

Supreme Court of California,
In Bank.
Shirley MacLaine PARKER, Plaintiff and
Respondent,
v.
TWENTIETH CENTURY-FOX FILM
CORPORATION, Defendant and Appellant.

474 P.2d 689, 89 Cal.Rptr. 737
Sept. 30, 1970.

BURKE, Justice.

Defendant Twentieth Century-Fox Film Corporation appeals from a summary judgment granting to plaintiff the recovery of agreed compensation under a written contract for her services as an actress in a motion picture. As will appear, we have concluded that the trial court correctly ruled in plaintiff's favor and that the judgment should be affirmed.

Plaintiff is well known as an actress, and in the contract between plaintiff and defendant is sometimes referred to as the 'Artist.' Under the contract, dated August 6, 1965, plaintiff was to play the female lead in defendant's contemplated production of a motion picture entitled 'Bloomer Girl.' The contract provided that defendant would pay plaintiff a minimum 'guaranteed compensation' of \$53,571.42 per week for 14 weeks commencing May 23, 1966, for a total of \$750,000. Prior to May 1966 defendant decided not to produce the picture and by a letter dated April 4, 1966, it notified plaintiff of that decision and that it would not 'comply with our obligations to you under' the written contract.

By the same letter and with the professed purpose 'to avoid any damage to you,' defendant instead offered to employ plaintiff as the leading actress in another film tentatively entitled 'Big Country, Big Man' (hereinafter, 'Big Country'). The compensation offered was identical, as were 31 of the 34 numbered provisions or articles of the original contract.¹ Unlike 'Bloomer Girl,' however, which was to have been a musical production, 'Big Country' was a dramatic 'western type' movie. 'Bloomer Girl' was to have been filmed in California; 'Big Country' was to be produced in Australia. Also, certain terms in the

¹ Among the identical provisions was the following found in the last paragraph of Article 2 of the original contract: 'We (defendant) shall not be obligated to utilize your (plaintiff's) services in or in connection with the Photoplay hereunder, our sole obligation, subject to the terms and conditions of this Agreement, being to pay you the guaranteed compensation herein provided for.'

proffered contract varied from those of the original.² Plaintiff was given one week within which to accept; she did not and the offer lapsed. Plaintiff then commenced this action seeking recovery of the agreed guaranteed compensation.

The complaint sets forth two causes of action. The first is for money due under the contract; the second, based upon the same allegations as the first, is for damages resulting from defendant's breach of contract. Defendant in its answer admits the existence and validity of the contract, that plaintiff complied with all the conditions, covenants and promises and stood ready to complete the performance, and that defendant breached and 'anticipatorily repudiated' the contract. It denies, however, that any money is due to plaintiff either under the contract or as a result of its breach, and

² Article 29 of the original contract specified that plaintiff approved the director already chosen for 'Bloomer Girl' and that in case he failed to act as director plaintiff was to have approval rights of any substitute director. Article 31 provided that plaintiff was to have the right of approval of the 'Bloomer Girl' dance director, and Article 32 gave her the right of approval of the screenplay.

Defendant's letter of April 4 to plaintiff, which contained both defendant's notice of breach of the 'Bloomer Girl' contract and offer of the lead in 'Big Country,' eliminated or impaired each of those rights. It read in part as follows: 'The terms and conditions of our offer of employment are identical to those set forth in the 'BLOOMER GIRL' Agreement, Articles 1 through 34 and Exhibit A to the Agreement, except as follows:

- '1. Article 31 of said Agreement will not be included in any contract of employment regarding 'BIG COUNTRY, BIG MAN' as it is not a musical and it thus will not need a dance director.
- '2. In the 'BLOOMER GIRL' agreement, in Articles 29 and 32, you were given certain director and screenplay approvals and you had preapproved certain matters. Since there simply is insufficient time to negotiate with you regarding your choice of director and regarding the screenplay and since you already expressed an interest in performing the role in 'BIG COUNTRY, BIG MAN,' we must exclude from our offer of employment in 'BIG COUNTRY, BIG MAN' any approval rights as are contained in said Articles 29 and 32; however, we shall consult with you respecting the director to be selected to direct the photoplay and will further consult with you with respect to the screenplay and any revisions or changes therein, provided, however, that if we fail to agree * * * the decision of * * * (defendant) with respect to the selection of a director and to revisions and changes in the said screenplay shall be binding upon the parties to said agreement.'

pleads as an affirmative defense to both causes of action plaintiff's allegedly deliberate failure to mitigate damages, asserting that she unreasonably refused to accept its offer of the leading role in 'Big Country.'

