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 REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF

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INTRODUCTION

Earlier this year, former Court of Appeal Justice Elwood Lui, acting as counsel for the defendant in a constructive discharge case, observed in a letter to the Los Angeles Daily Journal that the constructive discharge "'area of the law is quickly running out of control and the citizens of California will be the ultimate victims and losers.'" (Letter to the Editor, Los Angeles Daily Journal (June 4, 1993) p. 7, col. 1.) The instant case represents an extreme example of the syndrome Justice Lui warned about. For in this case, an employee who quit his job following an altercation with his supervisor has won hundreds of thousands of dollars in damages for wrongful discharge despite the fact that the employer corrected the problems of which the employee had complained; at the time the employee resigned, his only remaining complaint was that he did not wish to continue working for the same supervisor. If California law permits an employee to quit and recover damages under these circumstances, employers have been stripped of the most fundamental discretion in operating their businesses and the corporate exodus from our State has only just begun.

Although, as Justice Lui observed, California constructive discharge law is already dangerously weighted in favor of the plaintiff, even the current law does not countenance the result reached here. As its name implies, the action for constructive discharge originally developed as a means of preventing an employer from circumventing a wrongful discharge action by forcing the employee's resignation, and in many jurisdictions the plaintiff must prove the employer actually intended to force resignation. (See, e.g., cases collected in Brady v. Elixir Industries (1987) 196

Cal.App.3d 1299, 1305 fn. 5.) Although California does not require proof of such intent, the plaintiff must still prove he was subjected to truly intolerable conditions at the time of discharge, and that the employer failed to correct those conditions. It is these dual prongs of the law on which plaintiff's action founders.

In responding to Hughes' arguments on this issue, plaintiff continues to complain about his supervisor, but his principal strategy is to attempt to obscure the critical defects in his case by raising entirely new factual theories of uncorrected complaints. Not only is this appellate tactic plainly forbidden by abundant case authority, but review of the record and the law reveals that plaintiff's claims are simply without evidentiary or legal support. What this case boils down to is an employee who, when his employer responded to all his complaints by correcting the perceived problems but drew the line at permitting the employee to dictate who would be his supervisor, quit to pursue an alternative profession. Even California law does not permit recovery of damages under these circumstances.

But the trial in this case suffered from an even more basic defect--the trial court's indefensible decision to deprive Hughes of its right to a jury trial on the issue of whether an implied employment contract existed. Since 1872, it has been the fundamental public policy of California that employment is presumptively "at will," and that the burden is on the employee to prove an express or implied contract to the contrary. Whether the facts and circumstances of the employment relationship in any individual case give rise to an implied agreement not to terminate except for cause is quintessentially a factual issue for the jury. The trial court's astounding ruling that because the defendant is a "big business" with rational layoff procedures it had no right to a jury trial on the issue is plain error.

Plaintiff's strategy to counter these arguments is to attempt to change the nature of the issue by, for example, focussing on the substance of a jury instruction on implied contract, when the real issue is whether the jury should have been instructed at all. In addition, plaintiff wrongly assigns to Hughes the burden of proving the nonexistence of an implied contract; it is clear from Labor Code section 2922 that the burden was on plaintiff to prove the nonexistence of an at-will employment relationship. In any event, the issue on this appeal is not who has the burden of proof with respect to an implied contract, but rather who decides the issue, given the proof presented.

There is equally little substance to plaintiff's response to the other prejudicial errors identified in the opening brief. For example, with respect to the lack of evidentiary support for the damages awarded, he notes that an exhibit composed of original documents brought to trial by Hughes' counsel contained some salary history information. But that information does not cure plaintiff's substantial evidence problem with respect to proving loss; even assuming the evidence was properly tendered to the jury (it was not), there was, for example, no evidence connecting specific salary history information to his expert's testimony; the opinion as to plaintiff's loss remains without support in proven fact.

With respect to the internally contradictory language of BAJI No. 10.02, plaintiff argues, among other things, that the "reasonable person" standard should be applied to the determination of whether there was constructive discharge, and, further, that the verdict was unanimous, which, in his view, indicates no prejudice resulted from delivering the instruction if it was error to do so. The fact that all the jurors may have come to the same conclusion on the issue of constructive discharge

presumably from the perspective of a "reasonable person" does not obviate the fact that BAJI No. 10.02 announces conflicting standards to be applied in assessing the nature of conditions in the workplace -- "intolerable" or merely "unpleasant."

Finally, with respect to the hearsay memoranda, plaintiff concedes, by not disputing, that their admission into evidence was error, but argues, among other things, there was no prejudice because the memoranda addressed events testified to at trial. That there may have been some testimony about some of the events themselves which was within the parameters set by the rules of evidence does nothing to nullify the prejudice to Hughes by the trial court's permitting the jury to have in hand plaintiff's self-generated memoranda replete with hearsay, innuendo, rumor and speculation -- without at least instructing the jury of the very limited purpose for which such evidence was admitted.

In sum, the judgment in favor of plaintiff should be reversed with directions that judgment be entered in favor of Hughes.[1/]

1/ Hughes' responses to plaintiff's arguments as cross-appellant are addressed beginning at page 34.

LEGAL ARGUMENT

I.

THE JUDGMENT MUST BE REVERSED BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE OF CONSTRUCTIVE DISCHARGE; ALL SO-CALLED INTOLERABLE CONDITIONS WERE REMEDIED BY HUGHES.

In its opening brief, Hughes demonstrated that plaintiff failed to prove constructive discharge because the conditions about which he complained had been remedied well before his retirement in December 1987. (AOB 20-22.) In an effort to save his judgment, plaintiff now points to three additional matters purportedly not resolved which he contends constitute substantial evidence of intolerable conditions compelling his retirement: that his supervisor retained his personnel file, that Hughes failed to remedy a purported nepotism problem involving Ephraim and Bernard Shatz, and that derogatory information was left on company databases and returned to his file. (RB 17-21.)

Plaintiff's arguments are so utterly bereft of merit that they compellingly demonstrate Hughes' point. The matters to which plaintiff refers -- dissatisfaction with his supervisor, unhappiness about intra-company "nepotism," and the existence of stray bits of negative data about plaintiff in company records -- are precisely the sort of minor occurrences which are "a normal part of the employment relationship" and which cannot, as a matter of law, constitute "intolerable conditions" justifying an

employee to quit and sue. (Soules v. Cadam (1991) 2 Cal.App.4th 390, 401.) But even more fundamentally, the evidence simply does not support plaintiff's claims.

A. Rafelson's Custody Of Plaintiff's Personnel File As A Matter Of Law Cannot Be Deemed An Intolerable Condition.

Plaintiff contends he made repeated requests to have his personnel file taken from his immediate supervisor, Rafelson. (RB 17.) While there was evidence that he did make such requests and that Human Resources returned the file to Rafelson at the conclusion of the investigation (RT 249; see RT 947), these facts do not amount to intolerable working conditions compelling retirement.

Plaintiff's argument is no more than a variation on the theme of dissatisfaction with a supervisor. As Hughes' opening brief pointed out, intolerable working conditions to support constructive discharge may not be based upon plaintiff's hostility toward and distrust of Rafelson in light of the California Supreme Court's decision in Sanchez v. Unemployment Ins. Appeals Bd. (1984) 36 Cal.3d 575, a case decided in the context of worker's compensation law but clearly applicable here. (AOB 22-23.) The Supreme Court emphasized that an employee cannot quit and be compensated simply because he is unhappy with something the employer said or did, or because he anticipates that he might encounter problems in the future. (36 Cal.3d at pp. 587, 590.)

Plaintiff attempts to circumvent Sanchez by arguing that, once his personnel file was returned to Rafelson, Rafelson continued on a course of "falsification" with respect to it. (RB 18.) The record does not support this argument. Plaintiff's claims

rely primarily on events which occurred before the investigation was undertaken and the file restored to order. Thus, he notes that Yvonne Ellis admitted in testimony that Rafelson came to her office with his file for purposes of terminating plaintiff for cause. (RB 18.) It is unclear what significance plaintiff attributes to the Ellis-Rafelson discussion for purposes of this argument; however, the uncontroverted evidence established that the first time Ellis saw plaintiff's file was in January 1987, when she discussed with Rafelson a possible layoff of plaintiff and others (RT 158-160), and the last time she saw it was during her investigation of plaintiff's complaints in April. (RT 196-197.) Since plaintiff admits his file was in order by April 1987 (RT 1018), the discussion is irrelevant to plaintiff's argument.

