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BREWERTON V. DALRYMPLE
97-0954
CITY OF MIDLAND V. O'BRYANT

VAUGHAN: I will seek to address the common law claims in approximately ½ the time. Mr. Johnson will address the remaining issues in the other half. If the Austin court is not reversed in *O'Bryant* and *Dalrymple* with respect to the common law claims, which are intentional infliction of emotional distress and the duty of good faith and fair dealing, not only will this represent a major departure from this court's prior precedent, but we believe it will also circumvent legislative schemes enacted to address retaliation claims in ways that this court's prior recent opinions suggest the court is not inclined to do.

The procedural posture of the case highlights the danger associated with encouraging employees to pursue common law tort claims for retaliation based on actions that rightly come under the Whistleblower Act, the Labor Code or other statutes forbidding retaliation. Claims such as those at bar whose labor code retaliation claims were dismissed for failure to exhaust their administrative remedies that are required by the legislation would in effect be encouraged to ignore statutory obligations and pursue the same claims under perhaps less onerous common law requirements.

With respect to intentional infliction of emotional distress, specifically in both *O'Bryant* and *Dalrymple*, the Austin court equated alleged violations of anti-retaliation statutes. In *O'Bryant's* case, the labor code; in *Dalrymple*, the whistleblower act. Those were equated with the extreme and outrageous conduct requirement established in *Twyman*, which is part of the proof required of the common law tort of intentional infliction of emotional distress.

This court could scarcely have been clearer on this point in June of this year in the case of *Southwestern Bell Mobile Sys. v. Franco*, in which the plaintiff claimed that their firings occurred in retaliation for reporting sexual harassment. This court held that even assuming that there had been a wrongful termination under retaliatory circumstances, not withstanding that fact, this did not constitute sufficient evidence of extreme and outrageous conduct under *Twyman*'s rigorous standard. Also, in the case, there is a footnote citing several cases, including one in which there is a termination in violation of the whistleblower act, and another a termination in violation of Title VII, Sexual Harassment.

ABBOTT: Are you in the position that there is no type of situation where an employer, whether for the company or individuals who work for the company terminate an employee, where that conduct would rise to the level of intentional infliction of emotional distress?

VAUGHAN: I would like to say there is actually a case that does have more than just the adverse employment consequences that were involved. That case involved a situation wherein a person who is terminated was also made to appear to have criminal activities associated with it in that checks were placed in their belongings by someone at the work place to create the sense that they had done wrongdoing, that they in fact had not. And so, I believe that the lesson in *Southwestern Bell Mobile* and other cases is that adverse employment decisions without more, though they might be actionable under statutory schemes, the statutory schemes are designed to address those actions. But if you do have more that could rise to the level of the extreme and outrageous.

ABBOTT: Doesn't it seem as though something in addition to extreme and outrageous conduct is required? The reason I say that is that in all the cases cited by you and by the other defendant appearing here today, there are cases that do involve what typically would be categorized or some people would categorize as outrageous conduct, and conduct that no one would want in a civilized society, but yet in those cases, the courts have decided that there is no intentional infliction of emotional distress. And it seems to me that one reason for it is the notion that the purpose of the conduct was not to inflict emotional distress, but was to do some other act, such as terminate someone from employment or whatever the case may be. Do you have any comments, suggestions, or ideas about a different definition to be used to describe what is necessary to establish intentional infliction of emotional distress?

VAUGHAN: That is a very profound question and I hope that I can do it justice. It reminds me a bit of the concurrence in *Twyman*. Justice Hecht wrote in about the prevailing winds and the whims of the helmsmen and these sorts of things. It is possible I think to come up with a bit more defined standard than extreme and outrageous conduct. However, that is what we have been working with in the past. It seems as though it has sort of in the course of time and jurisprudence come to mean that regular employment disputes and other sorts of situations, even if it involves shouting matches between a supervisor and an employee, even if it involves behavior that we would not want in the courtroom, we would not want to see. It nevertheless isn't going to be actionable because it isn't so intolerable in a civilized society, such as the case I mentioned, where you have not only a termination of employment, but you have an effort by the employer to create a sense that the employee has done a felony, has stolen something when in fact they haven't. So, I appreciate the nature of your question.

