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Supreme Court of Texas.
Mission Consolidated Independent School District
v.
Gloria Garcia.
No. 10-0802.

January 10, 2012.

Appearances:

David P. Hansen of Schwartz & Eichelbaum Wardell Mehland Hansen, PC, for Petitioner.

Savannah Robinson of the Law Office of S. Robinson, for Respondent.

Before:

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

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 10- 0802, Mission Consolidated ISD vs. Gloria Garcia.

MARSHAL: May it please the Court, Mr. Hansen will present argument for the Petitioner. The Petitioner has reserved two minutes for rebuttal.

ORAL ARGUMENT OF DAVID P. HANSEN ON BEHALF OF THE PETITIONER

ATTORNEY DAVID P. HANSEN: May it please the Court and Counsel, the standard for waivers of sovereign immunity is that any waiver must be clear and unambiguous, as Justice Hecht that you put it in Kerrville, that means unmistakable clarity as to that waiver, particularly when we're talking about who the wavier is applicable against. In the Texas Labor Code, the Legislature clearly and unambiguously waived the sovereign immunity of state agencies and it clearly and unambiguously waived the sovereign immunity of state instrumentalities and it clearly and unambiguously waived the governmental immunity of counties and municipalities, but it clearly and unambiguously did not waive the governmental immunity of school districts because it was not included within the definition of employer. It is not now there and it has never been there. They're not even referred to within the Texas Labor Code at all. School districts are never mentioned in there. So it was error to construe the Labor Code as waiving the sovereign immunity of school districts.

JUSTICE NATHAN L. HECHT: You say you're a political subdivision.

ATTORNEY DAVID P. HANSEN: We are a political subdivision, Your Honor, that's correct.

JUSTICE NATHAN L. HECHT: And the Tort Claims Act includes school districts in that category.

ATTORNEY DAVID P. HANSEN: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: Why shouldn't we look to that?

ATTORNEY DAVID P. HANSEN: Well, if you do look to that, apply the principle of inclusio unius est exclusio alterius and you'll see that within the definition in the Labor Code, you'll see that school districts are not included. Only counties and municipalities are included within that definition.

JUSTICE NATHAN L. HECHT: Well, I would say political subdivisions, that's another category.

ATTORNEY DAVID P. HANSEN: But within the Labor Code, but that is a defined term in the Labor Code and the definition is limited to counties and municipalities, which are not school districts. They are very different things and normally, Your Honor, when political subdivisions are referred to, you'll see that they will be broken out. As a matter of fact, if you look into the Election Code, 1.005 of the Election Code where it describes what a political subdivision is, you'll see that they actually refer to school districts by name along with counties and municipalities. Even further, when you take a look at this statute and you see that they did actually at one point contemplate educational institutions, you'll see that they have narrowed that category to just institutions of higher education. And so when the Legislature had a chance to include school districts in a normal category of political subdivision, it did not. And the interesting part of this is that actually counties and municipalities are named specifically as employers, but the provision that you're talking about, Justice Hecht, with regard to political subdivisions, that relates to the ability to sue an elected official of a political subdivision and so in this case, you can sue elected officials of counties, elected officials of municipalities, but not boards of trustees.

JUSTICE NATHAN L. HECHT: One always hopes that the Legislature is trying to make sense. Why would they exclude school districts?

ATTORNEY DAVID P. HANSEN: There's excellent reason to exclude school districts, Your Honor, and it's because they're an incredibly large employer within the State of Texas. There's an incredible amount of liability that's bound up potentially with that and you can see that sort of process at work if you look at the Texas Tort Claims Act where you can see that not only when they were trying to determine whether or not, well who should be liable, they said, governmental entities and then they broke it down further and said, there's state entities and there are local government entities. And under those local government entities, they had schools and that would have been fine, but you can see then that later on in the statutes they then narrowed down the scope of liability for school districts, rather the scope of that waiver of governmental immunity for school districts just to use your operation of a motor vehicle. Though it's clear that when the Legislature makes a decision, it is contemplating all of these possible ramifications and not only for the finances of the school district, but also other implications, such as where this state has to spend probably hundreds of thousands if not millions of dollars assigning workers from the Texas Workforce Commission to investigate claims. So it's not just the liability side of the coin. It's the overall expenditure of funds that the state is allowed to consider. How much money does it wish to put in there or would it rather spend its money educating students and paying teachers to provide that education.

