IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

NANCY TENGLER

Plaintiff, Appellant and Cross-Respondent

vs.

Defendant, Respondent and Cross-Appellant

APPELLANT'S OPENING BRIEF

Appeal From Judgment of the Superior Court
City and County of San Francisco, Action No. 963822
The Honorable Douglas M. Moore, Jr. and William Cahill, Judges

ROBERT M. CHILVERS (State Bar No. 65442)
WILLIAM J. TAYLOR (State Bar No. 77160)
CHILVERS & TAYLOR PC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. STATEMENT OF THE FACTS

A. FACTS RELEVANT TO THE PRETRIAL ADJUDICATIONS

Appellant Nancy Tengler is a young, dynamic woman. Defendants below include the company Appellant helped found, the company's male officers, who were so "threatened by [Appellant's] femininity" that they took unlawful steps to deal with this "problem," Olaf Isachsen ("Isachsen"), a consultant engaged by the company, and Jeffrey Collinson ("Collinson"), a member of the company's board of directors.

In 1989 Appellant, together with Anthony Spare ("Spare"), Kenneth Kaplan ("Kaplan") and Andrew Bischel ("Bischel"), founded the investment management company then named Spare, Tengler, Kaplan & Bischel (now named Spare, Kaplan, Bischel & Associates; it is referred to herein as "Respondent" or "STK&B"). Each of those individuals became shareholders, officers and directors of STK&B. Spare was the largest shareholder and Chief Executive Officer; Appellant was the second largest shareholder, President and Chief Operating Officer. The capitalization of STK&B included $1.8 million obtained from the venture capital firm Schroder Venture Managers, Inc. ("Schroder"). As a result of that investment, Respondent Collinson, a part owner of Schroder, was placed on STK&B's Board of Directors.

Appellant's duties included responsibility for sales, marketing and client service, as well as management of the day-to-day operations of the firm. She was also a member of two of the firm's key investment strategy teams: the Equity Income Strategy Team and the Balanced Strategy Team. Largely as a result of Appellant's efforts, STK&B became profitable in 1993. (A0334, number 26, p. A0516[1]) Appellant naturally anticipated that

---

[1] Citations herein to the Clerk's Transcript on Appeal are referred to by "CT" followed by the page number; citations to the Stipulation Augmenting Record on Appeal are referred to by the unambiguous page numbers which commence with an "A;" citations to the Reporter's Transcripts on Appeal are referred to by "RT" followed by the date of the transcribed proceeding and the page number. Several documents from the Collinson/Isachsen Appeal (A075755) have been incorporated into this appeal at Exhibit

she would be handsomely rewarded her for her investment, as well as her four years of dedication and hard work that contributed so heavily to STK&B's success. Behind the scenes, however, the male officers of STK&B, with the aid of Collinson, were plotting against her.

In November 1993 Appellant had been instrumental in presenting a highly successful annual client conference for STK&B, and she received high praise for managing this event. (A0334, number 21, p. 0900) After the conference, Appellant went on a three-week vacation. (A0334, number 26, p. A0284) Apparently the success she had achieved at STK&B, and particularly the attention and accolades she received after the successful client conference, triggered a response from her male colleagues. While she was on vacation, the male officers of STK&B commenced a scheme that led to the company imposing intolerable conditions on Appellant's employment, and ultimately drove her out of the firm.

- On December 10, 1993, without Appellant's knowledge, Spare sent Collinson a memorandum stating that he was diminishing Appellant's role in the company and changing the conditions of her employment. (A0335, number 29, p. A0013)
- On December 20, 1993, Kaplan sent a memorandum to Spare complaining about Appellant's compensation and equity in the company. (A0334, number 26, pp. A0124, A0188)
- On December 29, 1993, Bischel sent a confidential letter to Collinson complaining about Appellant's compensation and equity in the company. (A0334, number 26, pp. A0485-6)
- On January 11, 1994, Spare announced changes in the compensation, ownership and working relationships at STK&B. (A0335, number 29, pp. A0015-19).

() to the Stipulation Augmenting Record on Appeal (A0332). Citations to these documents are referred to by the page number upon which the cite appears, the number of the cite, and then the page cite from the Clerk's Transcript in the Collinson/Isachsen appeal.

- On January 11, 1994, Spare also sent a memo criticizing Appellant, not only to Appellant, but also to Kaplan and Bischel. (A0335, number 29, p. A0020)
- On January 12, 1994, Spare sent Collinson a fax informing Collinson that he had sent a confidential memo to Appellant "about her attitude." (A0335, number 29, p. A0014)

During this same period of time, Collinson proposed that STK&B hire a management consultant, and in February 1994 Spare engaged Respondent Isachsen, ostensibly to conduct an organizational climate study and prepare a report. (A0333, number 16, p. 01155; A0334, number 26, pp. A0616-7) It appeared to Appellant that Isachsen and Spare were old friends. (A0334, number 26, p. A0323)

During February 1994 Isachsen met with employees of STK&B. On March 1, 1994, Isachsen met with Spare and agreed to send Spare a "personal report," which he sent on March 6, 1994. (A0334, number 26, pp. A0639-41, A0714) In that personal report, Isachsen told Spare that "the question of Nancy's [*i.e.*, Appellant's] future role becomes critical" (A0334, number 26, p. A0723), that "she probably should not continue in her day to day hands on management role" (A0334, number 26, p. A0723), and "if she continues in her present role the firm will be further damaged" (A0334, number 26, p. A0724). Spare faxed back a message to Isachsen, saying "Great Stuff." (A0334, number 26, p. A0726)

On March 8, 1994, Isachsen and Spare met for six hours in San Diego, during which they concocted a plan for Spare to insinuate himself into Appellant's role as the firm's primary client contact, and to package this change so it would look like it was Appellant's idea. (A0334, number 26, pp. A0646-7)

On March 18, 1994, Isachsen met again with Spare, and then with Bischel. (A0334, number 26, pp. A0633-4) At these meetings they discussed moving Appellant out of the firm's San Francisco office and putting her in a branch office in Alamo, California, with a small staff to run marketing and client services. This would, of course, have been a massive reduction in Appellant's responsibilities and opportunities at STK&B. She was, at that time, the President and Chief Operating Officer responsible for

the day-to-day operation of the entire firm, as well as having significant involvement in the investment decisions of the firm, including membership on two of the firm's key investment strategy teams. During this meeting Bischel noted that "Nancy is a hindrance." (A0334, number 26, pp. A0658-9) The plan was to move Appellant to Alamo, so Spare "could assume the day-to-day management and leadership of the rest of the company here in San Francisco." (A0334, number 26, p. A0635-6)