Plaintiff also contends Rafelson admitted he put documents critical of plaintiff in the file and that he made appropriate follow-up changes to plaintiff's personnel file after plaintiff's performance rating was dropped to a 4 in January 1987. (RB 18.) That Rafelson may have placed documents, properly or improperly, in the file between January and April is irrelevant, since the offending documents were removed and plaintiff's file was in order by April 1987. (RB 12; RT 824, 970, 975, 1017-1018.)

As for events after April 1987, plaintiff misstates the evidence when he asserts Rafelson "admits putting back in the file" the layoff approval request. (RB 14.) Rafelson's testimony was that he placed that document in the file "at one time." (RT 612.) There is no basis for inferring that time was other than in late 1986 or January 1987, when there were discussions regarding layoff. (RT 158, 160, 571, 615.)

Plaintiff's contention that Rafelson returned documents to the file which had been removed at the conclusion of the investigation is also based on Exhibit 82 which

was composed of original documents brought to trial by Hughes' counsel.[2/] The condition of plaintiff's file at time of trial is wholly irrelevant to his constructive discharge claim because to prove constructive discharge, an employee must show that conditions forcing resignation were intolerable "at the time of his resignation." (Zilmer v. Carnation Co. (1989) 215 Cal.App.3d 29, 39.) Moreover, Rafelson's testimony indicates only that he put documents in the file as the occurrences happened, on or about the date the documents bear, that is, before April 1987. (RT 686; see RT 688.)[3/]

Finally, the documents which were generated by Rafelson after the investigation and which were included in Exhibit 82 do not constitute evidence of "falsification."[4/] As a threshold matter, as a matter of law, it cannot be actionable

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2/ Hughes' counsel brought to trial a compilation of original documents pertaining to plaintiff and generated during his career at Hughes. (See RT 596.) During the course of discussions at bench, this compilation was referred to as plaintiff's Department Personnel File and characterized as the "full file." (RT 595.) A copy of a portion of the Department Personnel File, apparently without the documents which had been removed subsequent to the investigation, was produced during discovery. (See RT 593-594.) There is no evidence in the record to suggest that the Department Personnel File, as it existed between April and December 1987, was in the form of the "full file" brought to trial. For further discussion, see subsection C below.

3/ For example, a memo to the file prepared by Rafelson regarding plaintiff's performance before joining his department was dated December 15, 1986. (CT 1054.) Rafelson's memo to the file regarding plaintiff's performance on the C-Nite project was dated January 14, 1987. (CT 748.) Other memoranda he prepared pertaining to the possible lay-off of plaintiff were dated January 30, 1987, February 6, 1987, February 10, 1987. (CT 754, 756, 758.) An unsigned notice of lay-off was dated January 23, 1987. (CT 750.)

4/ For example, there was a memo to the file dated May 15, 1987, regarding plaintiff's refusal to meet with Rafelson (CT 1433), and two memos generated by Rafelson regarding criticism of plaintiff by a project manager and plaintiff's apparent failure to obtain a doctor's statement to support the extended sick leave he was taking, of which initially his supervisors were unaware. (CT 1424, 1425.) There was also a (continued...)

that a supervisor puts documents criticizing an employee into his file; it is standard operating procedure in the employment context. Nor is there any significance to the fact that Rafelson may have placed documents in the file without telling plaintiff. (RB 7, 18; RT 520.) One cannot infer from that conduct any attempt to hide or surreptitiously create problems for plaintiff when it is undisputed plaintiff had the right to inspect the file. Finally, criticism, without more, does not equate to "falsification," just because plaintiff may believe the criticism is unfounded.[5/]

B. Plaintiff's Argument Regarding The Shatz Matter Is A Red Herring, Completely Irrelevant And Unsubstantiated.

Plaintiff argues Hughes did not resolve the "Bernard Shatz matter," which in his view, constitutes an intolerable condition justifying his retirement and collection of damages. (RB 18.) While far from clear, his point appears to be that the "punitive action" to which he was subjected (i.e., he was not given a merit increase and his rating was reduced) "could" have been the result of a complaint by Bernard Shatz to

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4/(...continued)
memo to plaintiff regarding certain administrative matters. (CT 1442-43.) These documents and the events behind them were not specifically offered at trial as evidence to support constructive discharge. In any event, they prove nothing except that the "environment was not free of conflict," a situation which does not support voluntary retirement. (Sanchez v. Unemployment Ins. Appeals Bd., supra, 36 Cal.3d at 590, conc. opn. of Mosk, J.)

5/ The only evidence of possible tampering or "falsification" with plaintiff's personnel file was the evidence that an August 1986 performance evaluation had been reduced by white-out from 2 to 3. (RT 768.) That document was removed from the file subsequent to the investigation. (RT 975, 987; see AOB 10, fn. 8, and 21.)

management about plaintiff's treatment of Ephraim Shatz. (Ibid.) If that were so, plaintiff contends, it would be nepotism, and against Hughes' policy. (Ibid.)

As a threshold matter, this argument is entirely speculative; there is no evidence that either the reduction of plaintiff's performance rating or plaintiff's failure to get a raise was in retaliation for plaintiff's treatment of Ephraim Shatz, or that Bernard Shatz was involved. At most, there is evidence that plaintiff attributed a comment in his December 1986 appraisal regarding management's perception of him as a poor people manager to his problems with Shatz on the specification tailoring project (RT 745), and that Rafelson had not passed plaintiff's memo regarding his problems with Shatz to supervisors because of the possible involvement of Bernard Shatz. (RT 747.) However, the undisputed evidence established that the rating reduction was triggered by plaintiff's conduct on the C-Nite project, a project not involving Shatz. (RT 314-315, 775.)

In any event, even if Bernard Shatz were behind "punitive action" taken against plaintiff, that action was reversed in plaintiff's favor; thus this line of argument is wholly irrelevant to the issue of whether intolerable conditions existed at the time of plaintiff's voluntary retirement.

Plaintiff may mean to argue that his retirement was warranted by the mere fact that "nepotism" purportedly existed at Hughes -- Bernard and Ephraim Shatz worked in the same division, allegedly in violation of Hughes' own policies -- and Hughes did not investigate his charges to that effect. (RB 18-19.) However, the mere existence of nepotism at Hughes is irrelevant to the issue of constructive discharge if that practice has no impact on the employee's working situation. (See Zilmer v. Carnation Co., supra, 215 Cal.App.3d 29, 38 [employee must demonstrate employer had

knowledge of the intolerable conditions and "of their impact" on the employee].) The only impact alleged (but not substantiated by evidence) was nullified by Hughes' remedial action.

Finally, the uncontroverted evidence is that Bernard Shatz left Hughes in November 1986. (RT 734.) That was more than a year before plaintiff's retirement, and before any of his problems developed. To prove his resignation was compelled, a plaintiff must prove an employer "could have remedied the situation but did not." (Zilmer v. Carnation Co., supra, 215 Cal.App.3d at 38.) In light of the fact that Bernard Shatz had left Hughes, there was no situation to be remedied. There was nothing to investigate. Plaintiff's argument, in sum, is a red herring intended to distract from the inevitable conclusion that plaintiff retired not because he was compelled to, but because he wanted to.

C. Plaintiff's New Theories Regarding Databases And His Personnel File Are Not Supported By The Evidence; Moreover, The State Of Any Files At The Time Of Trial Is Wholly Irrelevant.

Plaintiff argues Hughes may not contend it remedied his situation because it cannot prove it corrected company databases, and because Exhibit 82, compiled of original documents brought to trial by Hughes' counsel, somehow proves documents, such as the layoff approval request and the appraisal with a 4 rating, were surreptitiously returned to his file. (RB 14, 20.) This argument is deficient in multiple respects.

1. The Databases

If plaintiff's factual theory is that the condition of the databases constituted an intolerable condition justifying his retirement, the burden was on plaintiff, not on Hughes as plaintiff contends (RB 14, 20), to prove the condition of the databases at the time of his retirement and Hughes' refusal to correct them. As it happens, while there is evidence databases were changed from a 3 to a 4 in January 1987, there is nothing in the record to suggest they were not corrected along with plaintiff's other records when plaintiff's 3 rating was restored in April 1987. Except for one printout which is illegible (CT 930),[6/] the computer printouts upon which plaintiff relies bear the January 1987 date, before the records were corrected. (CT 928, 932.) There is no evidence they were run at any time other than in January 1987, and hence no evidence that the databases were inaccurate at the time plaintiff resigned.[7/]

Significantly, plaintiff made no mention of databases in his lengthy complaint, and apparently learned only during discovery that databases had been changed to reflect a 4 when his rating was lowered in January 1987. (RB 7.) This creates an insurmountable causation problem: a condition of which an employee is ignorant at

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6/ During testimony, it was established that a copy of the same document, designated as Exhibit 69 (CT 930), was attached to a deposition transcript and bore the date 1/23/87. (RT 210-212.)

