LAWRENCE J. KING
State Bar No. 120805
6 "C" Street
Petaluma, CA 94952
Telephone: (707) 769-9791
Facsimile: (707) 769-9253

Attorney for Plaintiff
VAN A. PENA, PHD., M.D.

THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VAN A. PENA, PHD., M.D.,	**CASE NO. C 00-4009 CW**
Plaintiff,	**PLAINTIFF'S TRIAL BRIEF**
v.	Trial Date: November 16, 2009
TIMOTHY MEEKER, et al.,	Pretrial Conference: October 29, 2009 Time: 2:00 p.m. Courtroom: 2
Defendants.	The Honorable Claudia Wilken

I. INTRODUCTION.

This is a civil rights action under 42 U.S.C. Section 1983. Plaintiff Dr. Van A. Pena, Ph.D., M.D., alleges that he was reprimanded and eventually terminated from his ten-year employment at the Sonoma Developmental Center ("SDC") in violation of his First Amendment rights by SDC's Medical Director, Judith Bjorndal. The evidence at trial will establish that:

(1) Dr. Pena engaged in protected activity when he filed a retaliation lawsuit alleging that he was being retaliated against for speaking out about patient abuse and gross medical negligence being inflicted upon SDC patients;

(2) Director Bjorndal knew about Dr. Pena's lawsuit when she reprimanded him and ordered him to stop taking photographs of patient injuries;

(3) Director Bjorndal ordered Dr. Pena to stop taking photographs of patient injuries in

retaliation for his protected activity and to "chill" the exercise of his First Amendment rights to document and publicly expose patient abuse at SDC;

(4) Director Bjorndal knew about Dr. Pena's previous lawsuit when she fired him; and

(5) Director Bjorndal fired Dr. Pena in retaliation for his having engaged in protected activities and to "chill" the future exercise of his First Amendment rights.

II. PRIOR PROCEEDINGS.

Dr. Pena filed his original complaint in this case on October 31, 2000, against the five individuals, Timothy Meeker, SDC Executive Director, Patricia Rees, SDC Clinical Director, Hal Peterson, SDC Acting Medical Director, Denise Sheldon, DDS Special Investigator, and Dr. Jennifer Wear. Dr. Pena alleged that these individuals retaliated against him for his insistence on reporting patient abuse. He further alleged that these individuals conspired to have him terminated after he made a formal complaint of gross negligence against Dr. Wear.

A supplemental complaint was filed against two additional defendants: Dr. Bjorndal, SDC's new Medical Director, who was hired by Meeker, and Norm Kramer, the SDC Executive Director, who had replaced Meeker. Dr. Pena alleged in the supplemental complaint that he was fired in April 2001 because he continued to report the ongoing failures to investigate and remedy patient abuse at SDC.

On December 12, 2003, this Court issued an order denying, in part, and granting, in part, defendants' Motion for Summary Judgment. In her order, the District Court denied defendants Meeker, Rees and Sheldon's request for summary judgment, but granted summary judgment to defendants Peterson, Wear and Bjorndal. The parties subsequently settled all claims against Meeker, Rees, Sheldon, Peterson and Wear, but specifically reserved Dr. Pena's right to appeal the summary judgment granted to Dr. Bjorndal. On May 13, 2004, pursuant to a stipulation filed by the parties, the District Court dismissed the claims asserted against Meeker, Rees and Sheldon for whom the District Court had denied summary judgment.

Dr. Pena appealed the order granting Director Bjorndal summary judgment. The Ninth Circuit Court of Appeals reversed.. However, shortly after the Ninth Circuit issued its order, the

Supreme Court issued its decision in *Garcetti v. Ceballos*, 216 S.Ct. 1951 (2006). The Ninth Circuit then remanded the case to this Court for further consideration in light of *Garcetti.*

This Court ordered further briefing "addressing *Garcetti*'s impact, if any, on the case." Pursuant to the District Court's order, Director Bjorndal filed a second motion for summary judgment solely on the basis of *Garcetti.* On January 24, 2007, the District Court entered an order granting, in part, and denying, in part, Director Bjorndal's second motion for summary judgment on the issues raised in *Garcetti.* This Court specifically concluded that there are:

> "[I]ssues of triable fact concerning whether Defendant Dr. Bjorndal knew about Plaintiff's pending civil rights action and retaliated against him for bringing that action and whether Plaintiff photographed patients pursuant to his official duties and then experienced retaliation because he was photographing patients." (January 24, 2007 Order).

