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Supreme Court of Texas.  
City of Waco, Texas  
v.  
Robert Lopez.  
No. 06-0089.

September 27, 2007

Appearances:  
Enid Allyn Patterson Wade, Naman, Howell, Smith & Lee, L.L.P.,  
Waco, Texas, for petitioner.  
R. John Cullar, Cullar and McLeod, LLP, Waco, Texas, for  
respondent.

Before:

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

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CHIEF JUSTICE JEFFERSON: Court is now ready to hear argument in  
06-0089 City of Waco versus Robert Lopez.

COURT MARSHAL: Wade will present arguments for the petitioner. Has  
reserved five minutes for rebuttal.

ORAL ARGUMENT OF ENID ALLYN PATTERSON WADE ON BEHALF OF THE PETITIONER

MS. WADE: May it please the Court, Counsel. May I proceed, your  
Honor?

CHIEF JUSTICE JEFFERSON: Yes.

MS. WADE: Mr. Lopez asserted a claim, the gravamen of which-- in  
which from all sides is an employment discrimination claim. A claim,  
which falls squarely within the confines of Chapter 21 of the Labor  
Code. And yet for some reason it's not entirely clear, he dressed it up  
and cloaked it as a whistleblower claim. This Court has held in U.T.  
Southwestern versus Wickenheiser that if the claimant wishes to enjoy  
the sovereign immunity of a particular statute, it must plead itself  
within the strict confines of that statute. In this instance, Mr. Lopez  
did not do that because again, he, he has attempted to dress up an  
employment discrimination claim as a whistleblower claim and in doing  
so has failed to put himself within the strict confines of the  
whistleblower statute. Hence the plead of a jurisdiction and hence why

we are here considering whether or not he could do that.

JUSTICE O'NEILL: Could Mr. Lopez allege a claim just under the policy itself without trying to do whistleblower. I mean, the, the, the Human Rights Act seems to contemplate that you can file a separate action under a local statute or ordinance.

MS. WADE: No, your Honor. I don't, don't believe that he could that because in fact, Chapter 21 is the exclusive remedy that's available to assert employment discrimination claims.

JUSTICE O'NEILL: But doesn't it have a piece that says he can also

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MS. WADE: The election of remedies?

JUSTICE O'NEILL: Yes. Sue under other law or an order or ordinance of a political sub division?

MS. WADE: Your, your Honor, yes. There is the election of remedies provision. What that does, however, there's, there are two types of election of remedies provisions. One of them is, it indicates that you have a choice. You can choose A or B. Another type of election of remedies provision like-- exist in the Tort Claims Act is, it is a collateral estoppel. It basically puts you on notice that if you bring this, there's only one way to bring this, and if you bring this the wrong way, you forever lose your right to sue and, you know, foreclose. That is the nature of the election of remedies provision here. It, it, certainly does provide that there are other laws that may be provided by a local government entity, but they do not supplant, they do not take the place of, and they do not provide a basis for bringing a lawsuit in a, in a State, in a court of the State of Texas in lieu of proceeding under Chapter 21.

JUSTICE WILLETT: What, what remedies are possible if somebody chooses to sue only under the manual or, or the, the EEO policy of the City? You're-- not the, the Act. What remedies are possible if they try to sue under the policy?

MS. WADE: Well, it could have been that some litigants might have thought that intentional infliction of emotional stress would provide the basis, but I think this Court has pretty well foreclosed that. But there are certainly other types of claims which might be available of a common law nature, but is certainly more limited when the, when the defendant is a government entity because it has sovereign immunity, but there are certainly some instances or some causes of action that might be asserted. There might be an instance where a person would assert fraud, or assault and battery, or some other claim, which they-- which in fact, is at its heart or certainly connected to an employment discrimination claim. But that doesn't change the fact that if it is, at its base, an employment discrimination claim that the exclusive remedy is under Chapter 21 in the Labor Code. There is a comprehensive administrative review system that's been established by the Texas legislature for addressing these types of claims. The reason for that is that there are strong policy considerations that are associated with requiring people to use the scheme that has been established. There is-- but those policies are mediation, conciliation, and resolution before there is a lawsuit. That is why as a-- an entrance before you can even get into court, you've got to exhaust those administrative, those administrative requirements before you can sue. Of course, Chapter 21 is intended to carry out and affect the policies of Title VII. That's the very first purpose that's listed in Chapter 21, it's to affect the policies of, of Title VII and therefore this Court and the courts of the State of Texas are permitted to look to federal authority to determine or to provide guidance. If you look at the Fifth Circuit,

what it says repeatedly is that in fact, Title VII is the exclusive remedy for employment discrimination claims. There is a, a case decided by the Fifth Circuit Jackson versus the City of Atlanta. In that case, a fire chief attempted to sue, he brought a-- an employment discrimination claim, and that's cited at 73 F.3d 60. He brought an employment discrimination claim and what the court held in that case is he could not assert that claim under, under the Fourteenth Amendment or Section 1983 because Title VII provided the exclusive remedy.