7/ Moreover, even if the databases were not corrected, the fact that stray information (not generally available to Hughes personnel in any event [RT 226]) had been overlooked and remained in a computer would not amount to an intolerable condition. At worst, it would suggest an oversight which plaintiff could have had taken care of, if he had simply asked -- just as the other documents were taken care of.

the time of termination can hardly be deemed an intolerable condition compelling him to resign.

Moreover, plaintiff made no mention at trial of this new factual theory -- that Hughes knew or should have known that its databases reflected a 4 instead of a 3 rating after the investigation and after his 3 rating had supposedly been restored, and could have but failed to correct them. A party may not raise for the first time on appeal a factual theory not presented to the jury. In Richmond v. Dart Industries, Inc. (1987) 196 Cal.App.3d 869, 874, the Third District Court of Appeal summarized the rule:

> "The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant . . . The doctrine has been applied where a plaintiff on appeal asserts liability premised on a different negligent act from that at issue at trial." (Id. at 874, internal quotes and citations omitted.)

This Court should in its discretion apply the rule in this instance if for no other reason than that the theory is not supported by evidence that Hughes failed to correct its databases and hence does not serve to overcome plaintiff's substantial evidence problem.

2. Exhibit 82.

Plaintiff attempts to make much of the fact that Hughes' counsel had at trial originals of documents removed from his file at the conclusion of the investigation. (RB 20, 37.) The complete "personnel file" pertaining to plaintiff which counsel brought to trial became Exhibit 82. (See RT 596-598.) Here, plaintiff contends, is the proof of the continuing "falsification" of his file. (RB 18.) But again, plaintiff reasons backwards: he insists information discovered at trial justifies his voluntary retirement three years earlier. This argument obviously misses the mark. If plaintiff's factual theory in support of constructive discharge is that the offending documents were put back in the file after he had viewed it with Ellis and before he left Hughes, and that the condition of his file created an intolerable condition compelling retirement, then it was his burden to prove that Exhibit 82 represented the state of his personnel file as of the date he retired, December 1987, and that it was a factor compelling his retirement. This he failed to do. There is no evidence that his file upon retirement was in any condition other than the condition it was in when Ellis completed her investigation and resolved his complaints.

Nor can any impropriety or the undoing of any remedy afforded plaintiff be inferred from the fact that three years later, at trial, counsel for Hughes had a complete file, which in all likelihood contained the originals of most if not all the documents ever generated about plaintiff.[8/] The most which can be inferred is that,

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8/ As a general rule of practice, the originals of all pertinent documents are at least to be made available at trial, even though copies may usually be admitted into evidence. (Evidence Code §§ 1500, 1510; People v. Marcus (1973) 31 Cal.App.3d 367, 370.) In this case, in conformity with such practice, Hughes' counsel brought (continued...)

for the purposes of trial (or storage), Hughes collected all documents pertaining to plaintiff in one file to be drawn upon as needed.

In sum, it is obvious that in propounding his factual theories regarding databases and Exhibit 82 for the first time on appeal, plaintiff is grasping at straws in a desperate attempt to hold onto the judgment. These arguments should be summarily rejected because they are without substance or relevance to plaintiff's constructive discharge claim. Moreover, plaintiff's theories regarding nepotism and the custody of his personnel file are equally without merit and unavailing. Judgment must be reversed because plaintiff's complaints were remedied; it is apparent there is nothing Hughes could have done to satisfy this employee, who obviously wanted to leave the company and be compensated for doing so.

8/(...continued)
originals to trial, and on the first day of trial plaintiff in fact requested that at least one original be made available. (RT 599.) Plaintiff had earlier served notice on Hughes that all originals were to be preserved. (CT 69.)

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED HUGHES A JURY TRIAL ON THE ISSUE OF WHETHER AN IMPLIED EMPLOYMENT CONTRACT EXISTED.

A. Hughes Properly Requested That The Jury Be Instructed On The Issue Of At-Will Employment And Implied Contract.

In its opening brief, Hughes explained that the trial court usurped the jury's function by treating a question of fact as to the existence of an implied contract as one of law for the court. (AOB 26-32.) Thus, the trial court refused to deliver BAJI No. 10.10 which, reflecting Labor Code section 2922, provides that employment contracts of no specified term are terminable at will, absent evidence of an agreement to the contrary.

In response to Hughes' argument, plaintiff first contends that if Hughes wanted an instruction on implied contract, it should have requested one. (RB 25.) What Hughes wanted was an instruction on the presumption that employment was at will, and it therefore requested BAJI No. 10.10. (See AOB 28, n. 18; RT 1035-1036, CT 252, 488-489.) If plaintiff was contending there was an implied contract, it was up to him to request the appropriate jury instruction outlining the factors to be considered in determining whether an implied contract exists. But the trial court subverted the whole effort and determined not to instruct the jury at all on the implied contract issue. The court did so because it erroneously believed the question was a purely

legal one, that Labor Code section 2922 simply did not apply to "big businesses," and that, apparently, all "big businesses" as a matter of law are contractually bound not to terminate their employees except for good cause. (RT 1033-1035, 1148.) Any request for further instruction would have been futile given the trial court's position that Hughes was not entitled to a jury trial on the issue.

B. The Burden Was On Plaintiff To Prove The Nonexistence Of An At-Will Employment Relationship.

Plaintiff also contends the burden was on Hughes to prove an implied contract did not exist. (RB 26.)[9/] To support his position, plaintiff relies on Wood v. Loyola Marymount University (1990) 218 Cal.App.3d 661. However, plaintiff ignores the procedural posture of Wood. In Wood, summary judgment had been granted in favor of the defendant university. In reversing, the Court of Appeal did note that it was the university's burden to prove an implied contract did not exist. (Id. at 665.) But that was because, in the context of summary judgment, the burden was on the defendant moving party to conclusively negate elements of its opponent's claims. (Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092, 1107.) The same does not hold true at trial, where obviously the burden is on the plaintiff to prove all elements essential to his claim.

In this instance, given the statutory presumption of at-will employment, it was plaintiff's burden to prove the nonexistence of an at-will relationship by proving a

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9/ Plaintiff's point is apparently that if Hughes' evidence of the nonexistence of an implied contract was insufficient, the trial court was entitled to take the matter from the jury.

binding contract existed. As previously stated (AOB 27), Labor Code section 2922 establishes a presumption of at-will employment. (Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 677.) "A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action." (Evid. Code, § 600, subd. (a).) A presumption affecting the burden of proof is one "established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied . . ." (Evid. Code, § 605.) Labor Code section 2922 reflects the public policy of California that an employment relationship having no specified term may be terminated at will. (Hejmadi v. AMFAC, Inc. (1988) 202 Cal.App.3d 525, 544.) Thus, the at-will presumption is one affecting the burden of proof. That being the case, the party against whom the presumption operates has the burden of proof "as to the nonexistence of the presumed fact." (Evid. C. § 606.) In this instance, the presumed fact is an at-will employment relationship between plaintiff and Hughes. Thus, it was plaintiff's burden to prove the nonexistence of the at-will relationship by proving the existence of an implied contract. (See Foley v. Interactive Data Corp., supra, 47 Cal.3d at 677 [the at-will presumption "may . . . be overcome by evidence that . . . the parties agreed that the employer's power to terminate would be limited in some way . . . "].)