This Court also rejected Director Bjorndal's claim for qualified immunity.

Director Bjorndal appealed this Court's order denying summary judgment on the ground that she was entitled to summary judgment based upon qualified immunity. The Ninth Circuit dismissed Director Bjorndal's appeal on the ground that it was untimely.

Director Bjorndal requested permission to file a third motion for summary judgment and this Court denied her request.

III. ARGUMENT AND AUTHORITIES.

A. The Relevant Standard.

To state a claim against government officials for violation of the First Amendment, an employee must show (1) that he engaged in protected speech; (2) that the employer took "adverse action;" and (3) that his speech was a "substantial or motivating" factor for the adverse employment action. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 675 (1996); *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003); *Allen v. Schribner*, 812 F.2d 426, 430-36 (9th Cir. 1987).

An employee's speech is protected under the First Amendment if it addresses "a matter of legitimate public concern." *Pickering v. Bd. of Educ.*, 391 U.S. 56 (1968); *Coszalter*, 320 F.3d at 973. The determination whether or not an employee's speech addresses a matter of public concern

must be made in light of the content, form and context of the speech. *Coszalter*, 320 F.3d at 973-74; *Allen*, 812 F.2d at 430. The parties to this case do not dispute that Dr. Pena's original lawsuit, in which he alleged that he was retaliated against because he spoke out about the patient abuse and gross medical negligence to which SDC patients were being subjected, constitutes "protected activity" about a matter of legitimate public concern (i.e., institutionalized patients' safety).

By law, to constitute an actionable adverse action, an act of retaliation "need not be severe and it need not be of a certain kind." *Coszalter*, 320 F.3d at 975. The relevant inquiry is whether the action taken is "designed to retaliate and chill" protected speech. *Coszalter*, 320 F.3d at 975; *Thomas v. Carpenter*, 881 F.2d 828, 829 (1989); *Gibson v. United States*, 781 F.2d 1334, 1338 (1986). It is enough that the action taken is "reasonably likely to deter employees from engaging in protected activity." *Coszalter*, 320 F.3d at 975; *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000)(Title VII case); *Moore v. California Institute of Technology Jet Propulsion Laboratory*, 275 F.3d 838, 847 (9th Cir. 2000)(False Claims and Major Frauds Act case). Even "an act of retaliation as trivial as failing to hold a birthday party for a public employee ... when intended to punish her for exercising her free speech rights" would qualify as a retaliatory adverse action. *Coszalter*, 320 F.3d at 979, citing *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 76-77 (1990). The evidence at trial will establish that Director Bjorndal admonished Dr. Pena, both verbally and in writing, to stop taking photographs of patient injuries, then ultimately terminated his employment. Each of these adverse actions is actionable under the First Amendment because each was "designed to retaliate and chill" Dr. Pena's exercise of his First Amendment rights.

An employee may establish that retaliation was a "substantial or motivating factor" behind an employer's adverse actions in two ways:

> "(1) indirectly, by showing that the employer's proffered explanation is 'unworthy of credence' because it is internally inconsistent or not otherwise believable, or (2) directly, by showing that unlawful [retaliation] more likely motivated the employer." *Noyes v. Kelly Services,* 488 F.3d 1163, 1170-71 (9th Cir. 2007); *Chuang v. University of California Davis*, 225 F.3d 1115, 1127 (9th Cir. 2000).

"All of the evidence [as to pretext] – whether direct or indirect – is to be considered cumulatively." *Ennix v. Stanten,* 556 F. Supp. 1073 (N.D. Cal. 2008) (citing authorities).

As the Supreme Court has found in the context of a discrimination case, if a factfinder rejects the employer's proffered business reasons as unbelievable, it may infer the ultimate fact of intentional discrimination without additional proof. *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 147 (2000):

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements or the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination. *Id.*

See also Ennix v. Stanten, 556 F. Supp. at 1075 (plaintiff doctor's showing, among other things, that the hospital inconsistently applied hospital privileges to him versus doctors of other races helps to overcome defendant's summary judgment motion by showing pretext); *Salitros v. Chrysler Corp.,* 306 F.3d 562, 570 (8th Cir. 2002) (an employee can show pretext by showing that the employer meted out more lenient treatment to similarly situated employees who were not in the protected class or did not engage in the protected activity); *see also Coszalter*, 320 F.3d at 977, quoting *Keyser*, 265 F.3d at 752; *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 521 (1993). In this case, the evidence at trial will establish that the reasons Director Bjorndal has asserted for admonishing Dr. Pena to stop taking photographs of patient injuries and for firing Dr. Pena are not worthy of credence, false and merely a pretext to retaliate against him for his protected activities.

