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Supreme Court of Texas.
Baylor University, Petitioner
v.
Betty A. Coley, Respondent.
No. 04-0916.

October 19, 2005

Appearances:

Roy L. Barrett, Naman, Howell, Smith & Lee, L.L.P., Waco, TX, for petitioner.

LaNelle L. McNamara, McNamara and McNamara, P.C., Waco, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice Harriet O'Neill, Justice David M. Medina, Justice Paul W. Green, Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson, Justice Scott A. Brister

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COURT ATTENDANT: Oyez, Oyez, Oyez, the Honorable Supreme Court of Texas. All persons having business before the Honorable Supreme Court of Texas with matters to be brought near, to get near for the Court is now sitting. God save the State of Texas and this Honorable Court.

JUSTICE #: Thank you. Please be seated. Good morning, the Court has two matters on its oral submission docket and the order of their appearance they are: Docket No. 040916 Baylor University versus Betty A. Coley from McLennan County in the Tenth Court of Appeals District and 040961 Tony Gullo Motors L.P. and Brien Garcia versus Nury Chapa from Montgomery County in the Ninth Court of Appeals District; Judge Medina is not sitting in that case. The Court has allotted 20 minutes per side in this matter and the Court will take a brief recess between arguments. This proceeding is being recorded and the link to the arguments should be posted on the Court website by the end of the day today. The Court is now ready to hear argument in 040916 Baylor University versus Betty A. Coley.

JUSTICE #: May it please the Court. Mr. Roy Barrett will present the argument in judiciary; this must be verified and approved.

ORAL ARGUMENT OF ROY L. BARRETT ON BEHALF OF THE PETITIONER

MR. BARRETT: May it please the Court, co-counsel, my name is Roy Barrett a lawyer from Lake Barry County greatvines, Counsel Betty Coley versus Baylor University. This case involves I believe both of substantive question and procedural question. The substantive question is whether or not an employee who has a contract where a contract does not provide a very specific duties or responsibilities and can design employment in labor suits of constructive discharge and then have the trial court give some instruction under constructive discharge that if there's a problem had the jury charge instruction which require that the jury determine that the employer may be working conditions so intolerable that an employee seemingly situated would have felt compelled to resign. It is our position that constructive discharge for both an at-will employee and if the contract is assigned, it should be no difference. If the employee have contract rights that arise in contract, those rights maybe that the employee if they have a contract for specific job and specific location with specific duties and the employer makes a material change in those duties or that position, or that responsibility, the employee can refuse the form if they terminated, they can sue as a breach of contract or they can go to the Court inequity and ask for an injunction to force the employer to divide the contract but if they left to simply resigned and then labor sue constructive discharge, their burden is the same as if they were an actual employee. Now they may have some part of an easier hode or road hode because they have a contract and the Pattern Jury Charges instruction 107 says that "the employer make the working conditions" so intolerable that a employee seemingly situated would have felt compelled to resign. So if they have a contract and that the argument of the contract gives some certain rights and that as that contract personally would have felt compelled to resign because they weren't allowed to do so things that they're supposed to do; they may have a better factual argument that they have no different legal position. The Court of Appeals did not really say what the standard is. They seemed to the closes they get to resign, if an employer makes a material change in the employee's work or duties. That could be a constructive discharge. They cite Wolf Cigar versus Kramer decide in 1908, 50 years before the doctrine of constructive discharge was developed by Federal Courts initially and then by state courts in, in employment related cases. Wolf Cigar is not constructive discharge case; it is a contract case. In Wolf Cigar, the employee had a contract that provide a specific position. He was to be the manager of all the cigar stores for that company in that metropolitan area. He was to be located at a certain store in the contract said what store he'll be at, he was to have over-all administrative, clerical, bookkeeping, management responsibilities. They took away that job from him and they said "You go over instead and work in a little sanct shop in a hotel." That was a one person shop for the cigar store, they took away his responsibilities and duties, they took away his job, title in effect, as a manager, they move him on a location he had been contracted up to the end. What did he do, he refuse to do that, they fired him. He sue for breach of contract. That's all Wolf Cigar is, it's a breach of contract.