JUSTICE WILLETT: But the Human Rights Act in Texas doesn't have a provision analogous to that.

MS. WADE: The Human Rights -

JUSTICE WILLETT: The Texas Act has no exclusivity provision like Title VII does in the Act itself.

MS. WADE: That notwithstanding, the policy considerations are certainly the very same. The comprehensive nature of the scheme is very much the same.

JUSTICE BRISTER: But we-- we feel a lot more comfortable when the legislature says this is the exclusive act, we don't care about the policy. If they don't say that, shouldn't we feel less comfortable about saying well, we'll say it then.

MS. WADE: The federal courts that have looked at the-- looked at the Labor Code have considered that and contemplated that and what they indicated is the policy of Title VII, not just based on-- and certainly they look to the express language there, but separate and apart from that, the policy based on the comprehensive nature, based on-- based on the conciliation principles and indications are certainly consistent with and provide for having that be the exclusive remedy and to the extent that Chapter 21 is intended to affect the policies of Title VII, it's entirely consistent with that and appropriate for this Court to say that it is in fact, the exclusive remedy. In the Lakoski versus James case which was decided by the Fifth Circuit in 1995, that involved a professor who was seeking tenure. She was denied tenure and she brought a suit under Title IX and Section 1983 only. She did not assert a claim under Title VII. The court held that her failure to do that was critical to its resolution in that case and what it held was notwithstanding her failure to invoke Title VII, her exclusive remedy lay under Title VII. And based that in this case, the plaintiff was clearly attempting to circumvent the exclusive remedy that is established by Title VII and it, and it held that it was not going to allow her to disrupt the carefully balanced remedial scheme that had been established. And it also held that to allow her what was really an employment discrimination claim as a Title IX claim would do violence to the congressionally mandated procedures. What is significant about that is, in that case, the court determined that the exclusivity does not turn upon whether or not the litigant invokes Title VII irrespective of their filing a claim through the administrative process. Title VII and Chapter 21 is the exclusive remedy. It does not turn on whether or not the litigant chooses to avail themselves of it in the first instance.

JUSTICE WAINWRIGHT: Let's assume for a minute that it's not exclusive. Explain why the policy passed by the City Council is not a rule passed under a statute?

MS. WADE: The policy is just that. It is a policy that was passed by a resolution. A rule is something that is directive. It is a command. It tells you precisely what to do. It does not create due process concerns in terms of, I don't know what this means, which is a policy is something that's aspirational. It's a goal. It's something

that we would all like to aspire to. It is not something that establishes a bright-line rule. If you have a policy and that in and of itself is, is-- provides a basis for a claim under the Whistleblower Act-- I'm sorry, were you about to-- I didn't want to interrupt you, okay. Then, what you have again is you don't-- you have a circumstance where you don't really know what the parameters are and there's absolutely no limit to what the Whistleblower Act accomplishes. What that provision of the whistleblower statute provides I think, where it says a rule under a statute or ordinance, was that [inaudible] to that is circumstances where you still have a bright-line rule but say for example, you have a city that sets up a commission and the commission is made up of citizens and they're allowed to-- or a panel of people and they are allowed to establish rules for governing like a building code, or construction and so they have a rule that says you can't have dynamite or explosives on a work site. That is a rule that's covered. A policy is not covered. A resolution is not covered because again, that's not a bright-line rule. That's not a directive. That's not a command. There are no consequences to that.

JUSTICE WAINWRIGHT: Along some part of that spectrum they-- one bleeds into the other, rule versus policy, policy versus rule. Is that a case-by-case analysis or is there a bright-line you think we can draw from?

