

STATE OF CALIFORNIA Department of Industrial Relations Labor Commissioner's Office 100 Paseo de San Antonio, Room 120 San Jose, CA 95113 EMAIL: laborcomm.wca.sjo@dir.ca.gov FAX: (209) 812-1988		For Court Use Only:
Plaintiff: Mark Jacobson, an Individual		Court Number:
Defendant: The Leland Stanford Junior University, a California Nonprofit Organization		
Case No.: WC-CM-829392	ORDER, DECISION OR AWARD OF THE LABOR COMMISSIONER	

1. The above-entitled matter came on for hearing before the Labor Commissioner of the State of California as follows:
DATE: 4/8/2022 1:00 PM **CITY: 100 Paseo de San Antonio, Room 120, San Jose, CA 95113**

2. IT IS ORDERED THAT: Plaintiff recover from Defendant:

	Balance Due to Employee(s)	Interest Balance Due	Line Total
BUSINESS EXPENSES	\$62,101.99	\$7,452.24	\$69,554.23
Totals	\$62,101.99	\$7,452.24	\$69,554.23

3. The herein Order, Decision or Award is based upon the Findings of Fact, Legal Analysis and Conclusions attached hereto and incorporated herein by reference.
4. The parties herein are notified and advised that this Order, Decision or Award of the Labor Commissioner shall become final and enforceable as a judgment in a court of law unless either or both parties exercise their right to appeal to the appropriate court* within ten (10) days of service of this document. Service of this document can be accomplished either by first class mail or by personal delivery and is effective upon mailing or at the time of personal delivery. If service on the parties is made by mail, the ten (10) day appeal period shall be extended by five (5) days. For parties served outside of California, the period of extension is longer (See Code of Civil Procedure Section 1013). In case of appeal, the necessary filing fee must be paid by the appellant and appellant must, immediately upon filing an appeal with the appropriate court, serve a copy of the appeal request upon the Labor Commissioner. If an appeal is filed by a corporation, a non-lawyer agent of the corporation may file the Notice of Appeal with the appropriate court, but the corporation must be represented in any subsequent trial by an attorney, licensed to practice in the State of California. Labor Code Section 98.2(c) provides that if the party seeking review by filing an appeal to the court is unsuccessful in such appeal, the court shall determine the costs and reasonable attorney's fees incurred by the other party to the appeal and assess such amount as a cost upon the party filing the appeal. An employee is successful if the court awards an amount greater than zero. **PLEASE TAKE NOTICE:** Labor Code Section 98.2(b) requires that as a condition to filing an appeal of an Order, Decision or Award of the Labor Commissioner, the employer shall first post a bond or undertaking with the court in the amount of the ODA; and the employer shall provide written notice to the other parties and the Labor Commissioner of the posting of the undertaking. Labor Code Section 98.2(b) also requires the undertaking contain other specific conditions for distribution under the bond. While this claim is before the Labor Commissioner, you are required to notify the Labor Commissioner *in writing* of any changes in your business or personal address within 10 days after change occurs.

Notice Date: June 26, 2022

*California Superior Court, County of Santa Clara, Downtown
 Superior Court
 191 North First Street
 San Jose, CA 95113

By



Karyn Fox, Hearing Officer

BEFORE THE LABOR COMMISSIONER
OF THE STATE OF CALIFORNIA

MARK JACOBSON,

Plaintiff,

v.

THE LELAND STANFORD JUNIOR
UNIVERSITY, a California Non-Profit
Organization,

Defendant,

CASE NO. WC-CM-829392

ORDER, DECISION, OR AWARD
OF THE LABOR COMMISSIONER

BACKGROUND

Plaintiff filed an initial claim with the Labor Commissioner's office on April 14, 202, of which was Amended on January 25, 2022. The Amended Complaint raises the following allegations:

1. Reimbursement for business expenses incurred from April 14, 2018 through December 28, 2020, for necessary legal expenses that were incurred to protect the reputations of Plaintiff and two former Stanford PhD students from actions by three Stanford University employees and the University itself; \$9,748.99 incurred to initiate legal action and \$127,353.00 to defend against legal action, including reasonable attorney's fees, claiming \$137,101.99;

A Telephonic Hearing was conducted in San Jose, California, on April 8, 2022, before the Undersigned-Hearing Officer designated by the Labor Commissioner to hear this matter. Plaintiff appeared in pro per. Mary Cameron and Anthony Ingraffea were present as witnesses for Plaintiff. Defendant was represented by Marcia Pope, Esq.

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1 Due consideration having been given to the testimony, documentary evidence, and
2 arguments presented, the Labor Commissioner hereby adopts the following Order,
3 Decision, or Award.