JUSTICE DEBRA H. LEHRMANN: Excuse me, let me just kind of switch gears a little bit. If we decide that Garcia hasn't established a prima facie case, then do we even need to get to any of the other issues except for attorney's fees?

ATTORNEY DAVID P. HANSEN: No, Your Honor, you do not and I think the interesting thing about that question is, that it's one of the questions that Justice Gray addressed in his dissent in Purdin v. Copperas Cove

Economic Development Corporation and that's one of the cases that was cited in Garcia 1 as supporting this waiver idea, but as Justice Gray said, in that case, when the analysis begins in the majority's opinion with it's undefined what the meaning of state instrumentality is and it's unclear as to what its meaning is and therefore, will apply this eight-part test to determine what the Legislature intended, then by its very nature it is not a clear and unambiguous waiver of sovereign immunity. It is not clear as admitted by the courts. The other courts who admit this was in Funderburk, which was the other case decided by this Court, which said that, the term, is undefined. Undefined means indefinite and indefinite means ambiguous. Thus by the very holdings of the courts that this Court relied on, the justices in the majorities in those cases acquiesced to the fact that it was not clear and unambiguous and that is the important standard. And in those cases, I bring those up because the school districts have been absolutely defined out of everything else. The only possible pool would perhaps be the state instrumentality. But as you pointed out, Justice Hecht, normally we're considered to be a political subdivision, that's the normal mode. We're considered to be a local government entity and that's how we've been treated in all of the other waivers of sovereign immunity. Look to the Texas Local Government Code where they recently waived the sovereign immunity of school districts for breach of contract claims.

CHIEF JUSTICE WALLACE B. JEFFERSON: I think we didn't already say in the first round that the waiver applies to school districts?

ATTORNEY DAVID P. HANSEN: Your Honor, I think it wasn't with that level of specificity and I think it was on the nature of an implied holding, which was similar and thus an implied finding of a waiver of sovereign immunity, which I think is similar to what happened in Kerrville v. Fernandez where there is a decision to imply the waiver though there wasn't a thorough analysis as this Court has done over and over again in these cases with the state hospitals and it's been very consistently applied and we're simply asking that the Court consider this and apply that same standard of analysis to this case.

JUSTICE DALE WAINWRIGHT: If your jurisdictional argument is correct, wouldn't that mean that the Legislature decided that an employee who is discriminated against, even if clearly so the school district would have no recourse for that discrimination in Texas state courts?

ATTORNEY DAVID P. HANSEN: Absolutely not because somebody can still file a Title 7 claim if they wish to do so. So there is that avenue and if they wish to have it heard in state court, they certainly, they can certainly do that because that would be the federal case and there's--

JUSTICE DALE WAINWRIGHT: If they could pursue the same claims under the mirror federal statute Title 7?

ATTORNEY DAVID P. HANSEN: Yes, Your Honor, potentially, and as a matter of fact, in many ways, the state and the federal have merged at least in the initial claims handling process. It would simply alleviate the state from having to fund the investigations for those claims. So it would be a significant, probably there's no evidence in the record of what the significance would be, but when you imagine that there is over 1,000 school districts in the State of Texas and there's a significant amount of resources that are applied by the state in order to fund the investigatory part of the TWC, that that burden would be alleviated quite a great deal, but as far as school districts being able to discriminate, absolutely not, and no more so than the, absolutely not, Your Honor.

JUSTICE DON R. WILLETT: What is your take on the proper sequencing of how we ought to tackle issues? Tackle waiver first before getting to whether the prima facie elements have been met or the opposite?

