create records to support that  
9 view, make it look as bad as possible. Could change the  
10 story from -- changing the story, see if they can find  
11 one that actually might work.

12 I submit to you that that whole incident --  
13 that whole incident, which, by the way, was investigated  
14 by -- by public safety and concluded that it wasn't a  
15 serious threat -- that whole incident is simply a effort  
16 to try to create evidence against Dr. Kao.

17 MR. VARTAIN: Objection. The witness testified  
18 that it was not a criminal threat. Didn't testify what  
19 you said. Public Safety Director Lawson said he didn't  
20 regard it as a criminal threat. He didn't say it wasn't  
21 a serious threat.

22 THE COURT: Objection's overruled.

23 MR. KATZENBACH: As we talked about -- Mr.  
24 Lawson was on the stand, and we asked him about the two  
25 parts of the policy. And he acknowledged that under

1 part B, where it was not -- which he said this is what  
2 they determined; it wasn't a serious threat -- and he  
3 uses the word "serious threat" -- he said -- he  
4 acknowledged that under those circumstances, that people  
5 would go and talk to the person involved and say "You  
6 can't do those sorts of things." And he acknowledged  
7 that that never happened here, just like no one ever  
8 talked to Dr. Kao about any of these things.

9           Now, finally we come to what I would like to  
10 say -- describe as the bumping issues. We've talked  
11 about veering; we've talked about -- but let's look at  
12 bumpings, and let's look at how that story develops.  
13 And this is the time, of course, where I'd like to try  
14 to do a little show-and-tell, if I can. And I say in my  
15 technologically-challenged way, let's see how it goes.

16           The accusations about bumping, the evidence in  
17 this case are going to show, are ones that were  
18 generated and developed over time. They were produced  
19 in an effort, we think, to create a record.

20           So let's start here with what's in evidence as  
21 Tristan -- as notes Martha Peugh-Wade took of Tristan  
22 Needham, beginning on April 28<sup>th</sup>, 2008, which is  
23 Exhibit 56.

24           In that -- in those notes, Martha Peugh-Wade  
25 interviews Tristan Needham. What does he say? He says

1 "never threatened verbally or physically."

2 Paul Zeitz, the other person telling you about  
3 bumping, what does he say when he's interviewed, Exhibit  
4 61? He says "not ever physical."

5 Two -- more than two weeks later, all of a  
6 sudden we now have something about -- on 5/12, we all of  
7 a sudden now have something about bumping. Paul Zeitz  
8 can't put a date on it. See he tries, crosses it off;  
9 he tried and tried. "Sometime this semester, sometime  
10 January '08."

11 Remember, this is Mr. Zeitz, who, if you accept  
12 Dean Brown's testimony, was frightened of John Kao in  
13 early January. How can he have -- not know about this  
14 dangerous incident of bumping and -- not know it when it  
15 happened, not recall it when it happened, not report it  
16 when it happened, not remember exactly when it happened?

17 Same with Tristan Needham. Tristan Needham, on  
18 the 12<sup>th</sup>, can't give anything beyond the word  
19 "bumping."

20 I would submit to you that that just means he's  
21 still thinking about trying to find out some set of  
22 facts that are going to work here.

23 What's the purpose of this bumping? Well, it's  
24 really to give the university a fallback because when --  
25 their meeting notes with Dr. Missett state "If fit with

1 no qualification, we can regard bumping as assault. If  
2 people are terrified, we can regard it as purposeful and  
3 respond 'risk of physical harm, you can be fired.'

4 Submit to you that this isn't about something  
5 they would do in the past -- in the future. This is  
6 something -- they're going to use bumping as a way to  
7 get rid of John Kao. That's what the significance is.

8 And the clearest evidence of that is the notes  
9 with -- USF notes of a call with Dr. Missett on  
10 June 6<sup>th</sup>, where he says -- where Martha Peugh-Wade, re  
11 call, "Verbal to Reynolds, intentionally bumping into  
12 others, battery."

13 The significance of this particular evidence is  
14 multiple. But it shows that USF's professed argument  
15 that they were, quote, "just concerned about trying to  
16 find out the facts" is fake. They'd already made up  
17 their minds that they were going to claim that Dr. Kao  
18 was bumping people deliberately, so much so that they  
19 were going to tell Dr. Reynolds that, so much so that  
20 they were going to call it battery, so much so that they  
21 were going to put it verbal to Reynolds. And why verbal  
22 to Reynolds? No paper trail.

23 Now, sadly for USF, Martha Peugh-Wade writes  
24 this down. Why she would write down something that's  
25 supposed to be only verbal, I don't know. But this is

1 what the evidence is, "Verbal to Reynolds, bumping into  
2 people."

3           And what is Dr. Reynolds going to do with some  
4 information like that, when USF tells him "Verbal to  
5 Reynolds, intentionally bumping into others"? Is he  
6 going to find John Kao fit for duty? Not in a million  
7 years. He is going to send John Kao back to work when  
8 USF is telling him "Verbal to Reynolds; he is assaulting  
9 and battering people"? Is he going to send him back to  
10 teach at his job? Never. It's not going to happen.

11           This is not an examination designed to  
12 determine something; this is an examination designed to  
13 reach a result. And that result is betrayed by "verbal  
14 to Reynolds."

15           Finally, I want to mention two other points  
16 about Turpin, and that's to remind that her alleged  
17 emails weren't in Dr. Missett's files. Apparently they  
18 hadn't been written yet. And secondly, that the last  
19 discovery response that's in evidence on this case,  
20 Exhibit 121, indicates -- and you'll see it for the  
21 first time -- that all of a sudden, the -- that Jennifer  
22 Turpin's computer on which these emails were written is  
23 suddenly no longer in the university's custody and  
24 control.

25           So what I want to say here is simple. This

1 isn't about safety, never has been; it's about getting  
2 rid of John Kao.

3           There's some other things I would like to talk  
4 to you about on this alleged purpose to protect safety,  
5 as part of the instructions.

6           First of all, USF has no established policy on  
7 fitness-for-duty examinations. If fitness-for-duty  
8 examinations were really necessary for safety at  
9 University of San Francisco, surely USF would have a  
10 policy on that, a policy that would say exactly how  
11 they're going to come about, exactly what they're going  
12 to be, what the rights are, what the fairness is. All  
13 of that would be in a policy.

14           They have enough policies, god knows. They  
15 have a big collective bargaining agreement. Where is  
16 the stuff on fitnesses-for-duty? Where is the policy on  
17 that? There is nowhere.

18           They do have policies, however, governing these  
19 issues: They have the violence policy. We talked about  
20 that. That policy is, as I mentioned, even if you find  
21 there's no serious threat of danger, it does require a  
22 person to be talked to.

23           We have the respect policy. The respect  
24 policy. And what does the respect policy say? It says  
25 there will be thorough and complete investigations for

1 any reports of harassment. The policy defines  
2 harassment broadly; not just sexual harassment, any kind  
3 of harassment. Includes assault, being verbally  
4 aggressive with people.

5 Both of those policies do.

6 Yet what you see here is -- you have a  
7 collective bargaining agreement that has a just-cause  
8 provision. It also provides protections. But what you  
9 see in this case is the bizarre situation where the  
10 university is constantly saying that this is not a  
11 complaint, not a disciplinary action; it's  
12 nondisciplinary.

13 And why is that? It's nondisciplinary. Why is  
14 that? So they can avoid doing the obvious. They can  
15 avoid saying "'We have to investigate thoroughly.' We  
16 can now -- it's a nondisciplinary matter. We can just  
17 take the side of -- we can just take the opinions of a  
18 few people. If it's a nondisciplinary matter, we can  
19 just not bother to interview Dr. Kao, tell him what's  
20 going on."

21 But, of course, they know contrary because  
22 what's -- because David Philpott told you that  
23 throughout this period of time, while they're not  
24 telling Dr. Kao what's going on, he's having up to five  
25 conversations with Elliot Neaman, the union president,



1 describing the university's alleged allegations against  
2 Dr. Kao. So why -- and that he -- that he never asked  
3 Dr. Elliot Neaman to keep it secret. But Elliot Neaman,  
4 a friend of Paul Zeitz, and Paul Zeitz on the union  
5 board, perhaps that's his motivation for never telling  
6 John Kao about these conversations.

7 But the point is that if it wasn't secret from  
8 Elliot Neaman, why is it secret from John Kao? It's  
9 because they don't want John Kao to know about this.

10 The idea is to have John Kao go down to see Dr.  
11 Reynolds and to have this sprung on him, saying -- and  
12 John Kao is then going to say "Uh, uh, uh, I didn't do  
13 it."

14 And Dr. Reynolds is going to write "Hmm,  
15 denial." You know, queen of denial.

16 How can you defend yourself when you don't know  
17 what you're defending against? How can you not sound  
18 like you're defending yourself when you can't respond to  
19 any facts? How can you defend yourself when against an  
20 examination that's being set up against you, where no  
21 one will tell you what you're [sic] really done, when,  
22 where and how?

23 The university says "He wants to know the names  
24 of the people involved, and we're afraid of  
25 retaliation."

1           Well, that doesn't mean you can't give any  
2 information on its face. But more importantly, think  
3 about it, John Kao is alleged to have been bumping into  
4 people with the intent to scare them. He's alleged to  
5 be grimacing and chuckling at people with the intent to  
6 be -- maniacally chuckling to intimidate them. What,  
7 John Kao doesn't know -- if this is true, John Kao  
8 doesn't know who he's doing this to?

9           That's just circular.

10           If he really had done these things, the  
11 university would tell him. You don't hide the fact that  
12 you've committed wrongdoing in the workplace. If you  
13 attack somebody in the workplace, it isn't a secret.

14           Every disciplinary procedure in the world -- if  
15 you go out and hit someone with a two-by-four, it's not  
16 like, you know, "Sometime -- sometime in the last six  
17 months, you approached someone with a large block of  
18 wood and waved it around in a generally threatening  
19 manner that may or may not have actually hit somebody,  
20 somebody somewhere."

21           You have evidence, you say it. You have a  
22 reason, you explain it. And why? Because that's how  
23 things get done. If this is a serious issue, then you  
24 say so.

25           You will recall that John Kao, from the start,

1 said "What's this about? What can you tell me?"

2 The university's response in an email from  
3 Martha Peugh-Wade on Friday, right be- -- Friday, the  
4 20<sup>th</sup> of June, said "It wouldn't be productive to tell  
5 you."

6 Well, the university perspective, as we now see  
7 it -- we know why it wouldn't be productive; 'cause  
8 there wasn't anything to say.

9 And what happens? I respond back and I say,  
10 very simply, "I don't see how this can not be  
11 productive. You're asking me to advise John Kao whether  
12 to go to this examination, and you won't tell me any of  
13 the facts on which you're relying for this. How can I  
14 advise him? If you're serious -- isn't the obvious  
15 thing, if you're serious, you would say at least  
16 something, to say 'Well, this is what happened. This is  
17 why it's serious. This is what we need to tell you so  
18 you can tell Dr. Kao he needs to do this.'"

19 And what was the -- what was the university's  
20 response to that email? Not only did they demand that  
21 he respond by -- on Friday demand that he respond, all  
22 of a sudden, by Monday, but what was the real response  
23 from Martha Peugh-Wade? Martha Peugh-Wade's real  
24 response to that email was "Sorry, fellow, I'm out of  
25 the office all next week."

1           And so on the 24<sup>th</sup>, Martha Peugh-Wade sends  
2 the letter demanding he go to the medical exam -- the  
3 psychological examination, a letter that she testified  
4 to you she didn't even sign. She had someone else sign  
5 'cause she was out of the office doing something more  
6 important.

7           If there was a safety issue, the university had  
8 ample evidence and ample means to have normal policies,  
9 the safety -- the violence policy, the respect handbook,  
10 even the collective bargaining agreement, to handle  
11 those issues. They were established policies,  
12 established procedures, established ways of doing this.

13           And they chose -- they chose to avoid those, to  
14 characterize it as nondisciplinary, for the only purpose  
15 of avoiding doing them.

16           And why would you avoid telling someone the  
17 truth? Well, as Jack Nicholson once said, "You can't  
18 handle the truth."

19           They've also in this case tried to justify  
20 their conduct by relying on Dr. Missett. To do that,  
21 they, of course, presented a one-sided picture to Dr.  
22 Missett. Not a thorough investigation, but a one-sided,  
23 selected -- selected information, presented in a context  
24 where it's pretty obvious what the university wants.

25           In particular, you recall that Dr. Missett

1 acknowledged that -- that he understood there were  
2 student complaints. In fact, the evidence is there are  
3 not. John was a stellar teacher. And his evaluations  
4 from the spring of 2008, which are in evidence --  
5 Exhibit 10, I believe -- show that.

6 He also told them that Dr. -- that he had  
7 been -- that Dr. Kao had been talked to for years and  
8 years and years, without change. A complete falsehood.

9 And why is that a falsehood? Well, isn't it  
10 because Dr. Good, several months earlier, had -- had --  
11 had gone through role-playing with the university, had  
12 emphasized the need to talk to John Kao, and had  
13 proposed manners in which to do it?

14 Well, that tipped the university what they had  
15 to say to their next expert. They had to say "Oh, this  
16 has already happened, and he hasn't changed, and golly  
17 gosh, what are we going to do now?" But that's, again,  
18 manipulating the situation to get the result they want.

19 And what else about Dr. Missett that I want to  
20 say? Well, many things. But I point you to his bill.  
21 And I think there is no explanation for that bill, that  
22 after you work for six and a half hours and you bill for  
23 28 -- or 32 and a half, that those additional -- those  
24 additional 28 -- 34 and a half -- those additional hours  
25 that he's paying [sic] for reading the black binder for

1 hour after hour after hour after hour, which is just a  
2 copy of Dr. Kao's complaint, you know, for  
3 discrimination, that really that was a way of getting  
4 extra pay. It was like a bonus for a job well done.  
5 After he'd given his advice, just wasn't getting --  
6 gotten paid enough, so he needed another nine, nine and  
7 a half thousand dollars for it.

8           We've already discussed the "verbal with  
9 Reynolds," how they were wiring this exam to go against  
10 him. But you recall that Reynolds was suggested by Dr.  
11 Missett. And Missett -- and while -- while  
12 Ms. Peugh-Wade tried to say "Well, I made the decision  
13 myself," look at what Dr. Missett actually testified to.  
14 He said he pushed Reynolds on -- on -- he basically  
15 testified he pushed Ms. Reynolds [sic] on Martha  
16 Peugh-Wade 'cause Reynolds was good and -- because John  
17 looked at [sic] him psychotic, or was potentially  
18 psychotic.

19           Really. But the fact of the matter is Missett,  
20 Reynolds, have all been tied together in the Blau case  
21 that was going on right at that very moment, where Dr.  
22 Reynolds was -- Dr. Reynolds and Missett were sort of  
23 defending each other. Missett says "I don't know why  
24 Dr. Reynolds was there." Really? Is that believable?

25           For all these reasons and more, there's

1 nothing -- this fitness-for-duty had nothing to do with  
2 safety. There's another element of this, and that is  
3 whether the fitness-for-duty would be effective at  
4 accomplishing the purpose of safety. Well, again, let  
5 me emphasize, USF had regular policies on this. Why not  
6 follow those? Those would be effective. They were  
7 adopted to be effective. Those policies don't include  
8 fitness-for-duty examinations.

9           No one told you how this examination was --  
10 actually accomplished a safety purpose. When Dr.  
11 Missett testified, he never really gave an explanation  
12 of what this exam was and how it really was going to  
13 show them anything about safety issues.

14           What he really said was he thought that a  
15 fitness-for-duty would be -- might be helpful for USF to  
16 understand something about Dr. Kao. He testified that  
17 while they needed to do something and not sit on the  
18 issue, he didn't say that the only thing that could be  
19 happening was a fitness-for-duty examination.

20           He didn't -- Mr. Cawood, when he testified,  
21 testified, surprisingly, that fitness-for-duty -- when  
22 somebody doesn't want to go to a fitness-for-duty  
23 examination, he doesn't even recommend it. He goes,  
24 finds alternatives. And he testified about cases where  
25 he'd done that, where he'd done training on harassment,

1 and that that was a successful alternative.

2 If Mr. Cawood believes that a fitness-for-duty  
3 should not be done if an employee's rejecting it, how  
4 can it be a really effective tool at all for dealing  
5 with this violence? Certainly not an effective tool to  
6 overcome the invasiveness that it has.

7 Now, Dr. Reynolds, of course, never testified  
8 in this case. He never testified to you, told you how  
9 this was going to be a good exam, how it was going to  
10 work, how it was going to actually help determine  
11 anything about safety.

12 Moreover, the university knew how stressful  
13 this exam was going to be. Dr. Terr described it as a  
14 stress exam. And we can debate how stressful it is, but  
15 even Dr. Good said "Well, the outside limit would be  
16 eight hours."

17 They were sending him down to Dr. Reynolds from  
18 8:30 until 5:30. By my count, that's nine hours. But  
19 that's not all. Not only does he have to drive all the  
20 way to San Jose, but that's still not all -- it's like  
21 I'm selling on late night TV -- that it's still not all,  
22 because he has to go back for another couple of hours  
23 the next day.

24 Martha Peugh-Wade's notes reflect, in Exhibit  
25 27, that the first day would be long. It also reflects



1 that it would have like five to six hours of interviews,  
2 plus testing, including drug and alcohol testing. This  
3 is all way outside even what Dr. Good was willing to say  
4 is the outside limits of how an exam might be done, you  
5 know, under some exceptional circumstances.

6 And you can't ignore the fact Dr. Good noted  
7 that Dr. Kao's history of depression was a factor that  
8 might make it even more difficult for him.

9 And you just simply wonder here whether that  
10 was just another factor, another arrow in the  
11 university's quiver, hoping that Dr. Kao would maybe  
12 crack under this exam because he had a condition of  
13 depression, and this would be even harder for him.

14 Finally, the need for this FFD is additionally  
15 questionable when once they consulted Dr. Good, they  
16 weren't even interested in doing one. Yet they claim  
17 all these events had happened before then. How can  
18 Dr. -- how can they not even be interested in an FFD at  
19 that point if they're now claiming that FFD was  
20 necessary for safety and -- necessary and an appropriate  
21 vehicle to determine that.

22 If it really was that -- if it really was  
23 something like that, then they would have had that --  
24 they would have been eager to have Dr. Good's input on  
25 that particular issue at the end of February -- mid

1 February when that meeting occurred, a meeting that  
2 occurred after the January events that the university  
3 cites and after the February faculty meeting on the  
4 search, which was on February 6<sup>th</sup>.

5 Good had this long discussion with them too  
6 about how they could talk to Dr. Kao. And apparently  
7 Peter Pacheco was even willing to do that. But somehow  
8 that disappeared. And Mr. Pacheco -- Professor Pacheco  
9 never testified here why all of a sudden that changed.

10 Finally, if this FFD was going to be an  
11 effective tool for anything, it had to be a fair and  
12 neutral tool. It had to be an honest tool. Both sides  
13 had to have equal access to the information the doctor  
14 was going to be relying upon, had equal information as  
15 to what the events were. And it would not be a tool --  
16 it would never be a tool where there'd be a verbal to  
17 Reynolds about -- that John Kao was intentionally  
18 bumping people and that that was battery.

19 How can an un- -- how can a biased, how can a  
20 manipulated, how can a fake FFD be an effective tool for  
21 anything other than retaliation?

22 Which moves me on to the next issue I wish to  
23 talk about. And I apologize for going so long. The  
24 next issue I want to talk about is --

25 THE COURT: Would you like to take a break, Mr.

1 Katzenbach?

2 MR. KATZENBACH: No, Your Honor, I'll lose my  
3 train of thought. But I'm happy to do it for the jury.

4 THE COURT: Jurors, you need a break? I see  
5 heads shaking from side to side.

6 Go ahead, Mr. Katzenbach.

7 MR. KATZENBACH: Thank you, Your Honor.

8 The next thing I want to talk to you about is  
9 retaliation. And -- whoops. So we have another little  
10 slide show on that. And this -- USF wants to get rid of  
11 Kao because of his objections to the search.

12 Look at Martha Peugh-Wade's notes of the  
13 interview with Brandon Brown. What does he say on  
14 January 3<sup>rd</sup>?