B. Dr. Pena Will Prove the First Element – The First Amendment Protects Dr. Pena's Original Lawsuit and His Photographs of Patient Abuse.

It is undisputed that Dr. Pena filed a lawsuit alleging that he was retaliated against for speaking out about patient abuse, gross medical negligence, and the failure to conduct meaningful investigations about the same. This undisputed fact satisfies the first prong of Dr. Pena's burden of proof (i.e. that he engaged in protected activity). "[T]he right of access to the courts is an aspect of

the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 741 (1983)*; White v. Lee,* 227 F.3d 1214, 1225 (9th Cir. 2000). Dr. Pena's act of filing suit seeking redress for the retaliation to which he was subjected for documenting and speaking out about the patient abuse and gross medical negligence to which SDC patients were subjected is protected by the First Amendment.

Director Bjorndal asserted, in a declaration filed in conjunction with a summary judgment motion in this case, that she did not know about Dr. Pena's lawsuit before she fired him. This assertion, the evidence will prove, is simply not credible. The evidence will show that:

(1) Dr. Pena's prior lawsuit against, amongst others, Hal Peterson and Timothy Meeker, was was being prosecuted at the time Director Bjorndal was recruited and hired at SDC as its new Medical Director;

(2) Meeker was the person who had appointed Dr. Peterson as SDC's Acting Medical Director. Dr. Peterson and Director Bjorndal have been friends since 1979. Dr. Peterson advised Dr. Bjorndal about the opening for a new Medical Director;

(3) Meeker interviewed Dr. Bjorndal and hired her as Medical Director. At the time Meeker hired Dr. Bjorndal, he knew that Dr. Pena had been documenting and speaking out about patient abuse and gross medical negligence and that he was a named defendant in Dr. Pena's lawsuit;

(4) As Medical Director, Bjorndal would be Dr. Pena's direct supervisor;

(5) Meeker and Director Bjorndal discussed the fact that Dr. Pena was taking photographs of patients injuries and agreed that Director Bjorndal should order him to stop doing so;

(6) Ruth Maples, who replaced Meeker as the SDC Executive Director and suggested that Director Bjorndal put Dr. Pena on the administrative leave that resulted in his termination, admitted she knew about Dr. Pena's lawsuit when she made that suggestion; and

(7) Director Bjorndal, herself, acknowledged in a memorandum to Dr. Pena that she was aware of "the events that preceded my arrival at Sonoma Developmental Center." Those events included Dr. Pena's original lawsuit alleging he was retaliated against for documenting and

speaking out about the patient abuse and gross medical negligence to which SDC patients were being subjected.

Presented with these facts, a jury could reasonably conclude that it is simply not credible that neither Peterson, nor Meeker, nor Maples nor anyone else with knowledge at SDC had informed Director Bjorndal that one of the doctors she would be supervising had a pending lawsuit alleging patient abuse, gross medical negligence and failures to investigate in the department for which she would be responsible.

In addition, the evidence at trial will establish (1) that at the time Director Bjorndal ordered Dr. Pena to stop taking photographs of patients' injuries, she knew that he had filed suit alleging that he was being retaliated against for documenting and speaking out about patient abuse, (2) that Director Bjorndal knew that the photographs that Dr. Pena had taken documented patient injuries and, thereby, corroborated and supplemented the allegations in his lawsuit, and (3) that by ordering Dr. Pena to stop taking photographs of patient injuries, Director. Bjorndal subjected Dr. Pena to an "adverse employment action" that was intended to "chill" the exercise of Dr. Pena's First Amendment right to document and speak out about patient abuse. *See, e.g. Coszalter*, 320 F.3d at 975 (the relevant inquiry is whether the action taken is "designed to retaliate and chill" protected speech). *See also* authorities cited above.

