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Supreme Court of Texas.
MONTGOMERY COUNTY, TEXAS,
v.
DAVID PARK.
No. 05-1023.

March 20, 2007

Appearances:

JOHN J. HIGHTOWER, Olson & Olson, LLP, Houston, Texas RAMON G. VIADA III, Abrams Scott & Bickley, L.L.P., Houston, TX.
CHARLES B. FRYE, Lindeman, Alvarado & Frye, Houston, TX.

Before:

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

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CHIEF JUSTICE JEFFERSON: Be seated please. The Court is ready to hear argument in file numbered 05-1023, Montgomery County, Texas v. David Park.

SPEAKER: The Court is now in [inaudible].

ORAL ARGUMENT OF JOHN HIGHTOWER ON BEHALF OF THE PETITIONER

MR. HIGHTOWER: May it please the Court. Again, I am John Hightower. I am with the Houston Law firm of Olson & Olson and I represent the petitioner Montgomery County. This is a whistleblower case, as the Court knows, and it was brought by a lieutenant in Montgomery County Sheriff's Department by a man named David Park. In 2002, which is the time frame in which the events giving rise to the law suit arose, David Park was the patrol lieutenant in the Sheriff's Department. That means his principal duties were supervising deputies who perform the patrol function. He also, however, had the ancillary responsibility of coordinating security for the County Convention Center. And the arrangements were, the County Convention Center required that when someone was putting on a private event there, that they had to hire uniformed off-duty police officers to provide security. And it was David Park's responsibility to connect up these

parties' needed security with officers who were willing to work security at the Convention Center. It was undisputed in the case that Park received no additional benefits for performing this function. He did not get any extra pay. He did not get any benefits of any kind from doing it. He did the job during his regular hours as a patrol lieutenant, just an extra duty in addition to everything he else that he did.

JUSTICE O'NEILL: But do you think additional pay, I mean, would you tie the task to hurting you compensation wise?

MR. HIGHTOWER: Certainly a reduction in compensation -- let's say the county cut his salary significantly.

JUSTICE O'NEILL: But is that sine qua non? You can never have a whistleblower applying unless salary is cut.

MR. HIGHTOWER: Of course not. You can certainly have a lot of things other than -- other than a cut in salary. But that certainly -- salary isn't -- isn't --

JUSTICE O'NEILL: Well, but what other things? I mean you would say it has to be tangible. Salary, benefits -- you wouldn't -- I could put you over there working scrubbing floors at the same pay and benefits, but you would say that is not an adverse personnel decision.

JOHN J. HIGHTOWER: No. I would not necessarily say that. You would have to look at the circumstances. Certainly, moving one person from eight to five shift to midnight to 7 a.m. or midnight to 8 a.m. might be a great hardship based on their personal circumstances. To another person, it makes no difference to them. So, you have --

CHIEF JUSTICE JEFFERSON: Is it an objective or subjective task?

MR. HIGHTOWER: I would submit to the Court that it needs to be an objective task. There -- frankly, there is very little guidance from the Courts of Appeals, as to what a plaintiff has to show in order to prove an adverse personnel action on the Whistleblowers Act. As we pointed out to the Court, the United States Supreme Court has recently developed a test under Title 7, according to the similar retaliation claim, and they have required that the adverse action be both materially adverse to the person, to the claimant, and also be measured based on an objective standard. So, someone --

JUSTICE O'NEILL: And that -- that being the case, and I think the standard as a reasonable employee would have found the challenged action materially adverse, is that not inherently a fact question?

MR. HIGHTOWER: I think the answer to that is no. Yes, it can be a fact question and I gave you an example like a change in shifts. In this particular case, it is an example of why it doesn't have to be, why it is not inherently a fact issue, or it is a fact issue that may be resolved in summary judgment as it was here. The plaintiff's argument here again this -- comes to this -- if this case comes to this Court on summary judgment and the plaintiff's argument here was that, what he lost and the only argument he made, is that what he lost was the right to earn extra income from working extra jobs. And I don't know whether the Court is familiar, it is a very common practice with police officers to work extra jobs as police officer, in uniform, providing security -- very common in police departments. And the plaintiff's argument was "Hey, because I had this in the security coordinator function, I could assign myself the jobs, I lost the opportunity to do that when the county took that position -- that function, and gave it to another department instead of the Sheriff's department." That might be enough, but that's not the facts established by the summary judgment motion. What the summary judgement motion -- what the summary judgment evidence established was that he did not lose

the right to work extra jobs, at the Convention Center, or anywhere else.

JUSTICE O'NEILL: Yes, but he -- he -- you would presume, and I don't know what the record will bare out, but that someone who has the power and the authority to confer additional money on your fellow officers, would occupy position of some prestige within the department, and he certainly lost that.

MR. HIGHTOWER: And that might have been an argument that he could have made in response to the motion for summary judgment, but he did not. The only [inaudible] issue he said he took the -- excuse me -- the county -- the county took the position. He has not shown an adverse personnel action in the motion for summary judgment. It was incumbent upon him to say, "Okay. Yes. I did suffer negative consequences because of the action that was taken." And to set out those negative consequences he did that, only one consequence. He did not say it was a high-prestige job. He did not say he lost prestige, lost status. He said only, "Gosh, I could -- I had to pick -- I had to pick and choose jobs at the Convention Center when I had that position, and I can't do that anymore."