15 "Brandon is concerned about personal  
16 ramifications of the lawsuit. Obsessive  
17 attention. Will keep him up tonight."

18 "Personal ramifications of the lawsuit." Those  
19 are not words I suggested to him. Those are words that  
20 he said.

21 Notes with Paul Zeitz on May 3<sup>rd</sup> -- I'm  
22 sorry -- May 1, Exhibit 61. What does Professor Zeitz  
23 say?

24 "Dr. Kao feels everyone hates him, and  
25 we do because we're afraid he's collecting

1 data for a lawsuit."

2 What does Paul Zeitz also say?

3 "Can't trust him anymore because he is  
4 suing."

5 You've heard about closed doors. What do their  
6 notes say?

7 "Tristan and Stephen close doors  
8 because JK badgers about search."

9 Not because they're afraid of him; because they  
10 don't want to talk about the search.

11 Tristan Needham notes, Martha Peugh-Wade. Same  
12 sort of things. May 12<sup>th</sup>, "Protect you from, in  
13 lawsuit."

14 Again, "lawsuit." Take the brunt.

15 History notes that Martha Peugh-Wade wrote,  
16 Exhibit 55. And what does it say about the university's  
17 objectives?

18 "Get him out medically and keep him out  
19 medically."

20 As part of our obligation to prove retaliation,  
21 we'll have to show you that Dr. Kao acted in good faith  
22 in bringing his complaints. Dr. Kao made every effort  
23 to explain his complaints in detail, so much detail that  
24 he gets blamed for it. But these were honest concerns.

25 When he started these complaints in

1 January 2006, there weren't any diverse -- he was the  
2 only diverse person in math and computer science. It's  
3 only after that complaint that things started to  
4 improve.

5 In terms of showing Dr. Kao's good faith on  
6 this, I'd like to -- I'll direct you particularly to  
7 parts of Exhibit 4, which is his long complaint. See  
8 page 33 in particular.

9 In page 33 and thereabouts, he describes his  
10 use of statistics as an accepted method of showing  
11 adverse impact on minorities and women. He quotes  
12 studies and procedures from history where that has been  
13 used. And that explains, I think, to you why he uses so  
14 much statistics in those complaints and also why he uses  
15 so much statistics even this late in the search. Well,  
16 partly explains it. He's a mathematician. So that  
17 probably is the other part of it.

18 But the point is, throughout all this, he's  
19 trying to give explanations. He explains everything  
20 about what he's doing in detail. He explains, for  
21 example, how the 2002 leave of absence imposed on him  
22 violated the ADA. Look at pages -- Exhibit 4, pages 20  
23 through 24 in particular, where he puts -- lays all that  
24 out.

25 He explains rejection of USF settlement offer

1 of that complaint because it would impact his ability to  
2 bring other complaints in the future. He didn't want to  
3 tie his hands. He didn't want to be gagged.

4 And in Exhibit 17, which are statistics on the  
5 search, explains those statistics and why he felt that  
6 that was showing discrimination.

7 THE COURT: There's an important person I've  
8 omitted. Madam Court Reporter, are you okay to proceed?

9 THE REPORTER: I'm fine, thank you.

10 MR. KATZENBACH: I've tortured her in other  
11 cases, Your Honor.

12 There's no doubt about the importance of  
13 diversity in the University of San Francisco and the  
14 importance they attach to that. And that's completely  
15 laudable. But you have to ask yourself in the case,  
16 were these events -- how much of these events were  
17 designed because the university management simply didn't  
18 want a whistle-blower, and how much of these events were  
19 there because they were concerned about a can of worms  
20 being opened up in this accreditation review.

21 In short, we think the evidence here is strong  
22 for retaliation. And I would add that if it's  
23 retaliatory, if this whole FFD incident is retaliatory,  
24 then it obviously isn't necessary for anybody's business  
25 and obviously isn't necessary for safety.

1            Couple of other things I want to touch on in  
2 jury instructions, and that is invasion of privacy.  
3 I've already talked about privacy, the fact that this  
4 would require disclosure of records. And I've already  
5 talked about how this exam was not necessary but was  
6 manipulative. I don't think I have to repeat that, as  
7 much as I would like to.

8            I would like, however, to talk briefly about  
9 the Unruh Act. Unruh Act is really the stand-alone  
10 claim here and deals with the banning of Dr. Kao from  
11 the campus after his termination. And the premise of  
12 that claim is they're treating him -- he's perceived or  
13 regarded as someone with a record of a disability.

14           The reason they -- this claim is here is  
15 because Dr. Kao's been banned from campus because USF  
16 basically considers him dangerous and insane and crazy.

17           Mr. Philpott all but admitted that, when he  
18 indicated that Dr. Kao's mental stability was the reason  
19 for the ban. But more than that, more than even that,  
20 we know that this is how they were viewing -- at least  
21 pretending to view Dr. Kao, because Dr. Missett  
22 testified he was referring Dr. Kao's -- referring the  
23 university to Dr. Reynolds because of the perception  
24 that Dr. Kao might be psychotic.

25           But more than that, the cross-complaint, which

1 is -- that the university has filed against Dr. Kao is  
2 in evidence as Exhibit 100-and- -- It's an exhibit. I  
3 believe it's Exhibit 121. That cross-complaint -- that  
4 cross-complaint contains allegations portraying Dr. Kao  
5 as mentally unstable, a danger, a fear to everyone. It  
6 goes so far as to state that people are looking at Dr.  
7 Kao as if he were the Virginia Tech killer, somebody who  
8 was certifiably nuts and certifiably a killer and  
9 certifiably evil, if we can use such a word today.

10 The evidence is also that USF is an open  
11 campus. Dr. Kao can't go on there. He can't take his  
12 friends there. He can't do all the things that are  
13 there. He can't even watch basketball games. Can't go  
14 to the gym. Can't do any of the things that everyone  
15 else in the city, everyone in this jury box, can do.

16 He has been harmed by that, humiliated by that,  
17 branded as a killer -- branded as a killer -- potential  
18 killer in records that are open to the public, anyone  
19 can see, records that will haunt him for the rest of his  
20 life.

21 Dr. Ogus has given you a tool to use in  
22 assessing Dr. Kao's economic damages. Look at the  
23 evidence. Look who has the burden of proving -- showing  
24 there's some job that Dr. Kao could get that's like what  
25 he lost. There's not a smidgen of evidence there. The



1 only evidence is he's got to go find a new career.  
2 Seventeen years dedicated to teaching kids down the  
3 tubes, gone forever. He's got to go find a job in an  
4 industry -- an industry -- jobs where Dr. "Borsani" -- I  
5 hope I have that right -- their expert, testified it's a  
6 highly-competitive market.

7           How many people hire -- hire the Virginia Tech  
8 killer? How many people hire someone who's been branded  
9 publicly as a danger? How many people doing a  
10 background check wouldn't come upon this  
11 cross-complaint? And how many people -- and you can  
12 read it -- how many people reading that cross-complaint  
13 would then hire Dr. Kao in a highly-competitive market?  
14 Let me suggest to you that that number is zero.

15           But more importantly, to show a failure to  
16 mitigate, under the judge's instructions, it's not  
17 enough just for us to tell you the obvious, that they've  
18 destroyed him; in fact, it's their burden to show that  
19 there's some job he could have gotten that's like or  
20 similar to what he had, that has the same job duties:  
21 teaching kids, that has the same benefits, in the same  
22 location, that has the same protector -- protection and  
23 working conditions, such as tenure.

24           Is there such a job? Your job is to follow the  
25 evidence. There's no such job in the evidence here.

1           The shame and humiliation that Dr. Kao has  
2 suffered in this case is a factor, is something you  
3 should consider. Dr. Kao told you how he dedicated his  
4 life to teaching in honor of his father, in honor of his  
5 family. He told you how he worked hard to get the  
6 scholarship at Princeton to take the financial burden  
7 off his mother, to be a good son that his mother  
8 deserved, that his father would have wanted.

9           He has told you the pleasure that he got from  
10 teaching. In evidence in Exhibit 2, you'll see the book  
11 the math club gave him to honor what he'd done for them,  
12 to honor the math club and his interaction with  
13 students. The math club, since Dr. Kao was no longer  
14 there, no longer exists at USF.

15           He is -- finally, I'd like to make you -- ask  
16 you to return a verdict for punitive damages. The judge  
17 has given you the instruction, and let me just -- I'm  
18 not going to repeat what he said, but I want to point  
19 out two things to you, if I may.

20           First, malice is an intent to hurt, to harm. I  
21 can't -- the evidence we've presented shows, from day  
22 one, an intent to hurt Dr. Kao, to put him consistently  
23 to the choice of going to a rigged examination or being  
24 fired, a choice that isn't a choice at all.

25           If he'd gone to that examination, they would

1 not have had two experts here -- they wouldn't have had  
2 just Dr. Missett and Dr. Cawood; they would have had Dr.  
3 Missett telling -- Dr. Reynolds telling you that John  
4 was crazy too. It's trial by experts.

5           So the question, was he right not to go? Of  
6 course he was. Of course he was. But that nevertheless  
7 put him in the horrible position of seeing his job  
8 disappear over that summer, to see that his desperate  
9 efforts to save it, his meetings with Mr. Philpott, the  
10 effort to present all the emails that he had, the effort  
11 to argue "They haven't got any evidence against me.  
12 What is this about?" -- to see all those efforts go down  
13 in smoke, go down in flames, go down because they kept  
14 saying "You have to go to the IP that we select," the IP  
15 they could manipulate, the IP that could then come later  
16 on and say "Yes, they did the right -- that he can't --  
17 he cannot work."

18           Finally, fraud is an element of punitive  
19 damages. And I just want to emphasize this: that they  
20 manipulated -- they were going to manipulate Reynolds by  
21 the "verbal to Reynolds" about battery. They  
22 manipulated Missett by the false statements to him and  
23 the one-sided presentation.

24           And finally, this is -- it is despicable  
25 conduct to manipulate a medical examination in the

1 manner they have done for the sole purpose of getting  
2 him out medically and keeping him out medically.

3           So I would ask you, please, to return a verdict  
4 for punitive damages here. We will give you later the  
5 information you will need to assess that. But please, I  
6 would urge you to do that, to return that verdict to  
7 express your condemnation of this kind of misconduct,  
8 this kind of action, this kind of destruction of Dr.  
9 Kao's life and career.

10           Thank you. I'm sorry to have taken so much of  
11 your time. I hope you've found it useful. But I would  
12 urge you to remember the evidence that you've seen, to  
13 talk among yourselves as to the evidence as you recall  
14 it, to look at the documents yourselves, to look at them  
15 as much as you want, as long as you want, as hard as you  
16 want, and return a just verdict in this case.

17           Thank you very much.

18           THE COURT: Thank you, Mr. Katzenbach.

19           Mr. Vartain, would you like to start your  
20 argument after lunch so it's unbroken by the lunch hour?

21           MR. VARTAIN: I can start now, Your Honor.

22           THE COURT: Okay. Usual schedule?

23           MR. VARTAIN: Yeah. And then if you want to  
24 contact -- ask the jury what their preferences are for  
25 lunch -- I mean, I -- whether they would want to start

1 lunch at the usual time or maybe start after I finish my  
2 closing, you know, maybe at about 12:30 or around there,  
3 12:40. It's really neither here nor there for me.

4 THE COURT: So I hear you would prefer not to  
5 have your argument broken up?

6 MR. VARTAIN: What's that? I -- you know,  
7 really, when people get hungry, they need to eat. I  
8 don't mind having my argument broken up. Whatever --  
9 whatever the jury wants is fine.

10 THE COURT: Okay. Here is a hand.

11 JUROR 2: Wouldn't a decent solution be to take  
12 lunch now? We just take an early lunch, come back; it  
13 remains unbroken, and it doesn't screw anything up?

14 MR. VARTAIN: That's great. I mean, if that's  
15 what the jury wants, that's fine by me.

16 THE COURT: Yes, Juror Number 1?

17 JUROR 1: I just want to go to the rest room.  
18 After that, I don't care what happens.

19 MR. VARTAIN: No, you can't.

20 THE COURT: Okay. We'll come back for -- take  
21 the usual lunch break, make it 15 minutes earlier and we  
22 come back, since it's not quite noon yet.

23 Ladies and gentlemen, remember the admonition.  
24 Do not form or express any opinion on this case until  
25 it's finally submitted to you for your decision. Do not

1 discuss among yourselves or with others until that time.  
2 Please be back in your places at 1:15 according to the  
3 courtroom clock. Please remember to leave your  
4 notebooks, instruction and exhibits behind.

5 MR. VARTAIN: Your Honor, you want to take the  
6 full lunch break or do you want to take an abbreviated  
7 one?

8 THE COURT: Full, because we want to make sure  
9 we have the forms of verdict under control, exhibits  
10 ready to go.

11 (Jurors left the room.)

12 THE COURT: Jurors and alternates have departed  
13 the courtroom. Counsel for both sides and the plaintiff  
14 remain.

15 Anything that needs to go on the record, Mr.  
16 Katzenbach?

17 MR. KATZENBACH: We have a special verdict  
18 form. I think there's a dispute as to whether the  
19 verdict form should include future lost damages. We  
20 believe the jury instructions that were given refer to  
21 future loss damages and therefore it's an appropriate  
22 item on the jury form.

23 THE COURT: That's why I want to take a full  
24 lunch break, so we can sort out the verdict form  
25 question.

1           Mr. Vartain, anything that occurs to you that  
2 needs to go on the record?

3           MR. VARTAIN: No, thank you, Your Honor.

4           THE COURT: Okay. Off the record.

5           (Lunch recess from 11:50 to 1:15.)

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1 AFTERNOON SESSION

1:19 P.M.

2 THE COURT: Jurors are present. Alternates are  
3 present. Counsel from all sides are present. Plaintiff  
4 is personally present.

5 Mr. Vartain, would you like to begin your  
6 argument?

7 MR. VARTAIN: Yes, I would, Your Honor. Your  
8 Honor, you had indicated you were going to pass out the  
9 verdict forms to the jurors at this time.

10 THE COURT: Sure.

11 MR. VARTAIN: Would that be appropriate?

12 Thank you, Your Honor.

13 These are the forms that the judge approves, to  
14 help the jurors decide each of the four primary issues  
15 in the case. There's a question for each issue.

16 (Inaudible discussion.)

17 MR. VARTAIN: Ladies and gentlemen of the jury,  
18 I will help guide you through that at some point in my  
19 remarks. It's a fairly straightforward form. And I'll  
20 undertake to explain how the court wants us to deal with  
21 it.

22 CLOSING ARGUMENT BY MR. VARTAIN

23 MR. VARTAIN: First of all, thank you, Your  
24 Honor, for presiding over the case. It's been a  
25 pleasure being under your thumb for four weeks, although



1 it maybe didn't appear to you like I was under your  
2 thumb.

3 And ladies and gentlemen of the jury, and  
4 especially the alternates, 'cause I think for you folks  
5 it's probably a little bit of mixed feelings as to  
6 whether you're going to actually participate in the  
7 decision.

8 You know, it's a lot of time out of your busy  
9 schedule. And unlike the attorneys -- this is our  
10 job -- it wasn't your job to come here. And just know  
11 that we tried to be aware of your time and move as  
12 quickly as we could and still do our justice to our  
13 university client. So thank you.

14 The clerks -- Vicki's not here -- they had us  
15 under their thumb, and I know they helped you with your  
16 needs during the couple of weeks. And if Vicki was  
17 here -- but Trina, I do thank you as well.

18 And last but not least, the court reporter.

19 The University of San Francisco retained this  
20 law firm to represent it once it got to this place,  
21 which is the court. But it wasn't the university's wish  
22 to get here. And I think the evidence is rather clear  
23 that the people at the university really made every  
24 effort to resolve things, you know, in the most fair way  
25 possible with Dr. Kao, who was a long-term faculty

1 member, who up until his last year had not had the  
2 issues that he then had that the university had to --  
3 and I stress had to -- deal with; that is, those  
4 behaviors.

5           So I'm glad that Mr. Katzenbach represented  
6 that he felt he had a fair trial here. And now it's my  
7 duty to ask this jury to return a verdict for the  
8 university on each and all of the four claims.

9           The reason why I feel confident in asking that  
10 of you is His Honor gave us legal instructions -- I'm  
11 going to help -- hopefully help the jurors walk through  
12 those instructions. You folks can interpret them and  
13 should interpret them the way they plainly read.

14           But by those instructions of law, as applied to  
15 the evidence here, which I believe -- and I'm going to  
16 show -- was undisputed, that the university did not do  
17 what Mr. Katzenbach said -- the university did not  
18 manipulate; the university did not set up; the  
19 university did not manufacture; the people at the  
20 university did not lie; they didn't bribe Dr. Missett --  
21 all those things that were said by the counsel, which  
22 His Honor said are not evidence, therefore they're just  
23 his argument, just like mine -- it's not borne out by  
24 the people you saw.

25           They're human beings. They just came up here,

1 they explained what they did, and it's up to you to  
2 decide if -- it's a very simple decision: Were they  
3 doing what Mr. Katzenbach says, lying, manipulating,  
4 cheating, bribing, fabricating evidence, or were they  
5 saying the truth of what they said.

6           And none of them actually said any bad things  
7 about Dr. Kao, other than these behaviors that either  
8 he, voluntarily or not, engaged in needed to be  
9 addressed in the way the law -- the California  
10 legislature has given employers the right; that is, to a  
11 fitness-for-duty evaluation.

12           It is true that same law asks the employer, the  
13 university, to show to you that we had a good business  
14 reason for doing that. In fact, as we will go through  
15 the instructions, the instructions that Your Honor gave  
16 you actually have the word "safety" right built into  
17 what the definition is of "business necessity."

18           So -- and it's clear we've not -- we've not at  
19 all walked away from this. The university felt that in  
20 this day and age when an employee, however long-term,  
21 however valued, engages in such erratic, unstable and  
22 continuing behaviors that scare people, we have a duty  
23 to the community on campus, to you people, in a sense,  
24 the public, who can come on campus -- Mr. Katzenbach  
25 made that -- to do what we can do -- not everything --

1 to assess those behaviors and figure out what's the  
2 right thing to do.

3           Since the law gives this tool to employers, the  
4 right to send for a fitness-for-duty evaluation, we  
5 thought it would be careless, negligent, and our  
6 witnesses so explained to you, to not use that, where it  
7 was the most confidential process, given that Dr. Kao  
8 has some medical issues, that would keep his medical  
9 information confidential, as witness after witness after  
10 witness explained to you. So that's why it is.

11           I will walk through each of the four questions  
12 and ask you -- where the question says "Is the  
13 university liable to John Kao," I will ask you to say  
14 "No." His Honor said that there is a burden of proof on  
15 the issues that Dr. Kao was required to prove. He  
16 didn't even have evidence, much less proof, on those  
17 issues.

18           And I am going to take a moment to walk through  
19 those. If you could just -- maybe just put the form  
20 out. It's just four questions. And then I would like  
21 to -- then I would like to assist you with the actual  
22 jury instructions.

23           And I guess question number 1, "Is there  
24 liability of University of San Francisco to John Kao on  
25 the claim related to the medical and psychological

1 examination," in a few minutes, I'd like to go to the  
2 judge's instruction on what facts have to be proven for  
3 that, and then I will discuss that, why I will ask you  
4 to answer "No."

5           On the retaliation claim, which is the second  
6 question, "Is there liability of University of San  
7 Francisco to John Kao on the cause of action claiming  
8 retaliation" -- that's the one about did we concoct all  
9 this, as Mr. Katzenbach says, because we resented that  
10 Dr. Kao has made his complaints over the last ten  
11 years -- we will ask that you answer "No," based on the  
12 evidence.

13           Question 3, this is the -- the word "privacy"  
14 is in parentheses. The judge has also given  
15 instructions on what this legal issue is. And when we  
16 get to that instruction, we will respectfully ask you  
17 that, and persuade you, that the proper answer is  
18 clearly "No, the university is not liable to John Kao."

