This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
Texas A and M University - Kingsville
v.
Melody Yarbrough.
No. 09-0999.

January 4, 2011.

Appearances:

David S. Morales of the Office of the Attorney General, for petitioner.

Kevin F. Lungwitz of Lungwitz & Lungwitz, PC, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument now in the first case, 09 matter 0999 Texas A&M v. Yarbrough.

MARSHALL: May it please the Court, Mr. Morales will present argument for the Petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF DAVID S. MORALES ON BEHALF OF THE PETITIONER

ATTORNEY DAVID S. MORALES: May it please the Court. This Court should hold that the sole claim in this suit is in substance an ultra vires claim improperly brought directly against a governmental entity. Because this Court has definitively held that ultra vires claims are not actionable against the state and because the Respondent in this claim has not shown that any state officer acted without legal authority, this Court should reverse the Court of Appeals decision and render judgment dismissing her suit.

JUSTICE DAVID M. MEDINA: What about the judicial controversy here? Why isn't this case just moot?

ATTORNEY DAVID S. MORALES: Mootness is an issue that is before this Court. We raised it in the trial

court. Arguably, the trial court in granting summary judgment in favor of A&M Kingsville just granted summary judgment based on mootness. That is an issue here. There are other jurisdictional issues, primarily the ultra vires claim, whether or not the proper parties in front of this court, as well as whether or not a valid ultra vires claim has been stated. Those ultra vires issues can be decided on the pleadings. Just from a facial reading of the pleadings, you can determine whether or not, well what kind of claim this is, whether in fact it is an ultra vires claim or as the respondent has belatedly tried to couch it as some sort of declaratory judgment action that directly challenging a state university policy. You can decide that on the pleadings. Likewise, you can take a look at the pleadings and the record and determine that even though the ultra vires claim has been asserted, they cannot chin the bar that this Court said in Heinrich, which is to plead and prove your case.

JUSTICE DEBRA H. LEHRMANN: Mr. Morales, may I ask you is what distinction do you see or do you see a distinction between acts of government officials and government policy?

ATTORNEY DAVID S. MORALES: I don't see a distinction and there's always going to be some government actor that is enforcing a policy.

JUSTICE DEBRA H. LEHRMANN: And so is it your position that any policy that is past, that is enacted by any type of government agency, that any type of a claim that deals with that type of a policy must be filed as an ultra vires claim?

ATTORNEY DAVID S. MORALES: No, in fact, the Administrative Procedures Act was enacted just to, for challenges to policies and procedures that state entities might pass. There's a whole framework for that set up by the legislature to review. Of course, deference being given to the executive in those cases, those are often substantial evidence cases that go forward. I will, out of complete candor to the Court, the Administrative Procedures Act does not apply to state universities and policies such as this, but in the vast majority of policies enacted by the state, the administrative procedures act would be the remedy that a plaintiff would use to challenge a policy that they believed wasn't in some way in firm.

JUSTICE DEBRA H. LEHRMANN: What's your interpretation of Leeper and Leeper's relevance to this?

ATTORNEY DAVID S. MORALES: Well, Leeper was decided prior to Heinrich and Reconveyance and McQueen and so I believe that Heinrich, the framework that set out concerning ultra vires claims controls. Leeper was --

CHIEF JUSTICE WALLACE B. JEFFERSON: Would it conflict?

ATTORNEY DAVID S. MORALES: In some ways yes, but I don't think, not in this particular case. There is no need, I don't see a conflict between those two, but there certainly is a tension between those. Now in the Court's latest opinion on this issue, McQueen, which Justice Johnson issued back in October the Court very clearly set out a difference between ultra vires claims, which are claims where a governmental actor either acted or didn't act in contravention of a statute or the Constitution and claims that are brought to test the validity of a statute and certainly with McQueen there the Heinrich framework is still in place and in this particular case we believe the Heinrich framework is applicable. It's square on and this Court can dismiss just based on that jurisdictional issue.