4 FINDINGS OF FACT

5 Defendant currently employs Plaintiff under the terms of a written employment
6 agreement as a Professor of Civil and Environmental Engineering, in the County of Santa
7 Clara, California, from September 1, 1994 to current.

8 As a Professor of Civil and Environmental Engineering, for Stanford University,
9 Plaintiff writes scientific articles, of which are published in the *Proceedings of the National*
10 *Academy of Sciences*, and the likes thereof. These articles procure grants and funding to
11 Stanford. Stanford then provides more funding to Plaintiff so that he can continue his
12 research, write scientific articles on behalf of Stanford, of which are published.
13 Additionally, Plaintiff's annual assessment criteria includes number of articles written,
14 grants and funding produced for Stanford. If Plaintiff's credibility is defamed, the grants
15 and funding to Stanford decreases, thereby decreasing the funding Stanford allocates to
16 Plaintiff to perform his job, researching and writing scientific articles (as defined by
17 Stanford), which had a negative impact on Plaintiff's annual assessments. Plaintiff asserted
18 his reputation is paramount for retaining credibility as an environmental researcher, and
19 as he represents Stanford University. Plaintiff's witnesses testified as to the relevancy of
20 reputation as an environmental researcher, confirming that it is an essential part of
21 expectation.

22 Plaintiff brings a claim against Defendant for legal fees for which he incurred
23 defending his reputation of which Plaintiff asserts is vital criteria for his position at
24 Stanford University. Plaintiff asserted, an employee may be indemnified for filing a
25 defamation lawsuit if reputation is essential to their job and if their reputation was
26 damaged. Plaintiff provided a written statement, Exhibit 2, from Lynn Hildemann, PhD.,
27 Chair, Civil & Environmental Engineering Department and Professor in Environmental
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1 Engineering, of Stanford University, that reputation is essential to the career of an
2 environmental researcher. Plaintiff asserted that no one at Stanford including the
3 President, Deans, Provost, or the Legal Office, has disputed the fundamental duty of
4 protecting ones' reputation as an environmental researcher.

5 Plaintiff's claimed amount consists of \$9,748.99, for attorney's fees up to February 22,
6 2018, when Plaintiff dismissed his Washington D.C. lawsuit against *Proceedings of the*
7 *National Academy of Sciences*, hereinafter "PNAS" and Clack, defending reputations of his
8 self and two Stanford PhD student-employees, over an article that Plaintiff and the two
9 PhD student-employees wrote. The D.C. court did not make a ruling. The \$62,101.99, is for
10 attorneys' fees incurred by Plaintiff for defending himself against the two counter Anti-
11 SLAPP, lawsuits filed against him by PNAS and Clack, and the remaining amount of
12 \$75,000.00, which was awarded to Clack from the counter suit. Plaintiff has since filed a
13 motion to reverse judgement for the Clack award and which may or may not influence the
14 PNAS counter suit. Plaintiff also paid \$82,375.00 in legal fees prior to the statute of
15 limitations cut-off, as set by DLSE, which are not included in this claim.

16 Plaintiff testified in 2015, he, two PhD students, and another researcher, published a
17 paper in the *Proceedings of the National Academy of Sciences (PNAS)*. In 2017, Clack and 20
18 co-authors (three from Stanford), published a critique of Plaintiff's paper in PNAS. Plaintiff
19 explained critiques are a normal part of science and that other authors critique published
20 articles. However, the Clack critique differed because according to Plaintiff, Plaintiff's
21 witnesses, and a handful of declarations from accomplished professors from an array of
22 Universities, such as Cornell, University of New South Wales, and Robert Gordon
23 University, the critique contained both abnormal criticism and false-facts. Plaintiff stated
24 Clack's unprofessional critique, was published to the scientific world, defaming his and co-
25 authors' characters, as 10 plus defaming headlines followed the publication. The Clack
26 article cause irreparable damage to their reputations, which, in turn caused a negative
27 impact on the student's future employment and to his ability to procure funds for Stanford,

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1 limiting the amount of funding to him, which is needed to write articles. Because of this
2 snowball effect, Plaintiff has been passed over for pay increases due to low article
3 production.

4 Plaintiff stated he filed a complaint with the U.S. Equal Opportunity Commission
5 regarding the reduction of salary raises during 2018 to 2022. Plaintiff stated Defendant's
6 counsel, Pope, submitted in response to a salary complaint Plaintiff filed, that stated "The
7 most significant factor contributing to his (Plaintiff – Jacobson) lower ratings (that led to
8 lower salary raises), for the period prior to academic year 2021-2022 was Professor
9 Jacobson's comparatively low research funding figures." Plaintiff continued to explain the
10 low research funding was a direct consequence of the defamation from the Clack paper
11 plus the fact that one Stanford co-author of the Clack critique (there were three Stanford
12 co-authors) was a decision maker in some grant applications he submitted to Stanford.
13 Although Plaintiff brought this to Stanford's attention in 2019, Stanford's counsel Tom
14 Fenner, Esq., told Plaintiff that Stanford would not remove the three Stanford faculty from
15 any decision-making they may have relating to approving Plaintiff's grant applications.