19           The fourth question has to do with the  
20 university's instruction to John Kao to stay off campus.  
21 We will ask you to answer "No," we did not violate the  
22 Unruh Act, which has to do with you can't -- if you're a  
23 public entity -- that is, if you're a store or a  
24 business, and even a campus -- you can't exclude people  
25 by reason of their race, their religion, their

1 disability, a medical condition -- you know, like I  
2 can't go into Nordstrom's, which I don't like to go in  
3 anyway -- but I can't go in there and be excluded  
4 because of all those factors, nor can you.

5           But the university will show we didn't exclude  
6 him because of that. We excluded him because, as  
7 Mr. Cawood explained, it's best practices when someone  
8 hasn't gone for the fitness-for-duty evaluation and you  
9 can't assess what's going on with him, you need to  
10 exclude him. And he was excluded because he didn't go  
11 for the assessment. We weren't able to assess what his  
12 safety level were [sic].

13           I want to make one thing clear. The university  
14 never said Dr. Kao was or was not dangerous. You  
15 remember all those witnesses that Mr. Katzenbach marched  
16 in here. They all said nobody ever said what happened  
17 to him. The university, from the get-go, treated Dr.  
18 Kao like they, the people themselves, would want to be  
19 treated: discreetly, confidentially. So the point  
20 being, there was no -- there was no representational  
21 damage there.

22           The special verdict form -- I don't believe --  
23 there's a last page on damages. I'm not even going to  
24 address that. The university had compromised,  
25 negotiated, and so on with Dr. Kao. This is really the

1 time -- and Dr. Kao's asked for a decision by the jury.

2           And we're a nonprofit organization. All the  
3 money of the university goes to educating people. We  
4 don't believe, after all of this diverting the scarce  
5 resources of a nonprofit to Dr. Kao's profit, when he  
6 chose -- he made the choice after seven months -- June,  
7 July, August, September -- to basically give up his  
8 job -- all those people came here and explained how they  
9 almost, on bended knee, asked him to reconsider: "Would  
10 you -- here's some more time. Here's a retired judge to  
11 decide the case. Here's an arbitrator to decide the  
12 case. What can we do so we don't have to fire you?"

13           Dr. Kao made his choice. And now it's time for  
14 Dr. Kao, as he's chosen, to submit to your decision. We  
15 ask that he not be awarded any money in this case, not  
16 only because there's no liability -- the university  
17 didn't violate the law -- but also because he made the  
18 choice to give up his secure job and then to sit there  
19 for three years and spend his time suing and not once,  
20 not once, even try to look for a job. Who does that  
21 these days?

22           So may I ask the jurors if you could take out  
23 the jury instructions. And we, on our side of this,  
24 apologize for the sort of last-minute and somewhat messy  
25 stapling. But I would like to make that up to you by

1 helping work through the instructions a little bit.

2           The ones that are probably the most important  
3 legal instructions are the ones in the -- 2500A, 2500B  
4 and C. Then we get to -- let me just get mine out.  
5 Just pop them out.

6           So let's start with 2500A because -- that's  
7 called "Special Instruction 1A." And that's called  
8 "Medical And Psychological Examination Request."

9           I think this is a no-brainer in the sense --  
10 and I don't mean that disrespectfully -- every point on  
11 this is pretty much undisputed. It's the next page  
12 where the dispute comes. In other words, John Kao must  
13 prove that the university required him to have a  
14 fitness-for-duty.

15           Of course it did. We did discharge him,  
16 granted after seven months and after many opportunities;  
17 but the university did do that. We did discharge him  
18 because he did not go for the fitness-for-duty. There's  
19 no dispute about that.

20           He was harmed in the sense that he lost his  
21 job. I mean, there is that. And it was -- the reason  
22 it was a substantial factor in him losing his job was  
23 that we required him to have that.

24           That's not the problem in the case or the real  
25 issue in the case. The issue is page number 2503,



1 special instruction 1B, which the judge wrote, and says  
2 that the fitness-for-duty is legal, is lawful. It is  
3 lawful if it was necessary to the university's business.  
4 And that's what you have to decide.

5 And I will shortly go through, very briefly,  
6 what that evidence is.

7 One, the purpose of the fitness-for-duty was to  
8 operate its business safely and efficiently. Well,  
9 the -- witness after witness testified that they didn't  
10 have a better way of assessing whether Dr. Kao's  
11 behavior caused a safety risk than the fitness-for-duty.  
12 Witness after witness, including the experts in the  
13 field, said that's the proper way to do it, particularly  
14 if there's a medical issue and you want to keep his  
15 medical information confidential.

16 So there's the safety and efficiency right  
17 there. It's the best way -- there's really no other  
18 way.

19 Second point, the fitness-for-duty would  
20 substantially accomplish this business purpose. Witness  
21 after witness, including Dr. Missett, Dr. Good, Mr.  
22 Cawood, said it's the fairest thing because, number one,  
23 he gets to give his side of things to the doctor; he  
24 gets to give his medical information to the doctor. And  
25 then all the employer learns is what's the doctor's

1 opinion, fit or not fit. We don't get his medical  
2 records. We don't find out his psychotherapy, et  
3 cetera.

4 So did it -- would that have substantially  
5 accomplished the business purpose of safety and  
6 efficiency? All the witnesses said that. There was no  
7 other evidence. Mr. Katzenbach argued that it wouldn't  
8 have, but the evidence is what we go by, according to  
9 His Honor.

10 If the university, as it has, has shown that  
11 the safety issue was what motivated it to send Dr. Kao  
12 for the fitness-for-duty, then Dr. Kao -- go to the next  
13 page, 2504, where it said "If the university feels that  
14 the fitness-for-duty is necessary to the university's  
15 business" -- which I'll stop right there.

16 How could you be in business as a university  
17 and not keep your campus safe? You'll be out of  
18 business, especially if you're not, you know, Virginia  
19 Tech, which is a public entity. The University of San  
20 Francisco's private. If you have anybody get hurt and  
21 you could have stopped it, do you think the parents are  
22 going to keep sending their kids there at the tune of  
23 20-, \$30,000? No way.

24 So -- and especially if the legislature gives  
25 us this tool, writes it in the law and says "Use it if

1 you have a need to use it." And we had a need to use  
2 it. And if we didn't do that, we couldn't operate a  
3 business.

4 So if the university proves that sending Dr.  
5 Kao for the fitness-for-duty was necessary, then it is  
6 lawful. The judge has said it is lawful then, unless  
7 Dr. Kao proves two things, which he can't prove -- in  
8 fact, he didn't even offer evidence on these two  
9 things -- that there was something else that we could  
10 have done that would have accomplished the business  
11 purpose equally well, and that the alternative would  
12 have had less adverse impact.

13 Well, the one thing that Mr. Katzenbach did  
14 argue was we could have used our discipline and  
15 discharge procedure. Remember he kept talking about  
16 that, why didn't they just hit him over the head or  
17 treat him like he hit somebody over the head with a  
18 two-by-four and fire him?

19 Well, if we had fired him, would that have had  
20 less adverse impact on John Kao? No way. He would have  
21 been fired sooner than the seven months later when we  
22 went through the whole, you know, opportunity to  
23 negotiate.

24 So the alternative to the fitness-for-duty  
25 would have been using discipline and discharge for those

1 terrible things that he had done, whether he had done  
2 them unintentionally for medical reasons or not.

3 Mr. Katzenbach will say -- and he has the  
4 opportunity to have one more rebuttal after me, so I  
5 don't get to come back up. So I have to sort of  
6 anticipate what he's going to say. He may say "Well,  
7 the alternative they could have done is clear the air."  
8 Remember all the "clear the air meeting"?

9 Well, would that have, in the words of the  
10 judge, as he put in his instructions, accomplished the  
11 university's business purpose equally well if we had had  
12 had a meeting and we, you know, brought in the scared  
13 people, Dean Turpin, provost -- you saw her on there.  
14 Did she look like she was ready to have a meeting and  
15 try to accept assurances? She would have been ready if  
16 there had been a fitness-for-duty evaluation that said  
17 it was safe. And so would the other people. But Dr.  
18 Kao never went for that.

19 I guess giving the names of the faculty members  
20 to Mr. Katzenbach is his other alternative that we  
21 should have done instead of the fitness-for-duty.  
22 Remember he made the point about he asked for all the  
23 details, and then our witnesses said "Yeah, but we were  
24 scared that Dr. Kao would have -- then have the names,  
25 and there'd be a retaliation."

1           The expert witnesses, to a person, said "You  
2 don't do that." That information gets exchanged in the  
3 box, Mr. Cawood said, of the fitness-for-duty  
4 evaluation, where the doctor can gauge how much  
5 information should he give Dr. Kao, how much would it be  
6 safe to give him.

7           So there are no alternatives that would have  
8 accomplished the safety purpose better than the option  
9 that the law gave us, the fitness-for-duty evaluation.  
10 So Dr. Kao cannot rebut that the fitness-for-duty is  
11 lawful if the university has shown it was necessary.  
12 And we have shown it. And I'll summarize the evidence  
13 on that briefly.

14           I would like to ask you to go to 2505. So that  
15 covers the first claim about the fitness-for-duty  
16 medical/psychological examination.

17           So 2505, the judge wrote for us -- this is  
18 really what Dr. Kao -- he has the burden of proof.  
19 Remember, he's got to prove the case. We actually in  
20 this case spent a lot of time disproving something that  
21 he never actually proved. Fine. Sort of may be an  
22 academic question now.

23           But here's what he has to prove: that while he  
24 was employed by the -- number one, while he was employed  
25 by the university -- okay, that's a no-brainer -- he

1     opposed what he reasonably and in good faith believed  
2     was illegal employment discrimination.

3             Now, he came in and said to you that he  
4     believed it was employment discrimination.  But  
5     actually, when I questioned him, it actually came out  
6     that what he believed was going on was the ads were  
7     being posted on-line instead of in print.

8             He didn't -- he didn't ever testify that there  
9     was a connection between why the ads on-line would  
10    exclude women and minorities.  He never said anything  
11    about that.  He just said he thought that it might be  
12    discriminatory.  But he never made any reasonable --  
13    judge put in the word "reasonable" -- he never made any  
14    reasonable statement on the witness stand as to how it  
15    is when the Internet is here, has the widest reach  
16    possible, you can get to the point where "Wait a minute,  
17    we're excluding people," when the university's doing the  
18    most inclusive way it can of advertising.

19            I think some of the jurors asked some questions  
20    along those lines, and the witnesses explained.  They  
21    didn't see how that could be.

22            Plus, the actual facts are that -- I'll say it.  
23    The university -- well, Mr. Katzenbach admitted it.  He  
24    said they really are a diverse organization and they  
25    practice what they preach.

1           Well, the data certainly shows it. And so does  
2 the data that our gentleman who sends the reports to the  
3 government -- this was built right off of his data that  
4 he testified to.

5           All this data was public. Dr. Kao had all this  
6 data. It comes out, he said -- the witness said it  
7 comes out every year. So how would he have a  
8 reasonable -- in the words of the judge -- a reasonable  
9 and good-faith belief that there was illegal  
10 discrimination, when he had the same data everybody had?

11           Plus, in his department, Dr. Yeung, Stephen  
12 Yeung, was hired two years earlier. The two women were  
13 hired in the year of his problems. So I submit to you  
14 that he reasonably believed we weren't posting in print  
15 journals, but he didn't reasonably believe there was  
16 illegal discrimination going on. Nobody could think  
17 that, given this.

18           I don't know what was going on in Dr. Kao's  
19 mind, but it wasn't a good-faith and reasonable belief  
20 of discrimination. There was no evidence put on by his  
21 attorney that would show that.

22           Next one, item 3. Even if he had done -- I'm  
23 sorry -- item 2, "Was the university aware of John Kao's  
24 opposition?" In one sense, no. There wasn't any  
25 opposition, as defined in 1. So you don't even have to

1 get to -- yes, we were aware of his complaints, but they  
2 weren't complaints that qualify as a good-faith belief  
3 of illegal discrimination. So even if we were to get to  
4 the rest of it -- number 3 says did we have the  
5 motivation to retaliate against him; that is, did we  
6 retaliate for him having a good-faith belief in  
7 discrimination?

8           Witness after witness said he'd been filing  
9 complaints for years. This was the year it all came  
10 apart because now his behavior got worse. So one would  
11 say "Well, why would they have retaliated ten years,  
12 four years, three years ago?"

13           Plus, the witnesses, to a man and woman, just  
14 came in and said it's a university; it's not a  
15 corporation. It's free speech. Everybody files  
16 complaints if they feel like that. That's okay.

17           In fact, a number of his complaints, the  
18 university offered resolutions to. So why, if we were  
19 retaliatory and against him filing complaints, would the  
20 university have tried to negotiate resolutions? Makes  
21 no sense.

22           Plus, you saw all the people here: Martha  
23 Peugh-Wade, David Philpott, Provost Turpin -- she had  
24 the bronchitis. I didn't see anybody that had any  
25 negative energy around his complaints. The negative



1 energy came when they started getting scared.

2 So there's no motivating reason in number 3  
3 that Dr. Kao has shown by any evidence whatsoever.

4 I don't think we have to go to the other ones  
5 'cause 4 and 5 you'd only get to if he had shown those  
6 things, which he hasn't.

7 The next one is the longest one, 2430. So this  
8 is his third of four claims, 2430. This is called  
9 "Privacy." So the judge wrote this. And it looks like  
10 there's a lot of words, but he actually wrote it  
11 clearly. It just is a little bit of a road map.

12 If I may, could I walk you through that a  
13 little bit right now?

14 So it says on the second paragraph "To  
15 establish the claim, John Kao must prove ..."

16 Well, 1 and 2, it's a no-brainer. We employed  
17 him and we discharged him. Number 3, the university  
18 required that he authorize a release of confidential  
19 medical information for the psychological examination.

20 But look down below. The judge has given us a  
21 definition of what "confidential medical information"  
22 is. It says it is not -- it is not when the doctor --  
23 that would be the fitness-for-duty doctor -- tells the  
24 employer -- that would be the university -- his opinion  
25 as to whether the employee is fit or not fit or any of

1 the limitations on fitness, so long as the doctor's  
2 statement does not include medical cause.

3 Well, you saw; we passed out the document. And  
4 the witnesses -- remember there was that consent form,  
5 which exactly said that, that the university was telling  
6 Dr. Reynolds "You can't send us any confidential medical  
7 information. You can only tell us if he's fit or not  
8 fit, and if he's not fit, if there's any limitations."

9 So that definition of "confidential medical  
10 information" squares it with exactly what the university  
11 did, follow the law.

12 4 and 5, he did refuse the F -- the  
13 fitness-for-duty. But if you get down to -- even if he  
14 proved 1 through 6, which he can't -- let's get to  
15 the -- "If John Kao proves all of the above, the  
16 university nevertheless," the judge says, "avoids  
17 liability by showing," and we're back to these two  
18 points: John Kao refused to take the fitness-for-duty.  
19 It's a no-brainer. He admits that. Point 2, the  
20 university's decision to discharge him was necessary  
21 because he refused to take the fitness-for-duty.

22 Well, if we haven't proved that, I'm sorry. I  
23 mean, it's clear. We felt that without him going  
24 through the evaluation and getting an independent look  
25 at his condition to see if he was safe, we couldn't have

1 him on the campus; we couldn't have him working there.  
2 So we've proven 1 and 2 as well. And that claim should  
3 be denied for the same reasons, please.

4           When we get to special instruction 5, that's  
5 3020, that's the final claim that Dr. Kao has. And  
6 that's the one that has to do with the instruction to  
7 keep him off campus. But that instruction wasn't issued  
8 after he was terminated; that was issued when he was our  
9 employee. And the university had a duty, as the  
10 witnesses said -- Mr. Cawood said it's -- and I quote --  
11 standard practice to keep the employee -- quote,  
12 "standard practice," close quote, to keep the employee  
13 off campus -- off the corporate or business site when  
14 you order them for a fitness-for-duty, because you don't  
15 know yet whether he's safe or not.

16           So that's why we kept him off campus and why,  
17 after he was terminated, he had to stay off. We still  
18 didn't know. Remember the questioning that happened --  
19 I think it was Mr. Philpott Mr. Katzenbach was asking  
20 some questions, and what he said was "I'm not a doctor.  
21 I didn't know if he was safe or not."

22           It wasn't his depression or his medical  
23 condition. See in number 2 it says was a motivating  
24 reason for doing that, that the university perceived or  
25 regarded him as having a disability? And you see down

1 below, "Disability's a mental or physical condition."  
2 Well, we knew he had depression. That's -- we had known  
3 that for years. But that had not changed. What had  
4 changed was now the behaviors had required an  
5 assessment, and he wouldn't go. That was the motivating  
6 reason for keeping him off campus, 'cause we still  
7 didn't know what the answer was to that question can he  
8 act safely, can he be safe or not.

9           And frankly, the university wanted -- hoped  
10 that the answer would be he can be safe with some  
11 medical adjustments or with some mitigations, 'cause we  
12 had put 17 years in with Dr. Kao. Nobody wanted to see  
13 him leave. Nobody did.

14           So the point being that the fitness-for-duty  
15 was -- and the absence of it -- was the motivating  
16 reason why he had to be kept off campus.

17           And Mr. Katzenbach can say I filed the  
18 cross-complaint to keep him off campus. I did. He  
19 filed the lawsuit first. He put this whole thing in the  
20 public record, and he wouldn't guarantee that he would  
21 stay off campus.

22           So yes, I felt it's my duty -- I don't  
23 represent just the president; I represent the community  
24 at the university. I had to file for an injunction to  
25 keep him off campus until he -- if he goes and does a

1 fitness-for-duty tomorrow and he's cleared, no problem.  
2 But until that happens, we have a duty to keep him off  
3 campus.

4           Mr. Katzenbach can fight all he wants. He's  
5 not going to -- he's not going to come on campus until  
6 we're sure he's safe. We hope he is, 'cause he worked  
7 for us for 17 years and he did an excellent job, and the  
8 university had no wish to see that go down the drain.  
9 But he's not going to -- he's not going to buffalo us  
10 into letting someone on campus and endanger the  
11 children -- and we have 17-year-olds; we have children  
12 that come on campus for high school events -- we're not  
13 going to take a risk that we don't know until he does  
14 his part.

15           And he's the one who engaged in the behaviors  
16 to begin with. So why won't he reciprocate and do the  
17 thing that you need to do to make amends. He caused the  
18 issue by his behaviors. Now he had the duty to clear  
19 the air with the doctor, not with a meeting. The  
20 university did not keep him off campus 'cause he has a  
21 depression or a disability; it's 'cause he didn't go for  
22 the fitness-for-duty and give us the reassurance Mr.  
23 Philpott, Ms. Peugh-Wade, Dr. Turpin -- the word  
24 "reassurance" kept coming up over and over again.

25           It wasn't a manufactured effort to exclude him,

1 it wasn't anything about bribing Dr. Missett, or any of  
2 these words that counsel used; it was about taking care  
3 of our responsibility to the people there to do whatever  
4 we can to make sure they're safe. That's all.

5 And any -- and it's been done before -- you  
6 heard some evidence -- two or three times before. The  
7 president of the union said -- Mr. Katzenbach asked him  
8 "Has this ever been done before?"

9 He said "Yeah, two or three times it's happened  
10 before."

11 The university doesn't use this right that the  
12 legislature give us as a tool willy-nilly to drive  
13 people away. What sense would that make? But when  
14 there's a legitimate reason, it's used. And it was  
15 used, in this particular case, in a fair manner.

16 I'd like an opportunity -- I have gone through  
17 the instructions. I think I have summarized why it is  
18 on each of these instructions -- Mr. Katzenbach has not  
19 even come close to proving his claims.

20 I do feel the obligation, 'cause this is my  
21 thirtieth year representing universities -- and it's not  
22 'cause -- I don't want to take any more time, but Mr.  
23 Katzenbach accused my clients of lying, cheating,  
24 bribing, manipulating, and all that stuff. And I have a  
25 right to say they didn't do it, and leave it to the

1 jury, 'cause I would agree he's drawn the line in the  
2 sand; he's gotta prove it now.