MS. WADE: That is not a case-by-case analysis. That's precisely what you want to avoid, a rule that was pronounced by the Tenth Court creates that which is utter chaos and difficult to-- completely difficult to administer. What you look at-- you do not look at the body or how the body that made the rule or the thing came into existence. That is not what the, what the statute provides for. What you look at is whether or not it's a law, whether or not it's a rule, whether or not it's a directive, whether or not it has consequences, if it establishes a bright-line rule then it would be a law for purposes of the Whistleblower Act. If it is something that says we would all like to-- we'd like to have a green city or we would like to have a particular dress code or there are certain things that we aspire to, that is not a law, which can form the basis of a whistleblower claim. You can look at pretty much every rule that there is. For example, that the Code of Judicial Conduct, you look at that and it says-- it sets out standards and, and guidelines for conduct. It says that judges must be courteous and polite and treat litigants fairly. Well, certainly that's aspirational. If you have a briefing attorney who participates or is present and they say boy, I think the judge was rude to that particular person. Now under, under this idea that a policy can form the basis of a Whistleblower Act, you now have a briefing attorney who because they just made this comment or this complaint is now ensconced in the protections of the Whistleblower Act.

JUSTICE GREEN: But a, but a breach of the policy can, can create a grievable situation, wouldn't you agree?

MS. WADE: I would agree that it could contain-- could provide a grievable situation.

JUSTICE GREEN: And so someone who reports grievable conduct and then is terminated for it, you say that's not a whistleblower situation.

MS. WADE: What is-- what would perform or what would provide the basis for determination of an employment dispute or a grievance in an employment setting is not something that should necessarily also provide the basis for bringing a whistleblower claim and a lawsuit against, against an employer. As this Court noted in Hart, you have to

have a balance, you have to have a balance between encouraging people to police themselves internally and then also being able to maintain some order and some discipline at the work place. -

CHIEF JUSTICE JEFFERSON: But what if the policy, the policy forbids blatant discrimination and an employee witnesses someone fired solely on the basis of his or her race and that employee is then terminated. It's a-- it's in a policy of the City, but it is directed at a lawful command that there shall not be discrimination in Title VII or in a common law elsewhere. Why wouldn't that sort of conduct give rise to a whistleblower? Why?

MS. WADE: Because that speaks directly to-- that, that is provided for and taken care of by 21.055 of the Texas Labor Code which provides protection for retaliation.

CHIEF JUSTICE JEFFERSON: Well, we've moved beyond and we-- we're now assuming just for purposes of argument that we think that there's an election of remedies and there's an, an ability to pursue a whistleblower claim. So the question is, is this a law simply adopted by City Council to put in formal procedures and therefore in that scenario why wouldn't someone being fired for reporting blatant discrimination not be subject to a whistleblower claim?

MS. WADE: Again, because there is a, a remedy that is available for that. And the problem that arises is if you say that a policy-- and we can, we can say in this particular instance that ought to be okay, but then the rule eats up the circumstance. If you let someone be protected under the Whistleblower Act for reporting a policy in every instance then what the Whistleblower Act requires as a, as a general proposition is, as an, as a fundamental element is that you reach outside of it to report it to an appropriate law enforcement authority. You do that in good faith and that there will be an actual violation of law, with an internal policy qualifies for that. Basically, the requirements that were set out by this Court in Needham are, are, are done away with because if it's a policy, there's not a struggle over whether or not they believe it, if they think it was law, 'cause of course it's a law, it's in my employment handbook. And as it relates to whether or not are reported to an appropriate law enforcement authority, there's no test there either because of course, I reported it to an appropriate person 'cause it's in my handbook and I reported it to somebody who works here. And there are-- there's case after case that says reporting it internally is not sufficient because you want to have that balance. Certainly, you do want to encourage people to police themselves internally, but you don't want to create a situation where everything constitutes a whistleblower claim.

JUSTICE WILLETT: Talk about the appropriate law enforcement authority piece of the law 'cause you know, Chief Justice Gray below based his entire dissent on that, on that part of the test.

MS. WADE: My time is up. May I continue?

JUSTICE: You may.

JUSTICE: Time is [inaudible] it's okay to proceed.

MS. WADE: An appropriate law enforcement authority has certainly been spoken to repeatedly and that act. As the Court noted in the Deoreo what is required is not an internal HR person, but somebody who has the ability to take specific enforcement action. And again, if, if you do away with the requirement, that it be a law, something that is a rule and bright-line and it's only based on, the City has, has-- decided to adopt a policy then the effect of that is that there is no external element. There is no, there's no gate, there's no getting associated to the-- with the Whistleblower Act because of course, if it's in the

employment manual or here's what the Mayor's said or, here's what the City Council member said, then everybody is an appropriate law enforcement authority to enforce that internal rule and you've completely eaten up and done away with the Whistleblower Act. Thank you.

