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Supreme Court of Texas.
In re Frank Kent Motor Company d/b/a Frank Kent Cadillac.
No. 10-0687.

November 9, 2011.

Appearances:

Robert Ruotolo of Busch Ruotolo & Simpson, LLP, for Relator.

Timothy G. Chovanec of Fielding, Parker & Hallmon, LLP, for Real Party in Interest.

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.

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CHIEF JUSTICE WALLACE B. JEFFERSON: Court is ready to hear argument in 10-0687 In re Frank Kent Motor Company.

MARSHAL: May it please the Court, Mr. Ruotolo will present argument for the Relator. Relator has reserved five minutes for rebuttal.

ORAL ARGUMENT OF ROBERT RUOTOLO ON BEHALF OF THE PETITIONER

ATTORNEY ROBERT RUOTOLO: May it please the Court, the question in this case is what does it take for an at-will employee to overcome the presumption that he knowingly and voluntarily executed a conspicuous jury waiver clause. The trial court held that all that it took in this case was the testimony of the employee that the only reason he signed the jury waiver was because his employer told him that he would be fired if he didn't sign it.

JUSTICE EVA M. GUZMAN: Which for an employee might equate to rent money that week or putting food on the table or anything else if you lose your job.

ATTORNEY ROBERT RUOTOLO: True an employee might do that, but I don't think it has anything to do with the question on whether it was knowingly and voluntarily entered into. The employer has the right to tell an at-will employee at any time as long as it's not one of the exceptions to the at-will doctrine that he could be terminated for any reason whatsoever.

JUSTICE DAVID M. MEDINA: So coercion is not a defense, is that what you're saying?

ATTORNEY ROBERT RUOTOLO: No, coercion is a defense, but there's no coercion in this case. Mr. Valdez made the argument in the trial court, well let me step back a second.

JUSTICE DAVID M. MEDINA: His affidavit doesn't raise a fact question?

ATTORNEY ROBERT RUOTOLO: No, it doesn't. In the trial court, I don't think they even argued there was coercion. In the Fort Worth Court of Appeals, they did. But in order to prove coercion, and I do agree with it, if he was coerced into signing a jury waiver well that would be enough, I think that would be the without more that the Halliburton case teaches us that we need.

JUSTICE DEBRA H. LEHRMANN: Let me ask you, so are you conceding that Prudential would control in this case? I mean you're arguing, as I understand, that jury, that the jury waiver should be construed by the same standard as arbitration agreements, right?

ATTORNEY ROBERT RUOTOLO: Yes.

JUSTICE DEBRA H. LEHRMANN: Okay, and so we have Halliburton that talks about enforceability and less unconscionable and then we have Prudential that gets into only enforceable if voluntary knowing and intelligent and can't be coerced. And so you are, are those in conflict in your mind or explain that?

ATTORNEY ROBERT RUOTOLO: No, they're not. I agree that if you're coerced into signing it, then it's not enforceable, but this case there's no evidence of coercion. Coercion has certain elements and one of the elements is they have to prove, they had to prove in the trial court that Frank Kent did not have the legal right to do what it did.

JUSTICE EVA M. GUZMAN: Well, let me ask you about that, back to the question of coercion. How does an at-will employee show coercion in this context? Would there ever be a scenario where an at-will employee could show coercion?

ATTORNEY ROBERT RUOTOLO: I think there would be. One would be if the at-will employee, if they had his paycheck and they said, Mr. Employee, we're not going to give you this paycheck unless you signed this jury waiver.

JUSTICE DEBRA H. LEHRMANN: Isn't this--

JUSTICE EVA M. GUZMAN: Why isn't that the same thing though if they say you're not going to be able to earn a paycheck unless you sign this? Isn't that the same thing?

ATTORNEY ROBERT RUOTOLO: No, I don't think it is because this would be money that was already earned that the employee was entitled to. Say, for example, he already worked his two weeks and his two-week paycheck was coming up. It's the end of the month and he needs to make his mortgage payment. And the employer says, well, we're not going to give you this paycheck, the money that you already earned unless you sign this. But that's different in an at-will situation where we're looking forward. The employee has yet to earn this money and it's an at-will situation. The employer definitely has the right to tell him under the Halliburton case, I believe, that if he does not sign this, he's going to be terminated. Otherwise, we're going to be creating an exception, I think, to some good plaintiffs' attorneys to make an argument for another exception to the at-will doctrine.