JUSTICE: Is there any policy manual or anything at the university that describes the duties and responsibilities of assistant professor?

MR. BARRETT: No. There are the, the a-- it goes well as a very indifferent. There are, there are policy manuals that talk about academic freedom and the right to academic freedom, there are policy-- there are personal policies that talk about if you're going to

terminate someone's tenure, the procedure that she must follow. But there are no policy manuals that say, "a specific professor has a specific group of deeds."

JUSTICE: What if they had assigned her to the cafeteria?

MR. BARRETT: I think she would have had a very good argument, that fact, she would, she would have had an argument of that amounts to constructive discharge -

JUSTICE: All breach of contract.

MR. BARRETT: - and she would have a better argument for it's breach of contract. And she could have refuse to go to cafeteria and if they fired her for not going to cafeteria, she could sue for breach of contract. She, she did not have a per contract which is exhibit four in the exhibit does not provide any specific duties, it provides that she has a contract for the next academic year at the rank of associate professor; it doesn't even really saying what the problem is; and she was had ensue the associate professor in Library Science. Baylor does not have a library science teaching program. In 10 years, this librarians is a late sort of requirements. She was a tenured librarian. The only change made in her duties were really to change her for being the only librarian at the Armstrong Browning Library which is even known as such of collections library that matters. For being the only librarian there, which she was for many years when she retired. To being a lib-- a research librarian at that same library. By the time, those change were made two things have basically noticed ...

JUSTICE #: Why, why do we need constructive discharge? In the constructive discharge just another name for prior material breach?

MR. BARRETT: Constructive discharge is not a certain cause of action. It is merely a method of, of, of providing the, the breach element of a breach of contract rights.

JUSTICE #: Right. But that wouldn't, wouldn't that just be the same as asking, "Did Baylor, who breached first Ms. Collin or Coley?" ...

MR. BARRETT: Coley.

JUSTICE #: Ms. Coley or Baylor? And say a breach is a material violation of the contract.

MR. BARRETT: You, You're saying in constructive discharge saying, "who breach first?"

JUSTICE: Right?

MR. BARRETT: Well, if that's her contention, then that's a contract cause of action. And, and if she contends that there was a breach of contract, she should sue for breach of contract. If she contends there is a constructive discharge and that in effect breach her employment, then she's got to show that whatever was done to her was not just a violation of contract but it was something else because she didn't elect to sue under the contract and reliable the terms and conditions of the contract. If she had, she would have lost in this case because her contract doesn't provide for any specific duties and responsibilities. So what she did is try to go at the back door and say, "Okay, I'm just going to quit." Then she quit to get married, she got married then she sues. Then she says, "do I have constructively discharge even though she change my duties and responsibilities, even though I did have a contract that calls for duties and responsibilities, even though I am not tenured to a specific position." The plaintiff contends in the brief that Dr. Reynolds testified that you're tenured to a position that is not correct. If you look at the record, he specifically testified he were not tenured in a position, you're tenured in an academic fields. But there is no tenure in

managing position and there is no tenure as specific position with any academic field. A university has the right to say to a biology professor who's been teaching graduate students, you're not doing too good; in fact, we're going to hate to teach undergraduates or you'll hate to do research in biology. That can we tell them that your going to become the player of the bare pit, probably not. But we can make job assignments in change. All we need in Betty Coley&i was change her from being the librarian of Armstrong Browning, because jury for tenure two other people had gone and got their masters degrees in Library Science and been working there -

JUSTICE #: Counsel ...

MR. BARRETT: - dividing the duties.

JUSTICE #8: Let-- your position is that there's-- part of your position is that there is no cause of action for constructive discharge; it's really just a breach of contract to action, right?

MR. BARRETT: Well, I believe there is a cause of action for constructive discharge that is different from breach of contract and at the, the constructive-- you, you have to have some right to be employed, it maybe a right that you have not to the termination of closure of whistle blow or not to determinate the cause of rights of tenured or other protecting issues. It may each brought her any disfigurement, so constructive termination-- constructive discharge supplies the termination element of any client in which you have some right to continue employment. Contract maybe one of them but when you already rely -

JUSTICE #1: And so -

MR. BARRETT: - in our lives ...