Plaintiff moved for summary judgment under [Code of Civil Procedure section 437c](#), the motion was granted, and summary judgment for \$750,000 plus interest was entered in plaintiff's favor. This appeal by defendant followed.

[...] The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment.³ [...] However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages. [...]

In the present case defendant has raised no issue of Reasonableness of efforts by plaintiff to obtain other employment; the sole issue is whether plaintiff's refusal of defendant's substitute offer of 'Big Country' may be used in mitigation. Nor, if the 'Big Country' offer was of employment different or inferior when compared with the original 'Bloomer Girl' employment, is there an issue as to whether or not plaintiff acted reasonably in refusing the substitute offer. Despite defendant's arguments to the contrary, no case cited or which our research has discovered holds or suggests that reasonableness is an element of a wrongfully discharged employee's option to reject, or fail to seek, different or inferior employment lest the possible earnings therefrom be charged against him in mitigation of damages.⁴

³ Although it would appear that plaintiff was not Discharged by defendant in the customary sense of the term, as she was not permitted by defendant to enter upon performance of the 'Bloomer Girl' contract, nevertheless the motion for summary judgment was submitted for decision upon a stipulation by the parties that 'plaintiff Parker was discharged.'

⁴ Instead, in each case the reasonableness referred to was that of the efforts of the employee to obtain other employment that was not different or inferior; his right

Applying the foregoing rules to the record in the present case, with all intendments in favor of the party opposing the summary judgment motion-- here, defendant--it is clear that the trial court correctly ruled that plaintiff's failure to accept defendant's tendered substitute employment could not be applied in mitigation of damages because the offer of the 'Big Country' lead was of employment both different and inferior, and that no factual dispute was presented on that issue. The mere circumstance that 'Bloomer Girl' was to be a musical review calling upon plaintiff's talents as a dancer as well as an actress, and was to be produced in the City of Los Angeles, whereas 'Big Country' was a straight dramatic role in a 'Western Type' story taking place in an opal mine in Australia, demonstrates the difference in kind between the two employments; the female lead as a dramatic actress in a western style motion picture can by no stretch of imagination be considered the equivalent of or substantially similar to the lead in a song-and-dance production.

Additionally, the substitute 'Big Country' offer proposed to eliminate or impair the director and screenplay approvals accorded to plaintiff under the original 'Bloomer Girl' contract (see fn. 2, Ante), and thus constituted an offer of inferior employment. No expertise or judicial notice is required in order to hold that the deprivation or infringement of an employee's rights held under an original employment contract converts the available 'other employment' relied upon by the employer to mitigate damages, into inferior employment which the employee need not seek or accept. [...]

Statements found in affidavits submitted by defendant in opposition to plaintiff's summary

to reject the latter was declared as an unqualified rule of law. Thus, [Gonzales v. Internat. Assn. of Machinists, Supra, 213 Cal.App.2d 817, 823--824, 29 Cal.Rptr. 190, 194](#), holds that [...] plaintiff union member, a machinist, was required to make 'such Efforts as the average (member of his union) desiring employment would make at that particular time and place'; but, further, that the court Properly rejected defendant's Offer of proof of the Availability of other kinds of employment at the same or higher pay than plaintiff usually received and all outside the jurisdiction of his union, as plaintiff could not be required to accept different employment or a nonunion job. [...]