JUSTICE EVA M. GUZMAN: So and that includes telling them that, I guess at any time in the process stopping you in the middle of your work day, coming up to you and saying if you don't sign this, you're out of here versus calling them into the human recourses office, going over the document, explaining the consequences in a

rational manner and giving the opportunity, the employee an opportunity to evaluate, if you will, the consequences. Is there a difference and should there be?

ATTORNEY ROBERT RUOTOLO: I don't think there's a difference. It certainly would help if they did bring them in and explain it to them. But I think in this case though, the jury waiver was presented to the employee and he had time to review it and was not approached until later. So he did have time, he read it and he could understand it, but I think that unless an employee could show something more and if he could show coercion then, again, that would be enough. But in this case, Valdez only presented an affidavit and he just said, that the only reason he did not sign this jury, the only that he did sign the jury waiver was because his employer said that, if you don't sign it you're going to be terminated.

JUSTICE DEBRA H. LEHRMANN: I'm still not following though what you're saying would be sufficient to prove coercion.

ATTORNEY ROBERT RUOTOLO: Again--

JUSTICE DEBRA H. LEHRMANN: Because I think that he's arguing that he did not feel that he had time to go and talk to a lawyer. Well, under your argument, it really wouldn't matter, right?

ATTORNEY ROBERT RUOTOLO: Yes, it would have. It would matter because he was an at-will employee and even if he spoke to a lawyer, what would the lawyer tell him?

JUSTICE DEBRA H. LEHRMANN: That's my point.

ATTORNEY ROBERT RUOTOLO: Yeah, because.

JUSTICE DEBRA H. LEHRMANN: So you're saying that it wouldn't matter and so my question is, what would be sufficient for coercion?

ATTORNEY ROBERT RUOTOLO: Again, I think it would be if you were withholding his paycheck, that would be one thing.

JUSTICE DEBRA H. LEHRMANN: And that's it?

ATTORNEY ROBERT RUOTOLO: No, there would be, I think, other examples, none of them which are in this case that are of record here. Other areas of coercion, the one case that I believe and I forget the one case was cited by Mr. Valdez was the Mitchell case where actually they told him that he had to sign a release and that if he didn't sign it, he wouldn't have his job and that was, I think, sort of coercion. It could be argued it was coercion. Another case would be, and I forget the name of the case, but they had the employee actually incarcerated and if he wouldn't sign, I think it was another release case and maybe if you take that a step further, if the employer threatens the employee with incarceration well that's certainly going to be coercion. So I think there's numerous issues that we can find with coercion, but on this record, there simply isn't any and that's--

JUSTICE DEBRA H. LEHRMANN: So you think there's some real line between not paying somebody for past work and firing them from their job and their livelihood and their ability to feed their family. You think there's a line between the two?

ATTORNEY ROBERT RUOTOLO: I think there is under the at-will doctrine. Again, if the employee had earned his paycheck and this money was already due him and the employer was going to withhold it from him, I think an argument could be made that that's coercion. In this case, there's no such thing. There is a dividing line and the courts have not, unfortunately, determined that dividing line of where coercion is which would render a jury waiver invalid, but looking at the record here, the only evidence in the record is Mr. Valdez's testimony that

the only reason he signed it was because he was informed that he would be terminated if he didn't.

JUSTICE EVA M. GUZMAN: You cite to the Flameout case out of the, looks like the First Court of Appeals to discuss five elements in order to prove coercion.

ATTORNEY ROBERT RUOTOLO: Yes.

JUSTICE EVA M. GUZMAN: And the first one is that Frank Kent threatened to do some act that it had no legal right to do. You assert that it has a legal right to terminate employment because Texas is an at-will employment state. How would you, how would an at-will employee ever fit into that criteria? I'm envisioning a scenario where you don't have a legal right to coerce someone.