JUSTICE #1: - you make sure, I never understand you.

MR. BARRETT: Yes, your Honor.

JUSTICE #1: Slow you down just a little bit.

MR. BARRETT: I'm sorry, your Honor.

JUSTICE #1: That's okay. In the common law, constructive discharge is a means of breaching the contract, is that -

MR. BARRETT: It is -

JUSTICE #1: - say that's an accurate statement of your position.

MR. BARRETT: - it is a means of showing a wrong termination, whether it's a breach of contract or termination for other illegal reasons.

JUSTICE #1: Do you think in this case that the charge submitted a cause of action in the first question? There are two, two claims I think contended to be submitted. Intentional infliction of emotional distress, the second one. The first one was reign in terms of constructive discharge not breach of contract not on the termination. Was there a valid cause of actions submitted in that first claim that first set of, first set of questions?

MR. BARRETT: Yes, on the second contentions, what should the jury filed against the common plaintiffs.

JUSTICE #1: I, I understand.

MR. BARRETT: On the other period of plaintiff start have says, "I am both sued for breach of contract and I'm sued to constructive discharge." You don't have separate plaintiffs in this context, she had, she had to show a constructive discharge to having breach of contract in case you haven't ...

JUSTICE #1: I, I understand the arguments of the parties. My question is, do you think a valid cause of action was submitted in question one?

MR. BARRETT: Yes.

JUSTICE #1: And it is what-- how would you denominate that cause of action? What's it called?

MR. BARRETT: It, it would be a cause of action for breach of contract in protest, then it was undisputed on this case that she had a contract. It was undisputed in this case that she was not actually terminated.

JUSTICE #1: Has this Court ever recognized the doctrine of constructive discharge, this Court? ...

MR. BARRETT: I cannot -

JUSTICE #1: If it's circuit in 1993 you said, "We have not."

MR. BARRETT: - Actually, I cannot file the case where this Court has defined "constructive discharge." I found three Courts of Appeals cases and filed in certain cases.

JUSTICE #1: And the first question reads, "Did Baylor University constructively discharge Betty Coley?" What cause of action is that again?

MR. BARRETT: In this case, it was undisputed that she had a contract -

JUSTICE #1: I'm not -

MR. BARRETT: - it was undisputed that ...

JUSTICE #1: - I don't, I don't want to know, how it's viewed or what the parties argument were, just looking at the first question of the charge, was a recognized cause of actions submitted, in your opinion?

MR. BARRETT: If we constructively discharge Betty Coley, we breach of contract. The ultimate solution ...

JUSTICE #1: So you think question one is a question asking whether a contract-- the contract in this case was breached?

MR. BARRETT: Yes, your Honor. It is an ultimate question on whether a contract was breached. There was no dispute that she had a contract, there was no dispute that she was not actually discharge. She alleged, she was constructively discharge. So the Court did made to submit a question that says: was there a breach of contract and then define how it breach in different ways it occur, the ultimate question was why she was constructively discharge? If she was constructively discharge, there was a breach of the employment contract -

JUSTICE #1: That's right.

MR. BARRETT: - but her constructive discharge theory would be based upon whether or not we made the working conditions so intolerable that a reasonable person, a reasonable person similarly situated will have resigned. That's what constructive discharge is been held plea by every Court that is address that eventhough this Court is not.

JUSTICE #1: Is, is any material breach in the contract the constructive discharge?

MR. BARRETT: No.

JUSTICE #1: Then constructive discharge and breach of contract are not the same then, aren't they?

MR. BARRETT: Not always.

JUSTICE #1: But question one only ask about constructive discharge, he says that, he said, "that is the same as a breach of contract cause of action?"

MR. BARRETT: She had no-- she did not have any evidence that they were actually discharge. She did not have any evidence that they were committed any other breach of contract that the, the only damages she sued for were lost wages and lost employment benefits.