ATTORNEY DAVID P. HANSEN: Yes, I believe that the waiver would have to be addressed first because really that disposes of the rest of the issues if the Court determines that we are not clearly and unmistakably an employer under the act.

JUSTICE DEBRA H. LEHRMANN: But the reverse would also be true, right, if we decided the prima facie issue first?

ATTORNEY DAVID P. HANSEN: Well, if you decided the prima facie issue first and then proceeded to decide the jurisdictional issue--

JUSTICE DEBRA H. LEHRMANN: Or no didn't, because it takes care of.

ATTORNEY DAVID P. HANSEN: Right or if you didn't decide the jurisdictional issue, of course, one of the things that's happening or rather not the jurisdictional issue, they're all jurisdictional issues, but rather the issue with regard to whether or not a school district is an employer, if you don't address that, then by inference you're adopting the unclear and ambiguous standard that the lower courts have adopted in construing state instrumentality to mean at the school district. And I don't think that after the years and years that this Court has put into firmly establishing what that means and what the Legislature has done to ensure that that is the standard, I don't think that that would be the appropriate thing for the Court to do because it can have all sorts of other effects and certainly there wouldn't be any certainty as to who is a state instrumentality going forward.

JUSTICE NATHAN L. HECHT: You argue that if you replace the worker with an older worker, there can't be age discrimination. Why doesn't that rule find greater voice in the federal circuits?

ATTORNEY DAVID P. HANSEN: Well, it's interesting. They are split on that, Your Honor. There are some circuits that have stated that. I believe that there are folks as stated in the AARP brief that will say well you just can't account for the lowly nature of people and what kind of depths they'll sink to to harm one another. And I think that that fear of not wanting to leave something open to that has probably lead to that sort of decision. But I think that when you provide evidence that shows that the person that you hired was actually older than the person that you let go, assuming that lowly nature is not in the record, that you can't show that age, by itself that objective factor of age was the motivating factor. Maybe it was something else. Maybe it was something they didn't like about that person. But the Labor Code provision is written really as a protection of age and not just age. It's protection for people who are older from being replaced by people who are younger and that's really the main point of it. In this case, the questions on the issue of whether or not you could otherwise prove it are really not properly before the Court because they had a chance to otherwise prove it at the jurisdictional hearing and its probative evidence to the material issue of whether or not age, that characteristic was a motivating factor, which, of course, is the standard, as probative evidence. And so in response, they needed to come with probative evidence to the contrary that age was a motivating factor.

JUSTICE DALE WAINWRIGHT: Conceptually, what if the fired employee just looks a whole lot older than the one who's hired in replacement who may be actually a little older?

ATTORNEY DAVID P. HANSEN: Sort of the Anderson Cooper question isn't it? You have a 35-year-old person who's gone prematurely gray and you wonder did the Legislature really intend for somebody like Anderson Cooper to be able to file the suit even though they weren't 40? No, they didn't. It was the age characteristic that they were protecting. And so until they reach that age, then the issue of motivating factor never really becomes an issue. I understand how that can be a concern, but it is an appearance-based distinction and not strictly speaking an age-based distinction because there's no perfect correlation between those two. And as we look through the Labor Code cases, there really aren't any of these sort of proxy cases that exist in the Texas Labor Code. Nothing has really boiled up as we're taking this facially neutral characteristic and using it as a proxy for age and of course, typically those only arise in those, in the disparate impact type of cases.

JUSTICE DEBRA H. LEHRMANN: Excuse me, let me ask another question. Let's say if we were to determine that Section 21.254 is jurisdictional, then what is your position with regard to the issue of Garcia's diligence in obtaining service under these facts?

ATTORNEY DAVID P. HANSEN: I think that if it's jurisdictional, then diligence is not an issue. It has to be strictly construed in that 60 days it ends and that they no longer have the power, the authority or the discretion

to file that suit after that. And of course, if we're talking about strictly construing those timelines, then what we're absolutely talking about here is that's it. If they [inadible] --

JUSTICE DEBRA H. LEHRMANN: But what about her diligence?

