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Supreme Court of Texas.

Ed Vanegas, Jimmy D. Halman, Sam Armstrong, Alex Carbajal Roger
Farrington,

Curtis Huff and Tito Betancur, Petitioner,

v.

American Energy Services, Niewoehner Partnership, LP, RCH/HSJ/CCM/MCPI,
LP,

Autry Stephens, John Carnett, Brack Blackwood and Dennie Martin,
Respondent.

No. 07-0520.

October 15, 2008.

Appearances:

Allen R. Stroder, Odessa, TX, for petitioners.

Harper Estes, Lynch, Chappell & Alsup, A Professional Corporation,
Midland, Texas, for respondent.

Before:

Wallace B. Jefferson, Chief Justice; Don R. Willett, Harriet
O'Neill, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson,
and Scott A. Brister, Justices

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CHIEF JUSTICE JEFFERSON: Be seated please. The court is now ready
hear argument in 070520. Ed Vanegas and others versus American Energy
Services and others.

COURT ATTENDANT: May it please the Court. Mr. Stroder will present
argument for the petitioners. Petitioners have reserved 5 minutes for
rebuttal.

ORAL ARGUMENT OF ALLEN R. STRODER ON BEHALF OF THE PETITIONER

MR. STRODER: Good morning. I have the honor of course representing
a group of employee's trying to recover an incentive bonus. I believe
the issue basically here is whether or not the promise to pay that
bonus to at will employees is unenforceable because on the grounds that
that promise is in a sense illusory. I of course of the opinion that it
is not. The Apelles of course at trial, through the court of appeals
and here have seized on certain language in Light versus Centel(883
S.W.2d 642). They've adopted certain passages that they believe
support their intention that the promise to pay this incentive bonus

because the employer could terminate these employees at any time. Their em-- that promise was illusory and thus unenforceable and of course we are of the opinion that it's illusory only in the sense like an any-kind of a unilateral contract is that the promise is revoke-- revocable prior to acceptance by performance on the of the part of the employees. Now, our idea of what-- my idea of what the protections of-- on the concept of illusory promises is that you don't want to bind somebody to perform their promise when all they get in exchange is something that is just worthless. That's not the situation here. AES got the consideration. They got the accept-- the bargain for performance by the employees and now they're trying to tell us, 'Well, since our promise-- we believe our promise is illusory and thus worthless.' We don't have to perform.

JUSTICE: What if they fire the employees the day before the sale?

MR. STRODER: Fortunately, that's not my-- the issue here. That would be a-- certainly, would be-- and we thought about that. That would certainly be a situation where, I believe at that time you would have to look into the intent. I can't believe that the courts would allow that to happen when they just fire them without any reason just to fru, frustrate their, their entitlement to the bonus they were promised.

JUSTICE GREEN: Equitable theory. But I mean, would that render the, the agreement illusory though? Because they had the right to do that?

MR. STRODER: No because I-- if I were in that situation, fortunately I'm not here, it would not render it illusory because these people have tendered substantial performance. In fact, depending upon how close it got to the date of the sale or, or the merger. It would be complete performance but I, I would believe that some of the cases talked about in Miller versus Riata (517 S.W.2d 773) that, that at that point in time they substantially complied with their-- the terms of the offer and, and perform. So no it would be illusory because they have performed. The question might be more difficult if you got, you know, half way through the term 6 months before then it would be a really-- I wouldn't want to be in that situation be very tough to perform I mean to prove our case but ...

JUSTICE BRISTER: Have a sliding scale illusory argument?

MR. STRODER: No, I believe there would have to be some sort of determination whether or not they have substantially performed and then, I guess,-- and I realize, of course, there is no implied duty of good faith and fair dealing in the employment relationship but if you had somebody that actually fired just to avoid the-- fired an employee just to avoid the promise after the employee had performed I think you would have some good faith issues that have to be addressed by the court.

JUSTICE WAINWRIGHT: What if they fired them for good reasons the day before the performance was completed?

MR. STRODER: You would have a different situation, I believe. It would be an-- even tougher case. They would have-- it would have nothing to do with illusory I don't believe. I believe that it has to do with whether or not the, the, the employee had substantially performed his obligations. I don't think it would affect the illusory, the illusory nature of the promises one way or the other. It would go to whether or not the employee had performed.