JUSTICE O'NEILL: But isn't the message that then -- is then sent is, if you see sexual harassment going on in the workplace, you better not report it, because they are going to jerk some other duties away from you.

MR. HIGHTOWER: No. I think the message that is sent is, there is no action that an employer could take that won't result in a law suit once an employee has made some kind of claim. They then enter in this privilege status, where you can't make any changes with regard to their position without negotiating with them, get going and say, "Gosh, is it okay if we change your -- the, you know, color of the paint in your office? Is that okay with you?" And that's the problem that having such a low standard, such a low threshold -- basically absence of the standard and [inaudible] is there is no action an employer can take that is risk-free, once an employee has made -- has blown the whistle.

JUSTICE GREEN: Does it matter that in the situation here, Commissioner Rinehart had -- I guess he was responsible for making the assignments to the -- the Convention Center.

MR. HIGHTOWER: Actually, the allegations, and they have to be taken as true because of summary judgment, was that Rinehart engineered -- Rinehart basically went to the director of the Convention Center, who actually makes that decision and persuaded him to make this change, because he wanted to get back at David Park for having filed this complaint.

JUSTICE GREEN: Right, I guess -- was the Convention Center within the commissioner's precinct, I guess is --

MR. HIGHTOWER: It is a county-wide facility. He had no authority. I don't think there is any allegation that he had authority to go and make that change.

JUSTICE: Is it a county-owned facility?

MR. HIGHTOWER: It is a county-owned facility. Certainly, Commissioners Court, as a group, would have authority over it, but an individual commissioner --

JUSTICE: But the events where the officers provided private security were private events, and I guess, leasing space from the county.

MR. HIGHTOWER: Private events at a public facility. Yes. So they were not getting paid by the county. They got paid by the private participants in the event.

CHIEF JUSTICE JEFFERSON: Is there any evidence along the lines that a reasonable employee would consider transferring the security coordination duty to be punishment.

MR. HIGHTOWER: There's certainly -- the only -- again, the only argument that the plaintiff presented in response to the county's argument that there was not an adverse personnel action is, "Hey, I lost the ability to assign myself jobs at the Convention Center, even though I rarely did so. I lost that ability, and therefore, I lost -- my compensation was reduced." However, the plaintiff conceded that jobs like that, extra duty jobs for police officers in Montgomery County are plentiful, and that as far as he knows, he could get all the jobs that he wanted, though he himself refuted his own -- the -- the argument. The summary judgment evidence refuted the argument that he lost compensation. He did not lose any compensation. He did not argue that he lost status. He did not argue that there were some other incident of this position that --

CHIEF JUSTICE JEFFERSON: And if he had argued that, then the summary judgment would be inappropriate.

MR. HIGHTOWER: It would be [inaudible] that and -- if it was significant -- he identified a significant, a material negative effect on himself, then yes, a summary judgment would have been inappropriate. But he needed to be material. First of all, he needed to point out something, something at all, something other than compensation, since compensation does not work for him. His compensation wasn't reduced. He needed to point something out. He needed to show that it had a negative effect on him. If that negative effect was material, not just some small thing, but a material one and that it was -- and it had to be judged from an objective standard. He couldn't just say, "Why, I really like to have a blue office and they came in and painted my office orange just to get even."

JUSTICE BRISTER: Implied in your argument is that, you know, this was off-duty work. Would there be anything -- could there be any adverse personnel action ever, if what it affected was solely off-duty circumstances one way or another?

MR. HIGHTOWER: I do not think that the Court has to reach -- raise that question but -- and I am not sure I know the answer, but their argument is that if they did take away his right to work extra jobs. They are taking money out of his pocket. If it is common to do that for police officers in general, then that is an adverse personnel action. I think that would at least raise a fact issue. If that were the case here, he would at least be, I think, probably be entitled to have a jury decide that for him. That was -- the case was originally briefed under, there was a case out of the Fifth Circuit applying the Whistleblower Act, applying the ultimate employment decision standard, which the United States Supreme Court has now rejected in favor of the less stringent standard of materiality and viewed on an objective standard. But I think in that case, that maybe there would be a fact issue, but that was not the case we have here because, the testimony and summary judgment evidence conclusively showed that he did not lose the right to work extra jobs either at the Convention Center or anywhere else.

CHIEF JUSTICE JEFFERSON: Under the arguments you advanced here, would you say that a commissioner like Rinehart here could be subjectively motivated to retaliate against Park here, but there is still no cause of action under the Whistleblower Act.

MR. HIGHTOWER: I think you could. Yes.

CHIEF JUSTICE JEFFERSON: Does that undermine one of the purposes

of the Whistleblower Act, and that is to secure unlawful conduct of public servants?

MR. HIGHTOWER: You've got a balance here. You've got a balance between that very important purpose behind the act, and the necessity of public employers to be able to manage their employees. And if you elevate the most picayune and minor condition of employment, you do not apply a materiality test and you elevate the most minor condition of employment to something that is going to have to be resolved by the courts. You are hamstringing public employers. You've got to understand, and public employers, everything they do is subject to the law. Their employees have many opportunities to blow the whistle, and of course it does not have to be legitimate. There does not have to actually have been a violation of law, only the employee believes there is violation of the law. And if you adopt the no standard, what you are telling public employers is anytime a whistle, there is a potential, that a whistle has been blown that you need to treat that employee different than you treat any other employee, that you cannot make any change no matter how minor, without risking a whistleblower's lawsuit.

