ORAL ARGUMENT – 11/06/01
00-1003
GAGE VAN HORN & ASSOC. V. TATOM

WHITESIDE: This is a covenant not to compete case, which the courts have construed before. And the question of course here is simply may the employee or the promisor recover their attorney fees by filing a declaratory judgment action in the case? And it's our position that under the covenant not to compete act it has preemptive and exclusive language in there, where the only avenue for recovery, for the criteria for enforcement of the covenant and then the exclusivity for the remedies and the procedures are to be looked for or to be governed by the act.

JEFFERSON: Was §15 of the Business and Commerce code part of your answers? Did you file that as a preemption of an affirmative defense?

WHITESIDE: No.

JEFFERSON: Was it part of your motion for summary judgment?

WHITESIDE: Well I was responding. They moved for summary judgment. I didn't. It wasn't part of my response. We asked permission after the court had the oral hearing to submit additional authorities to the court, which I did, and it's at that point that I raised the issue of preemption.

JEFFERSON: And we don't have a transcript of that hearing before us?

WHITESIDE: I don't think so.

HANKINSON: And didn't that briefing that the court asked you to provide have to do with talking about a mandatory venue case? I can't recall the name of the case. It didn't have to do with preemption.

WHITESIDE: That is correct.

HANKINSON: So what the court gave you permission to do was to respond on a point related to mandatory venue?

WHITESIDE: I asked for time for additional response. I don't know if that was particular - but they did raise another case. I asked for time for additional response. And it is correct that at that point in a letter to the court I raised this issue of preemption.

HANKINSON: We don't have any record that you had permission from the court to do it in that way?

WHITESIDE: None, I believe, other than the fact that that's what...

HANKINSON: So how can we reach this issue under Rule 166a that required the issue to be joined in your response to the summary judgment motion, or with the permission of the court at a later point in time?

WHITESIDE: I think the issue can be joined if the court grants you permission and you do respond to the court and raise any issues where it's an issue of law similar to the Hollins(?) case, it's not something that can be waived at that point. So before the court renders a decision...

JEFFERSON: But where did the court - where in the record did the court grant permission for you to...

WHITESIDE: The court granted permission for me to respond, and I did.

JEFFERSON: But where in the record can we see the court granting permission? What piece of paper in the record is there that shows that?

WHITESIDE: All you have is the, unless we had the hearing, which we don't in front of you, fact that I in my letter, which I attached, stated that I was responding to the court's request - the court allowing me to respond to file anything else with the court.

HANKINSON: Is the letter in the record?

WHITESIDE: It was attached to one of my briefs.

ENOCH: Your argument on the preemption issue, as I understand it is, that the particular statute that permits attorney's fees to be recovered by an employee who defends on a covenant to deny the fee is preempted of any other statute authorizing the recovery of attorney's fees. Now there is statute 38.001, I guess, which authorizes attorney's fees to be recovered in the event you sue on a contract. It seems to me there is some authority out there that indicates that if I simply defend - somebody sues me for a breach of contract and I defend and I win, I don't necessarily get my attorney's fees for having defended. I didn't sue on the contract. I'm not suing to enforce the contract. I just said I didn't breach it. And there is some authority out there that says you don't get attorney's fees if you're not suing to enforce that contract. If I am correct in that, does the statute that authorize recovery of attorney's fees for successfully defending against a claim of breach of contract, which would be the covenant not to compete that allows attorney's fees, is that necessarily inconsistent with this statute that otherwise allows recovery of attorney's fees if you seek to enforce the contract?

WHITESIDE: I just believe that with this preemptive and exclusive language of the statute it is basically saying every remedy is contained within the statute. In other words, you're not looking to another statute. Because arguably, certainly, you could recover by bringing suit first, as they did.

Bringing suit under the declaratory judgment act you can arguably try to in effect do harm to the intent or purposes of the covenant not to compete act.

HANKINSON: Well then does the same preemptive language preclude an employer who sues to enforce one of these covenants from recovering attorney's fees under either ch. 37 for declaratory judgment, or under the breach of contract provision? Are you saying that employers never sue for breach of contract or declaratory relief and seek to recover their attorney's fees?

WHITESIDE: Nothing to prevent anybody from pleading for anything they want.

