S124494

SUPREME COURT
FILED

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Frederick K. Ohlrich Clerk

DEPUTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BROOK DORE,

Plaintiff and Appellant

v.

ARNOLD WORLDWIDE, INC.

Defendant and Respondent

Appeal from Court of Appeal, District No. 2, Div. No. 7
Case No. B162235

Los Angeles County Superior Court Case No. BC 260637
Hon. Jane Johnson, Judge

REQUEST FOR PERMISSION TO FILE AMICUS BRIEF; AMICUS BRIEF OF THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF/APPELLANT

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REQUEST FOR PERMISSION TO FILE AMICUS BRIEF:

TO THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The California Employment Lawyers Association (CELA) requests permission to file a brief as amicus curiae in support of Plaintiff and Appellant Brook Dore. CELA is a statewide organization of attorneys primarily representing plaintiffs in employment termination and discrimination cases.

CELA, through its undersigned attorney, is familiar with the questions involved in this case and the scope of their presentation and believes that there is necessity for additional argument on the following points:

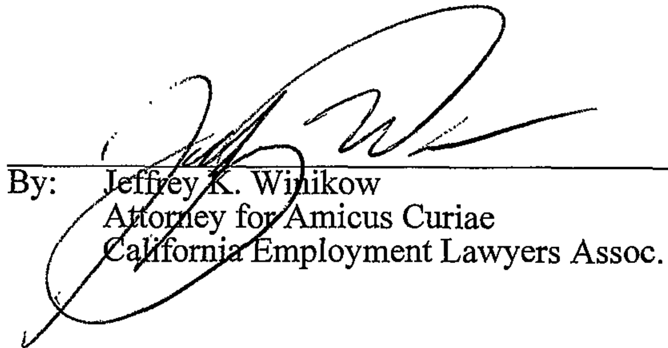
- The improper reliance on a statutory presumption of at will employment as a contextual frame of reference for interpreting the specific language at issue in this case;

- The reasonable interpretation of the specific at will clause as reflecting a "pay or play" provision under which performance and payment are independent covenants.

If this request is granted, the following brief in support of plaintiff and appellant is respectfully submitted.

Respectfully submitted,

Date: January 28, 2005 LAW OFFICES OF JEFFREY K. WINIKOW



By: Jeffrey K. Winikow
Attorney for Amicus Curiae
California Employment Lawyers Assoc.

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT 1

THE NATURE OF CELA'S INTEREST IN THIS MATTER 3

ARGUMENT 3

A. This Court is Empowered to Reject or Otherwise Modify the Statutory Presumption of At Will Employment: By Codifying Common Law Principles Such as At Will Employment, The Legislature Did Not Intend to Restrict or Otherwise Impede Judicial Development of the Law 3

1. The Genesis of Labor Code Section 2922 Was The Field Code, a Legislative Attempt to Codify Common Law Principles 4

2. While Courts May Not Ordinarily Re-Write Legislation, This Court is Empowered to Alter The Codified Portions of the Common Law Such As At Will Employment 5

3. This Court Should Reject the Presumption of At Will Employment as Being Antiquated and Economically Inefficient: Employers Must Be Given Incentives to Promulgate Clear and Unmistakable Waivers of Job Rights 6

B. The Specific At Will Language in This Case Mirrors Standard "Pay or Play" Provisions, Allowing Termination At Any Time Subject to An Employer's Obligation to Pay Contract Damages 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Hejmadi v. Amfac, Inc.,
202 Cal.App.3d 525 (1988) 4-5

Hunt v. Superior Court,
81 Cal.App.4th 901 (2000) 7

Li v. Yellow Cab Co,
13 Cal.3d 850 (1975) 1,4,5 6

Locke v. Warner Bros,
57 Cal.App.4th 354 (1997) 8

Statutes

Civil Code Section 1644 6-7

Civil Code Section 1647 3

Civil Code Section 1654 7

Labor Code Section 2922 3-5

SUMMARY OF ARGUMENT:

When construing the specific language at issue herein, the Court should look beyond the contract, and critically examine the context under which "at will" clauses operate. In doing so, this case presents an opportunity for the Court to re-evaluate the continuing validity of a mandatory presumption of "at will" employment. Just as the Court in Li v. Yellow Cab, 13 Cal.3d 850 (1975) abrogated the doctrine of "contributory negligence" in favor of comparable fault, this Court is similarly empowered to analyze, revise or repeal the "at will" doctrine – despite the fact that the Legislature enacted it into law. Indeed, both "contributory negligence" and the "employment at will" share a common legislative history, dating back to 1872, when the Legislature sought to codify portions of the common law. As the Li Court recognized, however, by codifying portions of the common law, the Legislature never intended to insulate these provisions from judicial development. The same notions of "judicial evolution" that compelled this Court to reject a "contributory negligence" bar in Li come into play in this case. The Court should analyze "at will" language through a contemporary prism.

In this case, the employer's "at will" language is open to interpretation. Nowhere does the employer specify that employees are subject to termination without cause. Nowhere does the employer indicate whether pay and performance are dependent or independent covenants. The only basis upon which one could credibly contend that the "at will" language adopted here allows for termination without cause, and without liability, is by holding the term "at will" to be a term of art, presuming that all individuals, regardless of their sophistication, fully grasp the meaning of

that term without any explanation whatsoever. To do so goes beyond the concept of legal fiction – and enters into the realm of the fantastic.

Here, the employer could have specified that employees may be subject to discharge without cause, and without continuing liability, but chose not to. Quite simply, this is one of the problems with the "at will" doctrine as it presently exists: it encourages ambiguity. Employers seeking to maintain "at will" relationships do not need to be clear in how they communicate this status to the rank and file; indeed, they do not need to say a thing about it. With a statutory presumption in hand, silence is worth a thousand words.

In every context outside of employment, the law construes contractual ambiguities against the drafter. An "at will" presumption, however, turns this rule on its head. If, as Law and Economics theorists postulate, legal rules are nothing more than incentive schemes calculated to affect behavior, then one must question the continuing vitality of the "at will" doctrine – at least as a rule of legal default. If the law is to encourage clarity over silence, and linguistic precision over ambiguity, then the solution is simple: encourage employers to promulgate "at will" policies that actually inform employees that they are subject to discharge without cause.

When the Court interprets the specific "at will" clause at issue in this case, it should do so without regard to any type of "at will" presumption. The employer should be held strictly accountable for the language it chose to adopt. Given the proliferation of properly drafted "at will" agreements, clarity and certainty is hardly an onerous burden to place on employers seeking to preserve "at will" relationships.

THE NATURE OF CELA'S INTEREST IN THIS MATTER:

The California Employment Lawyers Association ("CELA") is an organization composed of attorneys who represent primarily plaintiffs in employment discrimination and related cases. Through its undersigned attorney, CELA is familiar with the questions involved in this case and the scope of their presentation. CELA has sought leave of Court to submit this brief.

ARGUMENT

A. This Court is Empowered to Reject or Otherwise Modify the Statutory Presumption of "At-Will Employment": By Codifying Common Law Principles Such as "At Will Employment" The Legislature Did Not Intend to Restrict or Otherwise Impede Judicial Development of the Law

The Court cannot truly assess the significance of the "at will" language here without also assessing the legal context under which "at will" clauses operate. See Civil Code Section 1647. ("A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.") Did the employer want to deviate from the statutory scheme by promulgating language that is more narrow than Labor Code Section 2922's concept of "at will" employment? Did the employer merely want to preserve the type of "at will" scheme embraced by Labor Code Section 2922? So long as the law presumes "at will" employment, deviations from the statutory scheme seem to cut both ways.

The law, however, can – and should – reflect sound policy. While ordinarily it is the province of the legislature to enact or repeal laws,

as discussed more fully below, here it is fully within the province of this Court to modify the "at will" presumption in light of modern circumstances.

Employers who seek to maintain and preserve 'at will" employment relationships should be free to do so. As a matter of both law and policy, however, employers should be required to communicate with workers about their purported "at will" status, explaining precisely what that means. Here, the employer did not do so, but at least it tried to do ***something*** to notify employees about their job rights. Many employers do nothing, relying upon the statutory presumption to do their dirty work for them. It is time for the law to reflect the modern workplace.