ATTORNEY ROBERT RUOTOLO: I don't think you have a legal right, excuse me, to withhold, excuse me, a paycheck under the payday law and I'm not exactly sure of that because I haven't studied it up, but that would be a right that an employer does not have to with hold a paycheck from someone who's already earned that income. I think that would satisfy that first element, but there's also I think six other elements and you still need to prove the other elements of coercion and none of those were proven in this case that the harm was imminent, that he had no means of protection and that it destroyed his free will. That's a tough one, destroyed his free will. I would think, again, and it's not the situation here, but if an employee was living paycheck to paycheck and already earned that income and then the employer said, well, I'm going to hold this unless you sign it, that's something that the employer did not have the legal right to do. I would think that that might raise the bar or make the bar that that would be something that would be overcome his free will and he'd have to sign it, but that's not the case that we have here. The case here we're just trying to establish what an employee needs to do in order to overcome the presumption and if this case is allowed to stand, then the employee just has to say that the only reason I signed this document was because I was told I wasn't going to have a job. I think that's going to happen in almost every at-will employment situation in Texas. As I understand it, the employer has a good attorney. They're going to draft it their own clause, it's going to be a conspicuous jury waiver clause. They're going to present it to their employees and say here it is, sign this if you want to continue working here.

JUSTICE DAVID M. MEDINA: Well, it should be conspicuous. You're giving up a right to a jury should be out there in big bold letters. You sign this, you have no right to jury.

ATTORNEY ROBERT RUOTOLO: It should be and that's what this jury waiver in this case had and I think that's, that should be a requirement though I don't think this Court has addressed that yet. I believe in the Prudential case that it set it to not address it yet. But in this case, it was a conspicuous jury waiver clause. It was actually admitted by Valdez that it was conspicuous and just by looking at the jury waiver clause, I think you could tell it was conspicuous. So an example, that what we're looking at is that in every case, if an employee is presented with a conspicuous jury waiver clause, he's going to sign it, but he's also, if this case stands, they could always make the argument that the only reason I signed it was because they told me I was going to be terminated. If that's the case, that's going to turn the presumption established in the General Electric case and the Bank of America case on its head because every employee's going to be able to overcome that presumption and in effect, it's going to turn the presumption back against us, against the employer and it's going to be a presumption against jury waivers. That's the thing that I think needs to be avoided in this case. And it also, there's ramifications I believe for arbitration provisions because we all know arbitration can waive your right to jury trial and if this case is allowed to stand, that's going to be contrary to the arbitration in the cases out of this Court, particularly the Halliburton case, which, again, the employee in that case argued it was unconscionable, but the court disagreed and said, no, it's not unconscionable without more. You need to present more evidence. In this case, they didn't do that. The affidavit did not go on to present anymore evidence whatsoever other than the bald assertion that the only reason I signed this was because they told me I would be terminated.

JUSTICE DAVID M. MEDINA: Is there an argument at that they didn't plead they had an affirmative defense here?

ATTORNEY ROBERT RUOTOLO: There is an argument that they did not plead coercion and I have alleged that and I think that's an affirmative offense. I've found cases where it has been asserted as an affirmative offense, so that's my position that it is an affirmative defense, but even if they didn't assert it, they still had to prove coercion and they just didn't do it and the trial--

JUSTICE DEBRA H. LEHRMANN: Do you think that this issue of coercion should be viewed the same whether it has to do with arbitration or whether it has to do with waiver to jury trials? Because those things are really different when you look at the policy behind arbitration and the policy wanting to encourage people to arbitrate as opposed to the policies that underline a waiver of a jury trial because you're still going through all the procedural hoops that you would for a trial whether it's a jury trial or a bench trial. And so do you think that that distinction is worth, have merit?