JUSTICE #1: So in this case, they are the same, constructive discharge -

MR. BARRETT: This page that are-

JUSTICE #1: - or breach of contract in your opinion.

MR. BARRETT: Because the only damage that she she sought when the lost wages and lost employment benefits. So she had to show a breached of her const-- of her employment contract. She had no evidence and no pleading of actual discharge so her only available theory was constructive discharge. If the jury found constructive discharge in fact of the breach of contract.

JUSTICE #1: If question once asked: did Baylor University breach the-- its contract with Betty Coley; would that been an "okay submission" in your opinion?

MR. BARRETT: If you then went forward with an instruction that say, in this case, you will consider whether or not Baylor constructively terminated her or discharge her because there was no evidence of action. You see, you can't have a general question without an instruction that says ...

JUSTICE #1: Let me go back to my question -

MR. BARRETT: - they have to reach ...

JUSTICE #1: - let me go back to my question again. Without any instructions only with the submission; did Baylor University breach its contract with Betty Coley would that have been a valid submission of the cause-- the claim?

MR. BARRETT: Because she had told Betty of things which she claimed that they did to her. That we made her come in, in the afternoon and state of fact. There were a whole glittny of things she said you did. Most of those things would not have deprived her of employment benefits-- of salary and employment benefits. Her cause of action was the low salary and employment benefits for a 4-year period. In order to recover that damages, she had to prove a, a breach of her right to continue employment. She had no evidence of an actual discharge so she had to prove constructive discharge. That was all that she had planned and all the evidence that she had, so the ultimate issue in this case was not if she had a contract with Bayor or not if there are some immaterial matter of breach of contract. It wasn't a breach of a contract which is typically right if you continue employment into the current-- allowed her entire examinations of. Thank you very much.

JUSTICE #1: Thank you very much Mr. Barrett. The Court is now ready to hear argument from the respondent. May it please the Court, Ms. Lanelle McNamara attorney for the respondent.

ORAL ARGUMENT OF LANELLE L. MCNAMARA ON BEHALF OF THE RESPONDENT

MS. McNAMARA: Yes, may it please the Court and opposing counsel. I believe that the issue here is an academic contract, it was an academic tenured contract. She received tenure in her specialty. This was a special library, it was not a general library, it was the Armstrong Browning Library at Baylor University, she received tenure because her research in academic publications where on the Brownings were related family members of the Brownings. She became an expert in that field and when she got tenure, she progress to where she was participating in conferences, preparing for conferences, giving tours, helping scholars of the library on this particular academic field which was an Armstrongs with the Brownings. Elizabeth Barrett Browning and the other

Brownings when his family came.

JUSTICE: But that's not specified in her contract.

MS. McNAMARA: She had a list of job duties and responsibilities. In salary to her position in that library and getting to the point where in 1993, she was the first librarian on the Baylor campus to ever be granted a non-month sabbatical for purposes of research. On the ground, when she was going to be traveling to England. Now, there wasn't new supervisor in the Armstrong Browning Library, who was appointed to the English department but she was the only librarian in the Armstrong Browning Library. I believe that Mr. Barrett misstudied it, that there were two other clerical staff who were doing library studies on a part-time basis just that she had got ...

JUSTICE #2: Let me ask you a question, I mean obviously, you say there was a contract and you agreed that she did not-- she was not fired from her position?

MS. McNAMARA: I am saying that she was de facto terminated.

JUSTICE #2: Well, I know that but I mean, she was not affirmatively fired.

MS. McNAMARA: No.

JUSTICE #2: Okay. So the question then is whether she was-- there was some explanation for why she, she resigned. She did resign?

MS. McNAMARA: Yes. And I can tell you why.

JUSTICE #2: Right. That the way that the, that the issue was submitted to the jury, what is it about that, that doesn't allow you to make your case-- I did make your case with the jury on the reason why she'd, why she'd resigned?

MS. McNAMARA: Well, there, what those can he say was there are two ways of looking in contract as, as, as been noticed before which is somebody breaches the contract and somebody deny breaching the party, then has the right to sue on the contract. They don't have to be terminated, they don't have to terminate her ...

