ORAL ARGUMENT - 02/14/96
95-0827
CONTINENTAL COFFEE V. CAZAREZ

WHITCLIFF: May it please the court, opposing counsel. My name is Marvin Whitcliff. This case has a lot of importance to employers in the State of Texas. It has even more importance to employers who have businesses in Harris county. And we have brought before the court three issues which we would like the court to consider and reverse the CA in the decision that it's made.

The first point that is of most importance to us especially those of us who work in Harris county is to what extent does the county court at law in Harris county have the jurisdiction to entertain retaliation discharge cases? And I am going to loosely call it retaliation discharge cases, but we commonly refer to them as worker's compensation retaliation cases. Primarily because those persons who have been on a compensation leave, or who have instituted proceedings under the Comp statute and who may then be fired, there is a special provision in Art. 83.07(c) that gives them protection. And that's where we need to start is look at 83.07(c) and what does that statute say about which courts can entertain these kinds of suits. It says very specifically, and by the way, the 83.07(c) provision is a provision that was in the Act at the time that this particular scenario facts arose. The case was tried at a time when this statute had been recodified by the legislature in Sept. 1993. But the incident arose under the old 83.07(c). And I would like to focus the court on that because the language of that statute is very specific as far as we are concerned about which court is to entertain these types of cases. And the statute very clearly says that the district courts shall have jurisdiction to restrain violations of this statute. We think that simply means that if a claim arises that is considered to be a retaliatory discharge, that the DC courts of Texas have the authority and are given that exclusive authority. And we say that is exclusive, though the word "exclusive" is not used in the statute to entertain those kinds of causes of action and no other court, including county courts have that jurisdiction.

ABBOTT: So do you think it was just an accident that they put the words "to restrain" in there instead of the word "concerning"?

WHITCLIFF: Well I think it's a word of art that was used very loosely. And restrain can mean of course injunctions and awarding legal remedies. The constitution gives district courts the power to enjoin violations of statutes anyway. And we think that was a broad word used by the legislature to encompass not only injunctions but legal remedies under the statute.

But once you start with the premise and we assume that that is a correct premise that the district courts had that authority, then we need to look at the legislative grant of jurisdiction to the county courts in the State of Texas. And under 25.003, there is a grant of jurisdiction to county courts that is fairly broad, that talks about county courts having the same or concurrent jurisdiction of the district courts, but with certain _____ limits. But when you look at that broad grant of jurisdiction, the legislature with its infinite wisdom decided that it would then look at the various counties in Texas to decide on an ad hoc basis which county courts and particular counties should be given more authority or specific authority or have some authority taken away from those county courts based upon the work loads of district courts for example. In Harris county we have 25 civil district courts that don't have any criminal jurisdiction. We have probate courts. We have family courts. And so there is an enormous amount of courts in Harris county to undertake these kinds of cases. In El Paso if you look at the El Paso statute, the El Paso statute basically says county civil courts at law in El Paso have the same jurisdiction and can hear the same kinds of cases as DC in El Paso. Pretty much giving the county courts the ability to hear and entertain any type of case that the DC can. But when you look at Harris county under 25.232, there is specific grant of

authority that's given to the county court. And one of those, which has been repealed in 1989 is (b), that up till 1989 gave concurrent jurisdiction to the county courts with monetary limits. In 1989 the legislature totally revamped that and removed the concurrent jurisdiction for county courts in Harris county and took that away. But then in (d) gave specific grants of authority to the county courts in Harris county over real property, corporate forfeitures, 6 specific delineations of authority that the county courts in Harris county would have. In that delineation, there was nothing mentioned about retaliatory discharge cases. Not one single thing. But the court, the legislature still allowed the county courts in Harris county to entertain appeals from the Texas Worker's Comp. Commission. That was specifically given to them in that statute as well as the general jurisdictional statute.