CHIEF JUSTICE JEFFERSON: Do you think -- are you familiar with the Click case out of the Fifth Circuit, transferred to guard duty in prison, I think versus Copeland?

MR. HIGHTOWER: I am not sure Your Honor. I am sorry.

CHIEF JUSTICE JEFFERSON: Okay.

JUSTICE MEDINA: You know, what is minor to one person may be significant to the other and I understand the balancing test, and I guess I have some difficulty with that, irrespective of what the allegation may be. At some point, I think that the person who has, the employee has, for whatever reason decided to come forth to what he or she perceives to be some evidence of a bad act. As I understand this whistleblower statute, they need some protection from any type of change in their life. But I know it has to be more than allegation, so I am wrestling with, you know, where is this test and I know you suggest it should be a high test, and perhaps it should be but --

MR. HIGHTOWER: I think you are suggesting, may be I am misunderstanding you --

JUSTICE MEDINA: I am not suggesting anything. I want an answer.

MR. HIGHTOWER: It sounded like you want some subjective standard, which I certainly would think is not appropriate. What the Supreme Court has adopted is an objective standard. You do not look at this particular person and would they say, I use the absurd example, "I really like having my office walls painted blue then they come in now and painted them orange."

JUSTICE MEDINA: What if they paint it fuchsia? Would that be an objective test that we could apply? Or if it is an aggie and they paint it orange or they paint it red?

MR. HIGHTOWER: That might be -- if they painted an aggie's office orange, if they did something like that. I tried to give an example of "I just like blue. I do not dislike the color they painted my office, I just like blue."

JUSTICE MEDINA: Well those are easy.

MR. HIGHTOWER: Those are easy. There have to be some changes in conditions that do not reach the level of materiality. Again otherwise, every time you are dealing with a whistleblower, and we have, you know 100,000 or more public employees in Texas. Every time a public employer is dealing with a whistleblower, they have to treat them as if differently than any other employee they have. They can't make even the most minor change without risking being here where we are today.

JUSTICE MEDINA: It seems like, you are asking for a standard in discrimination cases -- hostile environment -- those types of standard are of very, very high thresholds.

MR. HIGHTOWER: Actually, I think the Supreme Court's standard is fairly low threshold and their standard is, the test is, would doing this to an average or regular employee based on objective standard, would that deter them from making this kind of compliant?

JUSTICE MEDINA: If their perception is in a hostile environment, and you changed their wall and you have done something. That is a high threshold for the plaintiff to prove.

CHIEF JUSTICE JEFFERSON: Counsel, I have just been reminded that the Amicus has reserved five minutes and you are well beyond your time, so we will hear from the Amicus and I apologize for it.

MR. HIGHTOWER: Thank you. No problem.

ORAL ARGUMENT OF RAMON G. VIADA III AS AMICUS CURIAE

MR. VIADA: May it please the Court. I am here on behalf of the Texas Association of School Boards Legal Assistance Fund, appearing as a friend of the Court in support of Montgomery County's petition for review. Our brief raises two issues of heightened concern to our member school districts. One is the point that Mr. Hightower was alluding to earlier and that is that the Whistleblower Act's prohibition against employers taking adverse personnel action is construed in a way that the term "adverse" requires an objective materiality standard, at least as rigorous as the objective materiality standard required by the U.S. Supreme Court in the Burlington Railroad case and it's applicable in Title 7 Retaliation Cases.

JUSTICE HECHT: We just do not think that there was any subjective component to it, because I was wondering, you know, we are all sitting here thinking, "Oh gosh, it would be terrible to have to work the graveyard shift." But maybe somebody liked the graveyard shift, and so to get back at him, we move him to the middle of the day.

MR. VIADA: I think that an objective test can look at those sorts of situations. You know, we do have a body of federal jurisprudence. It's grown up with Burlington as a stance and the courts look at all the factors, and at certain circumstances, a graveyard shift could be very difficult on a mother with kids. In other circumstances, police officers have their shifts changed all the time, and they have to frequently work graveyard shifts and so that is a common expectation in the job.

CHIEF JUSTICE JEFFERSON: Well let me ask you about, are you familiar with Click v. Copeland?

MR. VIADA: The name of the case is very familiar, your Honor.

CHIEF JUSTICE JEFFERSON: It is a case where the Sheriff's deputy sued because he was transferred from duty in the law enforcement section to duty as a jail guard, and they considered that to be an inferior position. But there was no change in compensation or benefits. They were not demoted under any of the policies in place, and yet the Fifth Circuit said that there was an issue of tribal fact there, and that was an adverse personnel action. So where do we draw the line?

MR. VIADA: Well, I think that the court in formulating the objective standard might draw from federal jurisprudence that is growing up under these tests where they look at things in addition to

pay, for example, prestige. Is the move from one job duty to another one that would visit a significant impact to prestige? Another would be, does the movement entail or reduce the opportunity for advancement? Does the movement remove a job function that the employee would need to stay current on in order to be able to do their job well? Is there a change in the difficulty of the work conditions? Things of this nature that don't necessarily affect pay, but do visit a significant impact on the employee's duties.

As far as the paint jobs are concerned, we do know the Whistleblower Act does define the term personnel action, and that does not involve the paint in the offices, but it does involve things such as employment evaluation. Is the Court going to count in its whistleblower claims where the employee feels that, "Well, I should have gotten an exemplary evaluation rather than just simply exceeds expectations." I mean, it could be as picky as that and we have a whistleblower case with a significant defense cost that could otherwise have been applied to educate the school's [inaudible].