ATTORNEY ROBERT RUOTOLO: I think they should be treated the same the way the Prudential case teaches us arbitrations and jury trials should be treated the same. And actually arbitration, I think is harsher then waving your right to a jury trial because in arbitration, you have to go through the arbitration proceeding. It's a lot more expensive and in some cases, there's not the right to appeal though I understand that the NAFTA case might have expanded that a little bit. But if it's a jury trial, you're in front of a judge. It's a lot cheaper. You have the right to appeal definitely and I think that that is the better way to go. But as far as procedurally, I think they're treated the same because if this case is allowed to stand, I think other attorneys will make the argument and try to expand it to the arbitration venue that an employee should be able to get out of arbitration by simply testifying that the only reason he signed the arbitration agreement was because he was told he would be let go if he didn't sign it, but I think that would be contrary to all the arbitration precedent out of this Court.

JUSTICE DEBRA H. LEHRMANN: [inaudible] or restrict the holding specifically not to deal with the arbitrations, right?

ATTORNEY ROBERT RUOTOLO: Sure. And I think the Court can do that. And again, what I'm trying to express is the ramifications of what could happen, but this case is still very narrow. It's just the simple issue of whether an at-will employee met his burden to overcome the presumption that he knowingly, voluntarily executed a conspicuous jury waiver and if all he did in his testimony the only reason I signed it was because they told me I would be terminated, that's not enough, you need more. More is going to be sorted out later, but as far as this case is concerned, I don't think they presented more. Therefore, we request that the Court grant the writ and see what it does.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The Court is ready to hear argument from the Real Party in Interest.

MARSHAL: May it please the Court, Mr. Chovanec will present argument for the Real Party in Interest.

ORAL ARGUMENT OF TIMOTHY G. CHOVANEC ON BEHALF OF THE RESPONDENT

ATTORNEY TIMOTHY G. CHOVANEC: May it please the Court, my name's Tim Chovanec and along with David Fielding, we represent the Real Party in Interest, Steven Valdez, in this case. I'd like to refer to the parties by their names in the trial court, Frank Kent for the Relator and Valdez for the Real Party in Interest. Just one friendly amendment to my colleague about what the record reflects in the argument of coercion made at the trail level. As we point out at page three of our original brief, we did argue coercion and at page 40-41 of the record, the argument was made he did sign an affidavit saying I didn't do it voluntarily. I did it because they were going to fire me if I didn't. That was in the record with regard to the issue of coercion that was in front of the trial court.

JUSTICE DEBRA H. LEHRMANN: Mr. Chovanec, since his employment was at will how can it become coer-

cion? Can you deal with that issue?

ATTORNEY TIMOTHY G. CHOVANEC: Yes, Your Honor. This Court has addressed the issue of coercion in all three of the jury waiver cases and said that, coercion, that coerced agreements cannot be upheld. The basis of those decisions dealt, grew out of the arbitration cases. And from Prima Paint and Scherk in the late '60's and early '70's, all the way to the Concepcion case, which the Supreme Court just handed down, there is an acknowledgment even in the arbitration cases that coerced agreements cannot be upheld. Now, it is Valdez's argument that, as an employee at will, he still has certain statutory rights in Texas. The federal legislature passed the Anti-Age Discrimination Employment Act. Texas passed the Texas Commission on Human Rights Act. This Court in Caballero extended the right to trial by jury and acknowledged that an at-will employee has a right to trial by jury under the statute. So we seek no exception to the employment at-will doctrine because of the existence of that statutory right. There is no infringement on the at-will doctrine as promulgated by the Texas Commission on Human Rights Act. It is simply a statement that the employer cannot discriminate based on age.

JUSTICE EVA M. GUZMAN: How do you respond to the argument that it would have the effect of invalidating almost all arbitration agreements in the employment context because all employees would respond, I didn't want to get fired, that's the only reason I signed it. I mean that's, that's a strong policy argument.

ATTORNEY TIMOTHY G. CHOVANEC: It is, Your Honor, but it doesn't exist in this case because our evidence is uncontroverted. Frank Kent had the ability to come forward with evidence to say Valdez is lying. Here is a videotape of the discussion that was had at the time of the signature on the jury waiver.