16 Plaintiff continued to explain that he filed suit against Clack and *PNAS* to protect not
17 only his reputation, but his students' reputations as well.

18 As a formal remedy, Plaintiff requested *PNAS* and the Clack Authors to correct
19 specific false-facts or retract the Clack 2017 paper. Plaintiff submitted his rebuttal,
20 however, both *PNAS* and Clack refused to make relevant changes.

21 Plaintiff went through the proper channels to have Stanford get legally involved,
22 however Stanford refused to get involved, investigate the validity of the Clack critique,
23 require *PNAS* to have Clack reword the critique, or to provide an attorney to reverse
24 reputational damage. Plaintiff testified that all Stanford had to do was to request the false-
25 facts in the Clack article be retracted or re-written in a more constructed academic tone.

26 Plaintiff's witnesses explained the process and remedies for disagreements prior to
27 publishing of which nothing viable was entertained. Plaintiff testified that because this
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1 issue was not taken care of prior to Clacks press release, he and the co-authors' still
2 experience the career damaging residual effect.

3 Plaintiff's witness, Ingraffea, who is the Dwight C. Baum Professor of Engineering,
4 Emeritus, at Cornell University, Co-Editor-In-Chief of a peer-reviewed journal, *Engineering*
5 *Fracture Mechanics*, for over 15 years, and has co-author of over 250 peer-reviewed technical
6 publications, including papers in the *PNAS*. Ingraffea also authored or co-authored papers
7 related to the ongoing national energy transition, including papers co-authored by Dr.
8 Jacobson. Ingraffea testified that it is the structure of the University to defend the
9 reputation of their employees. Ingraffea declared it did "indicate to me a degree of
10 carelessness in the Clack paper that should have been caught and corrected, pre-
11 publication, by one or more of the 21 coauthors of the paper and/or by one or more of its
12 *PNAS* reviewers." Ingraffea included that there are other means of remedy than lawsuits,
13 of which Plaintiff explored however receive no backing from Stanford. That Plaintiff has
14 lost many opportunities to get research funding, lost funding to support his research teams,
15 and losing publications of his articles due to the defamation against Plaintiff from the Clack
16 paper, since the publication in 2017.

17 Cameron testified she was the co-author of the Jacobson article. Cameron was a PhD
18 student at Stanford University and worked under Jacobson. When it was determined that
19 the Clack paper would be published, Cameron met with Professors Gerritsen and Field.
20 They both reassured Cameron that there were people at Stanford with the power to control
21 the narrative who were taking care of it. However, Stanford did not take care of it, and the
22 aftermath ruined her professional career.

23 Plaintiff presented a "... declaration from Robert W. Howarth, Ph.D., a tenured
24 faculty member at Cornell University, Ithaca, NY, since 1985. Since 1993, I have held an
25 endowed position at Cornell as the *David R. Atkinson Professor of Ecology & Environmental*
26 *Biology*. I have extensive experience in academic publishing. I am the author or co-author
27 of over 200 papers, and these have been cited by others in the peer-reviewed literature
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1 more than 65,000 times. I am the Founding Editor of the academic journal *Biogeochemistry*
2 and served as Editor-in-Chief of that journal from 1983 to 2004. I was also the Editor-in-
3 Chief of the academic journal *Limnology & Oceanography* from 2014 to 2019.

4 I served on the Committee on Ethics of the America Society for Limnology &
5 Oceanography from 1992-1998. I served as President-Elect and then President of the
6 Coastal & Estuarine Research Federation from 2005 to 2009, overseeing the publications
7 and ethical issues of that professional society. I have been a member of the Committee on
8 Publication Ethics (COPE) since 2014. COPE "is a nonprofit organization whose mission is
9 to define best practice in the ethics of scholarly publishing and to assist editors, publishers,
10 etc. to achieve this."