ATTORNEY DAVID P. HANSEN: Diligence is a construct that was created to sort of equitably toll that. And of course, we have a legislative enactment that says, you have to strictly construe those and they're jurisdictional, all those prerequisites to suit and an idea that, a judicially created idea of equitable tolling. Well, of course, the statute is going to control the equitable tolling part and to the extent that 254 has ever been construed in the past as simply being equitable or permissive with the enactment of the addition to 311.034 under the rules of statutory construction, 311.034 prevails because it was the later enacted statute. And as a matter of fact, I would say that the may language is what most people key off of and they say well may is a permissive sort of word. Well, may just goes to whether they can file the suit or not. May actually has--

JUSTICE DALE WAINWRIGHT: What about bring? What does it mean to bring a civil action?

ATTORNEY DAVID P. HANSEN: To bring means to file and to serve the suit. Otherwise they would have said file.

JUSTICE DALE WAINWRIGHT: Bring means to file and serve--

ATTORNEY DAVID P. HANSEN: And serve the suit.

JUSTICE DALE WAINWRIGHT: And where do you get that?

ATTORNEY DAVID P. HANSEN: That's from the several cases, the Education Service Center that I've cited in my brief, but it does mean to file and serve and that's how it's been treated throughout.

JUSTICE DALE WAINWRIGHT: You haven't addressed that language though. Bring means to file and serve.

ATTORNEY DAVID P. HANSEN: To file and serve.

JUSTICE DALE WAINWRIGHT: Strictly construing certainly something that we're required to do and do on occasion, we're bound, however, to strictly construe the words that are provided and we can't make it stricter than it appears to be, you agree with that.

ATTORNEY DAVID P. HANSEN: I agree with that Your Honor, of course.

JUSTICE DALE WAINWRIGHT: Then the question is, what does bring mean, I suppose?

ATTORNEY DAVID P. HANSEN: Bring has been treated as filing or to file and to serve and that has existed for, since the 90's. And so this statute has existed in this way for that amount of time. There hasn't been any changes or attempts to modify to simply say filing, but it has been treated in some cases sometimes mandatory, but not jurisdictional.

JUSTICE DEBRA H. LEHRMANN: The U.S. Supreme Court in the Irwin case though held that it should strictly construe a statute, but still found this equitable tolling exception. Why isn't that instructive here in this context? That was in a Title 7 case.

ATTORNEY DAVID P. HANSEN: It was in a Title 7 case, but I think what we have to do is apply what the Texas Legislature said, and particularly in light of or considering that it seemed to be an answer to the Loutzenhiser case in which the Court had determined that the notice provision was mandatory, but not jurisdictional and

I think that that response from the Legislature is probably more instructive than Irwin on how the Texas Legislature would like to treat the waivers of sovereign immunity it has enacted. I've run out of time. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court is ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Ms. Robinson will present argument for the Respondent.

ORAL ARGUMENT OF SAVANNAH ROBINSON ON BEHALF OF THE RESPONDENT

ATTORNEY SAVANNAH ROBINSON: May it please the Court and Mr. Hansen, Mr. Hansen speaks from the heart. His heart is in trying to exempt the school districts from the application of the Texas Commission on Human Rights Act. And he's absolutely correct that we construe waivers of sovereign immunity strictly, but the Legislature is not required to indulge in an endless listing of synonyms. There is no reason to find that governmental entities that political subdivisions are anything other than the school. There's no reason to find that the school is not an employer. In fact, the argument is that because it's an employer, great savings could be had although great injustice may be inflicted by refusing to apply the equal rights statutes the Texas Commission on Human Rights Act that protects race, national origin and age. Discrimination is the use of an irrelevant characteristic to make employment decisions. We have determined in this country that age, gender, race are irrelevant characteristics. What matters is the qualifications of the employees and in fact, studies done in the 1960's when Lyndon Baines Johnson was pushing these statutes through tended to show the discrimination costs business. It costs the school districts an equal amount to be subject to discrimination. This case comes out of the valley. Some of you may be familiar with the valley. In the valley, they play school district politics like it's a full-contact sport.