1. The Genesis of Labor Code Section 2922 Was The Field Code, a Legislative Attempt to Codify Common Law Principles.

California Labor Code Section 2922, which recognizes a statutory presumption of "at will" employment, was originally enacted as part of the Field Code, a legislative scheme devised in 1872 to codify large portions of the common law. See Li v. Yellow Cab Co., 13 Cal.3d 804 (1975) (chronicling the history of the Field Code). As detailed in Hejmadi v. Amfac, Inc., 202 Cal.App.3d 525 (1988) the historical antecedent of today's Labor Code Section 2922 was the former Civil Code Section 1999, which the Legislature moved into the Labor Code when that Code was first enacted in 1937. Id at 543-544. While there have been some minor legislative modifications to the statute since 1872, the "at will" presumption

has remained essentially intact since that time[1]. Id.

2. While Courts May Not Ordinarily Re-Write Legislation, This Court is Empowered to Alter The Codified Portions of Common Law Such as the "At Will" Doctrine.

In Li v. Yellow Cab Co., *supra*, this Court analyzed the history and purpose of the 1872 Field Code, rejecting the contention that only the Legislature could revise these statutes once they were enacted.

1

The Hejmadi Court recited the following legislative history of Labor Code Section 2922:

> The legislative history of section 2922 is instructive as to legislative intent regarding at will employment. Civil Code section 1999, enacted in 1872, provided: "An employment having no specified term may be terminated at the will of either party, on notice to the other, except where otherwise provided by this Title." In 1915, Civil Code section 1999 was amended to provide: "An employment having no specified term, may be terminated at the will of either party, on notice to the other. Employment for a specified term shall mean an employment for a period greater than one month." (Stats.1915, ch. 433, p. 720.) The so-called at-will statute remained unchanged until 1937 when the Labor Code was enacted. Section 2922 of the new code essentially reenacted former Civil Code section 1999. Thereafter, in 1969, section 2922 was amended. As amended the statute reiterated that an employment having no specified term could be terminated at will and added provisions regarding garnishment of wages with which we are unconcerned. In 1971, section 2922 was amended twice. (See Stats.1971, c. 1580, p. 3186, § 1; Stats.1971, c. 1607, p. 3459, § 2.) The final amendment merely deleted that portion of the statute which referred to garnishment procedures, thus leaving intact the at-will provisions. Hejmadi, supra at 543-544.

Instead, in language directly on point when discussing the "at will" doctrine, this Court held:

> "It was not the intention of the Legislature in enacting section 1714 of the Civil Code, ***as well as other sections of that code declarative of the common law***, to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation ***and with a distinct view toward continuing judicial evolution***." (Emphasis Added)

While the concept of "judicial evolution" can be something of a slippery slope, it is one grounded in both the common law and this State's own precedential decisions. Just as "judicial evolution" allowed this Court to abrogate the contributory negligence bar to recovery, just as "judicial evolution" allowed the United States Supreme Court to abrogate the "separate but equal" view of Equal Protection, "judicial evolution" allows this Court to re-visit the continuing vitality of an "at will" doctrine that has its roots in centuries old jurisprudence.

3. This Court Should Reject the Presumption of "At Will" Employment as Being Antiquated and Economically Inefficient: Employers Must Be Given Incentives To Promulgate Clear and Unmistakable Waivers of Job Rights

It is not a tremendous burden to require employers seeking "at will" relationships to put that policy in writing, in language that rank and file workers can understand. Civil Code Section 1644 ("The words of a

contract are to be understood in their ordinary and popular sense...").
Indeed, thousands of employers do so in contracts and policy manuals. In every context outside of employment, contractual ambiguities are strictly construed against the drafter (or the party causing uncertainty about the contract's terms). See, e.g., Civil Code 1654; Hunt v. Superior Court, 81 Cal.App.4th 901 (2000) . Here, however, the statutory presumption actually encourages ambiguity rather than penalizes it.

From an economic perspective, it is not unreasonable to place the burden of negotiating an "at will" clause on employers – especially when thousands of employers already do so. Employers can rely on pre-printed forms, and "at will" agreements can be precise and uniform throughout the workplace. In contrast, placing the burden on individual employees to "opt out"of a statutory "at will" scheme is much more difficult.