C. It Was For The Jury To Determine Whether The Presumption Of At-Will Employment Had Been Overcome.

It is up to the jury to decide whether a presumption affecting the burden of proof has been overcome. That is to say, if there is some evidence supporting the nonexistence of an at-will relationship, i.e., supporting an implied contract, the jury decides by the appropriate standard whether it is enough; if the plaintiff presents no evidence of an implied contract, then the presumption applies and the jury must find the employment is at will. (See generally 2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 46.3, pp. 1700-1703; 2 BAJI, Cal. Jury Inst., Civ. (7th ed. 1986) Appendix C, p. 338.)[10/]

As Hughes has pointed out (AOB 27), the question of whether an implied agreement exists is one of fact. (Foley v. Interactive Data Corp., supra, 47 Cal.3d at 677; Luck v. Southern Pacific Transportation Co. (1990) 218 Cal.App.3d 1, 14.) As Hughes also pointed out (AOB 31), at the very least, reasonable minds might disagree that evidence of length of employment, promotion, and raises were enough to prove a binding contract of employment. (See Wood v. Loyola Marymount University, supra, 218 Cal.App.3d at pp. 671-672, Acting P.J. Compton, dissenting, ["The suggestion . . . that somehow a binding contract of employment can be 'implied' by nothing more than satisfactory performance by the employee and praise and promotion . . . 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

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10/ The basic fact giving rise to the at-will presumption -- that plaintiff was employed by Hughes -- was undisputed in this action.

binding contract which neither party ever contemplated."]; see also Miller v. Pepsi-Cola Bottling Co. (1989) 210 Cal.App.3d 1554, 1559 [eleven years of employment with promotions and raises as a matter of law does not create enforceable contract].) This is particularly so where there is affirmative evidence that plaintiff never received oral assurances of continuing employment at Hughes, and it was the announced hiring policy at Hughes that "[n]o commitments are made to any person regarding the duration of employment without law office approval." (CT 903; RT 807.) Moreover, the fact that a company has layoff procedures or that it may terminate "for cause," e.g., for infractions of company rules, does not necessarily mean it cannot otherwise release an employee at will. (See discussion AOB 30-31.) At the very least, the trial court was required to instruct the jury so it could decide the question of whether an implied contract existed.

D. Denial Of A Jury Trial On An Issue Is Per Se Reversible Error.

Finally, plaintiff appears to argue that if it was error to take the issue from the jury, the error was harmless. (RB 28-29.) However, the right to a jury trial is guaranteed by the California Constitution. (Cal. Const., Art. I, § 16.) Hughes was wrongfully deprived of its right to a trial by jury on the issue of whether an implied contract existed. Such deprivation is reversible error per se, obviating the need to demonstrate actual prejudice, because only reversal will prevent a miscarriage of justice. (Selby Constructors v. McCarthy (1979) 91 Cal.App.3d 517, 527; see Phillips v. G.L. Truman Excavation Co. (1961) 55 Cal.2d 801, 808 [refusal to give instruction on theory where there is some evidence to support it is denial of right to

jury trial and necessarily prejudicial]; see Ng v. Hudson (1977) 75 Cal.App.3d 250, 261 [inherently prejudicial to refuse instruction on theories supported by substantial evidence].)[11/]

III.

THE JUDGMENT MUST BE REVERSED BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE OF DAMAGES.

In its opening brief, Hughes argued that plaintiff failed to meet his burden of proof on damages because he failed to prove the facts underlying his expert's opinion regarding economic loss. (AOB 25-26.) In response, plaintiff contends that Hughes has waived the right to raise this argument and that, although never mentioned at trial, there was substantial evidence of damages insofar as Exhibit 82 contained documents pertaining to salary history. (RB 21-23.) Both arguments are without merit.

11/ None of these cases involved presumptions affecting the burden of proof, and thus the parties requesting the pertinent instructions necessarily were required to put on evidence to support their respective theories. As explained above, Hughes as a matter of law had the benefit of the presumption of at-will employment, and was entitled to BAJI No. 10.10, and to a jury determination of the issue, upon proof of the foundational fact of employment.

A. Hughes Did Not In Any Manner Waive The Right To Argue There Was No Substantial Evidence Of Damages.

Plaintiff contends Hughes waived the right to argue there was no substantial evidence of damages, first, because it failed to object to or move to strike the testimony of Lonergan, his expert on damages, and second, because it requested a jury instruction (BAJI No. 2.40) regarding expert testimony. (RB 22-23.) These arguments are nonsense.

With respect to Lonergan's testimony, plaintiff misses the point entirely. The issue is not the admissibility of Lonergan's opinion, but rather plaintiff's failure to prove the facts supporting that opinion. Plaintiff's first and only attempt to prove those facts came after trial in response to post-trial motions when plaintiff offered the trial court declarations he and Lonergan had prepared on the subject. (CT 695-713.)[12/]

Plaintiff relies on Neilsen v. Uyechi (1959) 172 Cal.App.2d 508, for the proposition that Hughes "cannot object to lack of direct proof where no objection was made" at trial. (RB 22.) Neilsen is simply inapposite. In Neilsen, on appeal, respondents were not permitted to object for the first time that there had been no direct proof of the fact that appellant's driver had died. However, the fact of the driver's death had not been an issue at trial; counsel for both sides had made statements to the effect that the driver was dead and had proceeded on that assumption. (Id. at 514.) In this case, by contrast, plaintiff's economic loss clearly was at issue at trial, and nothing in the record indicates the parties were proceeding

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12/ The trial court appropriately refused to consider the declarations. (RT 1142.)

on the assumption that the basic facts underlying the opinion evidence were deemed true or uncontested, or that there was any agreement even what those facts were.

As to waiver by virtue of a request for a jury instruction, plaintiff apparently believes that when a party requests a jury instruction on expert testimony, it has effectively agreed its opponent has met its burden of proof as to the facts underlying the expert's opinion. Understandably plaintiff cites no authority for the proposition. Significantly, BAJI No. 2.40 -- which Hughes requested -- expressly contemplates that the jury will decide whether the burden of proof has been met by providing that the jury will be "determining what weight" to give to the opinion. The instruction cautions that "[a]n opinion is only as good as the facts and reasons upon which it is based," and that if the facts are not proved, that failure must affect the value of the opinion. Hughes' point on this issue is that Lonergan's expert testimony has, as a matter of law, no weight or value at all since plaintiff failed to prove any of the facts supporting it. Since Lonergan's opinion was the only evidence of damages actually tendered to the jury on damages, the evidence was insufficient to support the necessarily speculative verdict.

B. The Evidence Of Salary History At Hughes Does Not Cure Plaintiff's Substantial Evidence Problem.

As plaintiff points out, Exhibit 82 does contain summaries of plaintiff's salary history at Hughes. (CT 1466, 1519.)[13/] There were also miscellaneous payroll

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13/ These items were never mentioned at trial and were overlooked by Hughes' counsel in preparing the opening brief. As we explain, their presence does not rectify plaintiff's problem.

documents reflecting salary status changes for a number of years. (See e.g., CT 1472, 1480, 1486.) However, these documents do not cure plaintiff's substantial evidence problem with respect to damages. The salary history evidence was not properly tendered to the jury so that it could know what it was and determine its significance. It was never mentioned at trial either in opening argument, during the course of testimony, or in closing argument.

The court's analysis in Richmond v. Dart Industries, Inc., supra, 196 Cal.App.3d 869 is instructive on this point. In that case, the plaintiff argued a new theory of liability on appeal in an attempt to overcome a substantial evidence problem. The theory was based on a "fact book." (Id., at p. 874.) The fact book had been admitted into evidence, and there was some, albeit minimal, testimony concerning it. (Id., at pp. 876-877.) The court noted that the fact book had played an insignificant role in the litigation, which included 400 documentary exhibits, and stated that "if plaintiffs wanted the jury to return a verdict premised on statements in the 'fact book,' plaintiffs had an obligation reasonably to explain to the jury their theory of the case." (Id., at 877.)

In the instant case, plaintiff wanted the jury to return a verdict of damages based on Lonergan's opinion evidence. In closing argument plaintiff assured the jury that Lonergan had "salary history from 1961 . . . to 1987" upon which to base his opinion. (RT 1059.) Plaintiff never mentioned the salary history documents in Exhibit 82 to the jury nor did he direct the jury's attention to them. If plaintiff wanted the jury to return a verdict premised on that salary history from among the 800 or more pages of documents in the jury room, he had an obligation reasonably to identify those documents and explain them to the jury, and he had an obligation to

link the information in those documents to Lonergan's testimony. As previously stated (AOB 25), 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.) There is absolutely nothing in the record indicating that the salary history documented in Exhibit 82 was the information about salary history upon which Lonergan based his opinion. In sum, the only evidence presented to the jury with reasonably clarity was the bare opinion of Lonergan without a basis in proven fact.[14/]

Finally, plaintiff misstates the facts when he states Hughes failed to cross-examine Lonergan. (RB 22.) Cross-examination of Lonergan did take place and in fact revealed that he had no basis for valuing plaintiff's benefit package at 35%, that he had not taken into account the pension and health benefits plaintiff was receiving after retirement, and that his calculation of future earnings was based on a mere guess. (RT 659.)