JUSTICE PHIL JOHNSON: Well, but you can always have testimony that that's on the tape, but you didn't tape one where you threatened me. So I mean you can always have that. Let me ask you a different question. Could Frank Kent have terminated Valdez, called, him in and said, we're terminating you, here's your final paycheck, 10:00 in the morning pulled him off whatever he's doing. And then given him the paycheck and said, okay, now, Mr. Valdez, we'll hire you back, but you're going to have to sign this jury waiver in order for us to hire you. Is there anything in the law that would have prevented them from doing that? And if so if there's not, then aren't we just creating hoops for people to jump through here if by going with you?

ATTORNEY TIMOTHY G. CHOVANEC: Your Honor, your distinction between a pre-employment executed jury waiver and a post-employment execution is a valid one. And Valdez would argue that that distinction is evidentiary. It is probably, in all probability more likely that someone would be voluntarily willing to give up their right to trial by jury to get that good job with the Supreme Court of Texas.

JUSTICE PHIL JOHNSON: Yeah, but all I'm saying here is they say to Mr. Valdez, sign it or we're going to terminate you. And their position, Frank Kent's position is we can do that. Now Frank, if we say okay, you can't say to an employee sign it or you're going to lose your job and we'll give you your final paycheck and you're out of here, that's, if we say they can't do that, then what's to prevent the employers with the lawyer who reads the cases saying, look, what you're going to have to do is bring people in, terminate them, pay them off, and then say okay, now if you want us to hire you back, sign this jury waiver. It just seems like we're straining it at trying to make people jump through hoops when the essence of the action is the at-will employment doctrine too. Do you have to hire someone or can you fire someone for these things?

ATTORNEY TIMOTHY G. CHOVANEC: Well, Your Honor if I may, the, you raise a good point, but the at-will employment doctrine is at odds with Valdez's statutory rights under the TCHRA.

JUSTICE PHIL JOHNSON: Okay, so you're saying then that Frank Kent could not go to Valdez at 10:00 in the morning when he's doing his job and say, Mr. Valdez, come in. We're going to terminate you. You didn't do anything wrong. We just are going to terminate you and here's your final paycheck. They could do that.

ATTORNEY TIMOTHY G. CHOVANEC: Your Honor, no, absolutely they had the right to do that.

JUSTICE PHIL JOHNSON: Okay, then the next step is here's your paycheck, come back in, in 15 minutes fill out an employment application and if you do that and sign this jury waiver, we'll hire you back. Could they do that?

ATTORNEY TIMOTHY G. CHOVANEC: Not in the context of a statutory violation based on age and a finding by the Court that it was coerced.

JUSTICE PHIL JOHNSON: Of course, he didn't have that cause of action if they terminated him for some improper reason. I mean you're talking about the termination, but assuming he could always bring that.

ATTORNEY TIMOTHY G. CHOVANEC: Yes, Your Honor.

JUSTICE PHIL JOHNSON: But why couldn't they do that, terminate him and then say you can have your job back if you sign this?

ATTORNEY TIMOTHY G. CHOVANEC: Well, that would be for this Court to ascertain. When we started down the path of this rebuttable presumption in GE that was promulgated in GE and then refined in the Bank of America case, we sort have started down a road of fine distinctions of whether or not factually someone has been coerced to execute an otherwise presumptively valid jury waiver. So there's going to be some parsing necessary on a case-by-case basis.

JUSTICE PHIL JOHNSON: And just to clarify, you've not claimed that he was singled out on basis of age or anything. His only claim of coercion, his only claim is I was coerced. I thought I was going to lose my job. Not that I was going to lose my job or they made me sign this because I'm getting older or for some other reason?

ATTORNEY TIMOTHY G. CHOVANEC: Well, I mean, presumably that's an issue in the case that he was terminated within less than a year of having executed this jury waiver agreement. Again, that would be an issue of fact it would seem to Valdez.

JUSTICE PHIL JOHNSON: As to the jury waiver, the only think that you've pled is coercion?

ATTORNEY TIMOTHY G. CHOVANEC: Correct, Your Honor. As noted earlier, the arbitration decisions form the basis for this Court's pronouncements in Prudential, in GE and in Bank of America. There is an uninterrupted line of arbitration cases that still speak about the existence of a coercion exception even to an imposed mandatory arbitration agreement.