JUSTICE #2: Some parts material breach then the other parties no longer been and other party can ignore the contract whatever they want to do but when used-- you wanted to submit it twice was that breach of contract, was there constructive discharge; what's the difference?

MS. McNAMARA: I did not want to be if-- typically.

JUSTICE #2: I was thought your proposed charge had question number one went some material briefs and question number two was constructive discharge.

MS. McNAMARA: I did those alternative by not the same ...

JUSTICE #2: So the trial judge gave you one if the-- my question again is what's the difference? If there is no difference, then you're not entitled to have the same question submitted twice.

MS. McNAMARA: No, I'm not.

JUSTICE #2: So what's the difference?

MS. McNAMARA: The difference is that in this case, there was a material breach by Baylor because she was removed de facto from her position -

JUSTICE #2: Right.

MS. McNAMARA: - she gave up -

JUSTICE #2: You're telling..

MS. McNAMARA: - her fees to ...

JUSTICE #2: Stop. You're telling me the facts, I want to the difference in the legal theories. For breach of contract, you have to prove that they materially breached the first. As I understand constructive discharge from your brief you would have to prove that they materially change the cont-- breach the contract first which

sounds like exactly the same thing.

MS. McNAMARA: In the case of constructive discharge, the history of the constructive discharge concept came out of discrimination law, that was the definition under discrimination law. It is now being apply in this case to contract law. An employee at-will who has no contract may filed a suit for constructive discharge. Now, can an employee ...

JUSTICE #2: Wait. Let's stop, stop right there.

MS. McNAMARA: Okay.

JUSTICE: Said got an employee, I don't breach any raise, you know, federal or state discriminatory laws. But I just-- I'm a difficult person to work for, they give me work and I throw it over the trash can and do everything among themselves. So I make their job intolerable 'cause I'm not using them. How have I breach the contract-- why should, why should we worry about if they quit, they get to sue me?

MS. McNAMARA: Well, if there an employee at-will and they quit, they can't sue you.

JUSTICE #2: But ...

MS. McNAMARA: Because they have no contract -

JUSTICE #2: You just said -

MS. McNAMARA: - on which to predicate.

JUSTICE #2: - that you just said employees at-will could for constructive discharge.

MS. McNAMARA: No, not for constructive. It is a different definition. A breach of contract is brief, brief-- is a breach of a term of condition of a contract. She was the Armstrong Browning librarian, that is all she had been, she did her research there, she was after-- while she was on sabbatical.

JUSTICE #2: You argued all that in the final arguments of the jury and the jury said, "no." So the question is, what was unfair about this submission when-- that we shouldn't take "no" as mean a "no."

MS. McNAMARA: Not an employee at-will, because an employee at-will has a higher burden to prove that, that were a, a trigged maliciously, abused, discriminated against retaliation, whatever, you know, because they have no contract. There are statutes and there are federal laws that are enacted to protect the employees at-will from certain things and that is where the concept of constructive discharge arose. Contract law has always made in if you had a written contract or anything whether it's to built a house or to provide the services to the university that the university has, has hired you to do. And, and the university breaches its contract, then the other party is allowed to dishonor that contract and they're saying that, that she inbreach-- I mean, that they inbreach the contract that Baylor restate without her notice, without her agreement, without anything. She didn't give her, give her job description until after the contracts were let out that year, I mean, we're given allocate she got her job description and she couldn't do research, she couldn't go to England and study something, she couldn't participate on boards and the other two people although she was called and ...

JUSTICE #2: But she got the same salary.

MS. McNAMARA: She got the same salary.

JUSTICE #2: So what are we going to look like if we say, "this is intolerable; you get paid exactly the same amount but you don't have to do any work." How many employees are-- because-- that's just intolerable?

MS. McNAMARA: Well, to me, it's no different than a contractors having grown up in a contractor family. You know, you've been on the contract and a-- the, the other party interferes with your ability to

do that contract and so they had breached that contract because about their interference.

JUSTICE #3: Is that interference, I mean, she had a contract, she's been paid the same wages, she just says a little less prestige in her assignments.