14/ It should be noted that contrary to plaintiff's contention (RT 22), Hughes was not required to rebut plaintiff's evidence of damages when plaintiff failed at the threshold to present sufficient evidence of damages, i.e., failed to make a prima facie case in the first instance. (Evid. Code §§ 500, 550, subd. (b); Shapiro v. Equitable Life Assur. Soc. (1946) 76 Cal.App.2d 75, 95 [until burden of proof is met by plaintiff, the defendant may remain silent].)

IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DELIVERED THE INTERNALLY CONTRADICTORY BAJI NO. 10.02.

As previously explained, BAJI No. 10.02 regarding constructive discharge is internally contradictory in that it uses terms announcing conflicting standards to describe the nature of conditions giving rise to constructive discharge -- specifically, "intolerable" and "unpleasant." (AOB 33.)

Plaintiff employs a number of strategies to attempt to circumvent Hughes' argument that it was prejudicial error to deliver the instruction, all of which should be rejected. First, plaintiff contends Hughes addressed only the term "unpleasant" in the instruction and ignored the term "intolerable." (RB 31.) This contention ignores the plain words of the opening brief and makes no sense: Hughes has taken issue with the instruction because it contains the two conflicting terms and thus creates confusion; Hughes necessarily, therefore, referenced both terms. (AOB 34.)

Second, plaintiff states the relevant standard for determining whether conditions give rise to constructive discharge is the "reasonable person" standard and that the standard was clearly presented to the jury. (RB 32-33.) Certainly the reasonable person standard determines the perspective from which the conditions are to be viewed and requires an objective rather than a subjective test of those conditions. But the reasonable person standard says nothing about the level of negativity in conditions which must be reached before there can be constructive discharge. Under California law, the standard to be applied for that purpose is

"intolerable," that is, conditions so extreme and aggravated that a reasonable person could not tolerate them and would be compelled to resign. (E.g., Zilmer v. Carnation Co., supra, 215 Cal.App.3d at 38; Soules v. Cadam, Inc., supra, 2 Cal.App.4th at 399; Brady v. Elixir Industries, supra, 196 Cal.App.3d at 1306 [tort claim].) The term "unpleasant" in its common usage is utterly devoid of the element of extremity, of compelling aggravated circumstances. Clearly, a reasonable person could find conditions unpleasant but not intolerable. Given the conflicting standards in BAJI No. 10.02, it is impossible to tell in this instance if that is what the jury did. Since there is a reasonable probability it may very well have done so, judgment should be reversed on this additional ground. (Henderson v. Harnischfeger Corp. (1974) 12 Cal.3d 663, 670.)[15/]

Finally, in an attempt to argue no prejudice resulted from delivering the instruction, plaintiff addresses the factors offered in LeMons v. Regents of University of California (1978) 21 Cal.3d 869, 876, as a guide to determine the prejudicial effect of an erroneous jury instruction. (RB 33-34.) He argues, for example, there is no conflict in the evidence. (RB 34.) However, as previously explained (AOB 36-38), it is precisely in the close case, where conflict in the evidence is not great but the legal conclusions to be drawn from the evidence are divergent, that the result of

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15/ To the extent it may be argued the distinction between "intolerable" and unpleasant" is simply a matter of degree and insignificant, it should be pointed out that juries are commonly required to make such distinctions, for example, between "serious" emotional distress for a negligent infliction claim and "severe" emotional distress for an intentional infliction claim. Moreover, the Supreme Court has made clear that just such distinctions of degree in the employment context are significant and must be made. (Sanchez v. Unemployment Ins. Appeals Bd., supra, 36 Cal.3d at 587 ["It is not the policy of this state to encourage employees to quit their work and obtain unemployment insurance simply because they are unhappy . . . "].)

misinstruction is prejudicial. (Mock v. Michigan Millers Mutual Ins. Co. (1992) 4 Cal.App.4th 306, 336.) Plaintiff also emphasizes that the verdict was unanimous, a fact which proves nothing. Each juror may have concluded from the evidence that plaintiff's working conditions were unpleasant, even if no reasonable person could conclude they were intolerable. (AOB 38.)

In sum, this Court must assume that a different result would have been reached had the trial court eliminated the term "unpleasant" from the instruction and properly instructed the jury that it had to find conditions "intolerable" in order to find constructive discharge. (Mock v. Michigan Millers Mutual Ins. Co., supra, 4 Cal.App.4th at 322 [citing Henderson v. Harnischfeger Corp. (1974) 12 Cal.3d 663, 674].)

V.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED INTO EVIDENCE PLAINTIFF'S HEARSAY MEMORANDA.

Hughes argued that the memoranda generated by plaintiff between March and November 1987 were prejudicial hearsay and should not have been admitted, and certainly not without a limiting instruction. (AOB 39.) Plaintiff concedes, by not denying, the error of admitting the memoranda but challenges Hughes' argument on a number of other grounds, none of which are supported by law or fact.

A. Plaintiff's Contention That Hughes Failed To Show Prejudice Is Incorrect.

Plaintiff contends Hughes failed to show prejudice resulting from the error of admitting the documents. (RB 36.) Plaintiff's reasoning, which is not altogether clear, appears to be that there was no injury derived from admitting the memoranda themselves because there was testimony about the events referenced in the memoranda. (RB 38.) If that is plaintiff's argument, it is simply inaccurate or at the least misleading. For example, in one memorandum he asserts Rafelson told him termination proceedings had been initiated against him. (CT 760.) Rafelson testified on this point, but only to deny he had said this. (RT 525, 527.)[16/] In the same memorandum, plaintiff provides details on the C-Nite project, including purported expressions of satisfaction with his work by the project manager, Frank Damon ("he was very pleased"). (CT 762.) There was no testimony as to Damon's evaluation of plaintiff at trial. Again, while there was testimony concerning the whiting out of a performance appraisal (RT 620, 768), there was no testimony that this was done "for the purpose of falsely representing [plaintiff's] twenty-five year record with Hughes," as plaintiff asserted in another memorandum. (CT 805.)

Moreover, plaintiff's argument disregards the fact that any testimony at trial presumably conformed to the rules of evidence, whereas the memoranda clearly did not insofar as they were riddled with multiple levels of hearsay.

16/ Plaintiff admitted under cross-examination that no one at Hughes ever informed him that he was going to be terminated. (RT 832.)

The rationale for excluding hearsay highlights the precise nature of the harm done when it is admitted. Hearsay is inadmissible because the party against whom it is offered has no opportunity to cross-examine the declarant or to test honesty or faulty perception and memory. (1 Witkin Cal. Evidence (3d ed. 1986) The Hearsay Rule, § 558, p. 534; 1 Jefferson Cal. Evidence Bench Book (2d ed. 1982) § 1.1, p. 5; see Buchanon v. Nye (1954) 128 Cal.App.2d 582, 585 ["The basic theory is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of the witness, may be best brought to light and exposed by the test of cross-examination"].) As previously explained, the memoranda were inherently prejudicial and presented the jury with a hero-villain scenario, setting forth plaintiff's purported excellence as an employee on the one hand, and on the other, managerial skullduggery presented through reports of statements purportedly made by others. (AOB 40; CT 770, 760, 807-808.) The memoranda also presented unsubstantiated charges of deceit, fraud and conspiracy. (CT 808.) None of this could be tested in front of the jury, and without an appropriate limiting instruction, the jury was free to accept the memoranda as truth.

Error is prejudicial when "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error." (Pool v. City of Oakland (1986) 42 Cal.3d 1051, 1069; Osborn v. Mission Ready Mix (1990) 224 Cal.App.3d 104, 114.) The memoranda, by their very tone and by means of reported rumor, unsubstantiated charges, and statements purportedly made by others were plaintiff's attempt to make up for the fact that he could not present sufficient evidence, properly admissible, of intolerable conditions. (AOB 41.) It is therefore reasonably probable that without these memoranda, or at least with an

appropriate limiting instruction, an outcome more favorable to Hughes would have been reached.[17/]

B. Plaintiff's Contention That Hughes Did Not Properly Object To The Memoranda Ignores The Record.

Plaintiff argues that if the court had given a limiting instruction, it would have become "an advocate for defendants by correcting, after the fact, evidentiary mistakes its counsel made during trial." (RB 39.) The purported evidentiary mistake was the "failure to register a proper objection when the evidence was first introduced." (Id.) Hughes, however, did object on the grounds of hearsay and Evidence Code section 352, when the trial court was deciding whether or not to admit the memoranda and other exhibits. (RT 845-847.) The jury was not present when the court admitted the documents. (CT 288.) However, the court promised to advise the jury of the limited purpose of the memoranda, but it never did so, even upon being reminded. (RT 847, 1119.) It is difficult to see what more Hughes could have done with respect to objecting to the admission of these documents. Plaintiff's argument simply ignores the facts.