JUSTICE DALE WAINWRIGHT: Assuming Ms. Yarborough could make out a valid ultra vires claim under 617.005 is it your position, the State's position that she may have been able to plead a case that waives immunity if she had sued the appropriate individual state official at the university in that official's official capacity?

ATTORNEY DAVID S. MORALES: I'll catch it this way, no. Immunity is not implied. It does not imply if it is a true ultra vires claim as the Court has repeatedly said. That is not a claim against the state, so sovereign immunity doesn't apply. That's a claim against, in this legal fiction that we have yes, but if number one she was

able to allege an ultra vires claim and then chin the bar as to prove it as in Heinrich the Court took a look at what the evidence was in the plea to the jurisdiction to determine there was a valid ultra vires claim. Should she be able to chin those two bars and had she sued, I presume the provost in this case who did not allow her to go forward with the faculty grievance committee or the board of regents for enacting that policy to begin with, then yes that could proceed.

JUSTICE NATHAN L. HECHT: These distinctions are getting pretty murky. Is this going to be a viable framework, this Heinrich ultra vires with the Leeper by the side in the declaratory judgments? I mean it seems to me it's just getting more and more complex. What's your view of that?

ATTORNEY DAVID S. MORALES: I think up until the time of when Heinrich was decided back in 2009, I think it was confusing and I believe Heinrich brought a lot of clarity to this issue and essentially sovereign immunity is going to apply unless you have a situation where you have a government official that is acting outside of the law, acting in some way in contravention of law or if he's failing to perform a ministerial act and I think Heinrich provided us that framework and I think it was easy enough for this Court to apply it in reconveyance last year. You know it when you see it. You see the, the pleadings will tell you what kind of case this is regardless of whether or not the plaintiff couches it as an ultra vires claim or not. As the Court has seen through the briefing in this case the Respondent is trying very hard to say this is not an ultra vires claim. This is just a claim where the State is acting illegally. Well, there is no such animal. There's always a state actor that is doing something. I think the best I can do in trying to construct the argument for my opponent is the Board of Regents acted improperly in contravention of section 617.005 when they decided in their discretion to exclude employment evaluations from the faculty grievance process. That's a policy decision. That's a discretionary act by a state actor, in this case, in the field of employment, but if you take the Respondent's argument to its logical extension that applies way beyond the employment context and any policy that an employee does not agree with they can take a look at section 617, say hey that doesn't match up, I'm not able to grieve that the way I want to and I get to file suit and recover attorney fees just as she has in this particular case.

JUSTICE DEBRA H. LEHRMANN: In Heinrich, the Court said that ultra vires suits do not seek to alter governmental policy, but rather seek to enforce existing policy. So how do you think that plays into this?

ATTORNEY DAVID S. MORALES: I think that's exactly what the issue is before the Court today. The Respondent is saying 61-7 mandates this, mandates that I get a particular remedy that I want. In this particular case, I want my supervisor to be forced to rewrite my evaluation and that is trying to control state action. In Heinrich it was a case where you had the widow that was saying that there was tension between the statute that was in place that said that should we get the full benefits and the like. Now in this particular case, the Plaintiff is saying there's a policy that was enforced.

JUSTICE DEBRA H. LEHRMANN: That's incorrect, correct?