11 "... the Clack Paper failed to follow due diligence. In my professional judgement,
12 these facts can be correctly determined from evidence in the Jacobson et al. paper and in
13 the sources cited there. Beyond that, if Dr. Clack and his colleagues were confused, normal
14 scientific practice would have been for them to directly contact Dr. Jacobson for
15 clarification, rather than to publish the critique as they did in the Clack Paper. As an expert
16 on scientific publishing, I conclude that the Clack Paper should not have been published in
17 the *Proceedings of the National Academy of Sciences* as a "Research Article." The Clack Paper
18 is clearly not a research article, either as generally defined by the community of research
19 scientists or as specified by the journal's own guidelines. These guidelines state that the
20 journal only publishes research articles if they are based on "original scientific research of
21 exceptional importance..." There was no original research in the Clack Paper." "As such,
22 if it were to have been published at all, it should have been published as a "Letter" or as a
23 "Commentary." This is true under either general science publishing traditions or the
24 specific rules and guidelines of the *Proceedings of the National Academy of Sciences*.

25 Note that these journal guidelines specify that Letters be used to "point out potential
26 flaws in studies published in the journal." That is not the purpose of a Research Article."

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1 "In my professional opinion, the publication of the Clack Paper falls outside of the
2 bounds of normal scientific debate. *PNAS* did not follow normal publication procedures,
3 defined either in terms of general norms in our field or the specific guidelines of their own
4 journal. I believe this caused harm to the reputation of Dr. Jacobson."

5 "Again in my professional experience, and based on decades of involvement with
6 the ethics of scientific publication, I believe that the Clack Paper was reckless. Due diligence
7 would have demanded that Dr. Clack and his coauthors contact Prof. Jacobson for
8 clarification before they submitted their manuscript to *PNAS*. Due diligence would also
9 have required that Dr. Clack and coauthors correct their factual misinterpretation of the
10 Jacobson et al. paper, and do so quickly once they became aware of their error. If they were
11 aware before the paper was published, Dr. Clack and coauthors should have either
12 withdrawn their manuscript or completely revise it so as not to perpetuate their error. If
13 they only became aware of the error after publication in *PNAS*, they should have asked the
14 journal to publish a correction, and perhaps an apology. Further, Prof. Jacobson informs
15 me that one of the authors of the Clack Paper had earlier mentored a student who was a
16 coauthor of the Jacobson et al. paper criticized by the Clack Paper, and that Dr. Clack and
17 his coauthors did not inform this student of their criticism until after acceptance for
18 publication of the Clack Paper. If true, this is highly unprofessional behavior, in my
19 opinion."

20 Plaintiff presented "Declaration of Professor Peter A. Strachan. I have been an
21 academic member of staff at the Robert Gordon University, Aberdeen, Scotland, since 1993.
22 I am currently Professor of Energy Policy at the Aberdeen Business School. I was appointed
23 Professor of Energy Policy in 2009 and subsequently appointed in 2010, to the role of Group
24 Lead for Strategy and Policy, responsible for a research and teaching group of
25 approximately 20 full-time and part-time academic staff. Following University re-
26 organisation, I returned to my role as Professor of Energy Policy in 2017. My most recent
27 publications are in prestigious peer reviewed journals such as *Energy Policy* (2019) and
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1 Utilities Policy (2020) on the theme of offshore wind power. As an author and co-author, I
2 have an extensive publication record with my work focusing on the transition to 100%
3 renewable energy in Scotland and the other countries that comprise the United Kingdom.
4 I have edited three books and have also served as a journal Associate Editor. Further, I am
5 an active member of several editorial boards. My work by invitation has been presented to
6 the First Minister of Scotland, Holyrood, Edinburgh, Scotland and to Members of
7 Parliament (MPs) of the United Kingdom Parliament, Westminster, London, England. I
8 also receive regular invitations to present at academic and industry events on renewable
9 energy issues. A full list of articles and presentations is available on request. I have also
10 supervised to successful completion 18 doctoral students, with a number of these on
11 renewable energy deployment, particularly in Africa.

12 As an expert with considerable experience of publishing, I am astonished that the
13 Dr. Clack et al. (2017) paper was published by *PNAS* as a research article. The *PNAS*
14 publication guidelines are publicly available, with the Dr. Clack et al. (2017) paper
15 apparently contravening these guidelines, as there is no original research in the Dr. Clack
16 et al. (2017) paper, which in my perception must call into question the commissioning as
17 well as the referee process for their paper. I am dismayed that the journal commissioning
18 editor never identified this important point prior to sending the paper to referees.
19 Furthermore, the referee process must also be called into question, given the apparent
20 errors by Dr. Clack and the co-authors in their version of the published paper”.