HANKINSON: Well but there's a lot of case law out there awarding employers attorney's fees either for breach of contract or under the declaratory judgment statute when they have sued to enforce a covenant not to compete. Are all those cases wrong?

WHITESIDE: I don't believe this issue has been raised before.

HANKINSON: I'm just trying to understand the effect of the decision. Are you prepared under this preemption argument for it to be applied uniformly - sue employers as well so that there will be no recovery of attorney's fees by employers who sue to recover?

WHITESIDE: That's exactly right. Unless any provision was made in the statute, what my point is, then you don't have any basis for recovering any remedy other than what the statute allows you to do.

HANKINSON: How do you account for the language then in the statute that says its procedures and remedies in an action to enforce a covenant when a declaratory judgment action is not in fact an action to enforce a covenant.

WHITESIDE: Of course it is. A declaratory judgment action is nothing but other than a procedural remedy to try to get an issue resolved by the court. But there is no meat to the declaratory judgment action. You have to look somewhere else, and obviously you are going to have to look to this statute to determine enforcement.

HANKINSON: But an employee does not sue under the declaratory judgment action to enforce covenant not to compete.

WHITESIDE: Again, that goes to the issue of what did the legislature intend.

HANKINSON: And that's why I'm trying to understand how you would have us deal with that language in the statute, which seems to deal with procedures and remedies in an action to enforce a covenant. And if this is not an action to enforce a covenant, then how are we to agree with your position, and how would we write the opinion to deal with that language?

WHITESIDE: I think that it can't be construed that restrictively like the CA said. And says it's just in an action to enforce. Well obviously the intent of the legislature was to - in response to the court's decisions where the legislature had trouble trying to get the covenants not to compete to be enforceable, I think it was clear from what they cited and what this court recognized in the Light(?) case, is that the legislature was trying to say this is it, we're trying to get these enforced and this is the preemptive language, and we are going to preempt the common law. We tried to preempt the court here and everything to try to get some sort of certainty for employers who are trying to enforce covenant not to compete. So I think that it would be frankly sort of ludicrous to say, well simply because you're not seeking to enforce it in a declaratory judgment action, then obviously you know you can recover your attorney's fees. I don't think - that is obviously not in accord with the intent of the legislature to try to set forth specifically what employers could rely on and the employees in terms of what is and is not enforceable, and what can and cannot be recovered.

HANKINSON: Once someone says you're breaching the contract, you need to stop doing it, then nothing precludes them under the declaratory - it's not a declaratory judgment action for them going and saying, whoa, before I do anything else I want to make sure I'm okay.

WHITESIDE: Right. I think it's a very shrewd decision on their part.

HANKINSON: It wasn't anything improper under the law by doing that.

WHITESIDE: No, not at all. I just wish I would have beat them to it.

ENOCH: Not really, because then you don't owe attorney's fees. Right?

WHITESIDE: Again just the declaratory judgment action is just to try to decide obviously this issue, and we have to look somewhere for the construction like I've said. So you are going to have to look at the statute. So you can resolve this even though he's filed a declaratory judgment action, it's not the meat of the - we're going to have to decide this issue under the act.

PHILLIPS: Would you admit in a normal suit where there are no attorney's fees, if someone brings a normal type of cause of action for which there are no attorney's fees, if one brings a declaratory judgment action the courts have allowed attorney's fees in the past?

WHITESIDE: Right, but not in a tort case. In other words, if you ran a stop sign I think if you file a declaratory judgment action saying, they owe me $1 million because they ran that stop sign, I assume the courts at that point would say...

PHILLIPS: Is that discretionary with the judge?

WHITESIDE: I hope not. I hope you can't so beat the law down, the American rule that you can't recover attorney's fees unless specifically provided with this sort of admittedly, tremendously broad declaratory judgment action, which has been trying to be used here in my opinion against the

will of the legislature.

HANKINSON: If you prevail in this case and it is returned to the TC, would the plaintiff be entitled under §15.51(c) to seek recovery of their attorney's fees?

WHITESIDE: I don't believe so. I believe they would have to prove that...

HANKINSON: I understand they would have to prove it. But assuming that they could prove the requirements in terms of your client overreaching, I guess, just to summarize what proof is required, then the court may award the promisor the costs, including reasonable attorney's fees, actual(?) and reasonably incurred by the promisor in defending the action to enforce the covenant. In this declaratory judgment action, would he be allowed if he met the proof requirements to recover his attorney's fees even though he was the plaintiff in the declaratory judgment action?