Appellant, of course, was unaware of these behind-the-scenes machinations. But she met with Isachsen at about this same time and became aware of the motives and attitudes of the defendants. At that meeting Isachsen told Appellant that Spare, Kaplan and Bischel were "threatened by her femininity." He said that women, especially powerful, young women "evoke certain reactions from men." He said that she had that going "against" her; "it seemed to be a problem." He offered to "mentor" her to help her "channel her femininity." He told her he had "worked with" other powerful women like her. (A0334, number 26, pp. A0320-6; CT 1488, Exhibit B) One of the men from whom Appellant had apparently evoked such a reaction was Spare. Spare's attitude toward women was demonstrated by the fact that he brought to the STK&B offices photographs he had personally taken of nude women, including enlargements of female breasts and buttocks. Spare, the Chief Executive Officer of the company, hung these photographs not only in his own office, but also on the walls of common spaces in the firm. including the main corridor leading from the front door. (A0334, number 26, pp. A0542-8)

On March 29, 1994, Isachsen, Spare and Appellant met at the Park Hyatt Hotel. Appellant was presented with the defendants' plan to severely diminish her duties and responsibilities and move her to a branch office in Alamo. She rejected this out of hand. Spare got up, said, "Well, there's not much more to talk about," and walked out of the meeting. (A0334, number 26, pp. A0632, A0662-3) He went to STK&B's offices and immediately called and conducted a staff meeting (A0334, number 26, pp. A0631-2, A0668) at which he told the staff that Appellant was leaving the firm. (A0334, number 20, p. 00867; A0334, number 26, p. A0353) After that staff meeting, Spare, Bischel, Kaplan and Isachsen met in Bischel's office and discussed calling an emergency meeting

of the Board of Directors. (A0334, number 20, p. 00867; A0334, number 26, p. A0670) The next day, Isachsen met with Collinson in New York. (A0334, number 26, p. A0683)

After that series of meetings, the defendants excluded Appellant from the management of the company. Spare, Kaplan and Bischel stopped talking to her. Isachsen never spoke to her again after the Park Hyatt meeting. (A0334, number 26, p. A0671) Collinson also changed his relationship with her; he had meetings Appellant was not aware of with the male officers of the firm and applied a different set of rules to Appellant; his comments to her became requests for her to "get morale back in line." (A0334, number 20, pp. 00861-8) Rather than deal with Appellant as a professional, Collinson defaulted to behaviors that indicated to Appellant that he was getting input only from the men, which was representative of the way he traditionally views women. (A0334, number 20, p. 00865) The firm's counsel told Appellant she could no longer speak with her, even though Appellant was the President of the company, because of a conflict of interest. Appellant's job activities were shifted to others. Her involvement on the investment strategy teams was removed and diluted. (A0334, number 26, p. A0868)

In April or May 1994, Isachsen introduced Mark McKee ("McKee") to Spare, as a potential replacement for Appellant.[2] (A0334, number 26, p. A0649) Spare and Isachsen interviewed McKee on May 13, 1994, even though Appellant was still employed by STK&B. (A0334, number 26, p. A0650) On May 17, 1994, obviously sensing the direction events were heading, Isachsen asked STK&B to indemnify him against any claims "resulting from or arising out of my performance of the consulting service, which may include...related matters including the continued employment of certain employees." (A0334, number 26, pp. A0652-3, A0727-8) On May 18, 1994, Isachsen met again with Collinson in New York, and on May 20, 1994, he met again with Spare. (A0334, number 26, p. A0685) On May 24, 1994, STK&B agreed to Isachsen's proposed indemnity. (A0334, number 26, p. A0728) On May 25, Isachsen met with Spare in San Francisco (A0334, number 26, p. A0686), and on May 31, 1994, Isachsen and Spare met

with McKee in San Diego to explore "the opportunities for him" at STK&B. (A0334, number 26, p. A0651) Once again, this was while Appellant was still an employee.

Although a regular part of his organizational climate studies is the preparation of a report, Isachsen never prepared a report on this engagement. (A0334, number 26, pp. A0616-7)

Throughout her employment with STK&B Appellant was repeatedly commended for her skill, energy and dedication, the quality of her work, and her substantial responsibility for the success of the firm. (See, *e.g.*, A0334, number 21, pp. 0900, 01031; A0335, number 29, p. A0019; A0334, number 26, pp. A0189, A0869) Despite her dedication to the firm, and her obvious interest in seeing it succeed, the conditions of her employment at STK&B had become so intolerable that she regretfully resigned from the firm on June 8, 1994. (A0334, number 26, p. A0831) After Appellant resigned, Collinson sent her a self-serving fax, disingenuously stating that "the Board has no desire to remove you as President or to seek your resignation as an officer and employee," and accusing her of having a "hidden agenda." (A0334, number 21, p. 01029)

McKee, a man, was hired to replace Appellant as Chief Operating Officer. According to the firm's press release, McKee joined the firm effective September 12, 1994. (A0334, number 26, p. A0222) Appellant's other jobs and responsibilities had been parsed out among her former male colleagues Spare, Kaplan and Bischel. (A0334, number 26, pp. A0867-8) At this point, all of the senior officers of STK&B were men. (A0334, number 26, p. A0785)

Meanwhile, on September 9, 1994, Spare, Kaplan, Bischel and Collinson had unanimously voted at a board meeting to attempt to force Appellant to sell all of her shares in STK&B back to the company for less than 4% of their value. (A0334, number 21, p. 01033; A0334, number 26, p. A0138) Each of the defendants stood to make a substantial personal gain if Appellant were forced to sell her stock on these terms.

---

[2] At his deposition Isachsen originally testified that he introduced Spare to McKee in April 1994. When he reviewed the transcript, he changed it to "April or May."

Appellant was unable to resolve her differences with defendants, and, after exhausting her administrative remedies, on September 19, 1994, she filed this action. Respondent moved for summary judgment or adjudication, and on April 23 and May 28, 1996, the court entered its orders granting those motions in part. (CT 2159, 3818) On the matters relevant to this appeal, the court granted the motion for summary adjudication on the sixth, eighth and ninth causes of action of the Third Amended Complaint. (A0333, number 14, p. 630) With respect to the sixth cause of action, for intentional infliction of emotional distress, the court found that all of the acts complained of occurred during Appellant's employment, and are thus barred by worker's compensation. With respect to eighth and ninth causes of action, for constitutional and statutory gender discrimination, the court determined that there were no triable issues of material fact. In light of the determination of the court on the gender discrimination claims, the parties stipulated that the tenth cause of action, for wrongful termination in violation of public policy, would be deemed to have been summarily adjudicated against Appellant and in favor of Respondent, with Appellant retaining all rights to appeal. (CT 3519)

B. FACTS RELEVANT TO THE COURT'S REFUSAL TO ALLOW THE JURY TO COMPLETE ITS DELIBERATIONS

This case was assigned to the Honorable Douglas M. Moore, Jr., for trial. Judge Moore was a relatively inexperienced judge, having been appointed to the bench only six months before then.[3] Trial commenced on May 28, 1996, and continued until July 30, 1996, when the issues remaining in the case were submitted to the jury.[4] The jury

---

[3] Judge Moore's tenure as a Superior Court Judge was quite short. In March 1996, two months before this trial commenced, the electorate declined to confirm his appointment, and he left the bench soon after this trial was concluded.