JUSTICE NATHAN L. HECHT: What about Halliburton?

ATTORNEY TIMOTHY G. CHOVANEC: Your Honor, Halliburton, of course, precedes the court's jury waiver cases. The key holding in Halliburton was that this was an arbitration provision.

JUSTICE NATHAN L. HECHT: So it's different?

ATTORNEY TIMOTHY G. CHOVANEC: It is different, Your Honor. The arbitration provision enjoys legisla tive favor. If anything in the context we're dealing with today, what enjoys legislative favor is the statutory right to trial by jury enfranchised in the ADEA and in the TCHRA.

JUSTICE PAUL W. GREEN: But it's even in the constitution and you can waive constitutional rights.

ATTORNEY TIMOTHY G. CHOVANEC: You can voluntarily, Your Honor and the Supreme Court of the

United States has indicated that you cannot presume a waiver of a constitutional right. You have to do so willingly, voluntarily and intentionally. And of course, Valdez--

JUSTICE NATHAN L. HECHT: But by going to arbitration, you're not going to get a jury.

ATTORNEY TIMOTHY G. CHOVANEC: That's true, Your Honor.

JUSTICE NATHAN L. HECHT: You pretty well waived it.

ATTORNEY TIMOTHY G. CHOVANEC: And why Frank Kent chose a jury waiver agreement versus an arbi tration agreement, the record is silent, but they're different and the legislative favor does not present itself here. As indicated, if there's any, not only does the right to trial by jury enjoy statutory legislative favor, it enjoys judicial favor in the Loralard case of the US Supreme Court again enfranchised the right to trial by jury into the ADEA before it was statutorily codified.

JUSTICE DEBRA H. LEHRMANN: What do you think it takes to prove coercion?

ATTORNEY TIMOTHY G. CHOVANEC: Your Honor, uncontroverted evidence saying that I'm going to fire you if you don't sign this right now. You didn't sign it earlier and I'm going to fire you now as I sit down with you and tell you, you better sign this or you're fired. That we would argue is uncontroverted evidence of coercion.

JUSTICE DEBRA H. LEHRMANN: And what about the argument that Justice Guzman brought up that that's going to basically do away with the ability to, the at-will doctrine of being able to fire for whatever reason?

ATTORNEY TIMOTHY G. CHOVANEC: Well, in the context that we're dealing with, with statutory claims where the right to trial by jury is enfranchised, I would argue that that is not necessarily a limitation on the employment at-will doctrine anymore than the statute itself is a limitation on the employment at-will doctrine. But with regard to other causes of action, bailment, wrongful, whatever the other cause of action might be may not enjoy the type of legislative favor that the right to trial by jury does in the statute.

JUSTICE PAUL W. GREEN: So the employee says, well then I'm not going to sign it and so the course is you're fired.

ATTORNEY TIMOTHY G. CHOVANEC: Yes, Your Honor.

JUSTICE PAUL W. GREEN: Any cause of action?

ATTORNEY TIMOTHY G. CHOVANEC: Not unless there's an impermissible motive that the plaintiff has [inaudible] evidence and can present a prima fascia case on to invoke the protections of the statute. As indicated earlier, the arbitration cases have basically an uninterrupted line of acknowledgment of the coercion exception that is enfranchised in the three cases mentioned on jury waivers promulgated by this Court. Most recently, in the AT&T vs. Conception case, the, there's an interesting, that case involved a phone contract and an attempt by the plaintiffs to put together some sort of a class action with regard to a mandatory arbitration provision in the phone contract. It's particularly interesting to note Justice Thomas' concurrence. In that case, justice, and it's not cited in our briefs and I apologize for the omission. Obviously, I think that cite is readily available. I can get it for the Court if need be before I sit down today. Justice Thomas talks about the Federal Arbitration Act and the discussion revolves around what does it take for a party to defeat the formation of a mandatory arbitration agreement? And Justice Thomas talks about it in terms of it has to be a formational issue. It has to be at the inception of the formation of the agreement and it has, and Justice Thomas acknowledges, again, that relatively uninterrupted line of cases that talk about the ability to void an agreement, even an arbitration agreement based upon coercion. The Doctors Associates case, the US Supreme Court once again acknowledged in the franchise

agreement context that duress is not allowed. And that case indicated that duress was not an issue in that case. This, the case that we're presenting to the court today is a, as far as Valdez can discern from Westlaw, you can read way too many cases, but you can usually find if these issues are being addressed in other jurisdictions or elsewhere and it would appear that this is a cutting-edge issue for this Court to consider and--