JUSTICE EVA M. GUZMAN: Is that just limited to the valley?

ATTORNEY SAVANNAH ROBINSON: It's the only one I have experience with. But there are many, many examples where, for example, in Donna Edcouch, there was a school board election Saturday night and on Sunday morning, all the locks had been changed and 24 people lost their job.

JUSTICE DAVID M. MEDINA: Let's talk about this case. Your client was replaced by somebody of similar age and the argument is that defeats your claim.

ATTORNEY SAVANNAH ROBINSON: Two reasons that it should not defeat, well three reasons it should not defeat the claim. First is the accepted standard is for the fourth test replaced by someone younger or otherwise discriminated against. Why otherwise discriminated against in a replacement case? One, we don't know whether the person who fired Gloria Garcia was the same person who hired Ms. Longoria. You may have, we know who fired Gloria Garcia. It was the principal and he could have a discriminatory animus and somebody over in HR, in the human resources department, hires Mrs. Longoria and does not have that same animus. Second reason, I absolutely agree with Judge Hecht that just because one person is not discriminated against doesn't mean a different person was not discriminated against. Analogy, you have a young man who comes back from war. He doesn't like Oriental's, maybe he's been to Vietnam. There are two truck drivers in his shipping department, one's name Nguyen spelling with an N, another one's name is Smith, but clearly Oriental. He fires Nguyen based on the paperwork based on the last name. He retains Smith. Smith is also Oriental. Is it any different than can you say that Nguyen was not discriminated against because Smith was retained? No, of course not. You can have discrimination against one person and bypass the next.

JUSTICE NATHAN L. HECHT: But this is a rehire. This is hiring somebody else.

ATTORNEY SAVANNAH ROBINSON: Yes, sir.

JUSTICE NATHAN L. HECHT: So how can you say that the school district, which may have had different actors at different times, I can see that, was discriminatory with respect to age if it hired an older employee. It seems like that's impossible.

ATTORNEY SAVANNAH ROBINSON: Because the same thing that happens with a corporation happens in a school district. You have a principal who may have a discriminatory animus and you may have a different person entirely who does not. And the fact that there were two different people treated differently, although they were both of a similar age, doesn't mean the first person was not discriminated against.

JUSTICE DALE WAINWRIGHT: But doesn't that mean your age case is tenuous? If they're discriminating against two people, but they fire one of a certain age and then hire a replacement that's three years older, that really makes an age case hard to prove. Maybe you're arguing some other type of discrimination, but they hired someone older.

ATTORNEY SAVANNAH ROBINSON: You make an excellent point, Justice Wainwright, and the reason that that is so important is that we're here on the plea to the jurisdiction stage. After ten years of litigation, this happened in 2003, we have still not completed discovery. We still don't have the full facts and the standard of proof, the burden of proof is different here than it would be in a summary judgment.

JUSTICE EVA M. GUZMAN: Should we look to the fact that there's a replacement case and a reduction in force case and how does that impact our analysis although I realize the line is not as bright as has been suggested?

ATTORNEY SAVANNAH ROBINSON: I disagree with that proposition. Although the seductive part about it is that, of course, when you have a reduction in force, you don't have a replacement and that's seductive, that makes common sense, but it still doesn't go, and it still doesn't make sense to me that if you don't discriminate against one person, you haven't discriminated against a different person. It may be that one person looks older. The Anderson Cooper argument, it may be that one person's skin is whiter. But the fact that one person is not discriminated against even if that person is a replacement does not necessarily entail that the person who was discriminated against is as an out of law not discriminated against.

JUSTICE EVA M. GUZMAN: So at this plea to the jurisdiction stage, we are not yet looking to this nondiscriminatory reason, which would be proffered by the employer and you may end up at some point still losing because since she was replaced with an older worker, I mean they could articulate a valid nondiscriminatory reason.