JUSTICE JOHNSON: Counsel, in this case, does this somehow come under personnel action, because it affected his work assignment? As I understand in the record, this was part of his work duties.

MR. VIADA: This would be a work assignment and so, by definition, it is a personnel action. What the Whistleblower Act does not tell us is what is an adverse personnel action. So we are asking the court to put judicial gloss on the word "adverse." And we see that when the Whistleblower Act was amended in '95, to add the term adverse, there was a body of federal jurisprudence that we are looking at adverse personnel action, so there was already a dialogue in jurisprudence concerning what rose to the level of an adverse action. So I think that the word adverse is an important word.

JUSTICE WILLETT: Well, your second point, one was adverse requires an objective materiality standard, what is number two?

MR. VIADA: Our second point in our brief which has to do with the target of the whistle blowing here, and that is an elected official. And the elected official is neither the employing governmental entity nor a public employee within the definition of the Act. Our contention is in this case, the report of a violation of law by the commissioner was not a report of a violation by the entity. And there are -- there are a couple of ways that you can branch this out. You can look at it as a complaint of a violation of Title 7, but you have chapter 21, you have Title 7. And you have the Stinnett case saying that, if you want to bring a retaliation claim for reporting sexual harassment or those sorts of things, you've got to go through EEOC and that the Whistleblower Act, which is a more general statute is preempted.

The other angle, which is the one that I saw in the Court of Appeals opinion, is it is a violation of criminal law, but it is not a violation of criminal law by the governmental entity. It is a violation of criminal law by the commissioner. And so, you can't use the criminal statute to boot strap yourself into a whistleblower claim against the entity. And here is our problem. The elected official is not someone who like the appointed official, or the employee is subject to the entity's control. The Act exists to deter the entity from allowing retaliation to take place, and it creates a financial incentive on the part of the policymakers to make sure that people who retaliate are disciplined appropriately. But when you have an elected official, it is hard for the entity to be able to rein that person in. Well you say, "What is going to rein that person in?" Well you still have, you know, against the Whistleblower Act, the backdrop of Federal 1983 Law and

claims for violation of First Amendment Right that can be brought against the elected official in his individual capacity. And so, that means that the entity might and the taxpayers may not have to suffer for this elected official's malfeasance. But certainly, he is subject to that kind of financial deterrence through federal law. So that is our other concern.

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thank you.

MR. VIADA: Thank you.

CHIEF JUSTICE JEFFERSON: The Court is ready to hear the argument from the respondent.

ORAL ARGUMENT OF CHARLES B. FRYE ON BEHALF OF THE RESPONDENT

SPEAKER: May it please the Court. Mr. Charles Frye to present argument for the respondent.

MR. FRYE: May it please the Court. This is on the judgment case. That is the most important facet about this case today. Both the questions that we have about what a reasonable employee would do for an adverse personnel action, what a substantial change in job assignment or what material effect this retaliation had on Lieutenant Park can be answered by a jury.

JUSTICE O'NEILL: So, would you agree with the standard that the United States Supreme Court set? The reasonable employee would have found the challenged action materially adverse?

MR. FRYE: I would go further than that, Justice. I would cite you to the Texas Municipal League brief in this case, where they suggest a rule, or a definition of adverse personnel action as someone who drafts jury charges, at least for a part of my pay, I would like for someone to tell me what an adverse personnel action is, so that then I can argue to a jury that Montgomery County violated the Whistleblowers statute. The Texas Municipal League, and it pains me somewhat to say this, has put forth a very good definition, based in part upon the Burlington cases that Counsel and this Counsel spoke about. But this court has an opportunity to say what is an adverse personnel action.

JUSTICE HECHT: Well, is it -- is it true that Deputy Park's compensation was not reduced, or at least there is no evidence?

MR. FRYE: I do not know Justice Hecht, if it was or not, because -

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JUSTICE HECHT: Well, is there any evidence or claim of that?

MR. FRYE: He says in his affidavit responding to the summary judgment, that he lost the ability to assign extra jobs to him.

CHIEF JUSTICE JEFFERSON: But he is still eligible for extra jobs?

MR. FRYE: Eligible? Yes.

CHIEF JUSTICE JEFFERSON: He just may not get his first pick.

MR. FRYE: That is correct.

JUSTICE MEDINA: Why can't we say as a matter of law that is just not enough for your own on this record. That was the evidence that was before in response to the summary judgment motion.

MR. FRYE: Justice Medina, if we knew how much it was, then we could say that is not enough. If we don't know how much it is, how can we say it is not enough? We know that he lost 50 percent of the opportunity to assign extra jobs. We also know that extra jobs are covered by Montgomery County Sheriff's Office policy. They control the

extra jobs.

JUSTICE HECHT: Just to be sure, when you say 50 percent, because the constable and the Sheriff were sharing the --

MR. FRYE: That's correct, Justice Hecht, and they [inaudible] months now. So, I don't know if that is a lot or little. I think a jury should be able to hear whether if it is a lot or a little. I think the jury should be able to hear whether that is a material adverse personnel action in Lieutenant Park's case. The sheriff of Montgomery County at the time thought it was. The sheriff in Montgomery County said, "David Park could not be the convention security coordinator, unless he comported with Montgomery County's Sheriff's Office rules and procedures, which he did. He was appointed by the sheriff. I think the jury might also see that if someone is appointed by the sheriff and then removed, an obvious retaliation by the County Commissioners' board, one or more of its members. I think that then there is an issue, of whether or not, even under the Municipal Leagues definition, that is a material adverse effect.