So we think the legislature made it clear that in Harris county, the county courts at law will have certain jurisdiction and the Texas legislature made it clear that those particular courts would have specific jurisdiction and entertaining worker's comp. retaliation cases would not be one of them.

ABBOTT: If they wanted it clearer they very easily could have written it clearly when they granted jurisdiction to the district courts. They could have added just a few more words and it would have been incredibly clear and this issue wouldn't be here.

WHITCLIFF: Yes they could have made it clearer. But our point being that when you look at how these provisions of the grants of authority to the county courts play off against one another and if you read them together and follow the legislative history and then look at which statutes were repealed, we think you come to the conclusion that the county civil courts in Harris county do not have the authority to entertain these kinds of worker's comp. retaliation cases.

One additional point I would like to point out to the court is that in those counties where the legislature has given the county courts the jurisdiction to entertain by implication these kinds of cases, the specific statutory grant of jurisdiction will always refer back to the general grant of jurisdiction in 25.003. Noticeably in Harris county that introductory language is not present in the specific grant of jurisdiction to the Harris county civil courts. Leaving you to the conclusion that the legislature did not mean for the county courts in Harris county to have concurrent jurisdiction with monetary limits as you might find in some other counties in Texas.

GONZALEZ: Would you in some point of your argument address the issue of preservation of error and all the points that you have raised here?

WHITCLIFF: Well your honor that is something that the other side has brought up a number of occasions and a lot of what they are bringing up is for the first time in this court. Jurisdiction is an issue that can be brought into the supreme court for the first time. It was brought to the trial court's attention the first day of trial and raised in the CA and that would bring me before this court in asking you all to make a pronouncement about that. But we think there was no preservation of error needed specifically on jurisdiction, but certainly we did raise it at the TC level, and at the CA.

PHILLIPS: You're so sure about this argument that you have not preserved your argument that there was a sham to get around the $100,000 monetary limit?

WHITCLIFF: Yes we have alleged that.

PHILLIPS: But you don't allege that anymore?

WHITCLIFF: No we do not.

PHILLIPS: If the court were to find there was jurisdiction in the statutory county court in Harris county, then you would not be making any argument about the dollar amount?

WHITCLIFF: No we would not.

PHILLIPS: And this case would be if for any reason it was remanded it would remanded back to the statutory county court?

WHITCLIFF: Well if the court found that there was no jurisdiction then...

PHILLIPS: That question again was premised on if we found there was jurisdiction.

WHITCLIFF: If you found that there was jurisdiction, then points 2 and 3 however you would decide them if you found in our favor would be remanded to the county court for reconsideration. Yes.

Our second point of error deals with liability. We believe that we preserved error on liability. We have raised that issue a number of times starting with our proposed findings of fact and conclusions of law that were filed in the county court before the trial. After the trial we asked the county court judge to submit the findings of inclusions. She had to be reminded to do that. And then she finally filed them. And after she filed findings of fact and conclusions of law dealing with the facts and conclusions that she found that we requested the court for additional findings and conclusions and very clearly went through each one of hers to ask the court to make additional findings and additional conclusions. So we think that error was preserved there on whether or not there was legally sufficient evidence to support the verdict. We raised that in the CA very clearly and in the motion for rehearing. We talked about legal sufficiency issues and now we are raising it here before this court. And we don't think there is any question that we have preserved error in raising legal sufficiency.

