ORAL ARGUMENT - 2/26/97
96-1077
**MONTGOMERY COUNTY HOSPITAL DISTRICT V. BROWN**

LAWYER: (Tape starts off)...gave her an option to either resign or she would be terminated. Mrs. Spring denied that. In any event, on Sept. 4, 1991, Mrs. Brown gave a note to Mrs. Spring saying I will resign my position by 12:00 p.m. on Sept. 4, 1991. The next day Mrs. Brown submitted a letter of resignation saying that she resigned effective Sept. 25, 1991. On Sept. 5, 1991, the day after she had the meeting with Mrs. Spring, but 20 days before Mrs. Brown decided that she wanted to make her resignation effective, the hospital district issued a paycheck to Mrs. Brown and a severance pay check. A severance pay check that was for her vacation benefits and for her unused sick leave and the other benefits to which she was entitled by virtue of her voluntary resignation, to which she would not have been entitled had she not voluntarily resigned.

HECHT: Why not?

LAWYER: Because the employment contract says that...

HECHT: The employment contract?

LAWYER: It's the handbook, the employee handbook.

HECHT: Your position is that that's not a contract?

LAWYER: Our position is it's not a contract, but the handbook clearly says that if she voluntarily resigns she's entitled to these benefits, but if she's terminated she is not. She accepted the check and she cashed that. On Sept. 25, 1991, she faxed a letter back to the administrator of the hospital saying that she had revoked her decision to resign her position with the hospital district. The administrator said you can't do that it's too late. We accepted your resignation effective Sept. 6, 1991. We have paid you your termination pay, and you've cashed that. And Mrs. Brown shortly thereafter filed suit under wrongful discharge and a number of other causes of action including deprivation of property, liberty, and so on.

The TC granted a summary judgment to Montgomery Co. Hospital District on all causes of action which was appealed by Mrs. Brown to the Beaumont CA. The Beaumont CA reversed holding that there was a fact issue on the issue of constructive termination and with regard to whether Mrs. Brown estopped and denied that she had voluntarily resigned by virtue of her acceptance of the termination pay.

There are two issues before this court. Issue 1 being whether the at will employment agreement that Mrs. Brown had with the hospital district could be orally modified and if so

whether it falls within the statute of frauds. And the second issue being whether Mrs. Brown is estopped to deny that she voluntarily resigned by her acceptance of the benefits in conjunction with her voluntary termination.

I am going to address the first issue, the issue being whether this oral contract is at-will employment agreement is orally modified, and if so, whether it falls within the statute of frauds. My co-counsel, Mrs. Harris, is going to address the latter issue, the estoppel issue.

In reviewing the cases on at-will contracts and the oral modification, it becomes readily clear that there are cases all over the board. Regardless of what this court decides to do it will be very easy to focus on one or two, or three or four cases and find that as precedent for whatever the court's decision is. As I look at the cases I see that there are 2 lines of cases. One of them being the employment situation, strictly the at-will employment situation, and other being general contracts within definite terms of employment. In some of the cases those seem to be confused and mixed together. For example: The 5th Circuit in 1995 had before it a case called Unlimited Floors v. Fieldcrest. That was a case where it was a distributorship agreement that was terminated by the manufacturer without cause. And the distributor comes back and says: Well I understood I had an indefinite agreement unless that there was good cause to terminate the agreement. The 5th circuit looked at all the cases that had led up to that, focusing primarily on the employment cases, and said: We are convinced that with the line of authorities that we see from the Texas CA's, we are convinced that the Texas SC if now addressed with the issue would hold that a contract of indefinite length does not violate the statute of frauds provided that it is possible, conceivable that the event that terminated the contract could occur within one year of the date that the contract was entered. But it was a termination of a distributorship not an employment at-will case.

This court was faced in the Goodyear v. Cortea(?) case, 2 years ago, with that issue. The CA had held that the agreement with Mrs. Cortea(?) that she would not be terminated for violating a policy that they had where she couldn't work if her relative worked at the store, didn't violate the statute of frauds. This court wrote an opinion on it and held that the agreement, that was not an issue and this court was not going to address that issue because there really was no issue that the agreement was in writing. It's just that the writing could not be located. The 5th circuit nonetheless focused on it, the CA opinion.

I was unable to find any authority from this court that directly addresses the issue of whether an at-will employment agreement can be orally modified if there is a provision in the agreement that says you will be employed for so long as you do a good job.