[4] The trial was interrupted for three weeks: two weeks for Judge Moore to attend judicial training, and one week because Appellant's lead trial counsel broke her shoulder.

deliberated for six days, then, on August 6, 1996, reported to the bailiff that they had reached a verdict.[5]

The jury returned to the courtroom, where the clerk read the verdict. Appellant's counsel requested that the jury be polled, and the court directed the clerk to poll the jury. The poll included the following relevant statements:

THE CLERK: Question No. 1: "Did Defendant, Spare, Tengler, Kaplan & Bischel, constructively discharge Plaintiff, Nancy Tengler, in breach of its employment contract with her"?

* * *

THE CLERK: Maria De Guia, Juror No. 3, was no your answer?

JUROR De GUIA: No.

THE CLERK: So your answer is yes?

JUROR De GUIA: Yes.

THE CLERK: Juror No. 4, Rosa Li, was that your answer?

JUROR LI: My answer was yes.

THE CLERK: The answer here was no.

JUROR GREEN: She answered yes.

THE CLERK: The answer in the verdict was no. Was no your answer?

JUROR LI: No.

* * *

THE CLERK: Araceli DeAlba, Juror No. 6, the answer is no. What is your verdict?

JUROR DeALBA: I answered yes.

---

[5] On June 4, 1996, out of the presence of the jury, Judge Moore had stated: "based on the estimates we had, and even going as long as I thought we were going to go, I made some commitments with the Navy in mid August. And I would hope that we're out of here by mid August." (RT 973:22-25)

THE CLERK: You answered yes. Okay.

JUROR DcALBA: I think we're getting confused on our answers. I believe she was constructively discharged, so that's my answer. I want to make sure.

* * *

THE CLERK: MaryJane Santos, Juror No. 12, was that your verdict?

4705

JUROR SANTOS: No. I mean, yeah. I just said, do whatever it was.

THE CLERK: What?

The verdict is no. Was that your verdict?

JUROR SANTOS: Yes.

THE CLERK: As to question number one, your Honor, the count is nine to three.

THE COURT: Very well.

THE CLERK: No.

THE COURT: Yes. It is three.

* * *

THE CLERK: Question No. 3, "Did the Defendant, Spare, Tengler, Kaplan & Bischel, fail to pay Plaintiff, Nancy Tengler, all accrued and unused vacations due her"?

The answer is "No."

* * *

THE CLERK: MaryJane Santos, was that your answer?

JUROR SANTOS: (No response.)

THE CLERK: MaryJane Santos, No. 12 --

JUROR SANTOS: No.

THE CLERK: -- was that your verdict?

12 JUROR SANTOS: Yes.

* * *

25 Regarding the Cross-Complaint, these are the questions
26 and the answers: "Did Cross-Defendant, Nancy Tengler, breach
27 her employment contract with Cross-Complainant, Spare,
28 Tengler, Kaplan & Bischel, by failing to return documents with

4710

1 confidential information when she left her employment"?
2 The answer is "No."
3 Agnes Aurelio, was that your answer?
4 JUROR AURELIO: No.
5 THE CLERK: You did not answer no?
6 JUROR AURELIO: Yes.

* * *

18 THE CLERK: Rowland Lee, was that your answer?
19 JUROR LEE: Yes.
20 THE COURT: You skipped one, I think.
21 THE CLERK: Maria De Guia, was that your answer?
22 JUROR De GUIA: No.
23 THE CLERK: Deborah Baron, yes. DeAlba --
24 JUROR De GUIA: My answer was no.
25 THE CLERK: The answer is no here.
26 JUROR BARON: Can I suggest that we begin again.
27 THE CLERK: With your permission, your Honor.
28 THE COURT: Yes.

(RT 4703-4710, emphasis added)

Immediately after the poll was concluded Appellant's counsel asked the court a question in an attempt to clarify the confusing answers to Question No. 1 on the Complaint, and the following occurred:

MS. KUBIN: Your Honor, may we hear Juror No. 12's verdict on the first question on the Complaint.

THE COURT: Go ahead.

THE CLERK: The first question on the Complaint is: "Did Defendant, Spare, Tengler, Kaplan & Bischel, constructively discharge Plaintiff, Nancy Tengler, in breach of its employment contract with her"?

The answer as appears here is "No."

Was that your verdict?

JUROR SANTOS: I can't answer just without giving an explanation why. I'm sorry.

THE COURT: Let's do this, Mr. -- I want to --

JUROR SANTOS: I'm sorry.

THE COURT: I want to poll the jury on Question 1.

THE CLERK: Okay.

THE COURT: And I just want to ask each one of the jurors how did they vote so that we don't have the confusion that I think we had as we went through.

Would you read the question, please.

THE CLERK: "Did Defendant, Spare, Tengler, Kaplan & Bischel, constructively discharge Plaintiff, Nancy Tengler, in breach of its employment contract with her"?

Answer yes or no.

Juror No. 1, what is your answer?

JUROR AURELIO: No.

4716

THE CLERK: Juror No. 2, what is your answer?

JUROR BITANGA: Yes.

MS. de ODDONE: It's confusing again, your Honor.

THE COURT: Let's do it this way: Read the question and the juror's name, how did you vote.

THE CLERK: "Did Defendant, Spare, Tengler, Kaplan & Bischel, constructively discharge Plaintiff, Nancy Tengler, in breach of its employment contract with her"?

Answer yes or no.

How did you vote, Ms. Agnes?

JUROR AURELIO: No.

THE CLERK: I will repeat the question, how did you vote?

JUROR BITANGA: I vote no.

* * *

THE CLERK: How did you vote, Ms. Santos?

JUROR SANTOS: I changed. I think she was.

THE CLERK: Then what?

(Whereupon, sidebar discussion was held off the record.)

THE CLERK: Judge, are you calling for me?

THE COURT: I am calling for you.

(Whereupon, sidebar discussion was held off the record.)

THE COURT: All right. Ladies and gentlemen, as you can see, we're -- we don't have a verdict of nine jurors voting one way or the other on Question No. 1 with respect to the Complaint. So I'd ask you to return to the jury deliberation room and see if you can reach a verdict and then return to this room, if you can.