WHITESIDE: Yes.

HANKINSON: So you would still say in that instance, he's defending an action to enforce the covenant even though he's a plaintiff in a declaratory judgment action?

WHITESIDE: Right.

JEFFERSON: Who has the burden of proof under the statute?

WHITESIDE: I have the burden of proof .

JEFFERSON: So even though he's the plaintiff, the statute gives you the burden?

WHITESIDE: Again, he's just nominally the plaintiff. In a declaratory judgment action who is the plaintiff? Really all they are trying to do is say, court decide this issues for us...

JEFFERSON: Once the case was put in court under this statute, no matter who brought it first, even though it was a declaratory judgment action as soon as it was before the judge, then he became the party that had to defend the action. You became the party that had to enforce the covenant. Right?

WHITESIDE: Correct.

JEFFERSON: Under §15.51(b)?

WHITESIDE: Yes. Again going back to the attorney's fees, he would have to show that this restriction was unreasonable...it was an action for a case of personal services. It was unreasonable. And that we knew it was unreasonable before he can recover his attorney's fees, which makes sense. But not just recover attorney fees. Because he was the prevailing party, and of course, in this case

after we lost the temporary injunction, we gave up.

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RESPONDENT

WALLLS: I think the court is very much on tract with what I would like to point out to the court this morning, and ask the court to consider the broader implications of what it is that Gage Van Horn is asking this court to do today. I would point out that this case is somewhat unique . There was a race to the courthouse; however, it was a race to the same courthouse. There was a declaratory judgment action; however, it was on both sides. Both parties asked for declaratory relief.

The way it actually shook out at trial was that both parties had asked for a declaration. Just a different declaration.

RODRIGUEZ: Did your client seek a reformation or modification of the covenant at all?

WALLS: Actually I believe that that wasn't specifically requested, although I will point out that Gage Van Horn did seek only to enforce a portion of the covenant. It had a broader geographical reference than what they actually sought to enforce. So there was really never a question as to reformation of the contract. It just wasn't valid. And it was a classic case of a contract signed almost two decades before by a young man right out of college. He had spent almost the next 20 years working for a company. As the facts were presented, we contended, and the court agreed that he was in essence forced out, forced to resign. And that that contract which was an at will contract, no guarantee of employment was simply not an otherwise enforceable contract on which a valid covenant not to compete could hang.

Counsel has argued and this court has pointed out that the language of ch. 15 is somewhat unique. I mean in one sentence in §15.52, the legislature stated that certain criteria and certain procedures where enforcement of covenant are exclusive and preemptive. It twice used the phrase, as this court has pointed out on several occasions here this morning, "in an action to enforce." That language included twice in one sentence to qualify and limit the scope of that provision. If you take that language out of that provision it still reads fine. And in fact if the legislature had intended what Mr. Whiteside has argued here today, that it was a total preemption of everything having to do with covenants not to compete, certainly the legislature could have done a much better job of drafting by just simply taking those two limiting phrases out. Those two phrases repeated twice in one sentence have to be given meaning.

HANKINSON: But does it matter if the action to enforce is originally filed or is a counterclaim as long as the case itself by original petition or counterclaim involves an attempt to enforce? Why is that a distinction with a difference?

WALLS: I'm not sure that there is a distinction except to the fact that the legislature was concerned with their perceived inability to get the courts to recognize criteria under which these

agreements could be enforced. They were concerned. I don't believe there was a concern on the legislature's part that there is law out there that allows an employee to defend and to ask the court to strike down these agreements. That was very obvious to the legislature that that law existed. Their concern was aimed at setting up a set of rules in a statute which would ensure and guarantee that employers could also enforce these contracts.

So procedurally I don't believe it makes a difference as to how the parties are necessarily aligned. One party is obviously seeking to enforce the contract, and seeking extraordinary remedies such as injunctive relief...

JEFFERSON: So which party here is seeking to enforce?

WALLS: Gage Van Horn.

JEFFERSON: So you are defending an action to enforce?

WALLS: Exactly. My position was, we wanted, because we have been threatened with a lawsuit based on a contract which we felt was clearly invalid and unenforceable, Mr. Tatom was put to a choice. Do I seek declaratory relief before I go out and open my business and take the risk that at some point down the road I'm going to be enjoined, or do I go to the courthouse now and seek that declaration in advance?