3 He said all those bad things about all those  
4 people, said they're not worthy of belief. They did all  
5 these terrible things just to, quote, get Dr. Kao. I  
6 wrote the words over the lunch hour, and I feel bad that  
7 I have to do this, but you know, I am responsible to --  
8 I am a defense attorney. And I'm glad I don't have to  
9 defend Enron, but I do -- I am glad I defend  
10 universities. And I don't like it when people come into  
11 court and use it as a way of putting people down.

12 We've never put Dr. Kao down. We're sad we're  
13 here. We proved it through those seven months, that the  
14 last thing the university wanted was to lose him. He  
15 was a good professor. He had some type of problem. He  
16 had anger; he had obsession. His own -- his own doctor  
17 came on the witness stand. Remember this testimony?  
18 I'll read it. It's right here.

19 She said -- by the way, everything else she  
20 said, I'll leave it to you to decide what her  
21 believability was. But she said the personality trait  
22 of Dr. Kao, obsessive-compulsive, generally has trouble  
23 recognizing their levels of their own anger.

24 If that doesn't tell you what's going on  
25 here -- maybe that explains why Dr. Kao came in and told

1 you he didn't do this. He said -- he said he didn't do  
2 it intentionally, and then he said he didn't do any of  
3 that. All those other witnesses, Dr. Terr said Dr. Kao  
4 told her they're all lying.

5 But it explains a bit what the theory here is,  
6 that Mr. Katzenbach has -- these are the words he used:  
7 The university was, quote -- this is just this  
8 morning -- "plotting," quote, "get, shut him up, pay  
9 extra money to Missett as a bonus, witch hunt, setup,  
10 they were trying to provoke him, absurd, fabrication,  
11 preconceived plan to create a record, a fake  
12 fitness-for-duty, a secret plan, wired the  
13 fitness-for-duty, Missett and Reynolds were tied  
14 together." Oh, this was the worst one for me. That  
15 gentleman, Alan --

16 Ms. Adler, what's his last name, Alan, our --

17 MS. ADLER: Heineman.

18 MR. VARTAIN: No, not Heineman. The data  
19 gentleman.

20 MS. ADLER: Ziajka.

21 MR. VARTAIN: Mr. Ziajka, Mr. Katzenbach said,  
22 was manipulating lost data. Guy writes the reports,  
23 worked there for 23 years, he's manipulating data.

24 So let's go -- so these are the people that Mr.  
25 Katzenbach says were lying to you. Dr. Turpin. Oh, she



1 was lying. She really had an interest in making it up,  
2 what Dr. Kao -- what her experience with Dr. Kao when  
3 she -- he got in her face and was -- oh, in the parking  
4 lot. We're supposed to not believe her 'cause she said  
5 "Yeah, the incident did happen, in part, in the parking  
6 lot. I had my car right there in the parking lot and he  
7 was -- I was in the parking lot shaking."

8 David Philpott, yes, of course he was lying,  
9 according to Mr. Katzenbach. He was the last witness in  
10 the case. He's the one who negotiated -- you think the  
11 unions are going to let him get away with lying? He's  
12 the one who keeps -- Philpott's the one who keeps the  
13 university running by writing and negotiating the labor  
14 agreements with all the unions. He's not going to get  
15 away with lying there. And he didn't lie to you.

16 Nor did Ms. Martha Peugh-Wade, who gets the  
17 Christmas cards. Remember he said he doesn't get the  
18 Christmas -- she's the one who is kind. I want to focus  
19 on her testimony for a minute. I think she got a little  
20 emotional on the witness stand.

21 She's the witness who writes all the mental  
22 health policies and negotiates the mental health  
23 benefits with the insurance companies. She takes care  
24 of the -- she writes the sick leave, the medical leave,  
25 the disability policies. She's the one that said "We've

1 never, ever rejected a disability leave of absence or a  
2 disability accommodation."

3 Mr. Katzenbach is -- he spent a whole 15  
4 minutes on Martha Peugh-Wade as being part of this  
5 setup, witch hunt, lies. She sat there for three days  
6 and answered every single question he had, straight on.

7 And she kept saying "I just wanted him to go  
8 for the fitness-for-duty evaluation so that we could  
9 have the answers we needed."

10 On this -- so I've covered Dr. Turpin, Mr.  
11 Philpott. Mr. Philpott knew -- remember he had gone to  
12 boxing matches with Dr. Kao in previous years. It  
13 wasn't easy for him to come and say -- at that last  
14 meeting when Mr. Katzenbach was there doing the legal  
15 stuff, Mr. Philpott said he saw those behaviors right in  
16 front of him. It wasn't easy for him to come in and say  
17 that. Mr. Katzenbach would have you feel that or think  
18 he's lying. What would he get by lying?

19 Frankly, what do any of the university people  
20 get? It's not a corporation. This is just costing us  
21 money. There's actually no motive whatsoever other than  
22 to keep the institution safe.

23 I would like to -- because Mr. Katzenbach  
24 attacked the faculty members front and center -- they  
25 each had a very different set of emotions. Not one of

1    them was like the other one.  Ms. Adler has been their  
2    representative throughout this case and -- they didn't  
3    want to come in here at all.  You don't see any of them  
4    here, do you?  They don't want to be around Dr. Kao.

5                But to a person -- even Professor Needham said  
6    that spring -- he said "If he would just stop the  
7    behaviors, we could go back to business."  They didn't  
8    want him gone.  They just wanted the behaviors to end.

9                Thought I had their pictures here.  Oh,  
10   whatever.  I'll just -- oh, I know where it is.

11               My wife tries to get me to do repair things.  
12   If she saw me now, I'd be in trouble.  She'd say "If you  
13   can do that, why" -- I don't do anything anymore.  I've  
14   given that part up.

15               Brandon Brown.  We've already done Dean Turpin.  
16   This goes back to what the Dean's Office was when Dr.  
17   Kao was at the university.  You remember Dean Brown.  
18   He's now the physics professor.  He took it for, I  
19   think, about four hours, question after question from  
20   Mr. Katzenbach.  I guess -- he really, really invited  
21   Dr. Kao to come into his office and scare the daylight  
22   out of him?  No, he didn't.  He didn't even want to be  
23   here.  But he told the truth.

24               And I want to finish the other witnesses, each  
25   of whom -- I just want to remind you they all had the

1 courage to come in here. They're scared. They don't  
2 know -- the scary part is you don't know. You just  
3 don't know.

4 Professor Devlin, remember him? He's the  
5 chairman. He just did the search committee where we  
6 hired our first Latino math professor. He was so proud  
7 of that. And he should be. There aren't enough Latinos  
8 in math, so if you can recruit a top guy like that, you  
9 gotta outcompete the other universities for him.  
10 Unfortunately, they haven't gotten into the math -- math  
11 and sciences.

12 He came in -- he said that Dr. Kao was yelling  
13 and screaming in that -- in that faculty meeting.  
14 That's why I objected that one time when Mr. Katzenbach  
15 misrepresented what his testimony was. He said that,  
16 quote, unquote.

17 Dr. Yeung, he was pretty animated. I got a  
18 kick out of him. He's got two kids. What interest does  
19 he have in making all this up? He's just getting  
20 tenure. He's got a young family. Why would he take all  
21 this on for the privilege of coming up on the witness  
22 stand and lying, like Mr. Katzenbach says?

23 Mr. Zeitz -- Professor Zeitz, one of the ones  
24 who Martha Peugh-Wade's notes said "If he would just  
25 stop the behaviors, we could all go back," something

1 like that. He's the one who Dr. Kao showed up in his  
2 office like right after the holidays with the -- flipped  
3 in a second, went from nice to mean and scary and  
4 yelling and screaming.

5 I was going to bring Professor Pacheco here. I  
6 didn't think we needed one more person who had the same  
7 experience. I figured --

8 MR. KATZENBACH: Objection, Your Honor.

9 THE COURT: Sustained. Last sentence in the  
10 argument is stricken.

11 MR. VARTAIN: Professor Needham, you heard him.  
12 Mr. Katzenbach had a long diatribe about his malice,  
13 according to Mr. Katzenbach. I didn't see any malice,  
14 other than he's been one of the objects of this  
15 obsession -- this obsession about grieving something  
16 that happened ten years ago.

17 He's the one who's probably got the most reason  
18 to be upset and -- but he stood there and answered all  
19 the questions.

20 The reason I put Dr. Kao's picture up there  
21 when we made this, the faces of the math department, not  
22 just because he was there; he'd still be there probably.  
23 It was his choice to leave the university. He chose not  
24 to go for the medical evaluation. He could still be  
25 there if he had gone, got fixed whatever needed to be

1 fixed.

2           This was -- I put that up there, the  
3 "\$3 million," when Mr. Katzenbach brought in Dr. Ogus to  
4 tell us we owe Dr. Kao \$3 million even if he doesn't  
5 have to work. But then she agreed that the assumptions  
6 that she testified about were not accurate, that she  
7 didn't know if he had been looking for, not looking for  
8 work, or that -- if he was medically able or not able to  
9 work.

10           I think that witness was -- I might have been a  
11 little hard on her, and it might have been unfair, in  
12 the sense that she got bad information, in my view. She  
13 didn't have the right information to support her  
14 testimony before you.

15           I think this, really from -- I would suggest --  
16 you know, I had this out a little while.

17           Regarding all the allegations of malice and  
18 lying from Mr. Katzenbach -- and by the way, he's  
19 representing his attorney [sic]. I don't fault him for  
20 that. I'm just saying he didn't provide the evidence.  
21 He can make the arguments, but he didn't provide the  
22 evidence.

23           We brought all the people in. They're -- you  
24 got to see all them. But this scenario of what happened  
25 in these seven months says it all. If we were out to

1 get Dr. Kao, why would we have taken all these steps to  
2 persuade him to have the medical evaluation?

3 In corporate America, he'd be out like a flash.  
4 If he didn't do what he was instructed to do, they  
5 wouldn't have waited seven months. Martha met with him.  
6 We invited his attorney to come. Why would we invite  
7 his attorney if we were out to get him? We wanted him  
8 to be supported and have his advice.

9 Wrote him the letter, wrote him another letter.  
10 Dean Turpin wrote a letter. All this is in the  
11 exhibits. She wrote it -- Martha wrote to him again.  
12 All these months.

13 Finally, they went to the progressive  
14 discipline, follow the union contract. Mr. Philpott,  
15 Mr. Heineman, the union president, explained they filed  
16 progressive discipline. He had all these chances to  
17 change his mind because we wanted him to stay, as a  
18 professor. He's not a bad person. He's a good  
19 professor. He had some type of problem that needed  
20 assessment.

21 So what happened at the very end?

22 You know what, Linda; we don't need to put  
23 those letters up. The jury have seen those letters.  
24 I've handed them out.

25 Remember we said "Look, we'll stop -- we'll

1 take the train off the progressive discipline track.  
2 We'll have the arbitrator decide if we have the right to  
3 make you go to the doctor. We'll have a retired judge  
4 do it."

5 All those chances to compromise. Nothing. The  
6 university was really left, after seven months, with no  
7 choice. We ran out of options. And seven months to  
8 ask, ask again, was a sign of good faith.

9 There was no retaliation. There was no concern  
10 about him -- his complaints, or his oppositions, as he  
11 puts it.

12 I appreciated that the jurors asked questions  
13 and that His Honor allowed the jurors to ask questions.  
14 I thought the questions were somewhat embarrassing for  
15 me, that I hadn't put the evidence on so those questions  
16 would have been answered ahead of time. But I truly  
17 appreciated that.

18 So I would like to take a few minutes and wrap  
19 up. The first claim for medical and psychological  
20 evaluation, the university showed that it was safe --  
21 that its purpose was safety. The judge's instruction  
22 said that's a legitimate purpose for a fitness-for-duty  
23 evaluation under California law. If this isn't a safety  
24 issue, what would be, when you have a person who's  
25 exhibiting such signs of -- that concern people?



1 They're basically undenied. I mean, really.

2 Mr. Katzenbach -- when he got on the witness  
3 stand, the question he asked -- I thought it was a very  
4 interesting question. The question was -- this was when  
5 Dr. Kao first got on the witness stand. I wrote it down  
6 'cause I was interested. "Did you intentionally bump  
7 people? Did you intentionally scare people?" The word  
8 "intentionally" was there.

9 I hope it wasn't intentionally. But whether it  
10 was intentional or not, any responsible employer, any  
11 responsible college, has to get it assessed.

12 Dr. Missett testified, Dr. Good testified, and  
13 Mr. Cawood said when you don't have the expertise  
14 in-house to assess those kinds of behaviors -- Martha  
15 said that; David Philpott said that. We didn't -- we  
16 don't have doctors on staff. We don't know how to tell  
17 whether that's really a problem or not. We have a duty  
18 to get independent advice, and that's what the  
19 university did over and over, get independent advice:  
20 Dr. Missett, Dr. Good and Dr. Reynolds, who -- he's not  
21 here. If Dr. Kao had gone, we don't know what would  
22 have happened.

23 Mr. Katzenbach even went so far as to challenge  
24 the integrity of someone he's never met, his client  
25 never met. He wasn't even here to defend himself.

1 When -- Dr. Good said Dr. Reynolds is a man of  
2 integrity. He said that point-blank on the witness  
3 stand. Said Dr. Missett was.

4 Dr. Missett says Dr. Reynolds is a excellent,  
5 fair doctor, would have given a fair break to Dr. Kao.

6 Mr. Katzenbach had the nerve to impugn the  
7 integrity of a doctor who does nothing but help people,  
8 without any basis, any evidence whatsoever.

9 And I'm sorry, it really upset me. I don't --  
10 I don't like to have that experience of having people  
11 maligned without the opportunity to defend themselves.

12 And all these other good people -- and the  
13 other good people were Professor Wells, Professor Wolf,  
14 and all the other people who Mr. Katzenbach brought in.  
15 And what did they say? "I didn't see it because he  
16 didn't ever do that to me. I'm up on the fifth floor."

17 That nice lady who works at Mission High  
18 School, Mrs. Soares, said "Hey, I was only there two  
19 days a week that spring."

20 Oh, the fellow from the business school: "I  
21 never even go in that building. I only saw Dr. Kao once  
22 or twice."

23 Of course they didn't see these behaviors.  
24 Thank goodness that they didn't. But that doesn't mean  
25 that we didn't have to take serious the people who did

1 have these really, really upsetting experiences,  
2 including two women, Dr. Turpin and Mrs. Needham. And  
3 she didn't -- we didn't ask her.

4 I would like to thank His Honor again for the  
5 opportunity to appear before him. He came out -- he's a  
6 retired judge, and this is a special thing that he did  
7 for us.

8 I want to close by again thanking you for your  
9 time. I want to ask you to please return a verdict for  
10 the university. We did what the law requires. We don't  
11 owe Dr. Kao any money. What we owed him was fair  
12 treatment, and we gave him fair treatment.

13 It's a shame. It's sad it came to this. It is  
14 sad. It's not just sad for him, but it's sad for the  
15 university. We lost his services. The university had  
16 17 years with him. We lost his services. So it's sad  
17 all the way around. But the university didn't cause  
18 this.

19 Dr. Kao, he had his legal support. He had his  
20 mental health person who came. He had all the advisors  
21 and time that anybody could ask for. In fact, more.  
22 And he had a tenured position. He was well paid and  
23 well benefitted. He chose to give it up. We didn't  
24 want him to give it up. We didn't ask him. We just  
25 asked him to do one thing. "You did those behaviors.

1 It's up to you, however inconvenient and challenging it  
2 would be, go to the doctor, get the report and let's see  
3 where it goes."

4 So in closing, thank you for your time. Return  
5 a verdict, if you would, please, for the university so  
6 that in the future, universities are encouraged to be  
7 responsible for their citizens and at the same time to  
8 be fair to their employees, which it was.

9 Thank you for listening.

10 THE COURT: Thank you, Mr. Vartain.

11 Ladies and gentlemen, remember the admonition.  
12 Do not form or express any opinion on this case until  
13 it's finally submitted to you for a decision. Do not  
14 discuss among yourselves or with others until that time.  
15 Please be back in your places at 2:30 according to the  
16 courtroom clock.

17 May I have a quick word with counsel, please.

18 (Recess taken.)

19 THE COURT: Jurors and alternates are all  
20 present. Counsel for both sides are present. The  
21 plaintiff is personally present.

22 Mr. Katzenbach, would you like to give a  
23 rebuttal argument?

24 MR. KATZENBACH: I would, Your Honor.

25 THE COURT: Go ahead.

1 MR. KATZENBACH: Thank you.

2 REBUTTAL ARGUMENT BY MR. KATZENBACH

3 MR. KATZENBACH: In outrage, Mr. Vartain stands  
4 up and says to you how horrible it is that I would  
5 accuse people without giving them an opportunity to  
6 defend themselves. Well, what opportunity did they give  
7 Mr. Kao -- Dr. Kao?

8 For seven months, he asked "What is this  
9 about?"

10 For seven months, they said "We won't tell  
11 you."

12 From the day we started it, I said "Give me the  
13 information so I can advise him on this fitness-for-duty  
14 that you're demanding."

15 For seven months, they said "We won't tell  
16 you." For seven months, they said "Go to the exam."

17 This is a little like negotiating with Vito  
18 Corleone. It's a little bit like saying, you know,  
19 "You're going to do what I say or your brains are going  
20 to be on the darn contract."

21 That's what it was. That's the kind of  
22 negotiations that were going on. They describe it as  
23 progressive discipline. It is not progressive  
24 discipline to tell somebody to do the same thing ten  
25 times. That's not ten warnings; that's ten threats.

1           The other thing that counsel, Mr. Vartain,  
2       said -- another thing that he said, that I found  
3       particularly interesting, he said it was the behaviors  
4       that concerned him. Well, what behaviors would those  
5       be? Because I was in this courtroom and I heard the  
6       evidence, and you did too. When was there any specific  
7       behaviors of concern that were talked about?

8           We have a very mixed bag of testimony about the  
9       February meeting. Some people said Dr. Kao briefly  
10      yelled; some people said he was loud; some people said  
11      he shouted in frustration. But no one identified any  
12      behavior which any reasonable person would think was  
13      scary or insane or deserved -- thought that he was  
14      mentally deranged in any way. No one testified to that.

15           And what behaviors were identified afterwards  
16      about this issue? What behaviors? Well, the answer is  
17      we've seen the behaviors: the behaviors that Jennifer  
18      Turpin made up. Why do I say she made it up? Well,  
19      pretty simple. She tells three, four things to Dean  
20      Brown and then turns around and says those four things  
21      didn't happen. She writes emails and edits them and has  
22      no explanation for that.

23           So am I accusing her of lying just because I  
24      want to? No. Am I accusing her of lying just because  
25      of who she is? No. I'm accusing her of lying because

1 she did. I'm accusing her of lying because she made it  
2 that way. She's the one who put that evidence in front  
3 of you, and she's the one who can't explain it.

4 Now, I hate to call someone a liar. You, know  
5 it's really unpopular. Puts everyone under a lot of  
6 strain. Lawyers like to use words like  
7 "misrepresentation," "forgetful," things like that. But  
8 I want to call a spade a spade on that one.

9 What about the bumping. I've shown you the  
10 evidence on that. People keep changing their stories.  
11 But the really amazing thing here, the thing that  
12 absolutely strikes me as incredible in the argument that  
13 Mr. Vartain made, is he says they just wanted him to  
14 stop these behaviors.

15 But their theory is that he's going to stop the  
16 behaviors they don't like, but they're not going to  
17 actually tell him what those behaviors might be, or any  
18 of the circumstances under which they're occurring, so  
19 that even if they were sincere in their belief -- and I  
20 do not think they are, and I think the evidence is very  
21 powerful that they weren't -- how is he going to know  
22 that?

23 If they're really concerned about someone doing  
24 behaviors that are bad, there is no mystery about  
25 telling them that. There is none. It's what you do

1 every single day if you're an employer as big as the  
2 university here. Do you think that they go around to  
3 their people and play mystery games about "You did bad  
4 things and we won't tell you, tell the doctor"? No.

5 If they think that Dr. Kao had engaged in any  
6 behaviors of any kind that were causing safety concerns,  
7 they would have said so. And to claim in this court --  
8 to claim in this court that he's a danger to students,  
9 when they took no action for the entire spring semester  
10 when they claim these behaviors were going on, is  
11 surely -- is surely just an unbelievable position.