Looking at the cases from the CAs there appears to be a distinction that is being drawn by the courts or attempted to be drawn by the courts with regard to whether the employer says to the employee: You have a job here until you die, or until you retire, which most of the courts have held that falls under the statute of frauds. And a line of cases that say you have a job here for so long as you do a good job. You cannot be discharged except for cause.

In looking through and trying to reconcile those distinctions is very difficult to do. And the reason it's difficult to do is because I guess from a practical matter you look at if somebody says I was given an agreement by my employer that I had a job for so long as I did a good job. I guess the next question is always going to be: Well how long did you think that would be? And the obvious response to that is going to be, I think with anyone, is going to be: Well I thought it would be until I died, until I didn't want to work there anymore, or until I retired. But if you put it into the latter 3 categories, any of those three categories you clearly have a problem with the statute of frauds.

I don't think that there is any distinction between an agreement that you have a job for life, and an agreement that you have a job so long as you do a good job. I think as a practical matter every person that gets a job, and maybe that's changing with our economy as it changes along, that the general distinction is most people think that they've got a job for so long as they do a good job.

HECHT: The statute of frauds is an affirmative defense. Did the defendants plead it?

LAWYER: No we did not plead it and it's not in our motion for summary judgment. However that was an issue that was raised in the appeal by the defendant. It was not raised in the appellant's brief in the CA or in response to our motion for rehearing, or on our application for writ of error to the Texas SC. And I believe the _____ v. Garvey case, 1990, holds that issue has been waived as to whether it was adequately pleaded or addressed in a motion for summary judgment.

HECHT: With respect to your evidence on that subject, in fact you didn't raise any of this in your motion for summary judgment?

LAWYER: That's true.

HECHT: Is there any evidence concerning the existence of a contract or the breach of it, or the statute of frauds other than the one sentence in Mrs. Brown's affidavit?

LAWYER: No, sir. It's her sentence that a fellow in 1981 who is no longer there told her that she would have a job for so long as she did a good job.

HECHT: But defendants didn't put on any evidence on that subject at all?

LAWYER: No. I am not sure that we could. In most situations I'm not sure that we could.

HECHT: So we have to take that statement as if it is true?

LAWYER: I think that's accurate. And then the question is whether we are going to allow an employee to set up a fact issue so that we have a trial in every case where the employee says, and

I guess they would always pick somebody perhaps that is no longer available, either deceased or whatever, this person told me I had a job for so long as I did a good job. Whether we say that's going to violates the statute of frauds.

HECHT: You don't think the benefits handbook was a binding contract? The CA held that, and you agree with that?

LAWYER: Yes.

CORNYN: Do you think employment contracts should be treated differently from all other contracts?

LAWYER: I think we have treated them differently. We are pretty far long the road with treating employment at-will as a separate doctrine, separate and apart from other contracts...

CORNYN: If that's so why should we?

LAWYER: We've got a history of law dating back to 1888 with regard to the at-will employment doctrine. I think that the importance of the employment issue in the State of Texas particularly with regard to employers and employees being able to plan their future calls for this court to set some specific guidelines in the employment context of what you can and can't do and when you can or cannot be sued for it.

CORNYN: The proof problems that you alluded to a moment ago would be identical in any oral modification context would they not?

LAWYER: True.

CORNYN: And you're just saying because of the importance of the employment at-will doctrine we ought to carve out a special rule?

LAWYER: The court has carved out specials rules for the employment area. There are special cases that deal with employment and look at employment differently than other contracts.

CORNYN: As regards oral modification?

LAWYER: Yes.

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HARRIS: I, too, represent the Hospital District. I will be addressing point of error No. 2 regarding the doctrine of quasi estoppel. The CA erred in holding that Mrs. Brown somehow created a fact issue on the doctrine of quasi estoppel to defeat the district summary judgment.

The doctrine of quasi estoppel simply is that you cannot retain a benefit from someone and then turnaround and take the position that's contrary to the benefit that you received.

It's uncontroverted in the summary judgment evidence in this case and in fact admitted by Mrs. Brown in her own affidavit that the district paid her for 2 weeks of work that she did not work, paid her for her unused vacation, unused sick time, unused holiday time, which she would not have gotten had she not voluntarily resigned.

HECHT: Why not?

HARRIS: Because the policies and procedure manual, which is in the transcript at 264 and 265, specifically states: If you are terminated you will not receive your accrued benefits. The next page says: If you voluntarily resign and give written 2 weeks notice you will receive all of your accrued benefits.

