2d Civil No. B057029

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DON H. HAYCOCK,

Plaintiff, Respondent
and Cross-Appellant,

vs.

HUGHES AIRCRAFT COMPANY, et al.,

Defendant, Appellant
and Cross-Respondent.

Appeal From The Superior Court Of Los Angeles County
Honorable Dion G. Morrow, Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This is a constructive discharge case, based on breach of an implied contract, in which the rules which have developed in the area of employment law have been turned on their heads or, more accurately, thrown out. First, as a threshold matter, the jury was not permitted to decide whether an implied contract even existed between plaintiff and Hughes Aircraft Company, because the trial court determined that the presumption of at-will employment embodied in

Labor Code section 2922, as a matter of law, simply does not apply to "big businesses" which have detailed rules governing the treatment of employees. If the trial court's ruling in this regard is the law of California, then Labor Code section 2922 has effectively been abrogated as to large companies, since no successful business of any size can operate without a rational set of rules detailing the relationship between management and the employees being supervised.

But the trial court's remarkable ruling on the contract issue is only one of the errors which infected this trial. Even more fundamentally, plaintiff simply failed to prove a prima facie case of constructive discharge. The case law is clear there can be no constructive discharge unless intolerable conditions exist at the time the employee resigns and unless the employer could have remedied them but did not; but in this case, liability was imposed even though the undisputed evidence demonstrated that Hughes had remedied the alleged intolerable conditions and had done so seven months before plaintiff resigned. Nevertheless, the jury returned a verdict against Hughes for more than half a million dollars.[1/]

Plaintiff's evidentiary showing was fatally defective in another respect. There was also a complete failure of proof on the element of damages. Although plaintiff's expert provided his conclusion as to the total monetary damage plaintiff would suffer, that conclusion was unsupported by any proven facts regarding salary history, the value of benefits, or any other aspect of plaintiff's compensation. For example, since there was no evidence of earnings history, there was no basis upon

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1/ Although the trial court found the damages excessive and granted a remittitur, even as reduced, the award exceeded $280,000.

which the expert could project what plaintiff would have earned had he stayed at Hughes. Without such a projection, there was no basis for calculating plaintiff's loss of earnings upon retirement.

How the jury reached the verdict it did is not difficult to understand. Deliberations were plainly affected by two critical errors. First, an ill-chosen portion of BAJI No. 10.02 regarding constructive discharge was delivered which permitted the jury to find constructive discharge on the basis of merely unpleasant, rather than intolerable, conditions.

Second, the jury was improperly provided with self-serving memoranda written by plaintiff describing events and conditions at Hughes. The memoranda contained many levels of hearsay, as well as conclusory allegations of fraud and conspiracy. If the jury had any question about the course of events underlying the lawsuit, it had at hand what could fairly be characterized as plaintiff-generated "Cliff's Notes," containing all the distortions, inaccuracies, and misreadings for which such notes are famous.

The trial court had promised to give a limiting instruction as to these memoranda but failed to do so, and when reminded by Hughes' counsel, refused to do so. A limiting instruction would have been better than nothing, but it also would have been an inadequate remedy to the potential prejudicial effect of these documents, which far outweighed any probative value they may have possessed. However, without the proper instruction, the unfairness resulting from the admission of the memoranda cannot be questioned; plaintiff was able to make up

for the dearth of admissible evidence and to sway the jury with rumors, speculation and unsubstantiated and untested comments by other individuals.

In sum, because of the lack of substantial evidence to support the verdict, judgment should be reversed and in its stead judgment entered in favor of Hughes. At the least, because the trial court improperly took the contract issue away from the jury and the other errors rendered the trial unfair, the case should be remanded for a new trial.

STATEMENT OF THE CASE

A. Summary Of Material Facts Pertaining To Liability.

1. Plaintiff's Employment At Hughes.

Plaintiff began working at Hughes in 1961. (RT 796.) Except for a brief leave of absence which he took in 1975-76 to develop a law practice (RT 798, 801), he remained at Hughes until retirement in December 1987. (RT 834.)[2/] His employment at Hughes was as an engineer rather than as a lawyer. (RT 804.)[3/]

In 1985, plaintiff joined SEL, the Systems Engineering Laboratory at Hughes. (RT 735.) SEL provided management support--technical and administrative--for systems engineering services at Hughes. (RT 464.) When plaintiff joined SEL, its business was declining. (RT 805.)[4/] After March or April 1985, there was nothing for plaintiff to do at SEL, so he free-lanced within Hughes. (RT 806.) In early 1986, SEL was restructured, people were being

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2/ After 1976, plaintiff was a reluctant employee: he testified that he returned to Hughes after his leave in order to get laid off and that he did not want to work there. (RT 801, 803.) However, he promised his wife he would stay at Hughes when his daughter was diagnosed as suffering from epilepsy. (RT 837.)

3/ Plaintiff's law practice disbanded in 1977, but he continued completing legal projects until 1984. (RT 803.) He returned to his law practice on retirement from Hughes. (RT 794-795.)

4/ SEL was part of an organization called the Electro-Optical and Data Systems Group ("ESG"). (RT 464.) ESG was also in a state of decline at this time. (RT 806.)

displaced, and there were more people than there was work. (RT 808.) Plaintiff applied unsuccessfully for positions at Hughes outside of SEL. (RT 784, 807, 808.)

Included within SEL was a organization called Systems Engineering Operations within which were several departments. (RT 292, CT 922.) In April 1986, plaintiff joined one of those departments under the supervision of Jack Rafelson. (RT 809-810; see CT 922.) The job was beneath his job classification, but he continued to receive the rate of pay appropriate to his classification. (RT 810.)

2. Plaintiff's Work On The Specification Tailoring And C-Nite Projects.[5/]

In September 1986, Rafelson assigned plaintiff to the "specification tailoring" project, specifically to supervise an individual named Ephraim Shatz. (RT 741.) Plaintiff encountered difficulties with Shatz's performance which he reported to Rafelson. (RT 742-43.) Ultimately, Shatz called in sick and did not complete the project. (RT 743.) Plaintiff subsequently heard Shatz was blaming him for a nervous breakdown. (RT 744-745.) Plaintiff had threatened Shatz with discipline, although he never carried out the threat. (RT 811-812.) He did prepare a summary of Shatz's conduct and gave it to Rafelson. (RT 744.)

5/ Specification tailoring involved the development of an alternative to gold plating. (RT 438.) The C-Nite Project involved the installation and testing of telemetry systems in helicopters. (RT 391-392.)

In November 1986, Rafelson assigned plaintiff to work on the C-Nite Project to prepare reports on tests being performed in Yuma, Arizona. (RT 748.) Plaintiff's task was to produce the preliminary and final test reports on the project. (RT 415, 428.) There were disagreements between plaintiff and his supervisors on the project. For example, the preliminary test report was due on December 26; plaintiff's supervisors directed plaintiff to produce it by December 23, and he refused. (RT 761.) Plaintiff testified he and one supervisor had heated arguments. (RT 813.) Moreover, plaintiff disagreed with another supervisor on the format of the test reports and did not believe the preparation of the reports was being directed in accordance with applicable standards. (RT 839.)