(RT 4715-4717, emphasis added)

Counsel for Respondent made no objection to the request to clarify Juror No. 12's verdict on the first question on the Complaint; she made no objection to Juror No. 12's attempt to clarify her verdict; she made no objection to the court's statement that he

wanted to poll the jury on Question No.1; she made no objection to the court's comment that there was confusion "as we went through" (RT 4715) (in fact she herself noted: "It's confusing again" (RT 4716)); she made no objection to the court's determination that "we don't have a verdict of nine jurors voting one way or the other on Question No. 1 with respect to the Complaint" (RT 4717); and she made no objection to the court asking the jury to return to the jury deliberation room to see if they could reach a verdict.

After the jury retired for further deliberations Respondent's counsel commented that Juror No. 12[6] "appeared to be emotionally overwrought when she came into the courtroom and when she first was speaking," and that Appellant "was herself breaking down." (RT 4718:2-6) According to the court, Ms. Santos was visibly distraught when she sat down (RT 4724:25-27), and "She began crying once the verdict started to be read." (RT 4722:22-24) The trial judge commented "normally I say something about outbreaks of emotion and things like that. I didn't in this case." (RT 4718:17-18) Counsel for Respondent made no request for the court to admonish the jury before sending them out for further deliberations to remind them that they must not be influenced by sympathy, passion or prejudice.[7] The court also apparently did not feel that such an admonition was necessary. In any event, it did not give one.

The court then noted that the jury was "back deliberating again to see if they can come to an answer of nine on the first question" (RT 4717:27-4718:1), and said, "They may well be out tomorrow." (RT 4720:3) Respondent's counsel noted that it had "turned out not to be a verdict," and expressed a hope that they do come to a verdict. (RT 4718:9-11) The court acknowledged several times that the jury had not yet reached a verdict:

16 THE COURT: All right. Well, let's talk about damages.

17 I propose we just proceed first thing tomorrow.

* * *

---

[6] Juror No. 12 was then named Maryjane Santos and is now named Maryjane Simmons; she is referred to herein as "Ms. Santos."

[7] The trial court had previously given this standard instruction (BAJI 1.00) before the jury began its deliberations.

26 THE COURT: We proceed with the damages on the
27 Complaint, and we proceed with the damages on the
28 Cross-Complaint.
4720
1 MS. KUBIN: While they're still deliberating.
2 THE COURT: No, no. No. When they come back, if and
3 when they come back. They may well be out tomorrow. I
4 just -- I just don't want to keep these folks here any longer
5 than we have to.
* * *
25 THE COURT: Well, the trouble is if they come back with
26 a verdict tonight, I either discharge them or bring them back
27 in the morning.
* * *
4721
4 THE COURT: ...If they come back with a verdict, I'd like to discharge them
5 tonight.
(CT 4719-21, emphasis added)

At approximately 5:00 p.m., August 6, the jury foreman sent a note to the judge. There is no indication in the record that the judge showed the note to counsel at that time, although it was shown to counsel at some point. (RT 4732:24-26) The note stated: "We have not reached a verdict." It went on to say that the jury "will convene @ 8:30 – 4:00pm on 8/7/96. We the jury believe we will not be able to conclude by the end of the day Wed Aug 7, 1996. Therefore please respond to the previous Note #6 with yellow sheet, first thing in the morning. Thank you." (CT A0330)

Shortly after receiving these notes, the court convened with counsel present, and the following occurred:

4721

19 THE COURT: We're outside the presence of the jury. I have
20 concluded after conferring with several other judges in the
21 courthouse, and doing some brief research, that we had a
22 verdict the first time. And that was improper to repoll the
23 jury.
24 I've looked at the transcript. The transcript has been
25 read. It was the verdict when it was reached in the jury
26 room, and that was the vote. There was a display of emotion
27 that occurred in this court, watched between the plaintiff and
28 Juror No. 12. It became patently obvious to the court as we

4722

1 continued down through the other six --
2 (Interruption in the proceedings.)
3 THE COURT: Could you.
4 (Record read.)
5 THE COURT: -- questions on the verdict form that this
6 particular juror became more and more emotionally upset as
7 the -- as the plaintiff continued to show her emotion.
8 We had a good verdict when it was first polled. I find
9 it to be a good verdict. I made a mistake in asking for a
10 repolling. We have a good verdict. We're going to proceed
with the damage aspect of the case tomorrow.

* * *

4725

15 THE COURT: All right. Let's bring the jury in.
16 Anything else for the record?
17 MS. de ODDONE: No, your Honor.
18 MS. KUBIN: Just that we disagree with the verdict,
19 your Honor.

20 THE COURT: I understand you disagree.
21 MS. de ODDONE: Nothing further, your Honor.
22 MS. KUBIN: May Juror 12 be inquired of as to what her
23 verdict is?
24 THE COURT: Absolutely not. Absolutely not.
25 (Whereupon, the following proceedings were held in open
26 court in the presence of the jury at 5:13 p.m.)
27 THE CLERK: Remain seated. Come to order. The Court is
28 back in session.

4726

1 THE COURT: Ladies and gentlemen of the jury, the Court,
2 on reflection and some quick legal research, brief legal
3 research, has concluded that a true and correct verdict had
4 been rendered; and the original poll of the jury supported
5 that true verdict of the jury.
6 So I would ask at this time, Mr. Jasmin, if you would
7 record the verdict as read.
8 THE CLERK: Yes, your Honor.
9 (CT 4721-4726, emphasis added)

When the court announced that it had concluded that a true and correct verdict had been rendered, and directed the clerk to record the verdict as read, Ms. Santos shook her head "no" several times. (CT 4781, ¶ 3; RT 4733:9-12)

Because certain issues relating to damages remained to be tried, the court did not discharge the jury. It gave a standard admonition not to discuss the case with anyone, and asked the jury to return the next day.

The next morning, August 7, before the proceedings started, the court received two more notes from the jury: one from Ms. Santos and the other from Juror No. 6, Araceli DeAlba. (RT 4735-4736)

Ms. Santos' note read as follows:

Your Honor,

Yesterday, May 6, 1996 [sic], my true verdict is "YES" to Plaintiff's Question #1. I decided that I made a mistake on my answer as I was walking into the courtroom. I knew I made a mistake but I did not know how to get a message to you, because I was afraid I broke the law if I spoke while you were speaking.

Please accept my true verdict as "Yes" to Plaintiff's Question #1.

Thank you,

Juror #12

Maryjane Santos

Ms. DeAlba's note stated:

Your Honor:

I am about to witness the most unfair trial where justice has nothing to do. You should consider the pressure that some jurors have, not having any more time to share and deliberate. Changing their verdict to a no when they strongly believe in a yes.