12 So we have behaviors they won't identify. Not  
13 now, not at the time. They have fears that they don't  
14 act consistently with, if they were really scary.

15 And what do they say -- what about the -- they  
16 say they want to present to you that this was just a  
17 fair and aboveboard examination. Well, it wasn't. And  
18 we've shown why it wasn't. They lied to Dr. Missett  
19 about the facts. They paid Dr. Missett extra. They  
20 don't like the word -- I don't think I used the word  
21 "bribe," but I might have. But certainly bonus, it was.  
22 Bonus for a job well done. Is there any explanation  
23 they have for that that's credible and believable in  
24 this case? I haven't heard it.

25 So what -- they say retaliation was in our



1 mind. Well, not really. It's on -- a product of all  
2 the notes that they have about Dr. Kao's concerns, might  
3 be filing a lawsuit. Those are not my words. Those are  
4 their words.

5 But more than that, you heard Christine Liu  
6 testify here when Dr. Zeitz was speaking to her in the  
7 summer and they were talking about why John isn't there,  
8 and Dr. Zeitz said "Well, it's because of his complaints  
9 over the search."

10 The evidence in this case is they were hostile  
11 to these complaints. Whether they started this process  
12 thinking it was only a device to get Dr. Kao under their  
13 thumb and found themselves going down a river in a raft  
14 that they couldn't get out of, whether they intended to  
15 fire him right from the start, I'm not sure. I'll  
16 acknowledge that.

17 I think they probably just wanted to get him  
18 under a fitness-for-duty examination so they could say  
19 to him "You can't go to the meetings. Every time you do  
20 anything that's strong, forceful, every time you act,  
21 you're under the threat of us saying 'No teaching this  
22 semester; you're too dangerous. No teaching that  
23 semester; you're too dangerous.' You have to justify  
24 your life and your career to a doctor at the  
25 university's own choosing."

1           When Dr. Kao wouldn't do that, when he asked  
2 simply to be told what it was he was doing wrong, you  
3 know, that's when they wouldn't respond; that's when  
4 they wouldn't act; that's when they wouldn't just do the  
5 simplest possible thing, the thing that you would  
6 imagine they would do under their disciplinary policies,  
7 under their safety policies, under the Respect Handbook,  
8 is have a fair investigation that was thorough, asking  
9 everybody about the questions and asking Dr. Kao to  
10 explain behaviors that they really thought were  
11 problems, and he wouldn't do it.

12           Mr. Missett made -- I'm sorry -- Mr. Vartain  
13 made another comment that I thought was very -- he said  
14 they wanted Dr. Kao to get fixed whatever needed to be  
15 fixed. Fix whatever needs to be fixed. What do they  
16 think needs to be fixed? If that isn't looking at  
17 someone as if they are disabled and sick, what is? Fix  
18 whatever needs to be fixed.

19           Now, Dr. Terr came to you, testified that she's  
20 known John, she treats John, and he is no danger to  
21 anybody. Look at her resumé. Look at her experience.  
22 Look at her background. Look at the awards she has.  
23 Put her resumé against Dr. Missett's. I don't think  
24 there's even a contest.

25           The idea that Dr. Terr, an author of 72

1 published books and articles, who received an award as  
2 top psychiatrist in the country, who had received  
3 numerous prior awards, who had spent her life helping  
4 people, would sit here and tell you John Kao is not a  
5 danger and never has been and never will be -- the idea  
6 that she would come here and say that and lie, it's  
7 preposterous.

8           Counsel says Philpott saw the bad behaviors.  
9 What did Philpott say? He said that Dr. Kao was leaning  
10 back in his chair and rocking and maybe clutching it  
11 with white knuckles. When is that a bad behavior or a  
12 scary behavior?

13           What did Mr. Philpott really say? He said the  
14 meeting started pleasantly and ended pleasantly. And  
15 remembering that this is a meeting in -- one of a long  
16 series of meetings where Dr. Kao's whole job is on the  
17 line, and yet once again, the best that they can -- the  
18 evidence -- best evidence the university can put before  
19 you is he had white knuckles and was nervous during this  
20 meeting, when his whole life is on the line.

21           The question really isn't whether Dr. Kao might  
22 have been a little nervous. The question isn't really  
23 whether Dr. Kao might have been a little anxious. The  
24 real question is why wouldn't he be more?

25           Dr. -- Mr. Philpott testified seeing Dr. Kao

1 after the meeting with Martha Peugh-Wade, and Dr. Kao  
2 said to him "They're trying to fire me." But did he --  
3 and then Dr. Kao looked maybe angry, maybe upset. But  
4 did Dr. Kao do anything after that? Did he go back and  
5 attack anybody? Oh, no, he didn't do that.

6 Yet they pretend that he's -- that he's engaged  
7 in bad behaviors, that they're afraid of him. They have  
8 argued to you that -- they have tried to present this  
9 case as if this fitness-for-duty examination --  
10 evaluation that they're demanding can be looked at in  
11 the abstract. They can say to you "Well, safety's a  
12 legitimate concern. Therefore, anything we do to  
13 promote safety," such as they claim this  
14 fitness-for-duty, "is a legitimate tool."

15 But that's leaping over a huge step. That's  
16 leaping over not just the abstract, you have to get to  
17 the concrete. What's in it about this case and this  
18 fitness-for-duty and this situation.

19 Because in the end, you know, you can say  
20 "Well, fitnesses-for-duties are useful tools," but  
21 they're like any tools. It isn't the fact that you have  
22 a chain saw; it's where you use it that matters. It  
23 isn't where you have a hammer; it's how you use it that  
24 matters. It isn't -- so a tool is just a tool.

25 And the problem they have and the fact they

1 can't get around is that whatever legitimacy  
2 fitness-for-duty examinations may have in the abstract,  
3 they have no legitimacy here.

4 More importantly, while they like to pretend --  
5 while they argue to the contrary, the evidence I've put  
6 before you shows that this was always -- this whole  
7 situation was manipulated. Not only did they not tell  
8 Dr. Kao what he was accused of, but they misled Missett.  
9 They -- and the idea was to go to Reynolds and basically  
10 tell Reynolds Dr. Kao -- it's what the notes reflect --  
11 Dr. Kao was a danger, he can't come back, and manipulate  
12 the situation that way.

13 The surprising thing is we have any evidence of  
14 that at all. We have their notes. We have their own  
15 statements. I would say that 99 -- well, not -- I can't  
16 testify. I would say that it is a surprising fact that  
17 you get this close to seeing the interior minds of an  
18 institution like USF. People don't admit to  
19 discrimination. They don't acknowledge retaliation.  
20 They don't say that "We are bad people." But they --  
21 this is what the evidence in this case actually shows.  
22 And against that -- and against that, they have offered  
23 little or nothing.

24 At the start of this case, I asked you -- I  
25 said if you're a juror on this case, we're going to be

1 having to ask you to assess the credibility of people  
2 who are important people, who have important jobs, who  
3 are well educated. I said that's going to be one of  
4 your jobs. And I said to you it's going to be hard.

5 The university's position is believe them.  
6 They're doctors.

7 I say look at the evidence. Look at the  
8 evidence. If people are saying "We're afraid of a  
9 lawsuit, that John is gathering evidence for a lawsuit,"  
10 look at that evidence.

11 If people say -- make up -- if people tell  
12 inconsistent stories, look at that evidence. Doesn't  
13 matter if you have a Ph.D. or school of hard knocks.  
14 Look at the evidence. Are they consistent? Are they  
15 telling a consistent story? Are they telling a  
16 believable story? Are they saying "We told John Kao the  
17 facts" or not? Are they saying they followed their own  
18 policies or not?

19 They like to imagine the fitness-for-duty  
20 examination is a serious policy. Well, in some case, it  
21 might. But they have other policies here that were  
22 successfully designed for violence prevention. Did they  
23 follow those policies? Did they use their public safety  
24 that exists entirely for public safety? They did not.

25 Why not? It's because John Kao was never a

1 danger. He never has been a danger. He never will be a  
2 danger. He is simply a guy who teaches, that loves  
3 teaching, and thought that he could make things better  
4 at the university, so he brought up issues of concern  
5 about discrimination.

6           And while counsel argues his concerns were  
7 about -- weren't about discrimination, but were about  
8 print ads, the reality is look at the exhibit. Look at  
9 his own statistics. Look at the evidence that he put  
10 down on that piece of paper. Look at the reasons that  
11 they're there. Look at the numbers that he put down,  
12 compare them to the numbers he put in his complaints.

13           His effort was to try to show that the  
14 university could do more and better. Look at the 2008  
15 search. His evidence was not about whether it was a  
16 print ad; it was whether it was in a journal, whether it  
17 would attract -- they would have it advertised, like  
18 their policies required, that it would attract the  
19 people that their policies and their affirmative action  
20 basis for that -- the basis for those policies was  
21 followed through.

22           It's pretty reasonable that if you have a rule  
23 based on a desire to maximize diversity in applicants,  
24 that not following that rule is going to have an adverse  
25 impact on your search process, an adverse impact on the

1 way of reaching out to get minorities and women to  
2 apply. And you look at the proof. You look at the fact  
3 that this search had too few numbers and no minorities.

4 So any reasonable person would say there's a  
5 violation of policy that was enacted for -- that was  
6 enacted for diversity purposes. We ended up with no  
7 diversity -- with insufficient diversity; in fact, no  
8 minorities in this search. Is there a connection?

9 You know, if he had stopped right there,  
10 stopped right there, you'd have a pretty good claim,  
11 pretty credible belief. But John Kao was more than  
12 that. He said "I'll take -- I'll use my skills as a  
13 mathematician to see if I can find, you know, something  
14 more concrete that my colleagues might look at and  
15 analyze and say 'Yeah, there is something there. We did  
16 make a mistake. Let's fix it.'"

17 And that's what he tried to do. And if that  
18 isn't reasonable and if that isn't good faith, then I  
19 don't know what is.

20 In sum, this is not about the use of  
21 fitness-for-duty examinations in the abstract. It is  
22 about this case. It is about the fact that they never  
23 gave Dr. Kao a fair chance to even answer the issues,  
24 the claims, that they now come to you and say were their  
25 concerns.



1           They never gave -- they never wanted to have a  
2 fitness-for-duty examination that was fair and  
3 aboveboard. Evidence shows that. They never wanted to  
4 have an examination that would really deal with safety  
5 issues or even take policies that would really deal with  
6 safety issues, 'cause there were none.

7           Even their own expert, Cawood, as I point out,  
8 doesn't recommend fitness-for-duty evaluations. He in  
9 fact testified as to the alternatives that he uses when  
10 they -- and then they don't go forward. There's nothing  
11 magical there.

12           He went and had a training session with staff  
13 to deal with people that were really disruptive, not  
14 just Dr. Kao, not just somebody who raises issues.

15           So when they tell you about the terrible things  
16 he has done, what terrible things are those? They don't  
17 show you. When they say that he is a danger to be on  
18 the campus, what things are those?

19           This is about Dr. -- this is about some people  
20 getting together and thinking they can get Dr. Kao under  
21 his thumb -- their thumb. They can use the  
22 fitness-for-duty for that purpose. And it sort of just  
23 doesn't go as planned.

24           And foolishly, foolishly, they don't stop.  
25 They don't try to deal with the problem directly when

1 it's not working their way. They simply go ahead anyway  
2 and destroy John's career.

3 One word about Dr. Ogus's calculations. The  
4 judge read you an instruction about mitigation of  
5 damages. That's their burden, the university's burden,  
6 to show that there was some job that he could have  
7 gotten that was substantially similar.

8 If there isn't such a job, then you can look at  
9 Dr. Ogus's calculations and determine where to draw a  
10 line. And she said it's a tool. But it shows a measure  
11 of how hard it is for John to find new employment. They  
12 can't produce to you a single job -- hired an expert --  
13 they can't produce to you a single job that he could  
14 get -- that he could have looked for that would be  
15 substantially similar to what they took away from him.

16 I think this is a tragic situation. But it's a  
17 tragic situation because USF would not do the sensible  
18 things, the sensible things that even its own policies  
19 required, of talking to Dr. Kao if they had real  
20 concerns. Makes you think they don't have real  
21 concerns. But even if they had real concerns, you could  
22 talk to him.

23 They keep coming up with excuse after excuse  
24 why they don't have to do that. They said people are  
25 too frightened to speak to him. They had police

1 officers, they had public safety officers that could  
2 have done that. They have other people they could  
3 contact.

4           You know, in the end, the university's entire  
5 arguments here, apart from the fact they won't take  
6 responsibility for the acts that they set in motion, is  
7 just one long series of saying it's someone else's  
8 fault, one long series of saying that all -- that it  
9 isn't their fault that they fired him; it's somebody  
10 else's fault.

11           I mean ... it's their fault. It's their  
12 choice. It was their doings. It was their obstreperous  
13 refusal to do anything to meet -- to do -- to meet  
14 legitimate concerns of an effort to convince Dr. Kao to  
15 go to this exam, if they thought it was really  
16 necessary, to give him even the slightest information  
17 that would help him make a decision on this, if there  
18 were any real facts to help on this issue.

19           Instead, they simply said "Go, go, go." Like  
20 Vito Corleone, they had Luca Brasi standing next to the  
21 guy, put a gun to the guy's head and said "You either go  
22 to the exam or your brains are going to be on the  
23 contract."

24           Well, in this case, Dr. Kao's brains, his  
25 career, his life, everything he owns, everything he had

1 that was near and dear to him and important is gone.  
2 And they banned him from the campus because -- not  
3 because he wouldn't take an exam, but because, in  
4 counsel's own words, he didn't get fixed whatever needed  
5 to be fixed.

6 And if that isn't perceiving him as disabled  
7 and banning him for being -- because they think he's  
8 disabled, banning him out of stereotypes, out of  
9 discrimination, I don't know what is.

10 Please, in this case, I ask you return a  
11 verdict in our favor. The amount of money that you pick  
12 is based on your examination of the facts and the  
13 evidence. We have presented you the tools to do that.  
14 It is up to you, and each one of you, to decide what's  
15 fair and what's right and what's good. But give John --  
16 Dr. Kao back his career.

17 And if they say that he hasn't -- they have  
18 said that he should be able-bodied and working. In  
19 their hands -- for years and years, in their hands was a  
20 solution to that problem. Give him -- they, any day --  
21 any day, they could have. They could have turned to Dr.  
22 Kao and said "Here's your job back." But he doesn't  
23 have it. They haven't given it. So we're asking now  
24 the only place we can, and that's you.

25 Thank you very much for being here and

1 listening to me.

2 THE COURT: Thank you, Mr. Katzenbach.

3 MR. KATZENBACH: Thank you, Your Honor.

4 THE COURT: There's a mistake on the jury  
5 form -- the verdict form. Page 3, at the bottom -- page  
6 3, toward the bottom, "After the verdict form has been  
7 signed, deliver this verdict form to the clerk." That's  
8 not the procedure.

9 Let me explain what the procedure is. You  
10 notify the bailiff that you have a verdict. The  
11 presiding juror brings the verdict with him or her back  
12 to the courtroom. Bailiff collects it ceremoniously  
13 from the presiding juror, gives it ceremoniously to me;  
14 I read it.

15 If I'm happy with what it says, I think it  
16 adequately answers the questions, I pass it to the  
17 clerk, who then reads it aloud. It's not like TV where  
18 the foreperson is reading the verdict or announcing the  
19 verdict. It goes from the presiding juror to the  
20 bailiff, to me, to the clerk, who actually reads it.

21 Let me add my thanks to that of counsel for  
22 your attendance, for your good humor, for your  
23 promptness, your attentiveness. It shows, particularly  
24 in the questions you submitted, that you were really  
25 following what's going on. Some frank questions.

1           Especially now because the alternates, we might  
2 not see them again after you return your verdict.  
3 They're included very much. I think it's a frustrating  
4 experience to be an alternate -- I've never been one,  
5 but I have heard that it can be -- to sit through all  
6 this testimony.

7           There are some of you who have particularly  
8 been called on to seize your way through difficulties.  
9 Couple of you had malaise. You soldiered on.

10           I know that there are some of you that are  
11 missing work, and the pressure is getting on you of work  
12 undone.

13           I hear one of you had your car towed at great  
14 expense and inconvenience.

15           So thank you for all you've had to endure and  
16 for your good humor. I was pretty impressed. I was  
17 very embarrassed when we weren't ready for you this  
18 morning, but you cheerfully chatted among each other,  
19 and I didn't see a sour face among you. So thank you  
20 for that.

21           Some final instructions, beginning with 5009,  
22 "Predeliberation Instructions."

23           "When you go to the jury room, the  
24 first thing you should do is to choose a  
25 presiding juror. The presiding juror should

1 see to it that your discussions are orderly  
2 and that everyone has a fair chance to be  
3 heard. Please make sure that if you have  
4 any cell phones or pagers, they are turned  
5 off completely during jury deliberations.

6 "You have a duty to talk with one  
7 another in the jury room and consider the  
8 views of all the jurors. Each of you must  
9 decide the case for yourself, but only after  
10 you've considered the evidence with the  
11 other members of the jury. Feel free to  
12 change your mind if you're convinced that  
13 your position should be different. You  
14 should all try to agree, but do not give up  
15 your honest beliefs just because others  
16 think differently.

17 "Please do not state your opinions too  
18 strongly at the beginning of your  
19 deliberations. Also, do not immediately  
20 announce how you plan to vote. Keep an open  
21 mind so that you and your fellow jurors can  
22 easily share ideas about the case.

23 "You should use your common sense, but  
24 do not use or consider any special training  
25 or unique personal experience that any of

1       you have in matters involved in this case.  
2       Such training or experience is not a part of  
3       the evidence received in this case.

4               "Sometimes jurors disagree or have  
5       questions about the evidence or about what  
6       the witnesses said in their testimony. If  
7       that happens, you may ask to have the  
8       testimony read back to you or ask to see any  
9       exhibits admitted into evidence that have  
10      not already been provided to you. Also,  
11      jurors may need further explanation about  
12      the laws that apply to the case. If that  
13      happens during your discussions, write down  
14      your questions and give them to me" -- "give  
15      them to the bailiff for delivery to me.  
16      Please understand that I must contact the  
17      attorneys before I can formulate a response  
18      and that providing a response will take  
19      time. When you write me a note, do not tell  
20      me how you voted on any issue until I ask  
21      for this information while court is in  
22      session.

23              "At least nine jurors must agree on  
24      each question that you are asked to answer.  
25      However, the same jurors do not have to



1 agree on each question. Any nine jurors are  
2 sufficient. As soon as you have answered  
3 all the questions as instructed, the  
4 presiding juror must date and sign the  
5 verdict form and notify the bailiff.

6 "Your decision must be based on your  
7 personal evaluation of the evidence  
8 presented in the case. Each of you may be  
9 asked in open court how you voted on each  
10 question. Notes can help you remember."

11 That's why you have copies of the verdict form,  
12 so you can take notes as to how you voted on each issue.

13 "You must not base your decision on  
14 chance, such as a coin flip. If you decide  
15 to award damages, do not simply add up the  
16 amount each juror thinks is right and make  
17 the average your verdict.

18 "You may take breaks, but do not resume  
19 your deliberations until all of you are back  
20 in the jury room.

21 "You may request in writing that trial  
22 testimony be read to you. If you make such  
23 a request, the court reporter will read the  
24 testimony to you in the jury room. You may  
25 request that the court reporter read all or

1 part of a witness's testimony.

2 "Your request should be as specific as  
3 you can make it. It will be helpful if you  
4 can state, one, the name of the witness;  
5 two, the subject matter of the testimony you  
6 would like to have read; and three, the  
7 names of the attorney or attorneys asking  
8 questions when the witness gave the  
9 testimony.

10 "The court reporter will not converse  
11 with you when he or she is reading the  
12 testimony you've requested.

13 "While the court reporter's in the jury  
14 room, you must not deliberate or discuss the  
15 case. You may not ask the court reporter to  
16 read testimony that was not specifically  
17 mentioned in your written request. If your  
18 notes differ from the testimony which the  
19 court reporter reads to you, you must accept  
20 the court reporter's record as accurate.