HANKINSON: Would you be making the same argument had you not gotten to the courthouse first?

WALLS: I think so. I don't think it would have mattered. We both asked for declaratory relief. Ultimately, I wanted a declaration that this was an invalid contract. I didn't want this contract enforced.

HANKINSON: But if they got to the courthouse first and filed a declaratory judgment action - I guess they didn't file a breach of contract action because your client had not yet begun his business?

WALLS: That's correct.

HANKINSON: So is the declaratory judgment action a request for injunctive relief to stop him from starting the business?

WALLS: That is correct.

HANKINSON: If they had gotten to the courthouse first and filed their declaratory action and sought injunctive relief, at least as to the injunctive relief why wouldn't you be defending against an action to enforce a covenant within the meaning of the statute?

WALLS: I was defending. But I'm not sure the statute gets to defense. If you look to 15.51, and let's just take a moment because I think this is very important, the court will notice in sub paragraph (a) of 15.51 that the remedies that the legislature allows are solely for the promisee. There is no mention of remedies for the promisor. None. There is no mention of declaratory relief. Now if you couple that with - look at §15.51(c). The first phrase in that long section that is in essence two very long sentences, the first section says, if you find that the covenant is part of an otherwise enforceable agreement. So for (c) to apply, the court has to first find that we have a valid contract. If you have a valid contract, then you get down to the remedies as set out in 15.51(c), including, attorney's fees for the promisor, my client, only if the promisee seeks to enforce that otherwise valid contract beyond its reasonable terms.

In reality if you have a situation such as the one that exists here today, we had a contract that was not otherwise enforceable. My client never gets a remedy. Under the argument that has been put forth here today, and under the plain reading of 15.51(c), my client would have no remedy. Period. None.

HANKINSON: Are you saying then that if we interpret the clause the way that Mr. Whiteside would have us to do it, that even filing a declaratory judgment action in the first place would not be an option, because that would be a procedure?

WALLS: Absolutely. And I think it's important to note that even though we're talking here about attorney's fees under §37.009 of the Declaratory Judgment Act, we're not talking about preemption of just a piece of the declaratory judgment act. You're talking about preemption of the entire act.

O'NEILL: If there is no legally enforceable covenant not to compete, and the promisee elects not to bring a suit over it, if their argument prevails the promisor would never have any vehicle to bring the issue to court?

WALLS: That's correct. Other than simply going and opening his business and just waiting for the lawsuit to get served. I mean that's his only option. And then he can come in and defend that it's not a valid contract. But he has no vehicle by which he can get to the courthouse.

O'NEILL: And that's because the statute speaks in terms of remedies for the promisee?

WALLS: That's correct. Now if in 15.52 you give meaning to the limiting phrases in an action to enforce, you start to see a picture here of not two provisions of two different codes that conflict, but actually pieces of a puzzle that fit together and actually compliment each other. If you assume that the legislature knew that the promisor always had the option to go get declaratory relief and remedies under the declaratory judgment act, and now we have created a statutory scheme whereby we have guaranteed that the promisee also has remedies available - damages, injunctive relief, then you see two statutes that are interwoven. Not conflicting, but complimenting each other.

O'NEILL: But what if you do have an action to enforce as we have here, that has been done, and it's established in the action to enforce that you do have an otherwise enforceable agreement, it is ancillary to an otherwise enforceable agreement, then doesn't subsection (c) preempt you on the attorney's fees piece?

WALLS: I think that again only applies if - yes. If you have a situation where the court has found that it's an otherwise enforceable contract...

O'NEILL: Okay. If that's the case, then you would agree 15.51(c) trumps the declaratory judgment act?

WALLS: Right.

O'NEILL: If you prove those pieces?

WALLS: I would agree. Because I think where the legislature was going was - it's not necessarily win or lose. I mean if you have a situation where the agreement is clearly unenforceable because it's totally at will and it's not an otherwise enforceable agreement, so we have remedies under the declaratory judgment act for the promisor in that situation. Then the other situation where it is part of an otherwise valid contract, the court looks at the facts and determines that it is valid. Sometimes even in that scenario certain employers and through their counsel decide to enforce an agreement beyond its reasonable scope.