Araceli DeAlba

In the interim, the parties had reached a stipulation on the damage issues. The court told counsel that because of the stipulation, and the court's decision that there had been a verdict, it was ready to discharge the jury. Plaintiff's counsel objected to the discharge on the ground that there had not been a verdict. Defendant's counsel stated that they believed there was a verdict. The trial judge said: "You guys are the ones that are going to have to sort it out on appeal. Okay." (RT 4737:5-14) The court then discharged the jury.

Plaintiff moved for a new trial, supporting the motion with a Declaration of Ms. Santos, in which Ms. Santos declared under penalty of perjury:

- On August 6, 1996 the jury voted on the verdict in this case. Although I voted in favor of the verdict finding for defendant on plaintiff's constructive discharge claim while in the jury room, as I walked into the courtroom I realized I had made a mistake and that my vote was in favor of plaintiff. Although I knew I had made this mistake when I walked into the courtroom, I was not sure how to get the message to the judge without breaking the law.
- Because I changed my vote, I did not agree with the verdict during the jury polling. As I later stated during the polling and in a note I gave to the judge's clerk the next morning, I believe Nancy Tengler was constructively discharged from her employment with STK&B. It is for this reason that, when the court announced that there was a verdict, I shook my head "no" several times.
- My realization of my mistake occurred as I was walking in the courtroom and thus had nothing to do with Nancy Tengler's demeanor. During the reading of the verdict and the polling of the jurors, I was looking at Ken Kaplan, not Nancy Tengler.
- A true and correct copy of the note I gave to the judge's clerk in the morning of August 7, 1996 is attached as Exhibit A. I wrote the judge this note because I wanted him to know that my verdict was that Nancy Tengler had been constructively discharged. (CT 4781)

The court denied the motion for new trial, stating, *inter alia*, "Juror Santos was neither coerced nor silenced and she cannot now contend that she felt silenced by a fear of breaking the law when the Court poll [sic] her on the verdict." (CT 4882:10-13) The court also granted defendant's motion to strike Ms. Santos declaration. Plaintiff appeals.

II. STANDARD OF REVIEW

On review of an order granting summary adjudication, the court must resolve all doubts in favor of the appellant. The court conducts a *de novo* examination to determine whether there are any issues of material fact, or whether the moving party is entitled to judgment as a matter of law. *Dora v. Frontline Video, Inc.*, 15 Cal.App.4th 536 (1993).

The appellate court also conducts a *de novo* examination to determine whether the trial court correctly construed and applied a statute, here section 618 of the Code of Civil Procedure. *Burckhard v. Del Monte Corp.,* 48 Cal.App.4th 1912, 1916 (1996). In addition, "the ultimate determination of the issue of . . . misconduct rests upon the appellate court's view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances." *Las Palmas Associates v. Las Palmas Center Associates,* 235 Cal.App.3d 1220, 1247-48 (1991) (citations omitted). Thus, the appellate court independently ascertains the conclusion that must properly be drawn from the pertinent facts set forth in the record. *Leslie Salt Co. v. San Francisco Bay Conservation Etc. Comm.,* 153 Cal.App.3d 605, 611 (1984).

III. ARGUMENT

A. MORE THAN ONE-FOURTH OF THE JURORS DISAGREED WITH THE SIGNED VERDICT; THE COURT WAS REQUIRED TO SEND THEM OUT FOR FURTHER DELIBERATIONS

Article I, Section 16 of the Constitution of the State of California guaranties the right of trial by jury, and specifies that in civil cases three-fourths of the jury may

render a verdict.[8] Section 618 of the California Code of Civil Procedure gives effect to this Constitutional right:

> § 618. Verdict of jury
>
> When the jury, or three-fourths of them, have agreed upon a verdict, they must be conducted into court and the verdict rendered by their foreman. The verdict must be in writing, signed by the foreman, and must be read to the jury by the clerk, or by the court, if there be no clerk, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk, asking each juror if it is his verdict. If upon such inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case.

Section 618 imposes certain specific mandatory polling requirements on the trial court:

1) If either party requests that the jury be polled, the clerk or the court must ask each juror if the verdict signed by the foreman "is his verdict."
2) "If upon such inquiry or polling, more than one-fourth of the jurors disagree thereto," the jury must be sent out for further deliberations. (C.C.P. § 618, emphasis added)

The court has no discretion to ignore these statutory commands.

---

[8] **§ 16. Trial by jury**

Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict . . . . In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.
In civil causes the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court . . . .

1. During the Poll the Questions Were Confusing; the Answers Were Confusing and Contradictory

The court and counsel for both sides noted that Ms. Santos was obviously "distraught" and "emotionally overwrought" when she came into the courtroom, and that she began crying "when the verdict started to be read." (RT 4718:2-6; 4724:25-27; 4722:22-24) In the initial poll on Question No. 1 of the Complaint, Ms. Santos was asked "was that your verdict?" (RT 4704:17-18) This was not the question required by the statute, *viz*, to ask each juror "if it is his verdict." The clerk's question, posed in the past tense, could obviously have been understood by Ms. Santos to refer to how she had voted in the jury room. She gave several confusing and contradictory responses: "No. I mean yeah. I just said, do whatever it was. … Yes." (RT 4705:1-5) In light of her later clarification that she had changed her vote after leaving the jury room, it is easy to see how she might have been confused. Furthermore, the question posed by the clerk incorrectly implied that the vote in the jury room was the juror's final chance to dissent from the verdict. This illustrates the wisdom of the legislature in requiring that the question be asked in the present tense. *Cf., People v. Burnett*, (1962) 204 Cal.App.2d 453, 457, in which the question was correctly posed: "is this your verdict?" (Emphasis added)

After the initial poll had been completed, Appellant's counsel asked simply "Your Honor, may we hear Juror No. 12's verdict on the first question on the Complaint?" This was hardly an inappropriate request in light of Ms. Santos evident confusion and the fact that she had given no fewer than four different answers to that question. The Court said "Go ahead," and the clerk asked Ms. Santos again: "Was that your verdict?" Ms. Santos replied: "I can't answer just without giving an explanation why. I'm sorry."[9] (RT 4715:4-15)

---

[9] At the end of the day, when the trial judge had announced that he had decided to ignore Ms. Santos statement that she disagreed with the verdict, Appellant's counsel asked: "May Juror 12 be inquired as to what her verdict is?" The court responded: "Absolutely not. Absolutely not." (RT 4725:22-24)

2. The Trial Judge's Decision to Repoll the Jurors Disclosed that Four Jurors Disagreed with the Verdict

At this point the trial judge stepped in and said: "I want to poll the jury on Question No. 1.... And I just want to ask each one of the jurors how did they vote so that we don't have the confusion that I think we had as we went through. Would you read the question please." (RT 4715:17-22, emphasis added) The question was read by the clerk: "Did Defendant ... constructively discharge Plaintiff, Nancy Tengler, in breach of its employment contract with her"? Answer yes or no .... How did you vote Ms. Santos?" And Ms. Santos replied: "I changed. I think she was."