HECHT: What if you resign but it's involuntary?

HARRIS: Your honor that is true if there is a constructive discharge and someone is resigning because they fear they may be terminated.

HECHT: You get the pay?

HARRIS: Sure. Exactly. But that is not before this court because if this court holds that under the doctrine of quasi estoppel, she's estopped from even asserting a cause of action or is estopped because she didn't have an employment contract, then you never reach the issue of whether she was constructively discharged, which is not up before this court. That's an issue that would be addressed if this court finds for Mrs. Brown on either issue that's before it today.

PHILLIPS: Your defense is structured on an employment agreement, which is not a contract to the extent that the employee wants to rely on it, but does bind her to the extent there are provisions that you like?

HARRIS: It doesn't bind her to the extent that anything negative to her. All it's saying is is that if you resign and you give your two weeks notice, you're going to get all of these accrued benefits that you haven't used. It's nothing negative to her. Therefore, it's not like we are saying: Okay, you've got to do what we say, but we're not going to give you the benefits. It's simply a benefit to her if she gives her 2 weeks notice.

PHILLIPS: She never signed any release?

HARRIS: She did not sign a release. She was not asked to sign a release. What happened was is the check was cut and it was given to her on the 5th. She left and never returned after the 5th. She went and cashed the check, and has kept over $7,500. that the district gave her, that is

uncontroverted in Pat Jacob's affidavit that had she been terminated, that she would have never gotten than money. To date she has not returned the money. Under the doctrine of quasi estoppel once you learn that the other side is taking a position, that the money is a retained benefit, you've got the duty to tender it back. That's exactly what Mrs. Brown did not do and why she is estopped from bringing her cause of action. This is a case of first impression for this court.

CORNYN: Are you saying she had an enforceable right to compel the district to pay her that money?

HARRIS: Exactly.

CORNYN: So there was a contract?

HARRIS: There was not a contract. It was a right under the policies and procedures manual.

CORNYN: What's a nature of the right?

HARRIS: Simply that if you followed the rules and did what the district asked you to do, i.e. give two weeks notice that there would not be an interruption in the employment for the hospital, then you would...

CORNYN: Where is the mutuality in terms of her obligations.? What were her obligations under this agreement?

HARRIS: She had no obligations whatsoever until she filed suit. Once she filed suit, and the district filed a summary judgement saying: We're taking the position that you are estopped from bringing this cause of action because you have retained over $7500 of us for a voluntary resignation, and now you are saying we terminated you, you now have the obligation to either drop your lawsuit, or tender back the money.

CORNYN: And your position is she could have compelled the district to pay her that money under some sort of contractual agreement?

HARRIS: She could have compelled the district to do that under the policies and procedures manual. Exactly. And once she took the money, which we gave her, that was not an issue whether she was entitled to that or that she didn't get it, once we gave it to her, she turned around an filed suit, the district took the position of estoppel, then she was under the 5th circuit case of _____, entitled to do either one of two things: drop her lawsuit, or tender back the money. She can't do both. She can't keep the money and say you gave me this money under the policy because I voluntarily resigned, but now I am going to sue you saying I was constructively discharged or terminated. She can't have it both ways. And to date she has never tendered back that money.

HECHT: The CA remanded the due process claim. Is it your contention apparently that if she doesn't have a contract, she doesn't have a due process claim?

HARRIS: Exactly. Mrs. Brown contended that in her appellate briefs. The CA contended that, that she has no cause of action unless there is a contract that was breached. She can't get to the next step of having due process, liberty, interest, or anything else.

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RESPONDENT

LAWYER: The last question raises an interesting point, the due process issue. It's believed by me, that due process or due course of law is triggered where you have a protectable interest such as life, liberty, or property, and that property interests have historically been defined as something more than at will. We have an interesting case that is in Texas, it's one of the anomalies, that came out of the Austin court in 1995, Coke v. Riveridal, which says that even though you have an at-will employment situation, you may still be entitled to the due process.

I'm not sure whether that's a failure of the court to understand due process and when it's triggered, or whether that represents a fine line that we will follow in the future as to whether or not at-will truly is a protective property interest.

HECHT: And your argument is which?

LAWYER: My argument is the property interests protected which are defined by either state law or agreements between the parties or some wide spread practice tantamount to a policy may be found to exist within the context of that will.