CHIEF JUSTICE JEFFERSON: No further questions. Thank you, Counsel.

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

COURT MARSHAL: May it please the Court. Mr. Cullar will present argument for the respondent.

ORAL ARGUMENT OF R. JOHN CULLAR ON BEHALF OF THE RESPONDENT

MR. CULLAR: May it please the Court. I'd like to start with making sure we understand the basic facts of this case. Mr. Lopez on August 20th 2001 filed a grievance under the EEO policy. He filed that grievance with the EEO officer, the person that the City had designated as the individual to ride herd on these EEO grievances that if it passed. He alleged that his supervisors-- his supervisor had engaged in race and age discrimination. Before September 10th 2001, Mr. Lopez had been returned to his position as Chief Plumbing Inspector of the City of Waco. His grievance under the EEO policy was complete. Prior to September 10th 2001, the day he drove a vehicle, a City vehicle to Austin for a State Plumbing Board meet. The next day, on September 11th, he was told he was in trouble because he had taken that car without permission of his supervisor, the person that he had reported as being engaging in discrimination and against whom Mr. Lopez's grievance had been resolved in Mr. Lopez's favor. So that, that's the basic facts of what we've got. Less than a month later, Mr. Lopez was terminated. It's clear in this case that the Texas Whistleblower Act waives the sovereign immunity of the City. The City started out this case by filing not a plea to the jurisdiction but a motion for summary judgment.

CHIEF JUSTICE JEFFERSON: What do you gain by filing it as a whistleblower action rather than a retaliation under the Human Rights Act?

MR. CULLAR: Mr. Justice what we believe is that that was the only way that we could proceed because Mr. Lopez had not opposed discrimination under the Labor Code. If you look at the Labor Code -

CHIEF JUSTICE JEFFERSON: Mr. Lopez had not opposed the discrimination?

MR. CULLAR: He had, he had opposed it under the EEO policy of the City, which is a rule of law that had been adopted pursuant to statute. That's where he opposed it. He had not opposed it under the Texas Commission on Human Rights Act.

JUSTICE: But he could have -

MR. CULLAR: He could have.

JUSTICE: - and Title VII as well.

MR. CULLAR: And Title VII as well.

JUSTICE BRISTER: Obviously, what we're trying to decide here whether people have two options or one-- option. We're trying not to give people the wrong incentives. What do you gain by doing it under the Whistleblower Act? Damages different?

MR. CULLAR: Damages are less. Actually, the caps under the

Whistleblower Act are less than under the Texas Commission on Human Rights. The Whistleblower Act does in fact, have a grievance procedure. Employees who are discriminated against or who are retaliated against under the Whistleblower Act have to file an appeal, a grievance. If there is a system thpposed the discrimination under the Texas Commission on Human Rights Act, that retaliation provision was questionable as to whether it was there. We believe that the more clear, the more direct statute dealing with this was in fact, the Whistleblower Act.

CHIEF JUSTICE JEFFERSON: How will we, how would we harm the plaintiffs in any respect and, and who have legitimate claims if we were to hold that these sorts of claims must go through, must be filed with the Human Rights Commission and the lawsuit pursued under that Act rather than a Whistleblower Act?

MR. CULLAR: Well, I, I think that what would be happening in that case is that this Court would in fact, be legislating.

CHIEF JUSTICE JEFFERSON: I understand that and, and, and, and that's a legitimate point but I'm, what I'm trying to get at is how will that harm the public in any way? The Human Rights Commission is set up to handle precisely these sorts of age discrimination, race discrimination claims that are very comprehensive, administrative scheme. What would, I mean, how-- if that were to be the holding and I understand you, you, you would object to that but if that were to be the holding, how will that harm the public?

MR. CULLAR: Well, your Honor, I'm not sure exactly how that reaches everyone, but in this specific case, the focus, the facts of this case are such that you have to look at what was going on here. The discrimination complaint was resolved. It was completely over. All we're talking about here is retaliation.

CHIEF JUSTICE JEFFERSON: So I'm taking it that the answer is that it doesn't, it has no impact one way or the other.

MR. CULLAR: It, it, it certainly has an impact in this case and your Honor, I, I don't know that I've particularly thought -

CHIEF JUSTICE JEFFERSON: I'm saying if we were to hold that the exclusive remedy is the Human Rights Commission, your client loses under those facts. Then, forget about your client, in the future, how does that impact other plaintiffs who make valid racial or age discrimination claims?