We believe that when the court looks at, (and this is what is so critically important to employers in Harris county, and why if you let the CA's decision stand 90% of the employers who operate in Harris county are going to feel like they can't do anything with anyone who has filed a comp claim) when you look at the types of facts that the TC and the CA relied upon to support a conclusion that there had been a violation of the statute, any employer is going to feel like any employee who files a comp claim or who is hurt on the job whether they are a subscriber or nonsubscriber to the statute, or they say they are going to get a lawyer invoking the protection of 83.07c, that person becomes bullet proof. You can't talk with them about how are they doing like Mr. Duff did. You can't talk to the carrier and make sure that the benefits are being paid. You can't do all of the things that the court found in support of its judgment that Mr. Duff did. For example let me just run through these: knowledge of the claim; the CA takes great pain to say that he had knowledge of the claim. Well every personnel and individual is going to have knowledge of the claim. The supervisor is going to have knowledge of the claim. To use that as a factor to support a liability finding as far as we are concerned doesn't get you where you need to be. Negative attitude: they cited negative attitude very generally as asking on the employment application: Have you ever filed a worker's comp claim? And getting into those kinds of issues that the worker's comp statute permits employers to get into so that you can get into secondary liability issues.

CORNYN: Doesn't your client primarily rely upon what it says is a facially neutral absence control policy?

WHITCLIFF: Yes we do.

CORNYN: And since this is a bench trial and there were 80 different findings of fact here that were appended to the respondent's brief you have the burden to show there is no evidence to support the

critical findings. For example: the judge found that the plaintiff was never made aware of the existence of this absence control policy. And so you have the burden to show that there is no evidence to support that finding; correct?

WHITCLIFF: Well we made it clear in the TC through our own witnesses that Mr. Cazarez was a member of the bargaining union employees that were represented by the Chemical's worker's union. And in that collective bargaining agreement there is in fact a provision dealing with the 3-day no call, no show rule.

CORNYN: She said she didn't see it, and the TC found that as a fact.

WHITCLIFF: Well she said that she didn't see it. But if you are part of the bargaining unit of employees it is up to the union to educate the employees about what is in the contract. And we are to assume that she has knowledge of what the 3-day, no call-no show rule is. She said that she didn't know it. But if you are a member of the bargaining union of employees represented by this union it is to be assumed that you are aware because that is an obligation placed upon the union to educate its employees.

CORNYN: So even if she didn't actually know it she is charged with knowledge?

WHITCLIFF: She's charged with knowledge of that just by being a part of the bargaining union of employees.

CORNYN: And the trial judge also found that it was not uniformly applied and should not be applied to people who are on worker's compensation disability pre-benefits.

WHITCLIFF: Yes the trial court found that it was not uniformly applied by referring to an employee by the name of Karen Walker. And the reason why that is important as far as we are concerned as employers is that that is not a true comparison of persons who are similarly situated who don't have protection. For example: Karen Walker was on a worker's compensation leave of absence. And to compare her against what happened to Mrs. Cazarez is comparing apples and oranges because both of them are protected in the protective acts category of having filed a worker's comp. claim.

What the court should have done, what should have been presented by Mrs. Cazarez was to look at persons who were on none worker's comp. leaves of absences and how they were treated vis-a-vis this 3-day no call-no show rule. That is the comparison because this is a discrimination statute; 451 deals with discrimination. That is the first heading. In order to show discrimination individual by individual you look at the disparate treatment. You can't show disparate treatment by looking at persons who are in the same protected category. You have to look at persons who are outside of that category and see whether or not the rule was applied differently to those persons.

CORNYN: If I may ask one question about the 3rd point of error. Since we said in Moriel that the standard in that case does not apply to intentional conduct cases, what standard should we apply in determining the legal sufficiency of a punitive damage award in this case?

WHITCLIFF: I think Moriel demonstrates that the court is looking at evidence that's fairly egregious, that is punishing people for doing something that has evil intent. So it's to set an example of what shouldn't be done in other cases. The federal statutes have likewise borrowed that type of reasoning when dealing with intentional violations, and all the discrimination statutes and the US SC has said you've got to show intent to discriminate. But even if you show that you can collect punitive damages if you show something over and above that - show malicious conduct, evil intent, evil motive on the part of the alleged discriminator. We are suggesting to the court that at a minimum the court should apply the standards in

Moriel dealing with an objective criteria of determining whether the facts are so egregious as to warrant punishment, and to borrow the analogous reasoning of the federal appeals courts in the US SC about the types of standards that are required. Under the 1991 Civil Rights Statute there have been a number of cases decided that deal with under the circumstances where you can collect punitive damages even where there has been and you prove an intentional violation. Where the intentional violation gets you the liability and compensatory damages, but that doesn't automatically mean that you get punitive damages.