Since Ms. Santos' was the fourth dissenting vote, at this point Section 618 required that "the jury must be sent out again." At first the court complied with the statute. The trial judge noted "we don't have a verdict of nine jurors voting one way or the other on Question No. 1," and asked the jury "to return to the jury deliberation room and see if you can reach a verdict and then return to this room, if you can." (RT 4717:1519) The jury returned to the jury room and continued its deliberations. At the end of the day, the foreman sent a note to the court stating: "We have not reached a verdict" and "we the jury believe we will not be able to conclude by the end of the [next] day...." (CT A0330)

3. Despite the Disagreement the Judge Ordered the Clerk to Record the Earlier Verdict

However, before the jury left that evening, the trial judge announced to counsel: "I have concluded ... that we had a verdict the first time. And that it was improper to repoll the jury." (RT 4721:19-23) The judge decided that the last response Ms. Santos gave in the initial poll supported the verdict read by the clerk, and therefore, that was a good verdict. (RT 4724:8-9) He made this decision despite the fact that counsel for both sides, the jury foreman, and the court itself had all acknowledged that the jury had not reached a

verdict on Question No. 1. (RT 4717-4718; CT A0330) The judge declined to reconsider his decision in light of objections by Appellant's counsel, and adamantly refused her request to inquire as to what Juror No. 12's verdict "is." ("Absolutely not. Absolutely not.") (RT 4725:22-24)

The judge then called the jury back into court and told them that he had concluded that a true and correct verdict had been rendered. Ms. Santos shook her head "no" as the judge made this announcement. (CT 4781, ¶ 3; RT 4733:9-12) The judge then admonished the jury not to discuss the case with anyone, and directed them to return to court the following morning. (RT 4726-4727)

4. The "Eyes of the World"

The purpose of the jury poll is explained in *People v. Thornton*, (1984) 155 Cal.App.3d 845, 859:

> [T]hese processes are far from empty formalities of the type that ... might be deemed inconsequential to the defendant's constitutional rights. It is these procedures that allow the defendant to "test" whether the verdict form that was signed in the privacy of the jury room represents the "true verdict." i.e. the verdict that each and every juror is willing to hold to under the eyes of the world, or whether it is the product of mistake or unduly precipitous judgment.[10]

There is certainly no dispute in this case that, although Ms. Santos had voted "no" on Question No. 1 in the jury room, when "the eyes of the world" were upon her she was

---

[10] Although *Thornton*, *Chipman v. Superior Court*, (1982) 131 Cal.App.3d 263) and *People v. Burnett*, (1962) 204 Cal.App.2d 453, 457 involve criminal defendants' rights under Penal Code §§ 1163 and 1164, the rights of the parties in civil cases under C.C.P. § 618 are no different on these issues, and it is appropriate for the court to look to such criminal cases for guidance. See, *e.g.*, *Stoner v. Williams*, (1996) 46 Cal.App.4th 986, 996. The statutes are very similar, and both criminal and civil cases are governed by Article I, § 16 of the California Constitution.

not willing to stand by that decision. She was emotionally overwrought and confused throughout the reading of the verdicts and the polling. When she was given an opportunity to clear up the confusion, she unequivocally stated "I changed." This is precisely why juries are polled — to allow each juror to correct the product of unduly precipitous judgment, and to state the verdict she is willing to hold to under the eyes of the world.

The trial judge improperly interposed his own will on this process. Despite his own observation that the first poll had caused confusion, the trial judge seized on one of the several earlier vacillating and confusing statements made by Ms. Santos, and declared that that one statement foreclosed all further attempts by Ms. Santos (and even the court itself!) to clarify what her true verdict was. This was in clear violation of section 618.

5. Jurors Have the Power and the Right to Change Their Verdict Until it is Recorded

As stated in *Chipman v. Superior Court*, (1982) 131 Cal.App.3d 263, 267 the court is required to "give effect to the right of a juror to change his verdict at any time up to the time that it is finally recorded." Here the verdict was "finally recorded" at approximately 5:15 p.m. August 6, 1996. (RT 4726: 16-18: "So I would ask at this time Mr. Jasmin, if you would record the verdict as read. THE CLERK: Yes, your Honor.") (See 4727:10 for the time) This was after the jury had been sent out to continue their deliberations, after the court had interrupted those deliberations and called the jury back into the courtroom, and more than an hour after Ms. Santos had told the court she did not agree with the verdict signed by the foreman. (RT 4717:8; see line 23 for the time)

In *Chipman,* one of the jurors had voted for conviction in the jury room, but stated that was not his true verdict during the poll. The court "accepted" the initial vote, and recorded the verdict. The Court of Appeals disagreed with the trial court's actions, held that "any juror is empowered to declare, up to the last moment, that he dissents from the verdict" (*Id.* at 266), and issued a writ commanding the trial court to vacate the order that

the verdict be recorded. Ms. Santos thus had the power to change her vote, and she did change it.[11]

6. The Purpose of the Poll is to Determine if any Jurors Disagree with the Signed Verdict

The trial court in the instant case failed to perceive that the purpose of the jury polling is to determine whether any jurors "disagree" with the verdict signed by the foreman. The polling in this case did show that "more than one-fourth of the jurors disagree" with the signed verdict on Question No. 1. Given that result, the only options open to the court were to send the jury out for further deliberations, or to declare a mistrial. It did not have the right to nullify a juror's declaration that she disagreed with the verdict, and it certainly did not have the right to record a verdict to which "more than one-fourth of the juror's disagree." (C.C.P. § 618)

7. The Trial Court had a Duty to Avoid Confusion

"Peace, justice, truth…
Instructions, manners, mysteries and trades,
Degrees, observances, customs, and laws,
Decline to your confounding contraries;
And yet confusion live!"

Shakespeare, *Timon of Athens*, IV. i. 16-21.

---

[11] It should be noted that since the verdict had not yet been recorded and the jury had not been discharged but remained under the control of the court, this case is not like cases such as *People v. Romero*, (1982) 31 Cal.3d 685, and *People v. Peavey*, (1981) 126 Cal.App.3d 44. In those cases the salutary policies of finality and against impeachment of verdicts precluded reopening properly recorded jury verdicts.