On December 26, plaintiff turned in the preliminary test reports and left for a week-long cruise. (RT 760.) He stated that the final reports would be submitted January 14 and 23, 1987. (RT 762-763.) When he returned from the cruise, he discovered that the people reporting to him had failed to carry out certain instructions he had given. (RT 760-761.) He canceled a trip he had been planning to the test site at Yuma and left the program. (RT 761.)

3. Plaintiff's Performance Evaluation and Merit Review.

Shortly before he turned in the preliminary test reports on C-Nite, on December 17, 1986, plaintiff met with Rafelson for his annual performance evaluation. (RT 764.) The written performance evaluation indicated plaintiff was rated 3 on a scale of 1 to 5, 1 being highest. (CT 865.) The evaluation included a

comment regarding management's perception of plaintiff as a poor people manager (RT 745); at plaintiff's request, Rafelson agreed to remove the comment. (RT 603-604, 746.) Plaintiff attributed the statement to the Shatz matter and to the fact that Rafelson had not delivered to management the summary of Shatz's conduct which plaintiff had written. (RT 745-746.) Both plaintiff and Rafelson signed the evaluation. (RT 764; CT 865.)

On January 16, 1987, Jeffrey McConnell, the manager of Systems Engineering Operations (RT 292), rejected the performance appraisal that had been signed by Rafelson and plaintiff and sent it back to Rafelson. (RT 303-304; CT 865.) Earlier in the month, McConnell and the management of SEL had decided plaintiff would not receive a raise. (RT 294.) As plaintiff himself conceded at trial, he was probably overpaid (RT 1045); further, only limited funds were available for pay increases that year. (RT 294.)

McConnell testified that, on the basis of information obtained in a conversation with administration, he determined that an individual being passed over for a raise had to be rated at 4 or below. (RT 298, 311-312.)[6/] McConnell thus reduced plaintiff's performance rating to a 4. (RT 298.) A 4 rating signifies that an employee's performance is generally satisfactory, but falls short of fully meeting the requirements of his position. (RT 819; CT 865.)

6/ An administrative employee, from whom McConnell believed he received the information, did not recall a conversation with him about changing plaintiff's performance rating. She testified there was no policy in the division requiring a 4 rating if no raise were being given. (RT 223.) She also testified no policy required a memo to be written when an employee was going to be passed over for a raise. (Ibid.)

McConnell also prepared a memorandum to explain the reasons for rejecting the performance appraisal and for not giving plaintiff a raise. (CT 752; RT 311-312.) In early January 1987, he had received information from the supervisors of the C-Nite project which was critical of plaintiff's performance, including the information that the job had not been completed. (RT 314, 499, 502.) Among other things, McConnell's memorandum stated that plaintiff was not an asset to SEL, that he could not get along with other people, and that he was a candidate for layoff. (CT 752.) The memorandum was directed to division management. (RT 327.) Other people in Rafelson's organization also had their performance ratings lowered in December and January with McConnell's approval. (RT 334.)

On March 19, 1987, plaintiff met with Rafelson for the annual merit review and learned he was not to get a raise. (RT 767.) It was the first time in 25 years he had not gotten a raise. (RT 767-768.) Rafelson told plaintiff the action was being taken as a result of criticism of his performance on C-Nite. (RT 767.) Plaintiff testified that Rafelson also told him he had been pressured to begin termination proceedings against plaintiff. (Ibid.)[7/]

At the March 19 meeting, plaintiff reviewed his personnel file. (RT 768.) He observed McConnell's memo in the file, as well as the performance evaluation which McConnell had rejected. He also noticed that a favorable performance appraisal signed by his supervisor and by him in February and March, respectively,

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7/ Rafelson denied making the statement. (RT 525.) Plaintiff subsequently conceded no one at Hughes ever informed him he was going to be terminated. (RT 832.)

of 1986 appeared to be missing. (RT 768; CT 969-70.) A performance appraisal rating prepared in August 1986 had been reduced from a 2 to a 3 by whiteout. (RT 768.)[8/]

The missing appraisal was found the next day in another section of the file. (RT 769.) Plaintiff realized, however, that other appraisals were missing. (RT 770.) They too were later found, and when plaintiff reviewed his file again in April, it appeared to be complete. (RT 1017-1018.)

Plaintiff met with McConnell. He learned that his rating was to be a 4 instead of a 3. (RT 771, 818.) He asked McConnell to remove his memo from plaintiff's personnel file, and McConnell refused. (RT 771.)

4. Plaintiff's Complaint To The Human Resources Department.

Plaintiff then took his complaint to the Human Resources Department at Hughes. (RT 774.) Yvonne Ellis was assigned to investigate the matter. (RT 776-777.)

Plaintiff and Ellis met on April 14, 1987. (RT 966.) Ellis asked plaintiff how he wanted his problem resolved. (RT 969.) He responded that he wanted the performance appraisal changed (back to a 3), McConnell's memo removed from the file, and a merit increase. (RT 969.) He also wanted her to obtain an

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8/ Rafelson testified that he had changed the rating before August 15, 1986, the date on which plaintiff signed the document. (RT 620; CT 859.)

evaluation of his work from the project manager on the C-Nite Project. (RT 969.)[9/] During the meeting with Ellis, he mentioned the August 1986 appraisal on which the rating had been reduced with whiteout. (RT 971.) He also mentioned that appraisals had been missing when he reviewed the file in March. (RT 986.) By May 14, Ellis had concluded her investigation of plaintiff's complaint. (RT 986.) The complaint was resolved in plaintiff's favor because McConnell had not followed company procedures. (RT 990.) Plaintiff's 3 rating was restored, he received a retroactive merit increase, and the McConnell memo and the performance evaluation bearing his rejection were removed from his file. (RT 824, 970, 975.) The August 1986 appraisal which had been changed with whiteout was removed, and the performance appraisal for the full year (with a 3 rating) was substituted. (RT 987.) Ellis testified she did not obtain an evaluation from the C-Nite project manager since plaintiff had only worked for him for a short time and the evaluation would have had no bearing on resolving his complaint. (RT 970-971.)

Plaintiff commended Ellis for her efforts. (RT 825, 978.) Nonetheless, he continued to complain in writing to Human Resources and to corporate management. (RT 998.) He complained that, among other things, performance appraisals had been removed from his file and reduced by whiteout, and that a relative of Ephraim Shatz, who was a manager at Hughes, had interceded on

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9/ The project manager was in effect the supervisor of the supervisors who had criticized plaintiff. (See RT 761-762.)

Shatz's behalf against plaintiff with respect to the specification tailoring project. (RT 244-245, 284, 285.)

Plaintiff expressed concern about his personnel file being returned to the control of Rafelson after the investigation, and demanded that Ellis retain it. (RT 992.) The folder was subsequently returned to Rafelson, according to company procedures. (RT 249, see RT 947.)