CORNYN: Finding of fact 80 says that the termination, this conduct occurred intentionally, willfully and maliciously, that doesn't support a punitive damage award?

WHITCLIFF: We are saying that that is a conclusion she jumped to where the facts are legally insufficient to support that conclusion. When you look at the facts they don't warrant that conclusion. She looked at a number of innocuous facts and them jumped to the conclusion that it supported punitive damages. And we are saying that that's the kind of conduct that doesn't support the rational of awarding punitive damages in this state or any other state in the US.

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RESPONDENT

LAWYER: May it please the court. The petitioners argue that this is a case that's very important for employers in this state. We would like to submit to the court that this case is not something that this court should sit in trying to balance equities between employers and employees. But this court ought to sit to further the legislative purpose that's established in the wrongful discharge statute in the Worker's Comp. laws. If that legislative purpose is to be _____ this court needs to affirm the CA.

Now we in this state have said that there is a legislative policy, a public policy _____ people to choose the remedy of worker's comp. We have taken away from people their right to sue their employers directly for negligence. To further that legislative policy to keep employers in fact safe from civil lawsuits alleging negligence this state says you must take worker's compensation if you are hurt on the job. And if you elect to take your worker's compensation remedy and then can be subjected to the terrible and egregious acts that were performed in this case by Continental Coffee, in Ms. Casarez's case, that legislative purpose will be totally undermined, it will be ripped away, and people in this state will then have fear in exercising their legislatively enacted prerogative of taking worker's compensation benefits.

ENOCH: Is there any significance under the bargaining agreement to the letter from the doctor that released her to go back to work? Does that provide any sort of significant event in the application of the bargaining agreement?

LAWYER: Two answers to that question. First of all the collective bargaining agreement doesn't talk about a 3-day and you're out policy. The collective bargaining agreement and that's cited in the petitioner's brief, the collective bargaining agreement is entitled Termination of Seniority. And it says that if you are going for more than 3 days without calling your seniority status is terminated. That is not the same thing as what is cited in the work rules. So the court should not be misled that the collective bargaining agreement somehow creates a trigger point for a 3 day firing. It doesn't. It creates a trigger point for seniority revocation.

ENOCH: What does that mean? What does seniority revocation mean?

LAWYER: I am not exactly sure under the collective bargaining agreement. But typically in a union shop if you have seniority you get some better jobs, you lose your rights that are accorded by your

seniority status in the union.

ENOCH: Could you lose your current position to someone below you who has more time...I've got more time on the job than the one below me; I've lost my seniority position so the one below me is now entitled to take my job?

LAWYER: I suppose that could happen. You could lose that particular place in the plant. But you wouldn't lose your job under the termination of seniority status. Now that's in the record and certainly the court's free to look at the bargaining agreement between the union and Continental Coffee. But my second answer to your question is this: that the 3 day no-show-no-call rule that you lose your job there is a triggering event there. And the release from the doctor in this case under the pretext reason given by Continental Coffee for Ms. Cazarez's firing, the pretext reason in this case is that she didn't call in for 3 days, and that she was released by her employer on Oct. 28. I have passed out to the court an oral argument exhibit which I believe shows why this is a pretext reason, and also these reasons will also support the causal connection between the firing and her filing of a worker's compensation claim.

First of all she was not released to return to work by her doctor finally until Nov. 18. She was fired on Nov. 8. If you simply look at the calendar you see that there is an inaccurate and a misreading of the record in this case by the suggestion that Oct. 28 or Nov. 4 was the trigger date, as Justice Enoch mentioned in his question, that simply is not correct and a fair reading of the record.