HECHT: Is there any summary judgment evidence of anything to support a due process claim in this case other than the alleged contract - oral and the handbook?

LAWYER: Certainly in response to the question, I think that anytime that government makes a representation of policies that will be provided or procedures that will be provided by policy, then government should be expected to live up to its statements. But in direct response to the question, I think that when you have the oral modification of the employment situation, that that constitutes a protected property interest. And that's what Perry v. _____, the US SC said when it wrote in 1972 on the issue.

HECHT: None of these issues are in the motion for summary judgment. But you've not complained about that on appeal?

LAWYER: No, I did not complain about that.

HECHT: So as far as you are concerned we can address all of these issues in substance,

even though they were not raised in the TC?

LAWYER: The motion for summary judgment was limited. We tried to address the motion for summary judgment and the issues that it raised.

HECHT: You raised these issues actually in your response.

LAWYER: And what we were arguing was by analogy, whether or not oral modifications can exist to at will situations. And I do that by virtue of the fact that in the Perry v. _____, and in Roth the case that came down with it, the court indicated that private agreements may be enforceable. With regard to the due process anytime that you have a public employer/public employee there is always the possibility that if you have enforceable modification of the relationship, that you have a protected property interest. And it was by way of analogy and by an extension of the argument at the DC that we argued.

BAKER: The CA said that after Mrs. Brown rescinded her resignation in the letter to Mr. Brimer, that this letter stated that she intended to activate due process through a grievance procedure. And then the courts said 3 months later she sued. Does that mean that she did not invoke any grievance procedure?

LAWYER: She could not. The reason she couldn't invoke any grievance procedure because a the grievance procedure according to Brimer was only available to employees. She considered herself to be an employee up until the 25th because that was basically the term by which the agreement was reached. Brimer comes back and says: no, no. I have the authority to, and did accept your resignation on Sept. 6. Since Sept 6 you have not been an employee. Since you are not an employee grievance procedures don't apply.

The issue that I think that is probably most clearly stated in the oral modification is whether or not there is going to be a disparagement of the right of contract in this state. And my thought on that is that contracts whether they are oral or written can't be fractured or balkanized into different types to protect for example, an employer in some instances, employees in others, car salesmen in some, car purchasers in others, contracts are contracts are contracts.

GONZALEZ: What is the oral modification in this case?

LAWYER: The oral modification was a quality contingency that as long as the performance that was rendered by Mrs. Brown was satisfactory, did not compel or provide basis for termination.

GONZALEZ: Isn't that in every employment-at-will contract?

LAWYER: No, sir.

GONZALEZ: What contract means you are going to work at the pleasure of the employer. There's an assumption there that as long as you do a good job you've got a job.

LAWYER: I don't think that's true with all due respect your honor. I think that in an employment-at-will what you have is a situation where the employer says that I don't have to have a reason to terminate you. Now some bright arguments to sell that and make it more palatable to employees have been urged that well but you can leave at anytime.

I think that the very fact that you don't have to give a reason, that you don't have to justify your act is the very heart of the at-will situation. And that once you depart from that, once you start saying: Well, I, by agreement with you, will have to justify my act. I will have to have a basis to act. Then you are moving from clearly an agreed upon arbitrariness to a noncapricious level where you have to follow some standard of reasoned analysis in making an employment decision.

GONZALEZ: If that is so, should we require that that be in writing?

LAWYER: I don't think so. If you require that that be in writing, then what you're doing is you're limiting the right of people to contract.

BAKER: Are you arguing that you can't do that, that you can't limit the right to contract? Hasn't the legislature done that by the statute of frauds?

LAWYER: The statute of frauds in going back to the Charles 2nd statute, I think has a history that is not so much a limitation on the liberty of contract as it is to insure that certain agreements will be free from imprecision of memories.

BAKER: What's wrong with having that same policy apply in at-will contracts? If you're going to alter them between the parties you ought to put it in writing?

LAWYER: We do have that law in certain instances. If we have an express-at-will contact, Texas law says that you can't modify that expressed at-will contract accept by a written agreement that does that. And I say express. I am talking about a written contract. If you have a written at-will employment relationship, then you can't modify that, or you have to modify that in writing.

BAKER: So your alternative is if it's an oral-at-will you can orally modify it, but that's the end of it?

LAWYER: I think that if you have a presumed at-will, it may be orally modified.

BAKER: What is an unpresumed at-will?