5. Further Restructuring At Hughes.

In January 1987, the manager of SEL asked Rafelson to attempt to find a new parent organization for his department. (RT 464, 475, 513.) SEL was being reorganized to become more purely a systems engineering organization, large parts of SEL were being transferred elsewhere, and some employees were being laid off. (RT 469-470, 474.) Many individuals in Rafelson's group were not in the systems engineering business. (RT 475.) If Rafelson could not find a new parent organization for his people, they would have to be laid off or the section broken up. (RT 475.) There was some consideration given to laying off all of Rafelson's organization, except for Rafelson. (RT 469.)

There were discussions at the end of 1986 and in January 1987 about laying off plaintiff, among others. (RT 158, 160, 571, 615.)[10/] In April 1987, around the time he met with Yvonne Ellis about his complaint, plaintiff broke into Rafelson's

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10/ It was in January 1987 that McConnell decided plaintiff would not be given a raise, and wrote the memorandum that stated plaintiff was a candidate for layoff, as mentioned above. (RT 303-304, 311-312; CT 752.)

desk and discovered a layoff approval request and a notice of layoff, prepared by Rafelson, indicating plaintiff was to be laid off on January 23, 1987. (RT 777, 826; CT 750, 873-75.) The layoff documents were drafts, and Rafelson did not proceed with the layoff procedure. (RT 577, 615.)[11/] Plaintiff conceded no one ever informed him he was going to be terminated, nor was he ever given notice of termination. (RT 832.)[12/] Moreover, he was never even given notice of discipline. (Ibid.)

In February 1987, Rafelson approached Gerald Morrison, the manager of the Project Analysis Laboratory at Hughes. (RT 549-551.) Morrison reviewed the personnel files of the individuals in Rafelson's organization, including that of plaintiff. (RT 534-535, 552.) He saw some evidence of lower than average performance in plaintiff's file. (RT 535, 537.) However, Morrison offered jobs to Rafelson and his people, including plaintiff. (RT 552.) Morrison thought it was a new chance for plaintiff, and Rafelson had recommended plaintiff. (RT 553.) Rafelson's department joined Morrison's laboratory in about March 1987. (RT 553.)

11/ Plaintiff contends the notice of layoff was not delivered because on January 23 he went home sick. (RT 1059.)

12/ He did not raise his discovery of the draft layoff documents with Rafelson or Ellis, and mentioned it for the first time in October 1987, in one of his memoranda to Human Resources. (RT 826-827.)

6. Plaintiff's Retirement.

Plaintiff took two extended leaves of absence in 1987. (RT 830.) He was away from work from late January through February with a virus, and again, between July and October 1987, because of a detached retina. (RT 830-831.) Rather than returning to work in October, he took a vacation leave until December 4. (RT 831.) When he returned from vacation, he contacted the retirement office at Hughes and requested retirement, effective December 1. (RT 832-833.) A day or two later he met with Morrison and Rafelson. (RT 833.) He was welcomed back and told he still had a job in Morrison's laboratory under Rafelson. (RT 554, 832.) Plaintiff told Morrison that he did not want to work for Rafelson. (RT 555.) Once plaintiff had discovered the draft layoff notice, his relationship with Rafelson had become "hostile." (RT 778.) He could not trust Rafelson. (RT 1059.) In plaintiff's words, "There was no way [he] could work for a person like that." (Ibid.)

Morrison told plaintiff he had the option of looking for work outside of Rafelson's organization. (RT 832.) Instead, plaintiff retired. (RT 834.) Plaintiff told his wife he was retiring because he did not feel the business was going to survive, and the job was not what he wanted to do. (RT 834.)[13/]

13/ Plaintiff later testified that he told his wife this because he did not want her to know the circumstances of his leaving. (RT 842.)

B. Summary Of Plaintiff's Evidence On Damages-- Or Rather The Lack Thereof.

Plaintiff called Clyde Lonergan, an actuary, to testify about the economic loss plaintiff allegedly suffered from constructive discharge. (RT 624-625.)

Lonergan testified that plaintiff had provided him with information regarding his salary history at Hughes, the salary earned between termination and trial, and the salary to be made between the trial and the age of 65. (RT 627-630.) Plaintiff also had provided him with information regarding benefits, and Lonergan was himself familiar with the Hughes benefit package. (RT 629.)

Lonergan then testified that he had calculated the salary plaintiff would have received had he stayed at Hughes, to which he added a 35% markup for benefits. (RT 635.)[14/] He performed the same type of calculation with respect to plaintiff's self-employment after leaving Hughes. (RT 635.) In Lonergan's opinion, plaintiff suffered a loss of $638,890. (RT 639.) That is, he determined plaintiff's loss to be approximately $63,889 a year for ten years, although plaintiff had never made that amount in any year he had worked. (RT 668.)[15/]

14/ On cross-examination, Lonergan testified plaintiff had told him he was making about $55,000 a year when he left Hughes. (RT 662.) Lonergan did not testify about what plaintiff had been earning in prior years or otherwise indicate any basis upon which to project what plaintiff would have been earning had he stayed at Hughes. Nor did he testify as to the dollar amount of projected earnings at Hughes.

15/ Lonergan revealed he was unable to place a value on individual portions of plaintiff's benefits package, such as health care or pension benefits. (RT 651-652.) Nor had he taken into account the fact that plaintiff was receiving approximately $32,400 - $36,000 a year in pension benefits from Hughes, as well as certain health care benefits for himself and his dependents. (RT 653, 834.)

Plaintiff, however, never presented any admissible evidence to prove the factual basis for Lonergan's opinion.[16/] For example, plaintiff did not testify about his salary history at Hughes, his actual earnings, gross or net, as an attorney (except that he worked on a 30% contingency [RT 795]), his benefits package, or the basis for his "guess" (RT 659) as to future earnings as an attorney. Instead, he merely informed the jury he was claiming loss of earnings. (RT 791.)

C. Summary Of Procedural Facts.

Plaintiff filed suit on March 17, 1988. The First Amended Complaint, filed June 3, 1988, alleged a number of causes of action against Hughes and individual employees at Hughes. (CT 56.)

A jury trial began on October 25, 1990. (CT 143; RT 1.) The only cause of action ultimately submitted to the jury for determination was the fourth cause of action alleging constructive termination and breach of an implied employment contract; the only remaining defendant was Hughes. (RT 903, 906; CT 140, 288.) On November 20, 1990, the jury returned a general verdict in favor of plaintiff in the amount of $506,854. (RT 1121; CT 586.)

Before the case was submitted to the jury, the trial court decided as a matter of law that an implied employment contract existed and refused to instruct the jury on the issue. (RT 1034.) Additionally, the trial court rejected the

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16/ Certain documents plaintiff had given to Lonergan were excluded from evidence on the ground of hearsay. (RT 640.)

objection made by Hughes' counsel to BAJI No. 10.02 pertaining to constructive discharge; counsel objected on the ground, among others, that the law requires a finding of intolerable conditions to support constructive discharge, and language in the instruction indicated unpleasant conditions were sufficient. (RT 1025, 1030-32; CT 402.)