ATTORNEY SAVANNAH ROBINSON: Right, Justice Guzman, we are here at the stage of determining of whether the Court has jurisdiction to hear those summary judgments later.

JUSTICE EVA M. GUZMAN: Because the common sense approach is look, you failed the stated claim because under any circumstances you're not going to be able to prove age discrimination because she was replaced with someone older. Why can't we, I know what stage this is why can't we look to?

ATTORNEY SAVANNAH ROBINSON: I think everyone agrees that if we stated a prima facie case, the Court has jurisdiction. And the fourth prong says, replaced by someone younger or otherwise discriminated against. We don't have the facts that say that she was not otherwise discriminated against. Our pleadings set up the Court's jurisdiction. It then becomes incumbent on the school district to negate that. They contend that they have negated that fourth prong by half of the standard.

JUSTICE DALE WAINWRIGHT: Well, even the federal courts are not consistent in whether you can rely on that fourth prong in this type of case. The authority is not consistent on that point and some say you can't rely on that fourth prong in this type case.

ATTORNEY SAVANNAH ROBINSON: That's correct and I think the AARP brief has done an excellent job of laying all that out. The majority of the federal courts, the United States Supreme Court and prior decisions of this Court would tend to hold that the otherwise discriminated against provision applies even to replacement cases.

JUSTICE DALE WAINWRIGHT: Let's go back to the pleading point that you were making just a minute ago with Justice Guzman. With regards to an age case, age discrimination case, why doesn't O'Connor v. Consolidated Coin US Supreme Court Case in 1996 resolve that? It said, the "inference of a legal discrimination cannot be drawn from the replacement of one worker with another worker insignificantly younger" and this case it's probably clearer because the replacement was not just insignificantly younger, but was three years older. US Supreme Court said, you cannot draw an age discrimination inference in those types of cases.

ATTORNEY SAVANNAH ROBINSON: The United States Supreme Court in the O'Connor case was looking at the first half of the fourth standard, the fourth element. I don't think the O'Connor case can correctly be cited to say that the second half doesn't exist. In fact, subsequent cases have held that it's a very flexible standard. And I confess that I am not as familiar with United States Supreme Court law as I ought to be, but the AARP brief does a very excellent job of laying all that out.

JUSTICE EVA M. GUZMAN: This context or otherwise discriminated against, what would we be looking at here with this worker and her replacement?

ATTORNEY SAVANNAH ROBINSON: Who did the hiring and who did the firing. If it was the same person, then perhaps we would lose a summary judgment. If it is actually an acknowledgment of guilt, if it is actually that the HR department goes in and says, Mr. Principal, you really can't do this this way. You know, we've got to make up for this. If it's an acknowledgment of guilt by somebody else in the school district with the authority to bind the school district, then you've got age discrimination as to my lady.

JUSTICE EVA M. GUZMAN: So if the same person did the hiring and the firing, I guess you'd have to inquire as to whether initially they fired her because she was older and then, as you say, someone stepped in and--

JUSTICE DALE WAINWRIGHT: We can make the same argument--

JUSTICE EVA M. GUZMAN: Had them take a different course with that action?

ATTORNEY SAVANNAH ROBINSON: Yea.

JUSTICE EVA M. GUZMAN: Okay.

ATTORNEY SAVANNAH ROBINSON: It has to do with the animus of the actor. It has to do with the animus of the entity.

JUSTICE NATHAN L. HECHT: So how will you ever not prove a prima facie case? Because it seems to me that could always be true that the individual actor had a discriminatory animus even if the company always hired women or always hired older people or always hired a minority, it would seem like you could always say yes, but this particular person on this particular day held an animus.

ATTORNEY SAVANNAH ROBINSON: And if that's true, all we've done is given the Court the authority and jurisdiction to determine those motions for summary judgment.