ABBOTT: Would your position change if the intent of the employer in terminating or in the way that it terminated the employee were to humiliate the employee?

VAUGHAN: That's an important question. I do believe that some of the cases which have been through the judicial process in the past might have had more humiliating facts than the two that are in front of the court today. And I hesitate to say that there was anything erroneous about the way the prior jurisprudence has been decided. But I think that if humiliation becomes the standard, then

you are into a highly subjective sort of analysis. And that is a slight danger that would be associated with that. So I do hesitate to say that it would be the appropriate distinction to make. But I also think you needn't go that far in the circumstances appearing before the court both in *Dalrymple* and in *O'Bryant*.

The essence of what I would like to say is that this, too, is a common law determination for this court to make. It has made it so sparingly in the past that there must be a special relationship, and we believe that that has not been established in this case. And indeed, because of public employment carrying with it oftentimes and the case shows in the record that it carried with it in this case, the right to grievance determinations and other due process. There's actually less need - there is a less disparate relationship here than there even is in an at-will employment situation.

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JOHNSON: The question that I would like to present to the court is, whether or not there was a sufficient policy justification by the 3rd CA, or before this court to throw out an effective test of official immunity, and to substitute what we believe is an unworkable one involving delving into questions of subjective intent.

HANKINSON: Isn't subjective intent always an element of an intentional tort?

JOHNSON: Most of the intentional torts that I am aware of it would be, I guess there are probably some like defamation that maybe intent would not be involved. But certainly an intentional infliction of emotional distress intent plays some minor role. It certainly is much more relevant in §1983 claims. The policies expressed by this court in the *City of Lancaster* case, really don't change from this case at all. Official immunity, the test still presupposes that there is possibly some liability that the state official may have incurred. What the court is still doing is it's protecting acts of official discretion.

HANKINSON: *Chambers* was a negligence case, and clearly carved out any question about intentional conduct didn't it?

JOHNSON: *Chambers* certainly was a negligence case, but it relied on *Harlow,* which was a US SC retaliation case. And certainly all of the policies involved in protecting acts of discretionary decision-making that were listed both in *Harlow* and by this court still apply to questions of intentional decision-making by state officials.

HANKINSON: So, it's your view that the *Chambers* test should be applied when an intentional tort has been alleged, and there should be no differentiation in the test?

JOHNSON: That's right.

HANKINSON: It doesn't matter what the claim is or what the wrongful act is, the same test should apply?

JOHNSON: That's right. It's a workable test. We don't believe that - we believe that it is a test that a plaintiff can still overcome. It certainly doesn't preclude a plaintiff from bringing a claim whatsoever. And if you go into subjective intent, then what you do is, you provide plaintiffs with an ability for pretty pervasive discovery. It makes it very, very difficult for a defendant under state court summary judgment rules for a defendant to establish any sort of immunity and to establish summary judgment. And we get back to the place where we were before *City of Lancaster*; we're simply alleging improper motivation; basically gets you to trial.

ABBOTT: Isn't it true that the claims in at least one of these cases is that the conduct by the defendant officer was malicious?

JOHNSON: Yes. I think one of the findings is that they were motivated by retaliatory motivations. That's correct.

ABBOTT: To me it seems as though malice is inconsistent with good faith. You would agree with that would you not?

JOHNSON: Yes.

ABBOTT: If the claim is malice, and if that is inconsistent with good faith, how can we apply a good faith standard to the malice cause of action?

JOHNSON: First of all, it's a little unclear as I understand it what this malice claim really has anything to do with the intentional tort, that the official immunity analysis applies to. Unless this court decides to change the analysis under intentional infliction, the claims of malice really didn't have much to do with that tort; really had more to do with the free speech claim that was before the court. Because under this court's precedent in *City of Beaumont*, there really isn't any personal liabilities, so the official immunity analysis really would be inapplicable to that claim. So there is sort of a disjoining between the official immunity analysis and the intentional infliction claim when it comes to the allegation of retaliatory motivation.