LAWYER: Where you have an expressed written contract.

CORNYN: What was the term of Mrs. Brown's employment under this oral modification?

LAWYER: It was a quality contingency, not a time duration, but a quality duration..

CORNYN: So there was not time contemplated by the parties?

LAWYER: I don't think that there was any time contemplated by the parties in representation that was made to her by the authority who had the right and power to make that representation the administrator.

CORNYN: Why isn't it implicit in the oral modification that you argue was made that it was for an indefinite period of time?

LAWYER: It is an indefinite contract. It is a nondurational contract.

CORNYN: But it could be consummated in less than 1 year?

LAWYER: It could be consummated in less than 30 seconds. If Mrs. Brown had come in and had for some reason or another taken every _____ in the laboratory and bashed them, I suppose that she could have been terminated within 30 seconds of her arrival and bashing the _____. But the point is it was a contract that was specific. All he had to do or she had to do, Brimer and Spring had no more of a responsibility under the agreement than to simply say: These are the reasons you are being put into the position that you are to either resign or be terminated. They had to state a reason. Then once that reason was stated, it could be challenged. There could be some form of screening of that reasoning to see whether or not it was arbitrary and capricious. I mean after all that's not a new concept that we are dealing with.

HECHT: Is the sole basis for this agreement one sentence in Mrs. Brown's affidavit in the record?

LAWYER: In this record as I recall right now I think that's right. Now whether it's one sentence, or whether it's several words, the idea I think...

HECHT: "At the time I was hired as well as during my employment, I was told by the hospital administrator that I would be able to keep my job at the hospital as long as I was doing my job, and that I would not be fired unless there was good reason or good cause to fire me."

LAWYER: Great ideas don't necessarily have to be stated in many words. God is love is only three, but the idea is tremendous.

HECHT: Usually when we are forming a contract we don't allow such casual

conversations?

LAWYER: I don't know if that's true. I think that when we do form agreements, and when we try to assure people of their ability to rely upon what we say, it's not measured in word poundage, but in _____ and sincerity.

HECHT: Your position is, that a statement that an employee makes in what appears to be on no particular occasion and in a fairly off-hand way, conveys this lady constitutional rights?

LAWYER: She wasn't challenged to give anymore specific statement than that. Had she been challenged to give more specific statement than that, then she could have given more specific statement.

HECHT: Well that's one of the problems with a wreck(?). But as I understand your position, the fact that this was not raised or discussed in summary judgment accept in your response is not a reason for us not to consider it on appeal? That has been your position on appeal?

LAWYER: And the way you say that Justice Hecht makes me suddenly very uncomfortable with what has been my position on appeal, and what my answer may very well be.

HECHT: Well comfortable or uncomfortable, I am just trying to get at the facts.

LAWYER: Well I want to be candid with you. And I wanted to tell you that I am very uncomfortable. I think that the issue was not raised by them and it has been addressed by us as to why the court should not have done what he did at the DC level. There is a certain obligation I feel that we as attorneys must bear to the court. Judge you made a mistake and here is why. Did I avoid, or did I answer.

HECHT: You don't want to ask me that.

LAWYER: Then I must have not done well in the answer and must have avoided ungracefully.

PHILLIPS: It is your position that the statute of frauds could apply in this if this casual conversation had been you will be hired here for 16 months no matter what, no matter how badly you do, that was an oral remark?

LAWYER: If it was an oral representation, or an oral contract that could not be performed within the year, but the performance required more than a year, then statute of frauds would apply. Yes.

PHILLIPS: So you weren't asking for some special rule of employment contracts to be

outside the statute?

LAWYER: Absolutely not. I think the statute of frauds should stay as it is. Nor do I think that there should be some special rule for employees. I don't think that the law should be pro-employer, or pro-employee. I think it should be pro-contract. In 1928 this court was quoted in an opinion. In the quote that came out of this court in St. Louis Southwestern R.R. v. Griffin, the writer for this court said: that the citizen has the liberty of contract; there's a natural right which is beyond the power of government to take from him. Having some affection for _____ and natural rights, I find some consolation in that. I think that that's still the law, and I think that that's why this court should not carve any specific right less than what is given by that natural right.

HECHT: Explain though if the purpose of the statute of frauds is to cut down on faulty memories and disputes, how does that fit a contract that is indefinite in its term? It could be performed within a year. These people could be arguing about this statement that Mr. Edwards made 20 years hence.