21 "I will give you a verdict form with  
22 questions for you to answer. I have already  
23 instructed you on the law that you are to  
24 use in answering these questions. You must  
25 follow my instructions and the form

1       carefully. You must consider each question  
2       separately. Although you may discuss the  
3       evidence and the issues to be decided in any  
4       order, you must answer the questions on the  
5       verdict form in the order in which they  
6       appear. After you answer a question, the  
7       form tells you what to do next. All 12 of  
8       you must deliberate on and answer each  
9       question. At least nine of you must agree  
10      on an answer before you can move on to the  
11      next question. However the same nine or  
12      more people do not have to agree on each  
13      answer.

14                "When you have finished filling out the  
15      verdict form, your presiding juror must  
16      write the date and sign the form at the  
17      bottom of the last page and then notify the  
18      bailiff that you are ready to present your  
19      verdict in the courtroom."

20                And if the form doesn't say, after a question,  
21      "Go on to the next question" or "Stop here," if there  
22      are no instructions, that means just go on to the next  
23      question.

24                This is instructions for alternate jurors,  
25      which I'll save until the regular jurors retire for

1 their deliberation.

2 5017, "Polling The Jury":

3 "After the courtroom clerk reads your  
4 verdict in open court, I may ask each of you  
5 whether the verdict expresses your personal  
6 vote. This inquiry is referred to as  
7 'polling' the jury and ensures that at least  
8 nine jurors have agreed to each decision.

9 "The verdict form which you will  
10 receive asks you to answer several  
11 questions. You must vote separately on each  
12 question. Although nine or more jurors must  
13 agree on each answer, it does not have to be  
14 the same nine for each answer.

15 "Therefore, it is important for each of  
16 you to remember how you voted on each  
17 question so that if I poll the jury, each of  
18 you will be able to answer accurately about  
19 how you voted.

20 "Each of you will be provided a draft  
21 copy of the verdict form for your use in  
22 keeping track of your votes."

23 Do we have a bailiff on the way?

24 THE CLERK: We do.

25 THE COURT: While we're waiting for the

1 bailiff, I can read the alternate jurors --

2 THE BAILIFF: Right here.

3 THE COURT: Ms. Mack, will you swear the  
4 bailiff, please.

5 (Bailiff sworn.)

6 THE COURT: All right. Will the regular jurors  
7 gather together instructions, notebooks and exhibits  
8 that they still have, and the bailiff will escort you to  
9 the deliberation room.

10 Ask the three alternates to stay where you are,  
11 and I'll read your instructions as to what remains for  
12 you in this case.

13 (Regular jurors left the room.)

14 THE COURT: The regular jurors have departed  
15 the courtroom under the escort of the bailiff. Counsel  
16 for both sides, the plaintiff and the alternate jurors  
17 remain. I'll read Instruction 5015 to the alternates.

18 "As alternates jurors, you are bound by  
19 the same rules that govern the conduct of  
20 the jurors who are sitting on the panel.  
21 You should not form or express any opinion  
22 about this case until after you have been  
23 substituted in for one of the deliberating  
24 jurors on the panel or until the jury has  
25 been discharged."

1           Now, what'll happen is you will get a phone  
2 call which will tell you either you have to come back or  
3 the case is over and you're released from being on  
4 telephone standby.

5           Do each of you have a number with the clerks  
6 that you can be reached at?

7           ALTERNATE JUROR 1: I don't remember what  
8 number I gave.

9           ALTERNATE JUROR 2: Yeah, I don't know either  
10 what number I gave.

11          THE COURT: Why don't you check with the clerks  
12 before you leave and make sure they have numbers that  
13 are good so they can contact you. And try not to be too  
14 far away. Please don't go to Sonoma County.

15          ALTERNATE JUROR 3: I --

16          THE COURT: Yes?

17          ALTERNATE JUROR 3: Because I work as a  
18 hospital nurse, if I'm at work, the soonest I would be  
19 able to be here would be the next day, because it's not  
20 possible to just substitute somebody in for my  
21 assignment.

22          THE COURT: So you have to finish your shift.

23          THE WITNESS: Yeah.

24          THE COURT: Which would mean what would be the  
25 earliest in the day you could get here?

1           ALTERNATE JUROR 3: Well, I work 7 a.m. to  
2 7:30 p.m. down at Stanford Hospital, so ...

3           THE COURT: 7 a.m. till ...

4           ALTERNATE JUROR 3: 7:30 p.m.

5           THE COURT: 7:30 p.m. Well, fortunately,  
6 you're the last alternate to be called upon.

7           ALTERNATE JUROR 3: Honestly, it's not going to  
8 be an issue for the next, probably, two weeks.

9           THE COURT: Oh.

10          ALTERNATE JUROR 3: But I just wanted to let  
11 you know that 'cause it's -- you know, you can't just  
12 blow it off.

13          THE COURT: It would surprise the socks off me  
14 if we were still on this case two weeks from now.

15          All right. I think I've explained to you that  
16 I do instruct the jury to go back to square one on their  
17 deliberations if you have to be substituted in.

18          The phone call you get will tell you you don't  
19 have to be on phone standby anymore and it also will  
20 release you from the admonition not to discuss the case  
21 with anyone. You'll be completely free to discuss it  
22 with anyone you want to or to refuse to discuss it, if  
23 that's your preference. So that phone call letting you  
24 know the case is over will release you.

25          If you want to know how the case came out, just

1 ask the clerk who's calling you, and he or she will be  
2 glad to tell you.

3 Do leave your notebooks, instructions and  
4 exhibits behind. They present the same difficulty after  
5 the jury is deliberating that they do before  
6 deliberations are begun.

7 Do you have any questions?

8 ALTERNATE JUROR 2: Do we get a paper saying  
9 we're here?

10 THE CLERK: Yes.

11 THE COURT: Yes. She's the court clerk. She  
12 will come deliver it to you. You get a paper  
13 demonstrating you've been here faithfully throughout  
14 this -- this trial.

15 Any other questions?

16 Well, my thanks to you for what might be a  
17 somewhat frustrating role, but it's absolutely essential  
18 we have backups. Otherwise, we'd be in a mess. So  
19 thank you for filling that function.

20 Check with the clerks to make sure they have  
21 phone numbers at which to reach you. Thank you for your  
22 service.

23 (Alternate jurors left the room.)

24 THE COURT: Alternates have departed the  
25 courtroom. Counsel for both sides and the plaintiff



1 remain.

2 I suggest the next order of business will be  
3 making sure the jury has everything they need, the  
4 exhibits and question forms. The forms of verdict, they  
5 already had with them. Then we can make a record of the  
6 highlights of our instruction conferences.

7 MR. KATZENBACH: Sounds good. So should we  
8 check the exhibits first?

9 THE CLERK: Yeah.

10 THE COURT: Okay. Off the record.

11 (Discussion off the record.)

12 THE COURT: Back in session, on the record.

13 Counsel from both sides are present. The  
14 plaintiff is personally present. The jury is  
15 deliberating. The alternates are on phone standby.

16 We just sent in all the exhibits for the  
17 jurors. We need to make some sort of a record of our  
18 instruction conferences which took place last Thursday  
19 and yesterday.

20 With so many cooks stirring the broth, I had  
21 trouble sorting out the important things which are  
22 things that I had to decide, where there's a difference  
23 of opinion.

24 Mr. Katzenbach, why don't you go ahead and make  
25 whatever record you want to of the instruction

1 conferences.

2 MR. KATZENBACH: Yes, Your Honor, if I might.  
3 That our proposed instruction on reliance of experts was  
4 refused. And ... let me see.

5 Defendants' proposed 3930 and 3962 were  
6 refused.

7 And the court removed the second sentence of  
8 defendants' proposed 2507, modified -- the second  
9 sentence, the court removed.

10 And our instruction on spoliation of evidence  
11 was refused.

12 THE COURT: 204?

13 MR. KATZENBACH: Yes, I think that ...

14 THE COURT: That accords with what I can make  
15 of my notes.

16 Mr. Vartain?

17 MR. VARTAIN: I don't have anything to add.

18 THE COURT: That wasn't as difficult as I  
19 thought it was going to be.

20 All right. As I've told you off the record, I  
21 have a practice, when the jury concludes its service, of  
22 inviting the jurors to stay right where they are in the  
23 jury box and go through a debriefing with counsel and me  
24 and the jury.

25 And, Mr. Vartain, you were going to think about

1 whether you had any objection to that usual practice of  
2 mine, in light of my being the trier of fact and the  
3 determiner of law with respect to the equitable relief,  
4 which still is pending.

5 MR. VARTAIN: Yeah, I'm not prepared to  
6 stipulate to that until the jury verdict returns, Your  
7 Honor.

8 THE COURT: You're not ready to stipulate what?

9 MR. VARTAIN: I'm not ready to stipulate to  
10 that process until the verdict is returned.

11 THE COURT: Oh, I see. So you want to find out  
12 what the jury's verdict says, then confer?

13 MR. VARTAIN: Then I'll confer with my client,  
14 and then I can respond further.

15 THE COURT: Your client's going to be available  
16 for conference?

17 MR. VARTAIN: Either by -- yes, I will, yes.

18 THE COURT: All right. Which brings us to  
19 another topic. Should the jury find basis for award of  
20 punitive damages, I would like to be able to do that  
21 trial as quickly as possible. Have you folks made any  
22 arrangement for Mr. Vartain to get into Mr. Katzenbach's  
23 hands what he'll need for the punitive damage trial?

24 MR. KATZENBACH: We haven't discussed it, Your  
25 Honor. However, I would note that Exhibit 200 contains

1 a financial statement of the university. And that's  
2 already in evidence, indicating its endowment assets are  
3 so much. And that would be what we would, I think, need  
4 for this.

5 THE COURT: What was the exhibit number?

6 MR. KATZENBACH: 200.

7 THE COURT: So all we have to do, then, is draw  
8 the jurors' attention to the exhibit, give them the  
9 instruction that I inadvertently left in the pile this  
10 morning that we had them remove, and argue it.

11 MR. KATZENBACH: That's what I think. I'll  
12 look on-line to see if there's a more updated version,  
13 but that's what I would anticipate, more or less.

14 THE COURT: All right. Shouldn't be clumsy or  
15 take too much time at all.

16 MR. KATZENBACH: Shouldn't be.

17 THE COURT: Okay. Any other concerns?

18 We have an understanding, I think, that the  
19 jury can make its own schedule. They need not cling to  
20 the schedule we've been on in trial. And they need not  
21 assemble in the courtroom after they take breaks; they  
22 can just go to and from the jury room.

23 MR. VARTAIN: Sometimes the parties agree to  
24 fund their dinner if they want to stay and work, and  
25 send out for something to eat.

1 THE CLERK: We're not staying.

2 THE COURT: I'm sorry. From this distance ...

3 MR. VARTAIN: I apologize. I said sometimes  
4 the parties will be willing to fund a meal for the  
5 jurors or meals for the jurors if they don't want to go  
6 out to eat and they want to stay and work. We'd be  
7 happy to participate in that.

8 THE COURT: Sound reasonable to you, Mr.  
9 Katzenbach?

10 MR. KATZENBACH: That would be fine, Your  
11 Honor.

12 THE CLERK: It's not fine with staff, Your  
13 Honor. We don't get paid if we stay after hours.

14 MR. KATZENBACH: Oh. Good point.

15 THE CLERK: Are you going to take verdicts and  
16 all of this without staff? We don't -- they don't give  
17 us compensation. They don't --

18 THE COURT: You're not compensated for what?

19 MR. KATZENBACH: For staying late.

20 THE CLERK: For staying after hours.

21 THE COURT: Oh. I thought you were talking  
22 about lunch.

23 MR. KATZENBACH: No, lunch --

24 THE CLERK: He's trying to get us to stay for  
25 dinner tonight, that you tell them to stay for dinner

1 and work through dinner if they pay for dinner.

2 MR. VARTAIN: I'm not trying to --

3 THE CLERK: Lunch is fine. That would be  
4 a nice gesture.

5 THE COURT: Dinner's out. Lunch is fine. We  
6 can tell the bailiff that if the jurors are at it  
7 tomorrow at lunchtime --

8 MR. KATZENBACH: We'll be happy to do that.

9 THE COURT: -- it'll be the parties' treat.

10 MR. KATZENBACH: Of course.

11 THE COURT: Okay. Anything else?

12 MR. KATZENBACH: Yes, Your Honor. Just for our  
13 own information, how do you want to -- do you want us to  
14 show up in the courtroom or just be on call?

15 THE COURT: Be on call. It's 4:00 now. I --  
16 unless they depart without our knowing about it, I'd  
17 like, on the first day of deliberations, to bring the  
18 jury together and remind them of the admonition, how  
19 important it becomes now.

20 Part of the time, they aren't supposed to be  
21 talking about the case, and sometimes it's easy to  
22 forget that you're supposed to shift the topic  
23 to something else when one of the jurors goes to the  
24 bathroom. Just sort of remind them that the oath has  
25 changed a little bit -- the admonition has changed. But

1 they still have to be cognizant of their duty not to  
2 talk outside of deliberations.

3 MR. KATZENBACH: Okay.

4 THE COURT: Okay. Well, let's hang out and see  
5 if anything happens. Off the record.

6 (Recess taken.)

7 THE COURT: All jurors are present. Alternates  
8 are on phone standby. Counsel for both sides are  
9 present. The plaintiff is personally present.

10 Ladies and gentlemen, the admonition changes a  
11 little bit. You should not -- you should be forming  
12 opinions now. You should be expressing them, but only  
13 in the context of jury deliberations. So if you're  
14 deliberating and someone has to go to the bathroom,  
15 change the topic to the weather while he or she is in  
16 the bathroom, and don't resume deliberating until that  
17 person comes back.

18 I understand that you have agreed on returning  
19 at 9:00 tomorrow morning.

20 JUROR 1: I was going to scare you and say  
21 we've reached a verdict. I'm just kidding. We're  
22 trying to beat the 30 minutes. No, I'm kidding.

23 THE COURT: Okay. You need not assemble  
24 formally in the courtroom. Work out with the bailiff  
25 where she can get you assembled in the hall and take you

1 to continue your deliberations. The parties have  
2 generously offered to buy your lunch tomorrow if you are  
3 deliberating at lunchtime. I'll get further word of  
4 what they have in mind, but that's where it stands now.

5 You can set your hours, take your breaks. You  
6 don't have to consult me about that. Take as long as  
7 you want for lunch and take breaks as you need them,  
8 without consulting me. Any questions?

9 Yes, sir, Number 1?

10 JUROR 1: If we reach a point where we really  
11 need your guidance, can we?

12 THE COURT: Say it again.

13 JUROR 1: If we reach a point in our  
14 deliberations where we need to ask you something or  
15 we're stuck, or something like that, we can ask for  
16 your --

17 THE COURT: Write a note.

18 JUROR 1: Oh, write a note and give it to you?

19 THE COURT: Give it to the bailiff to give to  
20 me. That's -- I understand you do have forms in which  
21 you can put messages to me. So yeah, if there's any  
22 questions that you have, write them down, send them to  
23 me through the bailiff. I'll get in touch with the  
24 lawyers. We'll try to figure out an answer. It will  
25 take some time, but we'll get through it as quickly as



1 we can.

2 JUROR 1: Thank you.

3 THE COURT: And when you do return with a  
4 verdict, bring your instructions and notebooks, and  
5 anything you want to keep for souvenirs, with you back  
6 to the courtroom, rather than leaving them in the jury  
7 room, as you are doing tonight.

8 All right. Remember the admonition. See you  
9 sometime tomorrow.

10 THE BAILIFF: Remember, we all meet outside of  
11 318 and then we'll all walk back to the jury  
12 deliberation room.

13 (Jurors left the room).

14 THE COURT: Anything that needs to go on the  
15 record before we quit for the day?

16 MR. KATZENBACH: No, Your Honor. I guess we'll  
17 be on telephone standby and --

18 THE COURT: How long will it take you to get  
19 here?

20 MR. KATZENBACH: The office is in North Beach,  
21 so that usually takes, depending on the time of day, 20  
22 minutes, 25 minutes.

23 THE COURT: Okay. It's a little long, but ...

24 MR. KATZENBACH: I have to walk to the garage;  
25 the garage has to get me my car; and then I have to get

1 in the car. It's the garage that's sometimes the  
2 problem.

3 THE COURT: Okay.

4 MR. KATZENBACH: But it shouldn't be longer  
5 than that.

6 THE COURT: Mr. Vartain, how long will it take  
7 you to get here if we need you?

8 MR. VARTAIN: Fifteen minutes.

9 THE COURT: Okay. Thank you. See you  
10 tomorrow.

11 (Proceedings adjourned at 4:34 p.m.)

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## REPORTER CERTIFICATE

I hereby certify that the foregoing proceedings were taken at the time and place herein named; that this transcript is a true record of the proceedings, as reported to the best of my ability by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed under my direction into typewriting by computer.

I further certify that I am not interested in the outcome of said action, nor connected with, nor related to any of the parties in said action, nor to their respective counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 23rd day of September, 2012.

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HOLLY MOOSE, CSR NO. 6438

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COURT OF APPEALS OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT

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JOHN S. KAO,  
Plaintiff/Appellant,  
vs. Appellate No. A135750  
SUPERIOR COURT CASE  
No. CGC-09-489576  
UNIVERSITY OF SAN FRANCISCO,  
ET AL.,  
Defendants/Respondents.  
\_\_\_\_\_ /

ON APPEAL FROM THE JUDGMENT  
OF THE SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

THE HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE

REPORTER'S TRANSCRIPT ON APPEAL

February 29, 2012

Volume 14 (Pages 2887 - 2899)

For Plaintiff/Appellant:

KATZENBACH & KHTIKIAN  
1714 Stockton Street, Suite 300  
San Francisco, CA 94133  
(415)834-1778  
BY: CHRISTOPHER W. KATZENBACH, Attorney at Law  
CONOR MACK, Attorney at Law

For Defendants/Respondents:

VARTAIN LAW GROUP  
601 Montgomery Street, Suite 540  
San Francisco, CA 94111  
(415)391-1155  
BY: MICHAEL J. VARTAIN, Attorney at Law  
LINDA K. ADLER, Attorney at Law

REPORTED BY: HOLLY MOOSE, RDR-CRR-CCRR, CSR NO. 6438

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

BEFORE THE HONORABLE WALLACE P. DOUGLASS, RETIRED JUDGE

DEPARTMENT NUMBER 318

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JOHN S. KAO,

Plaintiff,

vs.

Case No. CGC-09-489576  
Jury Trial

UNIVERSITY OF SAN FRANCISCO,  
ET AL.,

Pages 2887 - 2899

Defendants.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

February 29, 2012

APPEARANCES OF COUNSEL:

For Plaintiff:

KATZENBACH & KHTIKIAN  
1714 Stockton Street, Suite 300  
San Francisco, CA 94133  
BY: CHRISTOPHER W. KATZENBACH, Attorney at Law  
CONOR MACK, Attorney at Law

For Defendants:

VARTAIN LAW GROUP  
601 Montgomery Street, Suite 540  
San Francisco, CA 94111  
BY: MICHAEL J. VARTAIN, Attorney at Law  
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San Francisco, California

Wednesday, February 29, 2012, 11:53 A.M.

Department No. 318

The Honorable Wallace P. Douglass, Retired Judge

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THE COURT: Jurors are present. Counsel for both sides are present. Plaintiff is personally present. Who is the foreperson, the presiding juror?

JUROR 9: (Raises hand.)

THE COURT: Okay. Juror Number 9. How long have you been kept waiting?

THE WITNESS: Half an hour.

THE COURT: I apologize. It's longer than it should be. You do have a verdict?

JUROR 9: Yes, sir.

THE COURT: All right. If you could give the verdict to the bailiff, she'll pass it up to me.

Ms. Mack, will you read the verdict, please.

THE CLERK: I will.

"In the Superior Court of California for the County of San Francisco, John S. Kao, Plaintiff, versus University of San Francisco, Defendant, No. CGC-09-489576, Verdict.

"We, the jury, answer the questions

1 submitted to us as follows:

2 "Question I, Medical and Psychological  
3 Examination: Is there liability of  
4 University of San Francisco to John Kao on  
5 the claim related to medical and  
6 psychological examination?"