CHIEF JUSTICE JEFFERSON: If an employer promises to pay at-will employees a pension. Can they, because they are at-will employees of, of-- renege on that, on that promise?

MR. STRODER: Well, yes other than there's such thing is Erisa, of course. They wouldn't let them to do that, but under the reasoning under the Vanegas Court(224 S.W.3d 544), I would say certainly they could. Just another form of compensation, deferred compensation but like we'd talked about, I believe Erisa would, would take sides with that, well, I don't believe we'll be faced with that problem. Although-- potentially there might be some sort of plan that would not be covered.

CHIEF JUSTICE JEFFERSON: Well, vacation pay or, you know, some other form of, of promises. Some other benefit.

MR. STRODER: Absolutely.

CHIEF JUSTICE JEFFERSON: that would cover all, all of those [inaudible]?

MR. STRODER: Absolutely. Anything the employee would get in, in, in return for his, the work he provided the employer, his compensation, bonuses, vacation pay. I wanted to point out that the Vanegas case has been looked at by a couple of sources. I think the court in supplements since our-- we wrote our brief as, has-- has been critical of Vanegas reasoning. It's a court room supplement in Section 1.17. It also posits the situation because, I believe, I pointed out in my brief if you hire somebody for a particular wage, \$15 an hour pick a number and if Vanegas court is correct, that, that promise is illusory and they don't have to pay him that wage. Despite the fact that this employee labored for a month at that wage it would be unenforceable and then what would you do? Are you going to back in and relieve and litigate what the reasonable value of those services or some sort of quantum merit theory every time? Well, Corbin points that out-- and it does lead to a very untenable result because if the promise is illusory because the employer could fire him or what under Vanegas what would keep-- what would make the employer pay the agreed upon wage. Even after the employee has accepted that wage by laboring under that arrangement. Both of them laboring under that arrangement. There's a, also recently, there is a federal case, Southern District of Texas. Talent Tree versus Madlock at (2008 WL 4104163) who was, that court was presented. Had some pretrial rulings but was presented with a similar situation as we had in Vanegas and that court addressed it and, and basically applied the-- it's best guess at what the Texas law under Miller versus Riata it said of course the bonuses payable and they rejected Vanegas. It's reasoning, and tells us that well, they pointed the same problems I would see. Well, what would keep an employer just renegeing on this promise to pay a particular rate under the-- if it just wanted to even though the employer accepted it. Anyway the court in Talent Tree was skeptical and did not follow Vanegas in that particular situation. Although it was waiting on a-- it didn't note that this case was on appeal and, and in an absence of a ruling by this court it applied previous Supreme Court Law.

JUSTICE BRISTER: How much, how much are we talking about in this case. What was the-- was it the merger with AES acquisition was that a sale, how much was it for, what would 5 percent be, how many employees are there?

MR. STRODER: Well, we've got and there were a few more employees along the line that actually quit, or I think one might have been even terminated, but we have, I guess, these that we have before us left and the amount of money that I calculate on the five percent, I guess, the time was like 1.4 million. There-- would be their share of the, the sale or merger. That's the five percent. So we are talking about which in my mind is a substantial amount of money.

JUSTICE BRISTER: Now the one's that quit before them, they wouldn't have fulfilled the condition to get paid, right?

MR. STRODER: Right.

JUSTICE BRISTER: So we're just talking about recovery for the ones that stayed through the acquisition.

MR. STRODER: Right.

JUSTICE JOHNSON: If there were one left and he would then get five percent?

MR. STRODER: Yes. That was, that was the deal.

JUSTICE BRISTER: That's the problem with oral promises. It sounds kind of outrageous, I mean, if your talking, I mean how many employees was it at the first that this-- was allegedly made to?

MR. STRODER: It, it-- these are the core people. It was basically. There is-- there might have been like I say 2 or 3 more but not, not, not many more.

JUSTICE BRISTER: Which is how many?

MR. STRODER: I think we got ...

JUSTICE BRISTER: 20, 200.

JUSTICE: Seven.

MR. STRODER: No, no. I'm talking about eight or ten.

JUSTICE BRISTER: So you tell eight or ten people, I'll pay you five percent and then if only one of them is left-- that is your position, they get the five percent?

MR. STRODER: Absolutely. That was the employer's position. They made the promise and it's my position at this point. Yes, Sir. In short, I, I, I just don't see how the ...

JUSTICE BRISTER: But that ...

MR. STRODER: Go ahead.