Now I will compliment Mr. Whiteside and Gage Van Horn, because they didn't seek to do that. They had an opportunity to do that. They had a contract that had a very broad territorial definition, and they sought only to enforce it within a small five county area that was actually only involved. But let's assume for a minute that they hadn't made that decision and they had sought to enforce the contract in its entire geographical region, then a court could find that even though it is a valid contract and even though I'm going to enforce it to some degree, I believe the employer was a little out of line here in seeking to enforce it to its full extent. And so under those circumstances, the promisor can still get some award of attorney's fees for defending - basically getting the court to back off of the full enforcement.

O'NEILL: And even that's difficult isn't it, because you have to show that the promisor - you have to establish that the promisee knew at the time the agreement was executed, and that's a difficult burden?

WALLS: It could be. We never really faced that question. The transcript indicates that the parties had already determined that they were only going to seek enforcement within a certain geographical area. But I think the statute was written in such a way as to deal with the eventuality that you could have a valid agreement that an employer is seeking to enforce in an unreasonable manner, and create an opportunity even if - you know you win and you lose. I guess one of those kind of deals.

JEFFERSON: Isn't it true that the court invited further briefing on the issue of the applicability of the covenant not to compete _____?

WALLS: I believe that the court invited further briefing of the issues that were presented to it at the hearing. Preemption was not presented to the court at the hearing.

OWEN: Were attorney's fees at issue here?

WALLS: Yes. In fact that was really the sole issue. As Mr. Whiteside pointed out, Gage Van Horn was not at that point aggressively seeking to enforce the covenant any longer and consented to summary judgment in our favor, but had also not contested anything other than the award of attorney's fees, and so the court invited further briefing. But the preemption argument was never raised until after in response to that, after the hearing in a letter, basically a letter brief, is raised for the first time.

Now I believe that if you're going to raise such an issue that was not raised before the hearing, that rule 166(a) is very clear: you have to seek permission from the court.

JEFFERSON: Would have you have any obligation whatsoever to get some indication from the court in writing that it did not consider preemption as grounds?

WALLS: From a litigation standpoint and as a zealous advocate to my client, my fear would be that I would be inviting the court to rule on it when it really hadn't. I don't think that's my burden to ask the court to rule on that motion, or to basically make the motion and get permission. I just don't believe that's my place or my requirement to do so.

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REBUTTAL

O'NEILL: How do you address the argument that, because opposing counsel has constructed a scheme that appears fairly workable, if you as the employer can prove that the covenant is ancillary to an otherwise enforceable contract, and is enforceable for that reason, you can rely on this statute? In other words if you try to enforce it beyond its scope, I think counsels agree that (c) would preempt their right to recover attorney's fees. But if you are unable to prove that it's a valid covenant ancillary to an otherwise enforceable agreement, then the promisor is out of luck under your construction, cannot bring a declaratory judgment act claim. How do you deal with that?

WHITESIDE: That's correct. In other words it provides for my remedy and his. I don't get attorney's fees under (a). It talks about damages, injunctive relief. It prescribes what I can and cannot do get.

O'NEILL: No. I'm envisioning a situation where his client sues for declaratory judgment that this is not an enforceable agreement. And the court finds it's not an enforceable agreement.

Your construction with this preemption is that they are now no longer entitled to - they cannot get attorney's fees for having gotten that declaration?

WHITESIDE: He can still try to get attorney's fees under the provision here as the promisor. If he shows that it was over-broad, that was the only provision...

O'NEILL: No. The way I understand he is reading the statutory scheme is, under (b) you have the burden to show that it's an enforceable covenant. It may be too broad, but in the first instance it's enforceable because properly ancillary.

WHITESIDE: Right.

O'NEILL: If you can't show that, then under your construction that this entire statute preempts declaratory judgment, then he might be able to knock out your covenant, but he gets attorney's fees. And where is that...

WHITESIDE: By exclusion. It provides the only remedy here about when he can get attorney fees.

O'NEILL: I think his statutory construct has some appeal because if you do limited preemption just under (c), then once you've established that your covenant is good, but you're just seeking to enforce it too broadly, he can get attorney's fees under (c) and I think he acknowledged does preempt the attorney's fees issue if you make that initial showing. Then attorney's fees are awarded to the extent you've sought to enforce too broadly.

WHITESIDE: Right. But not just from defending the case. In other words, I'm just saying...