Finally, the trial court admitted into evidence, over hearsay objections and objections under Evidence Code section 352, a number of memoranda written by plaintiff to his supervisors and senior management. (RT 845-847; CT 759-789, 793-808, 838-841, 1404-1418.) The memoranda set forth plaintiff's version of the events which, he contended, had transpired at Hughes. The jury was not present when the trial court made its decision to admit the documents. (CT 288.) The court promised it would advise the jury of the limited purpose for which it was admitting the documents--to show "a paper blizzard" had occurred. (RT 847.) The trial court did deliver BAJI instruction No. 2.05 which contemplates that the jury's attention has previously been drawn to evidence being admitted for a limited purpose. (RT 1107; CT 391.) However, the trial court never advised the jury which documents were in evidence for a limited purpose and what that purpose was, and, indeed, refused to do so even when reminded by defense counsel. (RT 1119.)

After trial, Hughes moved for judgment notwithstanding the verdict and for a new trial. (CT 593.) On February 21, 1991, the trial court denied the motion for judgment notwithstanding the verdict. (RT 1157; CT 727.) The court indicated it was going to grant the new trial motion on the ground of excessive

damages unless plaintiff agreed to accept a remittitur of 40% of the verdict, that is, total damages in the sum of $282,854, plus costs. (RT 1155-1157; CT 727.) On March 5, 1991, plaintiff agreed to the remittitur. (CT 728-729.) This appeal from the judgment and the court's ruling on Hughes' motion for judgment notwithstanding the verdict timely followed. (CT 732.)[17/]

17/ The order denying Hughes' motion for judgment notwithstanding the verdict is appealable under Code of Civil Procedure section 904.1, subdivision (d). The judgment, which disposes of all issues between the parties, is appealable under subdivision (a) of the same section.

LEGAL ARGUMENT

I.

THE TRIAL COURT SHOULD HAVE GRANTED HUGHES' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO PROVE EITHER CONSTRUCTIVE DISCHARGE OR DAMAGES.

A motion for judgment notwithstanding the verdict must be granted if, viewing the evidence in the light most favorable to the party which secured the verdict, there is no substantial evidence to support the verdict. (Hauter v. Zogarts (1975) 14 Cal.3d 104, 110.) Hughes was entitled to judgment notwithstanding the verdict here, because there was simply no evidence to support a finding of liability based on constructive discharge. To the contrary, uncontroverted evidence established that this was a case in which the employer did exactly what it was required to do--provide a remedy when an employee complains about problems in the workplace. In spite of that, Hughes was found liable, apparently on the basis of plaintiff's dissatisfaction with his supervisor, a condition the case law uniformly deems insufficient to warrant an employee's resignation. Moreover, the opinion of plaintiff's expert on damages did not constitute substantial evidence, because plaintiff failed to offer any admissible evidence to prove the facts and assumptions upon which it was purportedly based.

A. Viewing The Evidence In The Light Most Favorable To Plaintiff, A Jury Could Not Reasonably Have Inferred From The Evidence That Conditions At The Time Plaintiff Left Hughes Were So Intolerable That Plaintiff Was Constructively Discharged By Hughes.

To prove constructive discharge where the claim is for breach of an implied-in-fact contract, an employee must show that (1) the actions and conditions causing him to resign were "so intolerable or aggravated at the time of his resignation that a reasonable person in the employee's position would have resigned," and (2) "[the] employer had actual or constructive knowledge of the intolerable actions and conditions and of their impact upon the employee and could have remedied the situation, but did not." (Zilmer v. Carnation Co. (1989) 215 Cal.App.3d 29, 38; Soules v. Cadam, Inc. (1991) 2 Cal.App.4th 390, 399.) The conditions at Hughes at the time of plaintiff's resignation fall far short of anything which could reasonably be characterized as "intolerable."

The jury was asked to find constructive discharge on the basis of the following evidence:

1. Plaintiff's December 1986 performance evaluation was rejected, and his performance rating reduced from 3 to 4 (RT 298);

2. He was passed over for a merit increase (RT 294);

3. One performance evaluation prepared in August 1986 had been reduced, presumably without his knowledge, from 2 to 3 (RT 768);

4. Other performance appraisals, at least one of which rated him a 2, were at one point missing from his personnel file (RT 768);

5. McConnell's critical memorandum was in his personnel file, as was the performance evaluation marked for rejection (RT 768);

6. There was evidence, including a draft layoff approval request and the McConnell memo, that plaintiff's superiors (at least Rafelson and McConnell) discussed and intended to lay plaintiff off in January 1987 (RT 158, 160, 571, 615, 777);

7. After the investigation of plaintiff's complaint, his personnel file was not retained by Human Resources but rather was returned to the control of Rafelson (RT 249);

8. Rafelson was to continue to be plaintiff's supervisor in Morrison's laboratory (RT 554, 832);

9. Plaintiff's relationship with Rafelson had deteriorated after plaintiff discovered the draft layoff notice, and plaintiff no longer trusted Rafelson. (RT 778, 1059.)

Even assuming, for the sake of argument, that the actions and conditions described in items 1 through 6 above add up to an intolerable situation, it is undisputed that Hughes remedied each and every one of them. Plaintiff's 3 rating for the full year of 1986 was restored, he received a retroactive merit increase, and the modified August 1986 evaluation was removed from his file, as was McConnell's memorandum and the rejected performance evaluation. (RT 824, 975.) Plaintiff was not terminated in January 1987, and in fact he subsequently

obtained another job at Hughes on Rafelson's recommendation. (RT 552-553.) Plaintiff's file was apparently put back in order, and no appraisals were missing from it by April 1987. (RT 1017-1018.) Plaintiff conceded no one ever told him he would be terminated and that no discipline was threatened or pending against him. (RT 832.) That is to say, when plaintiff retired in December 1987, the only conditions which the law even theoretically might conceivably deem intolerable no longer existed, and they no longer existed because Hughes had promptly responded to plaintiff's complaint and remedied them.

As noted above, where an employee's wrongful discharge claim is not founded upon a claim that he or she was actually terminated, but rather is based upon the theory that working conditions were so intolerable that he or she was effectively forced to resign, the cases impose some exacting proof requirements on the employee. First, the employee must show that the conditions forcing resignation were intolerable "at the time of his resignation." (Zilmer v. Carnation Co., supra, 215 Cal.App.3d at 38; Soules v. Cadam, Inc., supra, 2 Cal.App.4th at 399.) In addition, the employee must prove that the employer actually or constructively knew about the conditions and "could have remedies them, but did not." (Ibid.) Here, plaintiff's proof failed on both prongs. The conditions of employment were not intolerable at the time of resignation, and the employer had remedied the circumstances of which plaintiff had complained. Under the clear mandate of the case law, Hughes cannot be liable in these circumstances.