JUSTICE NATHAN L. HECHT: Which means--

ATTORNEY SAVANNAH ROBINSON: And if we lose, we lose, but it's a very small step. It's not that expensive. It doesn't take ten years to go to the Supreme Court twice.

JUSTICE NATHAN L. HECHT: But all I'm saying is you're really arguing against having to make a prima facie case.

ATTORNEY SAVANNAH ROBINSON: No, not really. What I'm saying is that absent some compelling proof that the court has jurisdiction to hear the case and determine the merits and as Justice Wainwright says, it may be a very weak case, but being a weak plaintiff doesn't deprive the Court of jurisdiction.

JUSTICE DAVID M. MEDINA: What impact, if any, does the passing of your client have on us to reach a decision?

ATTORNEY SAVANNAH ROBINSON: For this Court, it makes no decision. For me, of course, it makes a very big decision. The passing of my client shows the futility of the interlocutory appeal in this case. And I don't know that this Court even has the authority to consider such things, but we've got to do something to make people bring their interlocutory appeals earlier in the case. Because otherwise people die, witnesses disperse and nobody cares except the lawyers. Gloria never saw her name brought up to the standard she felt she deserved. She died still unemployed, still being called, a thief, I mean it was a truly tragic situation. I just hope that her name does not go down in the annals of this Court as making bad law. It's really important not only to the AARP, but to anyone who's got a little white in their hair that the Court acknowledge that there is a flexible burden of proof that you can show in more ways than one that you have been discriminated against.

JUSTICE DALE WAINWRIGHT: Would you take what's been called, the Anderson Cooper analogy and apply it to race and sex as well? The replacement here, as you know, was of the same race, Hispanic, and the same sex, a woman. Take the same arguments you've made about age and you apply them in race and sex context as well, race and gender.

ATTORNEY SAVANNAH ROBINSON: I believe the United States Supreme Court has already done it with race and I would certainly do it with gender and other things. There is such a variation, not in the evil nature of humans, but in the good nature of humans. An engineer doesn't think that women engineer's can do math so he fires one lady, but the other lady who comes to him after work and says, please help me with my calculations, he keeps. Has he not discriminated against the first? His animus, his belief is that women can't do math and that's clearly wrong. It's clearly an irrelevant characteristic. So yes, I think that the United States Supreme Court has already headed that way and it should go across the board. There should be a flexible ability to show true facts and if they are discriminatory, they are. If they're not, then we lose on summary judgment, but not on a plea to the jurisdiction.

JUSTICE DON R. WILLETT: Mrs. Robinson, can you jump back to waiver?

ATTORNEY SAVANNAH ROBINSON: Yes, sir.

JUSTICE DON R. WILLETT: And we've talked about, of course the waiver has to be clear and unambiguous and Mr. Hansen talks about the Labor Code definition of political subdivision, which goes through a laundry list, but it leaves out school districts and I understand your point about that will be a grave injustice, but can you give me a more kind of text-based discussion?

ATTORNEY SAVANNAH ROBINSON: A text-based discussion. Um, not really. But what I can tell you is that I believe the Legislature doesn't do stupid things all the time and having an endless list of synonymous, how many synonymous do you want to have for governmental entities. Do we want to talk about administrative courts, tribunals, JP's, I mean where do you draw the line at ending the list of synonymous? I think school districts are in some of the other terms that are accepted.

JUSTICE DON R. WILLETT: Right, well if they include school districts, for example, and the Tort Claims Act, but they omit them in the Labor Code, do we draw nothing, do we draw nothing significant from that disparate treatment, I guess?

ATTORNEY SAVANNAH ROBINSON: I would not and partially because my interest is that way, but also partially just as common sense. If you have two different bodies, you know, 158 different men and women voting, you can't have that kind of unanimity. If it was a single person, yes. If it was a single body like the Texas Supreme Court that has a history of reviewing its work--

JUSTICE DON R. WILLETT: Because we have to assume that they didn't do something absurd, but we also have to assume that they intended what they enacted.