ATTORNEY DAVID S. MORALES: That she says is in contravention, not that it's incorrect because certainly the Board of Regents had the authority to issue a policy or to not have a policy and that's the, the tension in this case is there is no, there is no, there is no illegal act that's being alleged. What they're saying is by not providing this remedy, by enforcing this policy, you're violating chapter 617. Well, 617, if the Court takes a look at the text of the statute, it grants no additional rights to employees to grieve. The text of the statute states that the prohibition on collective bargaining by public employees, which is against public policy in Texas, does not prohibit, does not impair the right of public employees to present grievances concerning wages, hours, employment conditions of work. So from our reading of this that doesn't create any rights. What that does is it just memorializes that just because you can't collectively bargain, just because you can't strike, that does not mean that you're mute, that you cannot, that you have to remain silent about your conditions of work, but it does not create any additional rights and so if there are no additional rights created and as Respondent concedes, there is no particular grievance procedure that is required. All that's required is someone to be able to listen to you that can redress your grievances in the way you want. Then it doesn't matter what policy A&M had in place whether there was

one or wasn't one. What the Court needs to take a look at is take a look at the statute, take a look at what her claims are, has she stated an ultra vires claim and, number two, has she presented evidence that someone, that some state actor acted in contravention of the law and in this case on the pleadings, as well as in the evidence, there is no evidence of that. And Justice Lehrmann I don't know if I answered your question? I apologize if I didn't. Now if I could, the Respondent spends a lot of time in her brief talking about the policy implications behind not allowing people to have redressed to someone who can correct their grievances the way they want. On the other side, there are a lot of policy reasons why A&M would exclude performance evaluations from a university-wide faculty grievance process. As the Court is well aware, and in a lesser role than me, but I'll use myself as an example, I'm a manager as well as a lawyer. I have a lot of attorneys that I manage and I rely on my division chiefs to supervise those lawyers day in and day out. They perform performance evaluations on those lawyers. They are in the best position to assess whether or not those folks are doing well and to make recommendations as to how they can improve their performance. I'm not there day in and day out. I'm not in the best position so there's a policy reason for excluding these very common occurrences in the workplace. Employees are going to be dissatisfied with their employment evaluations. That's always been the case and until we don't have performance measures and that will continue to be the case. To invoke a university-wide committee to look at every single grievance with relation to a performance evaluation is a monumental misuse of state resources.

JUSTICE DEBRA H. LEHRMANN: What if the grievance is something legitimate? I mean what would somebody do?

ATTORNEY DAVID S. MORALES: I'm glad the Court asked about that. If you take a look at the grievance procedure, it allows a host of things, pretty much everything to be grieved through that policy with a few exceptions. One of them is the employment evaluation, but a couple are very serious issues such as sexual harassment, discrimination and the like. Those have separate policies that they go through. There are separate procedures to go through because of the importance of those serious issues. This isn't a case where discrimination was alleged. This isn't a case where it's a whistle-blower or someone is alleging gender discrimination or anything of the like. This is not even a case where the plaintiff is saying hey what was included in this evaluation was slanderous. That's not the case. What this is, I don't like the content and the tone of what my supervisor wrote in my evaluation. To ask the judiciary to control executive action and get into the weeds of what a state actor should and should not do in his discretion is violating separation of powers and goes way beyond what this Court has ever pronounced. Justice Hecht, if I could return to your question about if it's getting complicated. It certainly has become complicated in this area of ultra vires, but I believe it's a very necessary analysis in jurisdiction and the reason being we do want, as Justice Lehrmann has pointed out, we do want folks to have redress to the courts if there is a serious violation of law being perpetrated by some government official. That is not the case here. What we have here is a discretionary act by a manager of deciding not to rewrite an evaluation. The Respondent had an opportunity and asked her supervisor please rewrite my evaluation. He could have done that. According to 617 what she had the right to do was to petition according to the 13th Court of Appeals all you have is the, and I apologize I'm out of time if I could finish or I'll . . . ...

CHIEF JUSTICE WALLACE B. JEFFERSON: You can finish your thought, Mr. Morales.

ATTORNEY DAVID S. MORALES: Someone in authority has to have the ability to redress your claim. Well, she didn't like the fact that it was her supervisor that had that opportunity. I'll pick a division chief out of the hat. Robert O'Keefe may not like the fact that I'm the only one that can change his evaluation, but he can certainly come to me and say I want you to change it and I can, but chapter 617 does not require me to change that so I'll reserve the rest of my time for rebuttal.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Morales. The Court is ready to hear argument from the respondent.