In the realm of the courtroom, the trial judge is charged with the essential task to avoid confusion if possible, and to rectify any confusion that cannot be avoided. This is particularly true at the crucial point when the verdict is being verified. Thus, the trial court may not simply ignore equivocal, vacillating or inconsistent responses by a juror. It is especially unfair for a trial judge to place the burden of clarification on an emotionally distraught juror, and to rebuke her for saying, "I was afraid I broke the law if I spoke while you were speaking." (RT 4736:5-6; CT 4882:10-13) "In what sometimes appears a sterile atmosphere in the courtroom, it would be too much to require the jury to know if and when they should speak up." *People v. Thornton, (*1989) 155 Cal. App. 3d 845, 852.

The duty of the trial court to "ascertain the cause of the juror's confusion and explain the meaning of the verdict," *Marrinucci v. Bryant, et al.*, (1957) 151 Cal. App. 2d 298, 303, serves the essential ends of justice and truth. First, the trial court thereby "prevent[s] a doubtful or insufficient finding from passing into the records of the court." *People v. Bonillas*, (1989) 48 Cal. 3d 757, 773. Second, it gives effect to "the right of a juror to change his verdict at any time up to the time it is finally recorded." *Chipman v. Superior Court*, (1982) 131 Cal. App. 3d 263, 267. And finally, it provides the parties with their only opportunity to test whether the verdict form that was signed in the privacy of the jury room represents the "true verdict" that the juror is willing to stand by in open court and "under the eyes of the world." *People v. Thornton*, (1984) 155 Cal. App. 3d 845, 859.

In this case, the trial court dispensed with these principles in favor of expediency. The unassailable facts show that the trial court recorded a verdict in disregard of Ms. Santos' clear statement that she had changed her mind. The court thus impermissibly treated the jury poll as a mere "empty formality." See *Thornton*, 155 Cal.App. 3d at 859.

8. Juries Can Be Trusted

Moreover, the trial judge's later assertion that he had *sua sponte* concluded that Ms. Santos based her decision to change her verdict upon improper emotional empathy for the

plaintiff ignored a crucial assumption underlying that system [of trial by jury]...that juries will follow the instructions given them by the trial judge...The 'rule'—indeed, the premise upon which the system of jury trials functions under the American judicial system—is that juries can be trusted to follow the trial court's instructions. *Francis v. Franklin*, (1984) 471 U.S. 307, 324, n.9; *United States v. Olano*, (1983) 507 U.S. 725, 740. Even assuming that Ms. Santos' decision had been influenced by empathy, "it is only in the extreme case that the impropriety and prejudice...cannot be removed by an instruction to a jury to disregard it." *Hilliard v. A.H. Robins Co.*, (1983) 148 Cal. App. 3d 374, 406, 196 Cal. Rptr. 117. Under these circumstances, the trial judge's proper course would have been to direct the jury to continue their deliberations with an admonition that they recall and follow the instruction he had given them when they started their deliberations: that they "must not be influenced by sympathy, prejudice or passion" (RT 4504:13-14). See *People v. Bonillas*, (1989) 48 Cal. 3d 757, 770-777.

This case is the unfortunate result of improper intervention in the jury's province by an inexperienced trial judge. Sadly, this entire problem could have been avoided simply by allowing the jury to finish its deliberations. The trial judge ignored the safeguards of Section 618 of the Code of Civil Procedure and Article I, Section 16 of the California Constitution, by directing the clerk to record a verdict with which more than one-fourth of the jurors disagreed. This amounted to nothing less than a usurpation of the power of the jury, and an arrogation of that power to the court. In the Anglo-American tradition of jurisprudence the right to trial by a jury is fundamental. A trial without interference by a judge in the province of the jury has been a cherished tradition since at least the infamous trial of William Penn. Now, of course, it is a constitutional right. All trial judges would do well to remember Justice White's comment in *Duncan v. Louisiana*, (1968) 391 U.S. 145, 157, that "when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed."

B. THE GENDER DISCRIMINATION CLAIMS SHOULD NOT HAVE BEEN SUMMARILY ADJUDICATED

1. Reviewing Grants of Summary Adjudication

The court's sole function on a motion for summary adjudication is to determine whether there are any issues of material fact, not to decide any issue. Code of Civil Procedure § 437c(c) All matters going to the weight of the evidence must be disregarded. *Mann v. Cracchiolo*, 38 Cal. 3d 18 (1985) A summary adjudication cannot be granted solely because the opposing party's evidence is circumstantial. The presence of reasonable inferences arising from circumstantial evidence is sufficient to controvert direct evidence proffered by the moving party and defeat a motion for summary adjudication. *Hulett v. Farmers Ins. Exchange*, 10 Cal.App.4th 1051, 1059 (1992) Although the court generally does not resolve questions of credibility in ruling on a motion for summary adjudication, where other factors are present that call a witness' credibility into question, the court may disregard that testimony. *See. e.g., AARTS Productions, Inc. v. Crocker National Bank,* 179 Cal.App.3d 1061, 1064 (1986) The court must consider not only the evidence presented, but also reasonable inferences drawn from that evidence. *Mann v. Cracchiolo, supra,* 38 Cal. 3d 18 at 36 (1985) However, the court may not weigh the direct evidence against the inferences. If a reasonable inference controverts a material fact, there is a triable issue and the motion must be denied. *Gigax v. Ralston Purina Co.,* 136 Cal.App.3d 591, 602 (1982) The declarations, evidence and reasonable inferences offered by the party opposing the motion must be liberally construed, while that offered by the moving party must be strictly construed in determining whether there are any triable issues of fact. *D'Amico v. Board of Medical Examiners,* 11 Cal. 3d 1, 21 (1974)

2. The Law Governing the Gender Discrimination Claims

Appellant's claims of discrimination are claims of "disparate treatment." This occurs when an employee is treated less favorably than other employees because of her sex. *Caldwell v. Paramount Unified School Dist.*, 41 Cal.App.4th 189, 195 (1995), *reh'g denied, review denied*. In order to prove disparate treatment, a plaintiff must show that her employer was motivated by a discriminatory intent. *Id.* Since in "most cases ... the plaintiff will be unable to produce direct evidence of the employer's intent, but will instead have to rely on circumstantial evidence and the inferences that may be drawn therefrom...," *id.*, the courts have established a scheme of shifting burdens to aid the plaintiff in proving her case through circumstantial evidence.