LAWYER: First of all, there is no evidence that has been presented or suggested, it has been suggested to you today, that the genesis of this statement from Mrs. Brown would be challenged were the administrator brought forward. And it's also been suggested that the rules change from administrator to administrator. I'm also fond of that old adage that we are a nation of laws and not of men, and especially when that's a governmental entity.

Now with regard to the statute of frauds, that concept was originally innovated to protect title to lands. And I had occasion recently to read a memoir of Bacon's first speech to the end on that very issue. It didn't deal with employment contracts. Now it was focused mainly on various rights of property that were real in nature. There were some thieftan rights that were attached. I think that the statute of frauds applies now through the 5th section to employment agreements simply because we are talking about any contract, not simply employment contracts, but any contracts, that can't be performed within a year. Would it be forever discussed or disputed? I have seen litigants in deformation cases, or in fraud cases where material representations were made with purpose to induce performance and thereby injure discussed for years as to whether or not that representation was made.

HECHT: Why was not the acceptance of the last paycheck an estoppel because she knew it was severance pay?

LAWYER: I think that the case they cite...we've seen a whole line of cases in age discrimination and other discrimination instances where companies want to cut back rift, and what they do is they say this is consideration for your signing a release. The cases that they cite deal with that issue. Is severance a consideration? Is it buying a release? CJ Phillips asked if there was a release involved? I presumed that that may have been related to the concept even though there was no release. These were accrued benefits. These were earned benefits.

HECHT: They take the position she would not have been entitled to them if she had been terminated?

LAWYER: Well I am not sure that that's exactly...I heard them take the position that she would not have been entitled to them had she been terminated. And it may be that that was the carrot led the goat down to the resignation trough. But the point is that they say also that she would have had a right under the facts to compel them to pay her.

I think that the issue is that it was accrued, it was earned. It was not for future. It was not some large _____, as the court remarked.

BAKER: Is it factual that she did not work anytime past Sept. 6?

LAWYER: She was on leave.

BAKER: That she was paid for 2 weeks? That's their position, and that's why...

LAWYER: There's no evidence before the court below either at the trial level or at the appellate level as to whether or not that absence from work was by leave, was by some agreement that you will stay away pursuant to suspension prior to the 25th.

BAKER: Would you agree that it is factual she didn't work past Sept. 6?

LAWYER: I will agree that she was not on site after the 6th.

BAKER: Would that lead you to the conclusion is she's not on site, that she was not performing the duties that she had performed before?

LAWYER: I am not trying to duck this. I don't think so and here's why, because I am familiar personally with the situation in HISD where a teacher has been off cite, unemployed, on medical leave for 2 years, and yet is still registered by a governmental unit according to the laws of the state of Texas as a full time employee. I don't know exactly what the policy...

BAKER: And so what does that have to do with this question? Did she work or not?

LAWYER: Well she was not on site. So since she was not on site, she was not there doing something on site. But that's not to say she wasn't on call. That's not to say that she couldn't have been forded to be there. That's not to say that she was without obligation to respond.

ABBOTT: The quality contingency that your refer to, that she would be employed so long as she does a good job will that determination be a subjective or objective test?

LAWYER: I'm sure that as beauty, it's in the eye of the beholder. But I think that would it be

subjective or objective, I think it shouldn't be arbitrary and capricious. And we know some definition by that, that's been defined as being to escape the label of arbitrary and capricious, it has to be some grounded reasoned analysis. In answer to your question, I presumed that satisfactory performance would be or quality performance would be some performance that would be challengeable by reasoned analysis.

ABBOTT: So the distinction then that you make between a pure at-will employment situation, and the situation that you claim Mrs. Brown is in is that with pure at-will the employer could be arbitrary and capricious. The quality contingency would eliminate an employer from begin arbitrary and capricious?

LAWYER: At-will is I think arbitrary and capricious per se. It's an okay. It's okay to be arbitrary and capricious if you're really at-will. But the problem that we've got having employers say to employees: Look, you work for me so long as I want you to work for me. Instead we have employers who need employees and who will induce that employee to have some sense of security. The truth should be the truth. And if you're going to hire somebody and to make a representation to them, whether you're government or whether you are an individual, your yes should be a yes, and your no should be a no, and you should be held to honesty. I believe that. So I think that at-will is per se arbitrary and capricious. But it's okay arbitrary and capricious.