MARSHALL: May it please the Court, Mr. Lungwitz will present argument for the Respondent.

ORAL ARGUMENT OF KEVIN F. LUNGWITZ ON BEHALF OF THE RESPONDENT

ATTORNEY KEVIN F. LUNGWITZ: May it please the Court. This is a case to determine whether a university professor has the right to present a grievance over her performance evaluation and if we can just go back to the facts very briefly I believe they will demonstrate that on May 9, 2003, Professor Melody Yarbrough received her evaluation from her department chair, which had two components, a numerical component and a narrative component.

JUSTICE DEBRA H. LEHRMANN: Can I ask you something? I'm sorry, but why isn't this moot?

ATTORNEY KEVIN F. LUNGWITZ: This is not moot because it is a classic case, a classic example of a case that is capable of repetition, but evading review. A performance evaluation, a public employee's performance evaluation is a permanent record in that person's employment record. It could very well be a public record. The policy in this case says that the performance evaluation was to not only be used for tenure, which candidly was Professor Yarbrough's initial concern. She got tenure at some point subsequent to this case, but also to be used for periodic reviews of rank, pay, assignments and the like and since it is a permanent and public record could also be ostensibly used by perspective employers.

JUSTICE EVA M. GUZMAN: Must she have been able though to demonstrate some sort of actual injury other than this speculative injury, a perspective employer may review this or maybe someone is going to look at this and determine that rank and salary issues was something more required at this stage?

ATTORNEY KEVIN F. LUNGWITZ: I don't believe so, Justice Guzman. Again, an evaluation is a permanent record in an employee's file and there is no statute of limitations on using that performance evaluation for any host of employment concerns so I think the harm was real and it certainly, by the time it takes to get a case to this courthouse leave alone any other courthouse, things change and it certainly would be a classic example I think of a case capable of repeating itself, but evading review.

JUSTICE PAUL W. GREEN: What is it specifically that you want the University to do?

ATTORNEY KEVIN F. LUNGWITZ: First and foremost, to allow her to present her grievance.

JUSTICE PAUL W. GREEN: Okay, who? Who? How does the University do that?

ATTORNEY KEVIN F. LUNGWITZ: Well, the University has a policy that says that Professor Yarbrough could not present her grievance over her performance evaluation.

JUSTICE PAUL W. GREEN: Alright. What person do you want to perform that?

ATTORNEY KEVIN F. LUNGWITZ: Some person should be able to objectively review the underlying decision.

JUSTICE PAUL W. GREEN: Who is that person?

ATTORNEY KEVIN F. LUNGWITZ: Someone that designated by the institution in the absence of a policy on that matter.

JUSTICE PAUL W. GREEN: So in order to do what you want to do some person would have to do that, some actor for the University would have to do that?

ATTORNEY KEVIN F. LUNGWITZ: Someone needs to be available to review the underlying decision to allow Professor Yarbrough to present her grievance and so that she has the potential or opportunity to show violation of policy procedure, law, unfairness, the things that the grievance policy actually speak to.

JUSTICE PAUL W. GREEN: So why isn't that exactly the Heinrich scenario?