HANKINSON: But (c) requires to invoke (c) the court has have found the covenant to be ancillary to the agreement. If you don't have that finding you never get into (c). For example, in this instance, since the covenant was not found to be valid (c) is never invoked. You never go any further.

WHITESIDE: Right. Of course we really didn't get to the - you know _____ the validity of this particular covenant. It went up on a temporary injunction. The Houston CA decided it wasn't enforceable.

HANKINSON: But also would your reading of the preemption clause in 15.52 preclude him from even seeking a declaratory judgment in the first place, since it says it's preclusive as to procedures and remedies? So he can't even go the courthouse in the first place once he gets the letter saying stop what you're doing?

WHITESIDE: No. I think you can try to seek it and...

HANKINSON: But it says procedures and remedies. Why isn't that a procedure?

WHITESIDE: It is a procedure. It didn't say you can't file suit. It doesn't specify what kind of suit is to be filed.

HANKINSON: But you're saying it has very, very broad preemptive language. And if it has the kind of broad preemptive language that you say it does, which means it doesn't really matter how the parties are postured, then it would seem to preclude the promisor from even seeking a declaratory judgment in the first place, because it says that procedures and remedies in an action to defend are exclusive.

WHITESIDE: It doesn't really provide those procedures. Just like what the court did in Light(?), the court said it really didn't provide the standards for what's ancillary. So this court filled in the gap.

HANKINSON: I don't understand how we fill in that gap if we give the preemption clause very broad conclusive effect? If you're going to sweep it broadly, how do you avoid sweeping everything out the door, including the ability of the promisee to seek declaratory relief when he's under threat of action that he would like to avoid and wants to know what his legal rights are before he proceeds?

WHITESIDE: I think he can file it. The defendant could come in there if he joins issue, then it's his burden to try to establish it. So in effect you're going to have the resolution.

HANKINSON: If we give the broad effect that you're talking about, how do we carve out the declaratory judgment act in the first place from the terms "procedures" and "remedies?"

WHITESIDE: It doesn't speak to that one way or the other. What I'm saying is on the remedy action it does preclude a remedy that the declaratory judgment action provides. That is the attorney's fees. Unless it's in here, you can't recover attorney's fees.

O'NEILL: Why would the legislature afford the promisor relief for a valid covenant that's just too broad, but not afford any relief for an invalid covenant?

WHITESIDE: It can decide whether to provide relief or not. Again, this is the American rule. The only relief that he would seek - you know if he wins or he's not being forced anywhere, he's not you know out any money. But the legislature can decide, we're going to allow a remedy in a particular situation. And they haven't provided a remedy for this situation.

O'NEILL: Under your construct, if the agreement is valid but just simply overly broad, they can get attorney's fees to the extent it's overly broad. Why would the legislature afford that but then say if you've drafted a wholly unenforceable agreement, we're not going to give you any attorney's fees?

WHITESIDE: Because they don't think of every particular thing that can happen.

O'NEILL: So you can't think of any reason why they would. They just did.

WHITESIDE: Again, they've been rebuked on most issues. They've tried to make these things enforceable, and they did the best job they could with what they had to try to be specific on this - in this act. They were certainly specific about their decision to say, this is exclusive _____. And I think that's the issue that I think - because if you give them the ability to file this declaratory judgment action and then to recover the attorney's fees, then you've turned the cart over...

O'NEILL: My understanding though is that's not the position they take. And you only get attorney's fees if it's proven that the covenant is valid. And they've acknowledged that in that instance, 15.51(c) would preempt the declaratory judgment act.

WHITESIDE: Their position is, we filed suit so they could get attorney's fees. For an employer to run the risk that they are concerned that if they try to enforce the covenant not to compete for valid or whatever, they could still run the risk of the declaratory judgment act having to pay their attorney's fees. So I think that the legislature was trying to provide some sort of support for the employers who are drafting these agreements.

O'NEILL: So to protect an employer who is over broad, but not one who's overreaching.

WHITESIDE: Well it doesn't punish him, but it doesn't reward them either except when they are clearly overreaching and they knew they were overreaching, then you get your attorney's fees. So that's the thing the legislature did to tell employers you know don't try to do this or you will pay the employee for trying to make this kind of unreasonable statute that you knew were unreasonable and try to enforce it against them