JUSTICE GREEN: So you are suggesting though that, I mean the argument made by your opponent is that this is going to expose public employers to spending a lot of time in the courthouse, explaining their actions for employees, who happened to have made some allegation that they may not be illegal, but they say they think it is illegal. Shouldn't there be some circumscription around how we deal with these people, or otherwise, we are going to be in the court all the time?

MR. FRYE: Justice, we are in the court all the time now. I do not know how we reduce that necessarily from frivolous law suits. You already have --

JUSTICE BRISTER: Well, we could just draw a line and say, "Look, your pay is not any worse, your conditions, your office, everything is the same, in fact, you have less to do now than you did before." How could it -- we could draw the line there.

MR. FRYE: Well, that is not how the statute draws the line, Justice. The statute says that and the Supreme Court as Amicus Counsel argues says, "Would a reasonable employee feel like that is an adverse effect?" Now the statute talks about promotion, job evaluation, work assignment --

JUSTICE GREEN: From a reasonable or an objective point of view.

MR. FRYE: True.

JUSTICE GREEN: For example, my son is a police officer. He works this -- he talked about the midnight shift in the worst part of Fort Worth because he wants to get the experience, because he wants to move up the promotional ladder faster. If for some reason, he make some complaints, saying some reason the department says, "We decided we want to assign you to the daylight shift in the least-crime ridden part of Fort Worth." So he feels like, subjectively, that is an adverse action because his deed does not have the opportunity for promotion that he thinks he should have. Now that is subject for an ordinary person to look at that they'd say, "Well, that's great."

MR. FRYE: Unless an ordinary person is sitting in the jury box among 12 or 11 others.

JUSTICE GREEN: The father would think that would be great.

MR. FRYE: I understand. When we retaliate against someone, Justice, we do so in a way that we think will hurt him the most. Now, you can retaliate against me by saying, "You'll never be able to watch Texas Tech basketball ever again."

JUSTICE: That could be a relief, you know?

MR. FRYE: [inaudible]. Reasonable folks might differ as to whether

or not that is retaliation, but I think that the key in this case is David Park, has a right, should have the right to address the jury and to tell them.

CHIEF JUSTICE JEFFERSON: But you are also saying there is no room for summary judgment in these cases.

JUSTICE: It did sound like you are arguing in all of these cases, where adverse personnel action is contested, almost all should go to a jury.

MR. FRYE: Well, I have a bias to federal jury trials, Justice. I will admit that, but I think that if we adopt the Municipal League's definition, which is on page 9 of their Amicus brief, that is as close as we are going to get. We are never going to get to the perfect world, where you deter frivolous law suits 100 percent. All you can do is have Rule 13 motioned so you can write bar review articles and things like that.

JUSTICE: Or you can have summary judgments?

MR. FRYE: We can have summary judgments, but I think that we have summary judgments with a clear rule. Clear rule to what an adverse personnel action is.

JUSTICE O'NEILL: Well now, it seems to me that what would be appropriate in a summary judgment context would be the governing employer arguments. So, could you address that?

MR. FRYE: Absolutely. In this context, Commissioner Rinehart -- well, first, let me start it this way. I disagree with Amicus counsel that the Act exists to deter an entity's wrongdoing. Permissible acts exist to protect the public employees, who report in good faith wrongdoing. That is why the Act exists. I do not know if it deters [inaudible] board members, I have no idea. I do know that the Whistleblower Act is designed, not with them in mind, but with the employees who bring their misconduct to light. In this case, Commissioner Rinehart is a public official. He is not appointed. He is elected. He is a part of a governmental entity. Now it is true that the governmental entity did not, quote/unquote, retaliate, against David Park, because no governmental entity acts. It is like corporations don't act, except through people. So when the county judge and the county commissioner go to the director of the convention bureau and say, "We want you to change this," knowing that David Park will be adversely impacted, that is the governmental entity acting because David Park gets paid by the county. We know he works for the sheriff. He gets paid by the county.

JUSTICE: Is there evidence of that.

MR. FRYE: Not in this record but there is evidence that David Park is employed, of course, by the Montgomery County Sheriff's Office. So, the governmental entity involved is Montgomery County. It acted through Commissioner Rinehart, the Convention Center director and through, we think, we have alleged, the county judge. So when we look at this, if David Park had a good faith belief that he was reporting misconduct, unlawful conduct, to the appropriate person, the sheriff, then he gets over that hurdle, that initial hurdle which was brought up in the medium case in Wichita County v. Park.

CHIEF JUSTICE JEFFERSON: I am reading the Municipal League brief, on page 13, as you said.

MR. FRYE: Page 9.

CHIEF JUSTICE JEFFERSON: Page 9? Okay, I have the same question. What is materially adverse?

MR. FRYE: An objective and material has -- well, I think you'll go back to the Act. The Act says, "Does it affect your pay? Does it affect

your job evaluation? Does it affect your work assignment?"

CHIEF JUSTICE JEFFERSON: Which one of those do you say was affected?