C. Dr. Pena Will Prove the Second Element – That He Suffered Adverse Employment Actions.

1. Director Bjorndal's verbal and written warning constituted an "actionable adverse action."

It is undisputed that the very first time Director Bjorndal met with Dr. Pena, she admonished him to stop taking photographs of patients. Dr. Pena specifically advised Director Bjorndal that the photographs he had taken were photographs of suspicious injuries that may have been caused by patient abuse. He explained to Dr. Bjorndal that SDC policy required him to photograph suspicious patient injuries to document those injuries for further investigation. Nonetheless, Director Bjorndal insisted that Dr. Pena stop taking photographs of patients with the implicit threat that if he continued to do so, he would be disciplined for "violating SDC policies."

She then sent Dr. Pena a memorandum confirming their conversation, which she subsequently referenced in her notice of his termination as a "Prior Disciplinary Action and Corrective Action." In addition, by ordering Dr. Pena to stop taking photographs of patient injuries, Director Bjorndal altered Dr. Pena's job duties as a physician and restricted his authority as the Medical Officer of the Day ("MOD"). By threatening Dr. Pena with discipline if he continued to perform those duties and exercised his authority as the MOD, Director Bjorndal was attempting to "chill" Dr. Pena's First Amendment right to document and speak out about patient abuse and medical negligence inflicted upon patients at SDC. Accordingly, the disciplinary and corrective action she took against Dr. Pena for photographing patient injuries is "an actionable adverse action."

2. Dr. Pena's Firing Is An Adverse Employment Action.

As to Dr. Pena's termination after ten years of employment, the parties stipulate that this constitutes an "adverse employment action."

D. Dr. Pena Will Prove the Third Element – That His Original Lawsuit and His Photographs of Patient Abuse Were Substantial or Motivating Factors in for His Termination.

1. The reasons Director Bjorndal has proffered for why she ordered Dr. Pena to stop taking photographs of patient injuries are false and pretextual.

The evidence at trial will establish that Director Bjorndal's proffered reason for ordering Dr. Pena to stop taking photographs of patients was false and not worthy of credence. Director Bjorndal has testified that the reason that she ordered Dr. Pena to stop taking photographs of patients was because it was brought to her attention at an Executive Committee meeting that Dr. Pena was taking photographs of patients without the patients' consent. However, the evidence at trial will establish that SDC policy required Dr. Pena to photograph suspicious patient injuries to document those injuries for further investigation of possible patient abuse. Moreover, the evidence at trial will establish that to the degree a patient's consent was required, Dr. Pena was authorized as the MOD to provide that consent for patients who were incapable of providing informed consent. Finally, the evidence at trial will establish that Director Bjorndal, and those who complained at the Executive Committee meeting about Dr. Pena taking photographs, knew Dr. Pena was taking

photographs of suspicious patient injuries to document those injuries so the patient abuse and gross medical negligence to which SDC patients were being subjected could be publicly exposed. In light of this evidence, the jury could reasonably conclude that Director Bjorndal's asserted reason about why she ordered Dr. Pena to stop taking photographs of patient injuries is false. The real reason was to "chill" his protected activity.

2. Director Bjorndal Was Motivated To Terminate Dr. Pena Because of His Prior Lawsuit.

It is undisputed that Dr. Pena engaged in protected activity when he filed a lawsuit alleging that he was retaliated against for documenting and speaking out about the patient abuse and gross medical negligence to which SDC patients were being subjected.

The evidence at trial will establish that Director Bjorndal knew about Dr. Pena's original lawsuit at the time she fired Dr. Pena. The evidence at trial will also establish that Director Bjorndal fired Dr. Pena to retaliate against him for filing his original lawsuit and to prevent him from continuing to document and speak out about patient abuse, medical negligence and SDC's failure to investigate the same. Among other things, this evidence will include:

- **It is undisputed that the DNR order that Dr. Pena issued was medically appropriate.**

The pretexts that Director Bjorndal used to justify Dr. Pena's termination all center on the fact Dr. Pena issued a DNR order for a 92 year-old woman who was in the final stages of terminal renal failure.[1] However, every doctor involved, including Director Bjorndal herself, and Dr. Thakor, the patient's regular physician, unanimously agreed that a DNR order was medically *appropriate* for the patient and that CPR would have been of no medical benefit to the patient. Both Director Bjorndal and Dr. Thakor told Nancy Irving, who conducted the investigation of Dr. Pena, that CPR would have served no medical benefit for the patient. The reasons that Director Bjorndal