JUSTICE BRISTER: You see that doesn't look like, assuming that promise was made. That doesn't look like the promisor got what they bargained for, which was for you all to stay and you all if that all but one left.

MR. STRODER: And that-- well, of course the employer did get what is promised for, the vast majority did stay. That was the purpose of offering this to get the vast majority of them to stay and of course they did. That was the very purpose of it. Again, if the mere fact that a promise and, and looking to a unilateral contract if the mere fact that, that the promisor can revoke that promise makes it an illusory contract then there is not going to be such a thing as a unilateral contract anymore. Just won't be because all offers that include promises that are looking for acceptance by performance are revocable until they get actual performance so if the Vanegas Court is right and all these years of us talking about unilateral contracts is just out the window.

JUSTICE HECHT: If you prevail I suppose the case has to go back in the court of appeals to, to consider the Statute of Frauds argument?

MR. STRODER: They would, I, I believe, the Apelles would abandon that, that Statute of Frauds argument. They did-- and I, and I haven't talked about it, they did on appeal raise for the first time the fact there was no new consideration but that wasn't in the motion for summary judgment and there are precluded from, you know, raising it to the court of appeals or anywhere else because they just didn't raise it a motion for summary judgment where it has to be raised. And of course conditionally on-- that assumption, I did argue that traditionally, you know these incentive bonuses for people to stay or work better-- whatever. Has been considered consideration, has been upheld for years and years and years. Fact if Vanegas Court's ruling is upheld it's

going to change an awful lot of years and years and years and bonus, bonuses etc. There's going to be a lot of people that it will-- and we'll see a lot of this, these employers reneging on their promises to pay whatever. Bonuses, vacation pay, any other kind of perks. That's all I have right now.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The Court is ready now to hear argument from the respondents.

COURT ATTENDANT: May it please the Court. Mr. Estes will present argument for the respondents.

ORAL ARGUMENT OF HARPER ESTES ON BEHALF OF THE RESPONDENT

MR. ESTES: If it pleases the Court. There are two issues that play here of great importance. One is the contract formation issue. That is will an illusory promise form the basis for an enforceable unilateral contract. But the other issue that was disregarded in Talent Tree that Corbin didn't address and that the petitioner here does not addresses the employment at will doctrine. That is the principle difference between what one case is called this bold assertion that you can never have unilateral contracts if this is right, that's the principle difference. If I-- if A hire B to work for \$10 an hour, A is still free to fire B and B is still free to quit. But if he's worked an hour he gets \$10. The difference in this contract of course is, if you stay until some merger in the future and the record is very clear, no merger was contemplated at the time. If you stay until then, then I will pay you this and as the questions and the answers have clearly pointed out. It does great damage to an important policy issue in this state which is employment at will. That is you would not necessarily be free to fire B, and B would not be necessarily be free to quit and the court has correctly in it's questions, honed in on what the problem is, with oral promises of this nature. That in fact are the-- based on an illusory concept or an illusory promise. This is in fact a contract formation case. It involves a central question of whether or not in a continuing employment context which is what this is an illusory offer can constitute adequate consideration for unilateral contract.

JUSTICE BRISTER: There's no question the employer can say, 'I know you've been working but here's a new condition and if you keep working you accept, and that's an.'

MR. ESTES: Absolutely. That's, that's the Halliburton(80 S.W.3d 566) case and, and others because they are free to quit or you're free to fire them if they don't accept-- it does not damage.

JUSTICE BRISTER: Well, they, they accepted by the, they accept

MR. ESTES: They accept by showing up the next day and it does no damage to employment at will because they still have free will whereas the contracts such as we have here.

JUSTICE BRISTER: What would enforcing the five percent, how would that damage the employment that will?

MR. ESTES: Well, the, the question becomes is if you're look at enforcing, at the end of the day the question becomes-- can you have a contract to begin with and an employment at will contract where the promise impacts, whether or not that they remain an employee at will, are you free to fire them and, and for example, I think it was clearly pointed out in the opening argument that you might not be free to fire them the day before, whether for a good cause or no cause.

CHIEF JUSTICE JEFFERSON: If we were to say if they-- if we're to hold that, yes, you are free to fire.

MR. ESTES: Right.

CHIEF JUSTICE JEFFERSON: - but the emplo, but the employees is not fired, they remain in-- they remain based on the inducement or the incentive of this five percent. Again, how does-- how would that harm the at will doctrine?