MR. FRYE: Work assignment and pay. Now the pay is a little tricky. Let me take that up now. He did not get paid for extra jobs by Montgomery County. That is clear. But the county sheriff controls, through their extra job policy, which is in the record, what kind of extra jobs he can take --

JUSTICE BRISTER: But there is a huge step from controls you pay from the county and control you pay from somewhere else. I mean, Judge Green's example could control your future pay from the employer, or you know, employees could make the argument that, you know, anything you do to decrease experience now as a judge means I cannot get on with this good law firm someday when I quit. Those kinds of connections are going to apply to everything. It is no longer an adverse personnel action. It is just anything adverse.

MR. FRYE: I would pull out of my brief book, Your Honor, the hundreds of cases on speculative damages. You attack it that way, not whether or not it is material. I think in this case, going back to the original question, Montgomery County Sheriff's Office has certain rules about extra jobs. For example, you cannot work at disreputable locations, things like that. Now, if David Park had been retaliated against in a different way, if they had said, "David, you are the only Montgomery County Sheriff Officer who cannot work extra jobs." Montgomery's argument is the same. "We did not reduce his pay at the County. We did not affect his pay, his promotion. We affected nothing at the County."

JUSTICE O'NEILL: Well, but in your scenario, that would be the sheriff making that decision. I mean, the -- the problem I have here is this county commissioner does not have any power or authority to force the sheriff to do anything. He went out and did this unilaterally, and retaliatory though it may have been, there is no ability for the sheriff's department to rein in the -- since I -- fundamental for the Whistleblower Act is there must be some ability to rein in the abuser, and here, you know, somebody else gets word of it and what if it was you know, a cousin, who at the, you know --

MR. FRYE: I think that's exactly right. I think that if the county had gone to a third-party employer, so to speak, a vendor at the Convention Center, and said, "Don't hire that David Park guy. He is a trouble maker." We wouldn't have a whistleblower case. That is true. There is no doubt about that. But the county didn't do that. The county didn't go to his cousin or to a vendor. The county itself said, "You are now 50 percent less responsible for security coordination, ergo, 50 percent less able to be appointed, so to speak, to these independent vendors." So you are right, Justice, that the county, if it went to someone else and that pay is totally outside the county. But the county controls extra jobs. The county controlled this extra job. The only reason he got it, according to Sheriff Williams in his affidavit, is because he was an officer of the Montgomery County Sheriff's Office. So you have to be a law enforcement officer in Montgomery County to hold that position. So it's integral, I think, as part of his work assignment and part of the compensation that is part of the, what is a good word, penumbra, of being a law enforcement officer.

JUSTICE WAINWRIGHT: Do you agree with the opposing counsel that the standard he has argued should be an objective one? That is what page 9 of the brief you referred to says.

MR. FRYE: It has to be objective at some point, Justice. So, I do

think that this is a good definition from the Municipal League. I think it would make an excellent jury introduction for this case because I think this case should go to a jury.

JUSTICE WAINWRIGHT: Do you think there could ever be a case that should go to a jury because the color of a person's office was changed?

MR. FRYE: No.

JUSTICE WAINWRIGHT: Never?

MR. FRYE: I do not. No.

JUSTICE WAINWRIGHT: Even fuchsia would not get your dander up.

MR. FRYE: Justice, I confess, I have never known what fuchsia is.

JUSTICE WAINWRIGHT: You will know it when if you see it, probably.

JUSTICE O'NEILL: Let me make sure I understand something you said earlier. I understand you agree with the Supreme Court's pronouncement in Burlington Northern, "A reasonable employee would have found the challenge to actually materially adverse." And you responded, "I would go even further," and I didn't catch where you would go even further.

MR. FRYE: Just to the Municipal League's definition of adverse personnel action. I think it's more than just a standard. I think that they have drafted an instruction, basically, on page 9 of their brief that describes what an adverse personnel action is. Now, we can fuse these together and I think the judges at the top [inaudible] level do this a lot. When we write jury instructions, we have to do this a lot. But clearly, I think if we asked a jury, do you think, as a reasonable person, David Park was materially, adversely affected in his position as a lieutenant with the Montgomery County Sheriff's Office then that's a question. When this case is submitted after oral argument, if that's still a question, then it's a fact question and this is a summary judgment case.

JUSTICE JOHNSON: This is a traditional summary judgment trial.

MR. FRYE: Yes.

JUSTICE JOHNSON: So they had the burden to disapprove also.

MR. FRYE: I believe so.

JUSTICE JOHNSON: Alright now secondly, let me go back to your jury question. Should the standard be a reasonable-person-standard or should it be a reasonable lieutenant in a police department standard? I mean, where do we go with that?

MR. FRYE: Just like in car rents, Your Honor. I think in a car rent case, you don't ask that a reasonable truck driver or a reasonable pick-up driver, or a reasonable teenage driver -- a reasonable person.

JUSTICE JOHNSON: But how about a police officer, that Justice Green was asking about. There is sometimes a different community there. They act differently. They think differently. They have different -- they are not necessarily the same as a reasonable person in all cases, are they?

MR. FRYE: I think that is true, Justice Johnson, and what happens then is at trial, in front of the jury, you show the difference. You show why this --

JUSTICE JOHNSON: But the question goes to the instruction. Is he a reasonable person? I am not disagreeing that it would be objective, but is it going to be, how are we going to instruct the jury reasonable person or a reasonable person similarly situated as to the plaintiff?