17/ Plaintiff additionally contends that there was no injury to Hughes because "the court admitted [the memoranda] in part to show the 'flurry of documents' being exchanged." (RB 38.) First, that is the only reason the court stated for admitting the memoranda. (RT 847.) Second, plaintiff misses the point: the problem is that the trial court did not explain to the jury the purpose for which it was admitting the documents, and thus the jury was left free to assume plaintiff's charges were true.

C. Plaintiff's Contention The Memoranda Were Admitted As A Result of Hughes' "Deceptive" Conduct Has No Basis In Fact.

Plaintiff charges Hughes with "fraudulent" and "deceptive" conduct surrounding the admission into evidence of Exhibit 82. (RB 36-37.) He contends that it is Hughes' fault that the documents were admitted and perhaps is suggesting some sort of waiver or estoppel argument with respect to Hughes' objection.

As a threshold matter, plaintiff's charge of fraud and deception is left unexplained and unsubstantiated. The record demonstrates that Exhibit 79, a copy of plaintiff's personnel file produced during discovery, did not contain certain documents critical of plaintiff,[18/] so Rafelson, reviewing Exhibit 79 during his testimony, could not locate them. (RT 593-594.) Plaintiff apparently wanted Rafelson to identify and discuss those particular documents, and to do that, Rafelson needed the personnel file compiled of all original documents which Hughes' counsel brought to trial. (RT 598, 609-610.) Hughes' counsel stated that if plaintiff were going to ask Rafelson about documents, the documents should be before him. (RT 611.) A conference was held at bench and not reported. (RT 611-612.) When the proceedings were back on the record, the court said the parties would work the matter out during a recess. (RT 612.) Subsequently, during the discussion about which exhibits to admit, it appears plaintiff indicated he wanted the folder of original documents brought to trial by Hughes' counsel to be Exhibit 79 in place of the personnel file. (RT 852.) The court then asked the parties if they were willing to stipulate that the originals, which

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18/ Naturally so, since the documents were removed at plaintiff's request in April 1987.

comprised the folder brought to trial, would be returned to Hughes upon entry of final judgment. (RT 853.) When counsel so stipulated, the trial court then admitted the folder as Exhibit 82. (Ibid.) It is simply not possible to discern from the record of these occurrences anything that could be described as fraud or deceit. Nor does it appear that Hughes' counsel stipulated to admitting Exhibit 82 in its entirety.[19/]

In any event, to the extent plaintiff is attempting to argue Hughes retracted or waived its objections to the memoranda by agreeing (if it did) to the admission of Exhibit 82, the argument is without merit. The court had already ruled over Hughes' formal objection that the memoranda were admissible. (RT 846-847.) Where a party has once formally taken exception to a certain line of evidence, he is not required to renew the objection each time the matter comes up again. (People v. Brooks (1979) 88 Cal.App.3d 180, 186; see People v. Woods (1991) 226 Cal.App.3d 1037, 1051, fn. 1 [attorney who submits to an erroneous adverse ruling after making appropriate objection does not waive error by proceeding and attempting to make the best of a bad situation for which he was not responsible]; People v. Calio (1986) 42 Cal.3d 639, 643.) Thus, the court's adverse and erroneous ruling with respect to the memoranda would extend to originals of the memoranda in Exhibit 82; and the fact that Hughes' counsel did not repeat his objection would not preclude Hughes' right to appellate review of the error. (People v. Brooks, supra, 88 Cal.App.3d at 186.)

19/ For example, Hughes' counsel stated with respect to Exhibit 82 (which at that moment plaintiff appears to have been calling Exhibit 79): "We haven't gone through the whole folder. There is material in there that's certainly irrelevant to the case." (RT 852.)

CROSS-RESPONDENT'S BRIEF[20/]

INTRODUCTION

Plaintiff contends the trial court erred when it nonsuited his purported tort claim for termination in violation of public policy based on Labor Code section 1198.5 and his defamation claim. But, in fact, there was no error. As a threshold matter, no purported cause of action based on Labor Code section 1198.5 is asserted in the First Amended Complaint. (CT 56-94.) Nor, during the course of trial, did plaintiff seek leave to amend to add such a cause of action. On these grounds alone, nonsuit was proper. The fact is, formally seeking leave to amend would have been a futile act, because, as the trial court correctly concluded, there was no evidence to support plaintiff's contention that Labor Code section 1198.5 was ever violated.

As to plaintiff's cause of action for defamation, the trial court correctly granted Hughes' motion for nonsuit based on the ground of privilege; plaintiff presented no evidence of actual malice to defeat the privilege. In addition, on their face, the pertinent communications were statements of opinion evaluating plaintiff's performance at Hughes, rather than statements of fact, and thus not actionable. Moreover, by plaintiff's own admission, there was no evidence that these statements were circulated to any potential employer at Hughes except the one who in fact gave him a job; thus, plaintiff's proof of causation failed.

20/ This section will serve as Hughes' Cross-Respondent's Brief. Rule 14(c), California Rules of Court, provides as pertinent that "[w]hen a cross-appeal is taken pursuant to rule 3, . . . [t]he appellant, as cross-respondent, may reply thereto in a separate section of his reply brief. . . ."

LEGAL ARGUMENT

I.

THIS COURT SHOULD AFFIRM NONSUIT OF ANY PURPORTED CAUSE OF ACTION BASED ON LABOR CODE SECTION 1198.5 AND OF PLAINTIFF'S CAUSE OF ACTION FOR DEFAMATION.[21/]

A. The Trial Court Correctly Refused To Permit Plaintiff To Proceed On A Tort Cause Of Action Premised On Labor Code Section 1198.5.

1. Plaintiff Failed To Allege A Tort Cause Of Action Based On Labor Code Section 1198.5.

It is fundamental that a party may recover, if at all, on a cause of action alleged in his complaint, and not on another cause of action which may have been disclosed by the evidence. (Barrere v. Somps (1896) 113 Cal.97, 102; Lewis v. South S. F. Yellow Cab Co. (1949) 93 Cal.App.2d 849, 853; Weissensee v.

21/ Plaintiff also challenges the nonsuit of his damages and punitive damages claims on these causes of action against individual defendants. (RB 2.) Since, as we demonstrate, the nonsuit of these causes of action on liability issues was proper, the question of damages need not be reached. Moreover, the same evidence that conclusively establishes lack of malice on plaintiff's defamation cause of action made it impossible for plaintiff to prove any claim for punitive damages.

Chronicle Publishing Co. (1976) 59 Cal.App.3d 723, 729.) If the evidence on another cause has been developed and the plaintiff fails to request leave to amend, as a general rule, nonsuit is proper. (Lewis v. South S. F. Yellow Cab Co., supra, 93 Cal.App.2d at 853.) However, the general rule may yield when the case is tried as though the matter is an issue and evidence is received on it without objection. (Weissensee v. Chronicle Publishing Co., supra, 59 Cal.App.3d at 729; Pierce v. Pacific Gas & Electric Co. (1985) 166 Cal.App.3d 68, 78.) In this case, the first amended complaint is devoid of any reference to Labor Code 1198.5. (CT 56-94.) This fact was noted by Hughes' counsel when he objected before trial to plaintiff's mentioning the statute in his opening statement and noted there had been no discovery on this issue. (RT 5.) Moreover, plaintiff never sought leave to amend to add a tort claim for wrongful termination in violation of public policy based on Labor Code section 1198.5. Under the strict rules, this court should decline even to address the question of whether nonsuit on his Labor Code claim was proper.

Moreover, there is no reason in this instance to relax the rule that a party may not recover on a cause of action not pled, because, even though plaintiff mentioned Labor Code section 1198.5 in his opening statement (RT 127), no evidence whatsoever was offered at trial to prove a violation of Labor Code section 1198.5.

2. There Was No Evidence Of A Labor Code Section 1198.5 Violation.

Labor Code section 1198.5 provides in pertinent part that "(a) Every employer shall at reasonable times, and at reasonable intervals . . . , upon the request of an

employee, permit that employee to inspect such personnel files which are used or have been used to determine that employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action."

There is no evidence that plaintiff was ever denied the right to inspect his personnel file. In fact, plaintiff admitted that he had inspected his personnel file, and, as the trial court rightly stated, that admission destroyed his claim under this statute. (RT 879.)