MR. ESTES: Well, I, I think it does it just in general in that it's a contract that cuts against that public policy of employment at will.

CHIEF JUSTICE JEFFERSON: so you are saying, free to fire and free to quit, that would still remain. The employer could fire before the merger, the employee could quit. I'm saying-- I am saying, assuming that, that we [inaudible] ...

MR. ESTES: Actually there are a lot of cases out there were, were act-- there are cases that involve new consideration but there are a lot of substantial performance cases out there, some from this Court which really does not leave you free to fire. In those cases, I think, they were free to fire but had they reached certain commission levels you would owe them that had they substantially performed. Here, there's not really a, a ...

CHIEF JUSTICE JEFFERSON: But if we accept your principle and, and if the principle is free to fire and, and free to quit that, that, that those freedoms remain. Could we-- and, and again, assuming that, that we think the fire, you know, we hold the firing would be okay-- then I don't understand how enforcing that five percent promise which that we have to assume was made in, anyway undermines the at-will principles.

MR. ESTES: You do have to assume that in the summary judgment case, obviously, we deny that. But that then-- takes us back to the second issue because it's not just employment at will. It's, it's consideration and I beg to differ consideration was raised in the summary judgment motion. It was raised and briefed in a court of appeals by both parties but the truth of the matter is this illusory promise issue that was raised in Light, in certain discussions, and then mentioned again in Sheshunoff(209 S.W.3d 644). Is in fact a consideration issue. So you go back to the second important concept and that is-- did they even have a contract. If ...

JUSTICE HECHT: Well the problem in Light was that the fellow who gave the illusory promise was trying to hold the fellow who didn't to his promise.

MR. ESTES: Right.

JUSTICE HECHT: And this is the opposite.

MR. ESTES: Right. It, it, it is and, and that there's no question that it makes it, it has certain facial appeal at the end of the day but it doesn't undo the principle that's involved and, and I agree that Light was not this case, but the discussion in Light was an intentional discussion, it was a lengthy discussion and then it was raised again by this Court in Sheshunoff and if the principle is that that employers are free to contract with employees, they are free to contract with one another so long as it doesn't do damage to the employment at-will then they can have a contract and it went on to discuss the issue of unilateral contracts and the court was fairly clear and saying, 'Here's what would be required for such unilateral contract and that is a non-illusory promise that can be accepted by performance.' We have here the classic example of an illusory promise as, as footnote five in Light talked about promise of a future raise. That's an essence what we're talking about here. Here we have a case. This is not the case of first

employment, this is not a case of new consideration which you would see or a case of a standards. For example, in earning commissions in substantial performance. These employees were obligated to remain at work if they wanted to be paid. There was no new consideration given, there was no new duties undertaken, nobody got a cut in pay. There were, and the court of appeals expressly found based upon the record that nothing had changed from the date of the alleged promise through then.

JUSTICE JOHNSON: Couldn't an employer just simply to come in and say, 'You know, oil has gone up to \$150 a barrel guys, were going to raise your pay.

MR. ESTES: Sure.

JUSTICE JOHNSON: - just, just because I want to do that."

MR. ESTES: Absolutely.

JUSTICE JOHNSON: That doesn't bind anybody. You still had an employment at-will.

MR. ESTES: I, I think it binds the employer to pay it. It gives them the right to, to ...

JUSTICE JOHNSON: Yeah, yeah but it doesn't impair the employment at-will relationship does it, it just says, if you stay you get more money.

MR. ESTES: No but, no because it's not expressly dependent upon continuing employment. In other words, B could quit right then, A could fire them right then but this agreement -- as it's alleged in this case -- is expressly dependent upon continued employment.

JUSTICE BRISTER: I'm just concerned. These are very-- these are exceedingly common incentive promises. I mean, you know, every government in the world, if you win a gold medal at the Olympics you get 20,000 bucks and you-- you're saying those are all invalid.

MR. ESTES: No.

JUSTICE BRISTER: How about, how about judges. If you work for 20 years, you'll get a pension -

MR. ESTES: I, I want to make ...

JUSTICE BRISTER: - and you've saying no-- no you worked for 20 years but we're not giving you a pension.

MR. ESTES: Here, here is ...

JUSTICE BRISTER: - I'd be shocked if that's the rule.