[1] Dr. Pena issued the DNR order at 12:40 p.m. on March 3, 2001. Director. Bjorndal reversed the DNR order at 4:00 p.m. the same day. The patient died nine days later, on March 12, 2001, of complications from renal failure. No medical service or treatment was denied the patient as a result of Dr. Pena's DNR order.

concluded that CPR would be of no medical benefit to the patient were (1) because she was dying of chronic renal failure and CPR was not going to reverse that, (2) there was a risk of trauma (i.e. causing her unnecessary pain); and (3) the application of CPR had no reasonable chance of keeping her alive. In light of this evidence, a jury could reasonably conclude that the fact that Dr. Pena wrote a DNR for this patient could not be the real reason that he was terminated. Rather, Dr. Bjorndal is trying to hide the real reason, which was "to retaliate and chill" Dr. Pena's exercise of his First Amendment rights.

- **The patient's medical records establish that the patient did not have the capacity to issue an advanced directive nor make an informed decision that she did not want a DNR order issued on her behalf.**

Director Bjorndal asserted in the official notice of Dr. Pena's termination that Dr. Pena issued a DNR order that "was in direct contravention of [the patient's] express decision against a DNR order." Director Bjorndal went on to state that Dr. Pena knew that the patient "was a non-conserved adult with the capacity to decide whether or not she wanted a DNR order." However, the patient's medical records, with which Dr. Pena was familiar, stated the opposite, and any contention by Director Bjorndal that she was unfamiliar with these records in light of her decision to terminate Dr. Pena over this episode lacks credibility..

For example, on September 28, 2000, just four months before the patient died, the patient's medical records documented that the patient was read, but did *not* understand, her rights concerning an end-of-life, advance directive about whether to seek CPR. Similarly, on November 1, 2000, the patient's medical records stated that due to her "developmental delay," the patient was unable to participate in her medical care sufficiently to provide informed consent for medical treatments needed while at the SDC's General Acute Care clinic ("GAC"). Therefore, the Medical Director would have to provide any informed consent needed for treatment while the patient was at the GAC.

Before Director Bjorndal fired Dr. Pena, she attended a "team meeting" that had been scheduled for the express purpose of determining the patient's wishes regarding her final care. The minutes of that meeting state that the patient's wishes concerning her final care "are incompatible."

The meeting notes also expressly state that the patient did not want to be taken to the GAC (the acute care clinic). Nonetheless, the team, including Director Bjorndal, issued an order taking the patient to the GAC, which was, of course, "in direct contravention" of the patient's stated wish not to be taken to the GAC. This decision could only be made on the basis that the patient was unable to make an informed decision about her final care. Nevertheless, Director Bjorndal fired Dr. Pena on the ground that he issued an order "in direct contravention" of the patient's decision against a DNR order. Director Bjorndal cannot have it both ways. She cannot credibly fire Dr. Pena for issuing an order "in direct contravention" of the patient's alleged decision against a DNR order and yet herself issue an order that the patient be take to the GAC against the patient's expressed wishes.

In light of such evidence, the jury could reasonably conclude that Director Bjorndal's assertion that Dr. Pena knew the patient had the "capacity to decide whether or not she wanted a DNR order" is not true and that Director Bjorndal's assertion that Dr. Pena's order was "in direct contravention" of an informed decision made by the patient is merely a pretext to justify firing Dr. Pena in retaliation for his protected activity.

Likewise, all the other reasons that Director Bjorndal asserted that are all premised on the patient's allegedly having made an informed decision against a DNR order, fail as well.

- **The patient never issued an advanced directive stating she did not want a DNR order issued on her behalf.**

In the official notice of Dr. Pena's termination, Director Bjorndal justified Dr. Pena's termination on the ground that Dr. Pena "misrepresented the facts" to Director Bjorndal by failing to inform Director Bjorndal of the patient's earlier decision against a DNR order. As discussed above, the evidence at trial will establish that the patient was incapable of making an informed decision against a DNR order. The evidence at trial will also establish that no such decision was ever made or documented in an advanced directive, as required by SDC's policies.