To overcome the obvious defect in his claim, plaintiff has attempted to read provisions into section 1198.5 that simply are not there. Thus, he argued at trial that Hughes violated section 1198.5 because plaintiff's supervisors "were doing . . . things" to his folder without his knowledge. (RT 877.) Absent any evidence plaintiff was denied access to his personnel file, it is immaterial whether they were or not. By its plain language, the statute addresses only employee access to files. When statutory language is clear and unambiguous, there is no need to indulge in statutory construction. (In re Waters of Long Valley Creek Stream System (1979) 25 Cal.3d 339, 348; State Farm Mut. Auto. Ins. Co. v. Haight (1988) 205 Cal.App.3d 223, 231.) Labor Code section 1198.5 cannot reasonably be construed to have any bearing on the substance of a file or on employer conduct with respect to a file other than permitting access. Section 1198.5 cannot be construed to require supervisors to inform employees each time they put something into the employee's file. Indeed, as one appellate court recently held, the public policy alleged for purposes of a wrongful termination claim must be specifically stated in the pertinent statute, and cannot be inferred. (Sequoia Ins. Co. v. Superior Court (1993) 13 Cal.App.4th 1472, 1475, 1480.)

Plaintiff also now contends he was denied access to company databases, and that was a violation of section 1198.5. (RB 42.) No section 1198.5 claim based on a denial of access of company databases was ever tendered at trial. Plaintiff's argument to the court as he attempted to assert a section 1198.5 claim never addressed company databases; he simply argued evidence regarding his personnel file and what Rafelson may or may not have put into the file, or what Morrison may or may not have seen in the file. (See RT 877-880.)

Not only was no issue tendered regarding a section 1198.5 claim based on company databases, but no evidence was ever developed on this issue. There is no evidence plaintiff ever requested to inspect databases and no evidence he was ever denied access to the databases. It cannot reasonably be inferred from the fact that databases were not generally available to employees (RT 226) that plaintiff would not have been allowed to inspect the databases on him if he had ever thought to ask.

In sum, plaintiff's evidence is wholly insufficient to support a verdict in his favor for wrongful (constructive) termination in violation of public policy based on section 1198.5, because there is simply no evidence Hughes ever violated the statute.

3. A Formal Motion For Nonsuit Was Unnecessary In This Instance.

Finally, plaintiff advances the procedural argument that it was improper for the trial court to nonsuit him on this claim absent any motion by Hughes' counsel. (RB 40.) This argument is meritless. As a threshold matter, it should be noted that the question of a section 1198.5 claim arose in the course of argument regarding Hughes'

motion for nonsuit on punitive damages which were sought with respect to a number of claims in the first amended complaint. (RT 882.) In finding no evidence to support punitive damages on plaintiff's tort claims, the trial court found there was no evidence of the underlying torts, including any potential section 1198.5 claim. Strictly speaking, there was no section 1198.5 claim for the trial court to nonsuit. Instead, the trial court's action might be viewed as a denial of an implicit motion for leave to amend on the part of plaintiff. Allowance of amendment to conform to proof rests in the discretion of the trial court and it will not be disturbed, absent abuse of discretion. (Trafton v. Youngblood (1968) 69 Cal.2d 17, 31.) If, in effect, the trial court was denying leave to amend, there was no abuse of discretion here because there was no proof of a section 1198.5 violation.[22/]

In any event, it is true that California Code of Civil Procedure section 581 authorizes defendants to move for nonsuit and does not authorize the court on its own motion to do so. (Code Civ. Proc. § 581; Gulick v. Interstate Drilling Co. (1931) 111 Cal.App. 263, 267.) However, when the plaintiff has had a full chance to present his evidence and failed to make his case, and when there is no reason to believe any additional evidence on a claim could be produced, i.e., when the evidence could not support a verdict in plaintiff's favor, then a formal motion for nonsuit is not necessary and the court is justified in refusing to submit the case to the jury. (Estate of Higgins (1909) 156 Cal. 257, 260-261; Estate of Morey (1905) 147 Cal. 495, 506; 7 Witkin, Cal. Procedure (3d ed. 1985) Trial § 414, p. 416.) Plaintiff had no evidence to

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22/ Moreover, if the court had permitted plaintiff to proceed any further on this claim, it would have been an abuse of discretion because plaintiff was raising at trial a new issue not included in his pleadings and upon which Hughes effectively had no opportunity to defend. (Ibid.; Lavely v. Nonemaker (1931) 212 Cal.380, 385.)

support a claim for wrongful constructive termination in violation of public policy based on section 1198.5. He had presented his case and argued to the court the "evidence" he intended to rely on; it was simply not enough. Under these circumstances, nonsuit, if any, was appropriate even though Hughes' counsel did not make a formal motion on the claim. (Ibid.)

B. This Court Should Affirm Nonsuit Of Plaintiff's Defamation Claim.

1. Introductory Facts.

Plaintiff's defamation claim is asserted in the second cause of action of the first amended complaint. (CT 70-74.) According to the first amended complaint (at CT 70), the publications on which the defamation claim was based were Rafelson's request for layoff approval, the McConnell memorandum dated January 23, 1987, the performance appraisal with a 3 rating that was marked "rejected," and certain lists which McConnell allegedly referred to during a meeting in March 1987 and which indicated plaintiff and others had failed organizational review and plaintiff had a 4 rating. (CT 752, 820, 862-865, 932.) Plaintiff never sought leave to add other publications. However, in his brief he mentions the database printouts with a 4 rating, as well as the performance appraisal with the 4 rating. (CT 867-71, 926, 928, 930; RB 46.)

The draft request for layoff approval stated plaintiff's "abrasive attitude combined with lax schedule adherence made him an organizational liability." (CT

820, see RT 862.) The McConnell memo stated plaintiff's performance appraisal failed organizational review because of additional information obtained in early January (about the C-Nite project). (CT 752.) It further stated plaintiff "is not an asset to SEL. He does not perform at level 4. He cannot get along with other people. He is not a team player. No one wants him to work on their programs." (Ibid.) The other documents do little more than indicate plaintiff's status.

Hughes formally moved for nonsuit of the defamation claim on the ground that the communications at issue were privileged under Civil Code 47, subdivision (c). (RT 884.) Prior to that, during the argument regarding nonsuit on punitive damages, the court addressed plaintiff's defamation claim at his behest. (RT 866-871.) The court concluded, "I don't think there is any evidence of any defamation to the extent that opinions were given in these various memos and communications. I think they are privileged as employer appraisals of employees. There is no requirement that such appraisals be exactly accurate." (RT 882.) The court ultimately granted nonsuit motions as to everything except the constructive discharge claim, stating again, "I don't see any slander. I don't see any defamation." (RT 890.)

2. The Publications Which Form The Basis Of Plaintiff's Defamation Cause Of Action Were Privileged.

Civil Code section 47, subdivision (c)[23/] recognizes a qualified or conditional privilege where the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest. It is recognized that communications made in a commercial setting relating to the conduct of an employee fall squarely within the qualified privilege of communications to interested persons. (Cuenca v. Safeway San Francisco Employees Fed. Credit Union (1986) 180 Cal.App.3d 985, 995 [supervisor's report to board of directors about employee's lack of fitness as a manager conditionally privileged]; Deaile v. General Telephone Co. of California (1974) 40 Cal.App.3d 841, 849 [employer's communications to its employees about the reasons for another employee's termination conditionally privileged].) Because the comments containing the alleged defamatory remarks were written by plaintiff's supervisors regarding his performance and were directed, by virtue to being in the personnel file, presumably to other supervisors within Hughes (such as Morrison) who were plaintiff's potential employers at Hughes, they are subject to the qualified privilege set forth in Civil Code section 47, subdivision (c).

23/ Civil Code section 47, subdivision (c), provides in pertinent part: " . . . [A] privileged publication . . . is one made . . . [i]n a communication, without malice, to a person interested therein, . . . by one who is also interested, . . . or who is requested by the person interested to give the information." Civil Code section 47 was amended in 1991 to, inter alia, renumber its subsections. Accordingly, some of the cases cited in this argument refer to Civil Code section 47, subdivision (3), instead of section 47, subdivision (c).