JUSTICE PAUL W. GREEN: I'm a little bit concerned and I apologize for interrupting your thought there. Going back to what I said, before, you go with your point of view on this, it seems to me that we're encouraging a more harsh outcome for an employee by saying that this is coercion because as I used in the example, the answer then is simply to fire the employee, which is undesirable. And so to less harsh outcome, of course, is that he agrees to the waiver, the jury waiver and he gets to keep his job. So how do we resolve that dilemma?

ATTORNEY TIMOTHY G. CHOVANEC: Well, it's certainly something that can be freely negotiated. It wasn't in this case, but it can be freely negotiated. What if an employer says, hey we're going to give you all $100 bonus at Christmas this year if you'll sign this jury waiver?

JUSTICE PAUL W. GREEN: Well, but an employer can, he's got 50 employees and he's restructuring and so forth and so this is what we're going to do for everybody. Everybody in the shop and everybody else is going to have to sign these new agreements having to do with health benefits and all those kinds of things and said, here it is, boys and girls, take it or leave it. It just seems to me it would encourage a more harsh reaction from employers to do this.

ATTORNEY TIMOTHY G. CHOVANEC: A harsh reaction to avoid ending up--

JUSTICE PAUL W. GREEN: From the employees' perspective, I guess. He says, okay, I will take the waiver in order to keep my job, which is a better outcome, wouldn't you say?

ATTORNEY TIMOTHY G. CHOVANEC: Your Honor, yes. Again, I think from Valdez's perspective if I understand the Court's concern the, this Court rightly can be concerned about creating a situation that would encourage employers to willy-nilly fire employees based on new procedures. However, the rule of law still requires compliance and this Court has never held that Halliburton notwithstanding that coercion is a basis for imposing an enforceable arbitration agreement or jury waiver agreement absent a legislative mandate that says, you will enforce arbitration agreements because they're statutorily favored. Again, employers do have great responsibilities, but employees have rights and whether or not an employer is suffering in that situation based on a business transaction, the employee is suffering along with them.

JUSTICE DEBRA H. LEHRMANN: But the way that the court may respond to that is by acknowledging or holding that, that to fire somebody because they won't sign this is not coercion and that it's as the other side argued and that it would take something more, for example, withholding a paycheck. And so what is your response to that?

ATTORNEY TIMOTHY G. CHOVANEC: Well, Your Honor, in all candor, I think that raises constitutional implications then.

JUSTICE DEBRA H. LEHRMANN: Well, explain that.

ATTORNEY TIMOTHY G. CHOVANEC: The constitutional implication would be that the statutory right to trial by jury would be a protectable property interest. And as such, as cited in our supplemental brief under the Logan and Goss cases, if you have a statutorily acknowledged right that rises to the level of a protectable property interest, one has to be afforded proper levels of due process before that right is taken away. The situation described would indicate that there is this irrebuttable presumption of voluntariness. That's the position taken by Frank Kent here because they never controverted the evidence.

JUSTICE DEBRA H. LEHRMANN: But in answer to what Justice Hecht brought up, isn't that what's happened in arbitration cases? And how do you respond to that?

ATTORNEY TIMOTHY G. CHOVANEC: Is, I don't follow, is?

JUSTICE DEBRA H. LEHRMANN: I mean is because whenever somebody does give up their, or sign an arbitration agreement, they're also giving up their right to a jury. It's the same thing and your answer to that is that you can't coerce in that situation either.

ATTORNEY TIMOTHY G. CHOVANEC: Correct.