MR. ESTES: Here, here is the distinction. If you win a gold medal, you get \$20,000. That's changed. You're not-- you're still running the race. If they said you're running the race you get \$20,000. That would be different because they are already obligated to run the race. Judges pensions, for example, would be very different because there is performance in place which says if you stay five years it's this amount, if you stay ten years it's this amount, if you stay 20 years it's this amount. All of those agreements ...

JUSTICE BRISTER: Don't get it unless you go all the way through and this promise to sit if you stay till the merger and they say they did. So there's nothing ...

MR. ESTES: And, and they, and there was no new consideration for the promise. That's really the-- that-- and that is always been the law.

JUSTICE BRISTER: A lot of people start running and shoot archery without thinking, without a promise for 20,000 but that doesn't make-- and they do it even if nobody paid them but, I mean, these, there exceedingly common -

MR. ESTES: But ...

JUSTICE BRISTER: - people, people and governments all the time.

MR. ESTES: But the ...

JUSTICE BRISTER: Promise, if you'll-- if this, there are bonuses in every sport, if this happens then you get it and you're saying, you know, because somebody could quit early none of those are enforceable.

MR. ESTES: But, but all of those relate to some sort of specific performance. If you sell 20 cars instead of just stand at the car lot, you get a bonus. That's difference.

JUSTICE: He ...

MR. ESTES: It's tied to the performance not to the continuing time of the performance.

JUSTICE BRISTER: So, the problem here is that he just said, if you stay with the company and work, till a merger you get paid but they had to do better work than they had been doing before.

MR. ESTES: No.

JUSTICE BRISTER: It would have been enforceable?

MR. ESTES: No. That's-- that is the problem. They didn't have to do anything different other than that which they were already obligated to do. That's ...

JUSTICE O'NEILL: My understanding was is they had made rumblings that they wanted to leave. They were unhappy, their equipment was out of date and so to entice them to stay.

MR. ESTES: You, you might gain that understanding from the briefs. You won't gain it from the record. The, the record ...

JUSTICE: That may, I mean, you may win on that.

MR. ESTES: The record is very clear ...

JUSTICE BRISTER: We're on, we're on the summary judgment.

MR. ESTES: Right.

JUSTICE BRISTER: - and we, -

MR. ESTES: Well, I'm-- but I'm -

JUSTICE BRISTER: - we, we got to assume they will be able to prove that.

MR. ESTES: I-- I'm talking about the record in this case though the, the agreement that is alleged is very simple.

JUSTICE O'NEILL: But would that make a difference? Would it make a difference if if the record if on at trial they were to show that you had some unhappy employees and, and, you know, to entice them to stay? The, the employers said we will cut you in on a deal if we sell?

MR. ESTES: No. I don't think so. I, I think if they are obligated to stay then, they're free to quit, they're free ...

JUSTICE: What obligated them to stay?

MR. ESTES: They're not obligated to stay. That's he whole point.

JUSTICE WILLET: Why, why wouldn't their agreeing to kind of yield or give up their right to leave when they otherwise would. Why isn't that itself consideration?

MR. ESTES: Well, I think that because nothing new of value has been offered.

JUSTICE: Nothing, -

MR. ESTES: And, and I think the case ...

JUSTICE: - nothing new about, nothing new of value was offered in Halliburton?

MR. ESTES: But, but in Halliburton, the difference was it's not expressly dependent upon continued employment. The record here is not that these employees quit and were brought back in the promise of this bonus. The record here is that an allegedly, allegedly a promise was made if you stay someday in the future if and when we ever sell, you get five percent and it really goes back and I understand, it's a kind of like how many angels dance on the head of a needle but it really

does go back to the contract formation issue as does that promise have any meaning. It has some appeal after the fact to say, 'Boy, it would be nice if it did.' But from a policy perspective did, did they have a contract on that date? I think that the applica, applicable contract law would say no, that they didn't.

JUSTICE WAINWRIGHT: Let me give you a couple of examples so I can make sure I understand your position. If, if there is a runner who's going to run a five K race and his sponsors, the sponsors are there and, and he comes to me and says, 'Wainwright, I'm going to run this. Will you agree to give me a \$500 for charity -- my favorite charity -- when I finish?' and I say, 'Yes.' He runs, finishes. Am I obligated to pay him the \$500?