[Williams v. National Organization, Masters, etc. \(1956\) 384 Pa. 413, 120 A.2d 896, 901\(13\)](#): 'Even assuming that plaintiff * * * could have obtained employment in ports other than * * * where he resided, Legally he was not compelled to do so in order to mitigate his damages.' (Italics added.)

judgment motion, to the effect that the 'Big Country' offer was not of employment different from or inferior to that under the 'Bloomer Girl' contract, merely repeat the allegations of defendant's answer to the complaint in this action, constitute only conclusory assertions with respect to undisputed facts, and do not give rise to a triable factual issue so as to defeat the motion for summary judgment. [...]

In view of the determination that defendant failed to present any facts showing the existence of a factual issue with respect to its sole defense-- plaintiff's rejection of its substitute employment offer in mitigation of damages--we need not consider plaintiff's further contention that for various reasons, including the provisions of the original contract set forth in footnote 1, Ante, plaintiff was excused from attempting to mitigate damages.

The judgment is affirmed.

McCOMB, PETERS, and TOBRINER, JJ., and KAUS, J. pro tem., and ROTH, [FN*] J. pro tem., concur.

SULLIVAN, Acting Chief Justice (dissenting).

The basic question in this case is whether or not plaintiff acted reasonably in rejecting defendant's offer of alternate employment. The answer depends upon whether that offer (starring in 'Big Country, Big Man') was an offer of work that was substantially similar to her former employment (starring in 'Bloomer Girl') or of work that was of a different or inferior kind. To my mind this is a factual issue which the trial court should not have determined on a motion for summary judgment. *185 The majority have not only repeated this error but have compounded it by applying the rules governing mitigation of damages in the employer-employee context in a misleading fashion. Accordingly, I respectfully dissent.

The familiar rule requiring a plaintiff in a tort or contract action to mitigate damages embodies notions of fairness and socially responsible behavior which are fundamental to our jurisprudence. Most broadly stated, it precludes the recovery of damages which, through the exercise of due diligence, could have been avoided. Thus, in essence, it is a rule requiring reasonable conduct in commercial affairs. This general principle governs the obligations of an employee after his employer has wrongfully repudiated or terminated the employment contract. Rather than permitting the employee simply to remain idle during the balance of the contract period, the law requires him to make a reasonable effort to

secure other employment.⁵ He is not obliged, however, to seek or accept any and all types of work which may be available. Only work which is in the same field and which is of the same quality need be accepted.⁶

Over the years the courts have employed various phrases to define the type of employment which the employee, upon his wrongful discharge, is under an obligation to accept. Thus in California alone it has been held that he must accept employment which is 'substantially similar' [...]; 'comparable employment' [...]; employment 'in the same general line of the first employment' [...]; 'equivalent to his prior position' [...]; 'employment in a similar capacity' [...]; employment which is 'not of a different or inferior kind' [...];

For reasons which are unexplained, the majority cite several of these cases yet select from among the various judicial formulations which contain one particular phrase, 'Not of a different or inferior kind,' with which to analyze this case. I have discovered no historical or theoretical reason to adopt this phrase, which is simply a negative restatement of the affirmative standards set out in the above cases, as the exclusive standard. Indeed, its emergence is an example of the dubious phenomenon of the law responding not to rational judicial choice or changing social conditions, but to unrecognized changes in the language of opinions or legal treatises. However, the phrase is a serviceable one and my concern is not with its use as the standard but rather with what I

⁵ The issue is generally discussed in terms of a duty on the part of the employee to minimize loss. The practice is long-established and there is little reason to change despite Judge Cardozo's observation of its subtle inaccuracy. 'The servant is free to accept employment or reject it according to his uncensored pleasure. What is meant by the supposed duty is merely this: That if he unreasonably reject, he will not be heard to say that the loss of wages from then on shall be deemed the jural consequence of the earlier discharge. He has broken the chain of causation, and loss resulting to him thereafter is suffered through his own act.' ([McClelland v. Climax Hosiery Mills \(1930\) 252 N.Y. 347, 359, 169 N.E. 605, 609](#), concurring opinion.)