MR. FRYE: I do not have a good answer to that because I have not thought it through, Justice Johnson. I would stick with reasonable person standard and then depend upon the litigants to educate the jury on what that meant under the facts of their case. To tell you the truth, that is how I would handle it. I would bring in other police officers to testify about what it means to have your shift changed,

what it means to be sent to the Highlands Mall at noon everyday. What it means to have to go [inaudible] because I think, as I said before, when you retaliate against someone, you pick the way you can hurt them the worst. That's different for all of us.

JUSTICE JOHNSON: But whatever we do it's still object?

MR. FRYE: They can ask me at some point, Justice Johnson, but I do adopt the Municipal League's what I call the instruction, that even as a trial lawyer, I will tell you, we need some guidance under the Whistleblower Act as to what an adverse personnel action was.

CHIEF JUSTICE JEFFERSON: Couldn't we even say this sort of action is so trivial that even as a matter of law, an objective employee would not be deterred from reporting a violation of the law, if as a consequence, all that they face is having to apply for this position rather than assigning myself to that position. Couldn't that be a legal determination?

MR. FRYE: I think it is Chief Justice. That is one of the legal determinations in this case. I happen to be honored and privileged to argue in favor of Lieutenant Park that this is not the kind of triviality that would fit that test. It is not even close. When the county commissioner and the county judge removed you from a publicly visible position, and when they affect you and no one else in the department in your ability to earn extra jobs, or extra job pay from third party vendors, when they do that to you, it is not trivial.

JUSTICE: How much time did this security coordinator work assignment take?

MR. FRYE: Sheriff Williams, in his affidavit, and David Park indicated that it took just a few minutes a day at most, a few minutes a week to coordinate assignments.

JUSTICE: What does a few mean?

MR. FRYE: I do not know, Justice. I do not know. I cannot tell you. In our view, that's beside the point. The point is whether or not it was done as part of his regular duty during the day. The point is, is that it was a, it had the imprimatur of the county so to speak. He was put there by the county and removed by the county. That is the important part. So --

JUSTICE MEDINA: That in itself carries some prestige as I understand it with my fellow friends that are police officers, that extra job assignments can be that you can work at a nice place or horrible place. Someone is paying \$10 an hour versus \$75 an hour. So there is a significant impact, I guess as you said to the individual perhaps to be cited by some other evidence.

MR. FRYE: And Justice Medina, if that's a question then that is a jury question. And David Park deserves the right to prove his case or to at least try to prove his case.

JUSTICE WAINWRIGHT: Every time a law suit is filed it is because the person claims that the action was not trivial. So, but you just acknowledged a few minutes ago that all of these cases don't raise a fact question suitable for trial. So, again, in every lawsuit they went to the time and trouble, paid the filing fee to file it generally because they believe it was not trivial. All of those cases raise a fact question that survived summary judgment, counsel.

MR. FRYE: Your Honor, I have to refer to the Chief Justice, when he said that there is a legal question which I think is a very slow threshold, honestly or should be a very low threshold. My bias is in favor of jury trials. I think everyone who practices law should be biased in favor of jury trials. [inaudible] --

JUSTICE WAINWRIGHT: Assuming, we agree jury trials are good.

Still, every case does not go to trial.

MR. FRYE: That is correct.

JUSTICE: [inaudible].

JUSTICE WAINWRIGHT: But you said -- you said trivial. The statute talks about objective or this instruction you've -- you've -- as you've called it and the brief says objectively and materially adverse. We are not just deciding your case. We are trying also to set out some guidance in terms of a principle or rule that can apply to many cases in a huge state. If you were king, what's your standard? Which ones lose on summary judgment, and which ones get to go to trial?

MR. FRYE: My standard would be that, A, it goes to the reasonable person prism that first, you know, you must be able to tell that a reasonable person in that situation would be adversely affected objectively in that, as the statute said. It affects your job performance your evaluation. Now, if you are asking me is there a quantitative bar that I can set, I apologize, I cannot. If you are asking me whether or not trial court judges should still have the power to slip up, filter cases to what the Chief Justice pointed to, as trivialities perhaps, then yes, I would preserve that, of course. No one likes frivolous lawsuits.

JUSTICE WAINWRIGHT: But when it comes to affecting your work assignment, what would fall below the threshold?

MR. FRYE: I think that the amicus counsel -- oh, what would fall below the threshold?

JUSTICE WAINWRIGHT: What would not go to trial?

MR. FRYE: That's a good question, Justice. I think the point would be that we could follow as the amicus counsel said what the federal courts have been developing, the Burlington Northern case, for example, the sexual harassment cases, the hostile work environment cases. I think those are excellent cases to give us some quote, objective, unquote standards but still allow the development of facts. Thank you.

JUSTICE: Thank you.

REBUTTAL ARGUMENT OF JOHN HIGHTOWER ON BEHALF OF THE PETITIONER

MR. HIGHTOWER: May I proceed?

CHIEF JUSTICE JEFFERSON: Yes.

JUSTICE JOHNSON: Counsel, are you contesting that this was a personnel action?

MR. HIGHTOWER: We do contest it was a personnel action.

JUSTICE JOHNSON: And your position is, it did not affect his work assignment?

MR. HIGHTOWER: It did not affect his work assignment and here is the evidence, Your Honor. Again --

JUSTICE JOHNSON: Not adverse, I mean apart from adverse, adverse on one side, personnel action on the other.