ATTORNEY KEVIN F. LUNGWITZ: Well, because in this case, the University Officials were not using their discretion to foreclose her opportunity to pursue her grievance. Rather, the official policy of the University stripped all of the officials of the use of their discretion so this was a policy pronouncement not an official, university official's discretionary action. The policy says you may present a grievance over any matter of wages, hours and conditions of work, but not your employment evaluation. 617.005 has for 50 years been on the books in its current form and has allowed the presentation of grievances of wages, hours and conditions of work. The very court of appeals decision that we're reviewing in this case, the very court of appeals wrote the only other case that really flushes out this matter, and it's a 26-year-old opinion, Corpus Christi ISD v. Padilla and in that case the employees had a concern. The bus drivers had been reassigned by the transportation director. They wanted a formal school board hearing with rights to, I guess to present evidence and some sort of formalized due process hearing. They met with the superintendent. They said that's not good enough. We want to go to the board. The board said no, but they went to the board in open forum and this same Court in the Padilla case said the employees got all they were entitled to. They met with someone, the superintendent, who ostensibly had the authority to review the underlying decision. They got even more than that because they went to the school board in open forum. All they were entitled to was an audience with the superintendent. This is not a formal hearing. It's not a due process hearing. They have no right to expect any outcome. They have a right to air their grievance. I think this court of appeals in this case went to great strides to ensure that the jurisprudence of this state, that they did not step over their decision in Padilla. I think when we read this case in Yarbrough the court of appeals decision pending today; we can see that the court of appeals takes great strides to say just like in Padilla, we're not saying employees have a right to a due process or evidentiary hearing. We're only saying they have a right to appeal to someone with the authority to remedy the problem if that is the opinion of the person reviewing the case.

JUSTICE DALE WAINWRIGHT: Counsel, I want to follow up on Justice Green's questions. Your client met with the dean of the college after getting the performance evaluation and then the evaluation was considered by the associate vice president for academic affairs. Did neither of those persons have the authority to take any of the action that your client is seeking today? And I understand that she did not request any meetings with any additional officials other than to ask that the faculty grievance committee review the issue.

ATTORNEY KEVIN F. LUNGWITZ: I'm glad you asked the question Justice Wainwright and my view of the record, I believe the record will support this, is that five days after she received this evaluation she, first of all her department chair said if you don't like it appeal it. So she went to the dean who said I'm not the guy to hear this or receive this. You need to go to the associate vice president for academic affairs, Dalton Bigbee - So that same day she went to Professor Bigbee who in his deposition transcript, which I believe I have attached, at least the pertinent excerpt to my brief said I only met with her to discuss how she might go about availing herself of the grievance procedure. No one heard the merits. She had papers she had written up that she believed would give her voice to her concerns and no one received those papers. Dalton Bigbee told her to file a grievance with the faculty senate grievance committee. Well, the semester was over. As soon as she came back the following fall she did that. She filed a grievance with the faculty grievance committee under the advice of Dalton Bigbee the associate vice president for academic affairs and as it would come to be known, the university then developed the opinion that system policy did not allow grievances over evaluations and the faculty grievance committee was told to disband so the hearing never happened. And it is only then that Professor Yarbrough then went to court. I'm not asking the Court to rewrite her evaluation, but only asking the Court to make Texas A&M Kingsville, give her the limited opportunity to present her grievance. Someone with the authority to review, objectively review the underlying decision. Taking --

JUSTICE PAUL W. GREEN: I think more than simply submitting her own critique of the evaluation?

ATTORNEY KEVIN F. LUNGWITZ: I would say so. I would say, Justice Green, that it requires more than that. It seems to me that we always have that right. If I don't like my evaluation I may send my supervisor my own opinions of that. I don't think I need a state law that says that's all I have.

CHIEF JUSTICE WALLACE B. JEFFERSON: So why not under Heinrich sue the Dean and Bigbee, maybe the Faculty Committee and say that they did not perform their ministerial function under 617 rather than suing the University?

ATTORNEY KEVIN F. LUNGWITZ: Chief Justice Jefferson, I would say if we had the benefit of Heinrich when we filed this lawsuit, looking back I think we would have sued the Provost, the Associate Vice President for Academic Affairs, the Department Chair, and the Dean in their official capacities and done more of a shotgun approach. I can only suggest that the goal was to present a very lean and narrow issue and so only the university campus was sued. The question is did we, do we have to sue those officials and in this case I think it is distinguishable from Heinrich and Reconveyance because again I think unlike in Heinrich and Reconveyance, we are talking about official governmental policy and I think it really bends reality and makes things more complex Justice Hecht if we were told that we have to sue the Regents in their official capacity who adopted the policy. That I think pushes it into a realm of complexity that I don't think makes much sense to me anymore. Once the . . . ...