The 3rd court's proposed test we find to be completely unworkable. Because of the two prongs in the test, the court really argues that once a plaintiff provides some evidence of retaliatory motivation or prohibitive motivation, then the court must basically assume the facts as the plaintiff alleges, and to analyze whether or not any reasonable state official could engage in the actions that they did, which basically falls into a whether or not the plaintiff has in fact alleged a

cognizable claim. There is simply no threshold for a plaintiff that they need to get over on the second prong. So really it just becomes whether or not the plaintiff can allege any sort of facts that are at all related to prohibitive motivation. And in this case, all the plaintiff really did was to provide some speculation as to motivation. And that's really all that we would argue was presented at the TC, which the CA argued and based its decision that that was sufficient to adopt the second prong and to basically reverse the decision of the DC.

So we would ask this court to in fact reaffirm the analysis in *City of Lancaster*, and to apply the objective test to good faith to claims involving intent.

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RESPONDENT

ROBINETT: I was pleased to hear some of the questions that were coming from the court already this morning, because I think it indicates that the court has a good understanding of what the issues are in this case.

I would like to state clearly what this case is about and what it is not about, because every time that we write or we say that this is different from the *Chambers* case, we did not receive a response from the defendants explaining why it is not different from the *Chambers* case.

What this case is about, is accountability for deliberate intentional misconduct by those in mid to upper level bureaucratic positions in the state government, who the citizens of this state have entrusted with authority over other people's lives, careers and reputations.

It's about accountability for people who sit in their office. They are not out in the street in a car chase, but they plot and they scheme. They use the power that the citizens have entrusted to them, that has been entrusted to them to use for the public good, they scheme to use that power to pursue their own petty and vindictive vendettas rather than taking action that's in the best interest of the people to whom they owe their authority, their salary, and their loyalty. It's about holding these people accountable when they violate the oath that they have almost certainly taken to uphold this constitution and the laws of the state of Texas. And it's about holding those people accountability when, as this court clearly said they could be held accountable in *Lancaster* when they knowingly violate the law or are clearly incompetent.

What this case is not about, and this should be received well by one of the filers of the amicus brief, is that it's not about anyone in the private sector. It's not about anyone who does not have the obligation that a public employee has to act in the best interest of the general citizenry as opposed to the private sector administrator whose loyalty is to the bottom line.

PHILLIPS: What about the argument opposing counsel made that public sector employees

have more recourse to internal grievance procedures, etc., than an at-will private employee; and therefore, there is less need for a corresponding tort?

ROBINETT: I have been representing public sector employees for a number of years, and I don't think that as a practical matter, as a matter in the real world, that that argument holds any water. What happens in the real world is that the public sector employee has the right to go talk to the supervisor of the person who is doing him wrong. But the supervisor is the good buddy of the person who has done him wrong, and their decision is to generally rubberstamp. As a practical matter, I don't think that that is an effective solution especially when you're talking about problems that reach beyond the public employer one step, internal administrative process is finished.

PHILLIPS: The whole bent(?) of the Anglo/American law over the last few 100 years have been to insulate the public fist(?) from lawsuits more than we do private individuals, because of a sense of the money that would be used to pay damages is taxpayers' money. But you think here there is a good case that could be made for turning that general standard on its head?

ROBINETT: No, this case is not about public money. We are talking about public money being used properly by those who are given the power by the citizens who pay the taxes. If decisions are rendered in the types of cases that are before the court right now, that will be a matter of personal liability for the person who does the wrong.

PHILLIPS: But that may or may not be reimbursed?

ROBINETT: It may or may not be reimbursed. If the government has taken the policy that it will reimburse the employees, then it's free to do that. My understanding is that in many instances, these types of cases are always going to be based on personal deliberate misconduct. And in many cases, that type of conduct is not reimbursed by the employer.

HECHT: How is that the intentional infliction holding of the CA and whatever this court says about it will not affect the private marketplace?