If courts are going to examine incomplete "at will" language in order to assess whether such language is a full and complete expression of the parties' intent, then the Court should change the background legal rule against which this language is evaluated. A party seeking to alter a statutory presumption of contract rights may be held to a higher standard of linguistic precision than one that is merely reflecting that same presumption. Given that the employer is the party that universally drafts and promulgates "at will" policies, the law can – and should – provide the employer with the proper incentives to do the job correctly.

It's been said that Social Security is the "third rail of American politics;" touch it and you die. The same can be said of "at will" employment, a political hot potato that stands very little chance of being

reformed legislatively given the likely political fall-out. This Court has the power to effect meaningful change, and to create a set of legal rules that makes sense given the incentive schemes at issue. With this in mind, CELA urges the Court to exercise its vested powers with regard to common law development, and do for "at will" employment what it did for "contributory negligence."

B. The Specific "At Will" Language in This Case Mirrors Standard "Pay or Play" Provisions, Allowing Termination at Any Time Subject to a Employer's Obligation to Pay Contract Damages.

In this case, the employer reserved the right to terminate at any time, but did not specifically reserve the right to terminate without cause or without legal consequence. In this respect, the clause resembles a "pay or play" provision, which is becoming more commonplace in the employment context. See, e.g., Locke v. Warner Brothers, 57 Cal.App.4th 354, 358 (1997).

"Pay or play" provisions are prevalent in the entertainment industry, and are becoming more popular in other settings as well. Under such a provision, the employee cannot claim breach of contract simply because the employer is not allowing the employee to perform his or her contractually designated job duties. Most typically, the clause is designed to prohibit an actor from claiming career damage because he or she was not actually allowed to perform a given role; but, "pay or play" clauses are creeping into more traditional employment settings as well. At bottom, these clauses exist as a way of protecting employers from lawsuits, and so it is not surprising to see that they have become more popular over the years.

Under a "pay or play" scenario, the employer's ability to terminate "employment" does not discharge the employer from having to pay wages throughout the contract's term. If the employer chooses not to use the employee's services any longer, that is its prerogative: but this says nothing about contract damages. Under a "pay or play" scenario payment and performance are independent covenants.

Where, as here, an employer simply reserves the right to terminate an employee at any time, this seems to reach only questions of performance not payment. The parties can – and should – be able to rely upon parol evidence to shed light on how this particular "at will" provision operates. Was it intended to be a "pay or play" provision, which would only terminate an employee's right to payment in the event of good cause even though the employer could terminate performance at any time? Was it intended to mirror an more fully comprehensive and integrated "at will" provision allowing for termination without cause? One simply cannot tell from the four corners of the document.

CONCLUSION

For the foregoing reasons and authorities, CELA respectfully requests that the Court exercise its discretion to re-visit the continuing validity of Labor Code Section 2922 in the context of this case. As the law presently exists, there is absolutely no incentive for employers to inform workers of their job rights, to say nothing about doing so with any type of clarity. The law should place the onus of clear communication on the party best able to cure ambiguities.

January 28, 2005

LAW OFFICES OF JEFFREY K. WINIKOW

Attorneys for California Employment Lawyers Association, Amicus Curiae in support of Appellant

CERTIFICATE RE: WORD COUNT

I, Jeffrey K. Winikow, hereby certify that pursuant to Rule 14 of the California Rules of Court, that the Amicus Curiae brief submitted by the California Employment Lawyers Association contains 2890 words (including caption sheets and the request to file this brief). I make this representation in reliance upon the word count program accompanying the WordPerfect software that was used to create this brief.

January 28, 2005

Jeffrey K. Winikow
Attorney for Amicus Curiae
California Employment Lawyers
Assoc.

ATTORNEY'S CERTIFICATE OF SERVICE BY MAIL
[*Code Civ. Proc.*, § 1013a(2)]

I, Jeffrey K. Winikow, certify:

I am, and at all times mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is 1801 Century Park East, Suite 1520, Los Angeles, California 90067. I served CELA's REQUEST TO FILE AMICUS BRIEF and AMICUS BRIEF on January 28, 2005 by depositing copies thereof in the United States mail, with postage fully prepaid, at Los Angeles, CA enclosed in a separate sealed envelope for each addressee, and addressed as follows:

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At that time there was regular delivery of United States mail between the place of deposit and place of address. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California on January 28, 2005.

Jeffrey K. Winikow