Director Bjorndal admitted in her deposition that SDC has a formal policy concerning advance directives. Director Bjorndal further testified that the purpose of the advance directive policy was to be sure (1) that the patient issuing an advanced directive concerning his or her care had the capacity to make an informed decision concerning his or her care, (2) that the patient had been

provided the information necessary to make an informed decision, and (3) that the official advance directive form was placed in the patient's medical records so that the patient's medical providers would be aware of the patient's advance directive. The evidence at trial will establish (1) that the patient never issued an advance directive concerning a DNR order, (2) that the patient did not have the capacity to do so, (3) that the patient was never provided the information necessary to make an informed decision concerning a DNR (i.e. that CPR would not revive her if her heart stopped as a result of her renal failure and that CPR would only cause her unnecessary pain and suffering in her last few moments of life), and (4) there was no advance directive form placed in the patient's medical records to alert Dr. Pena or her other care givers that she had issued any such advance directive against a DNR.

Likewise, the evidence at trial will establish that Dr. Pena had known the patient for over ten years. He was familiar with her renal disease, her limited capacity to understand her medical condition, and the decisions that SDC had made to provide her with neither a kidney transplant or dialysis, which meant that her disease would ultimately cause her death. He was also familiar with her medical records, which documented that she did not have the sufficient capacity to make an informed decision concerning her medical care, and that she did not understand her rights concerning an advanced directive (and, therefore, could not issue one or make an informed decision about a DNR order).

In light of this evidence, the jury could reasonably conclude that Director Bjorndal's assertion that Dr. Pena ignored the patient's "express decision against a DNR order" and failed to inform Director Bjorndal of the patient's previous advance directive, is false and merely a pretext to justify firing Dr. Pena in retaliation for his protected activity.

- **Dr. Pena never violated a verbal or written directive issued by Director Bjorndal.**

In the official notice of Dr. Pena's termination, Director Bjorndal justified her decision to fire Dr. Pena on the ground that he refused a direct order from her to rescind the DNR order. The evidence at trial, however, will establish that Director Bjorndal never directed Dr. Pena to rescind the DNR order. Moreover, the evidence will establish that she knew she could not do so under California

law. Under California law, each medical doctor is required to exercise his or her own independent medical judgment in determining the proper care for a patient. A doctor may not be penalized or disciplined for a disagreement concerning the proper care to be given a patient. Cal. Bus. & Prof. Code § 2056; *Khajavi v. Feather River Anethesia Medical Group* (2000) 84 Cal.App.4th 32.

When Director Bjorndal asked Dr. Pena to rescind his DNR order, he informed her that he could not ethically do so. His independent medical judgment required him to issue the DNR because he felt that administering CPR to this 92 year-old patient. who had lost over thirty pounds in just four months (she now only weighed about 70 pounds), could do her no good and only do her harm. However, Dr. Pena was not insubordinate. He explained to Director Bjorndal that she had the authority to rescind his order herself, if, in her medical judgment, she concluded that would be medically appropriate. Director Bjorndal agreed that was the proper procedure. She then issued her own order rescinding the DNR order within mere hours of his having issued a DNR order for this patient.

In addition, the evidence at trial will establish that other doctors at SDC, who were found to have violated SDC's policies concerning the issuance of DNR orders, were not fired for doing so.

In light of the evidence to be presented at trial, the jury could reasonably conclude that accusing Dr. Pena of refusing a direct order from his supervisor is false and merely a pretext to justify his termination.

CONCLUSION.

As set forth above, the evidence at trial will establish that:

(1) Dr. Pena engaged in protected activity when he filed suit alleging that he was being retaliated against for speaking out about patient abuse and gross medical negligence being inflicted upon SDC patients;

(2) Director Bjorndal knew about Dr. Pena's lawsuit when she ordered him to stop taking photographs of patient injuries;

(3) Director Bjorndal ordered Dr. Pena to stop taking photographs of patient injuries in retaliation for his protected activity and to "chill" the exercise of his First Amendment to

document and publicly expose patient abuse at SDC;

(4) Director Bjorndal knew about Dr. Pena's lawsuit when she fired him;

(5) Director Bjorndal fired Dr. Pena in retaliation for his protected activity and to prevent him from documenting and exposing any further patient abuse and gross medical negligence being inflicted upon SDC patients.

RESPECTFULLY SUBMITTED,

Dated: October 23, 2009

LAW OFFICES OF LAWRENCE J. KING

By: _____
LAWRENCE J. KING
Attorney for Plaintiff