MR. CULLAR: It, it would not if they are acting under the Texas Commission on Human Rights Act. The problem that we have is that you -

JUSTICE HECHT: I don't understand that answer. It would not-- whose acting under the -

MR. CULLAR: If, if the person who's made the complaint is acting under the Texas Commission on Human Rights Act. The way that you act under the -

JUSTICE HECHT: It doesn't act under anything. I don't understand that. He just does what he does.

MR. CULLAR: Well, we're, we're talking-- and, and, and I think this is where-- there, there may be some confusion. We have to set aside the age and the race discrimination from the act of the retaliation. The age and race discrimination -

JUSTICE BRISTER: Why? The retaliation section of the Human Rights Act doesn't say if you were unsuccessful and then retaliated against made it certainly apply. If you were successful in your race claim and got reinstated as Mr. Lopez did and then they fire you 'cause you did this. That's-- there's no question that's covered by the Human Rights Act.

MR. CULLAR: And, and we have addressed in the brief the difference between the Title VII-- and the retaliation provision and the Texas Commission on Human Rights and the retaliation provision. In Title VII, it has both an oppositional clause that gives you protection if you oppose anything made illegal under this statute and then it gives protection for actually filing the complain-- complaint and other things. The Texas Commission on Human Rights Act does not use the same structure. It says that it provides protection to anyone who under this Act opposes discrimination. With the way, and Mr. Justice Hecht, the way I was trying to get to this, the way that you oppose discrimination under the act which to file a complaint.

JUSTICE: Which he did.

MR. CULLAR: He did not file it under the Texas Commission on Human Rights Act. He filed it under the City's EEO policy, which is where we are saying that is a law by definition of the statute. The law, the, the Whistleblower Act specifically defines what a law is. This EEO policy was a law and it says, it-- because it was adopted by the City acting under a statute. And because of that, that's separate from the Texas Commission on Human Rights Act and I, I would submit to you that the brief describes better the differences between Texas Commission on Human Rights Act and the Title VII oppositional language and how one can be confusing.

JUSTICE O'NEILL: But that's premised on the notion that if you proceed under the EEO policy, you're locked in to that avenue and cannot pursue a retaliatory claim under the Human Rights Act. That, that was your fear, that if you, if you filed it under Human Rights Act for retaliation, you get thrown out because you didn't initially proceed under the, the Human Rights Act [inaudible].

MR. CULLAR:-- That's, that's exactly correct. We had not filed under the Texas Commission on Human Rights Act and we're confident that we had protection there.

JUSTICE O'NEILL: But, but let me follow that through and I think it's driving what some of the questions here on the bench. If that were not an issue, if because the Human Rights Act allows by local ordinance for, for you to pursue other claims, if, if there are other policies in place, or not policies but ordinance or something like that, if we were to say that proceeding along that path does not preclude you from pursuing a Human Right Act retaliatory discharge claim then the issues you're worried about would go away and there'd be no reason not to make the Human Rights Act the exclusive remedy.

MR. CULLAR: I think that may be true, but that's not what we had in this case and what we have to deal with in this case are the facts of this case.

JUSTICE: How soon -

JUSTICE BRISTER: Respond, I'm sorry, respond to Judge Gray's dissent if you will.

MR. CULLAR: Judge Gray's dissent looks at -

JUSTICE BRISTER: Law enforcement authority.

MR. CULLAR: - law enforcement authority -

JUSTICE BRISTER: And which, which prong do you say-- you're obviously relying on the good faith, but good faith in which prong was the definition of law enforcement authority.

MR. CULLAR: Well, we -

JUSTICE BRISTER: Certainly not to investigate and prosecute criminal law.

MR. CULLAR: No, sir. Let me, let me turn to that -

JUSTICE BRISTER: That leaves regulate under or enforce the law.



MR. CULLAR: Regulate under or enforces, exactly what the EEO officer -

JUSTICE BRISTER: What kind of regulations could the EEO officer issue?

MR. CULLAR: If you look at the EEO policy, there's actually a letter that's attached that the EEO officer submits or, or issues as soon as he receives the complaint. The EEO officer in the City of Waco is a person who rides herd on these complaints. He makes sure -

JUSTICE BRISTER: Rides, rides herds is not in the statute. I need regulates or enforces. Do you claim that he regulates? He or she regulates.