MR. HIGHTOWER: Arguably, it was not even a personnel action taken towards him. The sheriff was his employer. The sheriff set his assignments. The sheriff determined who got hired.

JUSTICE JOHNSON: The question I am going to is this, personnel action is defined by the statute does it not and includes work assignment.

MR. HIGHTOWER: It -- it does include work assignment.

JUSTICE JOHNSON: And was this part of his work assignment as --

was this part of his work assignment to make these assignments? I understood it was.

MR. HIGHTOWER: Did the sheriff decide what his work assignment was? Yes.

JUSTICE JOHNSON: No, no, no. Was this assigned to him as part of his duties?

MR. HIGHTOWER: The sheriff designated him to perform this function, yes, during his regular work hours. And then --

JUSTICE JOHNSON: Okay, so and then they changed it. So, that's what I was -- understanding amicus' counsel say that they are not disputing it as a personnel action. The question is adverse.

MR. HIGHTOWER: That -- that's right. That's -- that goes to the heart of it. The question is -- and how do you determine whether someone -- something is adverse? [inaudible] its effect on the person.

JUSTICE JOHNSON: You are in the same place he is then. We are on adverse not personnel action.

MR. HIGHTOWER: Yes, we are on adverse. And if you look at the Whistleblowers Act there is a gloss on adverse. What the Whistleblowers Act says is that, what it applies to is suspensions -- terminations, suspensions or other adverse personnel actions. So, they've already -- legislature has already clued in that they are talking about serious actions or suspension without pay or termination as a serious personnel action. But they also define -- they go in and define personnel actions to include things like work assignments, and certainly compensation. No one is going to argue that -- any significant reduction in compensation is adverse to an employee's interest.

But in this case, we got to look -- look -- the summary judgment evidence was undisputed. Yes, it was on summary judgment, but the evidence was undisputed. Here was the effect on David Park. He had removed from him duties that took him 5 minutes or less a week which involved sitting in his office, picking up the phone and calling off-duty deputies and saying, "Hey, do you want to work security at the Convention Center." He was not sent to the graveyard shift. He was not given some undesirable duty. He wasn't -- they simply had removed a responsibility that he had. He had five minutes more a week he could work on supervising --

JUSTICE JOHNSON: Where does the record show of five minutes or less a week?

MR. HIGHTOWER: It may say a few minutes rather than five minutes.

JUSTICE: We'll find it, Counsel.

MR. HIGHTOWER: It's cited in the brief. There is a record cited to that on the brief. I am sorry, I can't --

JUSTICE MEDINA: Does it matter how long it took? I mean, can't you also associate whatever that job duty is with the perceived perception of power or prestige?

MR. HIGHTOWER: Well, that wasn't -- the plaintiff did not make that argument in this case.

JUSTICE JOHNSON: [inaudible] that forward.

MR. HIGHTOWER: The case that the Chief Justice was talking about is an example of significant. You take the -- if David Park was over patrol and they send him back to the jail which actually he was before he became a Patrol Deputy that might be undesirable. That is a change in his entire job. Instead of being -- supervising patrol officers you're having to deal with all of the issues of the jail. That is not the case here. They took away from him five minutes' worth of calling somebody on the phone.

JUSTICE O'NEILL: But you don't question that it was in fact

retaliatory.

MR. HIGHTOWER: I don't question the fact that that's the allegation, and this is on summary judgment. So, we have to take the allegation as true that it was retaliatory. So, for your purposes, you have to assume it was retaliatory or so.

JUSTICE WAINRIGHT: Would you -- how do you feel about the Texas Municipal League's setting out with the standard it likes on page 9 of its brief?

MR. HIGHTOWER: I think that is an appropriate standard and I think that if that standard is applied to this case, any reasonable standard is applied to this case that this is an action it was taking, was not significant enough, was not material enough --

JUSTICE HECHT: If we adopt the standard that opposing sides each think they went under, that is not much of a standard, certainly not to me.

MR. HIGHTOWER: Clearly we need a standard. And for all the reasons that have been stated on the briefs --

JUSTICE HECHT: Let me ask you this. I take it you share the amicus' concern about a commissioner being a public employee.

MR. HIGHTOWER: I do. And that --

JUSTICE HECHT: But why shouldn't the taxpayers pay for an elected official's misconduct -- the discrimination against the employee for reporting that versus a manager or somebody who is lower in the organization?

MR. HIGHTOWER: I think one of the points that was made by Mr. Viada is that the organization has control over who the manager is. Commissioner's Court, which is the policy making body for the county, can't do much of anything about what an individual commissioner does, whether he is out sexually harassing employees as alleged here or going over and trying to persuade some county official to take some kind of action, persuade him rather than order him. They can't do anything about that. But if it's a manager, if it is an employee of the county, they can fire him or they can take disciplinary action against him if he is taking inappropriate action so they have control.

The -- as to elected officials, there are other remedies out there. For instance in this particular case, based on the claims that were made, retaliation -- he could have brought an action under Title 7 against the commission and the county but for whatever reason they did not. The question here though, it's a whistleblower's case. Was it material? Judged objectively? And we think the summary judgment in evidence demonstrated that it was not.

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thank you, Mr. Hightower. That concludes the argument. That cause is submitted as our oral caucus this morning and the marshal will now adjourn the Court.

SPEAKER: All rise. Oyez, oyez, oyez. [inaudible].

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