ROBINETT: Because the distinction, and I think that it was brought out on the opening argument, is that this court has spoken quite clearly in the *Southwestern Bell* case, by reversing even without hearing oral argument, that it is not extreme and outrageous per se simply to retaliate against someone in the private sector, and this case again involves a public employee, and it's our feeling that no one in a civilized society and we compliment ourselves on being the most civilized society in the world, should accept a public official using his authority to conduct a personal vendetta as anything less than extreme and outrageous.

HECHT: But it's okay if the private sector does it?

ROBINETT: This court has said it is. I might be up here if I ever have a case involving a private sector employee saying that it's not and trying to convince you otherwise. But I think that the key factor that the court needs to take into consideration in this case, is that the public employee holds his position by the will of the people. And he has an obligation to serve the will of the people and the best interest of the people as opposed to simply gratifying his own ego, or getting vengeance on someone who has complained about him to his superior for telling off-colored jokes in the office, who has filed a complaint about something that official has done...

ABBOTT: Are you using that argument to distinguish *Franco* or to distinguish something else?

ROBINETT: No, I am using the argument primarily to distinguish any of the cases. And I don't believe that there have been any case before this court.

ABBOTT: I thought you said this court had decided differently.

ROBINETT: I was just discussing the *Southwestern Bell* case, and that's the one that the court decided earlier this summer.

ABBOTT: In the *Brewerton* case, the petitioner cites two US SC cases: *Harlow*; and *Malley v. Briggs*, and cites 11 Texas intermediate court cases for the proposition that intentional conduct on the part of public officials is efficient to get around the good faith standard?

ROBINETT: *Harlow* says that, and the US SC has held that in the federal context. The State of Texas has held that the citizens of this state are more protected than the citizens of the US in certain context, especially in matters such as free speech. And it is this court's obligation to decide what the rights of the people in the State of Texas is. This court is not obligated to simply say, that's what was said in *Harlow* by the US SC - we'll adopt it without giving it our own rational consideration. And this court does not also have to rubberstamp the decisions of a number of CA, which also is different from the court in this case. This court is not obligated to simply rubberstamp that, but is to use its own judgment. And we believe and we explained in our brief that all of the cases out of the CA did not address this specific issue when presented to it, which is the difference between the public official and the private administrator engaging in the same type of conduct.

I would like to stress also that this is not a *Lancaster* case, because we're not talking about a police officer, who is in the middle of a high speed chase having to make a split second decision and not wanting him as a policy matter to have to think: Wait a minute if I take this action or that action, will I get sued for it? Will I be personally liable for it? To the contrary. In this case, you're talking about someone who is sitting behind a desk, who has days, weeks, months to figure out a way to take an action to damage someone else and create a pre-text for that action that can stand up if the *Lancaster* objective test is adopted by the court in intentional tort cases.

HECHT: Personnel decisions are always difficult. And usually some tension precedes the decision. How can you ever make that hard decision and be protected by immunity if you can't appeal to an objective standard? You can't say, well whatever may have been said between us and whatever we may feel about each other, I think a reasonable person in this position looking at these facts would say, you need to be moved here, terminated, whatever.

ROBINETT: If that's the case, then you don't have an objective good faith standard, because it is inconsistent to say malice can be done in good faith. What you have is a good pretext standard.

HECHT: If 14 Bishops are in there and they all look at the situation and they say, "No, that was the right decision," would it make any difference that there had been animosity between the two people before?

ROBINETT: I think that what would need to be done is for the case to be presented to the court. In fact, I understand the position presented to the court, that if you simply apply the regular summary judgment standard, that gives no protection to the public official. Our position is that, the *Lancaster* standard gives virtual absolute immunity. In the real world it is a virtually absolute as long as you've got a good lawyer who can help you create a pretext before you take the action, or even after you take the action.

HECHT: I don't understand what difference the pretext makes. Can't you get someone to come in who says, "there was not objectively a good basis for this decision; no person in this position would have taken this personnel action?"