MR. CULLAR: He, he does enforce the time provisions -

JUSTICE BRISTER: So you don't claim that they regulate.

MR. CULLAR: Well, there, there may be some regulation, but I can certainly go with enforces. He -

JUSTICE BRISTER: Okay. And the person enforces the law by doing what?

MR. CULLAR: By sending, first sending the letter to the supervisor saying that you've had a complaint filed in your department. You've got 10 days in which to answer this complaint making sure that each level of, of the system, of the grievance procedure is addressed and then accepting the - any, any further appeals of the employee bringing together a commissioners actually a commissioner but, but, but

JUSTICE BRISTER: What, what [inaudible] you know, let's get together and talk about this. I understand that. Now, what does, what can they-- that EEO-- EEO officer do? Can they fire somebody?

MR. CULLAR: No, the EEO officer cannot.

JUSTICE BRISTER: Can they demote somebody?

MR. CULLAR: No.

JUSTICE BRISTER: Can they cut their pay? What can they do to enforce the law?

MR. CULLAR: They can in fact, make sure that the City follows the policy. He is charged with that job.

JUSTICE BRISTER: How? Send them letters around and talking to people. What can they, what can he, he or she do?

MR. CULLAR: He could-- Well, ultimately, he can, he can take it back to the City Council or to the City Manager -

JUSTICE BRISTER: That's nothing solid.

JUSTICE BRISTER: You said in-- Needham, that's not enough.

MR. CULLAR: Right.

JUSTICE BRISTER: If you, you know, handle the internal procedures and then report it to somebody else to enforce, that's not enforce.

MR. CULLAR: And that's where Needham comes into play because Needham talks about the good faith prong and it says in Needham that even if the employee is wrong, if the employee had a good faith belief -

JUSTICE BRISTER: So what did your client say he believed the EEO officer could do?

MR. CULLAR: And, and we've set forth the specific testimony in the brief in, in this section.

JUSTICE BRISTER: Did he say he thought the EEO officer could fire the supervisor or demote him?

MR. CULLAR: No, sir. What he said was that he-- he had been told in a meeting that the way to report this was to take it to the EEO officer, to take the grievance to the EEO officer. He had been told that in a citywide employee meeting. He had been told that in a meeting with his supervisor.

JUSTICE BRISTER: What, what if they told Needham to take it to the internal disciplinary officer? Think Needham would have come out differently?

MR. CULLAR: If, if Needham, if the facts of Needham had raised that issue, if there was a fact issue in Needham about the good faith and, and you have to address that good faith issue when you're dealing with a plea to the jurisdiction.

JUSTICE WILLETT: Can the EEO officer issue formal findings of discrimination analogous to a good cause discrimination like the Human Rights Commission or EEOC?

MR. CULLAR: Not under this particular policy.

JUSTICE WILLETT: Can the officer mandate some sort of corrective action on behalf of the City? Take this action or take that action in response to the allegation of discrimination?

MR. CULLAR: No, sir. Not under this policy. But under this policy and the way it had been described to my client, he was told that this was the way you file it. He believed that they were in fact -

JUSTICE BRISTER: Wondered how far this is going to go though? What if, what if, under your argument, won't it be true that every pay dispute, every dispute, any employee will have, every labor dispute, they underpaid-- they didn't pay me for overtime and let's assume that the overtime City's-- has overtime policies adopted pursuant to statute and under ordinances and you didn't pay me overtime. They give him the overtime and they fire him. Well, that's a whistleblower.

MR. CULLAR: Well, he has reported the violation of the Fair Labor Standards Act. It certainly would be.-- I'm, I'm, I'm not sure that that's -

JUSTICE BRISTER: So, so you're, you're, just to be clear with everybody where we're going. Where we're going is the Whistleblower Act is going to cover all employee disputes in all governments in the State.

MR. CULLAR: Well, no, no sir. I'm -

JUSTICE BRISTER: How, how are we going to stop it?

MR. CULLAR: Well, the way we stopped it is we say where a governmental employee opposes an action under a rule of policower Act. This idea being protected has been overplayed and overblown here. Most nearly everyone in this room is in a protected classification because of age or race or gender or something anyway. The vast majority of the people who work for governmental entities are-- are already in a protective classification.

JUSTICE BRISTER: But, but the authorizing acts for cities to do things are pretty broad -

MR. CULLA: Yes sir.