21 Strachan further answered questions presented in his declaration by means of
22 mitigation and the responsibility of certain entities, in the following manner...”Is an author
23 who makes a factual mistake in a review of other people's work following due diligence or
24 acting in reckless disregard for the truth or in bad faith when he or she (a) fails to request
25 clarification from the authors before publication if he or she is uncertain about an issue in
26 the paper? My Answer: When criticizing in a significant way an author's paper it is
27 accepted custom and practice to seek clarification on the issue or issues of uncertainty or
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1 issues that are in dispute. Such criticisms may involve factual issues contained within a
2 paper, or issues of a substantial nature related to the philosophical approach or
3 methodology employed by an author. Failure to seek clarification from an author,
4 especially where there is a significant rebuttal of a paper would amount to acting in
5 disregard of the truth. (b) Hides the publication from a student he or she mentored and is
6 now criticizing, until after acceptance of the paper? My Answer: A situation like this is
7 almost inconceivable. The mentor is clearly acting in bad faith and is being dishonest. And
8 worse actively (intentionally or unintentionally) working to discredit their mentee.
9 Professional ethics and accepted practice would dictate that the mentor be fully open and
10 transparent in all interactions with a mentee. Clearly, the mentor if he/she had concerns
11 regarding a student's published or other work should have highlighted this as part of the
12 mentee process. And, clearly explained this to the mentee so that the mentee could avoid
13 making such a mistake in the future. This standard would apply to both current and former
14 mentoring relationships. In my view a mentor hiding publication activity from their
15 mentees (current or former) where criticisms are being made of the mentee is clearly an act
16 of poor judgement, with this potentially even amounting to gross misconduct, but that
17 would be for an investigation committee to ultimately determine. (c) Refuses to correct the
18 factual mistake when informed about it, with evidence, before publication? My Answer:
19 This is clearly unethical behaviour and in contravention of accepted academic norms and
20 values. It is fundamentally dishonest. My perception is that this amounts to gross
21 misconduct, though again that would be for an investigation committee to determine. (d)
22 Refuses to correct the factual mistake when informed about it, with evidence, after
23 publication? My Answer: It would be dishonest for authors not to correct a mistake, when
24 evidence is presented that an error has been made. Once again, it is my perception that this
25 amounts to an act of gross misconduct, though again that would be for an investigation
26 committee to determine. 3. Is it standard practice in the sciences for authors of a paper to
27 issue a correction to the paper after publication if a material factual error is discovered in
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1 their paper? My Answer: Professional ethics and accepted practice dictates that authors
2 should issue a proportionate correction, with an explanation, and within a reasonable
3 timeframe after the discovery of a significant error that has been made in a published
4 output. I would go further and state that when such an error is detected that the author (or,
5 for that matter a whistle blower) should then refer the work to the Head of Faculty and
6 consequently for there to be an investigation undertaken to determine the context,
7 circumstances and to determine if any penalties should arise. Following an investigation
8 process there is precedent in the academic community that when an author has acted
9 recklessly or in bad faith, that author should then request that their paper be withdrawn
10 from the public domain, with an appropriate explanation given of the circumstances. In
11 my view the Clack paper would fall under this category, and it should be retracted. 4. Is it
12 unethical or ethical for authors of a paper to refuse to issue a correction to their paper after
13 publication if a material factual error is discovered in their paper? My Answer: It is my
14 perception that it is unethical for authors to refuse to issue a correction when clear errors
15 are apparent in their paper, as is the case with the Clack paper. In my view, as outlined
16 above professional ethics dictate that the Clack paper should be retracted. This would
17 correct the record for all concerned and further avoid potentially reputational damage to
18 an academic and his employer."

19 Plaintiff contends that this is not about a scientific disagreement; it is about
20 publishing false-facts, demeaning character, and causing reputable harm. Stanford refused
21 to get involved or protect Plaintiff and his co-authors, against the outcome of the published
22 Clack paper, of which they had the means.

23 The negative effects are significant to date as Plaintiff and one co-author, of the Clack
24 paper, was poised to receive a research award in Italy, through ENI, for 200,000 euros,
25 which would have helped research at Stanford. Just before the vote, two professors from
26 MIT, stated that they should not win the award due to the Clack paper and subsequently,
27 Plaintiff and the co-author lost the award.

1 Plaintiff asserted that permission is not needed for "necessary expenditures or losses
2 incurred by the employee in direct consequence of the discharge of his or her duties" as
3 provided by Labor Code Section 2802. Employer Must Indemnify Researcher-Employee's
4 Lawsuit to Defend Reputation Stanford has admitted that it is "true with 100% certainty"
5 that "reputation is essential to the career of an environmental researcher". "As such, it was
6 my job duty to protect my reputation and my students, Stanford employees, as reputation
7 is also essential to their careers". "Since my lawsuits arose from a job-related duty, so did
8 the countersuits. Both arose solely due to two papers (Jacobson 2015, Clack 2017)
9 authorized by Stanford and the need to maintain my reputation, as Stanford admitted, and
10 the fact I filed the lawsuits to protect my students' and my reputations, which Stanford also
11 admitted.