ROBINETT: There will be times when someone act maliciously. And yet, if they prepare their case carefully enough in advance, and I know there are attorneys who can be called and who will assist administrators in the public sector in preparing documentation that would create the appearance later that this was objectively justified. In fact, I mentioned in one of the briefs that filed, that I was involved in a case where the opposing counsel told me that the board of trustees was firing my client, who was a principal, because he had filed a complaint with the Commission on Human Rights. He told me that. And he told me they couldn't do it, and he told them they couldn't do it, and they wanted to do it anyway. And they were willing to pay whatever amount of judgment was entered against them. I told them, well why don't you tell your clients that we will file suit against them in their individual capacity. And he says, "Oh, I told them they are not liable in their individual capacity."

Now subsequently, when suit was filed they start scrambling around and getting a number of people to come in and say, "Oh, I didn't like this about the principal; I didn't like that about the principal. And if you take the *Lancaster* test and apply that to that case even where it has been admitted that there was an unlawful motivation, that will result in summary judgment for

the employer. Because looking at it objectively, you can find people who would say, "that evidence, it was accumulative after the fact to support a predetermined decision, it's evidence that some reasonable person could have taken to fire this principal."

ENOCH: Did I understand you to say that, under *Southwestern Bell v. Franco* this cause of action would not exist in the private sector?

ROBINETT: That's my reading of the case.

ENOCH: So if I was in the private sector, a middle management employee who did this as Brewerton did or the official in Midland did, if they are a private sector there would not be this cause of action?

ROBINETT: There would not be the cause of action.

ENOCH: So there would be no reason for a good faith exception to the cause of action, because a cause of action wouldn't exist in the private sector; therefore, there would be no need for a good faith exception?

ROBINETT: Perhaps I overstated it when I said there would be no cause of action. I think that what I have stated was my perception, which is even though on paper there might be a cause of action, the cause of action would not be worth anything because there is always a reasonable explanation that can be manufactured.

ENOCH: Except that you then go on to say that the reason that it should apply here because these are public sector employees and they have a separate special duty as government employees?

ROBINETT: That is why they need to be more accountable than the private sector.

ENOCH: How does that work in the *Chambers* context? In *Chambers* a private citizen doesn't have the right to engage in a high-speed chase; therefore, they are liable. And in *Chambers,* the whole test, the concept was: How do we take the police officers who have a duty to engage in high-speed chases and not expose them to the same type of liability that the private sector individual would have? And so you craft a good faith standard. If they're doing this in good faith, then they are protected. They aren't liable. So, in *Chambers* what happens is, we're saying the government employees have a different responsibility: duty, liabilities in the private sector. In this case, it seems to me you're arguing that we want government employees to have liability in the context that a private individual would not, and then reverse that back out and say, but if they exercise in good faith, then we don't. _____ are not the same thoughts.

ROBINETT: I think what I stated previously was in this case, is not about the situation where you have a police officer who is actively engaged in protecting the citizenry of the state in a high-speed chase having to make split second decisions. That is a vast difference from someone who is sitting behind their desk in their office consulting their attorney and saying, "what documentation do I need so that if it goes to court, I can get it thrown out in summary judgment." Somebody can testify, "hey, that what's reasonable to me some reasonable person could have done it." Now I would be surprised if this court would adopt the standard that all plaintiff has to do is show that a fact issue exists on the issue of the intent in an intentional tort. But what we're saying is the *Chambers* test in this type of situation is simply inappropriate to say that someone who is sitting behind a desk making cold calculated decisions with malice or forethought should be protected by the same test as someone who is out actively protecting the public in a high-speed pursuit.

And I would like to throw out a possible test for the court to consider. Perhaps not the only test, but it's the type of thing that I think a court should seek in finding a happy medium between those two extremes. One in which, according to the defendants, the plaintiffs always get to trial and the other in which from my experience the plaintiff will never get to trial. And one approach to take would be to use the objective good faith test in *Chambers* as the first step in the analysis to require the defendant to make a prima facie case of good faith by showing that a reasonable person could have taken this action. And then shift the burden to the plaintiff to present his own evidence, not simply speculation as the defendants in this case keep talking about, but to present evidence which is sufficient to support a finding by a jury that the official was motivated out of his own personal interest in damaging the plaintiff rather than in the best interest of the public.