MS. McNAMARA: Well, she has no prestige in her assignments. She cannot have access to the materials in the library. So you know that hurry-- potting out newspaper arguments and putting this in a scrapbook like an elementary school job. That anyone give match to this analogy, if they interfere with durability to perform the contract, then you may walk away from it and still be a true problem.

JUSTICE #4: Ms. Lanelle McNamara, you're to suggest that they are requested the special interrogatories submitted. The first one goes to breach of contract apparently in, in you asked if the-- if Baylor breached that contract including its contractual agreement that Ms. Coley could continue in her tenured position unless she was determined she was unfit to continue. And that if Baylor contest that she had did, did Baylor contest that, that she had a tenured position of-- by contract?

MS. McNAMARA: Ye, she had a tenured ...

JUSTICE #4: No, but that-- my question was did Baylor take a, a different position that they say she did not have a tenured position but rather she simply had a tenure?

MS. McNAMARA: Well, there has to be a tenured position ...

JUSTICE #4: Well, my question was did Baylor, did Baylor say she did not have tenure in this position as an Armstrong Browning librarian? Did they, did they say she doesn't have that tenured position, she just has tenure?

MS. McNAMARA: Well, she may have tenure that she's not-- she doesn't-- her area of expertise had been and always had been the Brownings -

JUSTICE #4: Okay. And did they ...

MS. McNAMARA: - and that library.

JUSTICE #4: And I understood, I understand that's her position. Did Baylor offer any evidence? That, she was not tenured in that position, because of their position that they offer evidence that she was not tenured in a specific position?

MS. McNAMARA: They did argued it but ...

JUSTICE #4: What-- was there any evidence then?

MS. McNAMARA: No. That there was evidence that the precedent did state that you would have the same position once you got tenure, you've had the same rights and responsibilities and the same in that inner tenured position that you held at the time you were tenured. So that's what he said, that was Dr. Reynolds in his, in his informations in the record.

JUSTICE #2: You said the contract did includes specific duties, specific responsibilities -

MS. McNAMARA: Yes.

JUSTICE #2: - in the four corners of the contract itself.

MS. McNAMARA: Not well, not in the-- they have appointment letters and then they have policies and procedures which are kept in different departments as to the job descriptions. And it incorporates the job descriptions and the personnel policies and procedures.

JUSTICE #2: Contract by records incorporates those other sources and policies ...

MS. McNAMARA: The policies and procedures have found. Yes, it does. Specifically say that and it also says that Baylor, you know,

incorporate-- well, I guess I said that, incorporates it by records into their contracts and keep it signed, I mean it says that they incorporate the duties.

JUSTICE #2: Those laid out specific-- particular duties, tasks and responsibilities for this position?

MS. McNAMARA: And when she came back after her sabbatical, she got a different as the evidence when you see that, that's Wolf Cigarming about a different time and she got different duties and responsibilities. She could not study after 5 to do work. She could not come in before 8. She could not go to meetings on campus during work hours. She was a clerical staff member in the Armstrong Browning Library. And at the end of that year, that she her job description in October; at the end of that year, she resigned at the end of this premise. She was supposed to get a performance evaluation in March, she never got it and she resigned in June. And a-- that's my presentation of that oral response to their presentation of that issue. Thank you very much.

JUSTICE #1: Thank you counsel.

REBUTTAL ARGUMENT OF ROY L. BARRETT ON BEHALF OF PETITIONER

MR. BARRETT: May it please the Court. With regard at issue of whether Baylor contested the-- whether it was a position to which she was tenured. How it refer the Court and I know the Court is already familiar with volume 5 of, of the record page 45 and pages 34 through 40. Specifically when Dr. Reynolds, the president of Baylor University was ask by Ms. McNamara that tenure is an entitlement to a position that you have the time that you were tenure and to well when you cite position, you're talking about the individual having certain kinds of responsibilities in their field. Question to raise an answers but to a particular position, per se, "No it would not."

JUSTICE #1: Proceed though, she testified differently, right?