ATTORNEY SAVANNAH ROBINSON: Yes.

JUSTICE DON R. WILLETT: How do we sort of balance those two presumptions? We presume they didn't do a foolish thing, but we presume that they did what they intended to do.

ATTORNEY SAVANNAH ROBINSON: And the law has been fairly clear on this. I mean this one case in 2008, you guys said that the immunity had been waived. The Legislature has met once, twice since then and it hasn't changed it? So I don't think you can draw a conclusion that your earlier decision was erroneous because if the Legislature is that well thought out, they would have corrected an error. If there are no further questions, thank you for your time.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Ms. Robinson. Court will hear rebuttal.

REBUTTAL ARGUMENT OF DAVID P. HANSEN ON BEHALF OF PETITIONER

ATTORNEY DAVID P. HANSEN: I hope that the Court remembers when it goes to write this decision that there is a record in this case and in this case, nobody was prohibited from providing other evidence of discrimination. Remember, this is not just a pleading on the pleadings, but it is also a Miranda-style plea to the jurisdiction where we offered evidence to rebut one of the elements of their case. So it isn't simply a case of did she plead all of her claims.

CHIEF JUSTICE WALLACE B. JEFFERSON: Can you take up her hypothetical. I'm the employer and I don't like old people and so I fire you and then somebody else hires a person who is older, doesn't have the same sort of animus. Either that or I fire you because you're older. I don't like older people, but my general counsel then says that, was a terrible error and we can immunize ourselves if we hire somebody older. What about those two scenarios?

ATTORNEY DAVID P. HANSEN: I'm not saying that that couldn't possibly occur at some point in time. I'm just saying that that's not in this record. That's not in these pleadings and there was no evidence whatsoever that was proffered to rebut our presumption or rebut the evidence that we provided on the material fact of motivating factor.

JUSTICE EVA M. GUZMAN: But they pled generally or otherwise discriminated against. On that pleading, potentially they could go get discovery to establish this scenario that she has said. So they theoretically have not pled themselves out of court if they could still go get discovery and that discovery reveals that someone was motivated by discriminatory factor.

ATTORNEY DAVID P. HANSEN: If you find that they've not pled themselves out of court, then we're left with the question of since we provided evidence that we did not discriminate against her on the basis of her age,

it's her burden to respond to that with evidence, with summary judgment evidence and that's what the Court held in Miranda and there was no evidence whatsoever not anything of the nature that was provided in this case and so simply as an evidentiary matter, if you agree that the pleading does pass muster, you can't agree that where we provided evidence that we did not discriminate and she does not now have to go back and provide evidence in response, which was the Miranda style.

JUSTICE DALE WAINWRIGHT: Assume with Chief Justice Jefferson's hypothetical's there is some evidence. How does the law speak to those situations?

ATTORNEY DAVID P. HANSEN: If there's some evidence, based upon the Fifth Circuit case law that we've relied upon, that's not the proper inquiry in the case. It simply, because it's not, it's a replacement case and not a risk case and so and it's not a hostile environment case either for that matter. So based upon the Albemarle case and the Cory v. Brady, those cases would preclude that, but as--

JUSTICE DALE WAINWRIGHT: Why? Does that mean you ignore the motivation of one supervisor, but adopt the motivation of the other and how do you decide which one?

ATTORNEY DAVID P. HANSEN: If that case ever becomes before the Court--

JUSTICE DALE WAINWRIGHT: Or do you have just an entity motivation that you determine?

ATTORNEY DAVID P. HANSEN: If that case ever come before the Court, which it's not presently before the Court, then perhaps it may be proper to determine that at that time. But in this case, there is no such allegation.

JUSTICE DALE WAINWRIGHT: You don't have an opinion about how the law should treat that situation if there's evidence of it of those two situations.

ATTORNEY DAVID P. HANSEN: I don't have an opinion about how that, how that particular type of situation should be treated. I see that I've exceeded my time and thank you very much.

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

MARSHAL: All rise.

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