I got this idea from another case the court decided within the last couple of years on a different issue, and I thought of it this morning, so I don't have the cite with me. But it was a case about tortious interference with contract in which it had always been stated that an officer in a company could not tortiously interfere with the contract that the company had with someone else. And this court said, "yes, there are instances in which that can occur if the plaintiff can show that the officer stepped outside his duties for the corporation, his responsibilities for the corporation and acted as a intermeddler, then that person can be held accountable." Now that's an awfully high standard, too. I'm not proposing that this court take that extreme of a position in this case, because I think that also virtually shuts out any liability even for the most malicious conduct. But I think there is a happy medium and we're here today asking the court to consider that and to find one.

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JUDGE: I do think that the law of intentional infliction of emotional distress is alive and well in the employment context both in the public and the private sector. As I understand *Franco*, mere retaliation alone may not constitute intentional infliction of emotional distress. But we have the restatement, we have *Dean v. Ford Motor Credit*, that I was happy to have tried in the TC and argued in the 5th circuit. And it tells us in *Wilson v. Monarch Paper* and in *Twyman* what the

standard is for intentional infliction of emotional distress. We have a legitimate concern that government officials should not be subjective to frivolous common law claims for the intentional infliction of emotional distress. And this court set up a gatekeeper type proceeding in its *Twyman* opinion that will take care of that concern. A plaintiff has to do more to come into court and allege a cause of action for intentional infliction of emotional distress. A plaintiff must come in to court and present at least summary judgment evidence of what is truly outrageous conduct. We've done that in this case. *The City of Midland* put a 1-legged police officer partnered up with another officer who had just come off heart-lung surgery on night patrol.

ABBOTT: Did that police officer ever request to be taken off of that night patrol?

LAWYER: Both of those officers had requested to be put on airport duty, which was a much less strenuous duty assignment.

ENOCH: But of course their argument is, that that was their second choice.

LAWYER: It's still outrageous. These men wanted to keep their jobs. They are police officers and they would do whatever they had to do to keep their jobs. It was outrageous to put them in that circumstance.

SPECTOR: What happened to the ADA claim?

LAWYER: It was dismissed and that happened before I got into the case, and I'm not sure I understand why it was dismissed.

ENOCH: Was it the police officer had no option but to put down street patrol as their second choice? I am trying to figure out why - you mean you say it's outrageous so the implication is that they were told they had to put that down as second choice?

LAWYER: I think that was the only thing that he was aware that might have been available to him in that highly charged atmosphere, which all of those officers were working.

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REBUTTAL

VAUGHAN: I would like to try to clarify a couple of things that were pointed out in Mr. Robinett's argument. One being, I believe that there was a false assumption there that the scope of immunity was broad enough to cover the statutory claims. That is not the case. The scope of the immunity is only for the common law claims. The *City of Midland* and the University of Texas do in fact have to face the retaliation claims under the statute. That is the way the legislature crafted it. Indeed in the *University of Texas* case, there was a jury finding of no retaliatory conduct.

HECHT: It was tried against the University?

VAUGHAN: Yes, it was tried against the University before a jury. There was no finding of retaliatory conduct. In the *City of Midland's* case, there were pleadings of violations of the Texas Labor Code. Those were addressed on the merits before the trial judge and the trial judge ruled in favor of the City on the merits. However, the Austin court on its own motion struck that from the case for failure to pursue the mandatory statutory administrative remedies prior to suit. And so I believe that we might be working under a false assumption to the extent that we start talking about immunization as to all claims for deliberate retaliatory conduct. That is not in fact the case.

When CJ Phillips asked the question about the grievance procedures, I believe Mr. Robinett suggested that as a practical matter in the real world grievance procedures are meaningless and so on. I think this record in *The City of Midland* case belies that sort of answer. The plaintiff, Hendon, in particular availed himself of grievance procedures on numerous occasions and successfully so in all but one. In terms of the petty things that they are alleging in this case to be petty at least, that may have occurred in their view as retaliatory things having to do with his claims for overtime compensation, having to do with other grievances of that sort, they were resolved in his favor under the City's grievance policies. So I think that our own record belies the sort of idea that this is a window dressing only sort of grievance procedure.