MR. BARRETT: Yes, but that was a contested issue of fact and ...

JUSTICE #1: So the jury should decide that might-- I'm still look at the question one of the submission here. Question was submitted the jury had defined the conditions was so intolerable; it would have felt compelled to resign. That's a higher standard that material breach in and I mean the material breach would be lower than an intolerable breach.

MR. BARRETT: That's correct.

JUSTICE #1: So-- but wouldn't she be entitled to win for a material breach and if so if the evidence-- if the jury could have found on this evidence that there was a material breach but it wouldn't intolerable, shouldn't she had been entitled to have the lower standards submitted?

MR. BARRETT: No, sir.

JUSTICE #1: Why not?

MR. BARRETT: Because she did not have evidence of an actual discharge. She elected to resign. Now -

JUSTICE #1: But again ...

MR. BARRETT: - with your question that ...

JUSTICE #1: My question is if you materially breach my contract, like if you don't pay me and then I quit, then who breach first you did? ...

MR. BARRETT: Yes.

JUSTICE #1: Say but it's, it's not a defense then to say, "Yeah, but you quit" because the question is who breach first? So if she says, "you all materially breach first", ain't she entitled to submission of that rather than a higher standard of-- did you all intolerably breach first?

MR. BARRETT: If she had evidence to support it that she did not but we come back to that one second. Just-- Justice Nelson, they'd be the, the instructions and the issue the question submitted are defective because they assumed that she was tenured in a position and recalls this assuming that she could not be move out of that tenure without a hearing before the tenure ruling. And that it was a contested question of fact if-- before the jury whether he would tenured in position. She said you were the president of the university said if you are not.

JUSTICE #3: Did anyone else had impression of the university addressed that issue?

MR. BARRETT: Nobody got the plaintiff, you said you are in charge of the university then you just have the tenured process said you're not and the tenured policies did not say that you're tenured, it says you're tenured on field but not in a to, to a certain position to teach graduate biology, you're not tenured in that, you're tenured in biology.

JUSTICE #3: And here proposed question number two, she references her tenured position as Armstrong Browning librarian.

MR. BARRETT: That's right.

JUSTICE #3: So ...

MR. BARRETT: And she-- and we can loose librarian to one position to another. Mrs. Coley testified that Baylor was just justified in moving its Chief Librarian for being Chief Librarian to just being a Librarian because the library faculty didn't like her and complain that. So she testified in her own testimony that Baylor was totally justified in moving its Chief Librarian in that tenure in that position to another library position. And that yet she said we couldn't move her from the, the Armstrong Browning sole librarian to being a research librarian at Armstrong Browning Library.

JUSTICE #3: Mr. Barrett, you says that Ms. Coley's contract exhibit 4.

MR. BARRETT: I, I said four but I, I was wrong it was exhibit 3.

JUSTICE #3: Okay, 3 provides for no specific duties -

MR. BARRETT: That's right.

JUSTICE #3: - or responsibilities.

MR. BARRETT: Yes.

JUSTICE #3: McNamara says that by reference they incorporates other letters and policy manuals, procedure manuals that do delineates specific duties and task for her position.

MR. BARRETT: Yes. I stand by the record. The record in exhibit 3 is the contract, it has no word in it about specific duties and responsibilities. It says that she'd been assistant professor that's where the story is when she works for this year. It incorporates the academic-- the PUPP the Browning First policies and procedures. The three that she contended provided some right to her is the one on academic freedom. It relates to professors having academic freedom. It didn't say, "what their job pattles or implies across the university." The next thing was a tenured policy statement, it provides policies and procedures by which you can terminate someones tenure. It is a procedural right, it, it re-- applies across the university, it doesn't

say Betty Coley has a certain job description then the-- a little she said is one of the dismissal, it's one that says what you have to do when you get dismissed.

JUSTICE #1: Counsel your time is ...

MR. BARRETT: I know and I did [inaudible] the question -

JUSTICE #1: All right, all right.

MR. BARRETT: - [inaudible]I.

JUSTICE #1: The files is submitted and the Court will now take a brief recess. All rise.

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