12 Under cross-examination, by Pope, Plaintiff re-stated that Clack wrote the false-fact
13 critique in 2017 with 20 co-authors, including three Stanford Professors. Plaintiff was
14 provided the article and of which he provided a reply, requesting a change in wording,
15 and mediation, however, Clack issued two press releases of which Plaintiff stated,
16 destroying his reputation, and his research teams' reputation.

17 Plaintiff confirmed that before he filed he asked Stanford to pay for attorney fees,
18 speaking to Tom Fenner, Stanford's Deputy General Counsel, who denied him, but
19 suggested to ask for mediation. Plaintiff did initiate a mediation where a Stanford
20 representative was present, however, Clack refused to make changes to his article. Plaintiff
21 reiterated that Stanford could have had *PNAS* step in and either clarify Clacks critique,
22 removing inappropriate language for professional etiquette, however did not provide
23 Plaintiff with additional support.

24 Pope asked Plaintiff if Stanford would have taken action, and joined in your lawsuit,
25 or called out the three other Stanford Professors and colleagues on the Clack paper, would
26 it have damaged their reputations.

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1 Plaintiff answered, maybe, but all Stanford had to do was to take action and correct
2 the false-facts. If the three other Stanford professors made false-facts then they should have
3 been told to correct those statements, prior to publication. Plaintiff reiterated, he did not
4 include the three other Stanford professors in the lawsuit.

5 Stanford's position presented by Defendant's Attorney, Pope, is that Plaintiff
6 brought the lawsuit for personal reasons and not acting on behalf of Stanford. Stanford
7 determined that the expenses Plaintiff claimed was not a necessity or appropriate. That
8 business expenses needed to be necessary to conduct business. No one appeared on behalf
9 of Defendant, nor did counsel call any witnesses.

10 Pope presented Defendant's position by brief "..... Jacobson has been pursuing this
11 personal grievance against fellow academics, both within and outside of Stanford, and the
12 National Academy of Sciences ("NAS") for years. Before incurring the bulk of the legal fees
13 at issue in this matter, he sought assurance from the University that it would pursue the
14 matter on his behalf or reimburse him. That request was contrary to both University policy
15 and applicable law, and it was denied. The University's position was made clear to
16 Jacobson in unequivocal terms on numerous occasions; but despite these communications,
17 he still went on thereafter to incur more than \$125,000 in attorney fees.

18 Stanford did not agree with or condone Jacobson's decision to pursue the Litigation.
19 The court in Washington, D.C. before whom he brought his claims likewise viewed them
20 with skepticism, as was apparently evident during a February 2018 hearing on the
21 defendants' motion to dismiss. Just two days after the hearing, and before his claims could
22 be dismissed by the court, Jacobson voluntarily dismissed them himself. The court
23 nevertheless awarded attorney fees and costs (in an as-yet unspecified amount) against
24 Jacobson and in favor of the defendants, holding that Jacobson had not carried his burden
25 of proof that he would likely succeed on the merits of his claims.

26 Although not directly relevant to the claim now before the Labor Commissioner, we
27 note that Stanford's approach to this matter has been both fair and consistent with its
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1 mission as an institution of higher learning. While Stanford did not (and does not) believe
2 that reimbursement of Jacobson's legal fees and costs is warranted, it did take reasonable
3 steps to help Jacobson resolve his concerns. Consistent with its Statement on Academic
4 Freedom, Stanford's practice is not to take positions in support of or in opposition to the
5 scholarly arguments of its faculty.

6 Pope asserts that Stanford did attempt (unsuccessfully) to mediate the dispute between
7 Jacobson and the Clack Article co-authors over the summer of 2017. And as mentioned above,
8 Mr. Fenner communicated with Jacobson about his concerns on several occasions over a period
9 of years, going so far as to speak directly with attorneys for Jacobson and the NAS to encourage
10 pre-litigation mediation.

11 Most recently, in response to Jacobson's submission in late October 2020 of a research
12 misconduct claim against his Stanford colleagues who co-authored the Clack Article, the
13 University referred the matter to two of its deans for review under the University's Research
14 Misconduct Policy. These deans concluded that the facts alleged by Jacobson did not amount
15 to "research misconduct" as defined by Stanford policy, but rather were matters best left to
16 scholarly debate; they explained the basis for their determination in two April 2021 letters to
17 Jacobson. Jacobson added that his intention was to file the misconduct claim earlier, however,
18 was dissuaded, by the Director of Research Compliance, Kathy McClelland, because the three
19 Stanford co-authors may have not have contributed that much information to the Clack paper,
20 research was not conducted at Stanford, and that Clack himself was not employed or attended
21 Stanford.