To defeat the privilege, plaintiff must show his supervisors acted with malice. To show malice, plaintiff must demonstrate by preponderance of evidence that Rafelson and McConnell acted with hatred or ill will toward him, or that they lacked reasonable grounds to believe their statements were true. (Agarwal v. Johnson (1979) 25 Cal.3d 932, 944; Sanborn v. Chronicle Pub. Co. (1976) 18 Cal.3d 406, 413.) The issue is not the truth or falsity of the statements, but whether they were made recklessly and without a reasonable belief in their truth. (Cuenca v. Safeway San Francisco Employees Fed. Credit Union, supra, at 999.)

Plaintiff's evidence failed to show malice. There was absolutely no evidence of hatred or ill will. Plaintiff focusses his argument on the contention that the statements were false. (RB 46; RT 868.) However, the truth or falsity of the statements is not the issue, but rather whether Rafelson or McConnell lacked reasonable grounds to believe their statements to be true. The undisputed facts demonstrated there were reasonable grounds to believe these statements true. Plaintiff admitted he had been fired from the Bradley Program. (RT 809.) Plaintiff admitted he refused to accommodate to a schedule change his supervisors wanted. (RT 761.) Plaintiff admitted that the final reports for the customer on the C-Nite project were due in January but were not submitted until late March. (RT 763.) Plaintiff admitted he quit the C-Nite program before he had completed the job. (RT 761.) Plaintiff admitted he had heated arguments with one of his supervisors on the C-Nite project. (RT 813.) Plaintiff admitted disagreements with a co-worker he didn't like on that project and that he was arguably abrasive. (RT 813-814.) Plaintiff admitted he had arguments with another supervisor on the project and resented that supervisor. (RT 815, 839.) Plaintiff admitted he had problems with Shatz on the specification tailoring

project (regardless of whose fault it was) and that he had threatened Shatz with discipline. (RT 811-812.) Given these admissions, plaintiff's proof of malice fails because he cannot prove his supervisors lacked reasonable grounds to believe the statements in their publications were true.

As set forth below, moreover, this court need not even reach the issue of privilege, because as a recently decided case makes clear, the publications challenged are statements of opinion, not fact, and hence are not actionable. In addition, plaintiff did not and could not prove causation.

3. The Publications Of Which Plaintiff Complains Were Statements Of Opinion, Not Of Fact.

As a general rule, only the grounds specified by a moving party should be considered in reviewing a judgment of nonsuit. (Lawless v. Callaway (1944) 24 Cal.2d 81, 92-94.) However, grounds not specified in the motion for nonsuit may be considered by an appellate court "if it is clear that the defect is one which could not have been remedied had it been called to the attention of plaintiff by the motion." (Id. at 94.)

As previously stated, Hughes moved for nonsuit on the single ground that the communications, even if defamatory, were privileged under Civil Code section 47, subdivision (c). However, it is clear on the basis of the evidence presented by plaintiff that there were other grounds for nonsuit which plaintiff could not have remedied. One such ground is that the publications of which plaintiff complains were

not statements of fact, but rather statements of opinion, insofar as they were evaluations of his performance at Hughes.

To demonstrate defamation through libel,[24/] a plaintiff must prove a publication "contains false statements of fact." (Gregory v. McDonnell Douglas Corp. (1976) 17 Cal.3d 596, 600, [emphasis in original]; Jensen v. Hewlett-Packard Co. (1993) 14 Cal.App.4th 958, 970.) A statement of opinion is not actionable. (Gregory v. McDonnell Douglas Corp., supra, at 601; Tschirky v. Superior Court (1981) 124 Cal.App.3d 534, 539; Jensen v. Hewlett-Packard, supra, 14 Cal.App.4th at 970.) As a general rule, the question of whether a statement is one of fact or opinion is a question of law. (Gregory v. McDonnell Douglas Corp., supra, at 601; Tschirky v. Superior Court, supra, at p. 539; Jensen v. Hewlett-Packard, supra, at 971.)

Jensen v. Hewlett-Packard Co. was decided after the trial of this action, and it specifically held that evaluations of an employee's performance in the workplace, except under certain limited conditions, do not support a claim for defamation: "[U]nless an employer's performance evaluation falsely accuses an employee of criminal conduct, lack of integrity, dishonesty, incompetence or reprehensible personal characteristics or behavior . . . it cannot support a cause of action for libel . . . even when the employer's perceptions . . . are objectively wrong and cannot be supported by reference to concrete, provable facts." (Jensen v. Hewlett-Packard Co., supra, at 965.) In Jensen, the plaintiff objected to a written evaluation which

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24/ "Libel is a false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injury him in his occupation." (Civ. Code, § 45.)

contained a performance rating indicating his work was adequate. However, it also contained comments that, among other things, indicated he was not carrying his weight and had a negative attitude in dealing with others, his productivity was low, and he was the subject of "tremendous amount of negative feedback." (Id. at 966, 971 fn. 14.) The court held that the contents of the evaluation did not suggest any of the characteristics necessary to support an exception to the rule that performance evaluations do not support a defamation claim and that the comments were therefore statements of opinion, not false statements of facts.

In the instant case, the substance of the comments about which plaintiff complains are substantially similar in kind to those presented in Jensen.[25/] Thus, even if the comments were objectively unjustified or made in bad faith, they could not provide a legitimate basis for plaintiff's libel or defamation claim because they were statements of opinion, not false statements of fact. (Jensen v. Hewlett-Packard Co., supra, 14 Cal.App.4th at 971.)

Even though Hughes did not formally move for nonsuit on this ground, it is clear that plaintiff could not have overcome this basic flaw in his case had it been called to his attention by a motion, because the documents speak for themselves, and their substance or import would not be changed by any subsequent effort by plaintiff to remedy defects in his case.

25/ The context was slightly different in Jensen in that in Jensen the only document at issue was presented to plaintiff, whereas, in this instance, certain documents were at some point in the file without plaintiff's knowledge. However, documenting performance is business as usual whether the comments are favorable or critical. Under Hughes' policy, plaintiff had access to his file (RT 257) and there is no evidence that he was ever denied access. Moreover, he was told he was not to get a merit increase and that his performance appraisal had failed organizational review. (RT 767-768.)

4. There Was No Evidence Of Causation.

The Jensen court noted that even had the plaintiff proved libelous statements, it still would have affirmed nonsuit because plaintiff presented no evidence of causation. (Jensen v. Hewlett-Packard Co., supra, 14 Cal.App.4th at pp. 971-972 fn. 15.) That is to say, he did not say in his opening statement (after which he was nonsuited) that he "would prove he would have progressed differently" in his career had his company had the negative evaluation retracted. Moreover, the plaintiff admitted a new supervisor gave him work despite the negative evaluation. Thus, the court concluded, there could be no legitimate inference that the critical document "poisoned the well" and changed the course of plaintiff's career with the company. (Ibid.)

Again, this case is strikingly similar to Jensen. Plaintiff admitted he had no evidence that Rafelson had circulated his file to anyone at Hughes but Morrison. (RT 820.) Despite what may or may not have been in the file, Morrison gave plaintiff a job. (RT 552.) Thus, plaintiff's assertions that his career at Hughes would be destroyed by Rafelson, who purportedly would continue to place documents critical of plaintiff in his file, is based solely on conjecture and speculation.[26/] There is simply no evidence that the well was poisoned for plaintiff at Hughes. Again, although this ground was not raised on the motion for nonsuit, no effort by plaintiff could have remedied this defect in his case.

26/ In his brief plaintiff charges Rafelson admitted putting negative documents in his file as part of "a malicious effort to injure" plaintiff. (RB 46.) This is, typically, a misstatement of the facts. Rafelson only admitted putting such documents in his file. (RT 520.) The legitimate recognized purpose in doing so is to advise potential employers, such as Morrison, of an employee's strengths and weaknesses.

In sum, plaintiff was not entitled to go to the jury either on a claim under Labor Code section 1198.5 or on his defamation claim. The trial court's ruling on these claims should be affirmed.

CONCLUSION

This case presents an extreme example of how the law designed to provide some protection for the employee in the form of job security can become so distorted as to allow the disgruntled employee to quit his job and be compensated, even where his employer has done exactly what it is supposed to do -- responded to his complaints and, in this case, resolved them in his favor. If this judgment is allowed to stand, an employer must now guarantee complete job satisfaction or, effectively, pay the employee to go elsewhere. The implications of such a result would, quite simply, wreak havoc in the workplace and be ruinous to the business climate of this State.

For all the reasons stated above and in its opening brief, Hughes Aircraft Company urges that the judgment be reversed, that the nonsuit of plaintiff's tort claims be affirmed, and that judgment be entered in favor of Hughes Aircraft Company.

Dated: September 15, 1993

Respectfully submitted,

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