It is, moreover, immaterial that there was one unresolved aspect of the situation, namely, plaintiff's hostility toward and distrust of Rafelson which

developed when he discovered the undelivered draft layoff notice in Rafelson's desk drawer. (RT 778, 1059.) As a matter of law, a jury may not infer constructive discharge from plaintiff's dissatisfaction with Rafelson. In the context of a worker's compensation action, the Supreme Court emphasized, "[i]t is not the policy of this state to encourage employees to quit their work and obtain unemployment insurance simply because they are unhappy over something the employer has said or done." (Sanchez v. Unemployment Ins. Appeals Bd. (1984) 36 Cal.3d 575, 587.) Rather, the employee must demonstrate a "continuing course" of intolerable conditions such as, for example, unlawful discrimination. As Justice Mosk further explained in his concurring opinion:

> 'This case should provide no precedent for other employees who voluntarily resign from continuous employment merely because the environment is not free of conflict, or because associates and superiors are imperious. While one must sympathize with employees who labor in an unhappy or contentious atmosphere, that circumstance alone does not justify voluntary termination and unemployment benefit claims. Nor are such claims proper when an employee resigns merely in anticipation, real or fancied, of possible firing or discipline at some vague time in the future. A foreseeably imminent discharge or unjustified discipline is required. As declared in Zorrero v. Unemployment Ins. Appeals Bd. (1975) 47 Cal.App.3d 434, 439 . . . voluntary termination must 'be based on serious and exigent circumstances.'" (Id. at p. 590.)

Applying the principles outlined in Sanchez to the instant action, there is no evidence of a continuing course of conduct against plaintiff; the incidents which triggered his distress were resolved in his favor seven months before he retired. The "unhappy or contentious atmosphere" fueled by his feelings toward Rafelson and perhaps his "anticipation, real or fancied" that sometime in the future he might encounter further trouble are not enough to justify voluntary termination and damages.

Because there is no substantial evidence of continuing "serious and exigent circumstances" to support a jury verdict of constructive discharge, plaintiff's decision to resign was unreasonable as a matter of law, based as it was on purely subjective feelings and speculation about the future. In a recent decision, another division of this court found an employee's decision to resign was unreasonable as a matter of law, since it was based on nothing more than a poor performance rating, demotion, and reduction in pay. (Soules v. Cadam, Inc., supra, 2 Cal.App.4th at 400-401 "[D]emotion of an employee or criticism of his job performance--even if alleged to be unfair or outrageous . . . does not create the intolerable working conditions necessary to support a claim of constructive discharge"]; see also Valdez v. City of Los Angeles (1991) 231 Cal.App.3d 1043, 1056.) Soules recognizes that, in the area of constructive discharge, clear lines must be drawn so that every instance of employee dissatisfaction does not precipitate voluntary resignation and a follow-on lawsuit. Certainly where, as here, the employer has responded to the employee's complaints and rectified the problems presented, there can be no basis for liability. The instant case presents conditions far less tangible and objective

than those presented and found insufficient in Soules; here, as in Soules, plaintiff's resignation was unreasonable as a matter of law and no constructive discharge occurred. Thus, the trial court should have granted Hughes' motion for judgment notwithstanding the verdict.

B. Plaintiff Completely Failed To Meet His Burden Of Proof On Damages.

Even if there were substantial evidence to support the jury's verdict on the issue of liability (there was not), there was no substantial evidence of damages.

As evidence of damages, plaintiff offered the opinion of actuary Clyde Lonergan that he had sustained economic loss in the sum of $638,890. (RT 639.) But the opinion of an expert "is no better than the reasons given for it." (White v. State of California (1971) 21 Cal.App.3d 738, 760.) If the opinion is "'not based upon facts otherwise proved, or assumes facts contrary to the only proof, it cannot rise to the dignity of substantial evidence.'" (Ibid; emphasis and citation omitted.) That is, "[w]here an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value." (Pacific Gas & Electric Co. v. Zuckerman (1987) 189 Cal.App.3d 1113, 1135; Hyatt v. Sierra Boat Co. (1978) 79 Cal.App.3d 325, 338-339; Richard v. Scott (1978) 79 Cal.App.3d 57, 63.)

Except for Lonergan's uncorroborated opinion that plaintiff suffered a loss of $638,890, there was no evidence that plaintiff suffered any loss at all. Plaintiff simply omitted proof of a critical element of his claim, namely, the evidentiary support for Lonergan's opinion regarding damages. There was no evidence of plaintiff's salary history at Hughes on the basis of which the salary he would have received had he stayed at Hughes could be calculated. There was no evidence of the value of his benefits package, a portion of which he continued to receive after retirement. (RT 834.) Lonergan conceded that any calculation of future earnings as an attorney was based purely on plaintiff's "guess." (RT 659.) Without any evidence of past earnings at Hughes and projected earnings had plaintiff stayed at Hughes, and without evidence of prior and projected earnings as an attorney based on more than speculation, there was no way to calculate the loss of earnings attributable to the alleged constructive discharge.

It was plaintiff's burden to prove the facts underlying his expert's opinion. He failed to do so. That failure of proof mandates that the judgment be reversed.

II.

THE TRIAL COURT WRONGFULLY USURPED THE JURY'S FUNCTION WHEN IT DECIDED THAT, AS A MATTER OF LAW, AN IMPLIED EMPLOYMENT CONTRACT EXISTED.

California Labor Code section 2922 provides that employment for an unspecified term may be terminated at the will of either party upon notice to the

other. Section 2922 "establishes a presumption of at-will employment if the parties have made no express oral or written agreement specifying the length of employment or the grounds for termination." (Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 677.) The presumption of at-will employment may be overcome by evidence of contrary intent, that is, by evidence that the parties intended and impliedly agreed that the employer's power to discharge was limited, for example, by a requirement that discharge be based only on good cause. (Ibid.) Factors to be examined include personnel policies or practices of the employer, the employee's length of service, actions or communications by the employer reflecting assurances of continued employment, and the practice of the industry in which the employee works. (Id. at p. 680.)

The question of whether such an implied agreement exists is one of fact. (Id. at p. 677; Luck v. Southern Pacific Transportation Co. (1990) 218 Cal.App.3d 1, 14.) As one court emphasized:

> "[T]he jury [has] the duty to determine the existence or nonexistence of . . . an implied in fact promise for some form of continued employment absent cause for firing. A congeries of factual matters must be examined and resolved in order to determine this question . . . These factual matters are for the jury (unless waived), not the court, to determine."

(Walker v. Northern San Diego County Hospital Dist. (1982) 135 Cal.App.3d 896, 905; emphasis in the original.)