ENOCH: There is a direct statement I think by Continental Coffee that there was a doctor's statement that said she would be released to work on Oct. 28. And I thought the whole argument was she just didn't have a brace or something and this was kind of interfering. But you're saying that that is an incorrect statement, the record shows that the doctor's release was Nov. 18?

LAWYER: That's correct your honor. We cited the pages under the first point. If you look behind Tab 1 in the oral argument exhibit, you will see what Mr. Duck had when he said that she was released to return to work on Oct. 28. This is the specific and subsequent medical report that Dr. Parsley in Houston filed. And it says not that she was released to return to work. In fact that section is left blank. This is defense Ex. 3 in the record. That blank is left blank. In fact she says, the part that's filled out is Item No. 23, anticipated dates the employee may return to work. And that says she should return to work on Oct. 28. That's also attached behind Tab 2. And behind Tab 2 is the piece of evidence that Mr. Duff had when he decided that she was released to return to work. This is what he testified to was the basis of his assumption that she was released to return to work on Oct. 28.

PHILLIPS: Does that meet your standard for punitive damages if we read should return and this date is returned?

LAWYER: Not in and of itself. That's evidence that the 3-day rule was a pretext. I will be happy to leave the argument on pretext to this exhibit and to the record in the case. Because the best evidence of pretext I will simply conclude that point with this fact is that Karen Walker instead of being terminated after being absent for a way longer than 3 days if you look under Tab 5, you will see the letter that Continental Coffee people wrote to Karen Walker. She didn't get terminated after 3 days. What she got was the right to go to her doctor and ask for a note from the doctor explaining why she wasn't there. Now that's just for treatment. That is not the application of a uniform and neutral policy of absence control. That is in this case a different treatment for a worker who had filed a worker's comp claim and was given the chance to redeem her employment. That's not neutral and that's not evenhanded.

ABBOTT: Do you think that punitive damages are warranted in every single wrongful discharge case?

LAWYER: No your honor I don't.

ABBOTT: So the mere fact of the employer terminating her is insufficient to warrant punitive damages?

LAWYER: Yes. That fact standing alone we would lose.

ABBOTT: So what makes this case worthy of punitive damages?

LAWYER: This case is worthy of punitive damages because you have different conduct than simply the termination. I would like to point the court first of all to the fact that the employer reported to the Texas Employment Commission that Ms. Cazarez voluntarily quit. This employee benefit's director Mr. Duff had it in for her.

ABBOTT: Those facts and other facts that I am going to guess that you were about to recite are evidence that support that they didn't just terminate her, but they terminated her because she had filed a worker's comp claim. That's the evidence that you need to establish actual damages. And then it seems as though you need evidence more egregious than that in order to warrant punitive damages.

LAWYER: I think we have not only more egregious evidence, but we have different evidence than simply evidence that they fired her because she filed a comp claim. We have evidence that they turned her into the Texas Employment Commission as a voluntary quit, which thereby automatically causes the TEC to not give her unemployment compensation. She not only loses her job, but if you voluntarily quit you are not entitled to unemployment compensation. That is an entirely different kind of conduct than simply termination.

ABBOTT: So what they did caused her to suffer additional property damage?