JUSTICE NATHAN L. HECHT: Well, but Heinrich is not supposed to be a game of hopscotch. It's not that you didn't touch the right base. I think the State's position would be that you can't win an ultra vires case because the bar is too high because it's not just a question of a state official, a state actor, a state employee making a decision going one way or the other. It has to be such a clear abuse of discretion that it's outside all bounds of legitimate activity. Could you meet that standard in this case only if the statute unequivocally gives you the right that you're seeking in this case?

ATTORNEY KEVIN F. LUNGWITZ: And certainly that is a jurisdictional question that takes us right back into the heart of the merits I believe and I do believe that by A&M saying that you can grieve any and everything as 617.005 and its predecessor Texas Revised Civil Statute Art. 51454c, Section 6 has said for 50 years as construed by Attorney Generals and a couple of courts in this state you can grieve anything, you can grieve any condition or work. So we would think that for them to take out evaluations as one of those then where do we stop the governmental entity saying well now that we can take out evaluations from the mix from the right to present a grievance, now that we have been bolstered by a court's decision saying we can do this then we're going to go back now and we're going to take out the right to grieve a reassignment or salary or tenure or whatever else. We'll just start lopping away at this.

JUSTICE NATHAN L. HECHT: But to be clear on, just to be clear on the ultra vires, you don't want to start over again, but if you had to start over again there's no question in your mind that you could win an ultra vires case based on the same substantive argument that you're making here?

ATTORNEY KEVIN F. LUNGWITZ: Yes, Justice Hecht, and I think that this Court has given a little more clarity to the ultra vires issues in its recent decision in the McQueen case and there I think foreclosing some of my opponent's arguments that were raised in the brief and that is that the DJA can be brought against the State. It doesn't have to be just a challenge to constitutionality of a statute. It can be brought to declare the, construe a statute. ...

JUSTICE DEBRA H. LEHRMANN: What's your view of Leeper with regard to this?

ATTORNEY KEVIN F. LUNGWITZ: Well, I think that the McQueen case, of course, reaches back and talks about Leeper again and suggests that Leeper has said these things all along that we can sue the government over

statutory construction and that the state is not immune from such suits including attorney's fees. I think the ultra vires claim, and I'm trying to wrap my head around this, it is I think a complex subject and I appreciated Chief Justice Jefferson putting Douglas Laycock's excerpt in the Heinrich decision saying how complex the law of suing governmental entities and governmental immunity can be. I like to think of the ultra vires claim as something akin to a civil rights liability. We don't want to hold the taxpayers responsible for the rogue acts of our officials and we're not going to hold the taxpayers or the governmental entity responsible for the civil rights violations by low level supervisor unless, I believe, we are bestowing upon that low level supervisor the authority to be the first and only and the last spokesperson for the institution on a particular subject and I believe the university could be setting themselves up for a creative claim in the future that if the low level frontline supervisor is the only person who can speak for the university on the issue of employment evaluations and it cannot be changed by anyone; it cannot be appealed, it cannot be opined on by anyone higher than the frontline supervisor, which is what I'm hearing my opponent argue then I think we've got a case where frontline supervisors could bind the institution in a host of claims.

JUSTICE DAVID M. MEDINA: I thought Mr. Morales said there was an avenue for that and there is. I mean this didn't equate to a civil rights violation. Her claim was that she didn't like the report because it may affect her tenure, which she later received and if there is a violation of any rights there's a procedure to grieve that so I think your trying to really cabin that in to limit what the grievance is and I don't see it.