It is undisputed here that there was no oral or written agreement between plaintiff and Hughes specifying the length of employment or grounds for termination. The only issue is whether there was an implied employment contract not to terminate except for good cause. The trial court in this case usurped the jury's function by treating a question of fact as one of law for the court, and refusing to instruct the jury on the issue.[18/]

It is apparent the trial court erroneously believed that the issue of whether an implied contract exists presents a purely legal question. (RT 1033-1035.) Thus, initially the court criticized plaintiff for failing to establish "as a matter of law" that an implied contract existed (RT 1033); but upon review of certain documents pertaining to policy and procedure, and purportedly supporting the inference of an implied contract, the court simply reversed course and found "as a matter of law" that he had. (RT 1035.)

In deciding the issue, the trial court reasoned that layoff procedures recognizing performance and skill were fatally inconsistent with the "absolute right to fire." (RT 1034.) Subsequently, at the hearing on post-trial motions, the trial court indicated that its criteria for finding an implied contract not to discharge except for cause were as follows: "big businesses with all these departments," "a

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18/ The trial court rejected two instructions offered by Hughes: (1) BAJI No. 10.10, which provides in pertinent part "an employment contract having no specified term may be terminated at will by the employer by giving notice to the employee, unless the employer and the employee have . . . [impliedly] agreed that the employee will not be discharged except for good cause," and (2) a special instruction which provided in pertinent part "in order to prevail on his claim of breach of contract, Plaintiff has the burden of proving by a preponderance of the evidence all of the facts necessary to establish that (1) Plaintiff and Defendant Hughes promised not to terminate Plaintiff except for good cause . . . ." (RT 1035, 1036; CT 252, 488-489.)

whole complicated system of procedures," "a system whereby if somebody is going to be laid off . . . there's a whole system of going to other parts of Hughes to seek employment." (RT 1148.)

In effect, the trial court determined that the statutorily-created at-will presumption, as a matter of law, is simply inapplicable to "big businesses" which have adopted internal procedures reflecting the corporation's decision to conduct itself in an economically rational manner. Hughes is aware of no authority to support the trial court's revolutionary ruling. The Legislature certainly has not created any such exception to Labor Code section 2922.[19/]

Nor did the evidence actually presented compel the conclusion that an implied employment contract existed. Indeed, there was more than ample evidence to support a reasonable jury's conclusion to the contrary.[20/] For example, plaintiff relied on evidence of policy and procedures as set forth in

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19/ We note there is something particularly awry when the mere existence of internal procedures is deemed as a matter of law to establish an implied employment contract, and yet when a company follows procedures to resolve an employee's complaint in his favor, i.e., delivers on the purported contract, it can nonetheless be found liable for breach.

20/ To the extent the trial court's erroneous conclusion of law, because of its effect--the failure to deliver BAJI No. 10.10--is viewed as instructional error, a reviewing court is required to analyze the issue in the light most favorable to the appellant. (Mock v. Michigan Millers Mutual Ins. Co. (1992) 4 Cal.App.4th 306, 322). The standard of review for instructional error is fully discussed in Section III, infra.

Exhibits 55 through 57.[21/] Exhibit 55, pertaining to problem resolution procedures, could be read as no more than a rational means of dealing with an employee's grievances while employed, in order to best facilitate the smooth functioning of the organization. With respect to Exhibit 56, there is absolutely no language in it from which a jury could infer a promise not to terminate except for good cause; in fact, Exhibit 56 suggests the opposite in that it expressly states that "[n]o commitments are made to any person regarding the duration of employment without Law office approval." (CT 903.) No evidence of any such commitment was presented at trial. To the contrary, plaintiff conceded he had never received any oral assurances of continued employment at Hughes. (RT 807.)

As to the layoff procedures set forth in Exhibit 57, if given the opportunity, a jury reasonably might not be persuaded that layoff procedures support the conclusion that Hughes had agreed not to terminate plaintiff except for cause. Layoff procedures present a special case of "for cause" termination, where cause is economic downturn; but the fact that a company has procedures which it follows under those special circumstances, or that it may terminate employment for specified causes, does not necessarily mean the company cannot otherwise release an employee at will. That is, it cannot be said that the existence of layoff procedures per se means an implied contract. Moreover, an employer which has specified some causes for termination should not necessarily be limited to

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21/ Exhibit 55 (CT 896-899) sets forth the "Employee Problem Resolution Procedure" at Hughes. Exhibit 56 (CT 900-907) sets forth general policies regarding hiring and promotion practices at Hughes. Exhibit 57 (CT 908-911) sets forth layoff procedures at Hughes.

terminating only for those causes, or for cause generally. For example, if an employer has stated employees partaking of illegal drugs on the job will be fired, a jury might reasonably not be persuaded that he is now contractually bound not to terminate any employee except for cause.

There was also evidence that plaintiff had been employed at Hughes for a substantial period of time and had received good performance appraisals and merit increases. However, a recent dissent illustrates that reasonable minds can disagree on the significance of such factors. In Wood v. Loyola Marymount University (1990) 218 Cal.App.3d 661, an employee of 15 years, who had received assurances of continued employment, was fired. The trial court granted summary judgment in favor of the employer, and the Court of Appeal reversed, finding a triable issue of fact on the question of the existence of an implied contract. Acting Presiding Justice Compton stated in dissent: "The suggestion in some recent court decisions that somehow a binding contract of employment can be 'implied' by nothing more than satisfactory performance by the employee and praise and promotion by the employer stands traditional concepts on their heads and will discourage employers from praising or promoting employees for fear that in doing so they are locking themselves into a binding contract which neither party ever contemplated." (218 Cal.App.3d at p. 672.)

The issue here is not whether there was evidence which arguably supported the existence of an implied contract; the issue is who decides the question. If the trial court was correct, and "big businesses" with complex rules governing employment are invariably deemed to have impliedly agreed that employment is

not at-will, then the presumption contained in Labor Code section 2922 has been rendered a nullity for a large segment of California's business population. Under existing authority, the jury decides whether an implied-in-fact agreement was entered into. The court's failure to deliver BAJI No. 10.10 was reversible error.

III.

THE TRIAL COURT SHOULD NOT HAVE DELIVERED THE HIGHLY PREJUDICIAL BAJI INSTRUCTION NO. 10.02 REGARDING CONSTRUCTIVE DISCHARGE; THE INSTRUCTION IS INTERNALLY INCONSISTENT AND DOES NOT PROPERLY REFLECT THE LAW.

In reviewing issues related to improper jury instructions, reviewing courts "must assume that the jury, had it been given proper instructions, might have drawn different inferences more favorable to [the appellant] and rendered a verdict in its favor on the issues as to which it was misinstructed." (Mock v. Michigan Millers Mutual Ins. Co., supra, 4 Cal.App.4th at p. 322 [citing Henderson v. Harnischfeger Corp. (1974) 12 Cal.3d 663, 674].)