LAWYER: Additional economic damage. And when you look at the inferences that can reasonably be drawn from the record, you have an older lady with an 8th grade education who's got a son at home, in that kind of circumstance for that person that is the equivalent of a financial ruining that Justice Cornyn talked about in Moriel. It is foreseeable that the employee benefit's director knows that if he reports voluntary quit to the TEC she not only will have no paycheck, she will have no unemployment compensation check. That's different. That's different conduct that is egregious. That is the ill will spite and evil motive kind of state of mind that this court recently in the Texas Beef Cattle case cited as justifying the imposition of punitive damages. You went back and you looked at the Clements v. Withers case, that is ill will and spite. They had it in for this woman. She filed a compensation claim and it wasn't enough that they would fire her because of that. Mr. Duff went further and he said: You're not only going to get fired, you are not going to get your compensation checks from the TEC. Now they will argue in rebuttal that the voluntary quit is a definition that is stated in the work place rules. However, it is preposterous to suggest to this court that Ms. Cazarez voluntarily quit when she was taking notes to the employer from Dr. Parsley asking to be reinstated, when she was meeting with the company VP asking to be reinstated and when in fact her son had told her employer that the reason she was out on Nov. 5 was because she had been to the doctor. It is simply preposterous to report that she voluntarily quit.

OWEN: Who did her son make that statement to?

LAWYER: Her son made that statement to Mazzie Villarreal.

OWEN: Did Mazzie Villarreal visit the home that day?

LAWYER: Yes she did your honor.

OWEN She talked with her son but not with your client?

LAWYER: That's correct. And Mr. Duff said that a report by a family member to Ms. Villarreal who then in term reported that conduct to Mr. Duff was enough to void the absence of control policy of this 3-day rule. Also remember your honors that Ms. Casarez specifically denied ever having told her employer that she would return on Nov. 4. That's again a pretext.

To go back to the argument on punitive damages because that may be something perhaps that the court may be interested in. You not only have malice, and you can look at the findings of fact and see the kind of egregious conduct that we are talking about here. You have malice in this TEC example that I am talking about. You also have malice in the sense that they knew that this lady was 1 year away from vested in the company's retirement plan. So if they could unload this worker who's making $14 an hour as a custodian that is going to...

PHILLIPS: Can we consider that after Ingersoll Rand?

LAWYER: I think you can your honor unless this case somehow comes under some kind of an ERISA _____ which we don't think it does. There is a SC case that was decided this year and it's cited in Texas Courts & Remedies that says that that kind of conduct is not preempted. You not only have that type of malice to support punitive damages, you also have fraud. These people are lying about the 3-day rule as my oral argument exhibit shows. It's a pretext. That's fraud. There was also fraud by virtue of the fact that Ms. Cazarez was never told: If you don't come in and you don't call in for 3 days you are going to be fired. That's fraud by failure to state. And that is an independent tort different than the wrongful termination tort which is statutorily and _____.

ABBOTT: So what you're saying is that the defendant in this case would have been better off instead of trying to dance around the issue if they had just told the plaintiff: Look if you file a comp claim we are going to fire you.

LAWYER: Well you know only Perry Mason gets those kinds of admissions at trial. Certainly she would be better off. She would have direct evidence of the wrongful termination.

ABBOTT: No what I am saying is the defendant would be better off had they just come out and said from the very beginning: You filed a comp claim, therefore you are fired. Instead of dancing around the issue which you're claiming they did, because they danced around the issue that warrants not only actual damages but punitive damages. But had they been direct about it and said you're fired because you filed a comp claim, then the plaintiff would be entitled to only actual damages and not punitive damages.

LAWYER: I would say your honor that they would be better off in the sense that there wouldn't be this other egregious conduct. But we don't just have the fraud by a failure to state something. We don't just have the lack of a direct statement here. We have direct actions that they were openly hostile to her worker's comp. benefits. They were openly hostile to her TEC benefits. And it wouldn't be better for the employer if they would have just said: Ms. Cazarez you're fired because you filed a comp case. That's the kind of intentional conduct which we would say under the legislative policy enacted in Texas this court ought to further by allowing the imposition of punitive damages, with that intentional conduct plus the fraud, plus the malice.

CORNYN: Are you saying that there needs to be some qualitatively different harm other than the harm that's sought to be protected by article 8307c in order to justify the recovery of punitive damages?

You cite the denial of TEC benefits and I'm wondering are you making the argument there has to be a qualitatively different harm, or you're just saying if there is it does have to be qualitatively different harm that qualifies it?