MR. ESTES: Probably not. It's a gratuity. A-- as you described it, I mean, it's easy to say bonuses are not gratuities and there are lots of cases that say that but you have to look at the facts of the specific case to determine whether there's bargain for consideration or gratuity.

JUSTICE WAINWRIGHT: Oh, let what's-- let's take gratuity out of it then. He's going to run five, five K but he's only going to run it to-- and finish by give me \$500. I say, 'Okay.' He runs it, finishes, says, 'Where's my \$500?' Does he win?

MR. ESTES: If, if the ...

JUSTICE WAINWRIGHT: [inaudible].

MR. ESTES: That is-- if that was the bargain for consideration. Was the \$500 and that was the, the deal from the beginning presumably so that then would not be gratuity.

JUSTICE WAINWRIGHT: So in my example, he can come to me and compel me to pay in the \$500.

MR. ESTES: In the second example, yes. In the first example, no. If I, if I follow it correctly?

JUSTICE WAINWRIGHT: Okay. Let's-- can let me change it a little bit more to, to see-- to make sure I understand the contours of your argument. If he comes to me and says, 'I'm going to this five K race and you pay me a \$500 if I finish.' And I say, 'Yes.' And he says, 'Oh by the way. My sponsors also are going to pay me a thousand dollars but I'm going to run it anyway to get another 500 from you. I would have run it even if you were not paying me another 500.' He runs the race, finishes it, comes to see me and says, 'Where's my \$500?' Does he win?

MR. ESTES: I-- I'm not sure I really see what the consideration would be there with the stranger to the original contract and I'm getting a little bit ...

JUSTICE: How would any, how would any ...

JUSTICE WAINWRIGHT: I need to-- let me make sure I understand. Does he win? Does he get the \$500 from me under your understanding?

MR. ESTES: If ...

JUSTICE WAINWRIGHT: And again he's being paid a thousand bucks by somebody else.

MR. ESTES: If there was consideration from your side, he's already obligated to run the race but there's additional and different consideration from another party. I apologize, Justice Wainwright, I'm not sure.

JUSTICE WAINWRIGHT: Okay. I'm, I'm trying to get closer and closer to your fact situation.

MR. ESTES: All right.

JUSTICE WAINWRIGHT: - which is the employees by staying there got paid anyway.

MR. ESTES: Right.

JUSTICE WAINWRIGHT: And you say the five percent is just illusory.

MR. ESTES: Right.

JUSTICE WAINWRIGHT: In my example is my \$500 illusory?

MR. ESTES: I think, -

JUSTICE WAINWRIGHT: In your understanding.

MR. ESTES: - I think probably so in, in your example, of course it comes from a third party and that would be if an investor of the company came in and said, 'I'll give you an extra \$500 if you'll stay then, then it's, it's a closer call but, but in this particular case, they are already obligated to work.' That deal ...

JUSTICE O'NEILL: What if they, what if they had quit? What if they at that morning said, 'We're done, we're out of here, we're going to quit' and they said, 'Hang on-- if you stay.' Then different case?

MR. ESTES: It certainly could have been a different case had they quit that morning now. Would, would they have stayed just for a promise of the future dependent upon future employment. It might have been a raise, it might have been new equipment, it might have been whatever the new consideration would be but the problem with, with these oral, alleged oral agreements that are just kind of pie in the sky way out there in the future. They were going to quit if we didn't keep paying them. They had every right to quit if we didn't keep paying them.

JUSTICE BRISTER: [inaudible] your argument. Raises wouldn't be enforceable either.

MR. ESTES: I'm sorry?

JUSTICE BRISTER: Raises-- no raises would be enforceable. You're already working for a company. They say, we like your work, we're going to give you a raise. It's unenforceable because all you are doing is still working.

MR. ESTES: No because, because the promise of a raise presently is not dependent upon continued employment. It, it's only continue-- it, it-- it's, it's due everyday that you show up and everyday that you work. But if I promise you a raise, if you stay with me a year, you'll get a raise at the end of the year.

JUSTICE BRISTER: Ah-- and that's-- unenforceable, bonuses ...

MR. ESTES: It, it certainly could be unenforceable because the promise is dependant upon continued employment. Expressly dependent upon continued employment and that's the very language in Light and Sheshunoff that, that we rely on.

JUSTICE BRISTER: Well, I mean, I understand your-- I understand the problem with this agreement with, you know, we give you a five percent of something that none of us have in mind what that will be and whether it's

MR. ESTES: Right.