JUSTICE DEBRA H. LEHRMANN: But is that also your answer in regard to this issue of where the line would be drawn in other words, between.

ATTORNEY TIMOTHY G. CHOVANEC: It would be, yes, Your Honor. In other words, coercion cannot form the basis of the deprivation of a protected property interest, which we would argue the right to trial by a jury in this jury waiver case exists. Absent some statutory enfranchisement, which under the Federal Arbitration Act, there is this preference for arbitration, but even there, the US Supreme Court has indicated that coercion is still a defense to an imposed contract. And I see my time is up so for these reasons, Valdez would respectfully request that the extraordinary writ be denied.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

REBUTTAL ARGUMENT OF ROBERT RUOTOLO ON BEHALF OF PETITIONER

ATTORNEY ROBERT RUOTOLO: I think I've said, it a few times. already, coercion is a defense, I agree with that, but there is not coercion in this case. If there was coercion in this case, then there's going to be coercion in every case there is. If an employee could just say the only reason I signed this jury waiver, the only reason I signed this arbitration agreement was because they told me if I didn't sign it, I would be terminated, we're going to have coercion all over the place and that's going to open up a lot of employment lock case and keep me busy for a while, hopefully. A few of the other issues that I'd like to address, the statutory rights under the Texas Commission on Human Rights Act and Labor Code, they do provide a right to a jury trial, but there's nothing in there that says, you can't waive it. And there's nothing in there that says, you definitely have to have a jury trial on these age discrimination cases. It's just not in there. There is no statutory mandate that you cannot waive a right to a jury trial under the Texas Labor Code or even under the Federal Act, which doesn't apply here.

JUSTICE DEBRA H. LEHRMANN: But I think what he's arguing is that you have to prove coercion and in this particular and that saying I'm going to fire you for not signing this is going to be sufficient. So what's your response to that?

ATTORNEY ROBERT RUOTOLO: My response is that's not sufficient to prove coercion and it's not sufficient to make an argument that you did not knowingly and voluntarily waive your right to a jury trial, which under the statutes even though the statutes provide to for a right to trial by jury in these age discrimination cases, you certainly can waive it. We all know you can waive it by not paying the jury fee. You can waive it by not demanding a jury trial. One of the cases even states that, the constitution by implication says, you can waive it because you're not entitled to a jury unless you make that jury demand and pay the fee. So the mantel that they're trying to put jury trials on just isn't that sacred. You can waive it. The legislature does favor arbitration, but I think courts favor bench trials too? What's wrong with a bench trail? I think a bench trail is better than arbitration and as I mentioned before, in a bench trial, you don't have to pay as much. You get a judge and hopefully, the judge, I would think would know the law a lot better than some of the arbitrators would know and you have definitely a right of full appeal in a bench trial though if it was an arbitration now under the NAFTA case, I think we still have that, but you have to get the court reporter into arbitration, that doesn't happen quite all the

time so you might not have a full record as you would. So I think the courts and even the legislature would favor bench trials as well as arbitration. There should be no difference between them. One final point, there's been an argument made that Frank Kent is arguing for an irrebuttable presumption that when an employee executes a conspicuous jury waiver trial and that there's an irebuttable presumption that he did it knowingly and voluntarily. Well, that's just not what we're saying. The employee can still overcome the presumption, but he just can't do it by providing testimony that the only reason I signed this jury waiver provision was because I was told I was going to be fired. That's just not enough. You need more. That's what the Halliburton case teaches us and oddly enough, there's another Frank Kent case out there that has been mentioned that the Forth Worth Court of Appeals just decided with is another employee, Mr. Garcia, and they went that way. And I think we provided that case to the Court as part of our supplementation and in that case under the same exact jury waiver in this case, the same exact testimony, they said that, was not enough to overcome the presumption and that's what this case is about. And I think if we allow what Valdez is arguing to stand, that it's going to have a vast effect on jury waivers, arbitration agreements and might even be argued to expand the at-will doctrine, which I don't think this Court's prepared to do. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: We thank both Counsel. The cause is submitted and the Court will take another brief recess.

MARSHAL: All rise

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