LAWYER: I'm saying both your honor. I am saying that yes in fact we have qualitatively different harm; we have evil state of mind that guided the evil hand in this case.

CORNYN: If qualitatively different harm is required is there anything else other than the TEC benefits?

LAWYER: The TEC benefits, the specific fraud that they engaged in in this case, the failure to tell her that she was going to be terminated if she didn't come into work. And her qualitatively different harm in terms of a financial ruin. She had no fall back position. She had no TEC benefits.

OWEN: Is it affirmatively in the record that she did not get any TEC benefits?

LAWYER: I'm not sure if that's affirmatively in the record. But that is not important. The consequence of that action is not as important as it is to show the evil will or the spite or the malice in this case. The answer directly to your question Justice Cornyn is that it's helpful to have qualitatively different harm. That's certainly helpful. But it is not necessary if the court is to follow and further the legislative policy of trying to encourage people to elect worker's comp. remedies.

GONZALEZ: With regards to the issue of the 3 day no-show or no-call rule that you say is was a pretext, assume that it was not. Focusing on the lack of knowledge of Ms. Cazarez Mr. Whitcliff argues that that is immaterial because the union had the duty to inform her and she is presumed to know everything in the collective bargaining agreement. What is your response to that?

LAWYER: My response is that's probably right. But if she was charged with that knowledge it's constructive knowledge in the first instance, but secondly the specific knowledge that she would be charged with is that her seniority status would be terminated, not that she would be fired, that her seniority status would be terminated. And that's qualitatively different than being fired and being told that if you don't call in for 3 days you are going to lose your job.

PHILLIPS: You don't know exactly what seniority status means. Can we find out from this record?

LAWYER: I think you can your honor. The entire collective bargaining agreement is Ex. 1 in the record. It's my understanding that in those kind of union shops that the termination of her employment is not mentioned in the collective bargaining agreement. In fact the brief filed by the petitioners in this case cites termination of seniority and it says: Termination of seniority and other rights. But that does not mean in fact that she is charged with constructive knowledge that she's going to lose her job.

PHILLIPS: Would you speak to the jurisdiction issue and whether Harris County is somehow unique. Is it not subject to the general jurisdictional scheme of the Uniform Statutory County Courts Act?

LAWYER: It is subject to that general jurisdictional scheme. Let me say briefly my answer to that is the CA got it exactly right. If you look at page 75 in the CA's opinion you will notice that even if we must rely on the specific ground of jurisdiction to Harris County Statutory Courts, in that provision, in provision C it says: In addition to other jurisdiction provided by law. We argue that that provision relates back to the general county court at law jurisdictional grant. And Mr. Whitcliff has now conceded that he doesn't challenge the $100,000 limitation in statutory county courts. So the CA got it right. The specific

statute refers back to the general. And finally on jurisdiction I will simply say that the legislature did not create exclusive jurisdiction in district courts. If they had wanted to as Justice Abbott correctly pointed out, they certainly have pen and paper and could have written that into the statute.

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REBUTTAL

ABBOTT: Mr. Whitcliff let me ask you a question. Let's assume that we were to rule in your favor on the issue of liability concerning actual damages. Why would that not send a signal statewide that in these types of cases or perhaps in any type of case that the SC is going to be reviewing evidence in every case and regardless of what a 6-person or 12-person jury did, you always have a 9-person jury, the SC, who can reconsider the evidence?