JUSTICE BRISTER: - oral contract or something. But if you're asking us to declare all year end bonuses, illegal in Texas, it's going to be a fire storm.

MR. ESTES: Well, that, that-- that's-- that actually raises a very good example. Our staff expects a Christmas bonus. Our staff can't sue us for that Christmas bonus.

JUSTICE BRISTER: But you'd never promised them a specific amount. Lot of, lot of people promised specific amounts of bonuses and you're saying, none of the year end bo, year end bonuses are unenforceable.

MR. ESTES: Mo, most of those type bonuses in practice and in reality are in fact gratuity bonuses as opposed to performance based bonuses. The difference that the distinction I would draw if you stay and oh, by the way, you make this performance goal this month then, then forth coming is the bonus because the new consideration besides

just the obligation you have to work for me is meeting certain performance goals.

JUSTICE JOHNSON: But what if, what if you promised them in February if you're here on December 31st-- we pay bonuses and you'll get a bonus?

MR. ESTES: I think that that in all likelihood is an illusory promise and I'd, I'd, I'd ...

JUSTICE JOHNSON: [inaudible].

MR. ESTES: I really don't think that, that does any damage. Number 1, to, to the old law as it relates to new consideration and I, I certainly don't think it does any damage to what is a sensible rule when you interplay it with employment at-will-- that was discussed in raised in Light in the footnote.

CHIEF JUSTICE JEFFERSON: But an, but an employee could act to his or her detriment on the assumption that that promise is going to -

MR. ESTES: They, -

CHIEF JUSTICE JEFFERSON: - fulfilled.

MR. ESTES: - they could and they have a remedy for that but that remedy doesn't necessarily depend on a formed contract or, or a, a contract based on an illusory offer and a unilateral contracts stance. They certainly, if they were allowing it to their-- detriment would have a promissory estoppel type claim or misrepresentation claim or a fraud claim but that's not the case here. The important, I think, thing for the jurisprudence of this state is for parties to understand what does it take and an employment-- a continuing employment case given the employment at-will doctrine to have a unilateral contract that will be enforceable and I would suggest much like the question in the earlier case. If you want to see a flood of cases, make it easy because that, that does then become easy because you can make at any pie in the sky promise and say, 'Oh I was still here the day I quit and we have a contract.' You have to have standards. And, and I think that this Court laid out standards in both Light and Sheshunoff. It's been followed by -- not only the Vanegas Court in Eastland but by the Tyler Court and frankly the Tyler Court going the other direction and whether you like those results or not at least it's based upon stable and well recognized law that everybody knows and everybody can live with ...

JUSTICE WAINWRIGHT: Let me ask you council -

MR. ESTES: And the Houston First Court. because your time is concluding here.

MR. ESTES: Sure.

JUSTICE WAINWRIGHT: Conceptually, you said we don't want to do damage to the at-will doctrine.

MR. ESTES: Right.

JUSTICE WAINWRIGHT: Free to quit, free to fire.

MR. ESTES: Right.

JUSTICE WAINWRIGHT: And, and certainly that's the premise for employment here in Texas.

MR. ESTES: Right.

JUSTICE WAINWRIGHT: What's wrong with parties agreeing to something that changes that?

MR. ESTES: I don't ...

JUSTICE WAINWRIGHT: Why, why can't, why can't they agree to a contract unilateral or bilateral? Bilateral, you don't have a problem with but unilateral one's at issue here. Why can't they just agree to something that's different so conceptually, there's no damage to at-will being done. The parties are just agreeing to modify it to some degree.

MR. ESTES: They can. So long as the offer in the unilateral contract is non-illusory but if it in fact is ...

JUSTICE WAINWRIGHT: Offers in unilateral contracts illusory?

MR. ESTES: You know, they're really not. One, one of ...

JUSTICE WAINWRIGHT: Paint my house and I'll give you a hundred dollars.

MR. ESTES: One, one of these cases referred to that as the bold assertion. They boldly assert that any thing that you could revoke would be illusory and that simply isn't true the agreement to come to work for me tomorrow is not illusory if you come to work and I pay you for that day's work. You're free come and go the following day. The difference is that, that a promise projected way out in a future such as a promise of a future raise, the promise of a future bonus or a highbred promise such as this. The promise at the very outset is illusory. You had no contract. Now, if what they said was true they had other remedies. They-- the court has already pointed out. They could sue for fraud, they could sue for misrepresentation, fraud and inducement in the original contract but, but the, the issue of importance to the jurisprudence of this state, I think, is in a continuing employment context for such a promise to be enforceable, will it have to be a non-illusory promise. I appreciate the Court's time. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you.