California has adopted the federal scheme of shifting burdens for the test of whether a plaintiff has been the subject of sex discrimination. *Mixon v. Fair Employment & Housing Com.*, 192 Cal.App.3d 1306, 1316 (1987). This test was described by the United States Supreme Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981): the plaintiff first must prove by a preponderance of the evidence a *prima facie* case of discrimination; if the plaintiff succeeds, the defendant then bears the burden to "articulate a legitimate, nondiscriminatory reason for the employee's rejection," (*id.*, citations omitted); and finally, if the defendant carries this burden, the plaintiff bears the burden of persuasion by a preponderance of the evidence that the "legitimate" reasons are in fact a pretext. *Id.*

A *prima facie* case of discrimination depends on the context. When the plaintiff is discharged from her job,[12] the *prima facie* elements of discrimination are:

> (1) complainant belongs to a protected class; (2) [her] job performance was satisfactory; (3) [s]he was discharged; and (4) others not in the protected class

---

12 Constructive discharge is an actionable form of termination under Govt. Code § 12940. *See, Valdez v. City of Los Angeles*, 231 Cal.App.3d 1043 (1991); *Soules v. Cadam Inc.*, 2 Cal.App.4th 390 (1991), overruled on other grounds in *Turner v. Anheuser-Busch, Inc.*, 7 Cal.4th 1238, 1251 (1994).

were retained in similar jobs, and/or [her] job was filled by an individual of comparable qualifications not in the protected class.

Mixon v. Fair Employment & Housing Com., supra at 1318; *Caldwell v. Paramount Unified School Dist., supra* at 200.

3. Appellant Was Treated Differently Because She is a Woman

As shown in the Statement of Facts above, plaintiff has set forth sufficient evidence to establish a *prima facie* case of sex discrimination under both Article I, Section 8 of the California Constitution[13] and the Fair Employment and Housing Act, Government Code Section 129400, *et seq.* She is, without argument, a woman who was replaced by a man with, (presumably) comparable qualifications, while her fellow officers, all men, maintained their positions. The numerous positive comments on the quality of her work, not to mention the undeniable success of the company under her management, is more than sufficient evidence to prove that her job performance was satisfactory. The facts that she was stripped of a large amount of her responsibilities, excluded from working in areas crucial to her career development, shunned by her male peers and superiors, omitted from important meetings, had her authority undermined, was the victim of an attempt to banish her to a small outpost with a vastly diminished role so the men in the company could assume her management and investment functions, and that she was forced to work under demeaning conditions certainly raise triable issues that she was discriminated against in "terms, conditions and privileges or privileges of employment" (Government Code § 12940(a)), was "disqualified from ...pursuing a business, profession, vocation, or employment" because of her sex, and was

---

[13] § 8. Employment discrimination. A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.

constructively discharged in violation of the statute, the constitution and public policy.[14] (See also, *Liebert v. Transworld Systems, Inc.*, (1995) 32 Cal.App.4th 1693.

Although it should not be required to defeat these motions for summary judgment unless and until the defendants successfully raise issues that shift the burden back to her (see, *Mixon v. Fair Employment & Housing Com.*, 192 Cal.App.3d at 1316), Appellant has also presented evidence that any claimed "legitimate" reasons for her discharge that may be offered by defendants were pretextual. Isachsen's statements that defendants Spare, Kaplan and Bischel were "threatened by her femininity," that women, especially powerful, young women, "evoke certain reactions from men," and that she had that going "against" her, is direct evidence of the defendants' discriminatory motives.[15] Appellant had to suffer the indignity of listening to this pious consultant offering to "mentor" her to help her "channel her femininity," in order to help her deal with her problem. Isachsen's statement that he had "worked with" other powerful women like Appellant leads to the reasonable inference that his real task was to teach Appellant how to behave around men and to accept her proper role. The fact that Isachsen never did issue the report he was ostensibly engaged to prepare leads to the reasonable inference that the real assignment he performed for Respondent STK&B was accomplished when Appellant was forced out of the company.

---

14 "[T]he standard by which a constructive discharge is determined is an objective one--the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.'" *Turner v. Anheuser-Busch, Inc.*, 7 Cal.4th 1238, 1248 (1994), 32 Cal.Rptr.2d 223 (citations omitted).

15 Tobi Mason, a relatively junior female officer of STK&B, testified at her deposition that, based on her personal experience at STK&B, she believed Appellant was unfairly treated because of her gender. (CT 01861-2) She, too, had been the victim of discrimination by STK&B.

4. There Are Triable Issues

Appellant raised triable issues that Respondent discriminated against her in the terms, conditions, or privileges of her employment. Discrimination in the highest levels of management, as in the case at hand, may be difficult to prove. Juries, perhaps even courts, may find it difficult to appreciate how a woman who climbs high enough to bump her head against the "glass ceiling" could be a victim of unlawful discrimination. The fact that such discrimination is difficult to prove, however, does not mean it does not exist. The fact that the few women whose assent to the upper echelon has stopped by the glass ceiling are, by definition, somewhat successful and powerful, does not change the fact that they may be victims of discrimination who merit the full protection of the civil rights laws.

C. THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM IS NOT BARRED BY WORKER'S COMPENSATION

The trial court summarily adjudicated the Sixth Cause of Action for intentional infliction of emotional distress against plaintiff on the ground that, since the alleged conduct occurred during Appellant's employment, this claim is barred by the exclusive remedy provisions of the Workers Compensation Act. (CT 2161, 3826) However, the conduct alleged in this cause of action is the very same conduct that supports Appellant's claims for gender discrimination and wrongful termination in violation of public policy. It is well settled in California that such claims are not barred by workers compensation.

Where the alleged conduct violates the fundamental public policies of this state, the conduct is outside of the proper role of the employer, and "cannot under any reasonable viewpoint be considered a 'normal part of the employment relationship.'" *Gantt v. Sentry Insurance*, (1992) 1 Cal.4th 1083 (quoting *Cole v. Fair Oaks Fire Protection District*, (1987) 43 Cal.3d 148, 160) This principle has been repeatedly affirmed and applied in a series of recent cases. See, *e.g., Fermino v. Fedco*, (1994) 7

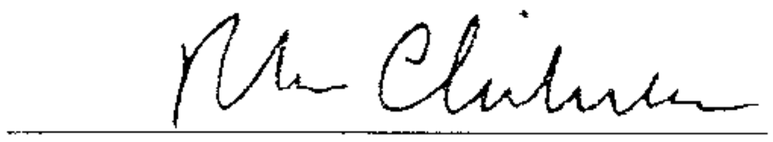
Cal.4th 701; *Accardi v. Superior Court*, (1993) 17 Cal.App.4th 341; and *Liebert v. Transworld Systems, Inc.*, (1995) 32 Cal.App.4th 1693. The grant of summary adjudication was manifest error.

IV. CONCLUSION

The judgments against Appellant on the Sixth (Intentional Infliction of Emotional Distress), Eighth (Constitutional Gender Discrimination), Ninth (Statutory Gender Discrimination), Tenth (Constructive Wrongful Discharge in Violation of Public Policy), and Eleventh (Constructive Wrongful Discharge in Violation of Contract) causes of action should be reversed.

Dated: May 27, 1997

Respectfully submitted,



Robert M. Chilvers
CHILVERS & TAYLOR, PC
Attorneys for Appellant
Nancy Tengler