22 Pope, in her brief, "cites no cases holding that an employee who incurs legal costs and
23 expenses as a plaintiff is entitled to indemnification by his employer. To the contrary,
24*Gattuso v. Harte-Hank Shoppers, Inc.*, 67 Cal.Rptr.3d 468 (2007), None of those cases, however,
25 stand for the proposition that an employer is obligated under section 2802 to reimburse an
26 employee for fees and costs incurred as a *plaintiff*.

27 *Plancarte v. Guardsmark, LLC*, 118 Cal.App.4th 640 (2004) (employer's indemnification of
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1 its employee sued by a third party for various tort claims did not constitute ratification of
2 employee's conduct); *Jacobus v. Krambo*, 78 Cal.App.4th 1096 (2000) (employee sued for sexual
3 harassment by coworker entitled to indemnification for legal costs incurred in defending that
4 action); *Devereaux v. Latham & Watkins*, 32 Cal.App.4th 1571, 1584 (1995) (former employee not
5 entitled to indemnification for deposition expenses in which she testified "adverse to the
6 interests of her employer" in response to a third party subpoena); *Grissom v. Vons Companies*, 1
7 Cal.App.4th 52 (1991).

8 Other cases over the years have similarly focused their analysis on an employee's
9 right to recover attorney fees and costs as a defendant. *See, Doug lasv. Los Angeles Herald-*
10 *Examiner* 50 Cal. App.3d 449, 461 (1975) ("Labor Code section 2802 requires an employer to
11 defend or indemnify an employee who is sued by third persons for conduct in the course
12 and scope of his employment." If the suit against the reporter was because of acts done at
13 the behest of his employer, the reporter "would be entitled to indemnity from [the
14 newspaper] for the costs and expenses incurred in defending" the lawsuit against him); *Los*
15 *Angeles Police Protective League v. City of Los Angeles*, 27 Cal.App.4th 168, 177 (1994) (the
16 section "has been interpreted to require employers in general to pay defense costs incurred
17 by employees when defending unfounded third party civil actions challenging the
18 employees' conduct within the course and scope of their employment.... This right to
19 indemnity encompasses only the right to indemnity for necessary expenditures.
20 [Citation.];" *Janken v. GM Hughes Electronics*, 46 Cal.App.4th 55, fn. 24 (1996) ("Labor Code
21 section 2802, which generally requires employers to indemnify their employees for losses
22 incurred in the discharge of the employee's duties, shows a legislative intent that duty-
23 related losses ultimately fall on the business enterprise, not on the individual employee.
24 The statute provides some measure of protection for employees, although no express
25 statutory duty to defend".

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1 Pope references California Labor Code section 2802 does not require Stanford to
2 reimburse Jacobson's attorney fees in these circumstances. The fees were neither
3 necessarily incurred in the course and scope of Jacobson's employment, nor were they at
4 Stanford's direction or for its benefit. Indeed, as noted, Stanford expressly informed
5 Jacobson that it would not reimburse him, and for good reason: Jacobson's litigation
6 vendetta was personal and ill-conceived, per se' a spat against an individual, and Stanford
7 wanted nothing to do with it. The University repeatedly informed him that the proper
8 venue for a scientific disagreement was in the scientific literature – and not in the courts.

9 LEGAL ANALYSIS

10
11 Defendant's business is subject to the requirements of Industrial Welfare Commission
12 Order 4-2001 (the Order).

13 Under the California Evidence Code, the plaintiff has the burden to prove, by the
14 preponderance of the evidence, each and every element of his or her claim.

15 California Labor Code section 2802 generally requires employers to indemnify their
16 employees for losses the employee incurs within the scope of employment. As one common
17 example, section 2802 requires an employer to indemnify an employee for attorneys' fees
18 if the employee is sued by a third party, such as a customer, concerning conduct that falls
19 within the scope of employment.

20 California has a strong public policy that favors the indemnification (and defense) of
21 employees by their employers for claims and liabilities resulting from the employees' acts
22 within the course and scope of their employment.' [Citation.] ... [S]ection 2802 codifies this
23 policy and gives an employee a right to indemnification from his or her employer."
24 (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 952).

25 The elements of a section 2802, subdivision (a) cause of action, as delineated by the
26 statutory language, are: (1) the employee made expenditures or incurred losses; (2) the
27 expenditures or losses were incurred in direct consequence of the employee's discharge of
28

1 his or her duties, or obedience to the directions of the employer; and (3) the expenditures
2 or losses were necessary.