REBUTTAL ARGUMENT OF ALLEN R. STRODER ON BEHALF OF PETITIONER

MR. STRODER: Of, course the appellants are not arguing that we want to destroy the employment at-will doctrine and as y'all have clearly pointed out paying an agreed upon bonus does nothing to the at-will doctrine. The employer's free to fire the employee, the employees are free to quit. What the employers are not free to do is not pay the compensation that he agreed upon. He's not free to do that. There are two separate considerations here and again, Mr. ...

JUSTICE WAINWRIGHT: Counsel, is respondent saying that employment is different. Maybe different from charity running race, maybe different from paint my house I'll give you a hundred dollars. There's no employee-employee relationship there. The employee employment is, is different because you're getting paid to come to work anyway. Conceptually, answer that argument and don't talk about the whole world being changed. Focus on employment. He says is different.

MR. STRODER: I don't know how it's different than contract law. The employment relationship basically is contract law either a bi-- you can have bilateral agreements or you can have, I'll pay you a particular wa-- wage and, and, and you work and then you get paid that wage.

JUSTICE WAINWRIGHT: And he didn't disagree with any of what you just said?

MR. STRODER: True. I, I-- I'm not sure whether he is talking about new consideration which wasn't raised in the summary judgment motion. It just wasn't.

JUSTICE WAINWRIGHT: But we've got the record. We'll look at that.

MR. STRODER: Right and, and, and so-- and he's trying to merge the two here and, and I, I, I don't think successfully so because he's trying to argue that there needs to be new consideration in this

situation. I don't believe so. The cases are, are for these people-- the-- in order to-- for incentive to an employee if you remain at work for stated period either a year or some event, they, they been upheld. So I, I think it's basic contract law. I don't know that it's employee-employer relationships which is based upon contract is different at all in that sense. The at-will doctrine, I don't know that has anything to do with contract law other than absent on agreement to the contrary, you can fire or you can quit at will. So I don't, I don't think there is really at, the employment relationship is a contract or relationship. It, it just simply is. As pointed out by all the Hornvick(sp?) people the Corbin. There-- they talk about its-- basically it's a unilateral situa-- in most situations, it's a unilateral agreement. You come to work, I'll pay your wage. Same thing with the bonus as Corbin points out, you stay till x-date, I'll pay you a bonus. Same situation and I'm not sure I answered your question or not maybe I didn't, I'm trying to but no, I believe, it's a, it's a contractual relationship. All of the considerations apply.

JUSTICE: This is it?

JUSTICE: Well, I have a [inaudible].

MR. STRODER: My time out.

JUSTICE: Okay. Just one of the thing I think you should done on that.

MR. STRODER: One other thing. I want to make sure and I, and I realize you all understand.

JUSTICE: [inaudible].

MR. STRODER: Light was a, a non-compete case and it was-- and you have that the statute of course came into play and when they started talking about well you can't have an agreement to pay a raise in a future. They were talking in that context because you had to have a bilateral agreement and that's what Light was dealt with. They-- light did not intent to turn on its head the law of contracts but what the Apelles have done is cut and pasted particular phrases that, that I don't blame them, I mean, that make it, it helps them. But they cut and paste a particular phrases but it just does not make logical sense. It just would lead to untenable results and I pray this Court to reverse the court of appeals.

CHIEF JUSTICE JEFFERSON: Justice Hecht has a question.

JUSTICE HECHT: I've got one other question.

CHIEF JUSTICE JEFFERSON: Mr. Estes.

JUSTICE HECHT: Oh, Mr. Estes, I'm sorry. Was this-- has the statute of fraud's argument been abandoned by the respondent?

MR. ESTES: Your Honor, it, it, it-- the agreement as alleged on it face on the current record could have been performed within one year had a sale or merger occurred in one year.

JUSTICE: Thank you.

JUSTICE: [inaudible].

MR. ESTES: Yes.

JUSTICE: Thank you.

CHIEF JUSTICE JEFFERSON: The cause has been submitted and the court will take a brief recess. Thank you, Counsel.

COURT ATTENDANT: All rise.

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