7 The answer is "No."

8 "Question number II, Retaliation: Is  
9 there liability of University of San  
10 Francisco to John Kao on the cause of action  
11 claiming retaliation?"

12 The jury answered "No."

13 "Question number III, Wrongful  
14 Discharge In Violation Of Public Policy  
15 (Privacy): Is there liability of University  
16 of San Francisco to John Kao on the claim of  
17 wrongful termination (privacy)?"

18 The answer is "No."

19 "Question number IV, Unruh Act: Is  
20 there liability of University of San  
21 Francisco to John Kao on the claim related  
22 to University's instructions to stay off the  
23 campus?"

24 The answer is "No."

25 "Question number V: Did" -- well --

1 "Did the jury answer 'yes' to questions 1,  
2 2, 3 or 4?"

3 The answer is "No."

4 The verdict is signed and dated by the jury  
5 foreman.

6 THE COURT: Ladies and gentlemen, each side has  
7 the right to ask me to ask each of you, with respect to  
8 each of the questions and the answers, whether you voted  
9 for the answer that was just read.

10 Before I entertain a request for such a formal  
11 polling of the jury, let me just get an indication by  
12 nodding your heads up and down or shaking them from side  
13 to side, if you cast a dissenting vote. Is this your  
14 true verdict? You can nod.

15 JUROR 1: I'm sorry. I didn't get it.

16 (Simultaneous speakers.)

17 THE COURT: Okay. If you voted for all of the  
18 answers that were read by the clerk. And I asked --  
19 when I ask "Is this your true verdict," nod your head up  
20 and down. If not, shake it from side to side.

21 I see a lot of nods. I see one shaking head.

22 Mr. Katzenbach, would you like the jury polled?

23 MR. KATZENBACH: Yes, I would, Your Honor.

24 THE COURT: Separate polling for each question,  
25 correct?



1 MR. KATZENBACH: Yes, Your Honor.

2 THE COURT: Question I, Medical and  
3 Psychological Examination. Jury answered "no" to the  
4 question "Is the university liable to Mr. Kao" -- "Dr.  
5 Kao on that claim?"

6 I'll identify you by number. Answer up "yes"  
7 if you voted "yes" or "no" -- "yes" if you voted -- oh,  
8 this gets confusing. Best to give the answer that you  
9 voted for, either "yes" or "no." "No" was in the  
10 majority. So if you voted "no," go ahead and say "no."  
11 If you voted "yes," say "yes."

12 Juror Number 1?

13 JUROR 1: No.

14 THE COURT: 2?

15 JUROR 2: No.

16 THE COURT: 3?

17 JUROR 3: No.

18 THE COURT: 4?

19 JUROR 4: Yes.

20 THE COURT: 5?

21 JUROR 5: No.

22 THE COURT: 6?

23 JUROR 6: No.

24 THE COURT: 7?

25 JUROR 7: No.

1 THE COURT: 8?

2 JUROR 8: Yes.

3 THE COURT: 9?

4 JUROR 9: No.

5 THE COURT: 10?

6 JUROR 10: Yes.

7 THE COURT: 11?

8 JUROR 11: No.

9 THE COURT: 12?

10 JUROR 12: No.

11 THE COURT: Sounds like eleven to one.

12 MR. KATZENBACH: No, nine to three.

13 THE COURT: Nine to three.

14 Same instruction for question II on the theory  
15 of retaliation. If you voted "no," say "no." If you  
16 voted "yes," say "yes."

17 Juror Number 1?

18 JUROR 1: No.

19 THE COURT: 2?

20 JUROR 2: No.

21 THE COURT: 3?

22 JUROR 3: No.

23 THE COURT: 4?

24 JUROR 4: No.

25 THE COURT: Okay. That was a "yes."

1 5?

2 UNIDENTIFIED JUROR: What? She said "no."

3 THE COURT: I'm sorry, my hearing is not very  
4 good. All right. So 1, 2, 3, 4 have answered "no"; is  
5 that correct?

6 UNIDENTIFIED JUROR: That's correct, sir.

7 THE COURT: 5?

8 JUROR 5: No.

9 THE COURT: 6?

10 JUROR 6: No.

11 THE COURT: 7?

12 JUROR 7: No.

13 THE COURT: 8?

14 JUROR 8: No.

15 THE COURT: 9?

16 JUROR 9: No.

17 THE COURT: 10?

18 JUROR 10: No.

19 THE COURT: 11?

20 JUROR 11: No.

21 THE COURT: 12?

22 JUROR 12: No.

23 THE COURT: That sounds unanimous.

24 Question number III, wrongful discharge in  
25 violation of public policy (privacy). Same story. When

1 I call your number, answer "no" if you voted "no," "yes"  
2 if you voted "yes."

3 Juror Number 1?

4 JUROR 1: No.

5 THE COURT: Number 2?

6 JUROR 2: No.

7 THE COURT: Number 3?

8 JUROR 3: No.

9 THE COURT: Number 4?

10 JUROR 4: Yes.

11 THE COURT: Was that a "yes" or "no"?

12 JUROR 4: "Yes."

13 THE COURT: A "yes." A "yes," okay.

14 Number 5?

15 JUROR 5: No.

16 THE COURT: Number 6?

17 JUROR 6: No.

18 THE COURT: Number 7?

19 JUROR 7: No.

20 THE COURT: Number 8?

21 JUROR 8: No.

22 THE COURT: Number 9?

23 JUROR 9: No.

24 THE COURT: Number 10?

25 JUROR 10: Yes.

1 THE COURT: Was that a "no"?

2 JUROR 10: That was a "yes."

3 THE COURT: Okay. Number 10 was a "no."  
4 11?

5 UNIDENTIFIED JUROR: 10 was a "yes."

6 THE COURT: 10 was a "yes." All right.  
7 11?

8 JUROR 11: No.

9 THE COURT: 12?

10 JUROR 12: No.

11 THE COURT: Okay. So that's ten to two.

12 Question number IV, Unruh Act, liability to the  
13 university, et cetera. If you voted "no" say, "no"; if  
14 you voted "yes," say "yes."

15 Juror Number 1?

16 JUROR 1: No.

17 THE COURT: Number 2?

18 JUROR 2: No.

19 THE COURT: Number 3?

20 JUROR 3: No.

21 THE COURT: Number 4?

22 JUROR 4: No.

23 THE COURT: That was a "no"?

24 JUROR 4: "No."

25 THE COURT: Number 5?

1 JUROR 5: No.

2 THE COURT: Number 6?

3 JUROR 6: No.

4 THE COURT: Number 7?

5 JUROR 7: No.

6 THE COURT: Number 8?

7 JUROR 8: No.

8 THE COURT: Number 9?

9 JUROR 9: No.

10 THE COURT: 10?

11 JUROR 10: No.

12 THE COURT: 11?

13 JUROR 11: No.

14 THE COURT: 12?

15 JUROR 12: No.

16 THE COURT: Okay. That sounds unanimous.

17 Question V, the answer is not much subject to  
18 debate.

19 You want a poll on question number V, Mr.  
20 Katzenbach?

21 MR. KATZENBACH: No.

22 THE COURT: Okay. 6, 7 ... looks like we have  
23 a good verdict.

24 Madam Clerk, record the verdict.

25 What I usually do, ladies and gentlemen, is at

1 the conclusion of the trial, I invite the jurors to stay  
2 and discuss with me and the lawyers anything they want  
3 to having to do with the case.

4           However, in this case, as you know, there is a  
5 cross-complaint for injunctive relief. That is a judge  
6 question, not a jury question. So I'm going to have to  
7 entertain argument and decide whether the university is  
8 entitled to have an injunction keeping Dr. Kao off the  
9 campus. If I take part in that debriefing, one can say  
10 that I was doing exactly what I told you not to do,  
11 which is gathering information other than through  
12 admitted exhibits and sworn testimony in court to help  
13 me decide that issue. So I will excuse --

14           Counsel can confer, if you want. And if you  
15 decide it's okay for me to sit in on the debriefing,  
16 that's fine. But --

17           MR. VARTAIN: I don't have any objection, Your  
18 Honor. The university doesn't.

19           THE COURT: Well, I said you could confer.  
20 Leaves Mr. Katzenbach kind of hanging out there by --

21           MR. KATZENBACH: Your Honor, how do you want to  
22 go about -- I don't have any objection.

23           THE COURT: Great. Then I can listen in.

24           MR. KATZENBACH: You can stay, yes.

25           THE COURT: Thank you.

1           So you are released from the admonition not to  
2 discuss the case with anyone. You are assured that you  
3 may discuss the case with anyone that you please, or you  
4 can decline to discuss the case with anyone you please.  
5 You're invited to sit right where you are, talk to me  
6 and the attorneys just so we can get some idea what came  
7 behind your decision. You can ask us questions. I'm  
8 sure that you might have some. And we can answer them,  
9 if possible.

10           So you are discharged with thanks, invited to  
11 stay right where you are to talk to us.

12           MR. KATZENBACH: And, Your Honor, I have just  
13 one question. When do we want to discuss the  
14 cross-complaint issues?

15           THE COURT: I think when we're through  
16 debriefing the jury.

17           MR. VARTAIN: Okay, your Honor.

18           (Proceedings concluded at 12:05 p.m.)

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## REPORTER CERTIFICATE

I hereby certify that the foregoing proceedings were taken at the time and place herein named; that this transcript is a true record of the proceedings, as reported to the best of my ability by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed under my direction into typewriting by computer.

I further certify that I am not interested in the outcome of said action, nor connected with, nor related to any of the parties in said action, nor to their respective counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 23rd day of September, 2012.

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HOLLY MOOSE, CSR NO. 6438

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

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JOHN S. KAO,

Plaintiff,

vs.

No. CGC-09-489576

**CERTIFIED  
TRANSCRIPT**

Department 318

UNIVERSITY OF SAN FRANCISCO, et al.,

Defendants.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS  
BEFORE THE  
HONORABLE WALLACE P. DOUGLASS

Thursday, May 17, 2012

Reported by:

LESLIE CASTRO, CSR #8876

JOB NO. 1-84943

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APPEARANCES OF COUNSEL

For JOHN S. KAO

KATZENBACK AND KHTIKIAN

By: CHRISTOPHER KATZENBACK AND CONOR D. MACK

1714 Stockton Street, Suite 300

San Francisco, California 94133-2930

For UNIVERSITY OF SAN FRANCISCO

VARTAIN LAW GROUP

By: MICHAEL J. VARTAIN AND LINDA ADLER

601 Montgomery Street, Suite 540

San Francisco, California 94111-2608

1 May 17, 2012

8:48 a.m.

2 PROCEEDINGS

3 JUDGE DOUGLASS: This is case number  
4 CGC-09-5489576. John S. Kao versus the University of  
5 San Francisco.

6 Counsel, state your appearances, please.

7 MR. KATZENBACH: Christopher W. Katzenbach  
8 appearing for the plaintiff along with Conor Mack.

9 MR. VARTAIN: We're for the University,  
10 Michael Vartain.

11 MS. ADLER: Linda Adler for the University.

12 JUDGE DOUGLASS: And I have an amended judgment  
13 meant in the sense that costs have been added.

14 Does Dr. Kao have any problem with the amended  
15 judgment?

16 MR. KATZENBACH: Yes, Your Honor.

17 First of all, I don't think the costs -- the costs  
18 should be paid to the University within ten days. I  
19 don't believe that's authorized by any law.

20 JUDGE DOUGLASS: I agree. Strike that.

21 MR. KATZENBACH: I believe the judgment, in  
22 general, on the taking the paragraph which begins "On  
23 the remaining causes of action..." I believe it's more  
24 descriptive than a judgment should be.

25 JUDGE DOUGLASS: So just leave the first sentence

1 of that paragraph, lines 14 and 15 in place and strike  
2 the balance of the paragraph?

3 MR. KATZENBACH: And then, actually, it should  
4 be -- the judgment should be described judgment is upon  
5 the special verdict of the jury in favor, I guess, of  
6 the University and against plaintiff.

7 JUDGE DOUGLASS: What you're suggesting is crossing  
8 out more language or inserting language?

9 MR. KATZENBACH: Inserting language.

10 The first sentence is it ends judgment is upon  
11 special verdict of the jury. And it should be the  
12 judgment should be described, and we're crossing out the  
13 remainder of the paragraph. Then there should be  
14 something in there describing what the judgment is.

15 Judgment is upon the special verdict of the jury  
16 for defendant University of San Francisco and against  
17 plaintiff.

18 JUDGE DOUGLASS: Any comment on behalf of the  
19 University?

20 MR. VARTAIN: I'm not sure I understand exactly  
21 what it would look like based on that. The judgment --  
22 the amended judgment is in form identical to the  
23 original judgment except for the inclusion of the costs  
24 are now payable within ten days.

25 So I'm not saying that that doesn't mean that the

1 court should not look at the form of the amended  
2 judgment, but it is identical to the amended judgment as  
3 to that paragraph.

4 And that does come out of the, frankly, the form  
5 books on judgments. So I don't see any reason to change  
6 it with the exception of the ten days, which is not  
7 required, but is permitted to be, a 10-day period is  
8 permitted.

9 JUDGE DOUGLASS: Counsel, why don't you do the  
10 version you like, and I can choose between the two  
11 versions.

12 MR. KATZENBACH: Yes, Your Honor. I'll have that  
13 to you -- I have to just say, I will be going -- I will  
14 be away Monday and Tuesday of next week, so I could  
15 probably be able to get it to you by Friday. Otherwise,  
16 it would be by Wednesday or Thursday, actually.

17 JUDGE DOUGLASS: Okay. Can we move on to the  
18 motion?

19 MR. KATZENBACH: Yes, Your Honor.

20 JUDGE DOUGLASS: Counsel, I thank you for running  
21 this by me rather than going directly to the court of  
22 appeal. I like to try to fix things on this level if  
23 they're able.

24 MR. KATZENBACH: I think, Your Honor, that's  
25 appropriate. And it's also -- candidly, there isn't a

1 very good way under California procedure for raising,  
2 sort of, legal issues that don't dismiss an entire cause  
3 of action pretrial. So I think this ends up being an  
4 appropriate procedure given California law.

5 JUDGE DOUGLASS: Anything you'd like to say in  
6 support of your motion?

7 MR. KATZENBACH: Yes, Your Honor.

8 I'd like to focus a little bit on what I think is  
9 the fundamental point that we're trying to make, which  
10 is that the notion of business necessity for a mental  
11 examination or physical examination has to be read in  
12 context of the Fair Employment Housing Act as a whole.

13 And in particular, the requirements that, one, of  
14 equal treatment. And two, the requirement for the  
15 interactive process, that the testimony at trial taken  
16 most favorably to the University indicates that certain  
17 individuals, by no means all, but certain individuals  
18 believe that they were frightened -- stated that they  
19 were frightened by Dr. Kao's conduct.

20 That is -- the University interpreted that conduct  
21 as being some form of mental problem and sent him to --  
22 and justifies the mental examination on that basis.

23 The difficulty with that is that if there was a  
24 conduct issue, and he was entitled to have -- in order  
25 to be non-discriminatory, you have to apply the normal

1 rules of conduct under their disciplinary and/or  
2 violence prevention policies. It's undisputed they did  
3 not.

4 If there's an issue of job performance, and  
5 assuming that getting along with colleagues is an  
6 element of job performance, then if that was perceived  
7 as being part of a disability, under California law,  
8 even if it was a perceived disability as opposed to  
9 actual disability, there is a requirement to engage in  
10 the interactive process.

11 The University's argument that the business  
12 necessity provisions for medical examinations under the  
13 Fair Employment Housing Act can sidestep those  
14 requirements I think fails to read those business  
15 necessity requirements in the context of the act as a  
16 whole.

17 In other words, what they have sought to do is  
18 basically use the mental examination as a way of getting  
19 around either the disciplinary -- the normal  
20 disciplinary process for conduct or get around the  
21 obligation to engage in an interactive process if they  
22 thought that his job performance was being affected by  
23 some form of mental disability or disease.

24 And that's the problem with their argument is even  
25 accepting all the facts as they state, that they had to



1 engage in either the disciplinary process in order to  
2 treat him non-discriminatorily or engage in the  
3 interactive process if they thought that this was a  
4 condition which had limitations -- limiting disability  
5 to perform his job.

6 And it seems to me that their failure to do both of  
7 those things has to inform whether the meaning of the  
8 term "business necessity." And without complying with  
9 either of those elements of their normal policies and  
10 the law, there cannot be a business necessity meeting  
11 that requirement in connection with the act as a whole.

12 I would point out in the recent proposed  
13 regulations, that we attached in our reply, which were  
14 issued after the trial, and which are still proposed,  
15 the Fair Employment Housing Commission makes particular  
16 reference to the requirement of the interactive process  
17 in connection with the risks to others defense. In  
18 other words, the safety to others defense.

19 And in that defense, which is allowed by the law  
20 where someone poses a danger to others or self, the Fair  
21 Employment Housing Commissions law by regulations  
22 restate what they believe to be the current law, which  
23 is that you cannot have a safety defense until you've  
24 completed the interactive process. In other words,  
25 until you've exhausted the procedure to determine if

1 there's something that can be done to alleviate those  
2 concerns.

3 And finally, I would point out, that under the Fair  
4 Employment and Housing Act, the risks of future injury  
5 is typically not the purpose of the California law  
6 sufficient reason to engage in discrimination against a  
7 person with a disability or perceived disability.

8 That, for example, if somebody has a condition  
9 which some employee says, "Well, I think that John  
10 looked like they were scratching his chest, he was  
11 rubbing his arm, and I think he's going to have a heart  
12 attack. He's overweight, he doesn't get any exercise, I  
13 think he's going to have a heart attack. And I notice  
14 he's been slow getting some things done."

15 That would -- again, that would be a situation  
16 where, again, you couldn't just send somebody to a  
17 doctor to say, "What's his medical condition?" You  
18 would have to first engage in the interactive process  
19 beginning with the statement, "Well, you seem to have  
20 some limitations on your ability to do your job. This  
21 is what they are."

22 Until you do that process, you can't get to the  
23 business necessity of a mental examination, because you  
24 can't do that.

25 Because you, first of all, don't know what the

1 issues are for the examination. Secondly, you don't  
2 know what limitations the doctor has to determine. And  
3 three, you don't know if there's a need for medical  
4 examination or mental examination to determine what  
5 limitations are necessary or would be necessary.

6 In other words, the business necessity only flows  
7 in this context from the -- from going to a mental --  
8 from the interactive process which would narrowly define  
9 what, if anything, needs to be examined by a doctor.

10 Just like in the case of the heart attack, if the  
11 interactive process if you really were to invoke that  
12 you'd say, "Well, what seems to be the problem?"

13 The person would say, "I have no problems." Then  
14 the employer can then identify some actual job  
15 limitations. You don't get to send them to a doctor to  
16 decide if they have some future risk of a heart attack.

17 Just like it may be "Well, I'm having some  
18 problems. I'm having some problems -- you know, my  
19 heart seems to be beating irregularly." You wouldn't  
20 send them to have them look at their knees and their  
21 back, you'd have them look at a heart specialist.

22 The same is true here. If there was a problem with  
23 anger management, for example, it might not be -- the  
24 solution might not be going to a psychiatrist, it might  
25 be going to an anger management program, if that is what

1 the case is.

2 So the whole interactive process is designed to do  
3 what the law requires. And that is to make sure that  
4 any mental examination or any physical examination or  
5 any examination that would lead to inquiry into  
6 disability narrowly framed and narrowly targeted to the  
7 specific job limitations that are at issue. And those  
8 can only be identified through an interactive process.

9 Finally, and I would emphasize this as well on this  
10 point. That the fact that this arises from expressions  
11 of concern by some faculty members doesn't change  
12 anything.

13 The evidence here is those faculty members  
14 apparently had these concerns before any testimony of  
15 any conduct by Dr. Kao that would have given rise to  
16 that. Apparently, they were concerned about him back in  
17 2007 before any of the events to which the testimony at  
18 trial was directed.

19 We think that this is a case where there is -- that  
20 you can't -- the faculty members were concerned is not  
21 going to be an independent justification for demanding a  
22 mental examination to assuage their concerns. Anymore  
23 than it would be, for example, if a customer said, "I  
24 will not, you know, deal with African American sales  
25 people." Or if a patient in a nursing home said, "I

1 will only have white nurse's aides treat me, I will not  
2 have any African American ones providing any services to  
3 me."