JUSTICE BRISTER: - and there's going to be lots of little things like overtime pay and much smaller that are going to be adopted policies under a statute. The person thinks they're not getting what they want. Do we really want all of those becoming-- is that what we meant when-- when the legislature said these are whistleblowers? Somebody come in and say you didn't pay me a half hour for my overtime? That's, that's the whistle blowing the legislature wanted to encourage?

MR. CULLAR: I don't believe that that would be -

JUSTICE BRISTER: You can't -

MR. CULLAR: But, but, but -

JUSTICE BRISTER: - because of belief. So how are we going to, how are we going to, how are we going to keep that out?

MR. CULLAR: What they wanted was to prevent somebody from retaliating. So why somebody go to retaliate against someone. And

that's where we get to really causation. I mean, just because an employee is elevated to a protective classification for having reported a pay issue that may be violative of the Fair Labor Standards Act, just because he is in that protective classification doesn't mean you're going to get a lawsuit. You have to have someone retaliate, you have to be able to connect everything, you have to-- show the nexus between the adverse employment action and the whistle blowing. So you don't always get there. And that's why I say, with all due respect Mr. Justice, that I think that they have overplayed this issue because there are lots of people who are in protective classifications and nothing bad happens to them. You have to have the bad act of retaliation, which is one of the core, one of the two principles for which the Whistleblower Act was adopted.

CHIEF JUSTICE JEFFERSON: Is this the need to establish a good faith belief that the officer could have regulated or enforced discrimination laws? Is that part of the Human Rights Commission as well, therefore part of the burden that the plaintiff has to show?

MR. CULLAR: No, sir.

CHIEF JUSTICE JEFFERSON: So if, so in, in some circumstances,-- it might be easier for them to get relief under the Human Rights Act than under the Whistleblower Act.

MR. CULLAR: It, it certainly could and, and, and your Honor, I think there may be others that I just had not thought of before. You asked that question earlier. But what it boils down to is we have a statute. We have-- the, the legislature has given us the definition of what a law is and this Court has written previously that if you're-- if, if we're given a statutory definition, we can't add words to that. We can't go beyond the statutory definition of what a law is in the Whistleblower Act. It's been 12 years since the Whistleblower Act was amended by the legislature. In those 12 years, the City and its friends in this Court have not been able to get the legislature to change that definition. This case was sitting there prior to the 2007 session. The legislature did not choose and, and, and of course, we're supposed to assume that the legislature knows how the courts are interpreting its statutes. And in 2007, during that session, the legislature didn't come back and say, Tenth Court of Appeals you were wrong in how you interpreted our statute and so, your Honors, basically -

JUSTICE HECHT: You have any idea how often the legislature responds to the Court of Appeals?

MR. CULLAR: I, I do know -

JUSTICE HECHT: Routinely-- just, just for the Texas Commission on Human Rights to look at.

JUSTICE WILLETT: Let me get straight on the facts. The transfer occurred and how long after the transfer did, was the grievance filed?

MR. CULLAR: He filed that within a matter of a day or two. He, he filed -

JUSTICE WILLETT: Okay. Then four days later the transfer was reversed and he was put back where he started.

MR. CULLAR: Put back as the Chief Plumbing Inspector, yes, sir. And so that's why we're saying that discrimination issue was over. But the Texas Commission on Human Rights Act is not the exclusive mode. In fact, it specifically says that it allows cities to adopt rules like the City of Waco did. The second thing is this Court, we're asking you to respect-- we are respectfully asking you not to amend the statute, to leave that to the legislature. They are inviting you to change the rules, to change the law and we are asking you to uphold the Tenth Court of Appeals opinion and allow this matter to finally get to trial.

JUSTICE O'NEILL: The, the City's policy manual has a statement about retaliation, doesn't it?

MR. CULLAR: It does.

JUSTICE O'NEILL: And did he pursue his retaliation claim through, I mean, is there an exhaustion problem even internally?

MR. CULLAR: No. There, there's, there's really not even a mechanism that, that we could find for that and, and we don't believe that, that was required at that point to, to, to file it under that specific provision.

CHIEF JUSTICE JEFFERSON: Any other question? Thank you.

MR. CULLAR: Thank you.

REBUTTAL ARGUMENT OF ENID ALLYN PATTERSON WADE ON BEHALF OF PETITIONER

MS. WADE: [inaudible] it did takes us to a really good point in our argument which is, you're cherry picking, and what you're doing is you're modifying and making what is a comprehensive scheme intended for specific purpose to be arbitrary and very dependent upon the facts and circumstances and that ought not happen and ought not occur. -

JUSTICE O'NEILL: Does the fact that Lopez proceeded under the, the, the EEO policy here rather than initially under the Human Rights Act preclude the later filing of a retaliatory claim under the Human Rights Act?