ATTORNEY KEVIN F. LUNGWITZ: Well, I respectfully disagree, Justice Medina. Grievance procedures are supposed to be out there for laypersons to use. It does, we do have the right to bring a representative, an employee has a right to bring a representative to a grievance presentation, but they are for lay persons to use and whether I'm looking at my evaluation and I know then that it's a sex discrimination claim, a race discrimination claim, a harassment claim, a whistle-blower claim, some other retaliation or lawful discrimination claim I don't know, I just know that I think I've been treated unfairly and I'm being told now I can't bring this to anyone so I think the record reflects that eventually she did couch this in a sex discrimination claim, which I don't believe is relevant to us today, but at a later date may have filed an EEOC complaint against the supervisor. So whether she knew that then so that she could articulate it and grieve it perfectly to get around the prohibition of the evaluation and couch it in some other language I think makes this more complex than it need be. If we just let an employee present a grievance over any working condition, wages or hours then she would have brought it, someone could have reviewed it and said you know what I think it's a fair evaluation. I hear you; I've looked at our policies and procedures. I think you got a fair shake and if that person thought that that wasn't fair or might breech upon the illegal, that person would be in the position to alert the institution and perhaps take remedial action then to stem off any further litigation. I think this is a great opportunity for the institution to have a litigation--free airing of a disgruntled employee if that's what we might call Professor Yarbrough, that it's a litigation free opportunity to resolve her complaint at the lowest possible level and I think the Court should support that so that people aren't running to the courthouse, have their employee evaluations reviewed and by the way, I do believe our opponents have mischaracterized our argument. I don't believe we've ever asked that someone rewrite, someone above the department chair rewrite the evaluation and I think the briefing from my opponents indicates that that's the only remedy that we believe would be acceptable and that's not the case.

JUSTICE EVA M. GUZMAN: You just want an opportunity to present it to someone?

ATTORNEY KEVIN F. LUNGWITZ: Just the opportunity to present.

JUSTICE EVA M. GUZMAN: So how does the opportunit to articulate in a written document your concerns and make it part of the file not equate to the same thing since you don't want anyone to rewrite it?

ATTORNEY KEVIN F. LUNGWITZ: Are you speaking of why isn't the right to file a rebuttal? I think again filing a rebuttal, let me back up and say it this way, the attorney general's opinions and the few court cases that we have construing this matter says that presenting a grievance is not bilateral. It's unilateral. I get to present one way to the employer someone with the right to review. But by saying that all you get to do is not even that,

but you just get to go home and write a rebuttal I think we're not even giving our employees the first opportunity to do the unilateral presentation. I don't think we need a state law to write a rebuttal. I don't believe Mr. Morales' subordinates would need a state law to give him their candid opinion if they received a poor appraisal from him.

JUSTICE NATHAN L. HECHT: Well, but I assume whoever got the first one would get the second one and then read them both. Is that not true?

ATTORNEY KEVIN F. LUNGWITZ: That is very possible.

JUSTICE NATHAN L. HECHT: You're just complaining that nobody is going to decide between them which one is right.

ATTORNEY KEVIN F. LUNGWITZ: I think that in all fairness if we were able to persuade someone that the evaluation was at the very least unfair let's just say, unfair and there was a note in the file from a top line supervisor to that effect, that would mean much more to the employee than her own unilateral rebuttal of that evaluation.

JUSTICE PHIL JOHNSON: Let me ask one more question and I think it's already been asked, but given the status of the cases that have been decided and you did not have the benefit of when you started this lawsuit, would you have sued the officials in their official capacity for enacting policy that did not conform with state statues or would you have sued the University still?

ATTORNEY KEVIN F. LUNGWITZ: I believe on that narrow question we would still have only sued the University, the University acting through its board of regents. I don't believe we should be required to sue the Regents who voted in support of a policy. I believe at that level the regents speak for the institution, enacting government policy and then we can challenge the policy as it was, I think the DeQueen case supports us on that. So in closing, Professor Yarbrough's case would not be here today had the University merely given her the right to present her grievance. It's been my distinct honor to argue before you today, especially the first case of the year. Thank you for your time and attention. I wish nothing but the best for you in the new year. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Lungwitz.