Thus, the test of reversible error with respect to an erroneous instruction is "whether it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error." (Mitchell v. Gonzales (1991) 54 Cal.3d 1041, 1054.) Specifically, "if it appears that error in giving an improper instruction was likely to mislead the jury and thus to become a factor in

its verdict, it is prejudicial and ground for reversal. [Citation.] To put it another way, 'where it seems probable that the jury's verdict may have been based on the erroneous instruction prejudice appears and this court "should not speculate upon the basis of the verdict."' [Citations.]" (Henderson v. Harnischfeger Corp. (1974) 12 Cal.3d 663, 670; Cobbs v. Grant (1972) 8 Cal.3d 229, 238.) To determine whether there has been reversible error with respect to an improper jury instruction, a reviewing court must examine "the entire cause, including the evidence." (People v. Watson (1956) 46 Cal.2d 818, 836.)

It is well-established that giving conflicting or contradictory instructions on a material point is error. (E.g., Smith v. Makaroff (1957) 149 Cal.App.2d 655, 658; Pittam v. City of Riverside (1932) 128 Cal.App. 57, 68; see Chidester v. Consolidated Peoples Ditch Co. (1878) 53 Cal. 56, 58 [judgment reversed because two instructions were contradictory, and it was impossible to determine on which of them the jury acted].) BAJI No. 10.02 on the issue of constructive discharge, delivered over Hughes' objection, is internally contradictory; by the qualitatively different terms it employs to describe the nature of the conditions which give rise to a constructive discharge--specifically, "intolerable" and "unpleasant"--it announces different and conflicting standards to be applied in assessing the nature of conditions in the workplace. Thus, as explained more fully below, it was error to deliver BAJI No. 10.02.

Moreover, the error was prejudicial. By announcing conflicting standards, BAJI No. 10.02 suggests alternative showings, one a lesser burden than the other, may satisfy the elements of constructive discharge. The damaging effect of the ill-

chosen word, "unpleasant," is particularly evident where, as here, conditions existed which could fairly be characterized as unpleasant, but could not be fairly characterized as intolerable.

A. It Was Error To Deliver BAJI No. 10.02.

As stated previously, for there to be constructive discharge, conditions causing an employee to resign must have been "so intolerable or aggravated at the time of his resignation that a reasonable person in the employee's position would have resigned." (Zilmer v. Carnation Co. (1989) 215 Cal.App.3d 29, 38; emphasis added.) BAJI No. 10.02 (1989 revision) provides in pertinent part:

> "In determining whether the employee's resignation was a constructive termination of employment, you should consider . . . whether:
>
> > The employer forced the employee to work under such difficult or unpleasant circumstances as would cause a reasonable person to resign."

(BAJI No. 10.02 [emphasis added].)

Elsewhere in the instruction, conditions constituting constructive discharge are defined, albeit indirectly, in the clause, "the employer knew or reasonably should have known of the intolerable conditions." (BAJI No. 10.02, supra.)

The words "intolerable" and "unpleasant" are by no means synonymous in their common usage. The ordinary dictionary definitions of "intolerable"--which surely comport with the ordinary understanding of the average person or juror--are "unendurable," "insufferable," or "unbearable," whereas "unpleasant" is defined as "displeasing" or "disagreeable." (The Random House Dictionary of the English Language (2nd Ed., Unabridged 1987) pp. 1000, 2082; Webster's 9th New Collegiate Dictionary (1987) pp. 634, 1293.) Because these two words connote radically different situations, BAJI No. 10.02 is internally inconsistent as to the standard to be applied to assess the nature of workplace conditions. The obvious way for a juror confronted with this instruction to resolve the conflict between these competing standards is to view them as alternative standards, and to pick one or the other to guide his or her deliberations.

Moreover, by expressly directing the jury to determine the issue of constructive discharge by considering whether conditions were sufficiently "unpleasant" to justify resignation, BAJI No. 10.02 actually emphasizes the wrong standard, one that does not comport with the law as set forth in Zilmer and the other controlling decisions. In fact, BAJI No. 10.02 gives the jury permission to find constructive discharge in just that situation where the California Supreme Court, in Sanchez v. Unemployment Ins. Appeals Bd, supra, has indicated it should not be found--where an environment is not free of conflict, where superiors are imperious, where the atmosphere is unhappy or contentious--in sum, where conditions are unpleasant, even if not necessarily intolerable. BAJI No. 10.02 is

thus not only internally inconsistent, it does not properly reflect the law, and it was error to deliver it.

B. The Error Was Prejudicial.

While there is no precise formula for determining the prejudicial effect of instructional error, courts are guided by the five factors enumerated in LeMons v. Regents of University of California (1978) 21 Cal.3d 869, 876. LeMons, however, does not require that all five factors be involved in order for there to be prejudice. (Mock v. Michigan Millers Mutual Insurance Co., supra, 4 Cal.App.4th 306, 336, fn. 34.) In this case, one factor is dispositive: the degree of conflict in the evidence on critical issues.

Mock v. Michigan Millers Mutual Insurance Co., supra, concerned, among other things, the definition of the term "malice" in a jury instruction pertaining to punitive damages. The court explained: "'Conflict in the evidence' [is] another way of describing the closeness of the case." (4 Cal.App.4th at p. 335.) The Mock court found the case extremely close because "it is only by inferences from the undisputed evidence that a jury could justify any finding of malice. However, reasonable inferences could just as well be drawn which favor Michigan Millers [the appellant]." (Id. at p. 336 [emphasis in original]; see also Mitchell v. Gonzales, supra, 54 Cal.3d 1041, 1054-1056, [BAJI jury instruction disapproved where the conflict in the evidence was not great and thus "if properly instructed, it is reasonably probable that the jury would have found defendant's behavior to

have been a substantial factor, and thus a cause in fact, in (the decedent's) death"].)

An examination of the error and its effect in Mock is instructive, because it is analogous to the situation in this case. The error at issue was the omission of the defining phrase, "despicable conduct," in the instruction on malice. (Mock, supra, 4 Cal.App.4th at p. 336.) The instruction given simply required the jury to find Michigan Millers guilty of oppression. (Ibid.) The court noted it was compelled to assume that, had the trial court properly defined malice according to the more exacting standard imposed by the legislature, the jury might well have reached a different result. (Id. at pp. 336-337.) In reviewing the evidence the court found, for example, there was evidence of a desire on the part of the defendant insurance company to protect its own subrogation interest at the expense of the plaintiffs and that it had improperly asked for unnecessary documentation, thereby forcing the plaintiffs to file a lawsuit, but that reasonable minds could differ as to whether such conduct was "despicable" and could well conclude the defendant was simply guilty of ineptitude and negligence in the handling of the claim. The court concluded that "[w]hen a jury is presented with such a close case and then is misinstructed (1) as to the definition and standards for malice and (2) as to the circumstances under which nonintentional conduct may constitute malicious behavior, the result is surely prejudicial to the aggrieved defendant." (Id. at p. 338.)