⁶ This qualification of the rule seems to reflect the simple and humane attitude that it is too severe to demand of a person that he attempt to find and perform work for which he has no training or experience. Many of the older cases hold that one need not accept work in an inferior rank or position nor work which is more menial or arduous. This suggests that the rule may have had its origin in the bourgeois fear of resubmergence in lower economic classes.

consider its distortion.

The relevant language excuses acceptance only of employment which is of a Different kind. [...] It has never been the law that the mere existence of Differences between two jobs in the same field is sufficient, as a matter of law, to excuse an employee wrongfully discharged from one from accepting the other in order to mitigate damages. Such an approach would effectively eliminate any obligation of an employee to attempt to minimize damage arising from a wrongful discharge. The only alternative job offer an employee would be required to accept would be an offer of his former job by his former employer.

Although the majority appear to hold that there was a difference 'in kind' between the employment offered plaintiff in 'Bloomer Girl' and that offered in 'Big Country' (opn. at p. 10), an examination of the opinion makes crystal clear that the majority merely point out differences between the two Films (an obvious circumstance) and then apodically assert that these constitute a difference in the Kind of Employment. The entire rationale of the majority boils down to this: that the 'mere circumstances' that 'Bloomer Girl' was to be a musical review while 'Big Country' was a straight drama 'demonstrates the difference in kind' since a female lead in a western is not 'the equivalent of or substantially similar to' a lead in a musical. This is merely attempting to prove the proposition by repeating it. It shows that the vehicles for the display of the star's talents are different but it does not prove that her employment as a star in such vehicles is of necessity different In kind and either inferior or superior.

I believe that the approach taken by the majority (a superficial listing of differences with no attempt to assess their significance) may subvert a valuable legal doctrine.⁷ The inquiry in cases such as this should not be whether differences between the two jobs exist (there will always be differences) but whether the differences which are present are

⁷ The values of the doctrine of mitigation of damages in this context are that it minimizes the unnecessary personal and social (e.g., nonproductive use of labor, litigation) costs of contractual failure. If a wrongfully discharged employee can, through his own action and without suffering financial or psychological loss in the process, reduce the damages accruing from the breach of contract, the most sensible policy is to require him to do so. I fear the majority opinion will encourage precisely opposite conduct

substantial enough to constitute differences in the Kind of employment or, alternatively, whether they render the substitute work employment of an Inferior kind.

It seems to me that This inquiry involves, in the instant case at least, factual determinations which are improper on a motion for summary judgment. [...]

It is not intuitively obvious, to me at least, that the leading female role in a dramatic motion picture is a radically different endeavor from the leading female role in a musical comedy film. Nor is it plain to me that the rather qualified rights of director and screenplay approval contained in the first contract are highly significant matters either in the entertainment industry in general or to this plaintiff in particular[...]

I cannot accept the proposition that an offer which eliminates Any contract right, regardless of its significance, is, as a matter of law, an offer of employment of an inferior kind. Such an absolute rule seems no more sensible than the majority's earlier suggestion that the mere existence of differences between two jobs is sufficient to render them employment of different kinds. Application of such per se rules will severely undermine the principle of mitigation of damages in the employer-employee context.

I remain convinced that the relevant question in such cases is whether or not a particular contract provision is so significant that its omission create employment of an inferior kind. This question is, of course, intimately bound up in what I consider the ultimate issue: whether or not the employee acted reasonably. This will generally involve a factual inquiry to ascertain the importance of the particular contract term and a process of weighing the absence of that term against the countervailing advantages of the alternate employment. In the typical case, this will mean that summary judgment must be withheld.

In the instant case, there was nothing properly before the trial court by which the importance of the approval rights could be ascertained, much less evaluated. Thus, in order to grant the motion for summary judgment, the trial court misused judicial notice. [...]

I believe that the judgment should be reversed so that the issue of whether or not the offer of the lead role in 'Big Country, Big Man' was of employment comparable to that of the lead role in 'Bloomer Girl' may be determined at trial.