MS. WADE: Absolutely not. For example, in Texas Department of-- Rehabilitative Services versus Abraham, in that case the claimant made an internal complaint of sexual harassment. He hadn't made the complaint externally and in that case, he brought a retaliation claim under Chapter 21. And it was held that in fact, there-- he was permitted to-- proceed with that because 21.055 protects exactly that type of conduct. The idea is that we want people to go through this process. We want people to report discrimination claims, wherever their, whatever their genesis, race, sex. And if they do that and they are retaliated for that, they are protected under Chapter 21 without regard to whether or not they've actually invoked the formal process.

CHIEF JUSTICE JEFFERSON: Let me ask you a procedural type of question. Just assume that we disagree that the Human Rights Act is an exclusive remedy so he could pursue the Whistleblower Act, that you had another ground in your plea to the jurisdiction and that is the good faith, the reporting to an appropriate law enforcement agency. Assume we agree with you on that. Is that the proper subject of a plea to the jurisdiction? In other words, if you win on the good-faith prong of your argument, does that mean the trial court loses jurisdiction or is that more a matter for summary judgment?

MS. WADE: Sovereign immunity operates as a shield in the absence of a waiver of fact. If you have a claim for which sovereign immunity has not been approecision issue I think in June, it was-- the Ocala case where this very issue was considered and the court said we think that's a defense-- a defensible matter and not a jurisdictional matter. Understanding that that's their view, I think you have to go back to what this Court's, what this Court has said in terms of, a litigant has to plead themselves with-- into the waiver of sovereign immunity and if their plead-- their plea does not include a waiver of those components, which is that they met the basic elements of the claim then sovereign immunity still stands and so it is an appropriate matter for

jurisdiction because the trial court never attains jurisdiction of the,  
of the -

JUSTICE GREEN: Let me, go back -

JUSTICE GREEN: I went first last time. After you.

JUSTICE WILLETT: Thank you. Thank you. Go back to those referenced question earlier to Mr. Cullar about what incentives a, a claimant's lawyer might have to bring this under the Whistleblower Act as opposed to the Human Rights Act or EEO-- or Title VII, I mean, why would strategically a lawyer want to bring this under the Whistleblower Act? Are there any advantages to that?

MS. WADE: I could opine on that. Frankly, I think Mr. Cullar would be better equipped to answer that but, but I would think you, you do get to court much more quickly. You, you get to court and a huge advantage, which makes a big difference is, you come to court with a presumption that the thing that you're complaining about, in fact, was the cause of, of your disciplinary action. That is a huge advantage. What that does is that, that puts the City in a circumstance of having to prove, no it wasn't that but these other things. That's the presumption that-- goes through with them and actually there's an instruction to the jury on that. That is a huge strategic advantage and, again, it is very-- counter and contrary to the idea of reconciliation, mediation and resolving it. Another point is yes, there is a provision in the Whistleblower statute, an exhaustion requirement, which says that you have to go through the grievance process. That cannot be confused with the administrative and, and grievance process that's provided for under the, under the Human Rights Act because in fact, there are lots of cities that don't even have a real grievance procedure. The grievance procedure and the appeal procedure consists of you go to the person who fired you and said-- say can I have my job back and they say no and then you're done and you've exhausted that under the whistleblower. It certainly is not a substitute for that comprehensive system that's intended to make you go through a formal protracted process so that we can resolve these, these internally -

JUSTICE WILLETT: And the City's EEO office deemed a so-called, you know, deferral agency for complaints filed with them are deemed filed under the Human Rights Act with the Commission?

MS. WADE: No. No, they are not. If the Court adopts the decision of the Tenth of Court of Appeals, you are going to discourage cities from adopting policies. You're going to discourage the very type of activity that we ought to encourage. You're going to discourage cities from having resolutions supporting the Girl Scouts and to putting festivals and those other things because then any violation of that, they didn't make pudding, is going to result in a whistleblower claim. And I, and I, and-- I realize the account is a little bit overblown, but that is really the reality, that's not a situation that we want to have. It's unmanageable and we have asked the Court to grant the plea to the jurisdiction. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

COURT MARSHAL: All rise.

2007 WL 5329468 (Tex.)