3 As long as the employee is acting within the scope of his or her employment, the right
4 to indemnity is not dependent upon a finding that the underlying action was
5 unfounded." "In determining whether for purposes of indemnification an employee's acts
6 were performed within the course and scope of employment, the courts have looked to the
7 doctrine of respondeat superior. Under that doctrine, an employer is vicariously liable for
8 risks broadly incidental to the enterprise undertaken by the employer—that is, for an
9 employee's conduct that, in the context of the employer's enterprise, is 'not so unusual or
10 startling that it would seem unfair to include the loss resulting from it among other costs
11 of the employer's business. *Cassady v. Morgan, Lewis & Bockius LLP*, 145 Cal. App. 4th 220,
12 230 (2006), as modified (Dec. 21, 2006).

13 "For purposes of this section, the term 'necessary expenditures or losses' shall include
14 all reasonable costs, including, but not limited to, attorney's fees incurred by the employee
15 enforcing the rights granted by this section."

16 In the course of his duties on behalf of Defendant, Plaintiff was working within the
17 scope of his employment to publish journal articles as a condition of employment. The
18 writing and publishing of the Clack paper, to the extreme, tarnished Plaintiff's reputation
19 enough so that Plaintiff was unable to get his articles published, to procure grants for
20 Stanford, for Stanford to approve funds to Plaintiff to continue to write and publish
21 scientific articles, producing negative annual appraisals and reduction or stagnant salary.
22 As such, Plaintiff brought suit against Clack and PNAS, to remedy the damage caused by
23 Clack stating false-facts in his paper, as Stanford refused to mitigate the damage on behalf
24 of Plaintiff, citing among other reasons, that the other three Stanford Professors and co-
25 authors for the Clack paper, may have experienced reputable harm as well, before Clack
26 published the paper and press release.

1 Plaintiff submitted an itemized list of attorneys' fees, prepared by Plaintiff
2 personally. The amount of time spent litigating Plaintiff's claim was nominal. The finding
3 is \$225.00 to \$275.00 per hour is a reasonable hourly rate for an attorney. Accordingly,
4 Plaintiff is awarded \$62,101.99 in attorney's fees pursuant to Labor Code § 2802.

5 Because the issue of damages, \$75,000.00, is on appeal, *Jacobson v Clack, PNA, C. A.*
6 No. 2017(2021), this decision does not address the issue of damages paid to Clack and no
7 decision will be issued that is currently being considered in the Superior Court for the
8 District of Columbia.

9 Labor Code Sections 98.1(c) and 2802 provide that all awards granted pursuant to
10 this hearing shall accrue interest on all due and unpaid wages, including liquidated
11 damages and business expenses, from the date that said wages became due until the wages
12 are paid. Therefore, Plaintiff is entitled to \$7,452.24 in interest accrued to date.

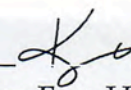
13 CONCLUSION

14 For all the foregoing reasons, IT IS HEREBY ORDERED that Defendant pays
15 Plaintiff as follows:

- 16 1. \$62,101.99 for reimbursable business expenses pursuant to Labor Code Section
17 2802(c); and
18 2. \$7,452.24 in interest pursuant to Labor Code Sections 98.1, and 2802.

19 The total award to Plaintiff is \$69,554.23.

20 Dated: June 26, 2022

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22 Karyn Fox, Hearing Officer
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NOTICE REGARDING DE NOVO APPEALS FROM ODAs

In response to the coronavirus (COVID-19) emergency, courts in every county have taken measures to protect the public. Many courts are postponing trials, limiting filings or stopping filings, and closing their doors for most purposes. The modification or closure of court operations could change, or even temporarily stop, your ability to file documents with courts. Each court operates independently, and the court's various emergency measures are rapidly evolving.

The measures taken by the specific courthouse in the county in which the enclosed Order, Decision or Award arises may impact important timelines and your rights.

The laws the Labor Commissioner's Office enforces are governed by strict statutory timelines even where courts have modified their services and operations. As detailed in the enclosed Order, Decision or Award of the Labor Commissioner (the "ODA"), the ODA shall become final and enforceable as a judgment in a court of law unless either or both parties file a timely appeal to the appropriate court and posts the required bond or undertaking. If you file an appeal, you are obligated to serve the Labor Commissioner's Office with a copy of that appeal and notice of posting the required bond or undertaking. If the Labor Commissioner's Office does not receive a copy of an appeal and proof of bond posting, judgment will be issued in accordance with the law.

Individual courts have taken a wide variety of approaches to the COVID-19 emergency, ranging from no changes to regular operations, to treating court closures that include filing as court holidays (which could mean a filing deadline falls as early as the next day the court is open for filings). The Labor Commissioner's Office is unable to provide specific information regarding the emergency measures taken in each courthouse.

It is your responsibility to check the appropriate court* website to determine if or how any of the court changes in operations impact your case.

If you have any questions regarding this notice, please contact the deputy handling your case.

***Superior Court of California, County of Santa Clara
191 N. First Street
San Jose, CA 95113
(408) 882-2100**