JUSTICE NATHAN L. HECHT: Mr. Morales, if I may, Counsel has put my concern pretty well. He said had we had the benefit of Heinrich we would have taken a more shotgun approach and I don't know whether a shotgun approach helps anything. What's your response to that?

REBUTTAL ARGUMENT OF DAVID S. MORALES ON BEHALF OF PETITIONER

ATTORNEY DAVID S. MORALES: I think Heinrich certainly was a clarification of 80 years of ultra vires case law and certainly Respondent had competent counsel below and could have taken that approach, but you're correct in that we will spot them even had they sued the proper officials under the proper ultra vires framework their claim still fails as a matter of law. If you take a look at 617, which imposes no additional rights and you take a look at the actions that are being complained of, which are discretionary acts first by the department chair, by the Board of Regents, whoever they could have sued you still don't chin that bar.

JUSTICE NATHAN L. HECHT: But if they were right about the statute they would be closer to being right about an ultra vires case.

ATTORNEY DAVID S. MORALES: I believe so.

JUSTICE NATHAN L. HECHT: And so it looks to me like we peek around the jurisdictional bar to see what the answer is going to be on the merits and then we come back and say oh well you don't have jurisdiction and maybe that's not the way it should work or maybe it is.

ATTORNEY DAVID S. MORALES: I think that they're both jurisdictional issues and the Court court decide on either one. I think that if you're looking at, I think Heinrich very clearly and Reconveyance also and I'm not sure if McQueen speaks about that, but it does talk to Miranda and all those cases that come up here on plea to the jurisdiction concerning looking at the record to determine whether there's jurisdiction and I think my opposing counsel is correct in saying the merits are intertwined in this. They rely so heavily on 617, a statute, which by the way this Court has looked at peripherally in years past, but has never addressed this issue. The last word on this statute as it stands right now is the 13th Court of Appeals opinion, which in essence has said Texas A&M did everything that they had to do. They had an open-door policy where Dr. Yarbrough could have gone to the president and asked the president to take a look at this.

CHIEF JUSTICE WALLACE B. JEFFERSON: You say there was no right to a hearing for this criticism of her evaluation, but you say there would be a right in a case of discrimination or a whistle-blower and other civil rights-type violations. What is the line that divides the two? I mean can you, would she have a right to grieve a demotion or does it have to relate to a cause of action or how do we decide whether there is a grievance procedure available to a dissatisfied employee?

ATTORNEY DAVID S. MORALES: I think, first and foremost, there is a grievance procedure for every possible, conceivable grievance that an employee at Texas A&M has including performance evaluation. Now it's not the procedure that Yarbrough wants. That procedure is you speak to your supervisor; you try to work it out. If you can't work it out, you put your rebuttal in the record and I think it's ironic that Counsel is standing up here saying we're providing the University a litigation-free opportunity to get this right when the Respondent herself chose not to include a rebuttal in the record.

CHIEF JUSTICE WALLACE B. JEFFERSON: So if you're unfairly demoted, your only recourse is to file a rebuttal letter?

ATTORNEY DAVID S. MORALES: No. In that case, you could avail yourself of the faculty grievance committee process. The only things that are excluded are evaluations, just everyday evaluations that people get every year, as well as all those heightened discriminatory standards, which have their own separate policies and this is all stated in the record and in our brief on the merits. If you have some serious discrimination or retaliation issue that is redressable not only in policy, but also through the courts. The legislature has made very clear that employees do have those rights to redress in the courts. That is not the case here. 617 does not impose any additional rights on employees. Again, we would ask the Court to reverse the Court of Appeals opinion and render judgment for A&M University in this case.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

MARSHALL: All rise.

2011 WL 96845 (Tex.)

END OF DOCUMENT