Similarly, this action presents a "close case," at least insofar as the critical evidence is essentially undisputed, and that the evidence could be construed as

showing plaintiff's working situation was unpleasant. There was evidence that work was becoming scarce and jobs were at best uncertain at Hughes. (RT 469, 475, 805, 806, 808.) Plaintiff's experience on the specification tailoring and C-Nite projects demonstrated that there was considerable tension and dissension in the workplace engendered as much by declining business and urgent deadlines as by personality. (RT 742, 743, 761, 813, 839.) There was the evidence of events surrounding plaintiff's performance appraisal as described previously. (See Statement Of The Case, section A, subsection 3, and citations to the record therein.) There was also evidence that, although actions adverse to plaintiff were reversed, he would have to continue to work under a man he did not trust. (RT 554, 832, 1059.)

Based upon this evidence, the jury could well have concluded that plaintiff's working circumstances were "unpleasant," even if no reasonable person would conclude they were "intolerable." The error here was not the omission of a definition from the instruction but the addition of a second and misleading definition, "unpleasant" which suggested a standard less exacting than "intolerable." This Court must assume that, had the trial court properly defined the nature of the conditions justifying discharge pursuant to the more exacting standard ("intolerable"), the jury might well have reached a different result, i.e., the jury might have concluded plaintiff voluntarily retired to return to his law practice and that conditions fell short of being intolerable.

Finally, it should be emphasized there was evidence that plaintiff preferred the practice of law to employment as an engineer at Hughes where he was

overqualified for available work. (RT 801, 803, 810.) Moreover, there was evidence that the problems of which plaintiff had complained were remedied months before he decided to retire, that he retired before he even knew he was to continue work under Rafelson, and that he told his wife he was planning to retire because business was in decline. (RT 986, 832-834.) Nevertheless, the jury found for plaintiff. Thus, it appears that the "unpleasant" standard may well have been the factor which convinced the jury to find constructive discharge.

In sum, presenting the jury with an instruction which was crucial to the resolution of the principal issue in the case, but which was internally inconsistent, was prejudicial error under the circumstances of this case. On this basis alone, the judgment should be reversed.

IV.

THE TRIAL COURT PREJUDICIALLY ABUSED ITS DISCRETION WHEN IT ADMITTED INTO EVIDENCE PLAINTIFF'S HEARSAY MEMORANDA.

The memoranda generated by plaintiff between March and November 1987 were hearsay and should not have been admitted into evidence, and certainly not without an appropriate limiting instruction.[22/] Plaintiff's factual theory was that

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22/ The following exhibits are at issue in this appeal: Exhibit 11 (CT 759-766) dated 27 March 1987; Exhibit 12 (CT 767-774) dated 31 March 1987; Exhibit 16 (CT 793-794) (notated page of memo) dated 11 May 1987; Exhibit 17 (CT 795-803) (the full memo, no notation) dated 11 May 1987; Exhibit 18 (CT 804-808) (continued...)

he was an excellent employee and his supervisors were out to get him. He clearly intended to offer the memoranda to prove that theory, although the trial court advised him in no uncertain terms at the outset that he could not do so. (RT 252.) Through multiple hearsay, the memos presented plaintiff's version of events, based on rumor and statements purportedly made by others. Thus, for example, Rafelson is said to have told plaintiff that he had an "excellent reputation" at Hughes and that a former boss had "praised [him] to the sky." (CT 770.) Additionally, Rafelson is said to have told plaintiff, "Shafer [his supervisor on the C-Nite project] did a job on you." (CT 760.) In one memorandum, plaintiff says of his career at Hughes, "I have always had a good performance review." (CT 807-808.) Moreover, the memoranda contained conclusory allegations of deceit, fraud and conspiracy. (CT 808.)

As previously mentioned, the trial court agreed the memoranda were hearsay and promised to advise the jury that they were not being admitted for the truth but only to show a "paper blizzard" at Hughes over plaintiff's complaints. (RT 847.) However, the only instruction the court gave on the matter was BAJI No. 2.05. (RT 1107-1108; CT 391.) It states:

22/(...continued)
dated 1 June 1987; Exhibit 32 (CT 838-841) dated 6 October 1986; portions of Exhibit 82, plaintiff's personnel file including the above listed exhibits and also a memorandum to R. E. Battle dated 21 October 1987 (CT 1404-1416) and a memorandum to A. B. MacAller, dated 21 November 1987 (CT 1417-1418). The October and November memoranda were apparently not marked separately as exhibits, although plaintiff apparently thought he had done so, at least with respect to the October memorandum. (RT 282.)

"[Whenever evidence was admitted for a limited purpose, you must not consider it for any other purpose.]

Your attention was called to these matters when the evidence was admitted."

The memoranda, however, were not admitted when the jury was present, contrary to the assumptions underlying this instruction. Inexplicably, the trial court failed to follow through on its promise to give appropriate guidance to the jury. The jury never knew the memoranda were admitted for any reason other than for their truth. Clearly, the trial court erred.

Moreover, the error was highly prejudicial to Hughes. It is inconceivable that the jury would not use the memoranda as proof of the statements they contained, since the trial court never told them not to do so. Faced with any uncertainty about what happened or what kind of a place Hughes was, the jury had readily available self-serving documents designed to sort matters out, but purely from plaintiff's perspective. These documents, most of which were generated after plaintiff's complaints had been remedied, unfairly served plaintiff's cause to the extent they made up for his failure to present sufficient evidence of intolerable conditions. In other words, it is more than reasonably probable that a different verdict would have been reached had the jury not received these exhibits which vividly and unfairly colored the case in plaintiff's favor. Further, it must be said that, given the multiple hearsay problems and conclusory allegations

regarding fraud and conspiracy in the memoranda, a limiting instruction would not have been adequate to protect Hughes' rights in this matter. Hughes objected to the admission of these documents pursuant to Evidence Code section 352 on the ground that their prejudicial effects outweighed their probative value. (RT 845.) The trial court admitted the documents to prove "the blizzard of paper" that was occurring, a blizzard wholly generated by plaintiff. However, there was no dispute as to notice to Hughes' supervisors of plaintiff's discontent. Thus, the probative value of these memoranda was marginal at best and far outweighed by the prejudicial effect of inherently untrustworthy unsworn statements by someone who, for whatever reason, may have been misperceiving or inaccurately representing events. The presence of these documents in the jury room rendered the trial irredeemably unfair to Hughes, and at the least mandates a new trial.

CONCLUSION

The judgment against Hughes Aircraft Company should not stand. The verdict was not supported by substantial evidence; to the contrary, plaintiff's decision to retire, based on nothing more than his hostile feelings towards his supervisor and speculation about what the future might bring, was unreasonable as a matter of law. Moreover, any sum awarded plaintiff was the product of pure guesswork because of the complete failure of proof on the issues of damages. And by taking away from the jury the issue of whether an implied-in-fact agreement existed, the trial court usurped the Legislature's function by unilaterally

abrogating Labor Code section 2922. At the least, a new trial should be had to remedy the unfairness engendered by the trial court's prejudicial instructional and evidentiary errors.

Thus, for all these reasons, Hughes Aircraft Company respectfully urges that the judgment be reversed and a new judgment entered in favor of Hughes Aircraft Company or that in the alternative, the matter be remanded for retrial.

Dated: February 16, 1993

Respectfully submitted,

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