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REBUTTAL

LAWYER: There are issues in this case that are of some great importance. This particular plaintiff should be estopped. There is no question that this particular plaintiff it was uncontested before the TC would not have been entitled to the $7,000 she got had she not voluntarily resigned. There may be an issue as to whether that's a contract or whether because this is a public entity, whether she had a property interest and therefore could have compelled it in accordance with due process rights.

CORNYN: Are you taking a conflicting position with your co-counsel?

LAWYER: I don't think so. I am just trying to clarify that it's not a contract, but because it is a public entity, she may have been entitled to compel that. Because it was a public entity she was a public servant. That is an issue in the case that could be present were the case to be remanded. There may be additional issues as to whether she exhausted her administrative remedies. I don't think that is before the court. That was not a part of the CA's opinion. There may be additional issues as to whether any employee of a public entity has a right to create a contract essentially for life for the public entity. Again, that was not a part of the motion for summary judgment. It's not a part of what's before this court.

What is crying out for clarification in this state is the issue of what do we do about at-will employment contracts where the employee says after they were terminated: I was promised a job

for so long as I did a good job.

CORNYN: If there was an expressed term of 6 months, would that contract be subject to oral modification?

LAWYER: That's an excellent question. And I guess it leads to the next comment I was going to make. There's 3 ways that that issue could be addressed.

CORNYN: If you will answer my question, and then go to the comments.

LAWYER: It depends on which way this court rules. I would advocate that, yes, that should be enforceable if it was 6 months.

CORNYN: Because it's not subject to the statute?

LAWYER: Correct. The CAs have gone all over the board on these issues. And as I said earlier, what I see them trying to do is draw some kind of a distinction between a lifetime contract and a contract that says: You've got a job for so long as you do a good job. It's an illusory distinction. In fact the most interesting case I've found is a most recent one, one that wasn't cited in our brief Ward v. Young, a 1996 Waco CA opinion, 917 S.W.2d 506, where they tried to make that distinction. And in reading it I found the distinction more confusing than I've seen in any other case. They tried to clarify to bring it all together.

OWEN: Just to be clear on that. You hinge the difference on the statute of frauds I gather by your answering Justice Cornyn's question If this had been a 6 month agreement you say an oral modification would have been alright. If it's for some indefinite period you say the statute of frauds prohibits it?

LAWYER: I am saying I believe is the way this court should clarify the law. Yes. This court could do one of three things. It could try to carve out the same distinction that the CA did...

OWEN: Based on the statute of frauds is my question, that's the touchstone?

LAWYER: Yes. This court could say that there is this distinction since the person could quit performing satisfactorily within a year, that distinction is such that the statute of frauds does not apply. The court could alternatively say that with an at-will-employment agreement we are going to state that it is not orally modifiable, period. No ifs, ands, or buts, that's a bright line distinction.

PHILLIPS: Is there any other _____ of a contract where the court has used the statutes of frauds as it's taking off point and then created a separate for cause of the subject matter?

LAWYER: Not that I am aware of. Although, I think if we look at the statute of frauds cases

themselves, and if we look at the historical development of the statute of frauds it's consistent with a concept of the statute of frauds why you want to have a separate rule of law for contracts that can't be performed within a year.

The third option is to hold that the oral at-will agreement is modifiable orally so long as there is a fixed term of 1 year or less, that the moment that you put a term of indefinite in it, such that the employee will not be discharged except for cause, or the employee has a job for life, or the employee has a job until they retire, that the contract should be void under the statute of frauds.

HECHT: But there's a general principle sort of floating out there, that a contract that can be performed within a year, even if it is for an indefinite term, is not unenforceable under the statute of frauds. At least two of these options would have to be a change from that?

LAWYER: I think it's a clarification, and consistent with this court's ruling in the Schraeder v. Texas Iron Works case.

HECHT: You don't argue that that clarification should be made in every other kind of contract, only in this kind of contract? It's not clear what the ramifications would be in other areas of contracts; is that true or not?

LAWYER: It is true. I think what's before this court is an employment-at-will case, and it should be treated separately.

PHILLIPS: You've given us more Texas cases than I ever knew were out there on this point, but no one from any other jurisdiction. Are you asking us to do something that puts us in the mainstream of American law among those states that recognize the at-will doctrine, or is this something where we would be pioneers?

LAWYER: I focused on the Texas cases. I am not prepared to address that. I would be happy to do a letter brief addressing what the majority of jurisdictions have done.

PHILLIPS: That would be helpful.