4 Customer complaints, co-employee complaints cannot  
5 justify discrimination. And cannot justify getting --  
6 cannot justify a mental or physical examination by  
7 reason upon the theory of business necessity.

8 Finally, just briefly to touch on one other issue  
9 on the Unruh Act issue, there really is no evidence that  
10 Dr. Kao has been band for campus other than the  
11 perception of a mental condition. There is no evidence  
12 that any other -- of any reason other than that for his  
13 ban. And if his ban is because of a perceived mental  
14 disability, that's a violation of the Unruh Act. The  
15 remaining points I think we've covered in our  
16 memorandum.

17 JUDGE DOUGLASS: Thank you, Mr. cause.

18 Anything on behalf of the University?

19 MR. VARTAIN: Yes, Your Honor.

20 JUDGE DOUGLASS: Go ahead, Mr. Vartain.

21 MR. VARTAIN: The statute that the motion is to be  
22 heard underweights against the motion. This is a  
23 disfavored motion. The statute says a new -- quote, "A  
24 new trial shall not be granted... unless..." And it  
25 goes to then what is the evidence, is there evidence to

1 support the verdict.

2 In this case, we have in our opposing papers laid  
3 out and summarized and referred to the, quote,  
4 transcript the enormous weight of evidence in support of  
5 the verdict on the three causes of action that plaintiff  
6 is making the subject of his motion.

7 Directly responding to the argument just now by  
8 Mr. Katzenbach, the argument fails to account for the  
9 actual jury instructions that Your Honor gave, which he  
10 does not have in his motion, the validity of the jury  
11 instructions.

12 No. 1, those jury instructions were agreed jury  
13 instructions. There was no exception lodged to the jury  
14 instructions on those three points. There was no  
15 objection lodged by plaintiff to the previously-agreed  
16 jury instructions on the three claims that are the  
17 subject of the motion.

18 Those jury instructions set out the definitions of  
19 business necessity. It was not -- this was not a jury  
20 instruction that Your Honor issued over the plaintiff's  
21 objection. You issued it in the form he agreed. And  
22 that jury instruction, which I have an extra copy for  
23 Your Honor if you would like to read along --

24 JUDGE DOUGLASS: I'd like that.

25 MR. VARTAIN: Would you like that? May I approach,

1 Your Honor?

2 JUDGE DOUGLASS: Sure.

3 MR. VARTAIN: 2503 and 2504.

4 JUDGE DOUGLASS: Mr. Katzenbach.

5 MR. KATZENBACH: Excuse me?

6 MR. VARTAIN: Your Honor, they are lodged with my  
7 declaration in support of the motions.

8 MR. KATZENBACH: I'll look at it.

9 MR. VARTAIN: If you look at Exhibit D to the  
10 motions, Mr. Katzenbach --

11 MR. KATZENBACH: Yes.

12 MR. VARTAIN: -- you will see that jury  
13 instruction.

14 So, again, Your Honor, what I just handed you is a  
15 true and correct copy of the jury instruction on the  
16 medical evaluation claim.

17 And as you can see, the parties agreed to define  
18 the term "business necessity" or what was necessary as  
19 two things: One, the purpose of the fitness for duty  
20 was to operate the business safely and efficiently.

21 And two, that the fitness for duty was  
22 substantially accomplished this business purpose.

23 Now, Mr. Katzenbach perhaps would now like to  
24 change the jury instruction to include other things such  
25 as that there had to be an interactive accommodation

1 process, which is his principal new point. But he did  
2 not ask for such a jury instruction, that the term  
3 "business necessity" would include his major point now  
4 that it could only be -- we could only meet the business  
5 necessity if we could show that we, the University, had  
6 completed what's called in the law of FEHA an  
7 interactive accommodation process.

8 So my major point is we have a revisionist attempt  
9 to rewrite the jury instruction to include a third point  
10 there that the University can establish that it had gone  
11 through an accommodation process.

12 However, Your Honor, apart from the fact that  
13 Mr. Katzenbach would like you to rewrite the jury  
14 instructions that he agreed to and did not file  
15 exception to, he also fails -- he also fails to note  
16 that he -- that the statute FEHA actually does provide,  
17 Your Honor, for a cause of action for a failure of an  
18 employer to do an interactive accommodation process.

19 May I show you that part of the statute because  
20 it's very important because he didn't plead a claim that  
21 is permitted under the statute, that is that the  
22 employer failed to provide an interactive accommodation  
23 process.

24 Not only didn't he put it in the jury instructions  
25 or ask for it, he didn't even plead that violation.



1           May I approach you with a copy of the section of  
2 the FEHA that I'm speaking of, Your Honor?

3           JUDGE DOUGLASS: Sure.

4           MR. VARTAIN: I've got it highlighted for you.

5           MR. KATZENBACH: I'm familiar with it, Michael. I  
6 think I cited it in my memorandum.

7           MR. VARTAIN: No, you didn't, actually. I'll give  
8 a copy --

9           MR. KATZENBACH: I think if you read the  
10 memorandum, you'd see I did.

11           MR. VARTAIN: The statute at issue is Government  
12 Code 12940N, like Ned, which defines what an unlawful  
13 employment practice is. And A through N -- or A through  
14 O are the list of unlawful practices of which N is,  
15 quote, "For an employer or other entity covered by this  
16 part to fail to engage in a timely good faith  
17 interactive process with the employee or applicant to  
18 determine effective reasonable accommodations, if any,  
19 in response to a request for reasonable accommodation by  
20 an employee or an applicant with a known physical or  
21 mental disability or known medical condition."

22           There was no allegation in the complaint, there was  
23 no requested jury instruction on the issue that the  
24 employer, the University, failed to engage in a timely  
25 good-faith interaction active process. Nor did

1 plaintiff ask for this concept to be embedded in the  
2 jury instruction on the medical and psychological  
3 examination.

4 He actually drafted this instruction, and, Your  
5 Honor, issued it with our agreement to have only those  
6 two definitions. That's my first major response to  
7 Mr. Katzenbach's attempt to rewrite the jury  
8 instructions as a motion for a new trial.

9 My second response is that, Your Honor,  
10 Mr. Katzenbach could have only established liability  
11 under the first claim if he, the University having met  
12 it's burden under the business necessity definition, if  
13 he had gone and rebutted that by showing that there was  
14 an alternative that was equally effective to achieve the  
15 University's business purpose, but would have had less  
16 adverse impact on Professor Kao. He writes that motion  
17 as that's the University's burden but it's actually his  
18 burden.

19 So here he is now, Your Honor, coming to you saying  
20 that in effect there was an alternative to using the  
21 discipline -- progressive discipline process to perhaps  
22 fire Professor Kao for the behavior rather than have him  
23 evaluated by the doctor. Apparently, he's arguing that  
24 that would have been equally alternative. But that was  
25 his burden to prove that.

1           And the jury was free on the evidence to say, "No  
2 plaintiff hasn't shown -- hasn't met its burden on the  
3 last part of the jury instruction." That wasn't the  
4 University's burden, that was his burden.

5           The motion of plaintiff is totally devoid of that  
6 which the law requires, which is an analysis of the  
7 record as a whole not picking out a particular witness  
8 like Philpott. And the motion has no analysis of a  
9 record as a whole. We gave you that in our opposition.  
10 We went through the exhibits; we went through the  
11 testimony of each witness and cited in Ms. Adler's  
12 declaration to the rough transcript of the enormous  
13 evidence that supports that part of the jury  
14 instruction, that is related to the business necessity  
15 defense, those two points.

16           All of those witnesses, including Philpott  
17 testified that they were motivated by the fact that the  
18 University could not assess to what extent Mr. --  
19 professor Kao was or was not a safety risk without a  
20 medical and psychological evaluation. And they based  
21 that on all the experiences with him of his aberrant  
22 behavior. The evidence was enormous in terms that it  
23 was to the interests of the University to operate its  
24 business.

25           Mr. Philpott and Ms. Peugh-Wade both testified that

1 they felt that they owed it to all the employees in the  
2 workforce to do what they could using this provision of  
3 the statute for medical examination, that they felt was  
4 necessary to use that provision in the context of  
5 wondering whether Professor Kao's behavior indicated a  
6 risk of safety that was or was not substantial.

7       There was much, much evidence by which the jury  
8 could have reasonably reached a verdict that it did on  
9 that claim. And they reached it within about two hours  
10 of deliberation time.

11       But the motion did not do anything to help, Your  
12 Honor, review all of the evidence, the opposition.

13       With regard to the request for judicial notice of a  
14 proposed regulation, the University objects to the  
15 granting of that request for judicial notice for a  
16 number of reasons.

17       No. 1, there actually is no provision for a reply  
18 in a motion for new trial. The rules of court provides  
19 in the motion and the opposition. There is no reply  
20 provided for.

21       Secondly -- until the request was filed as part of  
22 the reply.

23       Secondly, the University wasn't given any  
24 opportunity to respond. But those proposed regulations  
25 were issued over a month before this motion was filed.

1 It could have been -- it could have been lodged with a  
2 motion rather than with a reply.

3 And finally, they have no force of law. They're  
4 not even regulations, they're proposed regulations. And  
5 even FEHC regulations don't have a force of law. And  
6 finally, they don't say what Mr. Katzenbach says they  
7 said.

8 May I digress -- not digress but explain.  
9 Mr. Katzenbach focused on the part of those regulations  
10 that refer to an affirmative defense by an employer to a  
11 charge of unlawful employment practice that the  
12 University did not assert in this case. And that is an  
13 affirmative defense that the action, otherwise illegal,  
14 was nevertheless necessary to assure the safety of the  
15 plaintiff or of others.

16 We didn't actually undertake the burden to prove an  
17 affirmative defense that Dr. Kao was actually unsafe.  
18 That would have been the burden had we raised the  
19 affirmative defense that he's talking about and  
20 discussing in the proposed -- in the FEHA regulations.

21 No, we relied on the defense of could we show that  
22 that there was a business necessity. Safely and  
23 efficiently are the definitions that we agreed to to  
24 operate its business safely and efficiently.

25 We didn't undertake the burden to prove that

1 actually Dr. Kao was an unsafe individual, that would  
2 have been a separate defense.

3 If it would be helpful, I'd be happy to review all  
4 of the evidence that we cited and we discussed in our  
5 papers and are itemized point by point in our  
6 declaration that goes to the issue that we proved our  
7 burden under that jury instruction. And that plaintiff  
8 didn't prove his burden under the jury instruction,  
9 which is the equal alternative --

10 JUDGE DOUGLASS: Reviewing the evidence is not  
11 necessary.

12 MR. VARTAIN: Thank you, Your Honor.

13 Then let me finish my rebuttal to Mr. Katzenbach by  
14 discussing the Unruh claim.

15 Because Mr. Katzenbach, once again, erroneously  
16 described the record as containing no other evidence  
17 to -- by the University, offered by the University to  
18 defend itself on the Unruh Act claim, other than it had  
19 a perception that Mr. -- Professor Kao was disabled.  
20 Not true, entirely not true.

21 And moreover, it was plaintiff's burden to prove  
22 the elements of the claim. It wasn't the University's  
23 burden on this one, it was entirely plaintiff's burden.  
24 But let's talk a little bit about what the evidence was  
25 that Mr. Katzenbach fails to note on the Unruh Act

1 claim.

2 He talks specifically about Mr. Philpott. But  
3 Mr. Philpott testified at length, not just the one  
4 snippet that Mr. Katzenbach mentioned. Mr. Katzenbach  
5 failed to point out, and I'm going to quote the  
6 testimony, but it is -- it is actually at page 14,  
7 lines 18 to page 15, line 10 of Ms. Adler's declaration  
8 filed in support of the opposition.

9 Ms. Adler quotes the rough transcript of the  
10 testimony of Mr. Philpott, rather, that testimony  
11 discussing that the University perceived that  
12 Professor Kao had a mental disability, and that that was  
13 why they were excluding him, Mr. Philpott testified as  
14 to the ban from campus as follows, and Mr. Katzenbach  
15 asked him the question.

16 "Throughout this issue was the safety issue that  
17 concerned you" -- excuse me, Your Honor, I misquoted the  
18 cited portion.

19 Question, "Throughout this issue, what was the  
20 safety issue that concerned you regarding Dr. Young?" --  
21 he meant Kao.

22 Answer, "I think that there was overall concern for  
23 Professor Kao's personal safety, and for those of his  
24 colleagues, and for the University community."

25 Mr. Katzenbach tried to get Mr. Philpott to say his

1 perception of mental disorder. And so I'll continue  
2 with the question and answer by Mr. Katzenbach.

3 "To put it in direct terms, was the concern that  
4 they thought Dr. Kao was mentally unstable?" Question.

5 Answer, "I'm not a trained physician, and my HR  
6 colleagues are not, to my knowledge, trained in that.  
7 There were concerns, and that is why we moved forward  
8 with the fitness for duty exam, that was what our intent  
9 was."

10 Question, "Well, I'm just trying to get -- is that  
11 why -- after Dr. Kao's termination of employment he was  
12 banned -- the ban from campus continued?"

13 Answer, "That is correct."

14 Question, "Was that continued because of the same  
15 safety concerns?"

16 Answer, "Yes."

17 And Mr. Katzenbach again to get this perception  
18 thing into evidence.

19 Question, "Was that based on a perception that he  
20 was unstable?"

21 Answer, "I believe it was based on reassurances to  
22 our faculty and the students and other administrators  
23 that we were going to provide them a safe environment so  
24 that they could do their jobs."

25 Mr. Kao [verbatim] tried again. Question, "Was



1 that a safe environment because you perceived Dr. Kao as  
2 being unstable mentally?"

3 Answer, "I can't" -- as in cannot -- "draw a  
4 conclusion if he was mentally unstable. We weren't  
5 quite sure what was going on, and that's why we wanted  
6 an evaluation."

7 Question, "In other words, mental stability was a  
8 factor in continuing the ban from campus?"

9 Answer, "It could be in the bucket of concerns that  
10 we had. It was one of the concerns, but I don't want to  
11 say it was mental illness, I'm not trained in that  
12 arena."

13 That was the whole of Mr. Philpott's testimony  
14 that they had safety concerns. It wasn't that they  
15 perceived him to have a mental disability. Sure,  
16 instability can lead to safety concerns.

17 But actually, all of the witnesses, Your  
18 Honor, all of the professors, Ms. Peugh-Wade,  
19 Dr. Missit, the experts, they all testified that when a  
20 person engages in this behavior, it's not his health  
21 condition, it's his behavior because he engaged in this  
22 behavior, they had concerns for his safety, they wanted  
23 to have those concerns evaluated by the statutorily  
24 allowed medical and psychological examination.

25 So that deals with the Unruh Act claim that it

1 was the burden of plaintiff to prove, it wasn't the  
2 burden of the University to disprove. And yet the  
3 University produced substantial evidence that the  
4 business reasons, it needed to provide what it could  
5 because of evaluating a risk of possible safety  
6 problems, was the actual motivation for its decision.  
7 It's motivation -- there was no evidence that its  
8 motivation was because he had depression.

9           So I think I've rebutted each of  
10 Mr. Katzenbach's points on oral argument, insofar as he  
11 didn't go into his other points in his brief and rested  
12 on those other papers. I will likely rebut those other  
13 brief points by him by reference to our briefing as well  
14 and not orally argue that here.

15           I would close by saying on a motion for new  
16 trial based on insufficiency of evidence. It's the  
17 burden of the plaintiff to show by analysis of the  
18 entire record, not one witness, that the jury verdict  
19 could not be deemed reasonable based on the evidence.  
20 Thank you, Your Honor.

21           JUDGE DOUGLASS: Thank you, Mr. Vartain.

22           Last word, Mr. Katzenbach?

23           MR. KATZENBACH: Yes, Your Honor.

24           The thrust of this motion is that the burden is  
25 against the witness and law, and it is based on the

1 legal contentions that evidence deduced accepting  
2 entirely in their favor will not support the verdict.

3 And the reason for that, as I've explained, is that  
4 their -- and what I think they have done, they have  
5 repeated here is that their defense of business  
6 necessity can't be sustained on the facts that they're  
7 used at trial.

8 And that is because there is -- and that is because  
9 they are -- their argument here raises sort of an  
10 impossible problem situation. What they're saying is  
11 we're not raising an actual defense of safety.

12 What they're saying is this mental examination was  
13 justified not because they had a safety defense, which  
14 the law allows them, but because they didn't know if  
15 they had a safety defense.

16 So what they're saying is that the defense of  
17 sending someone to a mental examination can be done  
18 where you could not prove, and they acknowledged they  
19 could not prove and they did not prove an actual safety  
20 risk.

21 Now, if they are making that argument, then the  
22 question is you have to read that argument in the  
23 context of the act as a whole. If they don't have a  
24 risk safety defense, which they neither pled nor proved,  
25 then how do they have a defense of business necessity?

1 All they have is a defense of business speculation.

2 They want to say we want to look into someone's  
3 mental health to see if there's an issue here. And we  
4 want to do that -- and we don't want to do that through  
5 the process of what the law actually provides, which is  
6 the interactive process. And while it is true that the  
7 laws also provides for a separate cause of action for  
8 failure to engage in the interactive process, that  
9 requires -- that particular provision also requires a  
10 request for accommodation.

11 And the problem here is they never got -- this  
12 whole issue of mental illness was kept secret and used  
13 as a coverup, or a secret justification for their  
14 request for a mental examination.

15 In other words, they never wanted -- they never  
16 told Dr. Kao what the problems were enough so he could  
17 even make a request for accommodation.

18 What they're trying to do is not to engage in the  
19 interactive process, they're trying to sidestep that  
20 process entirely.

21 Finally, under the Unruh Act, I would simply point  
22 out that the fact that Mr. Philpott initially said  
23 safety. But when examined says, "Well that was because  
24 that mental instability was part -- was a factor I think  
25 shows that the safety issue and mental instability issue

1 are intertwined inextricably. And for that reason, the  
2 Unruh Act was violated.

3 In other words, Your Honor, to repeat: Their  
4 defense -- I would point on the jury Instructions, we  
5 did, of course, argue to the jury under the rebuttal to  
6 the University's claim of business necessity, the  
7 failure to engage in any discussions with Dr. Kao of any  
8 kind. And failure to use either violence prevention or  
9 their disciplinary process, which would have worked just  
10 as well if they were truly concerned about behavior.

11 So with that, Your Honor, we would submit.

12 JUDGE DOUGLASS: Submitted?

13 MR. VARTAIN: Yes, Your Honor.

14 JUDGE DOUGLASS: Motion is denied.

15 Referring to the proposed order denying the motion,  
16 it is more elaborate than is needed. Let me suggest  
17 what I would like to have you prepare for me to sign.

18 First paragraph is fine. You can fill in the date,  
19 fill in, Mr. Mack.

20 And then the balance of the order should be as  
21 follows: The Court has read, and considered papers  
22 presented in support of and in opposition to the motion.  
23 The Court has heard and considered the remarks of  
24 counsel at the hearing of the motion.

25 The Court finds good cause for making the following

1 order: The motion is denied. Date and signature.

2 MR. VARTAIN: We will submit that, Your Honor.

3 Thank you, Your Honor.

4 MR. KATZENBACH: Thank you, Your Honor.

5 JUDGE DOUGLASS: You're welcome.

6 (Whereupon, the proceedings concluded at 9:32 a.m.)

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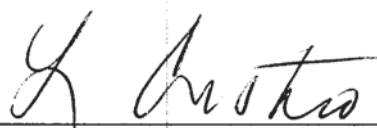
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R E P O R T E R ' S C E R T I F I C A T E

I hereby certify that the foregoing proceedings took place before me at said time and place, were taken down in shorthand by me, a Certified Shorthand Reporter of the State of California, and thereafter transcribed into typewriting;

And I further certify that I am not of counsel or attorney for either or any of the parties to said deposition, nor in any way interested in the outcome of the cause named in said caption;

That the foregoing transcript is a true record of said proceedings which took place. I witness whereof, I have hereunto set my hand this 13th day of August 2012.

  
\_\_\_\_\_  
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