WHITCLIFF: Well I think the message that you would be sending is it's going to take more than these types of innocuous facts for a plaintiff in a despaired treatment case, which is what this is, to be able to meet that burden of proof to show that there was in fact discrimination being practiced against that person. If the court were to look at facts like in Ramirez and some of the other opinions of other CAs where there have been really relatively egregious facts that can only lead to a conclusion that there was in fact discrimination we don't think your reversal of this case will affect the types of cases that have been decided by the various CAs in this state in terms of a quantum of proof. The Hinds decision that was decided last June I think is an example of how the court has under a whistle blower statute that has language similar to ours where it uses the word "because", the court reevaluated the quantum of proof that's necessary and decided that because in that statute means but for. Because in this statute ought to mean "but for" - but for Ms. Cazarez engaging in protective activity, i.e. in this case filing a worker's comp claim, she would not have been fired. And that is the exact same type of burden of proof analysis shifting burden of proof analysis that all the federal courts have used in discrimination cases. This is a despaired treatment case. And under the facts in this case despaired treatment has not been developed in this case to the extent that there should be liability against the employer.

ABBOTT: But the burden of proof standard would be different from the standard about whether or not there was some evidence to support the verdict?

WHITCLIFF: The court would be enunciating a standard of proof that would be analogous to what the court has done in Hinds, and what the various appellate courts and the US SC has done in the various civil rights statutes in this country. So we are asking the court to reevaluate the legal sufficiency of the evidence and set the standard, write an opinion that tells all employers and the CAs what is going to be required before you can find liability. And based upon this evidence in this record it does not meet that. It really doesn't meet the quantum of proof that the other CAs in this state have decided as necessary to meet your burden of proof. We are asking the court to give the CAs and employers and employees in this state guidance about what is going to be necessary. And all you've got to do is borrow what you did in Hinds and what the various Cas have done in civil rights statutes.

SPECTOR: How do you answer the argument that the 3-day rule only applies to seniority, not to termination?

WHITCLIFF: That provision is not unlike a lot of collective bargaining agreements where if you break a work rule, which there was a work rule in this case, and it's also in the collective bargaining agreement, that nomenclature you lose your seniority is equivalent to termination. If you lose your seniority you don't have a job within that company.

GONZALEZ: Why does it not mean you should not get promoted? You know be passed over

for promotions like in the City of Sherman case?

WHITCLIFF: But to say you are going to be passed over for a promotion doesn't equate to any loss of seniority. When you lose seniority in the union context you are out of a job. And that was the intent of that selection of the collective bargaining agreement.

SPECTOR: And that definition of seniority is in the agreement?

WHITCLIFF: Yes.

SPECTOR: That you're terminated when you lose seniority?

WHITCLIFF: It's our interpretation that because there is no other termination provision in the collective bargaining agreement, it's my view that Mr. Duff made it clear that if you violate the called no-show rule, that that loss of seniority provision comes into effect and then you are no longer employed there.

OWEN: Why doesn't the information that Mazzie Villarreal got satisfy the no-call/no-show rule?

WHITCLIFF: Because when you look at the record evidence that even counsel provided the court this morning all that Ms. Cazarez's son told Mazzie Villarreal when she went to visit was: She's not feeling well today. Who knows what that means? The respondent did not develop that at the TC to indicate or conclude that I can't come in. There was no direct overture by Cazarez or her son that I will not be in today. And that is what is affirmatively required of any employee who is out. You've got to call in or have someone call in for you and say I am not going to be in today. So to say I am not feeling well today doesn't mean anything. A lot of people go to work not feeling well.

OWEN: What does the record show one way or the other about loss of TEC benefits? Did she get them or not?

WHITCLIFF: I don't recall exactly. I can provide that to the court post-submission. What Mr. Duff did at the TEC was he said: Yes, she voluntarily quit. That's what the rule says. If you don't call in within 3 days you are considered a voluntary quit and that is in the work rule. So he was not misrepresenting anything to the TEC or anyone else.

SPECTOR: Where in the record is that work rule?

WHITCLIFF: I don't know off the top of my head.

SPECTOR: And that's not part of the agreement?

WHITCLIFF: The work rule is a separate document that's posted in the work place that mirrors some of the same language that's in the collective bargaining agreement about infractions.

SPECTOR: Are the work rules in the record?

WHITCLIFF: I'm very sure they are.